

The New Eliminativism

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Scott Hershovitz, [The End of Jurisprudence](#), 124 **Yale L.J.** 1160 (2015).

This [article](#) exemplifies — in a very clear and accessible way — a new position that appears to be emerging among philosophers of law in the anti-positivist tradition. Previously one would have described positivists and anti-positivists as providing different answers to the following question: What grounds the existence and content of legal norms? For positivists, the answer was social facts. For anti-positivists, the answer was a combination of social and evaluative (particularly moral) facts. No one doubted that there are distinctively legal norms (legal rights, obligations, privileges, powers) that together constitute the law of a community — and that these norms are different from the norms of morality and prudence.

Notice that even though anti-positivists considered the existence and content of legal norms to depend on the confluence of social and moral facts, they generally treated legal norms as distinct from moral norms. Consider Ronald Dworkin's anti-positivist theory of law, as presented in [Law's Empire](#). Under this theory, the law of a jurisdiction is the set of norms that would be accepted after a process in which "the interpreter settles on some general justification for the main elements of [legal] practice" and then reforms it by "adjust[ing] his sense of what the practice 'really' requires so as better to serve the justification" (P. 66). In particular, the interpreter attempts to come up with a justifying connection between past political decisions and present coercion (P. 98).

It might appear as if legal norms are moral norms for Dworkin. The process of interpretation simply determines how social facts about legal practices trigger moral norms, the way the social fact that I say I'll take you to the zoo triggers the moral obligation to keep one's promises. But such a reading would be a mistake. In interpretation, the identification of legal norms is *constrained* by the particular community's legal practices that are being justified. Justification must *fit* those practices, and this requirement of fit means that legal norms can deviate in a fundamental way from moral norms. There is no comparable constraint when social facts trigger moral norms. The social fact that I say I'll take you to the zoo does not constrain the moral obligation to keep one's promises — it simply makes that moral obligation more concrete and particular.

Thus, for most of Dworkin's career, he saw legal norms as distinctively legal. But toward the end of his life, he adopted a [different position](#). Now the way that social facts combine with moral facts to generate legal norms is comparable to the way my saying I'll take you to the zoo combines with the moral obligation to keep one's promises to generate my promissory obligation to take you to the zoo. Legal obligations are moral obligations made more concrete and particular by legal practices. Recently, Mark Greenberg has offered a [similar account](#) of legal norms, as the moral impact of social facts about legal institutions (when generated in legally proper ways).

[Hershovitz](#) argues, I think rightly, that the Dworkin/Greenberg position is better developed as an eliminativist one, in which there are no distinctively legal norms. As he acknowledges, this eliminativism has a good deal in common with positivism, for what is distinctively legal (that is social facts about legal practices) can be wholly without moral merit (P. 1194). But eliminativism isn't positivism, for positivists largely remain committed to the existence of distinctively legal rights, obligations, privileges, and

powers (P. 1195). For the eliminativist, the only way to think about what rights, obligations, privileges, and powers are generated by legal practices is *morally*.

There is a curious similarity between Hershovitz's eliminativism and American legal realism, particularly as expressed in the writings of Felix Cohen and Walter Wheeler Cook. The realists were not just worried about the [consequences of legal indeterminacy](#). They were skeptics about the [existence of legal norms](#) in general. Legal norms are unnecessary for adjudication — all a judge needs to do, and should do, is think morally about the social facts that are generated by legal practices.

I admire Hershovitz's willingness to draw Greenberg's and the later Dworkin's reasoning to its eliminativist conclusion. But I think that the fact that this conclusion is eliminativism only highlights why philosophers of law should be skeptical of the Greenberg-Dworkin position in the first place. Eliminativism is not just a problem for anti-positivists, however. Positivists also seem incapable of arriving at a convincing account of distinctively legal norms. Generally, they understand legal norms as only quasi-normative (for example, as moral obligations from the point of view of legal officials, who may be utterly misguided) (P. 1169). This can be considered a form of eliminativism itself, whether or not positivists would accept such a characterization.

But at times positivists argue that legal norms have a *genuine* (non-moral) normativity. For example, under Scott Shapiro's [theory of law](#), a law is a certain type of plan (P. 170-173).¹ Having adopted a plan, the norms of instrumental rationality (or prudence) recommend that one not reconsider it absent compelling reasons. Thus, for Shapiro legal norms are genuinely (albeit weakly) normative — they really give us (or at least officials) reasons for action, namely, reasons not to reconsider plans. They are not simply normative from a point of view. But doesn't this too suggest eliminativism? For Shapiro, legal norms are reducible to a combination of social facts (about the creation of the requisite plans) and the norms of instrumental rationality. If so, why speak about legal norms at all? Why not simply speak of the norms of instrumental rationality that are triggered by social facts about legal practices?

The problem, as I see it, is that philosophy of law (whether positivist or anti-positivist) is at war with itself. On the one hand, philosophers of law want to preserve the existence of a distinctive realm of legal norms that constitute the law of a community. On the other hand, they are unwilling to understand legal norms as *irreducibly* legal. Frankly, I cannot see how these two positions can be reconciled. Hershovitz bites the bullet and gives up the distinctive realm of legal norms. For my part, I would give up reduction and adopt the [Kelsenian position](#) that legal norms are irreducibly legal.

1. In particular, one created in accordance with a master plan adopted by a planning organization that is intended to overcome the fact that the community of which the planning organization is a part faces numerous and serious moral problems whose solutions are complex, contentious, or arbitrary.

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