

Rational Determination and the Prism of the First Person

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A thesis to be submitted for the degree of Master of Philosophy

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Hilary 2023

To my father Vivian
and to Luz, of course,
without whom not

ABSTRACT

In “How Facts Make Law”, Mark Greenberg argues that any plausible theory of law must meet what he calls “the rational determination requirement”. In short, this requirement supposes that any explanation of legal facts calls for a kind of interpretation of the role of institutional practice therein. Heeding this requirement will show that a full constitutive account of law includes not only social facts but also normative facts. In this thesis, I argue that we have no reason to accept Greenberg’s rational determination doctrine. I make this argument in two stages. First, I proceed by giving an account of the reasons that substantiate rational determination. Most prominently, the need for rational determination in law arises out of the arbitrariness of “brute” ontological determination. As far as brute determination is concerned, there can be endlessly different and inconsistent mappings from complete sets of law-determining facts to complete sets of legal facts, and there is nothing in the determining facts themselves to choose between one mapping or another. Since the legal domain cannot simply be brute, Greenberg argues that there must be an epistemic adequacy constraint playing a role in the metaphysical relation. This constraint is furnished by the doctrine of rational determination. According to rational determination, a given legal fact exists only insofar as it is intelligible for all rational creatures which aspects of the law practices support that legal fact and how. Second, I continue by presenting my case against rational determination. I start by making explicit what I take to be the main premise of Greenberg’s argument: as far as legal practices are concerned, it is ontologically *indeterminate* how they inferentially yield legal propositions. I argue that this assumption follows from Greenberg’s particular conception of legal practices as including only contents that are publicly available from the third-person perspective. My strategy consists in rejecting rational determination by offering a reductio ad absurdum of its premises: if it is true that the legal domain is indeterminate, then certain fundamental distinctions and notions we know independently to be valid from the first-person perspective would be lost. I push my case forward by challenging the assumption that legal understanding supposes drawing inferences from the more basic determining facts. I argue that the intentional structure of the legal domain is such that we can have non-inferential knowledge of legal facts. If this line of reasoning is right, then the legal domain is not indeterminate, and Greenberg’s rational determination happens to be simply the familiar underdetermination of hypothesis by empirical evidence, an ordinary epistemic problem that plays no role in the metaphysical determination relation. The conclusion is that, contrary to what contemporary interpretivism suggests, legal understanding can be explanatorily prior to interpretation.

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§1. SETTING THE SCENE

§1.1 *A Picture Held Us Captive*

Or so some legal philosophers urge us, bringing to mind Wittgenstein's pithy formula in paragraph 115 of the *Philosophical Investigations*.[1] A common source of criticism for legal positivism is that it doesn't fit neatly with our understanding of legal reasoning. Positivists think that the content of the law is ultimately determined by social facts and not moral facts.[2] In other words, what legal propositions count as true in a given jurisdiction (at a given time)—i.e., what legal obligations, powers, privileges, prohibitions, and so on there are—ultimately depends on some descriptive, non-normative facts about what people have said, done, written or intended in the past, and not, crucially, on what is morally fair or desirable. This position is often labelled as the "sources thesis". According to the sources thesis, the relevant facts that make up legal content can be identified by means of some social rules that conventionally ascertain the institutional events providing for the creation, modification, and annulment of legal standards.[3] If positivism were true, one would

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[1] See *Philosophical Investigations*, trans. P. M. S. Hacker and Joachim Schulte G. E. M. Anscombe (4th edn.; Oxford: Wiley-Blackwell, 2009). The actual text reads: "A *picture* held us captive. And we could not get outside it, for it lay in our language and language seemed to repeat it to us inexorably."

[2] A brief preliminary. I should stipulate at the outset that my use of the label "positivism" (and its cognates) would be narrowly intended. Positivism is a non-monolithic tradition in legal philosophy, comprising a wide array of several characteristic theses. I would use the term only to refer to the thesis according to which the conditions of legal validity are source-based—i.e., determined by social facts alone. I am well aware that this characterization might not please everyone (more on this in §1.2). *Cf.* John Gardner's remarks in 'Legal Positivism: 5 ½ Myths', *American Journal of Jurisprudence,* 46 (2001), 199-228. and Leslie Green's in 'Positivism and the Inseparability of Law and Morals', *New York University Law Review,* 83 (2008), 1035-58. For the purposes of this work, it will do no harm to keep the label as expressed and remain neutral on such debates.

[3] Since fashions dictate the use of terms, the relation between "facts" and "events" is often misunderstood. Let us provisionally stipulate that events are concrete, temporally, spatially located entities organized into part-whole hierarchies, while facts are abstract and a-temporal (e.g., the *event* of

expect legal reasoning to be confined solely to the task of uncovering some complex social fact about political institutions and the actions of those who operate within them. However, when we look at the phenomenology of legal argument, and what kind of reasoning those who partake in it indulge in, it is almost undeniable that normative and evaluative reasoning is pervasive. So that, at least on the face of it, some of the facts that legal reasoners are trying to elucidate are distinctively *moral* facts. But these are precisely the facts that positivists deny any currency in the task of identifying legal content. Hence, positivists face a conundrum.

Mark Greenberg focuses on an aspect of this debate that is new and interesting. In "How Facts Make Law" (hereafter HFML) and other more recent publications, he develops a novel insight into this controversy. His argument underscores one of the central challenges facing contemporary positivism, and it does so not merely by restating the familiar nonpositivist thesis mentioned above. Rather, it draws our attention to an important feature of the debate that has commonly been overlooked. This feature is metaphysical and is concerned with the relationship that holds between the facts that determine which legal propositions are true and the legal propositions themselves. Positivists (hard and soft) and nonpositivists seem to tacitly agree that their debate is one about what grounds what. This implicit commitment follows from the way in which the debate is framed: nonpositivists hold that both social and moral facts ground legal facts, whereas positivists hold that only the former do (at least in a primary way).

This relationship, he claims, can be made rationally intelligible to legal reasoners (e.g., judges, lawyers, citizens, etc.) since there must be systematic, epistemically transparent connections between the practices of a given jurisdiction and its legal content. The assumption is that legal reasoners are in principle capable of understanding why changes in one domain of facts—the facts that determine legal propositions—can have a particular impact on another domain, namely, the legal

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Julius Caesar's death took place in 44 BC, whereas that Caesar died is still a *fact* today). I will later reformulate this notion of fact.

propositions themselves. And they can do so not by virtue of some hard-wired capacity to have correct law reactions or predictions of the effects of changes in legal practices, but by virtue of *reasons*. Any successful theory of law must be able to explain what the more basic facts are and how they determine the content of the law in terms that are rationally intelligible to certain creatures under certain specified conditions and, moreover, what is the role that this fact of intelligibility plays in that relationship. Greenberg calls this putative feature of legal analysis the *rational-relation requirement*.[4]

The problem of grounds, or otherwise the validity of the law, namely, how can we derive true propositions about our legal rights, powers, privileges, immunities, obligations, prohibitions, and liabilities, from a collection of ordinary empirical contingent non-moral facts about the actions, decisions, utterances, intentions, and thoughts of those who operate inside political institutions, was originally presented by Ronald Dworkin. Dworkin urged us that jurisprudence should address the question of "sense", that is, it should include an account of the truth conditions of legal propositions.[5] Are these conditions exhausted solely by descriptive facts, or normative facts in addition to descriptive facts are also necessary? In this way of speaking, analysis can be better accomplished in terms of an attempt to fill the explanatory gap holding between a lower-level domain of determining facts and a higher-level domain of target facts obtaining in virtue of the former. Greenberg's account is interesting insofar as it insists that the difficulty lies not so much in specifying the members of both sets of facts, but in clarifying the nature of the dependence relation that holds between them.

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[4] Mark Greenberg, 'Hartian Positivism and Normative Facts: *How Facts Make Law Ii*', in Scott Hershovitz (ed.), *Exploring Law's Empire* (Oxford: Oxford University Press, 2006a) at 265. In HFML, Greenberg originally used the term "rational-relation *doctrine*". Considering that more than a doctrine rational-relation is a theoretical condition that any plausible theory must meet, it seems convenient to call stick by the term requirement.

[5] See Ronald Dworkin, 'Legal Theory and the Problem of Sense', in Ruth Gavison (ed.), *Contemporary Issues in Legal Philosophy* (Oxford: Clarendon Press, 1987) at 9-10.

There is a sense in which Greenberg's project doesn't seem to be too distant from the one of theorists like Joseph Raz, who contended that the object of any theory of law is to find the set of necessary truths that reveal its nature.[6] Greenberg, like Raz, is also after that fundamental nature. By resorting to a full constitutive account of law he seems to me after that very same nature. Yet, there is a strong methodological disanalogy between the two. Unlike Raz, Greenberg thinks that the entities that make up the legal domain at the level of its reference are not a set of truths specific to the legal case—e.g., a rule of recognition; a doctrine of identity; a claim to legitimate, moral, authority; its peremptory force, and so on—but more fundamental entities: descriptive facts, value facts, and a certain relation between these and legal facts.[7]

This quick comparison between Raz and Greenberg brings into sharp relief a contrast between two different ways of inquiring about the nature of a given entity in philosophy. According to one view, which has occupied the centre stage of philosophical thinking for centuries, metaphysics should aim at tackling questions about what there is in the world and what is the nature of reality. Do abstract objects such as numbers, reasons, meanings, and normative facts, which do not exist in space and time and cannot be touched or detected by scientific instruments, have the same robust existence as rocks, stars, gravity, or atoms? If so, can their existence be possible and not merely actual? What about the nature of processes and events, such as a flash of lightning or the collision of two galaxies, do they enjoy the same ontological status as things and their properties? And, more generally, does the world appear before us

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[6] See, e.g., Joseph Raz, 'Can There Be a Theory of Law?', *Between Authority and Interpretation* (Oxford: Oxford University Press, 2009b) at 24.

[7] When I speak of the "legal domain" I mean nothing like a separate substance or group of "particular entities, such as laws; properties (qualities, sets, classes), such as legal validity; and relations, such as legal obligations from one person to another", as Michael S. Moore would have it ('Legal Reality: A Naturalist Approach to Legal Ontology', *Law and Philosophy,* 21 (2002) at 620.). I do not deny realism, but I remain highly sceptical of there being any distinctive "legal ontology" quite separate from what would otherwise be a set of emergent properties of social phenomena. I'll keep my use of concepts at the level of sense and speak of the legal domain just as that part of reality comprising the entities, properties, and relations that legal thought and talk is distinctively *about*. Adopting this use, see David Plunkett and Scott Shapiro, 'Law, Morality, and Everything Else: General Jurisprudence as a Branch of Metanormative Inquiry', *Ethics,* 128 (2017) at 137.

carved at its joints or is it merely a by-product of our ways of thinking about what there is?

During the last few decades some philosophers have urged us that many meaningful questions about ontology can be better appreciated by inquiring not only about the identity conditions of problematic entities, but also about which kinds of things are more fundamental than others and what kind of dependence holds between such related phenomena.[8] This second approach draws on an Aristotelian picture of reality, whereby the world is assumed to have an inherently hierarchical structure and things enjoy constitutive relations with other things that are more foundational than them. The assumption seems to be quite unexceptional, just think about it: facts about our social life like money, nationality, private property, universities, cocktail parties, and summer vacations are dependent on more foundational facts about people's mental states and their actions; people's mental states are dependent on more foundational facts about neuro-physiological processes in their brains; neuro-physiological processes in brains are dependent on more foundational facts about chemical arrangements of molecules; and chemical arrangements of molecules are dependent on more foundational facts about physical configurations of atoms.

The Aristotelian picture of the world seems quite akin to our current scientific worldview, where all reality is said to emerge from and depend on the most fundamental particles and forces of physics, such as quarks and fields of force. Indeed, many heated debates in present-day philosophy seem to follow this change of agenda insofar as they are framed not in terms of what there is, but in terms of what is more foundational than something else. Thus, for instance, when contemporary philosophers of mind debate about the nature of consciousness, they frame their controversy as one about the character of the relation holding between lower-level

[8] Unsurprisingly, this reorientation pays homage to the long-forgotten original worries of Aristotle in his *Categories*, where he notoriously claimed that all entities are in some way dependent on primary substances.

neuronal firings in the brain and higher-level mental phenomena. Many of them agree that conscious experiences raging from pains, tickles, and itches, to the angst of post-industrial man under late capitalism, have no independent existence and are contingent on some physical facts about chemical processes in the brain, yet they cross swords on how this connection ought to be understood. A similar dialectic engages philosophers of language who labour on the theory of meaning. It is not questions concerning the fundamental nature of concepts that preoccupy them; they want to figure out whether facts about the meaning of symbols are reducible to lower-level facts about their actual or dispositional use. Though many often remain agnostic about the possibility of any such connection, their weightiest questions concern the proper way of understanding it.[9]

Likewise, it is not questions of existence that really matter to legal philosophers. Contemporary legal thinking does not seem to be in the business of arguing that legal facts or propositions have a mind-independent existence quite separate from any institutional practices. The central questions that kindle debates in contemporary philosophy-of-law circles are questions about foundations, not existence. Take the old chestnuts of legal theory: What is law? What makes this aspect of the world legal? Does legality depend on morality, and if so, how? Quite obviously, these inquiries are not aimed at uncovering what really exists out there. These are not attempts at finding out if legal facts have the same robust ontological existence as rocks, stars, gravity, and atoms. These are questions about hierarchies of existence, about what comes first in the order of explanation. And given that legal facts, unlike quarks, strings, and fields of force, are not part of the basic fabric of the universe and exist by virtue of something else, the main challenge is to find out what makes these facts what they are and how it does so. It is precisely here, in fact, where

[9] Particularly after the sceptical dialectic uncovered by Kripke in his discussion of Wittgenstein's rule-following considerations, whereby the latter is presented as committed to the thesis that there are no explicit rules matching facts about use and facts about meaning—since meaning is always normative and has an infinitary character while use is descriptive and finite. See *Wittgenstein on Rules and Private Language* (Cambridge, M.A.: Harvard University Press, 1982). For an interesting account discussion of the ensuing flow of articles and books, see Paul Boghossian, 'The Rule-Following Considerations', *Mind,* 98/392 (1989).

disagreements start: some people claim that legal facts are fully dependent of social facts, while others believe that normative facts are also among the building blocks of legality.

If it is safe to say that the legal domain is drawn to an Aristotelian framework, then Greenberg's schema is useful for deepening our understanding of questions about legal validity. This schema requires not only establishing the modal determinants of legal facts but also elucidating the nature of the relation in which our explanandum—legal facts—stands relative to them. Yet, once things are cast this way, a natural explanatory gap unfolds: how is it that legal propositions emerge from countless facts about our behavioural, semantic, and mental conditions of existence? How are we to combine these facts when they contradict each other? And if there are in principle many possible mappings from complete sets of legal determinants to complete sets of legal facts, how are we to choose among them?

Greenberg's response is that these relations can only be constitutively explained insofar as they are rationally determined. He develops and deploys a requirement—the above-mentioned rational-relation requirement—that any plausible theory of law must meet. Greenberg's conclusion is that legal positivists lack the theoretical means to meet this requirement. They can't explain non-question-beggingly in what way we can infer legal content from law practices alone, because their theories don't include a further specification on *how* social facts determine the content of the law. In other words, the positivist thesis to the effect that the content of the law is determined, at the most fundamental level, by social facts doesn't yet say anything about, for example, how statutes contribute to such content.[10] It is not immediately transparent how the actions, decisions, and intentions captured under the label of social facts determine unique legal propositions. Such a thing, Greenberg insists, cannot be taken as a given without begging the question. If we take practices to consist in communication or tacit endorsement of norms, we still require an

[10] See Mark Greenberg, 'The Moral Impact Theory of Law', *The Yale Law Journal,* 123/5 (2014) at 1298.

explanation as to why subjects ought to be placed under obligations just in virtue of the communication or endorsement of norms.[11] We can't just take this for granted and assume that the sayings and doings of people in authority automatically endow the law with content. The neglection of this explanatory gap in legal understanding, and the attached assumption that we have a unique and uncontroversial hard-and-fast rule matching facts to law, is the picture that held us captive—or so the charge goes.

Nonpositivists, in contrast, would have the resources to deal with this problem, and that itself suffices to reject legal positivism. In a nutshell, positivism's reliance on the sources thesis prevents it from producing a sound explanation of the metaphysical relation that obtains between legal determinants and legal content, committing it to the untenable view that social practices *by themselves* determine how their bearing on our rights and obligations should be understood. This is a mistake, according to Greenberg, because without any external standards it is indeterminate which candidate facts in the higher-level domain of legal facts are most supported by the different, sometimes inconsistent, aspects of the lower-level domain of descriptive facts.[12] The impact of the law-creating actions on legal content must be made intelligible by a reason-based standard, and that standard, under Greenberg's nonpositivist view, is morality.

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[11] As Nicos Stavropoulos emphasizes in 'Legal Interpretivism', in Edward N. Zalta (ed.), *Stanford Encyclopedia of Philosophy* (2021) at §4. The leap consists in conflating the content of the law with, say, the linguistic meaning of a provision without further argument. There is an explanatory gap, in other words, between the different aspects of practices and the content of the law which must be mediated by reasons. For a development of this argument, see Mark Greenberg, 'Legislation as Communication? Legal Interpretation and the Study of Linguistic Communication', in Marmor and S. Soames (ed.), *Philosophical Foundations of Language in Law* (Oxford: Oxford University Press, 2011b) at 233-41, 'Legal Interpretation', in Edward N. Zalta (ed.), *The Stanford Encyclopedia of Philosophy* (2021) at §2.1, 'The Standard Picture and Its Discontents', in Leslie Green and Brian Leiter (ed.), *Oxford Studies in Philosophy of Law* (Volume 1; Oxford: Oxford University Press, 2011a) at 40-55, 'The Prism of Rules', *Public Law & Legal Theory Research Paper Series Research Paper No. 07-31* (UCLA School of Law, 2007a) at 4-8.

[12] In his work, Greenberg credits Susan Hurley's writings in calling his attention on this problem. For Hurley's discussion of objectivity and interpretivism in the contexts of the mind, value, and the social, see *Natural Reasons* (Oxford: Oxford University Press, 1989) at 20-9, 84-101.

Greenberg's case for rational determination rests on the fundamental assumption that absent a requirement of intelligibility, the legal domain is modally indeterminate. This indeterminacy owes to the fact that there can be endlessly different and mutually inconsistent mappings from complete sets of legal practices to complete sets of legal facts. As far as legal practices are concerned, there is nothing to choose between one mapping and another. Hence, we are forced to confront the need of holding this relationship up to standards other than the practices themselves, like morality. But notice that this indeterminacy presupposes an inferential picture of legal understanding. The indeterminacy only arises for someone trying to figure out the content of the legal facts by drawing inferences from the more basic facts. To the extent that there are routes to obtaining justified beliefs about legal facts that do not suppose ascertaining the more basic facts, it is doubtful whether we get indeterminacy (at least so conceived).

In order to get a better grip of this background assumption, suppose, by way of illustration, that we can learn about legal facts in the same way as we learn about our own mental states. The fact that there are many possible mappings from lower-level electrochemical neuron firings at the synapses of neurons in our brain to higher-level facts about our intentional states, doesn't make the domain of the first-personal mental indeterminate. The reason is that our epistemic access to facts about our own mental states does not suppose tracking its more basic constituents. We don't learn that we are thinking by consulting neurochemical facts about processes in our brain. Our access to the target facts, in other words, is direct. Equally, if it is possible to argue that we can have a direct or otherwise non-inferential access to legal facts that does not suppose consulting the more basic constitutive determinants, then the indeterminacy presupposed by rational determination would never arise. In other words, the indeterminacy that justifies rational determination only arises if we conceive the intelligibility of the facts of a domain as an inference from the more basic facts.

It seems that the root of the problem of indeterminacy that justifies, in Greenberg's opinion, the need for an epistemic constraint of intelligibility, lies in his third-personal account of the relationship between legal facts and its modal determinants. From the third-person perspective, the relation between law and its determinants is surely indeterminate. By hypothesis, this choice of perspective rules out any first-personal account of legal facts. Yet, it seems that the idea that the legal domain is indeterminate absent an interpretation of the impact of legal practices on legal facts is completely far-fetched from the first-person perspective. We know from our own case that we can have a good grasp of the fundamental legal facts of a given community while knowing nothing about its legal practices. How is this possible? Does this possibility preclude the need for rational determination? Can we understand the law, at least in abstract terms, without any need to interpret the practices that determine it?

These and other related questions are the ones that I intend to explore in the ensuing pages. Greenberg's jurisprudence can be divided, for expository purposes, into two different provinces. On the one hand, there is his foundational work on the relations between constitutive determination and epistemic access in the legal domain. On the other, there is his first-order theory of law, the *moral impact theory*. According to the moral impact theory, legal rights and obligations are those rights and obligations that are the moral impact of institutional action.[13] In this essay I will not be interested in Greenberg's normative theory of law, but in the background metanormative requirements that his metaphysics of legal facts imposes over any putative theory of law (including his own). Here's my plan for this work. In the next section, I'll address some preliminaries concerning issues about terminology and a few background assumptions to Greenberg's argument. In the successive section, I'll frame Greenberg's argument and spell out its commitments in terms of the two elements that do the heavy lifting: (1) the idea of a constitutive account of law, and

[13] See 'The Moral Impact Theory of Law', (See also, for some refinements, 'The Moral Impact Theory, the Dependence View, and Natural Law', in George Duke & Robert P. George (ed.), *The Cambridge Companion to Natural Law Jurisprudence* (Cambridge: Cambridge University Press, 2017).

(2) the requirement of rational determination. Finally, in the last section, I'll pose a theoretical problem for rational determination and then proceed to add some tentative remarks suggesting an alternative picture of law.

§1.2 *Key Concepts*

For the sake of presenting his case for rational determination, Greenberg helps himself to several assumptions and notions that do not entirely belong to the currency of legal philosophy. Let us prepare the field by properly placing the building blocks from which his analysis proceeds. I am afraid that some previous terminological and conceptual regimentation will be needed before any attempt to step into the core of his case. Given the summary nature of this opening section, I will substantially oversimplify.

A theory of law, in Greenberg's sense, is an attempt to explain how legal content is determined. By "legal content" he means the total set of true propositions about the general legal rights, obligations, privileges, powers, immunities, liabilities, and so on, that there are in a given jurisdiction at a given time.[14] Conversely, a "legal proposition" denotes any true statement about the content of the law. These true propositions can be fundamental (e.g., it is not permissible to compel an individual to give self-incriminatory testimony; foreseeability is a relevant consideration for tortious liability), or applied (e.g., Sam was forced to confess his crime; Sally couldn't foresee that the brakes of her would fail).[15] These propositions, however general, have to be indexed to a particular jurisdiction and time, but we can leave this qualification aside for present purposes. "Legal facts", in turn, are said to be facts about legal content, namely, true legal propositions. Since Greenberg seems to endorse a Fregean

[14] Controversies about what legal relations there are lie outside Greenberg's concerns. Let us proceed then under a Hohfeldian gloss and stipulate that whenever I talk of rights, obligations, and so on, I mean to include the whole profile of subjective legal relations identified in *Fundamental Legal Conceptions* (New Haven, C.T.: Yale University Press, 1919).

[15] Greenberg in this respect follows, again, Dworkin. See *Law's Empire* (Cambridge, M. A.: Belknap Press of Harvard University Press, 1986) at 4.

conception of facts whereby facts are not things or states of affairs in themselves but true truth-bearers concerning statements about those things or states of affairs, we should be aware that a legal fact is a way of describing an entity with normative character and not the normative entity itself.[16] It is better, in general, to say that facts are true propositions *about* entities, properties, or relations (e.g., that water is an H_2O molecule or that torturing cats is morally wrong). For simplicity, let us just use "legal content", "legal proposition", and "legal fact" interchangeably. Let us also use the word "law" in this same sense. Otherwise, "law" is shorthand for "legal system", which includes practices and institutions.

Now, are these legal facts normative or descriptive? Generally speaking, normative facts state what is right or wrong, good or bad, correct or incorrect, beautiful or ugly. Descriptive facts state what is the case or how the world is. For example, the fact that some people believe that one ought to help those in need is not a normative fact but a descriptive fact about people's beliefs. The fact that doing so is good, if it is one, is a normative fact. Are legal facts facts about what we morally ought to do, or are they just reports of an existing and perhaps morally bankrupt set of prescriptions? Well, this is indeed a matter of fierce disagreement in philosophy-of-law circles. Greenberg's tactical move is to remain neutral on this issue so that he can avoid begging the question against the positivist.[17] If legal facts are normative facts, then by hypothesis normative facts are encompassed by the supervenience base of legal facts, thus trivially settling the debate in favour of the nonpositivist. In order to

[16] Greenberg explains that by "facts", he "simply mean[s] true propositions". See 'How Facts Make Law', in Scott Hershovitz (ed.), *Exploring Law's Empire* (Oxford: Oxford University Press, 2006c) at n. 22. This view of facts goes back to Frege's 1918 remark that a "fact is a thought that is true" (see 'Thoughts', in N. Salmon & S. Soames (ed.), *Propositions and Attitudes* (Oxford: Oxford University Press, 1918 [1988]) at 35.). This rather hermetic definition was helpfully clarified later by Dummett, who explained that Fregean facts belong "not to the realm of reference, but to that of sense". See *Frege: Philosophy of Language* (London: Duckworth, 1973) at 442.

[17] Note, however, as Stavropoulos argues a nonpositivist may explain how legal facts obtain while leaving open the genuinely moral question whether legal facts so determined truly bind. See Nicos Stavropoulos, 'Obligations, Interpretivism, and the Legal Point of View', in Andrei Marmor (ed.), *The Routledge Companion to Philosophy of Law* (London: Routledge, 2012) at 80.

avoid this misgiving, Greenberg rightly defers the question of the normative force of legal facts to the outcome of his procedure.

Despite disagreement among contemporary legal philosophers on the nature of legal facts, Greenberg takes it to be common ground that legal facts are not among the ultimate facts of the universe. Their obtaining can always be explained by virtue of more basic facts. In particular, he considers it uncontroversial that these more basic facts comprise ordinary empirical facts about people's actions, utterances, mental states, intentions, and attitudes (including facts about any other propositional contents and what their words mean). It is noteworthy that these institutional practices are not conceived as directly contributing any normative contents (norms, obligations, etc.). Greenberg thinks of law-determining practices in terms of actions and events, not norms that we can somehow discern without explanatory intermediaries from an account of the practices. This is why he chooses to describe them in a rather behaviouristic, non-normative way, merely as descriptive facts about what past people did, said, thought, believed, intended, preferred, hoped, and eventually decided.[18] Paradigmatic instances of these facts include the sayings and doings of members of legislatures, courts, constitutional assemblies, and administrative agencies; the particular circumstances in which a statute was passed; legislative committee reports; statements made by those officials who drafted a statute; the speeches delivered during a legislative debate; bills that would have repealed a particular statute but failed to pass; the executive interpretation of a statute; the canons of interpretation dominant at the time of its enactment; the Federalist Papers, and so on. In the case of a judicial decision, these facts may include the facts of the case, the words used in the majority opinion, the reasons given for the judgement, the concurring opinions, the dissenting opinions, judicial obiter dicta, precedents, judges' beliefs and identities, and so on. The list can grow endlessly and of course is largely over-inclusive, but at least it captures the main insight: the myriad

[18] As I will explain in §3.1, despite discussing the need to include mental contents in his account of practices, Greenberg's account is still behaviouristic because he adopts a third-personal perspective on the attribution of these contents.

descriptive facts that prima facie may bear on the law widely exceed the elements of single enactments. Bear in mind that Greenberg's shorthand for the totality of this subset of descriptive facts is "law practices" or, more fully, "law-determining facts".

What about the ordinary meanings of validly enacted statutes, constitutions, judicial decisions, or administrative acts, are they not legal facts, that is, true propositions about what rights and obligations we have? Under Greenberg's view, these are all law-determining facts, not legal facts. The canonical words of authoritative texts are not legal propositions themselves. They are events and ultimately obtain in virtue of more basic facts about the intentions and mental states of those who drafted or pronounced them. Talk about statutes, constitutions, or any other legal document for that matter is merely shorthand for a collection of facts leading to their enactment. Even semantic facts about the meaning of words, according to Greenberg, can be unexceptionally razed down and explained in virtue of other more primitive facts.[19] The upshot is that the full story of how facts make law cannot take any contents as given since any candidate fact that is descriptive and nonnormative can ultimately reducible to more basic facts. It is only normative facts that while necessary are nonreducible—or, at least, spring from ultimately nonreducible aspects of the universe. Unless we were natural lawyers who think that the law is a metaphysically basic aspect of the universe, our picture of the grounds of law should pay a generous measure of attention to the legal practices. It shouldn't be controversial then that the content of the law is (partly) determined by descriptive facts.

These distinctions allow Greenberg to argue that the core of the debate between positivists and nonpositivists is one of grounds or law-determining facts. Positivists think that the determinants of legal content comprise only descriptive facts. Nonpositivists, by contrast, claim that they also include normative facts. It is not immediately clear what these labels ultimately amount to, so let me clarify them a

[19] HFML at 226-7.

bit further. Positivists distinctively endorse what is often referred to as the "sources thesis". The standard idea behind the sources thesis is usually presented in epistemic terms. It is said, for example, that the relevant facts that make up legal content can be identified by means of some social rules that conventionally ascertain the institutional events providing the ways for creating, modifying, and annulling legal standards.[20] This formulation might be slightly misleading, because Greenberg's notion of the positivist thesis is constitutive, not epistemic; it is about the facts that make up legal content, not about ways of accessing them. Perhaps for his purposes a more apposite statement of positivism is the one we find in Hart's practice theory of rules, whereby (roughly) legal facts obtain by virtue of some social rules, and these in turn exist by virtue of people's collective attitudes of acceptance.[21] Thus, a full constitutive account of legal facts, according to Hartian positivism, would include only descriptive facts.[22]

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[20] Consider, for instance, Raz's version of the thesis whereby law "can be *identified* by reference to social facts alone, without resort to any evaluative argument" (my italics). See 'Authority, Law, and Morality', *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Oxford: Oxford University Press, 1994) at 211. Even Dworkin, at the other side of the street, seemed to grasp the sources thesis in epistemic terms by describing it as the idea that the law "can be identified and distinguished by specific criteria, by tests having to do not with their content but with their pedigree or the manner in which they were adopted or developed." See 'The Model of Rules I', *Taking Rights Seriously* (Cambridge, M.A.: Harvard University Press, 1977) at 17.

[21] See H.L.A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1994) at 55-61, 255.

[22] I am well aware that Raz's views ultimately lead to the same conclusion once recast in terms of grounding. Yet, he explains things in a more roundabout way. His position rests on a sophisticated requirement that stems from a distinctive hypothesis about the way in which the law, by its "nature", or by virtue of some conceptual truth, is supposed to operate. The truth in question is that law claims practical authority. And it does so by claiming the power not only to give reasons (or generate obligations) but also the power to give exclusionary reasons. The whole point of having authority—enabling us to conform with right reason—would be missed if the subjects employ the same kind of reasons that the authority was meant to rely on (and replace), namely: normative reasons. If follows that their directives must create reasons for action that have the property of *content independence*. The upshot of the idea of content independence is the sources thesis: all law is source-based, and its content can be identified by reference to social facts alone, without resort to any moral facts. Raz's views on authority are complex and require much more detailed unpacking. His theory is a combination of three sub-thesis: *dependence*, *normal justification*, and *pre-emption*. They are fleshed out in detail in his 'Authority, Law, and Morality'. See also, for rejoinders and further development, 'The Problem of Authority: Revisiting the Service Conception', *Minnesota Law Review,* 90 (2006), 'Postscript to the Second Edition: Rethinking Exclusionary Reasons', *Practical Reason and Norms* (Oxford: Oxford University Press, 1990), *The Morality of Freedom* (Oxford: Oxford University Press, 1986), 'Legal Positivism and the Sources of Law', *The Authority of Law: Essays on Law and Morality* (Oxford: Clarendon Press, 1979), 'Why Interpret?', *Between Authority and Interpretation* (Oxford: Oxford University Press, 2009a). I will stick to the Hartian version of positivism for ease of exposition.

Are all so-called positivists committed to this austere picture of law? What about *inclusive* positivists? Inclusive positivists think that they can achieve what seems prima facie unlikely: accept both descriptive and normative facts within the determinants of legal content. To avoid having their cake and eating it too they frame their position carefully: normative facts can be incorporated into the law *provided* that they are laid down or referred to by the relevant source-based norms. In other words, normative facts become determinants of legal content only insofar as they are incorporated in this secondary way, by means of the factual source itself. Other inclusivists, in an alternative camp, have held that it is not the institutional source that makes normative facts pertinent to the validity of ordinary norms but a rule of recognition—i.e., a customary norm that prevails in legal systems and governs the law-identifying and law-applying operations of judges and other officials. Thus, on one view, normative facts condition the validity of a given subset of law by mere stipulation, while on the other, it is not a fiat but the practices that embody the rule of recognition of the legal community that perform that role.[23]

These practices—which are better understood as an instance of custom—can establish ways of making valid law provided that, for example, enacted law is not grossly immoral—e.g., contrary to human rights, or such. On either view, however, it is ultimately nonnormative descriptive facts that do the fundamental work in rendering legal content. Descriptive facts are always explanatorily prior to normative facts, and thus the full story about the *ultimate* determinants of legal facts includes only descriptive facts. Descriptive facts only become relevant when some authoritative institution—e.g., a constitutional assembly—or a convergent practice—e.g., the rule of recognition—authorizes so, but this need not necessarily be the case. Let us then keep it simple and proceed under the assumption that all positivists agree that law is fundamentally a matter of social fact.[24]

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[23] Among the advocates of this version of the inclusivist thesis, see Jules Coleman, 'Negative and Positive Positivism', *Journal of Legal Studies,* 11 (1982)., and Wilfrid Waluchow, *Inclusive Legal Positivism* (Oxford: Clarendon Press, 1994).

[24] I am mindful that positivism is a non-monolithic tradition comprising a wide array of several characteristic theses that I'm possibly overlooking. Perhaps there is a more neutral formulation of its

Nonpositivists, on the other side of the spectrum, reject positivism in all its varieties and assert that the big book of legality comprises not only descriptive facts but also normative facts. Nonpositivism covers a wide variety of complex and inconsistent trends, ranging from extreme natural law positions to the rather nuanced hybrid interpretivism. According to Dworkin, probably the most influential torch-bearer of contemporary nonpositivism, a legal proposition is true in a given legal system if it is implicated by the set of principles that provide the best total justification of the past legal and political decisions of that system. Depending on how we understand the relevant notion of justification (the heavy-lifter of his model) this broad picture carves out different specific views. As I will argue later, here's where all the bodies are buried, yet my discussion of the details of his account should wait until then. The important point, for now, is that even if we construe Dworkin's understanding of justification simplistically (i.e., as implying principles that straightforwardly filter, supplement, or otherwise modify the existing practices as required by the value-involving interpretive goals in play), or more sophisticatedly (i.e., legal propositions are not made true merely by their goodness but must also fit the existing practices), the notion of justification remains normative. Thus, on Dworkin's view the content of the law depends also on normative facts.

The main thrust of the previous ruminations is to provide evidence about how philosophers of law move back and forth between claims about descriptive facts and normative facts. Greenberg's starting point is that this setup is widely taken for granted by both sides. On his understanding of the controversy between positivists and nonpositivists, what separates either camp concerns what sorts of facts are among the *ultimate* determinants of legal facts. Yet it is an open question what in turn constitutes such descriptive and normative facts. Or at least, it is an open question at one remove. For Greenberg pellucidly specifies, on the one hand, what

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main tenets but maintaining absolute neutrality across all fronts is a daunting if not inconceivable task. For some elaboration, compare John Gardner's remarks in 'Legal Positivism: 5 ½ Myths', (and Leslie Green's in 'Positivism and the Inseparability of Law and Morals', (

descriptive facts he intends to include in the supervenience base of his model, while remaining rather open, on the other, about the metaphysics of normative facts. This is not an oversight but a deliberate choice. He safely assumes that discussants of positivism believe that the problem of what constitutes normative facts carries no implications for their debate (and vice versa jurisprudential views entail no consequences for the status of normative facts). His argument, then, does not deny or claim anything at the metanormative level, it just relies on the plausibility of a particular sort of normative fact: moral facts.

I think Greenberg is right in observing that as a matter of fact in some quarters there remains a certain distrust about the real import of any second-order metaethical concerns. Just as a geologist might study the movements of tectonic plates without grasping the details of atomic physics, they believe that they can assess first-order jurisprudential theories without any contact at all with the eddies and currents underneath. Yet it seems to me that Greenberg is wrong in supposing that his model can afford such nonchalance. Let me illustrate. Say you believe that moral facts are covert descriptive or natural facts. Assume further that you believe this because you think that all our reasons for action spring only from whatever would best fulfil or achieve our present desires or goals. Wouldn't such reduction commit you to the view that legal facts are fully determined by descriptive facts (assuming that the relation is transitive)? The power of this objection rests on confronting Greenberg with two equally undesirable options: either biting the bullet and denying reductivism about moral facts, or else stipulatively limiting the scope of his argument in a manner that appeals only to moral objectivists. By claiming to have the resources to resolve a metaethical dispute, the argument of HFML seems to be doing too much. By restricting its operation to the endangered species of moral objectivism, too little.

Now, it is not at all clear that the demands here being placed on the metaphysics of moral facts are as vast or otherwise meagre as this objection suggests. Notice that moral facts are summoned up by Greenberg's argument as candidates for filling up a particular role in the constitutive explanation of legal facts. This role

consists in making legal facts intelligible in light of the law practices.[25] This is an explanatory duty, not a justificatory one. For the success of the argument, it suffices to demonstrate that these candidate moral facts can effectively function within arguments, either entailing conclusions or serving as antecedents or consequents of conditionals. It should have been obvious from the start that the main demand lies not in explaining how moral facts obtain but in establishing whether they possess the appropriate content for their intended role.

Perhaps it is easier to appreciate this by considering these candidate facts at work and not on holiday. If it is the case, for example, that certainty requires giving, other things equal, a central role to the plain meaning of enacted texts, or if democratic values cut against legislative intentions' having a central role in determining the content of statutes, then it seems that moral facts are in a good position to perform the avowed task. Greenberg's argument seems to be deliberately presented in a way that doesn't make any demands that go beyond our ordinary, non-committal understanding of moral facts. By remaining neutral on metaethical questions such as whether they are ultimately reducible to contingent facts about human attitudes or else grounded on irreducibly normative aspects of the universe, he can accommodate inconsistent accounts in a non-question-begging way. Even if successful, the argument of HFML would have established nothing with regards to the metaphysics of moral facts.

But let us illuminate more transparently this whole picture by considering a few more difficulties. Consider now a second objector who held the stronger view that purely descriptive reports about people's attitudes cannot account for the normativity of moral facts, in the sense of providing genuine reasons for action. This would be a kind of error-theorist who believes that subjectivists are in error about

[25] See 'How Facts Make Law', at 241-53, 'Hartian Positivism and Normative Facts: *How Facts Make Law II*', 'Reasons without Values?', *Social, Political, & Legal Philosophy* (2, 2007b) at 137-42.

this particular feature of moral facts.[26] Would this now mean that Greenberg's appeal to moral facts requires ruling out subjective theories on account of their incapacity to explain morality's reason-giving force? I don't see how this objection could go through either. As far as Greenberg's argument is concerned, the work of normative facts is epistemic, not practical. They must provide reasons that make a certain explanandum intelligible, not furnish considerations counting in favour of a particular course of action.[27] The argument of HFML is also entirely neutral with respect to the issue of the practical normativity of moral facts. Fatally flawed theories of normativity would suffice as much as otherwise successful ones.

What about the individuation of moral facts? If descriptive facts must rationally determine legal facts, wouldn't that require the same, by parity of reasoning, for a reductive account of moral facts? The puzzle raised by this challenge is this: if it is true that moral facts are ultimately just more ordinary empirical facts about people's attitudes, desires, and goals, and ordinary empirical facts cannot themselves determine their relevance to the target legal facts, then moral facts are not able to perform any rationalizing or bridge-building role.[28] In other words, if moral facts are in the end subject to the same difficulties as legal practices, then Greenberg's argument is a plain non-starter. (The same objection could be directed to the assumption that moral facts entail necessary truths, which in fact many philosophers have disputed).[29] Yet, again, showing this would require launching a parallel

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[26] Most error theorists are global sceptics about morality. Think, for instance, of someone like J. L. Mackie, who believed that subjective and objective theories alike mistakenly presume the existence of some "queer" facts, as he scathingly labelled them. See *Ethics: Inventing Right and Wrong* (London: Pinguin Books, 1977) at 38. Here I have in mind someone like Hume. Given that desires cannot be said to be true or false, Hume believed, it doesn't make any sense to assert that moral judgements are true or false either. See *A Treatise of Human Nature*, ed. L.A. Selby-Bigg (Oxford: Oxford University Press, 1978) at Book II, Part III, Section III.

[27] Unlike Ernest Weinrib, Greenberg believes that law is not intelligible in its own terms, only under the borrowed light of morality. See *The Idea of Private Law* (Cambridge, M.A.: Harvard University Press, 1995) at 6.

[28] See HFML at 178-85. Notice the parallel between this objection and Greenberg's own criticism of Hart's rule of recognition in 'Hartian Positivism and Normative Facts: *How Facts Make Law Ii*', at 273.

[29] See HFML at 227. *Cf.* Bernard Williams's claim that we would be "wrong in assimilating ethical truths to necessities", since ethical truths do not apply to all people. See *Ethics and the Limits of Philosophy* (New York: Fontana, 1985) at 95.

metaethical argument to the effect that moral facts require rational determination in the same way as legal facts do. Since we explain moral facts in moral terms, and this might require, for example, a priori reasoning, it is not even prima facie evident that the analogy holds.[30]

I have stopped to rehearse these objections because many of them have circulated under one clothing or another in the secondary literature for some time and they all, if I am right, miss the mark.[31] Let us now take Greenberg's understanding of the debate between positivists and nonpositivists at face value and focus on the particulars of his account of the relation between legal facts and law-determining facts. His thesis is that this relation is in principle intelligible to hypothetical rational creatures that are sensible to reasons and are aware of the law practices. Moreover, he claims that this must be so for reasons specific to this domain; it is fundamental to our ordinary understanding of law that the determinants must provide reasons for the obtaining of the legal facts. If legal facts are *rationally* determined by their determinants, then there exists a requirement that any full constitutive account of legal facts must do more than specify a mapping from non-legal facts to legal facts; it must also show that the non-legal facts make it intelligible in rational terms how and why legal facts obtain and, moreover, show that this fact itself fulfils a function in making legal facts what they are. This is the "rational-relation requirement". If it is not intelligible why and how the legal practices make the law have certain content, then it does not have it. In the following sections, I will try to flesh out what the rational relation requirement is and then discuss how Greenberg uses this requirement to present a case against positivism. But before this, I should first explain what a "full constitutive account of legal facts" amounts to.

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[30] See, arguing how legal reasoning involves a distinctive kind of reflective equilibrium, 'On Practices and the Law', *Legal Theory,* 12 (2006b) at 134-5, 'How Facts Make Law', at 238-40.

[31] See Ram Neta, 'On the Normative Significance of Brute Facts', *Legal Theory,* 10 (2004), Kenneth E. Himma, 'How Much a Theory of Law Can Tell Us About the Nature of Morality: A Response to Mark Greenberg's *How Facts Make Law*', *Direito, Estado e Sociedade,* 40 (2012), David Plunkett, 'A Positivist Route for Explaining How Facts Make Law', *Legal Theory,* 18 (2012).

§2. GREENBERG'S ARGUMENT

§2.1 *Grounding and Constitution*

Greenberg's route for looking for a satisfactory explanation of law consists in specifying a theory of modal determinants or, differently, grounds of legal content. He claims that any plausible theory of law must explain how the relevant law-creating actions figure in a "full constitutive account" of legal facts. That is, an account of that in-virtue-of which legal facts obtain. A "constitutive" account, as opposed to a causal or probabilistic one, focuses on an explanation of the fundamental nature or essence of a given phenomenon—such as meaning, knowledge, personal identity, value facts, legal practices, and so forth—and the obtaining of particular facts in virtue of them. Sometimes philosophers make constitutive claims by using somewhat unidiomatic locutions, like what "it *is* to be *x*", what is the "*nature* or *essence* of *x*", what "*makes* it the case that *x*", or "*in virtue*" of what "*x* obtains".[32] Albeit not exactly equivalent, these are just different *façons de parler* that point our nose in the direction of roughly the same philosophical thesis. We can thus deem them as interchangeable.[33]

For a given fact F, a constitutive account will involve a distinctively metaphysical explanation of what it *is* or what *makes* it the case that F obtains, rather than a causal or teleological explanation of *why* F came to be. For example, Locke believed that facts about personal identity obtain in virtue of more basic facts about psychological continuity and connectedness. Bentham asserted that facts about the

[32] For a clarifying account of the myriad confusing idioms of metaphysical dependence, see Gideon Rosen, 'Metaphysical Dependence: Grounding and Reduction', in Bob Hale and Aviv Hoffmann (ed.), *Modality* (Oxford: Oxford University Press, 2010), 109-35.

[33] I'll qualify this statement below.

meaning of concepts obtain in virtue of facts about perceptible substances and emotions. Each of these cases shares the topic-wise feature of targeting a particular non-causal priority, where the explanandum is *determined* by a lower-level domain of facts that are ontologically more primitive. Insofar as F is not a basic or ultimate fact about the universe, a "full constitutive account" will attempt to explain F in terms of what is more basic or fundamental than F.

Hence, a full explanation of the content of the law is an explanation of what *makes* certain legal propositions true. It should be noted that as far as we are concerned with constitutive reasons our explanandum is not exclusively the set of legal propositions themselves, but also the determination relation that holds between those propositions and whatever makes them true.[34] In one word, we are not concerned with whether legal propositions are substantively rational or reasonable, but with making intelligible how their content is determined (e.g., we want to understand the reason *why* the deletion of a particular word in a statute has the impact that we assume it has on the resulting content of the law). But what is the nature of this kind of determination relation that lies at the core of Greenberg's constitutive account? There are two key insights that need to be grasped in order to understand it—they will become crucial for the prospects of my challenge later.

First, under Greenberg's constitutive account the explanatory connection between the lower and target domains of facts is primarily metaphysical, and only secondarily epistemic.[35] Thus, by way of illustration, the particular issue at hand here is not how the law-determining practices provide evidentiary guidance for ascertaining the content of legal propositions (for instance, in what way the observable behaviour of judges and other officials is indication of a rule of recognition), but how these law-creating actions *make* it the case that true legal propositions obtain (what set of facts—descriptive or normative, if any—make it the

[34] See HFML at 232. See also Stavropoulos, 'Legal Interpretivism'.

[35] HFML at 226.

case that a rule of recognition exists).[36] It is *because* of this underlying metaphysical connection that we can ascertain the content of the law by consulting the practices.[37] Note that it is not generally true that belief in something having some essential properties makes it the case or is a precondition for that thing having such properties. If we agree that being made of H_2O is a constitutive property of water, then this would be so whether or not people believe it to be the case. In other words, the fact that our actual understanding of the molecular structure of water springs from an a posteriori discovery is no obstacle for it being a necessary truth—a truth that stood independently of our beliefs.[38]

Despite being primarily interested in the metaphysics of the determination relation between law and its determinants, Greenberg makes it plain that this relationship ought to be made "intelligible in rational terms".[39] If the intelligibility-enabling fact is a reason, and reasons are fundamentally epistemic in nature, then the metaphysics of what the law *is* depends on questions about what certain creatures with sufficient cognitive capacities find intelligible.[40] In other words, the determining facts would only yield true legal propositions if it is not possible for ideal reasoners to reliably ascertain the peculiar metaphysical relation that underscores legal facts. It follows that there are important questions of knowledge and justification—e.g., evidentiary relevance, reliability, entailment, tracking, etc.—that play a role in the determination of legal content. We might question, for instance, whether the rational-determination requirement can be anchored in the complex properties of creatures in the spatiotemporal world. A proper elucidation of this issue might, for example, demand a theory of grasp of relations at the level of reference in terms of mental files—where types of mental files correspond to ways of representing the

[36] In HFML Greenberg writes "my concern is constitutive or metaphysical, not epistemic; that is, the issue is how practices make it the case that the law's content is what it is, not how we can ascertain the law's content from law practices" ('How Facts Make Law', at 245.).

[37] Ibid., at 226.

[38] See Saul Kripke, *Naming and Necessity* (Oxford: Basil Blackwell, 1980) at 128.

[39] HFML at 268.

[40] Greenberg, 'How Facts Make Law', at 232., n. 17.

relation in question.[41] Once we turn to Greenberg's discussion of rational determination, I hope it becomes clear that an important question for any theorist advancing a constitutive account of any phenomenon is how we are to reconcile our understanding of the metaphysical truths involved in that domain with our understanding of our ability to obtain knowledge of such domain.

The issue seems to me of immense relevance because it evidences an important and mostly overlooked connection between the general theory of law and interpretation. If we assume by way of a working hypothesis that the epistemology of a certain domain—e.g., law—must track its metaphysics, then it feels right to think that a theory of law is the counterpart at a metaphysical level of a method of interpretation at the epistemic level. That is to say, constitutional, statutory, common law interpreters and the rest deal with issues of evidence and epistemic access while trying to track a certain pattern of law-determination as previously defined by their preferred model or theory of law. The upshot would be that the truth of the interpretive method is contingent upon that of the jurisprudential model. A theory of legal interpretation must assess the epistemic questions about what the right inferential structure is in order to reliably move from law-determining facts to target legal facts—i.e., the legal norms that the interpreter seeks to discern and apply.

But there is no reason to forage into these complexities here. It might just be convenient to separate these two issues for expository purposes and mark the first one. The gist of my previous remark, then, is this: given that metaphysical determination is an attempt at elucidating the fundamental ontological nature of a phenomenon in virtue of what is more basic than it, all psychological connotations germane to legal analysis should be left aside. An item has earned its admission into an ontological picture because it should be there, and not because someone thinks or endorses it being there.[42] Note, however, that this observation is not entirely

[41] See, e.g., John Perry, 'The Self, Self-Knowledge, and Self-Notions', *Identity, Personal Identity, and the Self* (Indianapolis, IN: Hackett, 2002).

[42] Kit Fine, 'The Study of Ontology', *Noûs,* 25 (1991), 263-94 at 264.

innocuous for our purposes here: detaching legal analysis from psychological quests might draw very sharp dividing lines between jurisprudential theories. Hartian analysis, for instance, which relies heavily on some conception of a societies' (or its members') "self-understanding" would be unfit for the explanatory ambitions of a constitutive account of law (more on this later).

The second point announced above concerns Greenberg's understanding of the kind of metaphysical explanation involved in a constitutive account. As I already said, law is not a fundamental aspect of reality. The fact that citizens in Texas have the right to bear firearms, or the fact that not recycling your own rubbish is a criminal offence in the UK, obtain in virtue of more fundamental facts about the actions of past people. Greenberg's assumption is that when we try to find out what the law *is* in a particular jurisdiction, we do so by acutely scrutinizing these more fundamental facts, for we have no direct epistemic access to the law. The nature of this noncausal dependency relation that ties law to its determinants, or any given phenomenon to what is more fundamental than it, is a variety of metaphysical determination known as "grounding".[43] One class of facts "grounds" another if the obtaining of the latter is *explained* in virtue of the former.[44] Thus, for example, it is often argued in philosophy that mental facts like facts about consciousness or facts about perception of the external world obtain in virtue of neurophysiological facts about brains, bodies, and series of interrelated physical events; semantic facts obtain in virtue of facts about the use of words; and chemical facts obtain in virtue of subatomic physical facts. Likewise, metaethical expressivists claim that moral facts obtain in virtue of non-cognitive attitudes, like desires, intentions, or responses.

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[43] Arguably, we owe the term "grounding" to the work of Kit Fine, the bulk of which resurfaced a topic that have been left aside in metaphysics since the times of Bolzano. For his attempts on the topic, see his 'The Question of Realism', *Philosophers' Imprint,* 1 (2001), 1-30, Kit Fine, 'Essence and Modality', *Philosophical Perspectives,* 8 (1994), 1-16, Kit Fine, 'Guide to Ground', in F. Correia and B. Schneider (ed.), *Metaphysical Grounding* (Cambridge: Cambridge University Press, 2012).

[44] See Jonathan Schaffer, 'On What Grounds What', in David Chalmers, David Manley, and Ryan Wasserman (ed.), *Metametaphysics: New Essays on the Foundations of Ontology* (Oxford: Oxford University Press, 2009) at 379, Fine, 'Guide to Ground', at 41.

Legal-content facts, as facts about personal identity, conceptual meaning, consciousness, and perception, are not basic facts about which there is nothing to say on what makes them the case. They obtain in virtue of more basic facts. The implication is that an understanding of how the determinants of legal content yield legal propositions cannot take any legal facts as given. It will be inadequate, for instance, to hold that the content of the law ultimately obtains in virtue of legal practices plus some basic legal-content facts (e.g., interpretive canons specifying the relevance of legal practices to the content of the law), because such an account would fail to explain in virtue of what these basic legal-content facts obtain.[45]

Crucially, the kind of dependency relations involved in grounding are not mere modal relations. Yet, it is not uncommon to find positions in the literature that cash constitutive accounts in terms of modality (metaphysical necessity and possibility, and the various forms of supervenience). For instance, some dedicated taxonomists frame as "constitutive" explanations of phenomena that appeal to the modal determinants of a non-redundant supervenience base.[46] Supervenience is a modal relation of necessary co-variation between two types of facts (properties, or some other relata). Roughly, *A*-facts supervene on *B*-facts iff the *A*-facts cannot vary without some variation in the *B*-facts. Conversely, if the there is a difference in the *B*-facts without there being a difference in the *A*-facts, then the *B*-facts do not supervene over the *A*-facts. These kinds of claims used to be very common in the philosophy of mind. For example, some people argued that beliefs, ideas, and dreams supervene upon neurophysiological properties of the brain, so that our mental properties cannot vary unless our neurophysiological properties also vary, since the latter are an "epiphenomena" of the former properties.[47]

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[45] HFML at 226-7.

[46] A contributing factor probably is that the term "constitutive" is often used to draw a coarse-grained distinction between the constitutive and the causal, where the modal belongs to the constitutive side, see Mark Greenberg, 'A New Map of Theories of Mental Content: Constitutive Accounts and Normative Theories', *Philosophical Issues,* 15 (2005), 229-320 at 300.

[47] For the claim that grounding involves distinct necessary connections, see, e.g., Rosen, 'Metaphysical Dependence: Grounding and Reduction', Fabrice Correia, *Existential Dependence and Cognate Notions* (Munich: Philosophia Verlag, 2005), Fine, 'Essence and Modality', (, Fine, 'Guide to Ground'. For an

Now, modality is not strictly grounding, and supervenience is a purely modal notion. In fact, appealing to constitutive truths is natural when trying to explain modal ones. For instance, the fact that the *A*-facts constitute the *B*-facts explains why the *B*-facts also supervene on the *A*-facts. More importantly, however, supervenience is not itself an *explanation* of why a given relationship obtains, nor it is an account that attempts to explain the *A*-facts "in-virtue-of" the *B*-facts. It merely reports a surface pattern which suggests the existence of a metaphysical kind of dependence.[48] Although every grounding claim purports to have modal force, the explanatory ambitions of the two are different.

Modality has many friends in areas where philosophical explanation concerns ineliminable imprecise phenomena, like, for example, in the case of content or conceptual-role theory—i.e., the analysis of what determines a thought's having particular content. Grounding relations, on the contrary, are more fine-grained because they are (or attempt to be) explanatory. A grounding claim states that mental properties are metaphysically *constituted* by more fundamental neurophysiological properties; not merely that there is a pattern of dependency between both. But there are other reasons why it is doubtful whether notions specifying modally necessary and sufficient connections can capture the explanatory demands that Greenberg imposes over legal analysis.

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illuminating distinction between different varieties of necessity, e.g., logical, conceptual, and metaphysical, and their relations to different types of grounding and how they contrast with modality, see Fabrice Correia, 'Ontological Dependence', *Philosophy Compass,* 3 (2008), 1013-32, and also, Fine, 'Guide to Ground', Kit Fine, 'Senses of Essence', in Diana Raffman Walter Sinnot-Armstrong, And Nicholas Asher (ed.), *Modality, Morality, and Belief: Essays in Honor of Ruth Barcan Marcus* (Cambridge: Cambridge University Press, 1995), 53-73. On the explanatory virtues of grounding, see Fine's example concerning the debate between three- and four-dimentionalist on the nature of material things ('Guide to Ground', at 42.), or Rosen's concerning the analysis of intrinsic property ('Metaphysical Dependence: Grounding and Reduction'. n. 1).

[48] See Jaegwon Kim, *Supervinience and Mind: Selected Philosophical Essays* (Cambridge: Cambridge University Press, 1993) at 167.

As I said, Greenberg's central question is whether a full constitutive account of legal facts must refer to normative facts in addition to descriptive, nonnormative facts. This question cannot be even formulated in terms of supervenience. Since normative facts are necessary truths, they are modally redundant.[49] Greenberg vindicates grounding as a way of gaining deeper insight into the perennial jurisprudential question of what type of relationship holds between law and its determinants. By doing so he inscribes his strategy in the wider tendency that has motivated the emergence of grounding in metaphysics as a salutary method for overcoming the deficiencies of notions specifying modally necessary and sufficient connections in capturing the explanatory demands of philosophy (it remains an open question, however, whether grounding can in fact meet the heavy explanatory duty that contemporary metaphysicians seem to assign to it).[50] Despite being published before metaphysical grounding became a real a subject-matter on its own right, arguably it was Ronald Dworkin's later work which propelled, perhaps unawares, the interest of grounding in law.[51] Be it as it may, the crucial insight to keep in mind is that for Greenberg a constitutive account of a certain target domain will not do the necessary work simply by pointing to supervenience relations. It also has to *explain* what makes those facts what they are (and render, as I mentioned before, the relevant explanandum intelligible).

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[49] Or, in Greenberg's own terms, they "cannot be a non-redundant element of a supervenience base", HFML at 227. See also, 'Reasons without Values?', at 136.

[50] A tendency that was propelled by Kit Fine's seminal work 'Essence and Modality', (Note, however, that the connection between grounding and explanation is not uncontroversial. Some have articulated grounding as itself a type of metaphysical explanation (see Shamik Dasgupta, 'Constitutive Explanation', *Philosophical Issues,* 27 (2017), 74-97.). Others have claimed that both things are not identical. Grounding backs or underwrites explanatory "because"-claims but is not itself explanation. See Paul Audi, 'Grounding: Toward a Theory of the in-Virtue-of Relation', *The Journal of Philosophy,* 109 (2012), 685-711, Jonathan Schaffer, 'Grounding in the Image of Causation', *Philosophical Studies,* 173 (2016), 49–100.

[51] In the opening pages of *Law's Empire*, Dworkin makes the next claim: "Everyone thinks that propositions of law are true or false (or neither) in virtue of other, more familiar kinds of propositions on which these propositions of law are (as we might put it) parasitic. These more familiar propositions furnish what I shall call the "grounds" of law." Controversial as they may be, this passage can be read as pointing our attention towards the idea that legal facts obtain in virtue of other, more basic things. See *Law's Empire* at 4.

Why does Greenberg seems so persuaded that the positivism/antipositivism debate concerns grounding relations instead of merely supervenience relations? In HFML, Greenberg takes the problem of the validity of the law to be that of determining how we can derive true propositions about our legal rights, powers, privileges, immunities, obligations, prohibitions, liabilities and so on (in a given jurisdiction at some given time), from a collection of ordinary empirical contingent non-moral facts about institutional practices—the legally relevant actions of political institutions and ultimately what people within them wrote, uttered, decided, intended and (perhaps) thought. Within this framework, legal positivism's claim to validity is that our best understanding of legal reasoning and argument suggests that the content of the law ultimately depends on social facts, and not on moral facts, such as facts about what is morally right, good, or praiseworthy. Antipositivism, on the contrary, contends that the kind of reasoning and argument that seeks to uncover which legal propositions are true commonly relies on evaluative or normative thinking, so that at least some of the facts that we discover in legal analysis are distinctively moral facts.

Positivism has been developed in contemporary philosophy of law in two directions: *exclusive* and *inclusive* positivism. Exclusive positivists deny that value facts entertain any role in legal content. Inclusive positivists maintain that value facts can be incorporated into the law in a secondary way: when the relevant social facts refer to them. Thus, by way of illustration, when the Eighth Amendment to the US Constitution provides protection against "cruel and unusual punishments", it is to be construed as having the effect of incorporating moral facts—about what counts as cruel and unusual punishment, in this case—into the law.[52] Bear in mind that on the inclusive variant it is still the social facts that make the moral facts relevant, and there is no need for the social facts to incorporate moral facts into the law. Putting things

[52] See, e.g., Coleman, 'Negative and Positive Positivism', (at 139, H.L.A. Hart, 'Postscript', *The Concept of Law* (Oxford: Clarendon Press, 1997).

metaphorically, Greenberg claims that for both exclusive and inclusive positivists "there could still be law if God destroyed all value facts".[53]

As explained in the previous section, the core insight of this debate for Greenberg is that both positivists and nonpositivists enter the controversy taking for granted that the question they are dealing with is the explanatory issue of *in virtue of what* legal facts obtain, rather than simply what is the modal pattern that holds between legal facts and other facts. In other words, the controversy is about which sorts of facts are *necessarily* among the determinants of legal content. Positivists assert that social facts alone are and moral facts are not, whereas nonpositivists assert that both are. Moreover, since moral facts, being necessary, cannot be different from what they are, they "cannot be a nonredundant element of a supervenience base", and hence, "both positivists and nonpositivists can agree that descriptive facts alone metaphysically determine the content of the law".[54] Therefore, if the dispute between positivists and nonpositivists is a meaningful one, then it mustn't be understood as involving solely supervenience relations but also grounding relations.[55] It is still an open question, in my opinion, whether supervenience relations are entirely irrelevant for drawing boundaries between different positions in this debate, and whether Greenberg's conception of supervenience is as widely held as he assumes, but in any case it is beyond the scope of this work to explore this matter with the care it demands.

To recap, in HFML Greenberg's pitch opts for a constitutive account of legal facts that vindicates a particular notion of grounding, that is, an "in-virtue-of" relation which holds between the legal-determinant facts and the legal facts. This strategy is helpful and a natural place to start elucidating what is at stake in the debate over legal positivism. Thinking of the determination relation that holds between the determinants of legal content and legal content in terms of grounding emphasizes

[53] HFML at 226.

[54] Greenberg, 'How Facts Make Law'.

[55] For a similar position, see Rosen, 'Metaphysical Dependence: Grounding and Reduction'.

three important lessons about the nature of this relation: (1) that it must be *explanatory*, (2) that it is *constitutive* rather than causal, and (3) that it is unable to be captured in all its important details by merely modal notions of metaphysical determination such as supervenience.

§2.2 *The Constraints of Intelligibility*

Now that we have a better sense of the kind of account that, according to Greenberg, both positivists and nonpositivists are after, we should turn to the rational-relation requirement. Greenberg's background motivation for introducing this requirement stems from the thought that in the legal domain the relation between legal facts and their determinants must be intelligible for certain creatures (under certain conditions). Casting things in terms of grounding alone is not enough to heed this requirement.

Indeed, asking what it is in virtue of which legal facts obtain might help us illuminate some important dividing lines in the space of the debate between positivists and nonpositivists, such as the nature of the facts that they take to determine legal content. But a ground-theoretic account cannot explain us how the different members of the lower-level domain of grounding facts (whatever they are) combine to yield the higher-level grounded facts. This is what Greenberg has in mind when he claims that "practices, understood as composed of descriptive facts, cannot themselves determine the content of the law".[56] Given that there are many possible ways in which practices could bear on the legal facts, practices "cannot determine their own relevance".[57]

Ground-theoretic accounts are hopeless at solving this fine-grained issue of relevance because they lack the sufficient explanatory resources. Posing an

[56] HFML at 236.

[57] Greenberg, 'Hartian Positivism and Normative Facts: *How Facts Make Law Ii*', at 270.

informative grounding relation involves claiming that the link between A and B is asymmetrical, irreflexive, and transitive. In other words, that *(i)* A grounds B, and B doesn't ground A (asymmetry), *(ii)* A doesn't ground itself (irreflexivity), and *(iii)* if A grounds B and B grounds C, then A grounds C (transitivity). Establishing that an in-virtue-of relation is asymmetrical, irreflexive, and transitive may help us identify the items that comprise its relata, but it doesn't illuminate how the A-facts combine to yield the B-facts. The aspect of the relation that we want to make sense of will remain entirely unfathomable as far as grounding is concerned.

Now, why this should be problematic? Why is it so relevant that the relationship between the determining facts and the determined facts can be made intelligible? And, more importantly, why is this a distinctively *constitutive*, and not merely epistemic, problem?

Let me illustrate what is at stake behind these worries with an analogy. Almost all aspects of reality are drawn to a nonbasic structure, where things are explainable by virtue of more basic things, and the order of explanation goes from the more foundational to the less foundational. The Aristotelian intuition according to which all reality is composite and admits of hierarchical structures seems to be all around us. For example, the fragile disposition of the glass I am now drinking from is contingent upon more foundational facts about complex configurations of atoms in its categorical base. The liquidity of the water inside the glass is contingent upon more basic facts about the distribution of its H_2O molecules. Similarly, facts about my qualitative perception of the glass obtain in virtue of more basic facts about a sequence of neurobiological processes initiated by the impact of photons reflected off the glass on the photoreceptor cells in my retina, thereby triggering a series of firings at nerve endings right through my cortex.

These neurobiological facts about my vision further obtain in virtue of some chemical facts, and these chemical facts, in turn, obtain in virtue of more basic microphysical facts. We can continue all the way down until we reach quarks and

subatomic particles in fields of force—that is, facts for which there is nothing to be said about what makes them the case. Despite the immense complexity implicated in the endless chains of existence that constitute the threads out of which reality is woven, it is not really the case that our understanding of nonbasic domains supposes an ability to intelligibly grasp the relation in which the facts of these domains stand relative to their immediate metaphysical determinants. I do not need to ask a neuroscientist to scan my brain and identify the neurobiological processes mentioned above to know that I am seeing a glass. Likewise, I don't learn that the glass in question is fragile by running an X-ray crystallography test revealing the brittle arrangement of atoms in its categorical base, nor I realize that what I am drinking from that glass is water by determining, with the aid of a spectroscope, the H_2O molecular structure of its solution. In all these cases my access to the target facts is direct and there is no extra requirement of making sense of the grounding relation. I can have knowledge of these facts despite being a creature with limited cognitive capacities and no conceptual understanding of crystallography, particle physics, and neuroscience (or even grounding).

However, our thinking about the law, Greenberg believes, is not so straightforward. We only learn about legal facts, he submits, by consulting the more basic facts. This is why the "relation between the law practices and the content of the law must be transparent".[58] If the legal domain, just like the domain of first-personal perception, was one in which our knowledge of the target facts is completely independent of the intricacies of the relation between these facts and their lower-level grounding base, then there would no need to care about transparency.

This distinction becomes pellucidly clear in the case of the mind-body problem. Scientists and philosophers of the mind cross swords on questions about the grounds of consciousness, but their disagreement, which concerns different ways of understanding the relationship between brain facts and mind facts, carries no

[58] HFML at 232.

consequences for the intelligibility of our first personal experience of consciousness. Setting aside dualism and eliminativism, scientists and philosophers have heated arguments about how to properly cast the bridge over the explanatory gap between lower-level facts about brain processes and higher-level facts about consciousness. Materialists believe that mental facts are reducible to facts about brain states, functionalists believe that mental facts are grounded in functional facts that are realizable by different brains, and identity theorists believe that mental facts are reducible not to facts about brain states but to facts about specific neuronal processes.

On the face of it, these disagreements reveal that the specifics of the determination relation between brain facts and mind facts is still unfathomable to us. Yet, we don't see that as a problem making our experience of consciousness unintelligible. The reason is that our access to consciousness is not mediated by the several possible mappings from brain facts to mental facts that each of these different theories suggest. We know independently that we are conscious, regardless of the many possible explanations of what makes it so. Indeed, things couldn't be more straightforward and reliable than in the case of first-personal consciousness, since I only need to *think* that I am conscious to *know* that I am conscious. Consciousness, epistemically speaking, is completely non-illusory given that the mere thinking so makes it so.

I hope it is not too controversial to suggest that the possibility of having many different, inconsistent mappings from determining facts to target facts, is only problematic once we have assumed at the beginning that our grasp of the target facts *necessarily* presupposes consulting the more basic facts. I have spent some time in these quandaries because I want to emphasize that Greenberg's doctrine of rational determination takes this setup for granted. The rational-relation requirement only makes sense for someone who assumes that our access to the target facts is necessarily mediated by the functions arising from the more basic facts.

Now, here's the problem that motivates Greenberg's requirement. In purely modal terms, determination relations within the legal domain are brute. The aid of counterfactuals has helped us establish that practices ontologically ground law, but we just don't know how. There are some domains in which we can live with the fact that things are just brute. Greenberg's examples are aesthetic facts and facts about humour. It may just be a brute fact that a certain configuration of paint in the surface of a canvas makes a paint elegant,[59] or that what was said and done was funny.[60] We might not be able to make sense why changes in the distribution of oil in the canvas or in the way the joke is delivered would make the painting more elegant or the joke funnier. That doesn't seem problematic. In the legal domain, however, relations between A and B cannot just be brute. Why? Because the legal domain is "reason-based".[61] Thus,

> when legal practitioners give reasons for their conclusions about what the law is, they believe that they are not merely citing evidence that is contingently connected to the content of the law; rather, they believe that they are giving the reasons that make the law what it is.[62]

As Greenberg observes, there must be reasons that explain which aspects of the determining domain of law practices support a given set of legal propositions over another. Without these reasons, there would be endlessly different and inconsistent mappings from complete sets of practices to complete sets of legal propositions, all of which could be made consistent with all actual and possible evidence concerning the totality of descriptive facts about people's behaviour. For a "perfectly rational being" it would be completely unfathomable why a certain variation in the practices leads to a consequent variation in the legal facts.[63] In other words, it would be simply

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[59] Ibid., at 228.

[60] Ibid.

[61] Ibid., at 232.

[62] Ibid., at 239.

[63] Ibid., at 231- 2. Greenberg's doctrine of rational determination resembles very closely Donald Davidson's radical interpretation approach to mental and semantic facts. According to Davidson, the

arbitrary which mapping is the correct one. Thus, to the extent that legal practices do not provide reasons allowing us to decide among the possible mappings from practices to legal facts, "the law is indeterminate".[64] In other words, there would be *no fact of the matter* regarding what the law of a given legal system is.

The implication is that, necessarily, legal facts must be rationally determined. The problem is that descriptive facts, the kind of facts that according to positivists exhaust the grounds of legality, cannot by themselves rationally determine the legal facts. Facts about people's actions, utterances, or intentions are just more descriptive facts and thus cannot self-interpretatively determine their own relevance to legal facts. Since there is nothing in practices that would allow us to determine which elements of practices are relevant and how they combine to yield legal propositions, we need standards of a different sort. Greenberg's thesis is that normative facts are these standards. This is the crucial step in the argument. Law practices alone cannot provide the relevant kind of reasons for settling the issue of relevance. They can only do so in conjunction with normative facts.[65]

With the help of normative facts working in tandem with reasons, we have the resources to formulate conditionals that would rationally determine the content of the law. Greenberg has in mind formulations of the following kind (just to add a few more examples to the ones provided in the previous section): "if fairness is a value, then even incorrectly decided cases should be given a precedential weight", "if democracy is a value, then legislative history shouldn't be given any impact on the

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content of a subject's propositional attitude is contingent on the fact that rational interpreters would find it intelligible that the subject holds a particular propositional attitude. This supposes ascribing beliefs to the subject in terms of which it may be understood as intentional. As Greenberg adds, "roughly, the thesis is that the constitutive determinants of one's propositional attitudes must make it intelligible that the person has the beliefs and desires they have" ('Hartian Positivism and Normative Facts: *How Facts Make Law Ii*', at 287.). Greenberg seems to suggest that he has reservations about the pertinence of Davidson's thesis in the mental case, however, he believes that its application holds squarely in the legal case (see his interview in *Problema - Anuario de Filosofía y Teoría del Derecho*, 11, 2017, at 595).

[64] HFML at 238.

[65] Ibid., at 257-264.

content of the law, "if fairness is a value, then criminal statutes should be construed only as contributing their plain meanings", and so on.[66] These conditionals are fit for the avowed task because they allow us to decide which aspects of practices impact legal content and how they combine to do so. Notice how Greenberg has added an epistemic notion, the notion of a reason, as an adequacy constraint *within* the grounding relation. Something "unusual", as Greenberg concedes, and to which I will dedicate more attention in a moment.[67]

Once we have conceded that the intelligibility-enabling fact that allows us to make sense of the grounding relation is a normative fact, then Greenberg's objection to positivism follows naturally. Given positivism's endorsement of the sources thesis, where all law is ultimately grounded on descriptive facts, it lacks the resources to meet the rational-relation requirement. Nonpositivists, by contrast, have such resources. Now we have the rough elements of Greenberg's doctrine of rational determination, which combines a thesis about grounds with an epistemic thesis about intelligibility. I should not forage into these preliminary considerations any longer, since my ensuing discussion will expand and re-emphasize many of the things I have explained here by way of introduction. There are a few important questions that I have deliberately left aside with the hope of returning to and fully explicating them in the next section.

[66] For a few more examples, see Stavropoulos, 'Legal Interpretivism', at §1.

[67] HFML at 228. In a later work, Greenberg emphasizes: "reasons play a central role in the ontology of law". See 'Reasons without Values?', at 142.

§3. PROBLEMS FOR RATIONAL DETERMINATION

In this section, I argue that the doctrine of rational determination rests on unreasonable assumptions. Chief among them is the assumption that our understanding of the law always supposes a third-personal inferential judgement from legal determinants to legal facts. I believe that this picture misconceives the nature of legal understanding. The goals of what follows are threefold: 1) to identify and articulate the premises out of which the case for rational determination is developed; 2) to argue that rational determination leads to a theoretical problem; 3) to illuminate what is missing in this picture of legal understanding.

§3.1 *Empirical Assumptions*

Greenberg's account of practices is motivated by a tactical goal. The goal is to argue from a difficult-to-dispute starting point to the controversial conclusion that normative facts are among the determinants of legal facts. Practices serve as this starting point and Greenberg's aim is to find an ecumenical description that both positivists and nonpositivists could accept. Thus, he builds up from the assumption that nearly everyone takes it to be common ground that legal practices consist of ordinary empirical facts about what past people said, thought, and did. These descriptive facts do not comprise any normatively significant objects, such as norms or statutes, because norms and statutes ultimately obtain in virtue of a complex collection of more basic facts about human behaviour. Paradigmatic instances of practices, then, include not constitutions, statutes, regulations, and judicial decisions, but the actions and attitudes involved in producing them. Members of assemblies produce drafts, debate, deliver speeches, invite executive officials, issue committee reports, and vote in certain ways with respect to a text. Administrative agencies adopt

regulations and develop official views thereof. Courts consider disputes, render judgements, issue dissenting, concurring, and majority opinions, consider sentences uttered by the parties to the controversy, cite the decisions of other judges, and so on.

The list of candidate facts about legal practices can potentially grow endlessly and Greenberg has no problem with that. He is adamant that his account should remain open and non-restrictive so as to block any concerns about scope.[68] For example, practices should not be conceived only in terms of what officials do in their official capacities. Pragmatic facts about customs, historical context, the political circumstances in which a legislature acted, judge's beliefs and identities, should also be included, however remote. Furthermore, the fact that we routinely account for practices by employing legal concepts, such as concepts about what counts as a legislature, a judge, or a bill, should not lead us to conflate practices with legal content. All the same, these legal-content-laden facts ultimately hold in virtue of a collection of more basic facts about people's behaviour.[69]

In short, the threads of which Greenberg's conception of practices is woven essentially comprise people's actions and mental states, together with the pragmatic context in which such behaviour takes place. In thus limiting the analysis, Greenberg attempts to pre-empt any normative facts from his base layer, limiting the set to ordinary empirical facts. This choice is understandable, otherwise he would be begging the question at the heart of his paper, namely, whether legal practices alone determine legal facts, or if they do so in tandem with normative facts. The sayings and doings that carve out legal contents do not merely consist of physical facts about sounds and bodily movements. Crucially, legal practices also include those mental and linguistic contents associated with such utterances and actions. Now it begins to look as though almost nothing is left out of Greenberg's wide-scopism about practices. Since the nature of our rights, obligations, powers, and privileges is

[68] See HFML at 236.

[69] See ibid., at 235.

fundamentally mind-dependent, in the sense that these exist insofar as we intentionally represent them as existing, I think that the decisive step in Greenberg's argument about rational determination is taken with his treatment of such content, so this is where I should stop and proceed carefully. Here is a hypothesis I want to explore. I will state it crudely and then flesh it out in detail. Crudely, the doctrine of rational determination arises out of a metaphysical choice for the third-person perspective. From this perspective, it is indeterminate how we should match legal practices to legal facts since there is an indefinite number of possible mappings from one to the other. But this choice flies in the face of the fact that from the first-person perspective, it is clear that we can have knowledge of the law without the need to draw any mappings from practices to legal facts.

Greenberg opens his discussion of mental and linguistic content by warning the reader that he is happy to take these contents "for granted".[70] To the extent that questions about the possibility of linguistic and mental contents offer no peculiarly legal implications, he finds no harm in granting their existence without further ado. He believes that the real difficulty, as far as law is concerned, is practical and revolves around the question of whether meanings and mental states can determine by themselves which legal propositions are true. So Greenberg's caveat is that we shouldn't be overly worried about the *nature* of meanings and mental states. Let meanings be a matter of ideas in the head, dispositions to behaviour, uses of words, or intentional capacities. That is not what matters. Once you grant the ordinary mental and linguistic contents of mental states and utterances of participants in law practices, the real issue is whether law is thereby automatically endowed with *legal* content. In other words, once we grant mental and linguistic contents, the really difficult question is whether you can ascertain the content of the law merely by looking up those propositions associated with the meanings of the texts and the contents of mental states entertained in the course of law practices. Thus, Greenberg is not terribly interested in the relation between the determinants of mental content

[70] Ibid., at 241.

and mental content itself; his real interest lies in the subsequent relation between already *determined* mental content and legal facts.

Is Greenberg entitled to such a division of labour? Can he swiftly move on to discuss issues about the bearing of the mental on the legal without taking any sides on substantive questions about how mental content obtains? I believe that this leap forward is unwarranted, and his own remarks seem to prove it. Let us return to the claim that mental and linguistic content can be safely taken for granted. As Greenberg clarifies, "when I say that we can take for granted mental and linguistic content, I mean that we need not ignore the mental and linguistic content that is available".[71] But what counts as "available"? Suppose I am in pain right now—my lower back hurts badly. Given that I am used to lower back pains, I am in no way disposed to exhibit this behaviour. Those around me haven't got the faintest idea of my mental state. I know, however, that my pain is no less real than the existence of Mount Everest. Would this content—my mental state of pain—count as *available*? To take a more legal example, suppose that a party to the negotiation of a contract has an unexpressed hope regarding how the other party will apply a particular clause. Is the content corresponding to this propositional attitude available too?

These questions are not addressed directly by Greenberg, but his discussion contains some scattered remarks that shed a distinctive light on the answer. For instance, he observes: "What is available in the standard reports of law practices is not sufficient to attribute much in the way of attitudes to the people who actually performed the actions and made the utterances".[72] Similarly, he warns us that: "although we are normally able to attribute attitudes to people based on what they say and do and to attribute standard meanings to a large number of sentences of a language we speak, there are difficulties in attributing non-legal content to aspects of a putative law practice".[73] Both remarks are clear indication to me that what counts as

[71] Ibid., at 242.

[72] Ibid.

[73] Ibid.

"available" in Greenberg is that which we can "attribute" to a speaker or thinker based on *public* evidence, namely, evidence that we can empirically observe on the basis of "standard reports" about "actions" and "utterances" of people, the things they "say and do".

This point is better brought out to the limelight if we notice that Greenberg takes the attribution of content on the basis of evidence to be a *problem* in need of solution. He mentions, for instance, that the fact that a judge signed an opinion, or a legislator voted in favour of a bill might not constitute enough evidence to attribute them any beliefs, intentions, hopes, or fears. Sometimes, he adds, we are in the predicament of having evidence that is redundant or insufficient to attribute any contents.[74] These purported obstacles are only problematic to someone who has already assumed at the outset that accounting for mental content is a question of attributing someone beliefs on the basis of empirical evidence about her actions, utterances, and sentences. Once we adopt this point of view such questions are tricky because the implication is that if a particular mental content is not attributable on the basis of what is publicly available, then there is *no such content*. To put it in more illustrative terms, if a difference in Sam's mental states—e.g., he was *hoping* to go for a walk but now *intends* to go for a walk—is not reflected in a difference in publicly observable evidence, then reality has not actually changed. So, in a word, in Greenberg's view our knowledge of mental states always supposes an inference from effects to causes; from behavioural evidence to mental states.

Now, how are we to judge what is attributable on the basis of empirical and publicly accessible evidence? Recall my lower back pain. I am certain about my pain, but others might have doubts. This is not at all unnatural, since having the pain is one thing, and exhibiting pain behaviour is another. One might have the pain and not display the behaviour or, equally, display the behaviour and not have the pain. Adopting a particular point of view seems to be decisive because there is a tension

[74] See ibid.

between my perspective and that of an observer. Someone might stress this tension by suggesting that there is something missing in attempting to account for someone else's pain on the basis of their outwardly observable pain behaviour. And what we miss here might be the same thing that we miss when we know everything about the neurophysiology of bats but can't experience echolocation,[75] when we are experts in the neuroscience of colour vision but have always inhabited a black-and-white room,[76] or when we have mastered a computer program that makes our speech indistinguishable from that of a native Chinese speaker but still doesn't understand Chinese.[77] Greenberg's choice of perspective on this respect, already implied in his public conception of data, is the third-person perspective. Contents exist insofar as they are attributable on the basis of external, behavioural evidence, from the perspective of a competent observer.[78]

This preference should not come to us as a surprise. Greenberg's view about mental content looks very much like that of Donald Davidson, whose radical interpretation approach to mental and linguistic content is explicitly cited in *How Facts Make Law* as an antecedent of rational determination.[79] According to Davidson,

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[75] See Thomas Nagel, 'What Is It Like to Be a Bat?', *The Philosophical Review,* 83/4 (1974), 435-50.

[76] See Frank Jackson, 'Epiphenomenal Qualia', *The Philosophical Quarterly,* 30/127 (1982), 127-36.

[77] See John Searle, 'Minds, Brains and Programs', *Behavioral and Brain Sciences,* 3 (1980), 417-57.

[78] Consider, for example: "The basic idea is that the content of the law is in principle accessible to a rational creature who is aware of the relevant law practices" (HFML at 237), or "To dramatize the point, even a perfectly rational being may not be able to see why it is that particular A facts make particular B facts obtain" (231). Sometimes he suggests that practices should be accessible from the perspective of an "idealized reasoner". Consider, for example, "the idea might be that practices yield a legal proposition if and only if an ideal reasoner would see that they do". HFML at 232, n. 17.

[79] HFML at 228, 232 n. 18. I should be quick to add that earlier in HFML, Greenberg disowns the Davidsonian view to the effect that meaning facts require an interpretation of use (albeit half-heartedly). He acknowledges that "Natural languages are a biological creation" and thus we work out the meaning of words not by virtue of reasons but by virtue of a "hardwired mechanism that rules out many incorrect mappings that are not ruled out by reasons" (138, n. 25). In a later work he endorses this view more resolutely, see 'How Facts Make Law and the Nature of Moral Facts', *Direito, Estado e Sociedade,* 40 (2012) at 170-1. Note, however, that Greenberg doesn't add a similar caveat concerning his views about mental states, sticking to the Davidsonian terminology of "attributing" content on the basis of what is publicly "available". I am not sure that this asymmetry is justified, yet I can imagine arguments supporting it. At any rate, I will return to this point after I present Greenberg's indeterminacy thesis; I believe that at a fundamental level, our understanding of legal facts works just like our understanding of meaning.

"What an interpreter cannot on empirical grounds decide about the reference of a schemer's words cannot be an empirical feature of those words"; and, "What no one can in the nature of the case figure out from the totality of the relevant evidence cannot be a part of meaning".[80] Note that despite a certain air of truism, these remarks evince a metaphysical choice of utmost importance. The choice, again, consists in a preference for the third-personal, anthropological, point of view—what there *is* comprises only that which we can garner from the detached perspective of an impartial observer. This preference, as in Greenberg's case, generally goes unacknowledged and is presupposed within what we can "take for granted". It seems to me that the reason behind this assumption, which is widely taken to be so obvious as to go without saying, is that an empirical theory of thought and language is the only possible way to acquit for the public nature of language.[81] Yet, as I hope it will emerge with more clarity later, developing an alternative view of practices does not involve a commitment to any mysterious inner state, private language, or ghostly Cartesian ego. For now, all that we should bear in mind is that, by hypothesis, what is attributed to the participant from the third-personal point of view might not be what is going on in the participant's mind, and what is going on in the participant's mind might not be attributed.

Let's recap and state more bluntly where these considerations leave us. Greenberg accounts for legal practices in terms of ordinary empirical facts about what past people said, thought, and did in various circumstances. These facts include those propositions that stand for the contents of the utterances and mental states of participants in law practices, such as facts about what they intend, believe, prefer, hope, fear, and so on; together with semantic and pragmatic facts about the meaning of their words. Given Greenberg's assumptions, these intentional contents are

[80] 'The Inscrutability of Reference', *Inquiries into Truth and Interpretation* (Oxford: Oxford University Press, 1984), 227-42 at 235.

[81] This assumption is widely held and taken for granted by philosophers of mind and language and goes back to Quine's early attempts to build a "scientific" theory of meaning, where analysis is confined to correlations between external stimuli and dispositions to produce utterances. Quine's conclusion was that words in our language have no determinate meanings. See *Word and Object* (Cambridge, M.A.: MIT Press, 1960) at 23-71.

granted only subject to an empirical constraint. This constraint is that content must be attributable on the basis of external evidence that is equally accessible to all competent users, that is, accessible from the third-person perspective. So despite his initial disclaimer—that we can take these contents for granted—Greenberg *does* take a side on questions concerning how linguistic and mental content are possible.[82] He tacitly supposes that mental contents exist only insofar as they can stand some empirical tests. By razing things to the grounds of what is observable under such-and-such public conditions, Greenberg reveals a preference for a certain level of description. The implication is that what an external observer cannot decide from external evidence is not part of what I think. What is presented as a naïve or "rough" account of practices,[83] ends up involving a particular ontology. It is precisely what this behaviouristic conception of the mental and linguistic rules out, which raises the theoretical problem that I pose for rational determination.[84]

So much for Greenberg's account of practices. It is time to turn to the core aspect of our discussion. We have to grasp why this understanding of objective reality yields indeterminacy, and why Greenberg believes that this indeterminacy must be corrected so that our ordinary understanding of the law is properly accounted for. His empirical assumptions are crucial for his views about the indeterminacy of the

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[82] Greenberg sometimes writes as if his characterization of practices is not entirely important. For instance, he makes statements of the following sort: "my argument will not depend on exactly which descriptive facts make up law practices. Rather, I will make a general argument that descriptive facts—in particular, facts about what people have done and said and thought—cannot by themselves determine the content of the law. Therefore it will not matter precisely which such facts are included in law practices." (236). I hope that my discussion shows that the details of the structure *do* matter. Different ontologies about what there is would yield a different account for practices. Part of my argument is that Greenberg's account roots out a very important aspect of practices and, therefore, of law.

[83] HFML at 236.

[84] I am aware that Greenberg wouldn't agree with my labelling his account of practices as "behavioural". In fact, he even explicitly states that he "should not be taken to suggest that law practices are to be understood in solely physical or behavioral terms" (HFML at 237). But he accepts an intentionalistic psychology only to the extent in which mental facts are equally available to all participants, thus denying any special status for the first-person case. In my view, this is just behaviourism with a human face, because ultimately all the work is done by external facts about behaviour. I'll keep the label subject to this proviso.

legal domain; and that indeterminacy, in turn, is vital for his doctrine of rational determination.

§3.1 *The Indeterminacy Thesis*

Stripped of any confusion, the objective reality furnishing the raw data Greenberg operates with is entirely defined in terms of external or "available" phenomena. Despite mentioning in passing that his account of practices is not merely physical or behavioural,[85] he allows for the consideration of mental states only insofar as these states are redeemable or epistemically accessible from the third person perspective, thus denying any special status to the first-person standpoint in his account of the determinants of legal content. The implication is that beyond what is public and available there is nothing—what you see is what you get. Assuming this picture of the objective reality of law practices, Greenberg observes that there can be endlessly different and inconsistent mappings from complete sets of practices to complete sets of legal propositions, all of which could be made consistent with all actual and possible evidence concerning the totality of nonlegal content. As far as legal practices are concerned, there is nothing to choose between one mapping and another, even though the two may be inconsistent and no possible set of mappings is closed under conjunction. A "perfectly rational being" will not be able to tell, from the third-person perspective, why a certain variation in the practices leads to a consequent variation in the legal facts. It might simply be arbitrary or "brute" which mapping is the legally right one.[86] He illustrates this point with an extreme example:

> it is consistent with the truth of the metaphysical-determination doctrine that, say, the deletion of one seemingly unimportant word in one subclause of one minor administrative regulation would result in the elimination of all legal content in the United States—in there being no

[85] Ibid., at 237.

[86] Ibid., at 231- 2.

> true legal propositions in the U.S. legal system (though there is no explanation of why it would do so).[87]

Greenberg introduces the term "model" to designate a candidate way in which practices contribute to the content of the law. He prefers this concept rather than that of "interpretation" to signal that his concern is constitutive, not epistemic.[88] The indeterminacy arises when we try to form models that state functions from what past people said, did, or intended to legal content. Suppose that candidate model A establishes that the content of the law is canvassed by the plain meanings of statutes, whereas candidate model B determines that legal content is contingent on the intentions of legislators. Given that each model states a different rule or function from practices to law, each model would yield a different set of legal propositions. Greenberg's argument is that legal practices themselves cannot determine which model is the legally correct one, because there is nothing in practices that would allow us to determine how these descriptive facts combine to contribute legal propositions. In short, there is an indiscriminate number of hypotheses providing mappings from practices to law. And practices, not being self-interpreting, cannot single-handedly adjudicate between them.

Even if we raised the stakes and adopted a God's-eye perspective claiming absolute factual knowledge of every causal aspect of the practices, our predicament would remain the same, because we would still be unable to draw the distinctions we need. Our privileged access would just furnish us with more descriptive facts and consequently more possible interpretations, mappings, or candidate models, all of which are supported by the practices. In Greenberg's terms, "For any legal proposition, there will always be a model supported by the practices that yields that proposition".[89] The difficulty, then, doesn't have to do with any scepticism about access but with the nature of the facts in question. Given that descriptive facts are

[87] Ibid., at 232.

[88] Ibid., at 245.

[89] Ibid., at 248.

never self-interpreting or self-applying, any collection of descriptive facts about people's behavioural dispositions, however comprehensive, would fail to lay down a unique inference rule setting constraints on the eligibility of interpretations. If you fix the facts, the law is still open—or so the charge goes.

I will call this view the *indeterminacy thesis*. The indeterminacy thesis represents the backdrop against which Greenberg develops his case for intelligibility, which is better understood as an adequacy constraint within an otherwise indeterminate relation. Speaking in purely modal terms, determination relations within the legal domain are brute. We know that practices ontologically ground law, but we just don't know how. Grounding relations are useful because they reveal to us that the relation between A and B is asymmetrical, irreflexive, and transitive, but they do not provide us with reasons making intelligible how one or more aspects of A determines B. Greenberg's examples are aesthetic facts and jokes. It may just be a brute fact that a certain configuration of paint in a surface makes a paint elegant,[90] or that what was said and done was funny.[91] But in the legal domain, Greenberg protests, relations between A and B cannot just be brute. Thus, he suggests including an epistemic notion within the metaphysical relation in order to reconcile the legal domain with what he takes to be our ordinary understanding of law. This condition is the "rational-relation requirement", the second step of the argument. According to the rational-relation requirement, a constitutive account of the legal facts must do more than merely specify the modal determinants of the legal facts; the constitutive determinants must also provide *reasons* why the legal facts obtain.[92] Otherwise, "to the extent that the law practices do not provide reasons supporting certain legal propositions over others, the law is *indeterminate*".[93] The issue of what kind of reasons are those that make legal facts intelligible would not be relevant for the moment. I'll return to this point briefly. For the time being, let me just stress the fact

[90] Ibid., at 228.

[91] Ibid.

[92] See 'Hartian Positivism and Normative Facts: *How Facts Make Law Ii*', at 268.

[93] HFML at 238 (emphasis added).

that rational-relation is conceived as a salutary consequence of baseline modal indeterminacy. Once this epistemic requirement is accepted into the picture, the implication is that any relation that is not rationally intelligible remains unfathomable—i.e., does not exist.

We should bear in mind that the indeterminacy in question doesn't concern the practices themselves, but their impact on legal content. There *is* a matter of fact about what practices there are, what is indeterminate is how these practices make law. This is why I prefer to speak of "indeterminacy" instead of brute determination, as Greenberg does. This label misleadingly suggests that the legal domain is modally determined. But Greenberg's view is the exact opposite. It isn't the case that there is a fact of the matter about how facts make law, but we simply don't know it. For that would mean that his problem is purely epistemic and thus entirely unrelated to constitution. He is not claiming that we haven't appropriately reconciled the epistemology of law with its metaphysics. He is claiming more. The thesis is that there is *no fact of the matter* about how facts make law, and this is the reason why we have to adjust our conception of the metaphysics of the legal domain in order to reconcile it with people's reputedly reason-based understanding of legal facts. It is the metaphysics that must be adjusted to match the epistemology. Like others before him, Greenberg derives a constitutive claim from an epistemic problem.

One way to refute the indeterminacy thesis is to offer a reductio ad absurdum of its premises. If indeterminacy were true, then certain legal notions known independently to be valid would be lost. Let me illustrate this objection with an example. Suppose I am driving on a speed highway and I suddenly run into the scene of an accident. A police officer is standing in the middle of the road and orders me to stop my car with a hand gesture. By any reasonable standard, it is absolutely clear to me what the legal fact here is. The officer has imposed on me the legal duty to stop driving. Yet, according to Greenberg's brute determination, this is not at all clear. In principle, the officer's hand gesture is compatible with many different hypotheses matching her action to possible legal facts. To borrow his own example, it would be

modally possible that the contribution of the officer's action to the law is not the imposition of a legal obligation but the "elimination of all legal content". Another possibility, equally modally tenable, is that her gesture is not a legal practice at all—she is just offering me a high-five. As far as linking practices to legal propositions is concerned, there is no way of making these distinctions as facts of the matter; our only aid out of this puzzling conundrum is resorting to a standard independent of the practices, which in his case is morality. Yet my knowledge of what is legally the case is a plain fact about me, not a hypothesis designed to account for the officer's observable behaviour. In Greenberg's view, there is no empirical basis for attributing this intentional fact to me since the empirical facts we are allowed to use are facts about what attitudes people have under such-and-such public conditions.[94] It follows that there is no way to make the distinctions that our common-sense intuitions insist on. However, what we seek in understanding legal practices cannot be at odds with what we already have in our own case, namely, a determinate sense of such a fundamental legal fact as that this is an officer and her gesture an order.

It seems that Greenberg's own methodological preferences have forced us into an untenable position. By any reasonable standard of reality, it is totally determinate what the officer's action means; even if we found ourselves in some remote country of whose legal practices we didn't know the first thing. It seems as though there is a pre-interpretive plain fact of the matter about which of the three putative explanations of the legal significance of the officer's action is the right one, without there being any indeterminacy attached. In other words, there is something that we know without the need to consult any practices, and thus draw any mappings from metaphysical determinants to legal facts. Now, before I dig deeper into this problem, let me remind

[94] Let me issue a brief warning about the term "intentional". Although it is unidiomatic, "intentionality" (and its cognates, such as "intentional") doesn't mean the same as "intending". Intentionality is a fancy philosophical word for that feature or capacity of the mind by which it is directed at, or about, objects and states of affairs in the world, typically independent of itself. If I believe that is raining, hope that interest rates fall, prefer Rembrandt over Vermeer, or fear that many glaciers will melt, I am in each instance in an intentional state. Intending to go to the movies, on the other hand, is just one type of intentionality among many.

you where we are and what the alleged reduction is. There are two inconsistent propositions:

(1) Legal practices consist of externally observable behavioural facts about what people say, do, or intend.

(2) There can be a plain fact of the matter about whether the officer's action made it the case that I am legally obliged to stop my car, as opposed to any other imaginable contribution to legal facts, including the elimination of all legal content.

If alternative and inconsistent candidate models can all be made consistent with the same legal practice, then there cannot be any fact of the matter about which of the two propositions is right, because, according to (1), there isn't anything else to be right about. But that is inconsistent with (2); so if we accept (2), (1) must be false.

I think it is clear which of (1) or (2) we have to give up. Greenberg has simply refuted behaviourism. If behaviourism was right, and all that we've got to learn about the law is the perspective of an external observer who tries to match practices to legal facts, we'll surely get indeterminacy, and I take that as enough refutation of that way of casting legal understanding. What is interesting, though, is that Greenberg doesn't regard his behaviourism as being refuted. But why be so confident about that? Why not abandon (2), as he suggests? The answer is the obvious one: if Greenberg's reductive account of legal understanding were correct, it would have to be correct for *us* as participants of legal practices. And we know from our own case that a road officer's lifted palm stands for "stop!", and not "high-five!" or "I hereby repeal all legal content". If my neighbour, having read Greenberg, decides to loot a shop and is held at gunpoint by the police and ordered to stop on her way out, she couldn't just say "look, I'll carry on because the contribution of legal practices to legal facts is indeterminate from a third-person perspective and I cannot decide how your sayings and doings morally impinge on my rights and obligations". She just *knows* what is

going on, in the same way that she knows that the goods she hid inside her bag are private property and the celluloid fibre papers she took from the till are money. She knows these legal facts even without knowing anything about the relevant practices—and if she doesn't, so much the worse for her.

Once we apply Greenberg's empirical assumptions to our understanding of the law we find out there is no way of making certain distinctions that we do make as plain facts of the matter. When we are discussing about mind-dependent entities it is always important to stand back at some stage and remind ourselves of the first-person case, however "against the rules" adopting this standpoint might be considered.[95] For example, no one can convince me by argument, no matter how clever, that the pain qualia I'm currently experiencing in my lower-back doesn't exist. The same holds true for Greenberg's idea that the legal domain is pre-interpretively indeterminate. Our pre-interpretive common-sense intuitions seem to suggest the opposite. If someone has a theory of legal practices according to which there is no difference between an officer signalling me to stop my car, high-fiving, or abrogating all laws, then I know that such a theory simply cannot be right. This is the reduction ad absurdum: if what holds for an external observer is simply absurd from our own standpoint, then it is irrational to believe it.

The indeterminacy thesis is that, where questions about the contribution of legal practices to legal facts are concerned, there is no such thing as getting it right or wrong. This is not because of an epistemic gulf between evidence and conclusion, but because there is no fact of the matter to be right or wrong about. As I have argued, indeterminacy is what Greenberg's brute ontology breeds and brute indeterminacy is only possible by way of dismissing any special status for the first-person case. In turn, the dismissal of the first personal stemmed from a reduction of legal practices—

[95] For a vindication of the first-person perspective in the case of indeterminacies of meaning, see John Searle, 'Skepticism About Rules and Intentionality', *Consciousness and Language* (Cambridge: Cambridge University Press, 2002), 251-64, 'Indeterminacy, Empiricism, and the First Person', *The Journal of Philosophy,* 84 (1987), 123-46.

particularly the mental—to public facts. A third-personal account of practices led to a third-personal account of legal understanding because we are only allowed to consider publicly accessible facts when figuring out the law.

Let me now retrace my steps and restate a few of my points. Greenberg's rational determination doctrine supposes that we can *only* find out the content of the law by making inferences from practices to legal facts. These inferences are drawn from the third-person perspective, namely, from the perspective of an impartial observer who judges things on the basis of what is publicly observable. Casting legal understanding in terms of hypotheses designed to account for people's behaviour leads to indeterminacy: the many possible inconsistent functions from A to B. The way to rescue law from this indeterminacy is by introducing morality into the picture. With the aid of normative facts—working in tandem with reasons—the impartial observer should have the resources to formulate conditionals that would help her determine the relevance of diverse aspects of law practices to legal facts. These are conditionals of the following sort: "if fair notice is a value, then criminal statutes affect legal content only narrowly construed", "if democracy is the relevant value, then legal facts should include the intentions of drafters of statutes".

This picture, Greenberg believes, is the only one consistent with our "ordinary understanding […] of the nature of the determination relation between the law practices and the content of the law".[96] Speaking purely modally, the legal domain is totally indeterminate, but our ordinary understanding of the law, Greenberg alerts us, is not as crude or absurd. Indeed, legal reasoners "work out what the law is and predict the effect on the law of changes in law practices through *reasons*, not through some non-rational human tendency to have correct law reactions to law practices".[97] In Greenberg's sense, a reason "is a consideration that makes the relevant explanandum intelligible".[98] So his interest lies not in practical reasons, namely,

[96] HFML at 231-2.

[97] Ibid., at 239.

[98] Ibid., at 232.

reasons furnishing considerations counting in favour of a particular course of action, but in epistemic reasons, that is, reasons that make it transparent why the relevant practices make the law what it is. These epistemic reasons, he adds, are not merely reasons for believing that the law is such-and-such, but "reasons that *make* the content of the law what it is".[99] We now have an "epistemic notion playing a role in the metaphysical relation", however "unusual" that might seem.[100] The implication is that legal facts exist only insofar as it is intelligible for an impartial observer how they obtain in light of their determinants. Since Greenberg argues that the relevant reasons for these kinds of inferences are, or appeal to, values, his interpretivism "builds moral investigation into the metaphysical one".[101]

The indeterminacy thesis was yielding unwelcome results. Chief among them was the conclusion that the legal domain is spurious, in the sense that there are no facts of the matter about it. Greenberg seemed to acknowledge this awkwardness and decided to correct his metaphysics by conjuring "our" understanding of the law, how "we" think about it. Instead of paring down his frankly behaviouristic ontology, he decided to introduce a particular theory of rationality as a constraint on his modal picture. At this stage, one just wonders why the need to add all these normative constraints in the model instead of just stopping and going back to revise the initial assumptions. Perhaps something went wrong right at the beginning of the inquiry and now we are just struggling with damage control.

Greenberg's third-personal interpretivism never considers the possibility of acknowledging what we know in our first-personal intentional case. He doesn't consider that most people have access to legal facts that is not contingent on

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[99] Ibid.

[100] Ibid., at 228. There are good reasons to argue that the metaphysics of the legal domain is always explanatorily prior to its epistemology. I remain deeply sceptical about Greenberg's move in this respect. A full discussion of my concerns here would take us too far afield. For an argument against this possibility, see Christopher Peacocke, *The Primacy of Metaphysics* (Oxford: Oxford University Press, 2019) at 3-15.

[101] The expression is Stavropoulos' and is intended to describe interpretivism in general, not Greenberg's particular account. See 'Legal Interpretivism'.

consulting the more basic determining practices as a problem in need of a solution. This possibility is ruled out by hypothesis since Greenberg's theory of rationality supposes *only* judgements formulated by an impartial observer seeking to match practices to law. My examples have attempted to elicit an alternative intuition, the intuition that we can have some knowledge of legal facts without any awareness of the more basic facts that determine them. I take this possibility to be a decisive obstacle for Greenberg's interpretivism and I will explore it more closely in the next section.

Now, if we were to construe indeterminacy as just the claim that there are no intentional facts of the matter about practices in addition to what is externally available in reports of what people say, do, or think, then it would seem puzzling that we didn't derive that conclusion immediately from the beginning. It would seem puzzling that there is so much heavy going about how models cannot self-interpret, and so forth. The reason is that the indeterminacy thesis is stronger than proposition (1); that is, it is stronger than the claim that there aren't any first-personal psychological facts in addition to what other people say, do, or think. It says further that there are an indefinite number of equally valid but inconsistent ways of correlating facts and norms in any given legal jurisdiction. The thesis that there are no objectively real mental facts in addition to observable dispositions to verbal and cognitive behaviour was already assumed at the beginning of the discussion. Greenberg rejected any appeal to descriptive facts, in any first-personal psychological sense, from the start. That was never an issue. What was the issue was the possibility of empirically motivated correct mappings from practices to legal propositions, *given behaviourism*; the issue was whether or not there is an empirically motivated determinacy left over once we have adopted the third-person standpoint.

I emphasize this point because I believe that it is easy to misconstrue the thesis of indeterminacy as simply the familiar underdetermination of hypothesis by empirical evidence. Because any empirical hypothesis makes a claim that goes beyond the evidence, according to underdetermination there will always be inconsistent

hypotheses that are consistent with any actual or possible evidence. But underdetermination, so construed, does not entail indeterminacy, that is, the idea that there is no fact of the matter about how facts make law. Even if we have established all the facts about practices, Greenberg points out, it would still be "*indeterminate* which candidate facts in the higher-level domain are most supported by the lower-level facts".[102] He reaches this conclusion because he has assumed from the very start the impossibility of any direct intentional access to legal facts, such as, for example, my knowledge that the piece of paper in my pocket is legal tender, or that the pen I am now holding belongs to me. These are things that I know independently of any legal practices (and, more importantly, without any need to reason about value). Yet, in Greenberg's picture, there is no place for such intentional facts, because "our only access to the content of the law is through law practices. It is not as if we can find out what the law is directly or through some other route".[103]

So, just to be clear, our plight is that we can only figure out the law by ascertaining practices—there is no "other route"—yet, how practices make law is indeterminate. The argument, then, is not the usual epistemic thesis to the effect that information at the level of descriptive facts about practices is, by itself, not sufficient to determine the level of legal facts. Such reading would misconstrue the nature of the discussion altogether. The argument says *more*, it says that there is no way to know what is constitutive of legal facts. Greenberg has assumed from the beginning that there are no independent facts connecting any practices (in his overinclusive sense) to law. If you believe that they are so much as possible, his argument fails; it is only *assuming* indeterminacy that rational determination can be made to go through. In turn, indeterminacy succeeds only assuming the nonexistence of mental facts directly explaining legal facts. Once this assumption is abandoned, that is, once we stop begging the question against intentionality, it seems that all that is left is underdetermination.

[102] HFML at 229 (emphasis added).

[103] Ibid., at 238.

The indeterminacy thesis has the absurd consequence that indeterminacy applies to oneself. If the argument that there cannot be empirically well-motivated mappings from facts to law is valid, then it must have the result that there isn't any difference *for me* between an officer stopping my car, abrogating all law, or asking for a high-five. And if it doesn't make sense to say of oneself that law is indeterminate, then I don't see how it makes sense to say it of someone else. What we seek in understanding another person is precisely what we already have in our own case. After all, why should anyone else's senses be less determinate than our own? I submit that all this is a consequence of the behaviourist assumption that there aren't any intentional facts beyond what is attributable from public evidence. Once we concede this, then the rest follows, because, on Greenberg's picture, there isn't any other objective fact of the matter as to how facts make law (unless we concede the rational-relation requirement). I think that these consequences are admittedly absurd on their face, and I hope it is clear by now that it is Greenberg's narrow conception of practices which generates the absurdity. We know from our own case, from the first-person case, that behaviourism is wrong because we know that our own mental phenomena are not equivalent to dispositions to behaviour. What we know in our case is a great deal more than under what observable conditions we hold this belief or that intention. As I explained earlier, exhibiting pain behaviour is not a reliable indicator of the presence of pain. It is possible for someone to display pain behaviour without actually experiencing pain, and conversely, someone may experience pain without displaying any outward signs of it. These considerations lead me to hypothesize that legal facts are grounded not only in practices but also in collective intentionality. The idea would be that a full constitutive account of legal facts contains not only practices but also a collective attitude of recognition towards legal facts. Perhaps more realistically, the collective recognition in question concerns not the legal facts but some social rules establishing their sources. I will not pursue this issue any further here.[104]

[104] The reasons for my reservation not only concern space but also consistency. In the next section, I will argue that we can have non-inferential knowledge of the law, that is, knowledge that does not

In a different environment than the one we inhabit, this might well be the end of the discussion. Legal interpretivists believe that interpretation—or rational determination—is always explanatorily prior to any grasp or understanding of legal facts. Since the need for interpretation arises out of indeterminacy, if the thesis of indeterminacy falls, then so does the need for rational determination. I have not yet proved why the legal domain is not indeterminate; I have not properly explained how it is possible that we know about the law without consulting the practices. Yet, the onus for the objector only amounts to producing counter-examples to the thesis under scrutiny, and my traffic patrol case was intended as one such counter-example. I haven't aimed to directly challenge rational determination but just to stress what I consider to be the shaky foundations on which it stands. Still, I believe that Greenberg's own case for rational determination can be construed just as well as a refutation of the indeterminacy thesis. Interestingly enough, he doesn't regard indeterminacy as being refuted.

Greenberg's rational determination was introduced as a constraint on indeterminacy. Indeterminacy is created by the possibility of endless inconsistent mappings from facts about practices to legal facts. This vital step, in turn, supposes a prior commitment to an inferential epistemic rationality, namely, the thesis that our *only* way to learn about legal facts involves ascertaining the more basic determining facts. Only given this core prior assumption, the need to draw any mappings from A to B arise. It seems, then, that there are two ways to argue against indeterminacy (and its subsequent doctrines). One involves the claim that there are facts other than practices—call them X—that partially determine the legal facts. These X facts

presuppose consulting the metaphysical determinants of legal facts. Since my hypothesis suggests that legal facts are partially grounded in mental facts about collective intentionality, I don't want to take a stance here that will prejudge my argument in the next section. In other words, I don't want to give the impression that my vindication of intentional facts as grounds of legal facts implies a counterpart method for finding out about the law. Nevertheless, I shouldn't be overly cautious in this respect because my ultimate view is that there is more than one method for finding out about legal facts. For a recent restatement of Hart's views about social rules and collective dispositions in terms of grounds for legal facts, see Andrei Marmor, *Foundations of Institutional Reality* (Oxford: Oxford University Press, 2023).

determine the law in ways that are not modally indeterminate. For example, some philosophers believe that all social reality is ultimately grounded on intentional facts about collective recognition.[105] Technically speaking, the claim would be that the existence of legal facts is grounded not only in practices but also in a shared belief within a group of people. This shared belief is such that it is incompatible with group-wide errors about the nature of things collectively recognized. Since this collective intentionality is contingent on mental facts, and mental facts are first-personal (insofar as they exist in individual brains), then what we know about the law in our own case (thus conceived) is always *determinate*. Another route involves challenging the epistemic assumption that legal reasoners figure out the law by way of inference from the more basic determining facts. If it is possible to show that we can have access to legal facts that is not mediated by inferences from practices, then the indeterminacy thesis, which arises only on an inferential scenario, would have revealed another flank. This is the claim I want to explore in the next section.

§3.3 *Non-inferential Access to Legal Facts*

§3.3.1 CONSTITUTIVE DOMAINS AND THEIR ACCESS. Now it is time to see where these considerations leave us. Rational determination was introduced by Greenberg as an adequacy constraint seeking to reconcile the modally indeterminate structure of the legal domain with our understanding of legal facts. The indeterminacy, in Greenberg's view, was generated by the fact that the legal domain is *nonbasic*, thus allowing for endless possible mappings from determinants (legal practices) to determined facts (legal facts). Yet, recognition of this hierarchical structure doesn't seem to be enough to sustain a concern of that kind. The fact that the legal domain, just like the mental, the semantic, the perceptual, and a number of other domains, is nonbasic, doesn't by itself explain the threat of indeterminacy. The indeterminacy in question only arises when we add the extra premise that in order to obtain knowledge of legal facts we must inferentially reason *from* the more basic facts that determine

[105] See, for example, John Searle, *The Social Construction of Reality* (New York: The Free Press, 1996).

them. If our knowledge of legal facts is not arrived at by way of inference from legal practices, then there is no need to draw any mappings from the latter to the former. If we can find out about legal facts, say, by direct introspection, just as we find out about our mental states, then the fact that we understand next to nothing about the series of lower-level neuronal firings in our brain that constitutively determine our belief that *p*, doesn't make the domain indeterminate. Indeterminacy supposes more than constitutive nonbasicness, it also supposes the epistemic thesis to the effect that access to the target facts of a given domain necessarily involves inference from the more basic determining facts.

A close reading of Greenberg's argument seems to evince awareness of this point. For instance, he argues that "It is only because of this underlying metaphysical relation that we ascertain what the law is by consulting [the legal] practices";[106] and later he adds "lawyers take for granted that the epistemology of law *tracks* its metaphysics".[107] Clearly, this observation is not meant as a matter of sociological fact. The claim is not that there is some kind of overlapping consensus among lawyers, judges, and law professors in this respect. The claim is that the epistemology of law is such that our only reliable method for obtaining knowledge of the law supposes drawing inferences from the more basic facts (and how they combine). To the extent that a method for finding out about the law deviates from this pathway, it would yield limited pockets of knowledge (if any).

But is it true that the metaphysics of the legal domain is such that inference from the more basic facts is the only feasible way for attaining knowledge of legal facts? And is it also true that the epistemology of law must "track" à la Greenberg its nonbasic metaphysical structure? I think that these are questions of fundamental

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[106] HFML at 226.

[107] Ibid., at 239 (emphasis added). The notion of "tracking" can be misleading because it is unidiomatic. It first entered the lexicon of epistemology to denote Nozickian tracking. In Nozick's theory, what is being tracked is the truth, whereas in Greenberg's use tracking is a method for obtaining knowledge must track the metaphysics. It requires additional argument to establish that metaphysical tracking ensures truth tracking. See *Philosophical Explanations* (Cambridge, M.A.: Harvard University Press, 1981) at 170-1, 75-7.

importance and they invite us to reflect on the reciprocal responsibilities that the metaphysics and the epistemology of law owe to each other. To the extent that knowledge about legal facts is not necessarily inferential, then the case for the explanatory priority of interpretation in legal understanding would be challenged. We should stop and spend some time considering this claim more carefully.

In general terms, the reliability of a method for figuring out the properties of a given domain often depends on how suitably geared it is to the metaphysics of that domain. A neuroscientist can use a brain scanner to understand how vertebrates neuronally respond to a certain smell. She might also need an olfactometer to identify the molecular composition of the odour she is applying. Her scanner is built following a theory about how the brain is wired and her olfactometer is designed to detect a certain chemical structure in odour molecules. For this reason, methods for ascertaining the target facts of a given domain are contingent on the nature of its properties, entities, and relations. Since these elements often vary from one domain to another, so do the methods for obtaining knowledge about them. It follows that constitution and epistemic access are, in principle, related. The difficulty lies in establishing how closely integrated that relation should be conceived.

In the case of ontologically *basic* domains, where there is nothing to be said about what makes them the case, such as the domain of physical quarks or the domain of irreducibly normative truths, knowledge by way of inference from the more basic facts is ruled out by hypothesis. The reason is simple, if there is nothing more fundamental in the fabric of the universe than quarks or fundamental normative truths, then by hypothesis we cannot infer them from more primitive entities. Perhaps the most reliable route to learn about the properties of quarks is by observing their effects since we cannot observe them directly. True, these reports include inferences, but these are inferences from evidentiary facts that are downstream of the target facts, not from the more basic facts (since there aren't

any).[108] Similarly, for those who believe that fundamental normative truths cannot be reduced to non-normative truths, there is no possible inferential knowledge about them. Our access to these truths seems to presuppose some kind of direct apprehension, be it through tacit understanding, a special mental faculty analogous to sense perception, or a kind of awareness resembling our grasp of fundamental mathematical principles or the logical a priori.

Other domains present constitutive features that force us to scale down our expectations of obtaining knowledge. For instance, in some cases there is no independent way of validating the available methods for ascertaining the facts of a domain.[109] In other cases, we have no choice but to rely on a single method despite having no means to assess its reliability. A standard example of the latter is the domain of first-personal intentionality, which can never be illusory, as Descartes suggested almost four centuries ago. If I *think* that I am conscious, then *I am* conscious. There is no way of disproving consciousness first-personally since there is no distinction between appearance and reality from that standpoint. In other domains, we simply lack the required abilities to form beliefs about the target facts, as it happens, for instance, in the case of first-personal echolocation or in domains which suppose the application of vague expressions.[110] Finally, some domains are spurious in the sense that there are no possible truths about them—and therefore no conceivable knowledge—as it happens with the domain of ghosts.[111]

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[108] To avoid ambiguity, I will use *inference* (and its cognates) to refer exclusively to inferences from the more basic determining facts. Under this stipulation, a *non-inferential* method encompasses any genuine alternative to inference, including inferences from facts other than the more basic facts, such as mere evidence.

[109] For a development of this problem, see Christopher Peacocke, *Being Known* (Oxford: Clarendon Press, 1999) at 8.

[110] As Timothy Williamson argues, the problem with domains in which vagueness abounds is not metaphysical but epistemological. There *is* a truth about how many grains make a heap of sand, the thing is that we don't know it (e.g., we lack the required cognitive abilities). See *Vagueness* (London: Routledge, 1994) at ch. 7. Cf. Timothy Endicott, *Vagueness in Law* (Oxford: Oxford University Press, 2000) at ch. 6.

[111] This is a bit of a toy example. Perhaps a more serious example would suppose engaging some more controversial scepticism about a domain. Take, for instance, the case of expressivist views about certain domains of discourse, where the sentences in that discourse are not assessable as true or false. Allan Gibbard believes that "to call something rational is to express one's acceptance of norms that

Most of our knowledge of the world comes from nonbasic domains, domains which are constituted by more basic facts. These are the ones that concern us here. The mental, the semantic, and the legal seem to be clear instances. Mental facts obtain in virtue of physical facts about lower-level neuronal firings and synaptic processes in our brain. Semantic facts about meaning obtain in virtue of facts about use. Legal facts obtain in virtue of more basic facts about human behaviour, and potentially also moral facts and facts about collective intentionality. Most domains of reality are nonbasic because reality is composite, and things do not exist separately from their components. Under an Aristotelian worldview, all that there *is* is explainable by virtue of something else, and the order of explanation goes from the more foundational to the less foundational. Everything around us is like this: the fragile disposition of the glass I am now drinking from is contingent upon more foundational facts about complex configurations of atoms in its categorical base, and the liquidity of the water inside the glass is contingent upon more basic facts about the distribution of its H_2O molecules.

However, despite the fact that most of reality is drawn to a hierarchical structure, it is not generally true that our ways of obtaining knowledge of nonbasic domains necessarily supposes consulting its constitutive determinants. In fact, putting aside the case of testimony, much of our access to reality is *direct*. Take, by way of illustration, the case of perception. Perception is fundamentally involved in nonbasic domains, like vision and smell, where we are casually affected by the features of what we perceive. Very roughly, facts about our vision of middle-sized objects constitutively obtain in virtue of more basic facts about how photons stimulate photoreceptor cells in our retina, and facts about our smell obtain in virtue of lower-level facts about molecular stimulations on nerve endings in our nose. Yet,

permit it […] not to state a matter of fact, either truly or falsely" (*Wise Choices, Apt Feelings: A Theory of Normative Judgement* (Cambridge, M.A.: Harvard University Press, 1990) at 7-8.). If Gibbard is right, then the domain of rationality cannot bear relations of reference and thus is also spurious.

in both these cases we have independent access to the target facts.[112] We don't find out that we are smelling a pleasant fragrance by using an olfactometer, or that we are seeing a middle-sized object by scanning our brain. Equally, and perhaps more controversially, we don't grasp the semantic meanings of utterances by balancing and discarding, in Kripkensteinian fashion, the myriad functions arising out of use. And the same holds for facts about mental states. In all these cases we have access to the target facts which is both reliable and entirely independent of the nonbasic metaphysics of the relevant domain.

The reason why most of our knowledge of nonbasic domains is non-inferential owes to the fact that the kind of phenomena studied by the natural and social sciences are embedded in complex causal networks. As a result, there can be endless routes for finding out about them. For example, there are many different causal pathways to learn about celestial bodies. They can be observed directly with the aid of refracting telescopes, or by launching rovers to collect data from their surface. Since these methods can only take us so far, most astronomers gather data about celestial bodies through the use of a combination of indirect measurements and mathematical models. Instruments of remote sensing interpret diverse kinds of signals in space, such as electromagnetic radiation, gravitational waves, cosmic rays, and others. This information is later used as the basis for mathematical inferences that yield more accurate knowledge of the properties of non-visible stars, such as their chemical composition, temperature, density, mass, distance, and luminosity. In the case of human behaviour, methods can vary widely. For instance, some people think that we can find out about people's personality traits by examining their calligraphy. Others believe that we should sit them in divans and ask them about their dreams. Still, others suggest that we should look at their consumption decisions. In all these cases there are many avenues for finding out about the target facts because these facts are nested in intricate webs of cause-and-effect relations.

[112] Notice, however, that in these cases the target fact we directly access is our representation of whatever we are perceiving, not the thing in the external world itself.

Moreover, most of our knowledge of nonbasic domains doesn't suppose consulting the determining facts because human beings are typically endowed with some background abilities that allow them to find non-inferential routes to the target facts. Chessmasters can glance at a certain position on a chessboard and reckon the best move without being aware of the premises of their reasoning. The same happens with pattern recognition in chicken sexing. Perhaps the proverbial "thinking like a lawyer" is yet another example of an ineffable know-how (more on this later). What is interesting about these background abilities is that some people have them, others do not, and their possessors often can't articulate how they work.[113] Of course, things are not always so straightforward in nonbasic domains. There can be complex intermediate cases, such as cases in which we obtain some initial knowledge directly or non-inferentially, but further knowledge requires inferences. An interesting example is depth perception. We are wired in such a way that our brains can tacitly infer three-dimensional spatial relations out of the two-dimensional stimulus provided directly by our retina.[114]

Greenberg's position is that "our *only* access to the content of the law is through legal practices".[115] And it isn't that we can infer the law by consulting *some* of the practices. To have reliable knowledge, we must consult "*complete* sets of law practices".[116] This rather sketchy claim is better presented as combining two theses, one about justification and the other about reliability. In terms of justification, the claim is that only a method for acquiring knowledge that tracks the nonbasic metaphysical structure of the legal domain can be independently justified. The attached claim about reliability, on the other hand, is that the single possible candidate that can thus provide us with reliable knowledge is a method that presents inferences from the determining facts. It follows that in order to *validly* ascertain a

[113] These are "things that we know but cannot tell", as Michael Polanyi said. See 'Tacit Knowing: Its Bearing on Some Problems of Philosophy', *Review of Modern Physics,* 34/4 (1962) at 601.

[114] For a detailed argument about how depth perception engages background abilities, see John Searle, *Seeing Things as They Are* (Oxford: Oxford University Press, 2015) at 139-42.

[115] HFML at 238 (emphasis added).

[116] Ibid., at 232 (emphasis added).

particular legal fact we first need to detect all of its determinants and then reason inferentially in a way that conforms to the mapping given by the applicable function or model.

Notice how Greenberg's case for inferential reasoning in law raises the stakes in two senses.[117] First, it requires that any valid inferences must be based on all and only the more basic facts that ground legal content, and not on a privileged subset of them. To the extent that inferences are based on fewer than all of the determining facts, they will provide limited or unreliable knowledge.[118] Second, all alternative methods for obtaining knowledge about the law must be ruled out since it is not possible to "find out what the law is *directly* or through *some other route*".[119] Notice how strong the thesis is. Unlike most domains, where we can learn about the target facts through different routes, it is only possible to acquire knowledge of legal facts by means of inference from the more basic facts. There is not even room for any matters of degree or intermediate cases. It isn't possible, for instance, that one part of our knowledge of legal facts is based on inferences from determining facts, and another is arrived at by another route, such as direct recognition. Or that we obtain some initial knowledge without inferential reasoning—tacitly, for example—but further knowledge requires inferences. No, *all* our knowledge of legal facts must be inferential, since inference is the only method that tracks the metaphysics, and tracking the metaphysics is the only route for reliable knowledge.

An implication of this view is that we can recast different models or theories of law in terms of tracking. Suppose, by way of illustration, that a Hartian delicacy food supplier for a local restaurant is attempting to determine whether the

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[117] Here I am mostly relying on Greenberg's more recent work on the epistemology of law (unpublished). See 'Nonbasic Epistemology: Must the Epistemology of a Nonbasic Domain Track Its Metaphysics?', *UCLA School of Law, Public Law Research Paper No. 20-33* (2020).

[118] He implicitly relies on this premise when he claims that there can be "indefinitely many possible mappings, from *complete sets of law practices* to legal content (to complete sets of legal propositions)" (HFML at 232, emphasis added).

[119] Ibid., at 238 (emphasis added).

importation of foie gras is prohibited in her jurisdiction. Under a Hartian model, in order to ascertain the content of the law we must consult the convergent practices of judges and other legal officials that determine both the relevant legal materials and the way in which these materials combine to contribute legal facts. If the officials within the local jurisdiction regard the semantic content of statutes as constituting legal norms, the merchant would have to reason inferentially from this shared practice of officials and from the fact that there is a statute with the semantic content that the importation of foie gras is forbidden, to the conclusion that a legal ban on foie gras importation is in place.[120] Suppose now that the merchant changes her jurisprudential outlook having read about Greenberg's moral impact theory. According to the moral impact theory, the content of the law is the impact of institutional action in light of values like justice, democracy, or fairness.[121] Suppose further that in a well-functioning democracy reasons of fairness require giving weight to the communicative intentions of lawmakers. It follows that the convert merchant would now have to infer the content of the law from the relevant intentions (perhaps arriving to the opposite conclusion).

Despite the fact that inference is not the main, let alone the only, method for accessing the target facts of a nonbasic domain, at first sight, the legal domain looks like promising territory for Greenberg's tracking theory. For one thing, all or nearly all competing methods of legal interpretation are inferential. There can be widespread disagreement among theorists about which method is the right one, but all these methods seem to operate by offering inferences from the determining facts. For example, textualists argue that we should work out the content of the law from the literal meanings of enacted texts, while intentionalists emphasize the communicative intentions of lawmakers. The same goes for public meaning theorists, living constitutionalists, minimal content thinkers, purposivists, and the like. Each of

[120] Perhaps Greenberg would reject this example since he believes that the practice theory of rules fails at rationally determining the content of the law. Let us keep the example only as such. See 'Hartian Positivism and Normative Facts: *How Facts Make Law Ii*'.

[121] See 'The Moral Impact Theory of Law', (

them should be understood as taking a stance on the inferential relevance of such determinants as literal meanings, intentions, moral values, legislative history, historical context, "public meaning", and so on.

The problem with appealing to canons of interpretation as evidence of tracking is that these methods are not sufficient validation since the inferences they yield are drawn not from the full grounds of legal content but only from partial subsets of it. In other words, these methods operate not by considering all the determining facts, as Greenberg's tracking theory requires, but by pre-empting those aspects of legal practices that are inconsistent with their favoured criteria. A method that partially tracks the more basic facts would yield limited knowledge, leaving open other non-inferential routes for forming warranted legal beliefs.

A fan of tracking might reply that despite the fact that the different methods of interpretation draw mappings from inconsistent subsets of practices to legal content, there is often consensus in legal communities about the relevant legal facts. Indeed, despite the fact that interpretive wars in law look very much like a stalemate in chess—each "tribe" has little to say that is going to persuade, let alone convince, the other[122]—things are not as intractable as they seem. Interpretive disagreements are often the tip of the iceberg, hiding the great ice mass of consensus below the surface. The consensus is likely the result of some epistemic redundancy in the base layer determining facts. This redundancy explains why the various candidate methods, through different routes, may sometimes yield the same legal facts. For example, concerning a particular enactment, it can be the case that all the relevant factors converge, e.g. communicative intentions, literal meaning, the norm that was intended to be enacted, what a reasonable third person could have understood, the best justification for the enactment à la Dworkin, its moral impact à la Greenberg, what the converging practices of officials indicate à la Hart, and so on.

[122] The label is Dworkin's. See *Justice for Hedgehogs* (Cambridge, M.A.: Belknap Press, 2011) at 127.

We often underestimate the degree of consensus that there can be in the different areas of the law. Indeed, if it wasn't for this consensus, if all legality was constantly hostage to a whirlpool of different opinions, people would simply not be able to plan and predict as they in fact do. The consensus has the virtue of constraining the contingency generated by the infinite number of solutions from practices to norms, thus endowing the law with stability.[123] However, it would be a mistake to assume that just because a method produces more of the facts on which there is consensus, we are therefore entitled to inductively rely on that method in the face of future questions. Equally, it would also be fallacious to suppose that the truth about legal facts must be the conjunction (or finite disjunction) represented by the area of consensus.

A consensus is no independent reality check. Even if a method of legal interpretation happens to be inductively accurate, it would still need to be justified. Reasons of justification cut against appealing directly to a consensus as an independent basis for validating our first-order methods for acquiring knowledge. The main reason is that the folk theory behind the consensus might well be describing as knowledge a set of beliefs arrived at by fluke. Gettier trick cases in epistemology, which concern imaginary counterexamples, are often engaged to test whether our (putatively) justified beliefs about the world could be classified as knowledge.[124] The idea is that a target theory that smuggles in beliefs arrived at by fluke—e.g., Smith glances at a broken clock in a train station whose hands are coincidentally placed in the right time, does he really *know* what time it is?—would require revision.[125] Similarly, in the absence of an independent way of validating our

[123] This point has been nicely argued by Niklas Luhmann, who emphasizes the stabilizing role of canons of legal interpretation in the emergence of the modern nation-state. See *Law as a Social System* (Oxford: Oxford University Press, 2004) at ch. 8.

[124] After Edmund Gettier's widely influential 'Is Justified True Belief Knowledge?', *Analysis,* 23 (1963) at 121-3.

[125] This example of an accidental belief is Bertrand Russell's. See his *Human Knowledge: Its Scope and Limits* (London: George Allen and Unwin Ltd, 1923) at 170-1. Consider also Plato's biased judge who sentences a defendant not on the basis of evidence but prejudice. Assume the defendant was guilty as a matter of fact, did the judge have knowledge? See *The Republic*, trans. R. E. Allen (New Haven: Yale University Press, 2006) at 487a.

methods for obtaining beliefs about the law, consensus has no way of explaining why the relevant beliefs it yields are not merely lucky. Something must validate the consensus itself. Moreover, following one method of interpretation rather than another always involves a choice. It isn't the case that legal interpreters have no option but to rely on a unique method for figuring out the legal facts without having access to its reliability.

Law differs quite sharply from the kind of phenomena that are studied by most special sciences to the extent that its epistemology seems to lack an independently observable standard of validation. For example, in the field of medical diagnosis there are many methods for obtaining knowledge: physical examinations, laboratory tests, imaging, patient history, and so on. Medical professionals often disagree about which one is the most effective. Yet, unlike the legal case, there is also an independent way of knowing which method is correct: the outcome. If a patient's condition improves following treatment based on a certain method, this can be seen as validation of that method. In the law we just can't choose a method and see whether it bumps against reality or yields the right predictions, because we lack such reality check.[126] Without some independent basis for verifying the deliverances of the extant ways of learning about the law, the claim that our knowledge of the legal domain is necessarily inferential consists in nothing more than a hypothesis.

Let us return to the idea that legal reasoners track the more basic facts. At first sight, it looks like the phenomenology of legal practice is not as uniform as the tracking thesis suggests. Lawyers have various kinds of access to legal facts, and when they proceed inferentially, their inferences are in the best case drawn from a few scattered facts, and not even a discreet subset of the determining facts. Lawyers start, on the one hand, with what look like plausible candidates, such as facts about the enactments of statutes and decisions of cases, meaning of words, intentions, *travaux préparatoires*, and so on. Often, they have firm convictions about certain interpretive

[126] Note that the claim that a method is sound insofar as it predicts the decisions of judges would beg the question, because judges themselves need a method to find out about the law.

outcomes in the face of these plausible candidates. They can also have some intuitive beliefs about the content of the law that are almost second nature to them. These beliefs are probably anchored in experience and emerge from familiarity with certain standard systematic ways of regulating the life of a community. Lawyers then make progress by engaging in a process that seeks to test and modify one belief against the other in light of some attractive epistemic values, such as coherence and explanatory power. On the face of it, they arrive at legal knowledge despite knowing only some of the determining facts.

Yet, on other occasions, practitioners and theorists remain irremediably uncertain about which aspects of the practices are relevant and how they combine to determine the content of the law. For example, a timeless *ur*-issue in civil law jurisdictions is how much relevance should be afforded to the practices of judges (absent a doctrine of precedent). The issue is rarely settled by means of a compromise which self-consciously vindicates one of the available mappings from facts to law. In the best of cases, the parties to the controversy reach an agreement by focusing on particular outcomes, rather than fundamental bridge-principles matching facts to law. That is to say, they agree on a result and offer low-level explanations which do not look like an agreement on principle but rather something like a so-called "incompletely theorized agreement".[127]

I don't mean to suggest that Greenberg is wrong when he observes: "When lawyers, judges, and law professors work out what the law is, they give reasons for their conclusions".[128] Indeed, lawyers feel committed to providing reasons that make their conclusions intelligible, but I believe that it doesn't follow from this observation that the reasons in question necessarily track the practices, as his next statement seems to indicate: "if we find that we cannot articulate reasons that justify a provisional judgment about what the law is in light of law practices, we reject the

[127] The concept of incomplete theorized agreement is a term of art in Cass Sunstein's writings. See 'Incompletely Theorized Agreements', *Harvard Law Review,* 108 (1995), 1733-72.

[128] See HFML at 239.

judgment".[129] It seems to me that there is a lot that lawyers do by way of heuristic act, which supposes the employment of methods that are not at all logico-deductive and yet are rational. A heuristic is, roughly speaking, a rule of thumb for solving problems of a given type that is fast, easy, and sufficiently reliable to be useful. It reports a kind of adaptive rationality which can nevertheless be biased. In many cases, lawyers apply them in ways that are quite automatic and not deliberate. Analogies, reliance on exemplars, recognition of similarities between cases, exploitation of regularities, are standard examples. These applications do not always involve a choice between different interpretive outcomes and are often the result of innate learning mechanisms and domain-general principles.[130] It is true that, generally speaking, heuristics can sometimes produce inconsistent case judgments or paradoxes, since they are not immune to the propensities to error that besiege our bounded rationality. For example, we routinely rely on colour contours as a pointer for telling shapes of three-dimensional objects, but all the same we can be prey to a camouflage illusion. As a result, legal heuristics, just like non-legal ones, are defeasible. When misleading illusions crop up often enough and are properly diagnosed, exceptions and qualifications are carved out, and conscious reflection passes the buck to unconscious storing up for later use. By contrast, when agents get things right, they move forward inductively from the fact that a heuristic has yielded correct answers in the past to the conclusion that it will continue to do so in the face of new questions.

I hope that the reader doesn't find anything too surprising in these ruminations. I take it to be almost undeniable that lawyers respond to and provide reasons in ways that do not suppose consulting the practices. The widespread presence of heuristics in practical legal reasoning seems to reveal to us the existence of shortcuts in legal reasoning that are not always reversible by means of inferential steps, and if they are, what would figure in a rational reconstruction would not

[129] Ibid.

[130] On the acquired aspect of heuristics in general, see Timothy Williamson, *Overfitting and Heuristics in Philosophy* (Oxford: Oxford University Press, forthcoming) at 2.

necessarily be identical to what happened in the first place.[131] As usual, these rather bold statements need to be qualified in order to be accurate. In order to find a genuine alternative method to tracking, we must press on the source of the warrant for the original, perhaps largely tacit, beliefs that provide the premises for heuristic reasoning. If alternative, non-inferential explanations for these beliefs are not sound enough, either because they lack reliability, or because they are ultimately parasitic on inference tickets, we would then have to keep our original hypothesis as the best fit for the available data and conclude, in agreement with Greenberg, that the epistemology of law must track its metaphysics. Now, what is the source of these pre-interpretive beliefs about the law?

§3.3.2 PRE-INTERPRETIVE BELIEFS ABOUT THE LAW. Thought experiments can be good intuition pumps, so let us resume by considering the following vignette: I go into a café in London and sit in a chair. The waiter comes, and I order a flat white. He asks me if I have any allergies, to which I respond negatively. The waiter brings the coffee and I drink it. I leave money on the table and make my way out.

This looks like a very innocent scene, but its legal complexity can be truly staggering. Think for a second about the myriad legal facts that I just simply took for granted. The waiter did not own the coffee, the café did. The waiter was under an employment contract. The café was licensed by the local council to sell food. The café had the duty to provide me with allergen information. I used local currency to pay on a listed price. I was entitled to be there in the first place because I am a citizen of Chile and the bearer of a valid passport. The list may continue forever—one need only contemplate the thousand regulations with which the café must meticulously comply in order to operate. For example, in the United Kingdom food businesses must keep an up-to-date record specifying the batch number of every product they purchase. Of course, I didn't have the foggiest idea about that, I just looked it up on

[131] I think that this consideration militates against Greenberg's attempt to cash legal know-how in terms of tracking. See 'Explaining Legal Facts', *UCLA School of Law Research Paper No. 08-19* (2008) at 12-5.

food.gov.uk. But I still had a good grasp of all the fundamental legal facts involved therein. I knew that upon my order the café acquired the obligation to deliver me a cup of coffee, that I acquired a property right over the coffee and the duty to discharge my obligation to pay for it, that the papers I left over the table were legal tender, that I entered the country legally, and so on. What is intriguing, though, is that I was aware of these facts even without any knowledge of the specific legal practices of the United Kingdom. I didn't infer these legal beliefs from the more basic law-making practices, yet it is hard to deny that they were true and justified.

How is this possible? Here is a hypothesis I want to explore. I will state it crudely and then flesh it out in detail in the face of potential objections. Crudely put, we can have reliable knowledge of legal facts without tracking the more basic determinants. In order to adumbrate what it is about the legal domain that makes non-inferential knowledge possible, we first have to source a basic requirement: for a non-inferential method to qualify as a genuine alternative to tracking it must not be parasitic on tracking.[132]. Let me put this point a bit more clearly. The intuition behind the vignette invites a natural riposte: a fan of tracking might object that any sense of direct, non-inferential awareness of legal facts is simply an illusion. What we know in our case is merely the outcome of socialization. We are familiar with such common-sense legal facts as money, property, obligations, and so on, because we have learned about them by listening to others or by looking things up on Google. It isn't the case that we have a nonrational, perhaps hardwired, tendency to have law reactions to events in the world. What is presented as non-inferential knowledge is nothing more than knowledge acquired by deference to others. We grasp the legal implications of people's behaviour with ease because we have benefited from the testimony of other human beings. And the problem is that such testimonial sources amount merely to a *secondary* method for discovering legal facts. The expert or whoever we have relied on has to figure out what the law is by herself without relying on testimony. Hence, whatever intimate knowledge we thought we had was not independent but merely

[132] This point is mentioned by Greenberg himself on his more recent work. See 'Nonbasic Epistemology: Must the Epistemology of a Nonbasic Domain Track Its Metaphysics?', at 12.

parasitic on a primary method of ascertaining the law, and such a primary method infers legal facts from legal practices. The main gloss introduced by this objection, then, is that a genuine alternative to tracking must not present as an independent source of knowledge something that is ultimately validated through tracking, as it happens in the case of testimony.[133]

Let us stop here to recap and then continue. Greenberg's tracking theory, which is a core presupposition of his doctrine of rational determination, claims that *all* legal knowledge is inferential. I have sourced informal reasons suggesting that we can have non-inferential knowledge of the law. But the onus in this discussion requires more. It is not enough to provide examples suggesting a kind of immediate awareness of legal facts. The source of the original warrant for these non-inferential beliefs must be explained non-question-beggingly, that is, in ways that are not parasitic on tracking. Let us now survey some of the explanations that can provided for the independence of the legal beliefs that my examples have attempted to elicit.

A first line of inquiry suggests that most primitive beliefs about the law are inferred from the observable effects of legal facts on people's behaviour. We observe drivers stopping at red lights, yielding to pedestrians at crosswalks, and driving on a specific side of the road. We then take this as evidence for the existence of traffic rules. Similarly, we see people exchanging money for goods in a store and infer the existence of contract law. The customer gives money and expects to receive a product in return. This mutual agreement must be governed by some background rules. We can then generalize our findings through some innate or acquired heuristic. For example, we conclude that similar cases evince tokens of the same type of rule, and then we cast our net wider by exploiting statistical regularities. These inferences do not count as tracking since they are contingent on evidence that is downstream of the legal facts, and not on constitutive evidence.

[133] Greenberg himself makes this point in ibid. Note how the objection presupposes that the expert acquired her knowledge through tracking and not through other non-tracking candidate methods. Thus, I don't believe that this is the best way to frame the objection, but for the time being, it will do.

By and large, inference from behavioural effects is the standard route for finding out about other minds. We have an acquired understanding of the typical causal impact of mental states which makes this process largely tacit.[134] At first, there seems to be nothing amiss in this picture as it resonates with our everyday experience. Most of our behaviour is casually explained by virtue of the self-referentiality of intentional states: the mind represents the propositional content as a condition of satisfaction of that very mental state, thus triggering the intended action.[135] However, this kind of explanation faces a significant hurdle. As I mentioned above, natural phenomena are nested in intricate webs of cause-and-effect relations. Consequently, there are indefinite routes for finding out about them. Normative domains, by contrast, have their causal impact only through one single route: people's beliefs about them. Indeed, the way we classify things in normative domains seems completely gerrymandered from the perspective of causal explanation. Moreover, as Hart was adamant to remind us, causal accounts often bring in a welter of irrelevant detail leaving the important bits out.[136] We can do all sorts of experiments to learn about the physical structure of the piece of celluloid paper that I have in my wallet. But we can only discover that it is *money* if people believe it so. If people stop thinking of pound notes as legal tender and start considering them a numismatic collectable, like Roman denarii, then people's trading behaviour will

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[134] Technically speaking, the inferences here are likely inferences from behavioural effects to functional facts, which in turn determine mental facts. Consider, for instance, Putnam's functionalism and his notion of multiple realizability in 'The Nature of Mental States', *Mind Language and Reality* (2; Cambridge: Cambridge University Press, 1975b). As I suggested in the previous section, my ultimate view is that behavioural reports are not sufficient to account for other minds. They are useful insofar as they reveal the existence of a causal structure supporting mental life, and which can lead us to infer that other people's mental life has the same structures. But no serious inferences can be drawn concerning the content of other people's mental states. For a similar view, see John Searle, 'Animal Minds', *Midwest Studies in Philosophy,* 19 (1994), 206-19.

[135] The self-referential nature of intentions was first discussed by Gilbert Harman in 'Practical Reasoning', *Review of Metaphysics,* 29 (1976), 431-63. Gilbert's notion was later refined by Searle under the label of "intentional causation". See *Intentionality: An Essay in the Philosophy of Mind* (Cambridge: Cambridge University Press, 1983) at 112-40.

[136] Consider, further, Putnam's anti-reductionist argument to the effect that lower-level microphysical descriptions about particles are immaterial to higher-level geometrical explanations about why a solid square peg cannot go through a round hole. See 'Reductionism and the Nature of Psychology', *Cognition,* 2 (1973) at 131-2.

change accordingly. Similarly, if in a given jurisdiction there is an utterly unknown enactment establishing that hovercrafts pay tonnage tax, then, by hypothesis, this would be the law regardless of the fact that nobody would follow it. Equally, if people are mistaken about the law governing an issue, we would expect to see the effects of the mistaken view.

If the effects of legal facts on human behaviour are mediated by people's beliefs about legal facts, then these beliefs do not provide us with a primary method. Something must explain the formation of the beliefs *themselves*. If you are in the next room and someone pokes you with a sharp object and you scream "ouch!", I might infer from your onomatopoeic verbal behaviour that you are in pain, but I can't by the same token infer the cause of your mental state.[137] Similarly, if car drivers yield to pedestrians on crossings I may infer that they do so because they believe that there is a traffic rule in place, but I can't *via* that inference explain how they acquired that belief. Thus, inferences from behavioural effects to legal facts are no genuine alternative to tracking since these inferences are parasitic on an independent way of verifying the mediating mental states.

A second line of argument might attempt to bite the bullet by claiming that the background beliefs in question are formed by perception of the external world. According to this view, we would have a kind of straightforward epistemic access to legal facts. At first sight, this proposal looks wild and strays too far away from common sense. It stands to reason that we cannot enjoy causal relations with legal facts, since their nature is not empirically verifiable. Unlike mountains, celestial bodies, and molecules, legal facts are mind-dependent and exist only insofar as we represent them as existing. By contrast, mountains, celestial bodies, and molecules

[137] Some people would doubt even that this is enough evidence for the mental state. Consider David Chalmers' "philosophical zombie" experiment in *The Conscious Mind: In Search of a Fundamental Theory* (Oxford & New York: Oxford University Press, 1996) at 93-171.

are intrinsic aspects of the world, and they will continue to exist once we have perished; their mode of existence is not relative to the intentionality of observers.[138]

A third possible explanation for our background beliefs about the law supposes the presence of some widely shared assumptions about the moral soundness of the law. To the extent that law must be responsive to morality, the idea would be that it is possible to ascertain legal facts without inference from the more basic facts. For example, we can immediately know that valid law does not require returning fugitive slaves or punishing homosexuality with death penalty. As it happens, this view is no genuine alternative to tracking since it supposes that moral facts are metaphysical determinants of legal facts and infers the latter straightforwardly by appealing to the former.

The view can be revised and modified so that the assumptions in question are not constitutively determined by morality. It can be said, for example, that people just hold reasonable expectations about the human goals that those appointed to draft laws must advance. If there is evidence warranting this generalized assumption about human psychology, then the inference in question would be one whose premises are independent of law's constitutive determinants. The revised view would imply something like this: in every legal system, there are some universal features that we can safely take for granted without consulting any texts or practices. These features typically include fundamental criminal prohibitions, such as prohibitions concerning rape, torture, murder, arson, and kidnapping, or some core economic institutions, such as property and contracts. Yet, upon close examination, it is clear that these assumptions rest on shaky psychological grounds. Not only lawmakers are often far from being morally wise, but even if they were these assumptions surely change, as a matter of psychological fact, from place to place.

[138] For the distinction between intrinsic and observer-relative features of the world, see Searle, *The Social Construction of Reality* at 9-13.

Each of these explanations seems to fail either because they beg the question about the original source of the relevant beliefs, or appeal to facts that explain them only contingently. However, it seems to me that there is a deeper interpretation of this failure. All these explanations presuppose that there is a clear distinction between, on the one hand, legal facts and, on the other, our beliefs about them. The assumption is that legal facts are, as it were, "out there", and our task is to form the right beliefs about them. As I will now suggest, there is a sense in which this view is profoundly wrongheaded.

Law is not a separate substance that exists quite independently from what we collectively think about it. On the contrary, the legal domain is ontologically subjective, in the sense that it exists only as long as there are conscious agents that can think of it as existing.[139] This doesn't mean to suggest that whatever people think about the law is ipso facto *legally* the case, for that would eliminate any possibility of mistakes about what the law governing a particular issue is. The claim is not an epistemic claim about objectivity, but an ontological claim about modes of existence. All social reality is ontologically subjective because all mental phenomena are ontologically subjective. Actions and events in the world, the whirlwind of utterances and physical bodily movements which we associate with legal practices, count as law-making actions given a very complex network of beliefs about the functional status of those events. It follows that legal facts are grounded not only in facts about what past people said, did, or intended; they are also grounded in the collective recognition of such facts as legally significant.[140] Thus, in order to understand how our pre-interpretive beliefs about the law are formed, we must first look more carefully at the conceptual and linguistic features of human thinking that underpin collective intentionality.

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[139] For the distinction between ontologically subjective and ontologically objective domains, see ibid., at 7-9.

[140] On the notion of collective recognition, see John Searle, *Making the Social World* (Oxford: Oxford University Press, 2010) at 56-8.

The previous discussion has proceeded almost exclusively under the assumption that legal facts, and our ways of representing them in thought and language, are totally independent from one another. The background thesis would be that the nature of properties, entities, and relations that figure in a constitutive account of a given domain are always explanatorily prior to the ways we represent elements of that domain in thought and language. This bifurcation goes back to Frege's claim, developed in the *Grundgesetze*, to the effect that sense is individuated by the fundamental condition of something to be its reference.[141] What is constitutive of a domain always constraints the theory of concepts or other ways of representing the range of elements within that domain. Any explanation of what it is for a participant to grasp concepts or to be in mental states with the relevant contents within a domain must make essential mention of the constitutive features of that domain.

In order to see where I am trying to get, let me first explain that the properties of a domain (together with its entities and relations) can be distinguished, for expository purposes, from the concepts in which those properties are given in thought and language.[142] Very roughly, a concept is what is meant or expressed by some word or phrase. The natural-kind concept *dog* is what the word "dog" and its synonyms and translations express. So "dog", "hound", and "chien" stand for the same concept. Concepts are also the constituents of thoughts. Thinking of a dog barking is, among other things, to mentally entertain the concept *dog* and the concept *bark*. Moreover, concepts are senses which can have a reference. References are the entities, properties, and relations in the world that concepts pick out. Senses are the modes of presentation of these references, such as meaning, connotation, and denotation. Necessarily, the concept *dog* is one which picks out all and only dogs. But

[141] See *The Basic Laws of Arithmetic*, ed. M. Rossberg P. Ebert, And C. Wright (Oxford: Oxford University Press, 2013) at §2, §32. For a particularly clear and recent statement of this view, under the label of "metaphysics-first", see Peacocke, *The Primacy of Metaphysics* at ch. 1.

[142] I here follow the standard distinction originally stressed in Hilary Putnam, 'On Properties', *Philosophical Papers Volume I: Mathematics, Matter, and Method* (Cambridge: Cambridge University Press, 1975a).

concepts, as I said, can pick out not only entities but also properties of those entities and relations in which they can stand to other things. For instance, *dog* includes the properties of being a four-legged domesticated animal, having a tail and pointed ears, and presenting some particular traits such as playfulness. Conversely, there are properties that dogs could never entertain, like that of being "too honest" or able to "simulate pain", for dogs are capable only of states with non-conceptual content.

The traditional *summa divisio* between things in the world and ways of picking them out, where the latter are necessarily modelled after a certain metaphysics of the former, looks very natural in domains such as that of numbers and perception of the external world. An explanation of a subject's perceptual states concerning middle-sized objects is *not* an explanation of the subject's holding of a certain conceptual content. Rather, it is an explanation of the subject's causal sensitivity to the properties of material objects. The explaining condition involves the object having the property itself, however picked out, since the same property can be picked out through different concepts (e.g., being squared and being regular-diamond shaped, or being equilateral and being equiangular are different conceptualizations of the same reference).[143] Consequently, in such cases what is constitutive of a domain is explanatorily more fundamental than our ways of thinking about it.

Now, in the case of some mind-dependent entities, whose existence is anchored in particular properties of our language, and where there is an environmental dimension of social practices embedding the concepts that pick them out, things are not so bipolar. In these cases, our concepts are partly involved in the constitutive explanation of things at the level of reference. In these cases, some observer-relative features of the world exist only insofar as they are collectively regarded as existing, and the features in question are a projection of our ways of thinking about them. The legal domain, I submit, is one such domain. The key aspect

[143] See Christopher Peacocke, *A Study of Concepts* (Cambridge, M.A.: MIT Press, 1992) at ch. 2.

of our culture that explains this feature of law is language. We are so familiarized with the operation of language that we seldom stop and consider its constitutive dimension. Not only human languages can represent how things are, as in the case of assertives (e.g., "it's raining"); or represent how we would like them to be, as in the case of directives (e.g., orders and commands), and commissives (e.g., promises and vows).[144] Human languages also possess a distinctive way of relating to reality by virtue of which they can create a reality by representing it as existing.[145] Through the use of language, humans can impose functions on objects and people, where the function in question cannot be performed (solely) by virtue of their physical structure. The performance of the function requires a collective recognition of a certain status in the object or person in question, and only in virtue of that status the function can be performed. The general form of a status function is a constitutive rule whose notation is "X counts as Y in context C".[146]

A ten-pound note, a plot of property, a marriage, a contract, the Prime Minister of the United Kingdom, a police officer, are all examples of people and objects that can perform certain functions only by virtue of a socially recognized status. There is nothing in the physical structure of the celluloid fibres that compose the ten-pound note in my wallet which explains its being *money*. It counts as money only in virtue of the collective recognition of that status, and that collective recognition supposes a specific linguistic mechanism. The point generalizes for all institutional facts. These are all status functions and they are brought into existence by constitutive rules.

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[144] The first kind of speech-acts have a world-to-word direction of fit, because the sentence is supposed to fit the world. In the second and third cases, there is a world-to-word direction of fit, since the world is expected to change to match the world. Here I am relying on John Searle, 'A Taxonomy of Illocutionary Acts', in K. Gunderson (ed.), *Language, Mind and Knowledge* (Minnesota Studies in the Philosophy of Science, VII; Minneapolis, M.N.: University of Minnesota Press, 1975).

[145] The original form of this speech-act was discovered by J. L. Austin, who adopted the vocabulary of "performatives". See *How to Do Things with Words* (Oxford: Clarendon Press, 1962) at 4-11. Later, Searle expanded the scope of performative and incepted the new vocabulary of "declarations". See 'A Taxonomy of Illocutionary Acts', at 358-61.

[146] I am not interested in the logical structure of status functions but only in the declarative aspect of language, nothing beyond that. For the complete statement of this view, see Searle, *The Social Construction of Reality* at 79-126.

The most distinctive feature of status functions is that they create power relations, which are vital to our evolutionary need for cooperation. Indeed, the whole purpose of having status functions is to distribute deontic powers, that is, to carry rights, duties, obligations, authorizations, permissions, and others. The property owner, the Prime Minister, or the holder of a ten-pound note has special powers. Similarly, the taxpayer, the parent, and the party to a contract have particular obligations. Only by virtue of these deontic powers and their recognition, social institutions can perform their status functions. The crucial importance of deonticity for social cooperation concerns the fact that these deontic powers, once socially recognized, provide us with desire-independent reasons for action. The institution and regulation of reasons for acting that are independent of our inclinations and desires is the intimate mechanism that makes our innate capacity to cooperate possible.[147]

This constitutive dimension of language militates against the idea that there is a sharp distinction between the metaphysics of a domain and the nature of the intentional contents justifying beliefs about that domain. Many of our concepts seek to carve nature at its joints. For example, in the case of perceptual demonstratives, such as "that oval shape" or "that musical chord", there must be an object on a particular occasion that is presented in a certain way in perception and that the concept merely individuates.[148] In other cases, concepts enable us to describe aspects of the world which respond to structures that are, essentially, in our minds. For instance, some people believe that our ability to associate particular tokens with types and tell different shades of red as shades of redness, is contingent upon an essentially biological, perhaps hardwired, capacity enabling us to represent the world in terms of tokens being instances of types. Yet, there is another order of cases where things exist,

[147] For an elaboration of this point, see Searle, *Making the Social World* at 124-31.

[148] For further discussion about this approach to sense and concepts, see Gareth Evans, 'Understanding Demonstratives', *Collected Papers* (Oxford: Oxford University Press, 1985).

at least partially, because they are conceptualized as such. Here, language not only represents the elements of a domain but also constitutes them.

The main thrust behind these ruminations is that language is vital for having rights and obligations. You can have a language and not have rights, obligations, property, marriage, Prime Ministers, contracts, and so on. But you cannot have rights, obligations, property, marriage, Prime Ministers, contracts, and not have a language. A chimpanzee can presumably recognize certain immediate sources of danger and communicatively alert others. Deer often break branches to indicate a direction for those who come behind. But both chimpanzees and deer cannot recognize in such a way factitive entities like rights and obligations. This possibility presupposes a specific symbolism with a declarative function. Status functions pervasively imbue our vocabulary and are maintained and reinforced through their continued usage—a usage, as Searle reminds us, that ranges all the way from "enthusiastic endorsement" to "grudging acknowledgement". Their ongoing recognition provides the glue which holds institutional reality together.[149] Much of our institutional life is invisible to us. This invisibility pays homage to the fact that the sea of institutional reality is embedded in our language, and language shapes our intuitive beliefs about legal facts.

These considerations entail an important epistemic conclusion. The conclusion is that when we have a population recognizing a status function it cannot be the case that there are group-wide errors about the content of the function in question.[150] The explanation is circular, but not viciously circular: the very existence of the function is *constituted* by the collective attitudes of those who recognize it as such (and their corresponding behaviour in light of that set of attitudes). I have provided a brief explanation of the linguistic mechanism that makes this recognition possible. Particular members may be wrong about the particulars of the functions

[149] *Making the Social World* at 8.

[150] I am borrowing this expression from Marmor, *Foundations of Institutional Reality* at 58.

that are socially accepted. For instance, they may have disagreements about the nature and extent of the deontic powers there involved. But it cannot be the case that everybody is wrong all the time.

One way to see why this is not possible is to conjure the most obvious example in the vicinity: natural languages. Suppose that for a certain collective of speakers of a random language, the word "gavagai" semantically represents "rabbit".[151] We would then have to say that gavagai is fully grounded in the collective intentions of the speakers of this random language to signify rabbit by this particular utterance. Now, consider a foreign visitor who seeks to learn and master the local tongue as it is collectively spoken. Suppose further that at some point, the visitor hears a native speaker shout "gavagai!" when a rabbit runs past, and wrongly assumes that the expression stands not for rabbit but for "stage in the life of a rabbit". Perhaps this mistake, not being awfully serious and recurrent—since there are not many rabbits around—would persist in the mind of the foreigner for some time until others correct her. Now, the question is what renders her belief mistaken? The answer is evident: her semantic representation of the specific utterance is not aligned with the intentionality of the collective. But the point is that this explanation is not available when applied to the collective itself, since the collective just cannot get it wrong. The reason, once again, is that the condition of common awareness, which is essential for recognizing social functions, precludes this possibility.

The ongoing, almost immemorial, process of applying and recognizing linguistically mediated social functions passes the buck to unconscious storing up. Small children naturally find their bearings in social life. They can visit an ice cream shop and pay with money, understand obligations, respect other people's property, acknowledge immediate sources of legal authority, like a police officer, and so on. Social functions are the rough elements behind our tacit knowledge of fundamental

[151] As it might be suspected, this is my own modified version of Quine's famous example. For the original, see *Word and Object* at ch. 2.

legal facts.[152] This know-how allows us to acknowledge some features of social reality as salient and commit ourselves to a particular description of what is being disclosed.[153] Recall the café vignette. We would never describe the legal facts there involved—money, property, obligation, contract, and so on—in terms of microphysical facts about particles in fields of force. We would regard that as a category mistake. This is largely due to our tacit knowledge, which is not reducible to inferential reasoning. Perhaps, upon reflection we might reconstruct our independent knowledge of legal facts completely inferentially, drawing mappings from practices to legal facts, but that is not what they did in the first place. This is only an ex-post rationalization. In general, cases of tacit knowledge are not reversible by means of inferential steps. And even though they sometimes provide us with inference tickets, these inferences are not drawn from the metaphysically more basic facts.

The conclusion here is not merely that we rely on our beliefs to ascertain what the law is.[154] The claim is that our collective we-beliefs about some fundamental social functions are involved in legal facts. Indeed, legal practices themselves are only intelligible against some background collective beliefs about the institutional significance of those actions. This is so because legal facts do not exist separately from our social concepts. This intimate relation explains our widespread intuitive beliefs about legal facts. Of course, having these beliefs is not the end of the story. The view is not that we simply find ourselves with largely tacit, non-inferential beliefs about fundamental legal facts, beliefs about our abilities to discern them, and other general beliefs about the world. A complete explanation would have to point to the fact that we further engage in reflective processes where we decide to modify our initial set of beliefs in light of some attractive epistemic values. We do this with the intention of reconciling our pre-interpretive beliefs with some attractive interpretive outcomes.

[152] Remember the distinction between fundamental and applied legal facts rehearsed in section §1.2.

[153] Let us remain neutral on the question of whether know-how can be eliminated in favour of know-that (Timothy Williamson) or the other way around (John Searle).

[154] See HFML at 252.

These considerations might suggest that the domain of social facts is constitutive of the domain of legal facts. If this is so, then Greenberg's tracking theory would have survived our scrutiny unscathed: in order to figure out the legal facts we squarely rely on the social facts. But this is not, I believe, the right way to understand the implications of the previous considerations. Social facts and legal facts may well be intimately related to one another, but that doesn't mean that grasping the relevant social facts implies *eo ipso* grasping the legal facts. This conclusion would simply rule out the possibility of any process of testing and revising our abstract beliefs in light of more concrete judgements about interpretive outcomes. The view, rather, is that both domains run parallel to one another and are often correlated in a law-like way, so that we can grasp some fundamental legal facts by grasping social facts. It follows that our methods for finding out about the law do not necessarily track its metaphysics.

§4. CONCLUSION

Raz once protested that we do not often ask "why interpret?". By asking so he placed the onus of providing reasons on those who believe that conclusions about the content of the law suppose the interpretation of a practice. His belief was that legal facts can be grasped without interpretation as a matter of conceptual truth. Interpretation is the exception. Many legal philosophers have taken on the challenge and replied in a principled way. Greenberg's doctrine of rational determination can be read as one such response. According to rational determination, figuring out how legal practices determine the content of the law always supposes a reason-based interpretation of the impact of legal practices on legal facts. Reasons, in his view, are inescapable. Those who believe that understanding comes before interpretation are begging the question against reasons. How are we to decide between the linguistic meanings of a given statute, and the communicative intentions of those who drafted it? He submits that we can't just take this question for granted and proceed without acknowledging that we need standards other than legal practices to decide which of their different aspects are relevant and how they combine to yield legal facts. Since legal interpretation, on his construal, is aided by normative truths, "in the order of explanation", as Nicos Stavropoulos comments, "morality comes first".[155]

In my reading, Greenberg's rational determination stands on two fundamental premises. First, in the legal domain we can only ascertain the content of the law by consulting the legal practices. Second, absent interpretation, the legal domain is modally indeterminate. One premise supports the other. The problem of indeterminacy arises once we try to draw mappings from practices to legal facts. We

[155] 'Legal Interpretivism', at §1.

draw these mappings in the first place because we assume that the only way to intelligibly find out about the legal facts supposes consulting the more basic practices. One of the virtues of Greenberg's doctrine is that it states clearly what would take to refute it: if we can consistently argue that it is possible to find out about the law without consulting legal practices, then it follows that the possibility of having many different functions from practices to legal facts does not make the legal domain indeterminate.

In this work, I have attempted to offer reasons on both counts. Firstly, I advanced an argument by way of reductio which sought to show that the idea of modal indeterminacy strays too far away from common sense. If indeterminacy were true, then certain facts and distinctions known independently to be valid from the first-person perspective would be lost. Secondly, I have argued that we can have knowledge of the legal facts in ways that are independent of their grounds. If our understanding of the law can be reliably non-inferential, then it doesn't follow that we necessarily figure out its content by consulting its constitutive determinants. The final implication is that the legal domain is not modally indeterminate, because the source of its putative indeterminacy has been proven false. Without indeterminacy, all that is left is underdetermination. Since the case for interpretivism lacks a metaphysical foundation, then it should be possible to have a basic understanding of the law without interpretation. In the order of explanation, understanding comes before interpretation.

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