Legal Theory, **10** (2004), 199–214. Printed in the United States of America
Published by Cambridge University Press 0361-6843/04 $12.00 + 00

ON THE NORMATIVE SIGNIFICANCE OF BRUTE FACTS

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INTRODUCTION

Sometimes there are *reasons* for us to think or act in certain ways. We pay our taxes, we show up on time for our classes, we refuse to assent to claims that we recognize to be inconsistent, and we refrain from wanton violence, and we do each of these things because—we assume—there are reasons for us to do them. I will express the general point by saying that there are *norms* that apply to us, and to our thought and action. For a norm to apply to a person is for there to be a reason for that person to think or act in a particular way—the way indicated by the norm. Perhaps this reason is one that the person herself does not in any way recognize or acknowledge. But the reason itself—whether or not it is recognized or acknowledged by the person for whom it purports to be a reason—is what I call a "norm." For instance, I might not recognize or acknowledge various norms concerning theft. But those norms still exist, and they still apply to me; there is a reason for me not to steal, whether or not I recognize or acknowledge that reason. My failure to recognize or acknowledge such reasons does not make them any less real or any less applicable to me.

The fact that a norm applies to someone—the fact that there is a reason for someone to think or act in a certain way—is what I will call a "normative fact." All other facts I will call "nonnormative." This distinction between normative and nonnormative facts has often been thought to have great metaphysical importance. In order to explain why it has been thought to have this importance, I should first draw a different distinction between two mutually exclusive and jointly exhaustive kinds of facts.[1] There are the "evaluative" facts, which are facts about what is good, what is bad, what is

* I am grateful to Mark Greenberg, Doug Lavin, Eric Marcus, Ori Simchen, and two anonymous referees for *Legal Theory* for helpful discussion of an earlier draft of this paper and for much useful discussion of the relevant issues. I am also grateful to Enrique Villanueva for organizing the very useful conference for which this piece was written.

1. I hope and believe that all this talk of different "kinds of fact" is neutral with respect to various metaphysical disputes concerning facts. In any case, I seek a neutral formulation, and invite the reader to suggest one if she takes the formulation in the text to be non-neutral.

better than what, what is worse that what, and so on. All other facts are "nonevaluative." So there are normative facts and nonnormative facts (that is one exclusive and exhaustive way of dividing up the facts), and there are evaluative facts and nonevaluative facts (that is another exclusive and exhaustive way of dividing up the facts). For present purposes, we need not take a stand on the issue of how the first pair of categories is related to the second pair of categories.

Now, philosophers have often been inclined to think of the world as consisting fundamentally of nothing more than the nonnormative, nonevaluative facts.[2] I will use Anscombe's phrase "brute facts" to denote all and only those facts that are both nonnormative and nonevaluative.[3] Using this terminology, I will say that philosophers have often struggled to understand how the brute facts can somehow add up to normative facts of various kinds. How, they have wondered, can the brute facts make it the case that we have reason to think or act in particular ways? Typically, philosophical attempts to address this question lead to one of three results: reductionism, eliminativism, or emergentism. Reductionists attempt to show how a conglomeration of brute facts can somehow add up to a normative fact of some kind. Thus, we might try to reduce moral facts to facts about what behavior would maximize utility or fitness, epistemic facts to facts about the reliability of our belief-forming processes, semantic facts to facts about the covariation of neural events and external events, and so on. Eliminativists claim that such reduction is impossible and so conclude that there really are no facts of the normative kind in question (i.e., no moral facts, no epistemic facts, no semantic facts). And finally, emergentists claim that reduction is impossible, and so conclude that the world contains facts over and above the brute facts.

In his paper "How Facts Make Law,"[4] Mark Greenberg offers an elegant and apparently compelling argument for emergentism about legal normative facts, or what I will call "legal emergentism." In other words, he argues that facts about what we have legal reason to do or not to do cannot be reduced entirely to the brute facts. This is not to suggest that Greenberg thinks that the legal normative facts are metaphysically basic or primitive; he explicitly denies this. Rather, what Greenberg claims is that, while the legal normative facts might be reduced to some other facts, they cannot be reduced entirely to the brute facts. According to Greenberg, unless there

2. I will not attempt to document or explain this extremely broad historical fact. I refer the interested reader to the classic work on this topic E.A. BURTT, THE METAPHYSICAL FOUNDATIONS OF MODERN PHYSICAL SCIENCE (1924).

3. G.E.M. Anscombe, *On Brute Facts*, 18 ANALYSIS 69–72 (1958). As Anscombe uses the term, a fact A is "brute" only relative to another fact B. She leaves it open whether there are facts that are brute relative to any other facts. She also leaves it open whether the relative bruteness of a fact has to do with its being normative or nonnormative, evaluative or nonevaluative. So I am not sure that my use of the term "brute fact" bears any significant resemblance to her use. Nonetheless, the term strikes me as appropriately evocative.

4. Mark Greenberg, *How Facts Make Law*, 10 LEGAL THEORY 157–198 (2004).

were some evaluative facts, there could be no legal normative facts. In this sense, then, Greenberg's metaphysics includes more than simply the brute facts. It also includes the evaluative facts, and it must, for Greenberg, include the evaluative facts if it is to include the legal normative facts. This is what I am calling his "legal emergentism."

Greenberg's argument for legal emergentism may have very radical implications, for it suggests a more general argument for emergentism concerning all normative facts, or what I will call "normative emergentism." If there is a sound, general argument for normative emergentism, that would be news of the very greatest importance to philosophy, for we would then know that the sparse metaphysical picture that includes nothing more than the brute facts leaves out something. If Greenberg's argument really does give us a way to show something of this sort, then we should find this out. In this paper, I intend to find out. Specifically, I will do two things. First, I will argue that the generalization of Greenberg's argument is not sound and so does not establish normative emergentism. But the flaw in the generalized version of Greenberg's argument reveals something important about his local argument for legal emergentism. And this brings me to the second goal of this paper, which is to show that the compellingness of Greenberg's local argument for legal emergentism depends upon contingent, empirical facts of legal history. If Greenberg's argument establishes its conclusion, then the fact that it establishes its conclusion cannot be known *a priori*.

Before I begin, I must issue a brief warning about terminology. As I use the term "norm," a norm is a reason to think or act in some way. But many philosophers—especially philosophers of law—use the term "norm" differently, so that, from the proposition that there is a norm that we V, it does not immediately follow that there is a reason for us (or anyone) to V.[5] Such philosophers might use the term "norm" to denote a certain class of actual beliefs, or statements, or sentences, or intentions, or practices. They might then sensibly ask whether there is any reason to do what certain legal norms enjoin us to do. Now, I use the term "norm" in a different sense than do these philosophers; I cannot sensibly ask whether there is any reason to do what a legal norm enjoins us to do; if there is a norm that enjoins us to do it, then it immediately follows—on my use of "norm"—that there is reason to do it. This may strike some readers as perverse stipulation on my part, but by way of excuse I note that there is no way to avoid some stipulation in the use of the term "norm"; it is a term of art, and different authors use it to mean different things. Furthermore, in using the term as I do, I follow what I take to be Greenberg's usage. Since he is my chief target in this paper, it seems to me sensible to follow his usage.

5. This is true of Hart, Finnis, and Raz, among others.

GREENBERG'S ARGUMENT FOR LEGAL EMERGENTISM

In this section, I will state Greenberg's argument for legal emergentism. First, I will briefly summarize Greenberg's explanations of the terminology that he uses in his argument: "Law practices" are things that legislators, judges, and other people do, as well as other legally relevant historical events that can be fully characterized in brute terms. (I leave aside the difficult issue of what's involved in being able to understand a historical event "fully"; however we end up settling that issue, Greenberg can then define "law practices" in the appropriate terms.) "Legal content" is the normative content of the law, that is what is legally forbidden or required or more generally, what legal norms there are.

I should note that Greenberg distinguishes legal content from semantic content: the former is what is forbidden or required by a law, whereas the latter is what is meant by a particular sentence or thought. Using this distinction between legal content and semantic content, we can say that it is open question—and one that we do not need to discuss here—whether the legal content of a particular law is identical to the semantic content of a sentence or thought that expresses, or lays down, that law.

"Legal propositions" are propositions articulating legal content. If the entire legal content of a particular legal system were articulated in legal propositions, then the semantic content of those legal propositions would be identical to the entire legal content of that particular system. In fact though, it is possible for some of the legal content of a particular legal system to remain unarticulated. From its being the law that P, it does not immediately follow that anyone has articulated any legal proposition that means that P.[6]

Finally, to say that one thing, A, "rationally determines" another thing, B, is to say that A makes it the case that B, and makes it the case in a way that makes it at least somewhat *reasonable* for it to be the case that B. To illustrate: there is nothing reasonable or unreasonable about the fact that water boils at 212 degrees Fahrenheit, and so whatever makes it the case that water boils at 212 degrees Fahrenheit does not rationally determine that fact. Nothing rationally determines the fact that water boils at 212 degrees Fahrenheit. In contrast, it is at least somewhat reasonable for the law to require that people who are not convicted of crimes not receive punishment. It is not just a fact that the law requires this, but it is a reasonable fact. Thus, whatever makes it the case that the law requires this *rationally determines* that the law requires it. These examples should provide one with a general sense of how Greenberg is using the expression "rationally determine." Admittedly, I have not given a rigorous account of this notion, but then Greenberg does not offer a rigorous account either, and I am following his practice for now in order to

6. I am grateful to two referees for *Legal Theory* for pressing me to clarify this point.

state his argument. It will turn out that his argument is subject to criticism no matter precisely how this notion is explicated.

Using the terminology above then, here is Greenberg's argument:

1. Premise D: In the legal system under consideration, there is a substantial body of determinate legal content.
2. Premise L: The law practices in part determine the content of the law.
3. The law practices can determine the content of the law only by *rationally* determining it.
4. The law practices rationally determine the content of the law. (From 2, 3)
5. In a legal system with a large body of determinate legal propositions, the law practices by themselves cannot fully determine how they rationally determine the content of the law.
6. Something else besides the law practices must help to determine how the law practices rationally determine the content of the law. (From 1, 4, 5)
7. Evaluative facts are the only things that can play the role of helping to determine how the law practices rationally determine the content of the law.
8. Evaluative facts enter into rationally determining the content of the law in the legal system under consideration. (From 6, 7)

If this argument is sound, then all attempts to reduce legal content to the history of law practices, or to the semantic contents of written and spoken texts, or to what judges had for breakfast, must fail. *A fortiori*, all versions of legal positivism and legal realism fail. None of the brute facts can, by themselves, fully determine the content of the law. That is because they can enter into determining the content of the law only by rationally determining it. But these facts cannot fully determine their own rational significance. That is, they cannot fully determine *the way in which* they rationally determine the content of the law. And that would be true no matter how broadly we extend this range of facts, so long as they exclude the evaluative facts and the facts about legal content. That totality of facts still could not fully determine its own rational significance for the content of the law. And so we would, according to Greenberg, need to add something to it in order fully to determine the content of the law.

Here is one intuitive way to think about Greenberg's thesis: The law requires us to act in all sorts of determinate ways, and it forbids us to act in all sorts of determinate ways. But there must be some reason for the law to require some things and forbid other things—the law's requirements, unlike the boiling point of water, must be at least somewhat reasonable (at least in any legal system that has any normative force for us), and something must make them so. The brute facts by themselves cannot rationally determine that the law issues these determinate requirements. The brute facts cannot, on their own, makes the legal requirements either reasonable or unreasonable. So there must be something over and above the brute facts that rationally determines that the law issues these determinate requirements. And this extra factor can be nothing other than the value facts. Greenberg

thus argues that no version of legal reductionism can be right. If we grant premise 2, and so reject legal eliminativism, Greenberg makes it look as if we must accept legal emergentism.

THE GENERALIZATION OF GREENBERG'S ARGUMENT

Part of what makes Greenberg's argument so important, even outside the philosophy of law, is that it suggests a more general argument concerning all normative systems of any interest whatsoever—moral, epistemic, semantic, and so on. To see this, let us consider whether the premises of Greenberg's argument for legal emergentism apply more generally.

Premise 1 says that in the legal system under consideration, there is a substantial body of determinate legal content. But something analogous will be true of any interesting system of norms. For instance, any interesting moral code will include a large body of determinate moral requirements. Any interesting methodology will include a large body of rules for theory-choice. Any interesting linguistic system will include a large body of semantic rules. And so on. So it seems that we can generalize premise 1 as follows:

> Premise 1′: In the normative system under consideration, there is a substantial body of determinate normative content.

Premise 2 of Greenberg's argument says that certain brute facts—here, the law practices—in part determine the content of the law. But again, it seems that something analogous will be true of any interesting system of norms. For instance, the normative content of a moral code depends to some extent upon various brute facts about the creatures to which the code applies (e.g. that they are mortal, that they are capable of suffering pain, that they can communicate, they are susceptible to certain kinds of temptation, and so on). The normative content of a particular scientific methodology depends to some extent upon various brute facts about the theoretical practice and practitioners to which that methodology applies (e.g., that they have certain sense organs and not others, that they are capable of making certain sorts of calculations easily but others only with great difficulty, that their sense organs can be trained to respond reliably to certain ranges of energies and not others, and so on). And the normative content of a particular linguistic system depends to some extent upon various brute facts about the creatures that employ that linguistic system (e.g. that they have a certain universal grammar hard wired, that they have learned to speak an SVO language instead of an SOV language, that they have learned to pronounce certain phonemic combination and not others, and so on). So it seems that we can generalize premise 2 as follows:

> Premise 2′: The brute facts in part determine the content of the norms.

Now it may be objected against premise 2′ that there are some normative facts that are metaphysically basic; they do not depend on any contingent features of the creatures to whom they apply. For instance, one might think that the categorical imperative, or *modus ponens*, is such a rule. I will not contest such claims here (even though I do think that they are false).[7] But even if they are true, we can still accept that premise 2′ holds for all normative systems of which premise 1′ is true, that is all normative systems that generate a substantial body of determinate norms. The categorical imperative does not generate many determinate norms all by itself. It can generate many determinate norms only when it is conjoined with lots of contingent facts about the features of the actual agents to whom it applies. The same holds true of any other allegedly necessary and basic normative fact. So, even if there are necessary and basic normative facts, this does not threaten the substance of premise 2′.

Premise 3 of Greenberg's argument says that the law practices can determine the content of the law only by *rationally* determining it. Recall that the phrase "rationally determine" is here being used to signify a metaphysical relation: X rationally determines Y just in case X makes Y obtain and also makes it reasonable for Y to obtain. In this sense, nothing rationally determines that water boils at 212 degrees Fahrenheit; it just does boil at that temperature. But something does rationally determine that the law requires that people not convicted of a crime not receive punishment. Instead of using Greenberg's phrase "rationally determine" to designate this metaphysical relation, we might equally well use the phrase "make it reasonable."

Now, we might worry that these examples do not give us a firm grasp on the metaphysical notion of "rational determination." Greenberg tells us a bit more about this notion, at least in its application to the law. Here is what he says:

> The basic idea is that the content of the law is in principle accessible to a rational creature who is aware of the relevant law practices. It is not possible that the truth of a legal proposition could simply be opaque, in the sense that there would be no possibility of seeing its truth to be an intelligible consequence of the law practices. In other words, that the law practices support *these* legal propositions over all others is always a matter of *reasons*—where reasons are considerations in principle intelligible to rational creatures.

I am eventually going to raise a question about how to interpret this passage. But for now, I will allow the passage to stand without comment, and I will ask whether something analogous to this passage could be said about the determination of norms in other kinds of normative system. For instance,

7. Briefly, the categorical imperative is not a reason for anyone to do anything; rather it is a constraint upon something's being a good practical reason. Again, *modus ponens* is not a reason for anyone to think anything but, in tandem with the laws of logic, places a constraint upon what it is for something to be a good theoretical reason.

do the brute facts that enter into determining the norms of a moral code make it reasonable for the norms to be what they are? Do the brute facts that enter into determining the norms of a particular methodology make it reasonable for the norms to be what they are? Do the brute facts that enter into determining the semantic norms of a particular linguistic system make it reasonable for the norms to be what they are? I think it is not entirely clear how to answer these questions. But I shall now argue that there is at least some plausibility in answering each of them affirmatively.

Here is my argument: If the brute facts do not make it reasonable for the norms to be what they are, then either nothing makes it reasonable for the norms to be what they are, or else the reason for the norms to be what they are includes something independent of the brute facts. Let us consider what follows from each of these two hypotheses.

If the first hypothesis is right, then nothing makes it reasonable for the norms to be what they are. In that case, it is arbitrary that the norms are what they are, that is there is nothing reasonable about the norms being what they are rather than some other way; they just are that way. But if there is nothing reasonable about the norms being what they are, then those norms are like the rules of a game that there is no reason to play, or the rules of a practice that there is no reason to participate in. That is not merely to say that some particular person *has* no reason to follow those norms. It is rather to say that *there is* no reason to follow those norms. But recall that a norm, as I am using the term here, is just a reason: if there is a norm that says to think or act in a certain way, then that is just for there to be a reason to think or act in that way. If there is no reason to follow a norm, then it is not really a norm at all. But by hypothesis, we are talking about *norms*. Therefore, the first hypothesis cannot be right, and so something must make it reasonable — at least more or less reasonable—for the norms to be what they are. There cannot be norms that are such that nothing makes it reasonable for them to be what they are.[8]

This line of reasoning will give rise to two objections: first, it may be objected that it generates an infinite regress of norms. But this is not so; we can avoid the infinite regress either by appeal to a big circle of norms, or by appeal to some foundation that makes it reasonable for the norms to be as they are but that is not itself a norm (i.e., is not itself a reason for thinking or acting in any particular way). We need not choose between these strategies here.

Second, it might be objected that, many of the norms that actually do apply to us *are* arbitrary but are, for all that, still norms. For instance, it may be said, we have reason to follow the particular linguistic norms of our language community, even though those norms are arbitrary. Again, the

8. I remind the reader that the term "norm" is used in different ways in the literature, and on some of these uses, the *reductio* argument that I have just given will seem to be a *non sequitur*. It is important, then, in going through this argument, to recall that, as I use the term "norm," it is just a reason to think or act in a certain way.

law gives us reason to stay within the speed limit or to drive on a particular side of the road, even though that is arbitrary as well. The problem with this objection is that these are not cases of there being reason to follow arbitrary norms. Rather, they are cases in which the specific norms that there is reason to follow are determined by more general non-arbitrary norms, together with various nonnormative contingencies.

For instance, there is a general norm to the effect that we should speak in such a way as to make ourselves understood. But this general norm makes it reasonable for us to comply with the more specific norms of our linguistic community, whatever those happen to be. Again, there is a general norm to the effect that one should promote social coordination. This general norm makes it reasonable for us to comply with the laws of our land, whatever those happen to be (at least within limits). In each of these cases, one has a reason to do some specific thing by virtue of one's reason to do some more general thing, along with the contingencies of one's particular situation. These are not cases of having a reason to do something for no reason at all. And so these cases do not invalidate the principle used in the preceding argument: if nothing makes it reasonable for a norm to be as it is, then there is no reason to follow the norm, and so it is not really a norm at all.

I conclude that the first hypothesis cannot be right. If the second hypothesis is right, then the reason for the norms to be what they are is independent of the brute facts that determine those norms. In that case, it is arbitrary that the norms are binding on all and only those creatures of which the determining brute facts obtain. For instance, it is arbitrary that the norms are binding on mortal creatures who are capable of feeling pain, rather than on angels. And in that case, again there is nothing that makes the norms in question binding on *creatures like us*. And that is just to say that, while the norms might really be norms for some creatures, they are not really *norms for us*. There is nothing about us that engages the binding power of the norms. They are like rules of a game that *creatures like us* have no reason to play.

On the strength of these considerations, I provisionally conclude that neither the first nor the second hypothesis can be right. (I will raise a question about this conclusion below, when I reconsider the question of what it is for one thing to "rationally determine" another thing.) It seems then, that for any normative system of which premises 1′ and 2′ are true (i.e., any normative system that has determinate norms that are binding on us), the brute facts that determine the norms of that system must rationally determine those norms to be what they are. If the preceding line of thought is correct (and, as I said, I will re-examine it below), then we can generalize premise 3 as follows:

> Premise 3′: The brute facts can determine the content of the norms only by *rationally* determining it.

Premise 5 of Greenberg's argument says that, in a legal system with a large body of determinate legal propositions, the law practices by themselves cannot fully determine how they rationally determine the content of the law. There are many possible mappings from law practices to legal content, and the law practices, according to Greenberg, cannot themselves determine which possible mapping is the correct one. That is why other facts, besides the law practices, are needed to determine the correct mapping. Now, as far as I can see, whether or not premise 5 is true depends upon nothing that is peculiar to *legal* normativity. Whatever it is that makes it the case that law practices cannot determine the correct mapping from themselves onto the facts of legal content, that same thing makes it the case that brute facts cannot determine the correct mapping from themselves onto the normative facts. If there is supposed to be something special about the determination of legal norms in this regard, it is not at all clear what it could be. This suggests that, if premise 5 is true, then so is

> Premise 5′: In a normative system with a large body of determinate norms, the brute facts by themselves cannot fully determine how they rationally determine the content of the norms.

Finally, premise 7 says that evaluative facts are the only things that can play the role of helping to determine how the law practices rationally determine the content of the law. Greenberg explains this point in the following passage:

> In order for practices to yield determinate legal requirements, it has to be the case that there are truths about which models are better than others, independently of how much the models are supported by law practices. Since practices must rationally determine the content of the law, truths about which models are better than others cannot simply be brute; there have to be reasons that favor some models over others.

The reason that favors some models over others includes facts about which models are *better*. And these are evaluative facts. But for the same reason that evaluative facts are needed to determine fully the correct mapping from law practices onto legal norms, so too, it seems, evaluative facts will be needed to determine fully the correct mapping from brute facts onto other norms generally. If premise 7 is true, then so is

> Premise 7′: Evaluative facts are the only things that can play the role of helping to determine how the brute facts rationally determine the content of the norms.

With all this in mind, we can now consider the following generalization of Greenberg's argument:

1′. In the normative system under consideration, there is a substantial body of determinate normative content.
2′. The brute facts in part determine the content of the norms.
3′. The brute facts can determine the content of the norms only by *rationally* determining it.
4′. The brute facts rationally determine the content of the norms. (From 2′, 3′)
5′. In a normative system with a large body of determinate norms, the brute facts by themselves cannot fully determine how they rationally determine the content of the norms.
6′. Something else besides the brute facts must help to determine how the brute facts rationally determine the content of the norms. (From 1′, 4′, 5′)
7′. Evaluative facts are the only things that can play the role of helping to determine how the brute facts rationally determine the content of the norms.
8′. Evaluative facts enter into rationally determining the content of the norms in the normative system under consideration. (From 6′, 7′)

By generalizing Greenberg's argument, we've constructed an argument for normative emergentism. The argument assumes (premise 2′) that normative eliminativism is false, but from this assumption it argues against normative reductionism.

WHAT'S WRONG WITH THIS GENERAL ARGUMENT FOR NORMATIVE EMERGENTISM?

I will now argue that this general argument for normative emergentism is not compelling, for either premise 5′ is false or else we have no reason to accept premise 3′. I will begin by leveling an objection against premise 5′, and then I will argue that the only way to save premise 5′ from this objection is to interpret the notion of "rational determination" in such a way that we have no reason to accept premise 3′.

Premise 5′ says that in a normative system with a large body of determinate norms, the brute facts by themselves cannot fully determine how it is that they rationally determine the norms—that is, they cannot fully determine the correct mapping from themselves onto the norms. But let us consider whether or not this general claim is borne out by cases. Of course, any discussion of such cases—any discussion of why we have reason to do one thing or another—is bound to be controversial. I cannot hope to find a case that will uncontroversially tell for or against the generalization of Greenberg's argument. But we can test that argument against what seem to us to be plausible views concerning familiar examples of normativity. To this end, I will now consider, all too briefly, the normativity of promising.

Suppose that Alice mowed the lawn because John promised to pay her four hundred dollars if she mowed the lawn. Now, what makes it wrong for John to break his promise? It seems to me that any plausible answer to this question will involve the following claim: what makes it wrong for John

to break his promise in this case is that it would be a case of breaking a promise, and it is generally wrong to break promises. That is an essential feature of the practice of promising: making a promise places one under an obligation to keep it (except in very special circumstances). The practice of promising essentially involves norms that are binding on all those who participate in that practice, and these norms include the norm that it is wrong to break a promise.

When I say that the practice of promising "essentially" involves these norms, I mean that it is not just true by convention that the practice of promising involves the norm that it is wrong to break one's promise. For instance, it is not just that we happen to use the word "promising" to designate practices that have this feature. Rather, the practice of promising essentially involves the norm in question because there is no way for the practice of promising to exist over time without that norm. If people were generally permitted to break their promises, then people would know (or soon come to know) this fact, and so would not expect other people to keep their promises, and so would tend not to act on any such expectation. Everyone would soon come to know all of this, and so no one would continue to expect her own promises to have any impact. Each person would thereby lose any motivation to make promises. In short, the institution of promising would quickly cease to exist if people were generally permitted to break their promises. For there to be an institution of promising, it must be impermissible—and known to be impermissible—for people to break their promises. Thus, it is an essential feature of the practice of promising that it involves the norm that it is wrong to break your promises.[9]

But this just pushes our original question back a step. Now, instead of asking why John must keep his promise, we can ask why John has reason to participate in this essentially norm-governed practice of promising. And there could be any number of answers to this question. For instance, John might have an interest in having his lawn mowed, and he recognizes that the only way that he can get his lawn mowed is by promising some able-bodied person that he will pay them if they mow it. Or John might, like some children, simply enjoy participating in a social practice that affords him opportunities for market interactions with others. But whatever the story, as long as John has some reason to participate in the practice of promising, he has reason to comply with the norms of that practice, and so they are norms for him.

9. Again, although this point about promising seems very plausible to me, I recognize that it is not uncontroversial. (For an instance of an opposing view, see Pall Ardal, *And That's a Promise*, 18 PHIL. Q. 225–237 [1968].) I do not know of any examples that will serve my dialectical purposes at this point and that are entirely uncontroversial. But I hope and believe that, in order to motivate the present dilemma to the generalization of Greenberg's argument, I need not rely on there being any uncontroversial examples of norms fully determined by the brute facts. It should suffice if I can display the epistemic possibility that there are such examples.

Now let us consider whether I have indeed explained what "rationally determines"—in Greenberg's sense—that it is wrong for John to break his promise. We can assess this issue by considering what it is for a normative fact to be "rationally determined," on Greenberg's use of that phrase. Paraphrasing the passage from Greenberg quoted above, we can say this: for norms to be rationally determined by something is for the contents of those norms to be in principle accessible to a rational creature who is aware of the relevant determinant of the norms. It is not possible that the obtaining of those normative facts could simply be opaque, in the sense that there would be no possibility of seeing them to be intelligible consequences of the relevant brute determinants. In other words, that the relevant brute determinants support these normative propositions over all others is always a matter of considerations in principle intelligible to rational creatures.

Now, it seems that, in the story that I have told about promising, I have shown how the wrongness of John's breaking his promise follows from the general prohibition against breaking promises. But that general prohibition is an intelligible consequence of various brute facts about the practice of promising. And John's reasons for engaging in that practice are themselves intelligible consequences of various brute facts about John (e.g., what he likes and does not like). Thus, it seems, I have articulated the reason why it is wrong for John to break his promise. I have explained what makes it wrong for John to break his promise, and my explanation adverts solely to brute facts about the social function of the institution of promising, and about John. If my explanation is correct, then premise 5′ is false. (And if you disagree with my explanation of what makes it wrong for John to break his promise, then I invite you to consider whether there is not another case that would falsify premise 5′.)

Of course this is not because of something special about promising. Whether or not my story about promising is correct, it seems that many other norms may be equally susceptible of explanation in terms of brute facts. In order to rescue premise 5′ from all such apparent counterexamples, the proponent of the argument above seems to have only one way out, and that is to claim that these explanations are not explanations of the right kind at all—they do not explain what *makes it reasonable* for the norms to be what they are.

Now, I am not sure how strong a case can be made for or against this way of avoiding the objection that I have just leveled, and that is because I am not sure exactly what is involved in the metaphysical constitutive relation that Greenberg uses the term "rational determination" to designate. What exactly is involved in the relation between normative facts and their brute determinants being "a matter of reasons" or "in principle intelligible to a rational creature"? Since I am not sure how to answer these questions, I will not attempt to argue against this proposed way of avoiding my objection to premise 5′.

Instead, I will point out that it does the proponent of the argument above no good. For if my aforestated explanation of why it is wrong to break a promise does not "rationally determine" (in the relevant sense) the wrongness of breaking a promise, then I do not see why we should think that anything else "rationally determines" it (in the relevant sense). In other words, if I have not set out what rationally determines the wrongness of breaking a promise, then why should we think that there is any reason (in the relevant metaphysical sense) for it is being wrong to break a promise? Why should we not just think that the wrongness of breaking a promise is a metaphysically basic fact of the world? Or it obtains not by virtue of something else rationally determining it, but rather by virtue of something making it obtain, in some nonrational way?

Now recall that we have already considered a plausible argument against these apparent possibilities: if there is no reason for the norms to be as they are, then we have no reason to comply with those norms, and so they are not really norms. Now, I do find something plausible about this argument, when the notion of "reason" that it employs is broad enough to include the kind of reason that I gave above for why it is wrong to break a promise. But if the notion of "reason" is interpreted more narrowly than that, then the argument seems to me to lose its plausibility. Why should there be a "reason"—in this special, narrow sense—for why it is wrong to break a promise? If there is no "reason," in this special narrow sense, for why it is wrong to break a promise, then how does it follow that we have no "reason," in a broad, ordinary sense, for not breaking our promises? Pending an answer to this question, there seems to be nothing to favor premise 3′.

In sum, if we do not grant the argument against premise 5′, then we have no reason to believe premise 3′. Either way, the general argument above for normative emergentism is not compelling. Maybe normative emergentism is true, but its truth is not proven by the general argument constructed in the previous section. Now what, if anything, does this show about Greenberg's local argument for legal emergentism?

THE CONSEQUENCES FOR GREENBERG'S LOCAL ARGUMENT FOR LEGAL EMERGENTISM

In the preceding section, I argued that the generalization of Greenberg's argument is not compelling: either premise 5′ is false (for the brute facts do fully rationally determine that John must pay Alice four hundred dollars), or else we have no reason to believe premise 3′ (for we do not know enough about the rational determination relation). I will now argue that an analogous, but somewhat weaker, conclusion is true of Greenberg's local argument for legal emergentism: either premise 5 is *subject to historical falsification* (for all we know *a priori*, the law practices may be such as to fully determine their own rational significance), or else we have no reason to believe

premise 3 (for we do not know enough about the rational determination relation).

Recall that premise 5 says that in a legal system with a large body of determinate legal propositions, the law practices by themselves cannot fully determine how it is that they rationally determine the content of the law. Now, in defending this premise, Greenberg considers a foundationalist challenge to it and a coherentist challenge to it. I would like to focus on the foundationalist challenge, and Greenberg's response to it. Here is the relevant passage:

> If practices are to determine which model is correct, there are two possibilities. First, a privileged foundational practice (or set of foundational practices) could determine the role of other practices. This possibility encounters the problem of how practices themselves can determine which practices are foundational. . . . A putatively foundational practice cannot non-question-beggingly provide the reason that it is foundational.

Now, I would like to ask why a putatively foundational decision cannot rationally determine that it is foundational. Suppose that, when the framers drafted the American Constitution, they had included a clause that stated explicitly and precisely how the content of the law was to depend upon the law practices. Couldn't their decision to include this clause be a foundational decision and rationally determine that it is foundational?

Perhaps Greenberg would object that their decision to include this clause could not have *non-question-beggingly* rationally determined that it is foundational: if their decision is foundational, that is just because the decision says that it is foundational, and so its foundational character is founded in a question-begging way. But then I ask: why must the reason why a decision is foundational be non-question-begging, in this sense?

I can imagine, on Greenberg's behalf, the following response to this question: Suppose that there are two putatively foundational but inconsistent law practices. In that case, neither decision can rationally determine that it, rather than the other, is really the foundational decision. And so neither decision can be foundational, except by dint of the help of some additional factor. In that case, each decision has its rational significance for the content of the law only by dint of the help of this additional factor.

I will grant that this is true in the case in which we have two putatively foundational but inconsistent law practices. But I do not see why it should also be true for the case in which we have only one putatively foundational decision, the dictates of which are consistent with all of the law practices. In short, I do not see why there cannot be a genuinely foundational decision that rationally determines that it is itself foundational. Of course, different philosophical accounts of law will provide us with different understandings of what sort of event can qualify as a genuinely foundational decision, and how such a foundational decision can rationally determine that it is itself

foundational. But we do not need to canvass these differences here in order to appreciate the force of the general challenge to Greenberg's argument.

Now, it is open to Greenberg to reply to this general challenge as follows: in the case that I have described, what we have is a legal decision that metaphysically determines the correct model, but not a legal decision that *rationally determines* that one model is correct. Since I do not have a fully firm grip on the notion of "rational determination," I will not object to this response. But then, if that is the response, I wonder what reason we have to think that law practices determine the content of the law by "rationally determining" it (in the relevant sense).

So my challenge to Greenberg stands as follows: If, as a matter of contingent historical fact, the framers had included a clause explicitly stating precisely how law practices were to determine legal content, and this clause was consistent with all other law practices, then either premise 5 of Greenberg's argument is false, or else we do not have any reason to accept premise 3. Either way, the compellingness of Greenberg's argument depends on a matter of contingent, and possibly unknown, fact of legal history.