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**Author**

Greenberg, Mark

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# Hartian Positivism and Normative Facts: How Facts Make Law II

Mark Greenberg  
UCLA School of Law and Department of Philosophy

## I. Introduction

In *How Facts Make Law* and other recent papers,<sup>1</sup> I argue that a full constitutive account of the content of the law – of *legal facts* – must appeal to normative facts. The project of *HFML* is to defend this position without assuming that legal facts are themselves normative facts. The argument’s engine is a requirement that a constitutive account of legal facts must meet. According to this *rational-relation requirement*,<sup>2</sup> it is not enough for a constitutive account of legal facts to specify non-legal facts that modally determine the legal facts. The constitutive determinants of legal facts must provide reasons for the obtaining of the legal facts (in a sense of “reason” that I develop). In *HFML*,<sup>3</sup> I argue that non-normative, contingent *facts* – *descriptive facts*, for short – do not provide such reasons without normative facts.<sup>4</sup>

In the present paper, I focus on the rational-relation requirement. I deploy it in three related projects. First, I respond to a family of objections that challenge me to explain why normative facts and descriptive facts together are better placed to provide

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<sup>1</sup> Mark Greenberg, *How Facts Make Law*, <INSERT CITE FOR HFML IN THIS VOLUME HERE 2006> [hereinafter *HFML*]. See also Mark Greenberg, *Reasons Without Values?*, in 2 SOCIAL, POLITICAL, AND LEGAL PHILOSOPHY (Enrique Villanueva ed. in press 2006); Mark Greenberg, *On Practices and the Law*, 12 LEGAL THEORY (in press 2006).

<sup>2</sup> In *HFML*, *id.*, I use the term *rational-relation doctrine*. For elaboration, see *infra* text accompanying notes 12-19.

<sup>3</sup> *HFML*, *supra* note 1.

<sup>4</sup> This paper was written substantially later than *HFML*, and my terminology has shifted slightly. I use the term “normative facts” here in the way that I used “value facts” in *HFML*. Thus, I use the term to include what are sometimes called “evaluative facts” such as facts about what is good or bad. For further explanation of the notion of a normative fact, see *HFML*, *supra* note 1, fn. 22. I explain another minor terminological shift in note 8 *infra* and accompanying text.

reasons for legal facts than descriptive facts alone.<sup>5</sup> A unifying theme of the objections is that explanations have to stop somewhere; descriptive facts, it is suggested, are no worse a stopping place than normative facts. For example, one objection maintains that if we need a reason why descriptive facts have a particular bearing on the legal facts, we need a reason why normative facts do so. Another claims that any account of law will have to rely on some kind of brute fact about law – in particular, one that can serve a bridge principle linking non-legal facts and legal facts. If a Hartian account of legal facts requires a bridge principle linking officials’ dispositions and attitudes to legal facts, a normative account of legal facts will require a bridge principle linking normative facts to legal facts.

Rather than considering such objections in the abstract, I consider an interlocutor who uses the objections to defend a Hartian account of law.<sup>6</sup> I choose a Hartian account because it is the most influential version of legal positivism. The second main project of the paper, accordingly, is to use the rational-relation requirement to show why a Hartian account of law fails.

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<sup>5</sup> I am particularly grateful to Gideon Rosen for his written comments on *HFML* for the Exploring Law’s Empire conference held at Princeton University in September 2004. In this paper, I draw especially on his clear and powerful formulation of the objection. See Gideon Rosen, Comments on Mark Greenberg, *How Facts Make Law* (unpublished manuscript, on file with author) (presented at “Exploring Law’s Empire” Conference, Princeton University, September 2004). Others who have raised versions of the objection include Scott Hershovitz, Tom Nagel, Ram Neta, Ori Simchen, and Enrique Villanueva. I would like to thank Scott Hershovitz, Herb Morris, Ram Neta, Keemin Ngiam, Seana Shiffrin, David Sosa, and Nicos Stavropoulos for comments on a draft. I am indebted to Scott Shapiro for many valuable discussions. I’m especially grateful to Scott Hershovitz for encouraging me to write this paper and for creating this volume.

<sup>6</sup> I say “a Hartian account” rather than “Hart’s account” because I try to address the most powerful and plausible version of a position in the neighborhood of Hart’s, rather than to be faithful to the details of Hart’s own view. I will largely ignore questions of exegesis of Hart.

Third, I spell out a consequence of the rational-relation requirement: if an account of what, at the most basic level,<sup>7</sup> determines legal facts is true in *any* possible legal system, it is true in all possible legal systems. For example, if a Hartian account of legal facts is true in any possible legal system, it is true in all possible legal systems. I use this *all-or-nothing result* in my critique of a Hartian account, but the result is of interest in its own right. For example, a familiar strategy for legal positivists is to argue that because Ronald Dworkin's arguments against legal positivism rely on features of the U.S. and U.K. legal systems, those arguments cannot establish conclusions about all possible legal systems; in particular, they cannot rule out the possibility of a Hartian legal system. My all-or-nothing result makes this positivist strategy unavailable.

It is important that the all-or-nothing result does not depend on the ultimate conclusion that a constitutive account of legal facts must appeal to normative facts, but follows immediately from the rational-relation requirement. (After all, my ultimate conclusion obviously implies that a Hartian legal system is not possible.) The rational-relation requirement is a relatively weak premise, which, I claim, most legal theorists implicitly accept. It therefore may be surprising that it rules out an ecumenical position according to which some possible legal systems are Hartian and some are not.

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<sup>7</sup> The point of the qualification "at the most basic level" is to exclude determinants of the legal facts the relevance of which depends on the contingent facts of the legal system – on, to use a term defined in the text two paragraphs below, *the law practices* of the legal system. As I explain in *HFML*, law practices have an impact on the contribution of law practices to the content of the law. But in order to satisfy the rational-relation requirement, there have to be additional determinants of the legal facts, independent of the law practices. See *HFML*, sections IV-V. These determinants are the ones "at the most basic level." For example, inclusive legal positivists think that normative facts can be constitutive determinants of legal facts because of the dispositions and attitudes of legal officials. According to inclusive legal positivism, therefore, the role of normative facts is not at the most basic level. The ultimate issue in *HFML* and the present paper is whether normative facts must be among the most basic constitutive determinants of the content of the law. See *HFML*, *supra* note 1. I will usually omit the qualification "at the most basic level."

A bit of terminology will be helpful. A *legal fact*<sup>8</sup> is a true legal proposition – a fact about the content of the law. That contracts for the sale of land must be in writing is a legal fact in many legal systems. *Law-determining practices*, or *law practices* for short, are ordinary empirical facts, paradigmatically facts about the sayings and doings of members of constitutional assemblies, legislatures, courts, and administrative agencies, that are determinants of the content of the law. I call the relevant facts “law-determining practices” rather than “legal decisions” because the term “decisions” tends to suggest judicial decisions in particular.<sup>9</sup>

*A model of the contribution of law practices to the content of the law* – or, for short, *a model* – is a (putative) way in which law practices contribute to the content of the law. A model is thus the metaphysical counterpart of a method of interpretation. For example, a Hartian rule of recognition (understood as constitutive of legal facts rather than as a way of identifying legal facts) is a candidate model. The *correct* model (in a given legal system at a given time) is the way in which law practices actually contribute to the content of the law (in the legal system at that time), not merely the way in which

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<sup>8</sup> In *HFML*, I use the uglier term “legal-content fact.” *HFML*, *supra* note 1, at <158>.

<sup>9</sup> For ease of exposition, I use legal-content-laden terms, such as “legislature” and “court” in characterizing law practices. Strictly speaking, however, the law practices should be understood to be the underlying descriptive facts in virtue of which the relevant legal-content facts obtain. Since legal facts are not basic, there must be non-legal facts that constitute the legal-content-laden practices. These more basic facts will include descriptive facts—the facts that I am calling “law practices.” For example, the fact that a legislature enacted a statute must hold in virtue of complex descriptive facts about people’s attitudes and behavior and perhaps also normative facts. (If, in order to account for legal-content-laden practices, we have to appeal not merely to descriptive facts but also to normative facts, so much the worse for the positivist thesis that the content of the law depends only on descriptive facts.) The convenience of talking as if law practices consisted in legal-content-laden facts about the behavior of legislatures, courts, and so on should not obscure the fact that there must be more basic facts in virtue of which the legal facts obtain. For elaboration of the notion of a law practice, *see HFML*, *supra* note 1, section II.C..

they are taken to do so. Note that correctness is therefore *legal* correctness, not, e.g., moral rightness.

In the next section (section II), I lay out the structure of the argument of *HFML*. In section III, I give a brief account of why a Hartian account of legal facts fails to satisfy the rational-relation requirement. In section IV, I show that a Hartian account requires it to be true *in all possible legal systems* that acceptance of a rule of recognition by officials makes that rule the correct model for the legal system. In Section V, I use this result to undermine an appeal to Hartian intuitions. Our reflective understanding of law does not support the Hartian position that acceptance of a rule of recognition by officials makes that rule the correct model for the legal system. Section VI shows that an account that appeals to normative facts does not run into the problems faced by the Hartian account. I conclude in section VII.

## **II. The argument of *How Facts Make Law***

This section sketches the structure of the argument of *HFML*. It will be helpful to present the argument in a slightly different form from that in which it appears in *HFML*.

The position for which I argue in *HFML* can be described as follows: in any legal system that has a certain three features, a full account of what determines<sup>10</sup> the content of the law will make reference to normative facts.

The three features are captured by the following premises:

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<sup>10</sup> I use “determination” (“determines,” “determinants,” etc.) for constitutive, rather than modal, determination. (When I mean modal determination, I will be explicit.) Thus, from the fact that the Y facts supervene on the X facts (or the X facts *fix* the Y facts), it does not follow that the X facts are the only constitutive determinants of the Y facts (or even that they are constitutive determinants of the Y facts at all). For more on constitutive and modal determination, see Mark Greenberg, *A New Map of Theories of Mental Content: Constitutive Accounts and Normative Theories*, 15 *PHILOSOPHICAL ISSUES* 299 (2005).

- (1) Every legal fact is determined in part by law practices.
- (2) There are many legal facts.<sup>11</sup>
- (3) Every legal fact is rationally determined by non-legal facts.

I think that these three premises are true in many contemporary legal systems, including those of the United States and the United Kingdom. Proposition (3) is the crucial one. The notion of rational determination is explained in *HFML*.<sup>12</sup> In brief, a full constitutive account of the legal facts must do more than specify constitutive determinants that modally determine the legal facts; the constitutive determinants must constitute *reasons* why the legal facts obtain. Reasons, in the relevant sense, are considerations that make the explanandum intelligible in rational terms, as opposed to, say, emotional or aesthetic ones.<sup>13</sup> In other words, the relation between the constitutive determinants and the legal facts must be rationally intelligible.<sup>14</sup> This is the rational-relation requirement mentioned in the Introduction.

Because of the rational-relation requirement, rational determination contrasts sharply with constitutive determination in general. For in general, it is an open possibility that the best we can do to explain why certain facts of a target domain obtain is to specify the mapping or function from determining facts to target facts. The

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<sup>11</sup> The point of this premise is to ensure that the conclusion (6) is not merely vacuously true.

<sup>12</sup> *HFML*, *supra* note 1, <163-166>. For elaboration, *see also* Greenberg, *On Practices and the Law*, *supra* note 1.

<sup>13</sup> *See HFML*, *supra* note 1, at xx <pp. 160, 163-166, 170-173 in original>.

<sup>14</sup> *See HFML*, *supra* note 1, at xx <p. 164>. We could dramatize this point by saying that a full constitutive account of legal facts must do more than specify the mapping or function from non-legal facts to legal facts. It has to specify considerations that make it intelligible in rational terms why a particular function is the operative one. But this way of characterizing the rational-relation requirement should not be understood to suggest that there are two fundamentally different kinds of constitutive determinants – first-order determinants that are the arguments of the function and second-order determinants that explain the function from first-order determinants to legal facts. *See infra* text accompanying notes 21-22 and note 57 and accompanying text.

determining facts need not provide reasons for the target facts. In *HFML*, I use aesthetic facts as an example.<sup>15</sup> Arguably, the facts about the arrangement of paint on a canvas need not provide reasons for the aesthetic facts that they determine. A small difference in the arrangement of paint might make a clumsy scene elegant, without providing a reason for the difference. In contrast, it cannot be a brute fact that, say, a particular change in the wording of statute would have a particular impact on the legal facts.

Before completing the summary of the argument's structure, I want to make three clarificatory points about the rational-relation requirement. First, the rational-relation requirement is only a necessary, not a sufficient, condition on the determinants of the legal facts. It is therefore possible that a fact (or sets of facts) could satisfy the rational-relation requirement, but not be a constitutive determinant of the legal facts.

Second, I am sometimes asked whether putative or perceived (normative) facts that turn out not to be facts at all could satisfy the rational-relation requirement.<sup>16</sup> We must, of course, distinguish between beliefs (or facts about beliefs) and the propositions that are believed. The present issue is not whether (false) beliefs about normative matters (or the fact that people have those beliefs) could satisfy the rational-relation requirement. That someone has a certain belief, whatever its content, and whether it is true or false, is an ordinary empirical fact, not a putative normative one. In *HFML*, I consider and reject the idea that beliefs about normative matters can substitute for normative facts in a constitutive account of legal facts.<sup>17</sup>

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<sup>15</sup> See *HFML*, *supra* note 1, at xx <p.160>. See also Greenberg, *On Practices and the Law*, *supra* note 1.

<sup>16</sup> Thanks to Seana Shiffrin for pushing me to address this point.

<sup>17</sup> See *HFML*, *supra* note 1, at <p. 185>.



A putative fact that turns out not to be a fact is merely a false proposition. Consider, for example, the proposition that morality requires that commands issued by members of a particular family have a particular impact on the law. Could this false normative proposition provide a reason of the requisite sort? I am inclined to give a negative answer, but it is not necessary to resolve the question. Only facts can be constitutive determinants of facts. For it is the obtaining of a fact or facts that makes it the case that another fact obtains. In the case of a false proposition, there is nothing to do the metaphysical work. Hence, the important point is that even if a false normative proposition could satisfy the rational-relation requirement, it could not be a determinant of a legal fact.

Before turning to the third clarificatory point, I want to note a consequence of the second one. Positivists cannot retreat to a position that concedes that *what are taken to be* normative facts are needed to satisfy the rational-relation requirement. The imagined positivist strategy would be to maintain that *merely putative* normative facts can provide rational intelligibility, which is consistent with the positivist view that normative facts need not be among the determinants of legal facts. As noted, however, only real facts can be constitutive determinants of anything. Hence, once it is conceded that putative normative facts are needed to satisfy the rational-relation requirement, it follows that (real, not merely putative) normative facts must be among the determinants of the content of the law.

Third, the rational-relation requirement is not a requirement that the legal facts be shown to be good or valuable.<sup>18</sup> I express the requirement by saying that the determining facts must provide reasons for the legal facts, but as noted above, a reason in the relevant

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<sup>18</sup> See *HFML*, *supra* note 1, at xx <pp. 165-166>.

sense is a consideration that accounts for an explanandum in rational terms, not a justification. In general, non-normative considerations can constitute such reasons. For example, the truth of A and of  $(A \rightarrow B)$  make the truth of B rationally intelligible, regardless of the content of B.

The point is important because otherwise positivists could not accept the rational-relation requirement. The strategy of the argument is to use the rational-relation requirement, which I claim most legal theorists implicitly accept, to argue for the controversial conclusion that normative facts must be determinants of legal facts. One can accept the rational-relation requirement, while taking it to be an open question whether non-normative facts could themselves provide reasons for the obtaining of legal facts – and indeed whether normative and non-normative facts together could do so.

In *HFML*, I sketch some reasons for believing that (3) is true,<sup>19</sup> at least in the U.S. and U.K. legal systems and perhaps in all legal systems,<sup>20</sup> though I do not attempt anything like a full defense of that position. I also suggest that most legal theorists implicitly take for granted that (3) is true in the legal systems with which they are concerned.

In fact, I am not especially concerned with the question of whether (3) is true in all possible legal systems. Throughout this paper, I will simply assume that (3) is true in the legal systems with which we are concerned, and I will omit any qualification to that effect. Readers who believe that (3) is true only in some legal systems can understand my arguments as applicable only to those legal systems.

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<sup>19</sup> See *HFML*, *supra* note 1, at xx <pp.170-172>.

<sup>20</sup> To be more precise, all those in which the legal facts are determined by law practices.

In *HFML*,<sup>21</sup> I argue that:

(4) The law practices cannot themselves rationally determine any legal facts.

I will not repeat that argument here. The basic problem with law practices is that there are many possible ways in which they could bear on the legal facts, and they cannot determine their own relevance. For this reason, I sometimes express the rational-relation requirement by saying that there have to be reasons that determine the contribution of law practices to the legal facts. This way of putting things should not mislead us into thinking that the rational-relation requirement is a requirement not only that there be reasons for the legal facts, but that there be reasons that explain why those reasons are reasons. That line of thought could suggest that an explanatory regress lurks.<sup>22</sup> But saying that there have to be reasons for the contribution of law practices to the legal facts is just an intuitive way of summarizing why law practices by themselves do not provide reasons for legal facts. What the rational-relation requirement demands is not higher-order reasons, but determining facts that together provide reasons for the legal facts.

From (3) and (4), it follows that:

(5) Something other than the law practices is among the determinants of the legal facts.

The objections that I want to consider in this paper accept (3), (4), and therefore

(5). But they deny that I can reach the conclusion:

(6) The legal facts are in part determined by normative facts.

So for purposes of this paper, we can assume (1)-(5).

### **III. Hartian dispositions**

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<sup>21</sup> See *HFML*, *supra* note 1, section IV.

<sup>22</sup> I discuss below the idea that if normative facts are needed to explain the relevance of law practices, an infinite regress is generated. See *infra* section VI, especially note 57.

Hart provides the most influential account of how non-normative facts determine legal facts.<sup>23</sup> In this section, I explore how that account fares with respect to the rational-relation requirement.

The existence of a rule of recognition does the main work in Hart's account. Although Hart would not put the point this way, on Hart's account, a model of how law practices contribute to the content of the law is legally correct in virtue of the existence of a rule of recognition specifying that model. Hart's account of what makes it the case that a rule of recognition exists is an application of his "practice theory" of rules.

According to the practice theory, a "social rule" is constituted by certain attitudes and dispositions.<sup>24</sup> We can call these dispositions and attitudes *Hartian dispositions*, and, following Hart's terminology, we can say that people who have such dispositions for a particular rule *accept* that rule.<sup>25</sup> The notion of Hartian dispositions is relative to some rule, so we can talk of Hartian dispositions *for* a given rule, or *acceptance of* a given rule. Given a social rule R, for people to have Hartian dispositions for R is for them to regularly act in accordance with R, to regard R as the standard by which to guide their future conduct, to be disposed to criticize or apply other kinds of social pressure to others who fail to follow R (or threaten to do so), and to regard such criticism as justified.<sup>26</sup>

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<sup>23</sup> H.L.A. HART, *THE CONCEPT OF LAW* (2d ed. 1994).

<sup>24</sup> We can avoid the issue of what proportion of the people in a community need to have the appropriate attitudes and dispositions because my criticisms of the Hartian approach will not depend on that issue. When discussing examples, I therefore assume that all or the great majority of the relevant people – in particular, the officials of a legal system – have the attitudes and dispositions.

<sup>25</sup> Because it avoids grammatical awkwardness, I will often use the "Hartian dispositions" terminology rather than talking of "acceptance" of a rule.

<sup>26</sup> See HART, *supra* note 23, at 55-61, 255. Let us ignore any difficulties about the indeterminacy of the rule for which officials have Hartian dispositions. If there are any such difficulties, they are problems for the Hartian, not for me. For present purposes, I propose to give the Hartian the strongest possible case by simply assuming that people's Hartian dispositions uniquely determine, in the way that Hart suggested, a particular rule.

(For convenience, I will sometimes use the phrase “social rule that one is to  $\Phi$ ,” but I prefer “Hartian dispositions for the rule that one is to  $\Phi$ ” because saying that there is a social rule may lead us to slip into thinking that we have established the existence of something more explanatorily substantial than the specified set of dispositions and attitudes.)

Now the canonical form of a Hartian social rule is that one is to  $\Phi$ , where  $\Phi$ ing is taking certain action under certain circumstances. For example, Hart mentions the social rule that one is to take off one’s hat in church.<sup>27</sup> By contrast, a typical formulation of a rule of recognition specifies what counts as law. Hart gives the example of a rule of recognition that specifies that “what the Queen in Parliament enacts is law.”<sup>28</sup> If we took such formulations of rules of recognition seriously, rules of recognition would not fit into Hart’s practice theory of rules. For that theory has nothing to say about rules that do not specify a course of action.

Hart simply proceeds on the assumption that the Hartian dispositions for a rule of recognition are what they would be if the rule were specified in terms of what standards an official *is to apply* in dealing with matters that come before her in her official capacity, rather than in terms of what *is law*.<sup>29</sup> That assumption is necessary for the practice theory of rules to yield Hart’s account of law. (One way to put the point is to say that the rule of recognition described as “what the Queen in Parliament enacts is law” is more properly stated as “what the Queen in Parliament enacts is to be applied in deciding matters that

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<sup>27</sup> *Id.* at 55-57, 109.

<sup>28</sup> *Id.* at 107.

<sup>29</sup> *Id.* at 100-110. In his account of what constitutes a rule of recognition in a contemporary legal system, Hart attributes a limited role to citizens who are not officials. *Id.* at 60-61. As it does not affect the substance of the argument, I will omit reference to citizens in what follows. Thanks to Scott Shapiro for help in formulating the assumption described in the text.

come before an official.” As long as we are aware of the point, however, there will be no harm in following Hart in informally formulating rules of recognition as specifications of what standards are law.)

For example, consider R1, according to which the plain meaning of whatever Rex pronounces is law (and if what Rex pronounces lacks a plain meaning, it has no effect on the law). On Hart’s account, for R1 to exist is for the officials to decide cases according to the plain meaning of whatever Rex pronounces, to criticize other officials if they fail to decide cases in that way, and so on. In other words, for R1 to exist is, roughly speaking, for the officials to treat R1 as the correct model.

Suppose that the officials of a legal system accept R1. And suppose that Rex has made only one pronouncement on the subject of foie gras, a pronouncement the plain meaning of which is that the production of foie gras is prohibited. A Hartian will now claim that the officials’ acceptance of R1 plus the fact of Rex’s pronouncement make it a legal fact that the production of foie gras is prohibited.

It will be important in what follows that, on Hart’s account, what makes something a legal rule (other than the rule of recognition) is not that people have Hartian dispositions for that rule. In our example, the law prohibits the production of foie gras even if people lack Hartian dispositions for the rule that one is not to produce foie gras. On Hart’s account, what makes a standard law is not that it is accepted, but that it is identified by an accepted rule.<sup>30</sup>

Given (3) (the rational determination premise), the non-legal facts have to make rationally intelligible the obtaining of the legal fact that the law prohibits the production

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<sup>30</sup> See HART, *supra* note 23, at 100-110.

of foie gras. It may be claimed that the officials' Hartian dispositions and Rex's pronouncement together satisfy this requirement. Is this claim correct?

The facts about the officials' Hartian dispositions are part of the law practices – they are just more of the ordinary empirical facts about the attitudes and behavior of various people that determine the content of the law. But by (4), law practices cannot themselves rationally determine the legal facts. As I argue in *HFML*,<sup>31</sup> the problem is that ordinary empirical facts cannot determine their own relevance to the legal facts.

Without repeating the arguments for (4), I will say very briefly why Hartian dispositions in particular seem inadequate to satisfy the rational-relation requirement. Officials have Hartian dispositions for a rule that requires them to apply certain standards. The Hartian needs this fact to explain why the standards are law. The problem is that it is not clear why we should think that Hartian dispositions for a rule have this significance. As a general matter – outside the legal arena – a case has not been made that Hartian dispositions have explanatory potency. For example, Hartian dispositions for a rule do not in general make the rule binding on anyone or provide *any* reason for acting in accordance with the rule.<sup>32</sup> There are practices or organizations in which there are Hartian dispositions for rules requiring people to haze new recruits, to sell children into sexual slavery, and to use violence to extract “protection money” from shops. It does not follow that these rules obtain or are binding on anyone in any non-trivial sense.

The Hartian will likely respond that what is at issue is not whether the rule of recognition is morally or all-things-considered binding or even whether there are any

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<sup>31</sup> *HFML*, *supra* note 1, at 178-185.

<sup>32</sup> For fuller discussion of essentially this point, see Greenberg, *On Practices and the Law*, *supra* note 1.

(non-legal) reasons to act in accordance with it. Rather, the issue is simply whether the rule is *legally* authoritative. According to this line of argument, Hartian dispositions for a rule of recognition make it legally authoritative not because of some general truth about Hartian dispositions, but because of some truth specific to the legal case.

Consider, for example, Joseph Raz's account of "why it is true that parliamentary legislation is binding on the courts:"

The answer is that this is so because of the practice of the courts which follow a rule to that effect and because the rules practised by the courts of a legal system are rules of that system according to the doctrine of identity.<sup>33</sup>

Raz sees that the practice of the courts – their Hartian dispositions – by itself is not an explanation. The "doctrine of identity" – a special truth about how things are with law – is needed to complete the account. In the next two sections, we will turn to the possibility that the Hartian could appeal to a truth specific to the legal case.

It might be thought that there is an alternative to an appeal to a truth specific to the legal case. A Hartian could argue that there is a realm that is broader than and encompasses the legal domain in which acceptance of a rule of recognition has the impact that the Hartian claims it has in the legal domain. One suggestion would be that the relevant realm includes anything that is socially constructed. But this suggestion is a nonstarter. What makes something a celebration, a book, a kitchen, or fashionable is not the acceptance of a rule of recognition.

A somewhat more promising suggestion would be that we should consider rules of practices (including organizations, games, and so on). Notice, first, that the Hartian cannot claim that legal rules are an instance of Hartian social rules. As noted above, by the Hartian's own account, the existence of a social rule S is constituted by Hartian

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<sup>33</sup> JOSEPH RAZ, *THE AUTHORITY OF LAW* 68 (1979).



dispositions for S, *not* by officials having Hartian dispositions for a rule of recognition requiring officials to apply S. The Hartian needs not a domain of Hartian social rules, but a domain in which acceptance of a rule of recognition by officials charged with applying primary standards makes the standards it specifies rules of the practice (regardless of whether there are Hartian dispositions for those standards).<sup>34</sup> Call a domain that has this feature *Hartian*. Many familiar social practices, such as etiquette, are obviously not Hartian since they have no equivalent to legal officials, let alone to the acceptance by officials of a rule of recognition.

There has been no serious attempt to pursue this approach to defending the Hartian account of law. Rather than pursuing it here, I will simply register a few comments about the task facing the Hartian who would take this route. First, there is no obvious reason why an attempt to show that there is a domain of practices that is Hartian would fare any better than an attempt to show directly that law is Hartian. (Indeed, Hart himself does not seem to recognize the possibility of practices outside the legal domain in which acceptance of a rule of recognition makes the standards it specifies rules of the practice.) Second, even if it were shown that there is a Hartian domain, it would require further work to establish both that law is a member of that domain, and that a legal norm is an instance of a rule of a practice.

Finally, it would not be sufficient for the positivist to show that there are *some* practices that are Hartian. As a preliminary matter, note that it is consistent with my argument that there be some such instances. In the legal domain, constitutive determination is rational determination. That is the source of the rational-relation

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<sup>34</sup> Hart maintains that in order for a legal system to exist, it is also necessary that the primary rules specified in the rule of recognition must generally be obeyed. But there need be no Hartian dispositions for those rules. See HART, *supra* note 23, at 116-117.

requirement. But it may be that in the case of some practices, the rules are not rationally determined.<sup>35</sup> In such cases, there will be no requirement that the practices make the rules rationally intelligible. The correct model can be determined arbitrarily, so it can be determined by Hartian dispositions, by normative facts, or in any other way.

The Hartian seeks a non-legal truth that will help to explain the claimed role of Hartian dispositions. If some practices are Hartian and some are not, that may well be because they are members of a domain in which the determination of correctness can be arbitrary. In that case, however, the practices that happen to be Hartian are no evidence of an explanatory truth that could help the Hartian. (This is not to say that the Hartian needs an absolutely general truth. It might be enough if there were an explanatorily significant class of practices – one that forms a social kind – that is Hartian.)

In sum, the approach of identifying a Hartian domain, developing an account of it, and showing that that account can explain the legal case seems more daunting (and less developed) than the more direct approach of appealing to a specifically legal truth. In this paper, at any rate, I focus on the latter approach.

I close this section with a preliminary indication of why an account that appeals to normative facts in addition to law practices is not vulnerable to the problems that we have identified with respect to the Hartian account. We should begin by saying something about the kind of normative facts that are at issue. The relevant normative facts are facts about the bearing of law practices on our legal obligations (or on other aspects of the legal facts). An example might be that fairness supports a statute's contributing its plain meaning to the content of the law. Or that democratic reasons cut against a judicial

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<sup>35</sup> See *HFML*, *supra* note 1, at 161.

decision's being able to create a standard that goes beyond what is necessary for resolution of the dispute before the court.

We noted that Hartian dispositions are just more law practices, and thus subject to the arguments of *HFML* regarding why law practices cannot themselves provide reasons for the legal facts. Unlike Hartian dispositions, normative facts are not part of the law practices.<sup>36</sup> More substantively, the normative facts in question seem to be just the sort of fact that, with law practices, could explain in rational terms the obtaining of particular legal facts. Suppose fairness and democracy favor plain meaning over all other models of the bearing of statutes on the content of the law. On the face of it, that normative fact is the kind of thing that could supplement facts about statutory language to yield an explanation of legal facts. I will have more to say about this point in section V below.

At this stage, we have reason to think that normative facts and law practices together are not in the same position as law practices alone with respect to the rational-relation requirement. It is therefore not open to an objector simply to insist that if law practices cannot satisfy the explanatory demand, neither can normative facts and law practices together. In the next two sections, after developing the Hartian's position, we will take a closer look at strategies a Hartian might pursue to argue that the Hartian account can satisfy the rational-relation requirement.

#### **IV. Hartian bridge principles**

We mentioned in the previous section the possibility that there are fundamental truths about law that enable the Hartian to meet the rational-relation requirement. For the

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<sup>36</sup> See *HFML*, *supra* note 1, at xx<168>.

Hartian positivist, the natural candidate for such a truth is something along the following lines:

(7) For any rule R (that specifies that standards with certain features are law)<sup>37</sup>, officials' Hartian dispositions for R make it the case that a legal system's law practices contribute to the content of the law in accordance with R and only in accordance with R (and if officials do not have Hartian dispositions for any such rule, then there are no legal facts).

Proposition (7) is in effect a bridge principle, one that takes us from ordinary empirical facts – law practices – to legal facts. (7) along with facts about Hartian dispositions and other law practices of a legal system is supposed to make rationally intelligible the legal facts of the system.

Before we examine whether (7) (or some similar bridge principle) can play the role it is introduced to play, we need to become clearer about (7)'s scope. Is it a claim about all possible legal systems or merely about some legal systems?

Let us use the term *Hartian legal system* for a legal system in which Hartian dispositions for a rule of recognition make that rule the correct model for the legal system (and in which that is the only way in which the correct model can be determined). It is tempting for the Hartian to rest on the claim that a Hartian legal system is at least *possible*.<sup>38</sup> I want to raise the stakes by arguing that a bridge principle, such as (7), has to be true in *all* possible legal systems in order for it to be true of any legal system. If I am

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<sup>37</sup> On the proper formulation of rules of recognition, see *supra* text accompanying notes 27-29.

<sup>38</sup> Rosen says: "One need not go all the way with Hart to think that it lies in the very nature of legal systems that *one way* for a legal system to be in place is for Hart's conditions to be satisfied." Rosen, *supra* note 5, at 6. This remark need not be understood to suggest that some legal systems could be Hartian and others not. The remark seems to recognize that it would have to be a general truth about law – "in the very nature of legal systems" – that Hartian dispositions for a rule of recognition can make a model correct. Perhaps the possibility Rosen has in mind is that Hartian dispositions for a rule are sufficient to make that rule the correct model in any possible legal system, but if officials do not have Hartian dispositions for any rule of recognition, there are other ways for a model to be correct. This possibility is consistent with there being a (disjunctive) principle about how legal facts are determined that is true in all possible legal systems.

correct, it is not an option to retreat to the mere possibility of a Hartian legal system – it's all or nothing.

*Hartianism: All or nothing*

Suppose that there are some possible legal systems in which (7) is false. The question at issue in this subsection is whether there can be any legal system in which (7) is true. Suppose, for purposes of *reductio*, that there is such a system, which we can call *H* (for Hartian).

In *H*, the correct model is the rule of recognition for which the officials have Hartian dispositions. Call this model *M*. According to the rational-relation requirement, the determinants of the legal facts have to provide reasons for the legal facts. So the determinants have to provide reasons that explain why *M* is the correct model in *H*. There has to be more to those reasons than the facts about the Hartian dispositions of the legal officials. By our initial assumption, there are legal systems in which Hartian dispositions for a rule do not make that rule the correct model. In other words, there are legal systems in which, even if the officials accepted *M*, it would not be the correct model. Therefore, if the correctness of *M* in *H* is not to be arbitrary, there has to be a reason why the Hartian dispositions are operative in *H*, but not in those other legal systems – i.e., why *H* is Hartian.

If it is not to be a brute fact about *H* that it is Hartian, *H* must have some property *X* in virtue of which it is Hartian.<sup>39</sup> It follows that (7) is not true in *H*. Hartian

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<sup>39</sup> Could it simply be a brute fact *about a particular legal system* (as opposed to about the law or all possible legal systems) that it is Hartian, i.e., that there are no other facts about the legal system in virtue of which the system's being Hartian can be explained? The rational-relation requirement rules out the possibility of a brute fact about a particular legal system. Accepting the

dispositions for a rule R are not sufficient to make it the case that R is the correct model in H. Part of the explanation is that H has property X. The supposition that (7) was true in H, but not in all possible legal systems has led to a contradiction. Hence (7) is true in all possible legal systems or in none.

The foregoing argument does not exclude the possibility that in some legal systems, acceptance of a rule makes it the correct model, while in other legal systems it does not.<sup>40</sup> It is just that there will have to be some property, X, in virtue of which a given legal system falls in the former category. The full constitutive account of the legal facts in legal systems in the former category will not be the Hartian account because it will have to make reference to X. (And if the account is to be a positivist one, X will have to be a non-normative property.)

Moreover, the revised account – the one that makes reference to X – will be true in all possible legal systems. For if it were not, then there could be a legal system with property X, but in which Hartian dispositions for a given rule fail to make that rule the correct model for the legal system. But in that case, X is not the property that makes Hartian dispositions operative, after all.

The point generalizes to any account of what, independent of the law practices, determines the correct model of the contribution of law practices to the content of the

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possibility of such a fact is tantamount to accepting that it can be arbitrary which model is correct. Notice that if it could be a brute fact that a particular legal system was Hartian, two legal systems could be identical in every respect, except that one was Hartian and one was not. Two such legal systems would be empirically indistinguishable; they would not differ even in the participants' dispositions, beliefs, and utterances. Hence the participants in two systems would not be distinguished even by their beliefs about whether their own system was Hartian. It would thus be utterly mysterious what made one system Hartian and not another.

<sup>40</sup> Another possibility is the one described in note 38 *supra* that Hartian dispositions are always sufficient to determine legal facts, but that in the absence of such dispositions, there are other alternatives. The argument in the text applies, with appropriate modifications, to that possibility.

law. A full constitutive account of the legal facts in a particular legal system A must specify some principle P that is independent of the law practices of A and that, with those law practices, explains the legal facts.<sup>41</sup> Suppose there is a legal system B in which P is not true. In B, the legal facts can be different from those of A in a way that is not explained by differences in the law practices. For example, identical law practices would yield different legal facts in A and B. We have a violation of the rational-relation requirement.

Different models can of course be correct in different legal systems. If a principle Q (about the relevance of law practices to the content of the law) is true in A, but not in B, then that principle cannot be the whole story about what, independent of law practices, determines the correct model. In order to satisfy the rational-relation requirement, a constitutive account of the legal facts of A would have to explain why Q is true in A. In other words, we will need a conditional principle whose antecedent includes the condition that the legal system has the critical property that makes Q applicable. The rational-relation requirement ensures that there will be such a property. But the revised principle will be true even in legal systems that do not possess that property. In sum, principles about the relevance of law practices to the content of the law that are not themselves derived from law practices must be true in all possible legal systems.

Returning to the Hartian account, we can conclude that, in order to satisfy the rational-relation requirement, the Hartian needs a bridge principle whose scope is all possible legal systems. Since the Hartian holds that (7) is a complete and correct account of legal facts – that there is no property X – we can hereafter take (7) as our candidate

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<sup>41</sup> See *HFML*, *supra* note 1, section IV.

bridge principle.<sup>42</sup> The Hartian needs (7) to be true in all possible legal systems. To save words, I will hereafter understand “(7)” to make the Hartian claim about all possible legal systems.<sup>43</sup>

*Does the bridge principle enable the Hartian to satisfy the rational-relation requirement?*

If (7) could be taken for granted, the Hartian account would satisfy the rational-relation requirement. But taking (7) for granted would blatantly beg the question in favor of Hartian positivists. A main reason for introducing the rational-relation requirement into the debate was precisely in order to make progress in assessing (7) and related propositions. (Indeed, if the Hartian account does not satisfy the rational-relation requirement, we can conclude that (7) cannot be true.)

According to (3), all legal facts must be rationally determined by *non-legal* facts. Now the Hartian might point out that (7) is not a legal fact in our technical sense – that is, it is not part of the content of the law.<sup>44</sup> Instead it is some kind of basic fact *about* law. Hence, the Hartian might argue that (7) is a non-legal fact, which therefore can be counted among the determinants of the legal facts, and need not itself be rationally intelligible in terms of non-legal determinants. The issue, of course, is not whether (7) escapes the precise formulation that (3) gives to the rational-relation requirement, but whether the reasons for believing in the requirement apply with respect to (7).

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<sup>42</sup> A positivist who thinks that some property X needs to be added to the specification of the correct bridge principle can substitute the appropriate bridge principle for (7) throughout. My arguments will generally not be affected by the details of the bridge principle.

<sup>43</sup> In other words, the revised version of (7) is as follows: In all possible legal systems, for any rule R (that specifies that standards with certain features are law), officials’ Hartian dispositions for R make it the case that a legal system’s law practices contribute to the content of the law in accordance with R and only in accordance with R (and if officials do not have Hartian dispositions for any such rule, then there are no legal facts).

<sup>44</sup> See *supra* text accompanying note 8.



The idea that motivates (3) is that all legal facts must be susceptible of being made intelligible in terms of facts that are not part of the legal domain.<sup>45</sup> According to this idea, law is fundamentally not only a human creation, but one that is constructed in such a way that the existence of particular legal facts must always be fundamentally intelligible to rational creatures who know all the facts except those that are specially legal. But if there are brute truths<sup>46</sup> about how the law practices contribute to the content of the law, the requirement of rational intelligibility will be respected in name only. To put the point another way, to allow a bridge principle (from non-legal facts to legal facts) to count as a “non-legal fact” would trivialize the requirement that the relation between the non-legal facts and the legal facts be rationally intelligible. Hence, in (3), the phrase “non-legal facts” should be understood to exclude facts about how non-legal facts contribute to the content of the law, even if those facts are not legal facts in our technical sense.

We therefore find ourselves back to the question of whether (7) is rationally intelligible in light of the non-legal facts, which is really just the original question, addressed quickly back in section III, of whether Hartian dispositions for a rule of recognition R make it intelligible that the legal facts are determined in accordance with R. Now that we have clarified what the Hartian needs – in particular that what has to be rationally intelligible is that the Hartian bridge principle be true in all possible legal systems – I want to address that question at greater length.

The Hartian is in a difficult position in trying to give reasons why Hartian dispositions for a given rule make it the case that law practices contribute to the content

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<sup>45</sup> See *HFML*, *supra* note 1, at xx-xx <original 163-164, 170-172>. See also Greenberg, *Reasons Without Values?*, *supra* note 1; Greenberg, *On Practices and the Law*, *supra* note 1.

<sup>46</sup> See, e.g., *HFML*, *supra* note 1, at xx <original p. 160>.

of the law in accordance with that rule. In section III, we raised and set aside the possibility of reasons that are not specifically legal. The present question concerns reasons specific to law.

First, the Hartian cannot appeal to features of particular legal systems to explain the relevance of law practices to the content of the law. The Hartian needs to explain a truth about all possible legal systems. Second, empirical induction is not a promising option. As we will see below, whether Hartian dispositions for a rule make it the correct model in a particular legal system is not a straightforward empirical question. Moreover, we will see that the evidence of our own legal system, if anything, cuts against the Hartian. In the next section, I address the possibility that the Hartian could explain (7) by appealing to our reflective understanding of law.

## **V. Can the Hartian explain the bridge principle by appealing to our reflective understanding of law?**

In the absence of non-legal reasons for (7), the Hartian will insist that understanding why (7) is true – i.e., grasping the explanatory relevance of Hartian dispositions – is part of understanding the nature of law, as revealed in our intuitions or convictions about what legal systems are possible. No further explanation is needed or could be given.<sup>47</sup>

The Hartian may add a second point – that any account of legal facts will have to appeal to some such brute fact about law, in particular about the way in which non-legal

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<sup>47</sup> Rosen puts the point this way: “The positivist claim is that someone who fails to see the explanatory force of the sociological facts in this sort of case simply fails to understand *what it is for a law to be the law of a given community*.” Rosen, *supra* note 5, at 6.

determinants of legal facts relate to legal facts. Hence, it cannot be an objection to the Hartian account that it must appeal to a brute fact about law.

As to this second point, I address it in section VI below. I show that it is not true that an account of legal facts that appeals to normative facts as well as to law practices has to appeal to a brute fact about law. Normative facts make such a specifically legal bridge principle unnecessary.

As to the first point, I want to examine at some length the claim that understanding law requires understanding the explanatory force of Hartian dispositions. To defend this claim, the Hartian appeals to our intuitions about the nature of law. In addition to relying on an alleged intuition that (7) is true in all possible legal systems, the Hartian may argue that a Hartian legal system seems to be possible. In this way, the Hartian may try to turn to her advantage my all-or-nothing result – that, at the most basic level, principles concerning how law practices determine legal facts have to be true in all possible legal systems. That all-or-nothing result implies that if a Hartian legal system is possible, all possible legal systems are Hartian.

Given this dialectical situation, I think it is fair to offer a thought experiment that tries to elicit the intuition that there could be a legal system in which (7) is false. I do not put much store in our ability to divine what legal systems are possible through the kind of thought experiment I offer. For one thing, the all-or-nothing result should make us cautious about the reliability of our judgments about what legal systems are possible. That result puts our intuitions that different kinds of legal systems are possible in sharp competition with each other.

Hence I do not advance my thought experiment as an affirmative argument that a non-Hartian legal system is possible (and therefore that all legal systems must be non-Hartian). Rather, the point is to counter the Hartian's attempt to rely on intuitions about what legal systems are possible.

Consider rule of recognition R2:

R2: The plain meaning of whatever the tallest person in the country pronounces is law (and if what the tallest person pronounces lacks a plain meaning, it has no effect on the law).

Imagine a legal system in which at time T1 all legal officials have Hartian dispositions with respect to rule R2. That is, every legal official is disposed to apply the plain meaning of whatever the tallest person in the country pronounces, is disposed to criticize others who fail to do so, takes such criticism to be justified, and so on. Suppose that years go by, and at time T2 a local legal theorist, Themis, proposes that the practices of the officials are, and always have been, mistaken. She points out that the wise king Rex I happened to be both very wise and very tall. And she argues that the practice of treating the tallest person's pronouncements as law is best explained as the result of a confusion about whether Rex I's wisdom or height was the relevant criterion. It seems at least *possible* that Themis is correct that the officials' Hartian dispositions for R2 are mistaken, that it is not legally correct to treat whatever the tallest person pronounces as law.

Whether Themis is correct does not depend on whether the other officials come to agree with her. But, to dramatize the story, we can suppose that they do. At time T3, they come to agree not only about the current situation, but that their Hartian dispositions for R2 were mistaken at T1, and have always been mistaken. Isn't it at least *possible* that

they are correct? That is, couldn't there be a legal system in which the officials' Hartian dispositions for a rule could turn out to be incorrect?

It might be objected that I have chosen an implausible or silly rule of recognition. But this objection misses the mark. In order for (7) to play the explanatory role it is supposed to play, the merits of the rule of recognition cannot matter. If it is a brute truth about legal systems that Hartian dispositions for a rule of recognition makes it the correct model, then the merits of the rule are irrelevant. If, on the contrary, Hartian dispositions for a given rule are effective in making that rule the correct model only when the rule is sufficiently wise or sensible, then a constitutive account of the legal facts that appealed only to (7) and the law practices would be incomplete. A full account would have to make reference to facts about the wisdom or sensibleness of the rule of recognition. Hence, if (7) is to play the explanatory role it is supposed to play – making normative facts unnecessary – the merits of the rule of recognition must be irrelevant. Therefore, in considering whether there could be a legal system in which (7) is not true, it is fair game to consider situations involving silly or bad rules of recognition. Indeed, we need to consider such situations if we are to separate the work that is being done by acceptance of a rule from the work that is being done by the merits of the rule.

Let it not be objected that if the officials come to agree with Themis, they must already have had a disposition inconsistent with Hartian dispositions for R2. This objection is based on a mistake. From the fact that a person can be convinced that doing X is the wrong thing to do, it does not follow that she was not previously disposed to do X. A person's dispositions can change. And, by hypothesis, that is what has happened here. It is part of the description of the original situation that the officials have Hartian

dispositions for R2. The fact that they later decide that their dispositions to follow R2 were mistaken, and consequently come to have new dispositions, is consistent with that description.<sup>48</sup>

We should not get too caught up in the details of an example. The issue is simply whether there could be a legal system in which officials' acceptance of a rule is not the final word on how the content of the law derives from statutes, judicial decisions, and other law practices. In such a legal system, judges and other officials could unambiguously accept a particular rule of recognition, but could nonetheless be mistaken. Remember that I am not using the example to argue that such a legal system is possible, but merely to make the limited point that our intuitions do not rule it out.

Setting thought experiments aside, it is worth noting that support for (7) is not to be found in the evidence of our own legal system. One bit of evidence is that it seems to be coherent for a lawyer to challenge any attitudes and dispositions of officials about the correct model, even ones that are common to all officials and have never been questioned.

Another piece of evidence concerns the way in which our discussions of the relevance of law practices to legal facts actually proceed. When a lawyer, judge, or theorist raises questions about what the correct model is, the ensuing discussions typically make reference to value facts. Advocates of particular positions appeal to normative facts – they give reasons why law practices *should* have one impact rather than

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<sup>48</sup> We can also alter the facts to eliminate any worry of the sort addressed in the last paragraph. We can suppose that none of the legal officials who are convinced by Themis at T3 were legal officials at T1 – all of those who were legal officials at T1 have died or retired. Moreover, those who were legal officials at T1 would not have been convinced by Themis that their acceptance of R2 was mistaken. In other words, the legal officials at T1 accepted R2, and were not disposed to reconsider that acceptance.

another. For example, they claim that their positions are more consonant with democratic values, better protect the rights of minorities, will lead to better states of affairs, are fairer, and so on. Dworkin has made this point very powerfully, and I will not rehearse the evidence here.<sup>49</sup> The relevance of this evidence is as follows. If our legal system were Hartian, then barring a widespread misunderstanding, one would expect that debates over the correct model would be resolved exclusively by appeal to facts about the actual attitudes and dispositions of officials. How law practices *should* affect the legal facts would be irrelevant.

A Hartian cannot respond to this evidence by maintaining that officials in our legal system do not accept a rule of recognition. As (2) states, there are many legal facts in our legal system. According to (7), however, without an accepted rule of recognition, there would be no legal facts.

A Hartian might maintain that the explanation of the relevance of normative facts is that officials in our system accept something like the following rule of recognition: statutes, judicial decisions, and other law practices contribute to the content of the law according to the model that is most supported by the relevant values.<sup>50</sup> In other words, the Hartian could argue that our legal system is not one in which values are ultimately

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<sup>49</sup> See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977); RONALD DWORKIN, *LAW'S EMPIRE* (1986).

<sup>50</sup> Alternatively, the Hartian might argue that the Hartian dispositions of the officials in our system is for the following rule of recognition: statutes, judicial decisions, and other law practices contribute to the content of the law in the way that *the officials believe* is most supported by the relevant values. But notice that the hypothesis in the text is simpler and better accords with what the officials themselves think and do. The officials do not think that the rule is to take law practices to contribute to the law in the way that *the officials believe* is most supported by the relevant values. They think that the rule is to take the law practices to contribute to the law in the way that *is* most supported by the relevant values. For example, officials who know that they are in the minority with respect to some dispute about the correct model do not automatically concede that they are mistaken, as they would if they believed that the rule of recognition was the one described in this footnote. For discussion of a related point, see Greenberg and Litman, *The Meaning of Original Meaning*, 86 GEO. L.J. 569, 608-609 (1998).

doing the work – rather, at the most basic level, dispositions to treat normative facts as relevant is what makes them relevant.<sup>51</sup>

It might be thought that this move by the Hartian leaves us with a stalemate. Against this thought, however, I want to point out an asymmetry between the positions. The positivist position is in tension with what the officials themselves believe. In our legal system, when officials appeal to normative facts, they believe that it is those facts, not other officials' dispositions to be guided by those facts, that ultimately matter.<sup>52</sup> An official who appeals to fairness or democracy does not think that fairness or democracy matters because all or most officials think it does.<sup>53</sup> In contrast, the anti-positivist position is in harmony with what the officials believe. This asymmetry supports the view that our legal system is non-Hartian because, other things being equal, a view that does not have the consequence that the officials are systematically wrong about such a fundamental matter is more plausible than a view that does. Again, the point of this brief discussion is not to argue that our legal system is not Hartian, but merely to refute the claim that (7) is part of our reflective understanding of law, including of our own legal system.

In sum, we have little reason to accept the Hartian's claim that our understanding of law includes an understanding that Hartian dispositions yield legal facts in accordance

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<sup>51</sup> As readers will have noted, we find ourselves in the vicinity of a familiar debate. *See, e.g.*, Jules Coleman, *Negative and Positive Positivism*, in RONALD DWORKIN AND CONTEMPORARY JURISPRUDENCE 28 (Marshall Cohen ed., 1984); Ronald Dworkin, *Reply to Coleman*, in RONALD DWORKIN AND CONTEMPORARY JURISPRUDENCE 252 (Marshall Cohen ed., 1984). The rational-relation requirement provides a new perspective on the debate. From this perspective, the issue is whether the practices of officials or the normative facts to which they appeal are the reasons that, at the most basic level, explain the legally correct model.

<sup>52</sup> I think this claim is very plausible, but it is an empirical one, and my basis for it is admittedly unsystematic. I will simply assume that it is true in what follows.

<sup>53</sup> *See* note 50 above.



with (7). If that is right, the Hartian needs to provide reasons why (7) is true for all legal systems, and to do so without appeal to normative facts. We remarked on the dimensions of this task in section III. We can leave it as a challenge to the Hartian.

## **VI. Is an appeal to normative facts subject to parallel objections?**

I have argued that the Hartian account of the contribution of law practices to legal facts does not fare well with respect to the rational-relation requirement. It remains to address the claim that an account that appeals to normative facts in addition to law practices encounters parallel difficulties.

It might be objected, for example, that in order for an account that appeals to normative facts to be complete, a bridge principle, parallel to the Hartian one, will be required. The idea would be something like the following:

(8) That a legal system's law practices *should* contribute to the law in accordance with a model M makes it the case that they *do* contribute to the law in accordance with M.

(The bridge principle could be refined by specifying how the term "should" is to be understood. For example, only certain values might be relevant.) Such a bridge principle, the objection continues, is no better off than the Hartian bridge principle (7). The normative theorist must either explain a bridge principle like (8) or rely on a brute fact about law.<sup>54</sup>

We have already suggested the core of a response to this objection, however. In section III above, in criticizing the Hartian account, we observed that facts about Hartian dispositions were simply more law practices. We noticed that these facts would not provide reasons of the needed sort without a truth about the special relevance of Hartian

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<sup>54</sup> Rosen makes this objection. Rosen, *supra* note 5, at 6.

dispositions in the legal domain. The Hartian bridge principle is just a way of formulating the Hartian's claim about the relevance of Hartian dispositions.

We also suggested in section III that an account of legal facts that appealed to normative facts does not encounter parallel problems. On the face of it, facts about how law practices should contribute to the content of the law make rationally intelligible how the law practices do contribute to the content of the law. We'll examine this claim further in this section.

To put the point another way, the normative facts in question *are*, or serve the function of, a bridge principle. For they are precisely facts about the relevance of law practices to legal obligations, rights, powers, and so on. Here are a few examples, similar to those mentioned above.

(9) Fairness requires giving some precedential weight even to incorrectly decided previous court decisions.

(10) Democratic values cut against legislative history's having any impact on the content of the law.

(11) All things considered, the relevant values support model M over all other models of the bearing of law practices on the content of the law.

It might be objected that to think that these normative facts could serve as bridge principles, explaining the impact of law practices on the legal facts, is to confuse how things should be with how they are. There is an explanatory gap, the objection claims, between the fact that the law practices *should* have a certain impact on the law and their having that impact on the law.

According to one way of understanding this objection, it makes a logical point. The normative facts, with the law practices, do not logically entail the legal facts. Rational

determination does not require logical entailment, however. The determining facts must both modally entail the legal facts and make the obtaining of the legal facts intelligible in rational terms. Logical entailment may be sufficient for rational intelligibility, but it is not necessary. (The inadequacy of facts about Hartian dispositions was *not* that they do not logically entail legal facts.)

The objection that there is a gap between the normative facts and the correct model should instead be understood as challenging whether normative facts are the right sort of material to combine with law practices to provide reasons for legal facts. For example, it might be claimed that the fact that fairness militates in favor of judicial decisions' contributing to the law in a particular way does not provide a reason that they do contribute to the law in that way.

Because what is at stake in the overall argument is precisely whether the content of the law depends on normative facts, it would be question begging for the objector to assume that there is an explanatory gap between normative facts and the correct model on the ground that the content of the law is independent of normative facts. (Equally, it would be question begging for me to assume that the content of the law depends on normative facts.) The relevant question is not, at this stage, the ultimate one of whether the content of the law is or is not independent of normative facts. (If we had the answer to that question, we would not be engaged in the present discussion.) Rather, it is whether normative facts about the bearing of law practices on legal facts are even the right sort of material to provide, along with law practices, reasons for legal facts. To put it crudely, is the fact that it would be fair or democratic or just for law practices to affect

the content of the law in a certain way the right kind of fact to make it rationally intelligible that law practices do affect the content of the law in that way?

If we were trying to explain the occurrence of physical events, we might question whether normative facts were the right sort of material. For such explananda, causal explanations are needed, and normative facts will not feature ineliminably in such explanations. Although it was long thought otherwise, in the physical domain, how it would be good for objects to behave is no explanation of how they do behave.

This platitude about causal explanation tells us little about rational intelligibility. In fact, the platitude is consistent with the claim that facts about how it would be good for objects to behave make it rationally intelligible that they behave in that way. (In fact, it is tempting to speculate that part of the explanation of why people long took for granted teleological explanations of occurrences in the physical world is that people expected that the physical world would be susceptible to being made intelligible in rational terms.) For rational intelligibility is neither necessary nor sufficient for causal explanation. On the one hand, the best we can do to explain the occurrence of physical events may be to cite laws or correlations that cannot be made intelligible in rational terms. And, on the other, a putative causal explanation that makes a phenomenon intelligible may be false.

In contrast, the kind of explanation at issue here is not explanation of the occurrence of events, but constitutive explanation – explanation of what makes it the case that a fact of some target domain obtains. It is not a confusion to think that what significance base facts should have for target facts could make intelligible the significance that they actually have.

Donald Davidson's radical interpretation theory of mind provides a useful analogy.<sup>55</sup> Davidson holds that it counts in favor of an overall attribution of beliefs and desires to a person that it makes the person believe and desire what he or she should believe and desire. The basis for this position is not an empirical hypothesis that humans are likely to believe and desire what they should, but a constitutive thesis. 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.

Davidson's account is, of course, controversial, but what is typically thought to be problematic is (among other things) the constitutive role Davidson gives to rational intelligibility, not the claim that normative facts are the right sort of thing to provide such intelligibility.<sup>56</sup>

An objector might concede that normative facts can, with law practices, provide reasons for the legal facts, but insist that we still need an explanation of the normative facts themselves. If the Hartian bridge principle needs an explanation, it might be suggested, so do normative facts.<sup>57</sup>

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<sup>55</sup> For citations to Davidson and very brief discussion, see *HFML*, *supra* note 1, at xx <pp. 164 n. 18, 171 n. 25>.

<sup>56</sup> I do not mean to endorse Davidson's account. See *HFML*, *supra* note 1, at <XX> n. 25. Also, it might be objected that Davidson's view in the mental case is not parallel to my view of the determination relation in the legal case. According to this objection, what Davidson holds must be intelligible is the *content* of the subject's mental states, not the relation between determining facts and content facts. On a better understanding of Davidson's view – and on the understanding that is useful for our purposes – the best interpretation of a person makes the person intelligible in light of his or her circumstances and behavior. For example, the attribution of a false belief on a particular issue makes the person more intelligible rather than less if the person's only evidence on the issue is misleading.

<sup>57</sup> Some commentators who have made objections in the general neighborhood of the one described in the text have compared their objections to the point of Lewis Carroll's famous dialogue between Achilles and the Tortoise. See Lewis Carroll, *What the Tortoise Said to Achilles*, 4 *MIND* 278 (April 1895), reprinted in 104 *MIND* 69 (1995). On a straightforward interpretation of this comparison, I would stand accused of mistakenly treating normative facts as premises rather than inference rules. In other words, the objector's claim would be that

The answer to this objection is that the rational-relation requirement applies only to *legal* facts. Specific normative facts about the relevance of law practices to legal facts can be explained as the consequence of applying general normative truths to the circumstances of legal systems.<sup>58</sup> For example, we might explain why fairness requires giving some precedential weight even to incorrectly decided previous court decisions by appealing to more general truths about fairness as well as to non-normative facts about the impact of court decisions on people's lives. Whether or not we can explain general

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normative facts are analogous to inference rules that allow one to move from law practices to legal facts. But this claim, whatever its merits, would be no objection to my position that normative facts must figure in a full constitutive account of legal facts.

The appeal to Lewis Carroll's dialogue is perhaps more of a loose analogy than a direct application. The idea seems to be that if I make an explanatory demand of the sort that makes it necessary to appeal normative facts, I open up an infinite regress. But this idea is mistaken.

In the text, I argue that normative facts and law practices together, unlike law practices alone, provide the requisite reasons for the legal facts. The type of objection that I want to consider here grants this claim, but maintains that the appeal to normative facts generates a further, higher-order explanatory demand. (And the satisfier of that further demand will generate a still higher-order explanatory demand, and so on.)

There seem to be two ways to develop the infinite-regress objection. According to the first, if a constitutive account of legal facts appeals to normative facts, it will then have to explain the obtaining of the normative facts. This is the objection that I address in the text.

According to the second version of the objection, if a constitutive account of legal facts appeals to normative facts, it will then have to explain the relevance of those normative facts to the legal facts. As noted above, I sometimes express the intuitive inadequacy of law practices as reasons for legal facts by writing that we need facts that explain the relevance of law practices to legal facts. *See supra* note 14 and text accompanying note 22. Similarly, I sometimes write that we need reasons for the mapping from law practices to the content of the law. In using these formulations, I may have misled readers into thinking that the rational-relation requirement is a requirement not only of reasons for the legal facts, but also of reasons for those reasons. The requirement is only that the constitutive determinants of the legal facts together provide reasons for the legal facts.

A constitutive account appeals to normative facts not to satisfy a second-order explanatory requirement, but simply to meet the first-order explanatory requirement that law practices do not meet themselves. It is tempting to express what is missing from an account that appeals only to law practices by saying that we need facts that explain the relevance of the law practices to the content of the law. But, once again, this is simply a way of expressing the requirement that something must supplement the law practices if the constitutive determinants are to provide reasons for the legal facts. If the law practices and the normative facts together provide the requisite reasons for the legal facts, the rational-relation requirement is satisfied.

<sup>58</sup> For a sketch of this picture of normative facts, see Greenberg, *On Practices and the Law*, *supra* note 1, section IV.

normative truths – ones not specifically concerned with legal systems – is not relevant for present purposes. Again, the rational-relation requirement is that legal facts be rationally intelligible in light of non-legal facts. There is no such requirement with respect to non-legal facts.

Hence, an objector who insists that explanations have to stop somewhere may well be correct. But the important point for present purposes is that explanations do not have to stop with legal facts, or facts about how legal facts are determined. And given the rational-relation requirement, they cannot do so.

Finally, an objector might appeal to a thought experiment, parallel to my thought experiment about the legal system with the height-based rule of recognition, to argue that we have little reason to believe that normative facts have a bearing on the correct model in all possible legal systems. Just as I suggested that we can conceive of a non-Hartian legal system, the objector suggests that we can conceive of a legal system in which normative facts are not relevant to the correct model.

This objection gets the dialectical situation wrong. I appealed to the seeming possibility of a non-Hartian legal system only to answer the Hartian's appeal to intuition in support of a brute truth about law. The normative account of legal content does not rely on a brute truth about law, and thus does not need to appeal to intuitions about what law is. It has been independently defended on the ground that normative facts are the best candidate for what is needed in addition to law practices to satisfy the rational-relation requirement. As pointed out above, we should be skeptical of the reliability of thought experiments about what sorts of legal systems are possible, especially in light of

my all-or-nothing result. I have used the rational-relation requirement to argue against a Hartian account. In the face of this argument, thought experiments get no traction.

## **VII. Conclusion**

In this paper, I have argued that normative facts and law practices together are better placed to satisfy the rational-relation requirement than law practices alone, including facts about officials' Hartian dispositions. Normative facts about the relevance of law practices to legal facts provide reasons why law practices have a particular impact on the law, and facts about Hartian dispositions do not. That law practices should have a particular impact on the content of the law makes rationally intelligible that law practices do have that impact. For instance, that it is fair for judicial decisions to have a certain precedential force is a reason why those decisions in fact have that force. The mere fact that officials are disposed to give decisions a certain precedential force does not by itself constitute such a reason.

Adding a purported truth about law, or bridge principle, to the effect that certain attitudes and dispositions of officials have a certain bearing on which model is legally correct does not help. If the officials' attitudes and dispositions do not provide reasons for the legal facts, the bridge principle is itself just a brute fact about law.

By contrast, normative facts avoid the need to appeal to brute facts about law. With law practices, they provide reasons for the legal facts. That it is fair or democratic for statutes or judicial decisions to have a particular impact on the law, combined with facts about the particular statutes and judicial decisions of a legal system, can explain the legal facts. We can sum up in an intuitive way by saying that normative facts explain the



relevance of the law practices to the legal facts. But there is no further requirement to explain why the normative facts explain the relevance of the law practices to the content of the law. Strictly speaking, the rational-relation requirement demands only that the constitutive determinants provide reasons for the legal facts.

Along the way, I argued that the rational-relation requirement yields the relatively immediate result that, at the most basic level, legal systems cannot vary with respect to what determines the relevance of law practices to the content of the law. The most basic principles about the relevance of law practices to legal facts – the ones that do not depend on law practices – must be true in all possible legal systems. One can accept this result even if one rejects other parts of my argument for the conclusion that normative facts must figure in a constitutive account of legal facts.

The result has a variety of implications. It implies, for example, that our convictions about what kinds of legal systems are possible cannot all be correct. It therefore should make us dubious about the reliability of such convictions. I mentioned that the result undermines the familiar claim that because Dworkin's arguments depend on properties of the U.S. and U.K. legal systems, those arguments cannot show that Hartian legal systems are not possible. Of course, the result is a double-edged sword. For example, an argument for the proposition that one legal system is Hartian supports the conclusion that all possible legal systems are Hartian.