

How much a theory of law can tell us about the nature of morality: a response to Mark Greenberg's *How facts make law*

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1. Introduction

Although every theory of the nature of law acknowledges that the content of the law is determined by contingent social facts regarding the practices of persons who function as officials in a legal system, legal positivism is distinguished from other theories in that it holds that, ultimately, these social practices are, at bottom, the *sole* determinants of legal content. The content of the law, on this view, is determined by the legislative and adjudicative activities of officials who have adopted and follow (or “practice”) a rule of recognition to govern these activities. The rule of recognition is the basic legal norm that determines whether any other norm has the status of law (and thereby defines the criteria of legality, which is not, strictly speaking, a norm¹) and itself has the status of law in virtue of the contingent social fact that it is something like a convention practiced by the officials in a system where citizens generally conform their behavior to the norms that count as law under this rule.

Positivists, of course, are divided on the issue of whether morality can play a role in determining legal content. Inclusive positivists, like Jules Coleman, argue that moral norms can play a role in determining the content of the law; if officials practice a conventional rule of recognition that

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¹ See, e.g., HIMMA (2005).

incorporates moral principles as criteria of legality, those principles play a role in determining the content of the law. Exclusive positivists, like Joseph Raz and Scott Shapiro, deny moral principles can be incorporated into a rule of recognition and hence deny they can play a role in determining the content of the law; on this view, law *cannot* be authoritative or make a practical difference in the behavior of subjects on the inclusive positivist's assumption that the rule of recognition can incorporate legal principles; and it is a conceptual truth that law is authoritative and/or can make such a practical difference.

In any event, inclusive and exclusive positivists agree that (1) the content of the rule of recognition is determined entirely by social facts; (2) the content of the rule of recognition, together with social facts about the practices of officials, fully determine the content of all other law; and (3) moral norms – or moral facts (i.e., true propositions expressing the content of those norms) – play no necessary role in determining the content of the law. If moral facts play a role (or could play a role) in determining legal content, it would be because there is a social practice assigning them that role. The ultimate determinant of legal content would thus remain social facts about the practices of officials.

In contrast, anti-positivists deny the view that social facts are the only necessary determinants of legal content. Classical natural law theorists, like Aquinas, and neo-classical natural law theorists, like John Finnis, hold that what counts as legal content is necessarily constrained by norms of morality; according to classical natural law theorists, unjust norms *cannot* count as law. Similarly, Ronald Dworkin argues that the moral principles showing the existing institutional history (e.g., including social practices that provide the basic furniture of the law, like courts and legislatures) in the best moral light also play a necessary role in determining the content of the law. Although Dworkin sidesteps the issue of whether his theory makes any conceptual necessary claims, it must do so if construed as opposed to legal positivism.

In his outstanding paper “How Facts Make Law,” Mark Greenberg sides with anti-positivism and with Dworkin's version in particular. He argues that descriptive facts about certain social practices are not the only necessary determinants of legal content. In addition, he argues that “value facts” – which he is committed to construing as moral facts – are another *necessary* determinant of legal content. As he describes his position:

Given the nature of the relevant kind of determination, law practices – understood as descriptive facts about what people have said and done – *cannot* themselves determine the content of the law. Value facts are needed to determine the legal relevance of different aspects of law practices. I therefore defend an antipositivist position (HFML 160; emphasis added).

Here it is utterly essential to emphasize that, in siding with Dworkin as an antipositivist, Greenberg logically commits himself to the idea that *moral facts* “are needed to determine the legal relevance of different aspects of law.” It is obvious that value facts of some kind will be needed to determine legal content: if, for example, judges had no values whatsoever, they would not be able to choose one interpretation of the law as *better* than another. Values will play a role, on anyone’s theory, in contributing to the decisions legislatures and courts make about legal content. Moreover, insofar as law is at least sometimes normative, there will have to be values that are the foundation for its normativity. But a positivist can hold this view because the values might be prudential, rather than moral, and because it is ultimately the social process of promulgation and interpretation that determines legal content – even if human beings must make some sort of value judgment to determine which content is better.

Further, it is important to notice that this commonplace would not be metaphysically necessary; it might not even be a general psychological truth of all human beings. One can surely imagine a possible legal system in which a court or legislature makes a decision on the basis of a coin-flip – a process that doesn’t obviously reflect the expression of or commitment to a value. Greenberg’s claim is one of metaphysical necessity: it is metaphysically necessary that value facts partly determine legal content.

Although Greenberg’s substantive view of law resembles Dworkin’s, his argument is utterly novel and noteworthy for its rare combination of creativity and depth. Unlike Dworkin, who defends his view on the basis of a morally informed conception of what role law ought to play in a society, Greenberg defends his view “on the basis of very general philosophical considerations unlike those on which Dworkin himself relies” (HFML 160) that are metaphysical in character and do not involve normative or meta-ethical claims. Indeed, Greenberg takes his argument to show, more generally, that descriptive facts about social practices cannot, by themselves, *rationally* determine the content any social rule; value facts play a necessary role in *rationally* determining the content of *any* set of social rules.

So it is important than to get clear on the outset on exactly what Greenberg is claiming here. He is not claiming that it is impossible for social practices to determine the content of the social norms; rather he is claiming that it is impossible for social practices to fully and *rationally* determine the content of social norms – and these are two very different claims. As Greenberg understands it, the notion of rational determination is a term of art that connotes defining a rationally intelligible relationship between the content of the social practices and the content of the social rules determined by these practices. The relationship is *intelligible* in the sense that we can make sense of the connection between the content of the practices and how they shape the process of the rules because this connection is one of rational determination, rather than, say, some sort of arbitrary position. As we will see, this point will become important below when I claim to identify some of the implications of Greenberg's position. Indeed, in correspondence with me, Greenberg indicates that the set of social practices that rationally determine the content of social norms is quite small in comparison to the total number of sets of social norms – this is, in part, what makes law theoretically interesting.

In this response, I will focus primarily on Greenberg's conclusion and the general structure of his deep and nuanced argument, and not on the details of the argument. In particular, I will argue that, construed as doing the work Greenberg believes it does in refuting positivism, his conclusion that legal content is not possible without value facts has certain implications about the nature of morality that no purely metaphysical considerations about the relationship between social practices and the content of social norms can plausibly have. In particular, Greenberg's conclusion, together with the obvious (because extremely weak) truth that law is *possible*, seems to imply moral objectivism – a highly contested view in general ethical theorizing. Indeed, if Greenberg is correct, his view together with the obvious *possibility* of other kinds of social rules (like rules of *language*), seems to imply the truth of moral objectivism. I take this to be a *reductio* of his view, as it seems clear that no theory relying on general metaphysical claims about social practices can bear such weight. Since I will frame the structure of Greenberg's argument so that it is transparently logically valid, then the reader will have to reject one of the premises of his argument if the conclusion logically implies something that the reader believes is false.

Of course, no pretense is made here that my argument is a decisive or fatal blow against Greenberg. Someone who is maximally committed to the truth of the premises might very well be willing to bite the bullet and accept the logical implications of the conclusion even if they seem implausible to other people. But that is true of any other counterargument in philosophy, including counterarguments that challenge premises in the argument under evaluation. Indeed, counterarguments targeting an argument's premises frequently attempt to give a *reductio* against the premise – and it is always possible for someone to bite the bullet and accept the implication is thought to constitute the *reductio* of the argument. Since this is always an option for anyone who makes an argument being criticized, it should not be considered a weakness in this argument. Conclusive criticisms of philosophical arguments by first-rate thinkers like Greenberg are rarely possible – and I have no illusions here about the persuasiveness of mine.

2. A sketch of the argument

A. Premise 1: Every conceptually possible legal system has determinate legal content

Greenberg bases his analysis for his conclusion that law practices cannot be the sole determinant of legal content on two claims he takes to be “uncontroversial.” The first, as he expresses it, is:

(D): In the legal system under consideration, there is a substantial body of determinate legal content.

In other words, in the legal system under consideration, there are many true legal propositions, which express legal standards or legal requirements.

A couple of brief observations are in order about this premise. First, the claim is neither epistemological nor empirical; it is metaphysical – a claim about the nature of law. The claim is not that we know how to identify such content, but merely that there is a fact of the matter as to what the law requires with respect to the issue, although he does not specify whether this fact of the matter is mind-independent and hence objective or whether it is conventional and hence dependent on the beliefs and practices of social groups. Moreover, he is not making just an empirical claim

about this system, being one system under consideration because he has not specified that (D) applies to just the US legal system. He clearly has in mind something stronger.

Second, and this is the stronger claim, although Greenberg takes himself to be avoiding any conceptual claims about the nature of law¹, this is surely a true conceptual claim about any possible legal system. Any conceptually possible legal system must contain something that counts as law; if what is represented as “law” is indeterminate with respect to every conceivable legal issue, then there is nothing in that system that could count as law. It is a conceptual truth that law, on all counts, has some kind of normative dimension, but a system in which there is no determinate legal content contains nothing that could have the distinctive normative force of law – whatever that turns out to be – and hence could not, as a conceptual matter, be a system of *law*.

This, of course, is no criticism of Greenberg. On the contrary, it is necessary for his argument to do the antipositivist work he takes it to do and is hence a merit. Positivists make conceptual claims about the nature of law that purport to state necessary conditions for the existence of laws and legal systems. If Greenberg's analysis did not assert or imply some sort of conceptual claim about law, it simply could not engage the positivist in the manner he takes himself to be doing so. As we have seen, he takes his argument to be a refutation of the positivist's conceptual claim that the sole determinants of legal content are descriptive facts about the law practices of officials; and nothing but a conceptual claim can refute another conceptual claim.

Not only, then, will all parties concede (D), as Greenberg has stated it, they will concede the stronger conceptual claim:

(D*) In any conceptually possible legal system, there is determinate legal content.

Indeed, since law is not possible without determinate legal content, it is a conceptual (and therefore conceptually necessary) truth that every system of law contains some determinate legal content. Although Greenberg does not make this stronger claim, I think that (D*) is uncontroversial among positivists and antipositivists and that Greenberg would accept this stronger claim.

1. He says, for example, “I do not address questions of the necessary conditions for something's counting as a legal system [or system of law]”. GREENBERG, 2007 (HFML 173).

B. Premise 2: Legal Content and Legal Practice

The second claim on which Greenberg relies is that the content of the law is constituted in part by descriptive facts about legal practices. As he states the premise:

(L) The law-determining practices in part determine the content of the law.

The idea here is the very natural one that the social practices defining the appropriate legislative and judicial activities partly determine the content of the law. As Greenberg notes, (L) excludes, for example, the extreme position that the content of the law is entirely determined by morality. The fact that this is position that no one seems to hold, I think, speaks to the *prima facie* plausibility of (L). Law is, in part, the outcome of social activity – a claim that, on the face of it, everyone would seem to accept.

As was true of Greenberg's first premise, claim (L) is metaphysical, rather than epistemic, in character. This crucial claim has two elements. The first is that legal practices contribute to determining the content of the law by *constituting* particular content as being part of the law; this is a metaphysical claim that, by itself, implies nothing about how judges or citizens should go about identifying the law – though it is quite natural to suppose that, as an epistemic matter, one should look to the practices in attempting to identify legal content. The second is that the relation between the legal practices, which help to determine legal content, and the content these practices determine is both rational and intelligible to us. It is important to note that this does not imply anything about how we identify legal content, because it asserts only that the *connection* between the determinants of legal content and that content is intelligible; it says nothing about legal content itself; this general connection might be very clear while the content of particular legal norms might not be.

Although (L) may seem uncontroversial, as stated in the part of the argument, Greenberg intends a stronger claim than the one everyone would accept without argument. His claim is *not* the obvious one that legal practices determine, *at least in part*, legal content, which would be accepted by everyone from positivists to the very first natural law theorists, like

Aquinas, who recognized that human beings have something to do with the content of “human law.” His claim is the much stronger one that legal practices determine *only* partly legal content – which implies that legal practices do not wholly determine legal content. Indeed, Greenberg fleshes out what he means by (L) in the following passage:

Why have I made the qualification that law practices *partially* determine the content of the law? Law practices must determine the content of the law. But, my argument continues, there are many possible ways in which practices could determine the content of the law.... Something other than law practices – X, for short – must help to determine how practices contribute to the content of the law.... So a full account of the metaphysics of legal content involves X as well as law practices (166).

As Greenberg intends (L) as he states it here, it excludes the possibility that the only determinants of legal content are law practices.

This, of course, is not uncontroversial. In fact, it amounts to a direct denial of legal positivism’s distinguishing thesis that the content of the law is ultimately determined – and fully so – by the social practices of persons who function as officials in the legal system in their capacities as officials. As Greenberg himself describes the positivist’s view, “the content of the law depends only on *social facts*, understood as a proper subset of descriptive facts” (157). Indeed, it might appear at this early stage in his argument, (L) seems to beg the question against legal positivism.

The appearance is misleading. Greenberg indicates in the passage above, albeit not quite as clearly as is desirable, that he will go on to provide an argument for the stronger claim expressed by (L). As he puts it, “but, *my argument continues*, there are many possible ways in which practices could determine the content of the law” (166). So while, strictly speaking, Greenberg is wrong in asserting that (L) as stated is likely to be regarded as uncontroversial, it is simply a mistake to think that he has overlooked the need to give an argument for the stronger claim – though, to be sure, Greenberg’s language here invites the charge, incorrect though it is, by characterizing (L) as largely “uncontroversial.”

In any event, this turns out to be merely a harmless mistake in wording. Greenberg ultimately goes on to buttress this construction of (L) with a defense that clearly avoids begging any questions against positivism.

The most directly relevant part of the argument, as far as positivism is concerned, attempts to show that this something else, X, cannot be law practices themselves. X must involve, on Greenberg's view, reference to standards that are independent of law: "without standards of independent of practices, practices cannot themselves adjudicate between ways in which practices could contribute to the content of the law" (178). These standards, of course, will describe true normative or evaluative propositions – or "value facts," as Greenberg calls them². It is clear after wading through the paper that (L), as Greenberg intends it, is the conclusion of an outstandingly dense and insightful argument – and is not vulnerable in the least to the charge that he has begged the question as initially might have appeared to a less than careful reader.

C. The Conclusion: The Possibility of Law Depends on Non-Legal Value Facts

As I am ultimately concerned with the implications of Greenberg's conclusion, I will focus on the details of his conclusion and refrain from further discussion about his defense of (L), which is the primary focus of his powerful argument. If I am correct that the conclusion has logical implications that an argument of the general sort he gives cannot have, then something must go wrong somewhere in that argument. I make no extended attempt in this paper, however, to attempt to identify exactly where this might occur.

Greenberg's conclusion has two elements. As Greenberg states one element, "law practices – understood as descriptive facts about what people have said and done – *cannot* [by] themselves determine the content of the law" (160; emphasis added). As Greenberg states the other, "[v]alue facts are *needed* to determine the legal relevance of different aspects of law practices" (160; emphasis added). As the relevance of the different aspects of law practices, of course, contributes to determining the content of the law, it is fair to restate this part of Greenberg's conclusion as follows: value facts are *needed* to determine the content of the law.

Both these claims, as Greenberg intends them, are metaphysical claims that purport to be necessary truths. If law practices "cannot" be the sole determinants of legal content, there is no metaphysically possible world

2 See GREENBERG, 2007, (p. 166, note 22).

in which law practices are the sole determinants of legal content. If value facts are “needed” to determine the content of the law, there is no metaphysically possible world in which there is determinate legal content but this content is not determined in part by independent value facts.

This clearly implies another metaphysical claim purporting to be necessarily true: there is no possible world in which there is determinate legal content but no independent value facts. In other words, to reverse Greenberg’s metaphorical formulation of positivism,³ there could not be law if God destroyed all independent value facts – a characterization he himself endorses: “if God destroyed the value facts, the law would have no content” (159). Since it seems clear, as a conceptual matter, that there is no possible world in which there is law but no determinate legal content, Greenberg’s conclusion is fairly represented as follows:

(GC) Law is not possible if there no are independent value facts.

In the next section, I argue that (GC), together with the obvious fact that law is possible, implies something that no purely metaphysical considerations having *solely* to do with the character of legal or social practices can plausibly imply.

3. The implications of (GC)

A. An Initial Positivist Response: A Concession

One might be tempted to think a positivist need not reject Greenberg’s conclusion. Most, but not all, positivists believe it is a conceptual truth that law is normative⁴ in some sense (that is quite difficult to explain theoretic-

3 Greenberg describes the positivist’s distinguishing thesis as follows: “To put things metaphorically, hard positivism and soft positivism hold there could still be law if God destroyed all value facts” (158). Since Greenberg takes his conclusion to be anti-positivistic, it is fair to characterize his conclusion as expressing or implying the negation of this claim.

4 Some will say no more than law “purports” to be normative. I have always found this purports-talk to be metaphysically mysterious because it is not clear how abstract objects like legal systems and laws could “purport” to do anything. But if law merely purports to have some property, the most plausible claim is that law purports to be morally legitimate – something which law, as a conceptual matter, might fail to be. It seems clear that law does more than merely purport to be normative; the practices that give rise to the rule of recognition as well as the practices associated with enforcement of legal norms provide, and necessarily so, reasons for actions. The trick is to explain the distinctive way in which law is normative.

cally); on this view, it is a conceptual truth that law provides, or attempts to provide, a reason for action (that, of course, can be outweighed or nullified by other reasons). Moreover, the tacit assumption is that although law has this normativity *qua* law, law's normativity cannot plausibly be explained as brute in the sense of not being reducible to other kinds of reason for action.

Indeed, one of the most important unsolved problems in legal philosophy is to explain the sense in which law is normative, and this suggests that, while a norm is normative in virtue of having the status of law, legal normativity will have to be explained in terms of other kinds of reasons for action. Hart and Austin, for example, seemed to explain legal normativity in terms of prudential normativity: legal obligation is constituted by social pressure to conform – social pressure being relevant from the standpoint of prudential rationality. Other things being equal, it is in *my* best interest to avoid being on the business end of expressed social disapproval, which may take the form of coercive measures enforced against me. But if law is necessarily normative and law's normativity must be explained in terms of more basic normative considerations, then one might think positivism is committed to the claim that it is a necessary truth that there are independent value facts.

There are two problems with this line of reasoning. First, the claim that law is necessarily normative is logically compatible with a Humean non-cognitive, subjective conception of normativity. Hume believed that sentences like "killing is wrong" lack cognitive content and hence lack truth-value; if so, then legal positivism does not *logically entail* that legal normativity must be explained in terms of value *facts*, which, as Greenberg defines them, are true *propositions* about value. Of course, most positivists would likely reject a Humean account of normativity in general and its applicability to legal normativity in particular. But this is an *assumption* informed by either empirical observations or ordinary intuitions about legal practice and normativity-talk – and not a logical consequence of the set of claims comprising the core theses of legal positivism.

Second, (GC) is derived from an argument that contains as its premise the claim that it is a necessary truth that independent value facts figure into determining the content of the law and hence that descriptive facts about social practices making up legislative and adjudicative activities contribute only *partly* to the content of the law. These claims are, of course, logically

inconsistent with positivism's claim that social practices are, at bottom, the ultimate determinants of legal content (i.e., of what content counts as "law"). Perhaps a positivist can accept (GC), but not on the strength of Greenberg's reasoning – because that reasoning supports a sub-conclusion straightforwardly inconsistent with positivism. Some other response is needed to Greenberg's argument.

B. The Basic Problem with (GC)

It should be noted that (GC), of course, is logically equivalent to the claim that if law is possible, then there are independent value facts; the latter conditional is simply the contrapositive of the former and is hence logically equivalent to it. But this can be deployed in an argument to show that there are independent value facts. Here's the argument:

- (1) If law is possible, then there are independent value facts⁵.
- (2) Law is possible.
- (3) Therefore, there are independent value facts.

Before proceeding further, I should assure the reader that this interpretation does not misrepresent Greenberg's argument or conclusion. Greenberg acknowledges as much in a footnote:

This paper does not attempt to address a skeptic who maintains that there are no true propositions about value. One could use an argument of the same form as mine to argue that there must be value facts – for without them there would not be determinate legal requirements. But a skeptic about value facts

5 One might think that Greenberg's first premise is "if law exists at a world, then there are independent (moral) value facts at that world," but this is incorrect. Greenberg characterizes himself as an antipositivist and states the claim that he is denying as follows: "To put things metaphorically, hard positivism and soft positivism hold there could still be law if God destroyed all value facts" (158). Notice the occurrence of the modality "could." This means that he is denying the claim "law is possible if there are no independent value facts." In other words, he holds the position that law is not possible if there are no independent value facts. And this, again, is simply the contrapositive of premise (1) as I have stated it. In any event, similar counterarguments could be made since the conclusion of the argument will be a metaphysically necessary claim that there are independent moral value facts. And this much is certainly clear: his argument for this premise is sufficiently general, as we will see below, that it implies that the content of any social practice will be partly determined by independent moral facts. This would imply that the existence of *language* implies the existence of independent moral facts. For the details of the argument see p. 20 below.

would no doubt take such an argument to be a case of the legal tail wagging the value dog (167, note 22).

I am not a skeptic about value facts, but I think the skeptic's charge is correct. In this section, I argue that it is implausible to think that the existence of independent value facts can be shown by the kind of considerations adduced by Greenberg. Since it is clear that the U.S. has a system of law and hence that law exists and is therefore possible, premise (2) is true⁶. Since premise (2) is true, premise (1) and its contrapositive (GC) are false. Notice that I am not denying the truth of claim (3). In fact, I am an objectivist about both moral and prudential "value facts" (as Greenberg uses the term) and hence accept a very strong and specific version of claim (3). Rather, my claim is that a metaphysical analysis pertaining solely to social practices like *law*, together with no more than the obvious fact that law is *possible*, cannot imply the existence of independent value facts of the sort that would refute positivism's distinguishing thesis. The issue of whether there are such facts, however these are conceived, is much too complex to be conclusively resolved by a general analysis of social practices like those that make up law. In other words, I take the skeptic Greenberg describes to be correct in thinking his argument is "a case of the legal tail wagging the value dog."

In fact, construed as metaphysical claims purporting to express necessary truths, the conclusion of Greenberg's argument is quite strong. Consider the following two axioms of S5, the most universally accepted system of modal logic:

K axiom: $\Box (A \rightarrow B) \rightarrow (\Box A \rightarrow \Box B)$

5 axiom: $\Diamond A \rightarrow \Box \Diamond A$

We can apply these axioms to Greenberg's argument in the following way. First, the claim law is possible can be represented using the possibility operator as follows: "law is possible" can be represented as " \Diamond there is law." Since Greenberg is explicit about Premise (1)'s being a metaphysical

⁶ I offer no more argument than this for the claim that law is possible because I know of no major theory or scholar in mainstream philosophy of law that would deny this. Greenberg would surely not deny that the U.S. has a legal system. This premise is genuinely uncontroversial.

claim purporting to express a necessary truth, we can express the necessary truth of it by simply appending the necessity operator \Box to range over the whole conditional. Thus construed, premises (1) and (2) of his argument are:

(1*) $\Box(\Diamond\text{there is law} \rightarrow \text{there are independent moral facts})$

(2*) $\Diamond\text{there is law}$

Now adding the appropriate instances of the K axiom and the 5 axiom to the argument we get:

(3*) $\Box(\Diamond\text{there is law} \rightarrow \text{there are independent moral facts}) \rightarrow$
 $(\Box\Diamond\text{there is law} \rightarrow \Box\text{there are independent value facts})$ (K axiom)

(4*) $\Diamond\text{there is law} \rightarrow \Box\Diamond\text{there is law}$ (5 axiom)

Applying Modus Ponens to (1*) and (3*), we get:

(5*) $(\Box\Diamond\text{there is law} \rightarrow \Box\text{there are independent value facts})$

Applying Modus Ponens to (2*) and (4*), we get:

(6*) $\Box\Diamond\text{there is law}$

Finally, applying Modus Ponens to (5*) and (6*), we get the metaphysically necessary conclusion:

(7*) Therefore, $\Box\text{there are independent value facts}$

That is to say, Greenberg's argument, together with the assumption that (1) states a metaphysical claim and some uncontroversial theorems of modal logic, shows the following claim:

It is a necessary truth that there are independent value facts.

It is utterly crucial to note that Greenberg would not reject this characterization of the conclusion of his argument. First, in the footnote quoted above, Greenberg states the conclusion in modal terms: "One could use an argument of the same form as mine to argue that there *must* be value facts." "Must" is an idiomatic way of expressing the necessity operator. It is therefore clear that he believes his argument can be used to show that it is a necessary truth that there are independent value facts.

Nor could he reject this characterization. The relevant axioms of modal logic and rule of inference (Modus Ponens) are not controversial within the

mainstream community. There are Quinean skeptics about necessity, but they would also *have to* reject Greenberg's arguments on methodological grounds (though they could not make sense of the locution "have to" because it is also a modal notion); on this view, Greenberg's argument would have to be rejected as non-naturalized philosophy – not a position Greenberg is likely to find plausible and certainly not one I find plausible. If one accepts the notion of necessity and hence the most natural system of modal logic, there is simply no plausible objection to be made to the inferences I have made in steps (1*) to (7*).

Now there are a couple of things to notice about this conclusion. First, strictly speaking, it does not imply that the independent value facts true in one possible world are true in every possible world; it might be that different independent value facts hold in different possible worlds. As long as the description of every possible world contains at least one independent value fact, the above conclusion is true – regardless of whether the description of other possible worlds contain conflicting value facts. So the conclusion that Greenberg draws does not imply that each true value proposition at a world is true in every other possible world; indeed, it does not imply that *any* value proposition true in one world is necessarily true. The conclusion shows only that, in every possible world, some set of value propositions is true – rather than that some set of value propositions is true in every possible world.

Second, the claim that it is necessarily true that there are independent value facts does not imply even the much weaker claim that the value facts in one possible world *are of the same kind* as the value facts in all others. As we will see below, there are different candidates for value facts: moral, aesthetic, and prudential. It might be that the value facts that make law possible at one world are aesthetic (because there are aesthetic value facts at that world but not moral value facts), while the value facts that make law possible at another are moral (because there are moral value facts at that world but not aesthetic value facts). Nothing in the claim that it is necessarily true that there are independent value facts would imply that the same kind of value facts obtain in every possible world.

I doubt Greenberg would endorse such a view and think it can be ruled out on intuitive grounds. The idea that, at some possible world W1, there are aesthetic value facts but no moral value facts and hence that the former make law possible at W1, while at W2 there are moral facts making

law possible because these are the only value facts existing at W2, is sufficiently queer that I think we can rule out the idea on intuitive grounds⁷. The metaphysical features of such a logical universe are counterintuitive and verge on being unintelligible – and that is good enough, at least for me, to reject that thesis.

For his part, Greenberg would not object to rejecting this thesis as expressing his view. Here it is worth noting that Greenberg seems to endorse the stronger claim that each true value proposition is necessarily true. As he puts the point:

I claim that the content of the law depends not just on descriptive facts but on value facts as well. Given the plausible assumption that fundamental value facts are necessary rather than contingent, there is, however, a difficulty about expressing my claim in terms of counterfactual theses or theses about metaphysical determination (159)⁸.

Greenberg goes on to solve the difficulty by adding that the relationship between the determinants of legal content and that content must be rationally connected and hence intelligible. This suggests that Greenberg would reject the views (i) that value facts on two possible worlds might conflict and (ii) that value facts of a kind that exist at one possible world do not exist at another. If fundamental value facts are necessarily true, they are true at every possible world; so whatever type exist at one world exist at every world – and the same fundamental value propositions are true at every possible world.

7 However, it is worth noting in this context that certain epistemic principles seem to rest on aesthetic considerations. For example, simpler theories, other things being equal, are regarded as more likely to be true than more complicated versions. The principle of simplicity resembles, of course, Occam's Razor, which requires rejecting the existence of entities not needed to explain the relevant phenomenon, but differs from it in that it generalizes beyond such ontological considerations. Occam's Razor is probably not fairly characterized as grounded in aesthetic judgments, but the principle of simplicity is grounded in the aesthetic intuition that the universe is likely to be simpler, and hence more elegant in character, than a more complex one. So the idea that aesthetic value facts might play a role in determining the content of the law is not completely implausible – though the idea that these are the *only* value facts that do so is. There is simply nothing in our experience that would support such a judgment – or even to make it intelligible given that the only aesthetic value that informs epistemic judgments is a preference for simplicity.

8 Again, it is utterly crucial to note that Greenberg takes his own argument as supporting the position that it is *necessarily true* that there are independent value facts. The reader must keep this in mind in considering the counterarguments I make in this paper.

In any event, the rejection of (i) and (ii) is not, strictly speaking, implied or expressed by the conclusion from his argument. The strongest claim that his conclusion can be interpreted as expressing is the comparatively weaker claim that in every possible world there are some value facts that obtain. As far as that conclusion is concerned, each individual value fact might hold in every possible world or it might not; some types of value fact might exist in some worlds, but not others.

But even this modest conclusion is immediately striking for two reasons. For starters, Greenberg takes a metaphysical thesis about law, together with the claim that there is some possible world in which there is law (which is much weaker than the claim that law exists in this one), and derives a claim about independent value facts that hold in possible worlds where there is no law. Even more strikingly, from this extremely modest starting point, he derives a claim that independent value facts hold in worlds in which not only does law not exist but also in *worlds in which rational beings capable of making law do not exist*.

Even at this early point in my argument, this should seem counter-intuitive. It would be one thing to say that law is not possible in worlds where human beings value nothing. That seems reasonably plausible. It is hard to see how law could succeed in guiding or coordinating behavior if human beings do not value anything; indeed, it is hard to see how a rule of any kind could have normative force in such a case. If it is necessarily true, as many theorists (including myself) believe, law necessarily has normative force, it would seem to follow that law is not possible in worlds where human beings value nothing because in such worlds the law can provide nothing that a human subject would recognize as a reason for action.

Perhaps one could solve this problem by saying there are necessary objective truths about what counts as a reason for action, so that legal normativity is possible even in worlds where human beings do not value anything because in those worlds there are things they should value. For what it is worth, I am skeptical about this kind of move because norms properly apply only to beings with certain capabilities, like rationality. But it is hard to make sense of the idea that a norm applies to a class of beings that make no value attributions at all; such a class of beings would seem to be practically irrational – even if they had, so to speak, the computing ability to solve problems in an intelligent way.

In any event, this much seems reasonable: this is not the kind of issue that can be settled by reflections about whether social practices like law can, by themselves, rationally determine the content of social rules like laws. But Greenberg's argument seems to gesture in the direction of showing a claim that very much resembles this one. And that seems to call into question the key premise of the argument – namely premise (1) of the original argument and its logical equivalent (GC).

C. Elaborating on the Basic Problem

1. *Up to Three Kinds of Value Facts*

At the outset, it is worth noting that there are probably no more than three candidates for kinds of value facts: prudential, moral, and aesthetic. As Greenberg defines “value fact”⁹, a prudential value fact, if there is any, would be a true proposition about what is in some person's best interests. I take it that, for example, one ought to eat at least five servings of fruits and vegetables every day would be an example of a true normatively prudential proposition; although this one is general, what is in a person's best interest surely differs from person to person, so that not all prudential statements true of one person are necessarily true of another. Of course, I might have a morally normative reason for doing so if other people depend on my being healthy, but that is another matter; it is clearly a true proposition about prudential value that I ought to eat five servings of fruits and vegetables every day. But perhaps it is true, as Greenberg suggests of the relevant kind of value fact, that there are fundamental prudential standards that express or imply prudential statements that are both universal and necessarily true.

An aesthetic value fact, if there is any, would be a true proposition about the quality of the aesthetic experience that some natural or artistic object provides, one relevant consideration being the experience of beauty the object provides (or perhaps the beauty of the object itself). An example of such a proposition might be the claim that *The Last Supper* is Leonardo de Vinci's most beautiful painting or the claim that one should experience

9 Greenberg states: “By ‘facts’, I mean simply true propositions. Hence facts about value, or value facts, are true normative or evaluative propositions, such as true propositions about what is right or wrong, good or bad, beautiful or ugly. The fact that people value something or believe something is valuable is not a value fact but a descriptive fact about people's attitudes. For example, the fact, if it is one, that accepting bribes is wrong is a value fact; the fact that people value honesty is a descriptive fact” (167, note 22).

first-hand the beauty of *The Last Supper* in a museum. I obviously cannot defend the view here, but I find it *prima facie* plausible to think not only that there might be fundamental aesthetic standards that are necessarily true. Ordinary talk certainly presupposes such standards: many people claim that one piece of art or music is superior to another and defend that view with an argument making reference to aesthetic qualities – a style of reasoning that presupposes aesthetic judgments are objective. Similarly, many people believe high art is superior to popular culture and defend that view with similar arguments. Ordinary talk about aesthetics seems incompatible with the claim that aesthetic, so to speak, is in the eye of the beholder (or beholders if it is some social group responsible for manufacturing conventional aesthetic standards). Indeed, ordinary folk frequently think the musings of art “experts” preposterous as an objective matter; they regard art criticism as overly sympathetic to abstract art that lacks, as an objective matter, sufficient merit to take seriously (not always sadly, “that’s not art; my three-year-old could do that” is a common remark heard in museums of contemporary art).

A moral value fact, if any, would be a true proposition about what is morally obligatory, wrong, good, praiseworthy or blameworthy. An example of such a proposition would be the claim that killing an innocent person is wrong. Such propositions might be quite specific (e.g., it would be wrong for John Doe to take Jane Roe’s car without her permission) or fundamental and hence at a high level of generality (e.g., intentionally causing harm to innocent sentient beings is presumptively wrong). It is not implausible to think that there are fundamental moral standards (and hence fundamental moral value facts) that are necessarily true. Certainly, this continues to be a very common view among philosophers and laypersons.

2. *The Logical Relationship between Objectivity and Necessity*

At the outset, it is worth noting that any normative proposition that is necessarily true is *objective* in the sense it is true independently of what any person or group of persons think or believe about that proposition. The truth-makers of objective normative propositions, then, do not include reference to attitudes, beliefs, or conventional practices. Everyone could simultaneously be mistaken in a belief about a matter of objective fact – such as might have once been true of the objective truth that the earth is round. The claim that a proposition is objectively true does not imply, of course,

that it is necessarily true; that the earth is round is objectively true, but contingently so. But the claim that a proposition is necessarily true does imply that it is objectively true because it is true in worlds where everyone believes its negation. That is the hallmark of objectivity.

As we have seen, Greenberg believes that he has shown the necessary existence of fundamental value facts; this, by itself, asserts only that in every possible world there exist some value facts independent of law and social practices. Again, this does not imply that the same value facts exist in every possible world. However, he also believes that some of these value facts are “fundamental” and hence both necessarily true and objectively true in the sense of being mind-independent truths about the world. Strictly speaking, then, Greenberg believes the following stronger proposition:

It is a necessary truth that there exist fundamental value facts independent of law and social practices and each of these value facts is itself necessarily true and hence objectively true.

Of course, Greenberg does not claim to have established this much stronger claim; this stronger claim seems much less plausibly inferred than the weaker claim he has established from a premise about the nature of legal and social practices and a premise about the possibility of law.

Nevertheless, in the next section, I will argue that (1) if we assume that Greenberg's conclusion is incompatible with positivism, as he believes, then it is somewhat stronger than the one expressed by (GC), which is what he explicitly claims as a consequence of the argument, but weaker than the one above and (2) not a claim that can plausibly be inferred from such premises.

D. What Kind of Value Facts Does Greenberg Believe the Possibility of Law Implies?

Greenberg takes his conclusion to be antipositivist in the style of Dworkin's substantive conclusions about law, though his argument is, again, nothing at all like Dworkin's. To put Dworkin's view in the terms used by Greenberg, legal content is partly determined by law practices, construed to include the history of past decisions, and partly determined by the value facts that show these practices in their morally best light. While Greenberg does not say much about which value facts contribute with law prac-

tices to determining legal content, the resemblance to Dworkin's position is clear: on Dworkin's view, the law is determined not only by institutional history but also by *moral* value facts; only moral value facts could show that history in its best *moral* light. Although Dworkin justifies his view on the strength of normative political philosophy¹⁰, Greenberg's argument is purely metaphysical in character.

Although Greenberg never explicitly specifies what kind of value facts he believes must figure into determining legal content, Greenberg's conception of his position as antipositivist tells us that he assumes the relevant value facts are moral value facts. As the positivist denies only that it is a necessary truth that true propositions about *morality* partly determine legal content, Greenberg's position must be, like Dworkin's, that the positivist is mistaken about this – and the positivist takes no explicit position about the role of any other true normative propositions in determining legal content. That is to say, Greenberg's conclusion must be, if it is to be construed as anti-positivist, that the independent value facts are moral. Thus, (GC) needs to be recast as follows:

(GC) It is a necessary truth that there are moral value facts – i.e., it is a necessary truth that there are true propositions of morality.

Greenberg's argument does not seem to explicitly contain anything that would imply that the relevant value facts are moral in character, but I do not think much would be needed by way of addition to move from the claim that value facts (of an unspecified sort) are needed to determine legal content to the claim that moral value facts are needed to determine legal content. If independent value facts necessarily figure into determining legal content, I think it is clear that the relevant value facts would have to be moral.

Aesthetic standards furnish one principle for evaluating something other aesthetic experience and objects – simpler scientific or philosophical theories or explanations, other things being equal, are preferred to more complicated theories or explanations¹¹; and it is pretty clear that these have

¹⁰ As is well known, Dworkin believes that legal philosophy falls within the scope of normative political philosophy and that positivist theorizing is problematic because it assumes that purely descriptive non-normative theorizing about law is possible.

¹¹ See Note 7, above.

no necessary role to play in determining legal content. But even if a value fact expressing a principle of simplicity did play a necessary role in determining legal content, its function as an *epistemic* constraint is logically compatible with positivism; after all, the epistemic norm that precludes there being two inconsistent legal norms that directly to a law subject is compatible with positivism.

Prudential standards do not seem to have any necessary relevance because they are standards governing the efforts of *individuals* to achieve their own interests. Surely it is not a necessary truth that law is created or adjudicated by people who are motivated to achieve their own interests; much less plausible is the claim that prudential value facts make intelligible the connection between legal practices and the legal content they determine. When individuals begin to identify their own interests with the interests of other people, we begin to have something resembling the beginnings of moral concern (as, for example, expressed both in versions of the Golden Rule and in the Judaic and Christian command to love one's neighbor as one loves oneself).

The only value facts left are moral value facts. If there is any plausible candidate for a necessary evaluative determinant of legal content, it is morality. The necessary connections between law, justice, justification, authority, and other concepts that lead antipositivists to deny positivism might not entail a natural law view. But they do seem to make it clear that *if* any value facts play a necessary role in determining legal content, they are moral value facts – i.e. true propositions about morality – which, of course, is precisely what Greenberg must intend if his argument is to succeed in attacking a positivist position and in defending Dworkin's view.

But here is where the implications of (GC), thus construed, seem to get into real trouble. To begin, we have a theory of law and social norms that logically precludes any form of moral skepticism. For example, it implies that John Mackie's "Error Theory" of morality is false. Mackie argues that our ordinary moral talk is systematically mistaken and that *all* propositions stating moral judgments are false; on this view, it is false that killing innocent people is permissible and it is false that killing innocent people are wrong. Now I do not find this a plausible theory, but it is noteworthy that Greenberg's argument, unlike Dworkin's defense of moral objectivity, makes no meta-ethical or normative ethical claims whatsoever. It is very difficult to see how an argument that lacks any

meta-ethical or ethical claims whatsoever could successfully establish a conclusion that implies the falsity of a meta-ethical theory like John Mackie's Error Theory.

It might be tempting to think that Greenberg's claim that it is a necessary truth that (moral) value facts rationally determine the content of the law, but this misunderstands the notion of a meta-ethical claim. Here is a characterization of a meta-ethical claim so uncontroversial it can be found in a respected encyclopedia of philosophy: "A central task of philosophical ethics is to articulate what constitutes ethics or morality. This project is meta-ethics." I cite an encyclopedia not because it has some special philosophical authority, but because it reports an uncontroversial shared understanding of the term and the associated issues.

Meta-ethics is thus concerned with the nature and grounds of moral rules, the meaning of moral language, etc. Thus, Greenberg's claim is no more a meta-ethical claim than the classical natural law claim that the content of law is necessarily constrained by the content of morality. It is a conceptual claim about the nature of law asserting a metaphysical relationship between the content of the criteria of legality and the content of morality.

In any event, it does not really matter much what label we hang on the relevant claim. The argument is that Greenberg's claim lacks the content to imply the falsity of a theory like Mackie's error theory. It should be clear that the idea that the classical natural law claim that it is a necessary condition for a norm to be law that it is consistent with morality does not, by itself, have sufficient content to imply the falsity of a theory like Mackie's. It is no less evident that Greenberg's claim is in the same position because it does the same kind of work that the classical natural law claim does – merely asserts a metaphysically necessary relationship between law and morality.

Moreover, (GC) implies the falsity of any meta-ethical theory that asserts that moral claims lack cognitive content – i.e., (GC) falsifies any form of ethical non-cognitivism – because Greenberg defines "value facts" as "true propositions about values." For example, the emotivist denies that sentences expressing moral judgment have cognitive content and hence that such sentences express propositions (i.e., something that has truth-value). According to the emotivist, the sentence "killing is wrong" asserts no more than what is expressed by "Boo, killing" which expresses, rather than reports, the speaker's disapproval of killing. But what is expressed by "Boo, killing" is neither true nor false; whereas a propositional state-

ment describing the speaker's attitude about killing has cognitive content and hence truth-value, an expression of disapproval in the form of booing lacks truth-value. Again, it is hard to see how an argument that contains no meta-ethical claims about, say, the semantics of moral language could establish a conclusion that successfully shows that ethical non-cognitivism is false. Greenberg's argument does not seem to have the resources to do the kind of work that would have to be done by an argument that settles the controversy between ethical cognitivists and ethical non-cognitivists.

(GC) also implies the falsity of *cognitivist* meta-ethical subjectivism. According to this view, the sentence "killing is wrong" says no more than "I, the speaker, disapprove of killing" – a descriptive proposition about the attitude of the speaker towards killing. Insofar as such a subjectivist claims that there is nothing more that can be said about moral talk, Greenberg's argument falsifies this species of subjectivism because the existence of moral facts implies the existence of true morally-*normative* propositions; and this falsifies the cognitivist conception of subjectivism because it claims that moral judgments are purely descriptive reports of the speaker's attitude towards the relevant act.

It also falsifies normative theories of subjectivism, such as they are. I am not sure that any theorist holds this view (though one frequently hears younger people say things suggesting a normative subjectivism). According to this position, there are no moral norms that apply universally or even that apply to certain social groups. Morality is manufactured by individuals; what is right and wrong for a person is determined by what she accepts or believes. This is not an especially plausible theory and it is not clear how it differs from a skepticism that denies there are any binding moral rules; since an individual can always change her beliefs at any time and thereby extinguish the rule she once accepted, it is hard to see how any rule could be binding in any meaningful sense if it can be unilaterally extinguished by will. If I can extinguish an obligation simply by unilaterally rejecting the associated rule, it is hard to see how I could have anything that would count, as a conceptual matter, as an obligation.

Greenberg's argument rules out this form of subjectivism for three reasons. First, any form of moral subjectivism presupposes that people have moral beliefs – and it should be clear that this is a *contingent* fact about people. Some people have moral beliefs, I guess, but do not care about conforming to them; these people are considered sociopaths and, I guess,

fairly regarded as being mentally ill. But it is a certainly possible for a human being to lack such beliefs. I assume that feral children (e.g., those that have been abandoned in wilderness areas and raised by wolves) lack such beliefs despite having an undeveloped capacity for rationality. If it is possible for there to be some feral child, there are clearly possible worlds in which all people lack moral beliefs – and this, it should be clear, is inconsistent with Greenberg’s claim that it is a necessary truth that there are independent moral facts on a subjectivist account of moral facts.

Second, a subjective “value fact” could not do the work in making intelligible the connection between legal practices and legal content in a system where the officials disagree on relevant moral propositions. If one is skeptical that a legal system can exist and be efficacious in such an environment, consider that Supreme Court Justices disagree on what is the legitimate way to interpret the Constitution – and disagreements about normative theories of interpretation are disagreements involving political morality. If value facts are needed to determine how legal practices determine legal content, it cannot be that normative subjectivism is the right account of these value facts. Accordingly, Greenberg’s conclusion, together with some additional uncontroversial premises, implies that it is a necessary truth that there are true propositions of morality and the truth-makers of these propositions are not subjective beliefs and preferences.

Finally, and most importantly, subjective moral facts (whatever they turn out to be) could determine legal content only through the social practices of interpreting and choosing new rules to enact – a claim that is perfectly consistent with legal positivism. There are two problems here. To begin, if it were a fact about human beings that they necessarily base such decisions on their subjective moral views (a dubious proposition, to say the least), the relevant necessity would be psychological and not metaphysical. Further, in such cases, the social practices of interpreting and legislating would still fully determine the content of the law in the relevant sense; those processes would simply be grounded in moral views. Greenberg simply cannot ground his antipositivist views on any form of subjectivism.

Again, the problem here is not that Greenberg seems committed to the falsity of moral subjectivism. I think that position is not only false, but silly. The problem, however, is that (GC) logically precludes the truth of moral skepticism and all forms of meta-ethical and normative subjectivism sug-

gests that (GC) is false. This is problematic because Greenberg's argument simply doesn't have the resources to establish such a powerful claim – even if the conclusion is, as I believe, true. You need an ethical or metaethical premise to derive that conclusion and there is nothing ethical or metaethical in either the claim that law is possible or the claim that if law is possible, there are independent moral value facts. Something has gone wrong somewhere in Greenberg's argument.

But (GC) has even stronger implications for moral theory than those discussed above. As it turns out, (GC) seems to falsify any intersubjectivist conception of morality. A meta-ethical intersubjectivist (or relativist) theory might hold that what constitutes an act as morally wrong is that it violates certain cultural customs or conventions (or is disapproved of by the majority of people in the culture). A normative relativist theory holds that a person *P* is morally obligated to *x* if and only if the norms conventionally accepted by people in the culture to which *P* belongs assert that one is morally obligated to *x*.

Again, there are two problems here. First, that people have moral convictions and practice them is a logically contingent fact. There are logically possible worlds (or conceptually possible worlds) in which people lack such beliefs and practices. Think of the earliest human beings in this world. If intersubjectivism is true, then those human beings had no moral principles and hence there were no moral principles in this world at that time. Of course, we evolved to develop them, but that is not a necessary truth about us. The truth of intersubjectivism is inconsistent with (GC)'s claim that it is a necessary truth that there are true independent moral value facts.

A second problem arises because Greenberg seems correct in thinking that his argument generalizes to cover all social norms that rationally determine social norms. Here it is crucial to emphasize that the scope of Greenberg's argument is limited:

The basic argument is general enough to apply to any realm in which a body of descriptive facts is supposed to make it the case by rational determination that facts in a certain domain obtain. For example, if the relation between social practices, understood purely descriptively, and social rules is rational determination, the argument implies that social practices cannot themselves determine the content of social rules.

It should be clear here that the scope of the argument is limited to the relationships between practices and norms that are governed by “rational determination”; and not every set of norms and dependent rules will be governed by rational determination.

However, insofar as a set of social practices rationally determine the content of social norms, Greenberg believes his argument generalizes to cover these practices and norms. As Greenberg puts the point:

Although I will not discuss the point here, it is worth noting that my argument is not limited to the law. For example, the argument shows that without standards independent of the practices, *no set of practices can rationally determine rules* (184; emphasis added).

It is easy to see why Greenberg is correct about this. One can go back through the paper and change all references and examples involving the law to some other kind of social practice without removing anything crucial to the argument. Greenberg’s argument, if sound, will cover many kinds of social practice that rationally determine the content of the associated social norms, including those that define clubs and even those that define *languages* – something that, as we will see, is especially problematic for the argument.

But we can now see that Greenberg’s argument precludes the truth of normative ethical relativism for two reasons. First, again, if ethical normative relativism is true, there are no independent moral value facts in possible worlds in which no human beings have any moral views. Of course, life in such a world will be like life in a state of nature – nasty, brutish and short. But it should be clear from many examples in our world that it is a purely contingent fact about us that we have moral views. It might be that a society lacking moral views will lack law (though I doubt this is true), but this is of no consequence: Greenberg’s argument proceeds from no more than the assumption that law is possible.

Second, if any form of ethical normative relativism is true, then moral norms are ultimately social norms and hence determined by social practices. But if, as a general matter, independent moral value facts are needed to pick out which aspects of any social practice are relevant with respect to determining the content of social norms, then there must be independent moral value facts that rationally determine the content of the social norms

that constitute a culture's morality which, on Greenberg's own view, cannot themselves be *fully* determined by social practices – and these moral value facts would have to be *objective* in character. Otherwise, we wind up with an infinite regress of social practices that rationally determine the content of the related social norms.

Of course, Greenberg has a move here he can attempt. He can simply argue that the social practices that determine the content of the conventional norms that count as moral norms in a culture are not *rationally* determined. But this seems pretty clearly *ad hoc*. Here we are talking about a set of norms and practices that share many of the features that distinguish law as a system of normative, reason-giving rules, from other social norms. In at least this case, it is simply implausible to deny that the social norms that determine the content of moral norms under normative relativism fail to do so by the theoretically significant process of rational determination.

If this is correct, then (GC) implies the truth of moral objectivism – i.e., the view that the truth-makers of some true moral proposition are independent of the beliefs, practices, attitudes and behaviors of any person or social group. That is to say, (GC) implies that there are some sentences that express morally normative propositions that are objectively true. If this is correct, then Greenberg's argument, *which contains no meta-ethical or normative ethical claims whatsoever*, implies a conclusion that straightforwardly resolves one of the most contentious philosophical disputes in ethics – namely, the dispute as to whether morality is objective in character.

More worryingly, we can obtain this result by reference to the possibility of social practices far more basic than the ones that contribute to law. Again, Greenberg correctly believes his argument applies to all social practices that rationally determine the content of social norms; as noted above, this seems correct because his arguments regarding metaphysical and rational determination of legal content by legal practices contain no crucial premises that are specific to law (although many of the examples, of course, are from legal practice since these practices are the most salient). But if this is correct, then we can derive (GC) and all its consequences from the mere possibility of *language* as follows:

- (1) If language is possible, then there are independent value facts.
- (2) Language is possible.
- (3) Therefore, there are independent value facts.

While it might be false that a language can be completely defined by social norms, it is clear that language is clearly grounded in social practices that define social norms that define the semantics and syntax of a language. Accordingly, the mere possibility of language, together with premise (1), gets exactly the conclusion that Greenberg derives in his discussion of law and legal practice.

Moreover, applying the same axioms of modal logic applied to Greenberg's original argument to this argument yields:

(GC) It is a necessary truth that there are moral value facts – i.e., it is a necessary truth that there are true propositions of morality.

Insofar as (GC) implies the truth of moral objectivism, we can derive the existence of objective moral value facts from just the possibility of *language* using a generalized version of Greenberg's argument.

This is especially counterintuitive. It is difficult to imagine that one could resolve such a contentious issue in ethics simply by reference to the sorts of considerations Greenberg adduces in his antipositivist argument, together with just the possibility of *language*. As noted above, Greenberg's argument does not contain any meta-ethical or ethically normative claims at all – which are exactly the sort of claims that seem to make up all the arguments on this issue. It is difficult to understand how an argument like Greenberg's could do this kind of work when it does not utilize any of the resources usually called upon in arguments on this issue. Something appears to have gone wrong somewhere in the argument.

Greenberg senses something is wrong here and gestures in “How Practices Make Law” at rejecting this idea:

[I]t may be that the relation between facts about the use of words and facts about meaning is not rational determination. In sharp contrast to the legal case, I see no reason to think that the relation between the use of words and their meaning is necessarily rationally intelligible. It may be possible that many possible meanings are ruled out arbitrarily (i.e., in ways for which reason cannot be given) and that we have non-rational mechanisms that exclude these possibilities from consideration¹².

12 GREENBERG, 2006, p. 113.

Indeed, in HFML, Greenberg explicitly acknowledges that there are social practices that do not rationally determine the content of social rules; for example, he writes: “A painting is elegant in virtue of facts about the distribution of color over the surface (and the like), [b]ut arguably there need not be reasons that explain why the relevant descriptive facts make paintings elegant” (HFML 160).

Indeed, Greenberg is explicitly skeptical with respect to the idea that the social practices that constitute language rationally determine the social norms (and even if it is true that language is not exhausted by social norms, it is absolutely clear that there are normative rules governing the use of language:

Compare the issue of how facts about our use of words determine their meaning. Natural languages are a biological creation. Although many philosophers have thought differently, we cannot take for granted that the correct mapping from the use of words to their meaning will be based on reasons. How, it may be objected, would we then be able to work out from their use of words what others mean? The answer may simply be that we have species-specific, hardwired mechanism that rules out many incorrect mappings that are not ruled out by reasons. In that case, an intelligent creature without that mechanism would not be able to work out what words mean (HFML 171).

There are a number of problems with this response. First, Greenberg equivocates with respect to his notion of rational determination to the language case. To say that one set of social practices X rationally determines the set Y of social norms is not, strictly speaking to say, that there are reasons behind our decisions for the particular social practices that give rise to the relevant social normative content; rather, it is to say something superficially similar but logically distinct: it is to say, as Greenberg puts it, “The A facts rationally determine the B facts just in case the A facts metaphysically determine the B facts and the obtaining of the A facts makes intelligible or rationally explains the B facts’ obtaining” (HFML). *This neither says nor implies absolutely nothing about whether we have reasons for adopting the A facts as social practices!* It says only that once we choose the practices that explain the obtaining of the A facts, we can make intelligible why it is that they determine the B facts metaphysically determined by them.

Properly understood, there is simply no reason to deny that the social practices giving rise to language rationally determine the social norms governing the meanings of terms. If people converge upon using “bachelor” to denote bachelors, that fact makes intelligible why the practices involving use of “bachelor” determine the content of the social norms governing use of “bachelor.” This, of course, is a transparently simple case of rational determination as Greenberg defines it, but I see no non-question begging reason to deny that it is a case of rational determination as he defines this notion.

Moreover, if we concede Greenberg’s point that the rational determination relation presupposes that there is a reason for that explains why the social practices constituting the A facts obtain (a point that he has given no argument to justify accepting), this at most gets him off the hook with respect to one aspect of defining a language – namely the assignment of meaning to words. It does not get him off the hook with respect to another equally important aspect of defining a language – namely, the social practices that define social syntactical norms for taking words and creating well-formed formulas out of them. There are reasons to distinguish the use of the independent clause marked by a comma and “which” from use of the dependent clause marked by the term “that.” This, and all other norms of grammar, facilitates communication by disambiguating sentences. So if reasons for the obtaining of the social practices constituting the A facts as true are needed to satisfy Greenberg’s notion of rational determination, we have them, if not in the case of semantical rules, in the case of syntactical rules – and the argument described above goes through, constituting a clear counterexample to Greenberg’s claim. Greenberg’s analysis of language here is problematic because he fails to recognize that creation of a language involves defining both semantic and syntactic norms.

Second, and more importantly, without far more elaboration of the notion of rational determination than Greenberg gives it, all of his examples of social practices that determine social norms without rationally doing so seems *ad hoc*. As he explains the notion, the fact that there are no reasons for the assignments we make from words to meanings is irrelevant. Moreover, he gives no compelling reason to think that the relevant sense in which social practices determine aesthetic standards is not *rational* determination. The most that he can plausibly say, at this point, is comparatively weak: “We may be able to discover which descriptive facts make paintings

elegant (and even the underlying psychological mechanisms), but even if we do, those facts need not provide substantive aesthetic reactions why the painting is elegant (as opposed to causal explanations of our reactions).

Here it is important to note that the Greenberg's point is not, and could not be, the claim that it is metaphysically or logically possible that the facts that make a painting elegant are not substantive reasons for thinking them elegant; rather the claim is an *epistemic* point: for all we know, we cannot rule out that the relationship between the social practices governing the characterization of a painting as elegant and the social norms is not one of rational determination. That might very well be true, but Greenberg needs something stronger than the epistemic point here about art – and about language to properly engage the argument I have made. At this point in the development of his genuinely remarkable argument and ideas, he just doesn't have that something stronger. Without much more than he has to say in "On Practices and Law", the attempt to distinguish legal rules from rules of language fails – meaning something very serious has gone wrong somewhere in his argument.

4. Concluding considerations

Accordingly, we can conclude that the argument goes wrong. Greenberg's argument takes place at a very challenging level of nuance, detail, and abstraction. I cannot address the issue in detail here, but am tempted to think that Greenberg's argument moves too quickly in considering the issue of whether legal practices can themselves determine which aspects of those practices is relevant with respect to determining the content of the law. Moreover, he seems to overlook the role that the commitments of participants to following an ultimate conventional rule might play in determining which practices are relevant; there is no clear reason to rule out the possibility that the practices constituting the rule of recognition in the U.S. include aspects that rule out, say, both coin-flipping as a means of settling legal disputes and considering preambles to legislative enactments as having legal effect. But such considerations fall well short of an argument that Greenberg has made a mistake here.

But although it is important (if I am correct) to try to identify where in the argument a mistake might have been made, this is really not necessary for my purposes. My purpose in this essay is to show that Greenberg's argument, construed as antipositivistic, has a conclusion with implications

that no argument grounded in just the resources employed by Greenberg can have – in particular, Greenberg’s conclusion implies the truth of moral objectivism. If this is correct, this is sufficient to reject Greenberg’s defense of Dworkin’s anti-positivism (and implied critique of positivism) – even if I have not identified exactly where this defense is in error.

Of course, nothing I have said in this paper implies the falsity of Greenberg’s substantive views about the determinants of legal content. Showing that an argument is problematic, if I have succeeded in doing even that much, is a radically different matter than showing that the conclusion is false. His substantive view that value facts are needed to determine legal content remains very much alive in spite of anything I have said here that might be correct.

6. References

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