

How Facts Make Law and the nature of moral facts *

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In his thoughtful and thought-provoking paper, Ken Himma claims that the argument of *How Facts Make Law* must go wrong somewhere because, if successful, the argument shows too much with too little¹. In particular, he claims that my argument, with very limited resources, reaches a conclusion that entails that subjectivist and non-cognitivist theories of morality are false. Himma insists that I should not be able to resolve such controversial debates in meta-ethics with no meta-ethical or even normative resources.

My response has two parts. First, it is not correct that my conclusion entails that subjectivist and non-cognitivist theories of morality are false. My conclusion itself is neutral as to the metaphysics of morality. Second, it's not even true that my argument, if successful, shows that there must be moral facts. The reason is that I rely on the plausibility of the existence of moral facts (whatever their metaphysics) in arguing for my conclusion.

In sum, my argument's conclusion doesn't get us nearly as far as Himma thinks. Nor are my argument's resources as meager as he claims.

* The following paper was presented at the American Philosophical Association's 2007 Berger Prize session. It is a reply to Ken Himma's comment on my paper, "How Facts Make Law", which was awarded the 2007 Berger Memorial Prize for the outstanding paper in philosophy of law published during 2004 and 2005. I am very grateful to Ken for his kind remarks and his stimulating comments.

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¹ HIMMA, 2012. Page numbers in the text refer to Himma's paper.

A. *How Facts Make Law* is neutral with respect to the metaphysics of moral facts

My argument for the role of normative facts in *How Facts Make Law* (HFML) is that there's a certain role in the constitutive explanation of legal facts that has to be filled, and moral facts are the best candidates². So, in order to work out what demands my argument places on the metaphysics of moral facts, we should look at the nature of the relevant explanatory role.

I argue that factors independent of the law-determining practices – i.e., of the past decisions of legislators, judges, and so on – must determine how those practices contribute to the content of the law³. Since the question is how the law-determining practices affect people's obligations, rights, powers, and so on, the relevant normative facts have to be ones that bear on that question. (To save words, I'll say simply "obligations"). The main demand, therefore, is that the normative facts have to have the right content⁴.

Here are two examples:

- i. Fairness requires giving some precedential weight even to incorrectly decided previous court decisions.
- ii. Democratic values cut against legislative history's having any impact on the content of the law.

So I need it to be the case that fairness requires giving some precedential weight even to incorrectly decided previous court decisions, and that democratic values cut against legislative history's having any impact on the content of the law, and so on. But it's not obvious why the metaphysics matters. Suppose someone gave an otherwise successful subjectivist account of moral facts – for example, one on which they depend on what people would desire to desire under ideal conditions. Such an account is perfectly consistent with my argument.

2 For elaboration, see GREENBERG, 2004/2006; 2006a; 2007a, 137-142.

3 GREENBERG, 2004/2006, 241-253; 2006a, 268-284; 2007b, 9-10. (Citations to Greenberg 2004/2006 use the page numbers of the Hershovitz 2006 reprinting because the paper was corrected in the reprinted version.)

4 See GREENBERG, 2004/2006, 254; 2006a, 284-289.

Why does Himma think otherwise? He gives several reasons. I'm going to consider the three most important. The first two are supposed to show that various forms of cognitivist subjectivism are ruled out by my argument. The third concerns non-cognitivism and also theories that hold that all of our ordinary moral claims are false.

1. Subjectivist theories: reductive theories and *How Facts Make Law*

Himma's first argument is that the argument of HFML requires that moral facts be normative. This requirement, he claims, cannot be satisfied by subjectivist theories of moral facts that make use of exclusively descriptive resources (such as facts about what people approve and disapprove of). Such a theory, according to Himma, "claims that moral judgments are purely descriptive reports of the speaker's attitude towards the relevant act" (p. 155).

First, a preliminary point. I don't think that my argument does require that moral facts be normative in the sense of necessarily providing genuine reasons for action. That's why, as I discuss in HFML, non-normative conceptual truths could potentially provide the kind of rational intelligibility that is at issue. (It's just that in the case of law, it so happens that the best candidates for the needed reasons are moral facts, which are, in my view and that of most theorists, normative.)

I gave examples above of the sort of facts that are at issue. These are, of course, paradigms of normative facts. So in the paper I refer to them as "normative facts." But that these facts are normative – that is, that they provide reasons for action – doesn't matter for my argument. What matters is only that the facts in question can make the obtaining of the legal facts intelligible in light of the law practices. Suppose it's a fact that democracy supports the textualist approach to statutory interpretation. That fact helps to make intelligible why a statute makes a certain contribution to the law, and it does so regardless of whether democracy's supporting textualism provides any genuine reason for action.

But let's leave this point aside. I'd like to use Himma's argument to make a more general point. So let's assume that my argument does require that moral facts be normative. Himma says that my argument therefore rules out subjectivist theories that appeal only to descriptive facts.

We can distinguish two kinds of subjectivist theories. First, there are theories that maintain that they can account for the apparent features of

moral facts in terms of non-normative facts such as facts about people's attitudes. Call such theories reductive theories because they hold that normativity is reducible to non-normative phenomena. Second, there are theories that deny that moral facts are normative or, more generally, that they have the features that we ordinarily take them to have. Such theories are a form of error theory because they claim that we are in error about the features of moral facts. I'm going to focus on reductive theories for the moment. (I'll come to error theories in section 3.)

Himma's claim, again, is that subjectivist theories that appeal only to descriptive resources cannot account for the normativity of moral facts. Now it's obviously too quick to say that because a theory does not make use of normative resources, it can't account for normativity. That form of argument would rule out any reductive account of anything. It's the point of reductive accounts that they attempt to account for some target phenomenon entirely in terms of other phenomena.

I therefore assume that Himma has reasons specific to this domain for thinking that reductive accounts of normativity cannot be successful. But – and this is the crucial point – to the extent that he is relying on these arguments to rule out such theories, it is not my arguments in HFML, but Himma's arguments against reductive accounts of normativity that are doing the work.

The point that I am making applies not just to normativity but to other putative features of moral facts. Roughly, there are two possibilities. The first is that some sophisticated reductive subjectivist theory could succeed in accounting for the features of moral facts that are part of our understanding of those facts. If such a theory could be otherwise successful in accounting for moral facts, I don't see any reason why such a subjectivist theory couldn't provide facts of the sort my argument requires. (In order to provide such reasons, Himma would have to point to demands that my argument makes on moral facts that are special to my argument – i.e., that go beyond the demands made by our ordinary or philosophical understanding of moral facts.)

The second possibility is that no reductive subjectivist theory could be successful in accounting for moral facts. There are features of moral facts, such as their normativity, that reductive subjectivist theories cannot explain. But, in that case, such theories fail not because of my argument but because they can't account for moral facts.

The general moral is that Himma needs to show something much stronger than that a subjectivist or non-cognitivist theory could not account for the moral facts that, according to my conclusion, legal facts depend on. He needs to show that an otherwise successful subjectivist or non-cognitivist theory could not do so. In other words, it's not enough to point out that subjectivist and non-cognitivist theories have problems like the one Himma identifies when he says that the subjectivist theory he considers would not account for the normativity of moral facts. That may be true, and it may even be true of every possible subjectivist theory. But that would show only that there are fatal meta-ethical objections to such theories. It wouldn't show that my argument was responsible for the fatal objections.

2. Subjectivist theories: a moral parallel to the argument of *How Facts Make Law*?

Himma has a second argument for his claim that my argument in HFML rules out any form of subjectivism that makes moral facts depend on people's attitudes or practices. The core idea is that an analogue of my argument for the case of morality shows that attitudes and practices cannot themselves determine moral facts.

Himma's argument assumes that if practices are to determine moral facts, they must rationally determine them in the sense in which I use that term in HFML⁵. Without that assumption, the analogue of my argument for the moral case is a non-starter. But this assumption is a strong meta-ethical assumption, and one that is not supported by anything in my argument.

In my view, moral facts are not determined by social practices at all. So the question of whether they are rationally determined by social practices does not arise⁶. But obviously the question does arise for the kind of subjectivist that Himma is considering at this point in his argument: a subjectivist who maintains that moral facts are determined in some complex way by people's beliefs, desires, behaviors, and practices. As noted, if the relevant kind of determination were not rational determination, Him-

5 See GREENBERG, 2004/2006, 231-234; 2006a, 268-271; 2006b, 115-118.

6 See GREENBERG, 2006b, 130-136, especially pp. 134-136.

ma's argument against practice-based subjectivist theories would not go through. In order to show that rational determination was the relevant kind of determination, one would have to make a meta-ethical argument. (The considerations that I appeal to in the legal case to support the claim that the determination of legal facts is rational determination obviously would not be relevant in the moral case)⁷. If one were successful, one could indeed launch an argument, parallel to my legal argument, to show that moral facts could not be determined by practices alone. But one would have relied on a meta-ethical argument.

It is worth noting that the subjectivist theorist would likely not accept Himma's assumption that the relevant kind of determination was rational determination. And the kinds of considerations that I adduced in my paper to support the claim that the determination relation in law is rational determination seem absent here. For example, it is no part of our ordinary moral practice to explain why particular moral requirements obtain in terms of underlying decisions that are their determinants. Rather, we explain moral requirements in moral terms⁸.

Himma also claims that my argument can be used to derive objectivism in meta-ethics from the possibility of rules of language. I will briefly sketch why he is mistaken.

Himma envisages an argument with respect to language that is parallel to my argument with respect to law. The first premise would be that the semantics and syntax of a natural language, say English, are determined in part by practices – in particular by the practices of using the words. Let's grant this. The second premise, which we can also grant, is that there are many rules of syntax and semantics.

Himma claims that my arguments regarding rational determination are not in any way special to law. So, he urges, if they show that the content of the law is rationally determined, then they show that semantic and syntactic rules are as well.

But the claim on which this inference is based is a mistake. As described in HFML, the reasons for thinking that determination in the legal domain is rational determination are very much specific to law. To take one example, I rely on the fact that it is part of the practice of law that a judge

7 See GREENBERG, 2004/2006, pp. 237-240.

8 See GREENBERG, 2006b, pp. 134-135; cf. Greenberg 2004/2006, pp. 238-240.

or lawyer who makes a claim about what the law is must give reasons that support that claim⁹. There is no parallel in the case of language. In the normal case, it is infants who work out what the rules of syntax and semantics are from the practices. And no one challenges them to give reasons. Not only is it no part of the practice that one is required to explain why the determinants of the linguistic rules make the rules what they are, competent speakers of the language in general cannot give such explanations. Indeed, the relation between the semantics and the determining facts – the meta-semantics – is the subject of great controversy among philosophers of language and mind.

It might be objected that if the connection between the practices and the rules of language were not rationally intelligible, we would never be able to work out what the rules were. This objection rests on a mistake, however. It may be, as Chomsky has famously argued, that infants are able to work out what the rules of the language are only because of hard-wired species-specific mechanisms that exclude many possibilities that are not ruled out by the data. Even if this view is correct, it remains possible that the total set of practices provides reasons sufficient to rule out all possible incorrect candidates. But there is no force to the objection that linguistic rules must be rationally determined in order for infants to be able to learn them¹⁰.

Even if Himma could show that the rules of language were rationally determined, what would follow by my argument is merely that something independent of the practices must play a role in the determination of those rules. We would then, as in the case of law, have to consider potential candidates for this role. In the case of language, moral facts would be very poor candidates. For the subject matter is not the subject matter of morality at all. It is not even clear that normative facts of a different sort – e.g., semantic normative facts, if there are such things – would be the best candidates. For, in the case of language, there might be non-normative conceptual truths that would do the needed work.

I have now argued against both of Himma's reasons why subjectivist theories are ruled out by my argument. (He gives a third reason that I will not address because it is directed only at what he himself agrees is a very implausible form of subjectivism.)

9 See GREENBERG, 2004/2006, 2p. 39.

10 See GREENBERG, 2004/2006, 238 n. 25; see also GREENBERG, 2006b, 135-136.

3. Error theories and non-cognitivist theories

Himma points out that, in HFML, I write that by “normative facts” I mean simply true normative propositions. Himma claims that this understanding of normative facts rules out both error theories like J.L. Mackie’s¹¹, according to which there are no true moral propositions and non-cognitivist theories according to which there are no moral propositions.

When I say, in HFML, that normative facts are true normative propositions, I intend merely to offer a common, plausible, and relatively metaphysically non-committal account of value facts. Perhaps I could find an even more neutral formulation, but it’s difficult to find a way to write that is neutral with respect to every possible philosophical view. I don’t think that anything in my argument depends on the understanding of value facts as true propositions.

Himma assumes that the truth of non-cognitivist theories is inconsistent with the existence of the moral facts that I need. I want to make a point about this assumption that is roughly parallel to the point that I made above about Himma’s argument that subjectivist theories cannot account for normativity. One approach that is common among contemporary non-cognitivist theories is try to account for moral discourse in a non-cognitivist way. Unlike old-fashioned emotivism, such theories do not claim that the surface of moral discourse is mistaken. Rather, they try to find a non-cognitivist account of the semantics of that discourse. For example, they try to meet the Frege-Geach challenge to make sense of embedded uses of moral claims. Such theories accept that it is true – even a fact – that, e.g., democracy supports interpreting statutes according to their plain meaning. It’s just that they have a non-cognitivist account of what that means.

If a sophisticated non-cognitivist theory is otherwise successful in its ambition to account for moral discourse, it may well be able to provide what my argument needs. A sophisticated non-cognitivist theory will have to have the resources to explain how moral claims can function in arguments: how they can entail conclusions, how they can be antecedents or consequents of conditionals, and so on. A theory that has such resources ought to be able to account for the way in which democracy and fairness can explain the relevance of law practices to the content of the law.

11 MACKIE, 1977.

B. The existence of moral facts presupposed

I have argued that it is not true that my argument, if successful, would establish that there are objective moral facts. Its conclusion is neutral as to the metaphysics of moral facts.

I will now show that my argument does not establish even that there are moral facts at all. Therefore, it does not rule out old-fashioned non-cognitivism or error theories that maintain that all moral claims are false.

In HFML, after arguing that law practices cannot themselves rationally determine the law, I argue that normative facts are the best candidates to provide what is missing. This stage of the argument depends on considering and eliminating plausible candidates. For example, I consider and reject the possibility that there is a non-normative conceptual truth about law that might do the necessary work. Moral facts – for example, about democracy and fairness – seem to be the best candidates. But this suggestion obviously depends on the plausibility of the view that there are such facts about democracy, fairness, and the like. (Although I use the term “facts” here and in what follows, talk of moral facts should be consistent with the kind of sophisticated contemporary non-cognitivist account of moral facts I mentioned above, if such an account were otherwise successful. Thus, in relying on the existence of relevant moral facts, I’m not relying on anything that a sophisticated non-cognitivist need reject.)

My legal positivist opponents and I largely agree that there are some things that democracy supports and other things that fairness supports (though we may disagree about which things they support) – the obtaining of such facts about democracy and fairness is not what is at issue between us. Therefore, it is not question-begging for me to appeal to such facts.

I want to conclude by agreeing with Himma to a limited extent. Although my argument does not demonstrate that there are moral facts, by showing that moral facts would fill a certain role and by ruling out other potential candidates to fill that role, my argument could add some support to one’s belief in the existence of moral facts. How much my argument will make it rational to increase your confidence in the existence of moral facts will depend on your prior confidence that there are legal facts compared with your prior confidence that there are moral facts. For example, if you are highly confident that there are both moral facts and legal facts – the situation with most of my interlocutors – your confidence that there are

moral facts might very slightly increase. This is unsurprising, for if my argument is successful it shows that there's a way in which your beliefs in the existence of legal and moral facts cohere with and therefore support each other.

Now the more my argument relies on the existence of moral facts, the less effective it will be against someone who thinks there are no moral facts. But that should have been obvious from the start. Someone who doesn't believe that there are any truths about what democracy supports obviously is going to be hard to convince that such truths play a role in determining the content of the law.

C. References

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