Legal Theory, **18** (2012), 139–207.
© Cambridge University Press 2012 0361-6843/12 $15.00 + 00
doi:10.1017/S1352325212000079

A POSITIVIST ROUTE FOR EXPLAINING HOW FACTS MAKE LAW

David Plunkett*
Dartmouth College

In "How Facts Make Law" and other recent work, Mark Greenberg argues that legal positivists cannot develop a viable constitutive account of law that meets what he calls the "the rational-relation requirement." He argues that this gives us reason to reject positivism in favor of antipositivism. In this paper, I argue that Greenberg is wrong: positivists can in fact develop a viable constitutive account of law that meets the rational-relation requirement. I make this argument in two stages. First, I offer an account of the rational-relation requirement. Second, I put forward a viable positivist account of law that I argue meets this requirement. The account that I propose is a version of Scott Shapiro's Planning Theory of Law. The version of Shapiro's account that I propose combines (1) the account of concepts and conceptual analysis put forward by David Chalmers and Frank Jackson with (2) the account of the concept LEGAL INSTITUTION (and its conceptual connections to the concept LEGAL NORM) that we get from a certain reading of Shapiro's Planning Theory. In addition to providing a compelling response to Greenberg's argument in "How Facts Make Law," I argue

*This paper has benefited enormously from a wide range of conversations and written comments. My greatest debt is to Scott Shapiro, who has helped me develop my basic argument over the last number of years. Some of the material in this paper about how to best understand core debates within the philosophy of law draws on material from a paper in progress that is coauthored with Shapiro. I thank him for letting me draw on that material for this paper. I also owe a tremendous amount to extensive conversations and correspondence with Mark Greenberg, who has enthusiastically welcomed my attempts to develop a convincing positivist response to his work. I would also like to thank Scott Hershovitz, Daniel Nolan, Shamik Dasgupta, David Manley, David Braddon-Mitchell, Frank Jackson, Eliot Michaelson, Nicos Stavropoulos, Tristram McPherson, Alex Silk, Seana Shiffrin, Stephen Darwall, Peter Railton, Allan Gibbard, Brian Leiter, Alejandro Pérez Carballo, David Chalmers, Boris Kment, Andy Egan, Nadeem Hussain, Sarah Buss, Ira Lindsay, Michael Bratman, Dimitrios Kyritsis, A.J. Julius, Arudra Burra, Jules Coleman, Ralph Wedgwood, Rob Kar, Kevin Toh, Barbara Levenbook, Luís Duarte d'Almeida, Brian Hutler, Ronald Dworkin, Andrea Dolcetti, James Edwards, Patrick Tomlin, George Pavlakos, Tria Gouvas, Steve Finlay, Leslie Green, Liam Murphy, my students from my 2011 class on the Philosophy of Law at UCLA, and the editors of LEGAL THEORY. Earlier versions of this paper were given as talks at the conference "The Nature of Law: Contemporary Perspectives" at McMaster University, May 2011, at the Oxford Jurisprudence Discussion Group at Oxford, June 2011, and at the Centre for Law and Cosmopolitan Values at the University of Antwerp, June 2011. Thanks to everyone who participated in discussions during those talks and especially to Heather Kuiper for her insightful comments on my paper at the McMaster conference. Thanks also to Susanna Pfeffer for help in formatting my citations and bibliography. Finally, I am indebted to the UCLA Law and Philosophy Program, which provided generous financial support and a wonderful environment to work on this paper as a postdoctoral fellow for the academic years of 2010–2011 and 2011–2012.

https://doi.org/10.1017/S1352325212000079 Published online by Cambridge University Press

that the explanation for why my response to Greenberg works underscores one of the central problems facing legal antipositivism: namely, its lack of a convincing account of the nature of legal institutions.

I. INTRODUCTION

One common criticism of legal positivism is that it fits poorly with our best understanding of legal reasoning and legal argument. The basic thought can be put as follows. According to legal positivism, the content of the law ultimately depends on social facts and not on moral facts. In rough terms, this means that, according to legal positivism, what legal propositions are true in a given jurisdiction (at a given time)—that is, what legal obligations, powers, privileges, prohibitions, and so on there are in a given jurisdiction (at a given time)—ultimately depends on contingent, descriptive facts about people and the products that they have produced, such as facts about what people have done, said, written, or intended, and not on moral facts, such as facts about what is morally right, fair, just, or praiseworthy.[1] If positivism were true, it seems that we should expect that legal reasoning—that is, reasoning where one tries to discover what legal obligations, powers, privileges, prohibitions, and so on there are in a given jurisdiction (at a given time)—would ultimately involve trying to uncover some sort of complex social fact.

However, when we look at how people involved in existing legal practice such as judges and lawyers actually reason and argue when they try to discover which legal propositions are true, they seem almost inevitably to rely partly on the sort of normative and evaluative thought that has its natural home in moral theory rather than in the descriptive social sciences. At least on the face of it, this seems to suggest that at least some of the facts that people are trying to discover when engaged in legal reasoning are distinctively *moral* facts. But such facts are precisely those that positivism denies are part of what constitutes the content of the law. Hence it seems that legal positivism has a problem. Or at least so the charge goes.[2]

In "How Facts Make Law"[3] and other recent papers, Mark Greenberg develops an argument against legal positivism that, like the above familiar

1. This way of understanding the nature of legal positivism draws heavily on the work of Mark Greenberg, esp. Mark Greenberg, *How Facts Make Law, in* EXPLORING LAW'S EMPIRE: THE JURISPRUDENCE OF RONALD DWORKIN 225–264 (Scott Hershovitz ed., 2006); and Mark Greenberg, *Hartian Positivism and Normative Facts: How Facts Make Law II, in* EXPLORING LAW'S EMPIRE: THE JURISPRUDENCE OF RONALD DWORKIN 265–290 (Scott Hershovitz ed., 2006). I explicate this way of understanding legal positivism—as well as the crucial background notion of "the content of the law" that it relies on—at greater length in the first section of this paper.

2. For a helpful overview of this sort of criticism, as well as for discussion of the various possible positivist responses to it, *see* SCOTT SHAPIRO, LEGALITY (2011), at 234–281. I should here emphasize that in presenting this criticism, I do not mean to endorse the idea that it is a particularly good objection to legal positivism.

3. Greenberg, *How Facts Make Law*, *supra* note 1.

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argument, draws on our best understanding of legal reasoning and legal argument. However, Greenberg's argument in "How Facts Make Law" (hereafter HFML) is not simply an updated version of the familiar argument above. Rather, Greenberg appeals to legal reasoning and legal argument in a novel way: as evidence for an important but underappreciated feature of the metaphysics of law. This feature concerns the relationship between, on the one hand, the facts in virtue of which the true legal propositions in a given jurisdiction are true, and, on the other hand, the legal propositions themselves. The feature of this relationship that Greenberg wants to draw our attention to is this: this relationship is in principle *intelligible* to us as legal reasoners, for example, as lawyers or judges seeking to discover what the law is in a given jurisdiction (at a given time). Roughly, Greenberg's claim is that legal reasoners (under certain conditions) are in principle able to understand why changes in one set of facts—the facts in virtue of which legal propositions hold—have a particular effect on another set of facts, namely, the legal propositions themselves.

For Greenberg, this fact about intelligibility plays a crucial role in the metaphysics of law. In short, Greenberg argues that the fact that this relationship is an intelligible one to certain creatures in certain specified conditions (a broadly *epistemic* issue about the ability of certain creatures in certain conditions to understand a given metaphysical relation) is in fact part of the correct *metaphysical* account of what makes it the case that the law is what it is in a given jurisdiction (at a given time). Greenberg argues that any full constitutive account of law must therefore capture this feature of law. In short, he maintains that any successful constitutive account of law must demonstrate that the relationship in question is in fact an intelligible one and, moreover, that this fact of intelligibility plays a role in making legal content what it is. This is the core of what Greenberg calls *the rational-relation requirement* for constitutive accounts of law.[4]

With the rational-relation requirement in hand, Greenberg then argues that legal positivists lack a viable account of law that can meet this requirement. In contrast, he claims that if one embraces antipositivism (i.e., the thesis that the content of the law is necessarily determined in part by moral facts in addition to social facts), then this gives one the ability to develop a viable account of law that meets the rational-relation requirement. Hence, he argues, we have an important new reason to reject positivism in favor of antipositivism.

In this paper, I develop a positivist response to Greenberg's argument in HFML. My argument is a version of a response that Greenberg himself briefly considers in HFML and subsequent work: one can appeal to *conceptual facts* in order to provide a viable positivist theory that meets the rational-relation requirement. In his brief discussion of this type of response, Greenberg holds that the prospects for its success are dim. I argue that in

4. Greenberg, *Hartian Positivism, supra* note 1, at 265.

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fact this line of response is the most promising one for positivists to take. Or more precisely, I argue that it is the most promising positivist line of response *insofar as* Greenberg is correct that a constitutive account of law must meet the rational-relation requirement.

In fact, I think that it is an open question whether or not positivists should grant that the rational-relation requirement is a legitimate requirement to have in place when trying to understand the metaphysics of law. In short, this is because (1) I am skeptical that Greenberg's rational-relation requirement is in fact established by the evidence he cites in favor of it; and (2) I worry that we do not yet have a sophisticated enough grip on important details about what the rational-relation requirement amounts to. Nonetheless, I think that Greenberg's discussion of the rational-relation requirement *does* draw our attention to important issues in the metaphysics of law that are worth exploring. Because of this, I simply grant to Greenberg his rational-relation requirement for the purposes of this paper (or, more specifically, I grant him what I take to be one plausible version of that requirement that I explicate in the first part of this paper). Following this, I then argue that the positivist can respond to Greenberg's argument in HFML by drawing on (a) the broad account of concepts and conceptual analysis put forward by David Chalmers and Frank Jackson, in combination with (b) the basic account of the concept LEGAL INSTITUTION (and its conceptual connections to the concept LEGAL NORM) that we get from a certain reading of Scott Shapiro's Planning Theory of Law.[5]

In particular, I argue that if we read Shapiro as putting forward the conceptual claim that legal institutions are institutions of shared planning and, in turn, we understand this claim as a conceptual analysis on the model of analysis we get from Chalmers and Jackson, then we have the basis for a viable constitutive account of law that (1) is thoroughly positivist and (2) meets the rational-relation requirement.[6]

In addition to providing a compelling reply to Greenberg's argument in HFML, I argue that my response to Greenberg underscores one of the central problems facing contemporary antipositivism: namely, its lack of a convincing account of the nature of legal institutions. Thus, by using a particular reading of Shapiro's Planning Theory to respond to Greenberg, I argue that we can not only find a convincing response to the argument

5. Following one standard convention, I use small capitals in this paper to designate concepts. On this convention, *see* ERIC MARGOLIS & STEPHEN LAURENCE, CONCEPTS: CORE READINGS (1999).

6. In pursuing this strategy, I take myself to be articulating one way of making good on Shapiro's remark in the acknowledgments to LEGALITY that his work can be seen as a response to Greenberg. Shapiro writes that "Mark Greenberg woke me up from my dogmatic, positivistic slumber and helped me see the power of the natural law view. This book is largely a response to our many conversations over the years"; SHAPIRO, *supra* note 2, at 451. Despite the fact that Shapiro says this, nowhere in LEGALITY does he explicitly engage with Greenberg's work. I take my argument in this paper to be one way of understanding how Shapiro's positivist view in LEGALITY can form the basis of a response to one (though not the only one) of the important arguments that Greenberg develops against positivism.

https://doi.org/10.1017/S1352325212000079 Published online by Cambridge University Press

in HFML but also build an effective argument against antipositivism. The argument that I develop draws on themes already present in much existing positivist discussion, ranging from Joseph Raz to Hans Kelsen.[7] Moreover, as I explain later in this paper, the main thrust of the argument is at the forefront of Shapiro's attacks on antipositivism in *Legality*, wherein he argues that our best account of the nature of legal institutions (one thing that we refer to when we use the often ambiguous word "law") entails a positivist account of the content of law (another thing that we refer to when we use the often ambiguous word "law"). I think that Shapiro's argument here is essentially correct. However, I seek to develop the core insight of this argument in a new fashion—one that puts emphasis on a putative *conceptual* connection between legal institutions and legal norms—that I believe underscores the depth of the problem that contemporary antipositivists face in accounting for legal institutions and, moreover, makes clear why Greenberg's own version of antipositivism is one of the versions where this problem runs deepest.

It should be stressed up front that my ambition in this paper is *not* to defend a full positivist account of the nature of law. Instead, my ambition is much more limited: I want (1) to respond to Greenberg's argument in HFML and (2) to put pressure on contemporary antipositivism in one of the places where I think it is weakest. Given these aims, I do not seek fully to defend either the account of conceptual analysis that I draw on (namely, the broad account I get from Chalmers and Jackson) or the positivist account of law that I favor (namely, a version of Shapiro's Planning Theory). Rather, I rely on the idea that both of these accounts are independently *plausible enough* to establish that, contrary to Greenberg's charge, positivists can indeed develop a plausible account of law that, like Greenberg's own antipositivist account, has a good way to meet the rational-relation requirement.

That being said, in order to provide a convincing response to Greenberg's argument in HFML that antipositivists have a *better* overall account of law that (among other things) does a better job of explaining the (putative) feature of law that gives rise to the rational-relation requirement, my response to Greenberg does ultimately depend on the relative merits of my positivist account of the nature of law, as opposed to Greenberg's antipositivist one. Thus, even though I do not seek fully to defend the systematic account of the nature of law that I put forward in this paper, I try to establish that it is worth taking seriously as an alternative to the antipositivist theory of law that Greenberg himself puts forward. Given this situation, the final argument against antipositivism that I advance in this paper, in addition to being an argument of independent interest to those concerned with the prospects

7. Hans Kelsen, General Theory of Law and State (1945); Joseph Raz, Practical Reason and Norms (1999).

https://doi.org/10.1017/S1352325212000079 Published online by Cambridge University Press

of antipositivist theories of law, is in fact ultimately *part* of an extended response to Greenberg's argument in HFML.

II. GREENBERG'S ARGUMENT

In order to set up my argument in this paper, we first need to get clear on what Greenberg's core argument in HFML *is*. This is no easy task. For although Greenberg's argument in HFML revolves around a fairly straightforward contention—namely, that antipositivists have a better way of meeting the rational-relation requirement than positivists do—it takes great care to understand the details of exactly how the overall argument in HFML is meant to work. One of the core contentions of this paper is that these details matter. I argue that it is only by focusing on some of these details—in particular, details about exactly how Greenberg conceives of the nature of legal positivism and details about how we should understand what exactly the rational-relation requirement amounts to—that positivists are able to provide an adequate response to Greenberg's argument in HFML. In what follows, I present what I take to be the core of Greenberg's argument in HFML, or at the very least, one plausible reading of his argument that I think makes for a philosophically interesting challenge to legal positivism. Given this, my aim is not to make sense of all of Greenberg's writing. Rather, my aim is to pick out one helpful way of making sense of the argument in HFML that both (1) is faithful to core elements of Greenberg's thought, and (2) makes for a philosophically interesting challenge to legal positivism.[8]

In order to regiment the discussion in what follows, it will be helpful to introduce some stipulative terminology. Following Greenberg, let us define the *content of the law* or, equivalently, *legal content* as the total set of true legal propositions in a given legal system at a given time. As Greenberg puts it, "the content of the law in a given legal system (at a given time) consists at least of all of the general legal obligations, rights, privileges, and powers that exist in the legal system (at that time)."[9] In turn, again following Greenberg, let us use the term "legal facts" to refer to the legal propositions that comprise legal content. On this way of speaking, a single legal fact is one true legal proposition in a given legal system at a given time (e.g., the proposition that one is legally required to pay one's taxes by April 15), and

8. The reading I advance of Greenberg's argument in what follows draws heavily on extensive conversations and written correspondence with Greenberg. However, this should not be taken to mean that Greenberg endorses everything I say here about how to understand his views.

9. Mark Greenberg, *The Standard Picture and Its Discontents*, *in* 1 OXFORD STUDIES IN THE PHILOSOPHY OF LAW 39–106 (Leslie Green & Brian Leiter eds., 2011). For a similar formulation of what legal content includes, *see* Mark Greenberg, *Legislation as Communication? Legal Interpretation and the Study of Linguistic Communication*, *in* PHILOSOPHICAL FOUNDATIONS OF LANGUAGE IN THE LAW 217–256 (Andrei Marmor & Scott Soames eds., 2011).

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the total set of legal facts in a given legal system at a given time is equivalent to the total legal content of that system.

As I understand Greenberg, the core idea behind the term "legal content" is that in a given legal system, people are *legally* permitted, empowered, obligated, and so on to do certain things rather than others. For instance, Greenberg writes "that contracts for the sale of land must be in writing is a legal fact in many legal systems."[10] "Legal content" is, for Greenberg, a helpful shorthand way of speaking about the totality of the legal permissions, powers, obligations, and so on that there are in a given legal system at a given time. Moreover, it is a shorthand way of speaking about this subject that is meant to be as theoretically neutral as possible with respect to how to understand those obligations, permissions, powers, and so on—for instance, whether they are genuine moral obligations and so on (as some antipositivists such as Greenberg think)[11] or whether they are best understood as a specific way of redescribing the prescriptions of a perhaps morally bankrupt set of norms that might provide no genuine obligations and so on whatsoever (as some positivists such as Shapiro think).[12]

Although there is wide disagreement among contemporary legal philosophers about what explains the legal facts (i.e., the true legal propositions that comprise the legal content) in a given jurisdiction at a given time, it is essentially common ground that legal facts are not ontologically primitive facts, in the sense that their obtaining is always capable of being explained by reference to other, more basic facts. In particular, it is common ground that social facts are among those basic facts. In this context, the social facts can be understood to be contingent, descriptive facts about people's actual actions, utterances, dispositions, attitudes, and mental states, as well as those contingent, descriptive facts about the products that people have produced, such as facts about the meaning of the texts they have written.[13]

10. Mark Greenberg, *On Practices and the Law*, *in* 2 LAW: METAPHYSICS, MEANING, AND OBJECTIVITY: SOCIAL, POLITICAL, & LEGAL PHILOSOPHY 95–125 (Enrique Villanueva ed., 2007), at 95.

11. Greenberg, *Standard Picture*, *supra* note 9.

12. SHAPIRO, *supra* note 2. It should also be stressed that Greenberg's idea of "legal content" is meant to be theoretically neutral on many other important issues that I do not discuss in this paper. For instance, it is meant to be neutral on the issue of whether legal content should be understood atomistically (as with Austin or Raz) or holistically (as with Dworkin or Greenberg). For a discussion of the distinction between atomistic and holistic views of legal content, *see* Greenberg, *Standard Picture*, *supra* note 9.

13. It should be noted that some of these purportedly descriptive facts which count as "social facts" in the context of the debate over legal positivism might turn out to be covert normative ones—such as, perhaps, facts about meaning or content. I briefly return to this important point below. What is important to note here is simply that even if such facts turn out to be normative ones, they will likely still not be specifically *moral* normative facts of the sort that matters in the debate over positivism as Greenberg is framing it. Thus, as the debate has been set up, even if it turned out that facts about the mental states of agents depended on normative facts, and those facts in turn helped determine the legal facts, this would not settle the debate in favor of antipositivism. Rather, it would do so only if those normative facts that helped determine the facts of mental content were specifically moral normative facts, such as facts about fairness, justice, and human well-being.

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These social facts are, roughly, the sorts of descriptive facts that we can study in the descriptive social sciences such as sociology, psychology, economics, linguistics, and anthropology. Greenberg calls the totality of the facts (social or otherwise) that explain the legal facts the *determinants of legal content*; similarly, we can say the *determinants of legal facts* or the *determinants of law*. For brevity, I sometimes call these facts the "legal-determinant facts."[14]

As Greenberg understands it, and as I think is roughly correct, the core of the debate between positivists and antipositivists concerns which sorts of facts are *necessarily* among the determinants of legal content. Positivists claim that solely social facts are and moral facts are not. Antipositivists claim that both sorts of facts are. That is, antipositivists claim that in addition to social facts, normative facts about what *should* or *ought* be the case, or similarly, evaluative facts about what is *good* or *bad* or *better* or *worse*, play a necessary role in determining legal content. In particular, antipositivists claim that those normative or evaluative facts that play this role are specifically *moral* facts, such as facts about justice, the value of democracy, fairness, respect for persons, and human flourishing.[15] Thus, in short, the debate is whether moral facts are always part of the determinants of law in addition to social facts.[16] Antipositivists claim that moral facts are always necessarily part of the determinants of law, whereas, in contrast, positivists claim that they need not be.

More precisely, and more importantly, as I emphasize below, the crucial thing for positivists is that although some positivists believe that moral facts might be among the determinants of law, moral facts are never among the *ultimate* determinants of law. Thus, as I explain shortly, the core of the debate between positivists and antipositivists in fact concerns what sorts of facts are necessarily among the *ultimate* determinants of law in addition to social facts: antipositivists claim that moral facts are, while positivists claim that moral facts are not.

14. Greenberg, *How Facts Make Law*, *supra* note 1, at 225.

15. I take it that this formulation of the positivism/antipositivism debate tacitly assumes that the moral facts, whatever they are, are not themselves identical to (or reducible to or solely determined by) the social facts that are among the determinants of law. I think this is a reasonable assumption but one that at the same time constrains the way in which philosophers of law understand the space of possible positions in explaining legal content. However, it is beyond the scope of this paper to address this set of issues here.

16. It should also be noted here that as Greenberg emphasizes, there is also an important debate about *which* social facts are among the determinants of law in any given legal system—that is, which facts are part of what Greenberg calls the *law-determining practices* or the *legal practices* (i.e., those social facts that are among the determinants of law); Greenberg, *How Facts Make Law*, *supra* note 1, at 257–264. However, this debate is not the focus of the positivism/antipositivism debate that Greenberg is concerned with in HFML. Instead, the debate is about whether moral facts are necessarily among the determinants of law in addition to the law-determining practices (whatever exactly those are). To put it another way, the debate involves figuring out whether moral facts determine which social facts are among the law-determining practices or, similarly, whether moral facts help determine the law as additional, independent determinants of law in a way that hangs free from whatever role they play in determining what social facts are among the law-determining practices.

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On the picture of the positivism/antipositivism debate that I am here attributing to Greenberg, what separates positivism from antipositivism ultimately concerns what sorts of facts are necessarily among the ultimate determinants of legal content. But what in turn constitutes those social facts and moral facts? For Greenberg, I take it, any theory on which moral facts play a necessary role in determining legal content—including, importantly, if they did so because of determining the social facts themselves—counts as an antipositivist theory. As for what constitutes the moral facts, I take it that Greenberg is essentially assuming (along with most contemporary philosophers of law) that it does not matter to the debate what theory is correct. For instance, I take it that he is assuming that if legal facts are in part determined by facts about justice, then this will be a victory for the antipositivist, regardless of what constitutes facts about justice.

I think that Greenberg is right that as a matter of sociological fact, legal philosophers engaged in the debate over positivism assume that what constitutes moral facts does not matter to the debate that they are interested in. However, I disagree with Greenberg that this assumption is in fact warranted. This is because I think that this assumption obscures some of the ways in which further philosophical positions might in fact matter for our understanding of the stated subject matter—namely, what sorts of facts are among the ultimate determinants of law. In turn, I think that this result might in fact matter for how to classify various positions within the philosophy of law and thus might matter to the question of whether positivism or antipositivism is true.

To see why this is so, consider that many philosophers think that it might well be that moral facts are identical to or fully determined by social facts. For instance, many Humean views hold that moral facts are solely determined by facts about the content of people's desires or other motivational attitudes.[17] Suppose that a) such a metaethical view is correct and b) one held that legal facts are determined by both moral facts and social facts. If the determination relation in question here is a transitive one, then it will turn out that on this view, legal facts are fully determined by social facts. In turn, depending on how one understands 1) the individuation of facts and theories as well as 2) the nature of the determination relation here, it is not clear that such a view could not legitimately be put forward as one in which legal facts are fully determined by social facts, despite the fact that it was initially put forward in a different way.

Furthermore, from another angle, suppose that one advanced a story on which legal facts are fully determined by social facts. Suppose further that the correct metaethical story shows that some of those same social facts also constitute moral facts. How should we classify such a view? Again, I think

17. *See, e.g.*, Mark Schroeder, Slaves of the Passions (2007); and Sharon Street, *Constructivism about Reasons*, *in* 3 Oxford Studies in Metaethics 207–245 (Russ Shafer-Landau ed., 2008).

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the answer here depends on a range of further issues in metaphysics of the sort that I mention above. Because of the complications introduced by such views, it is hard to see how thinking in the terms that we get from Greenberg is enough to illuminate all of the important dividing lines in the space of the metaphysics of law that matter for the debate over positivism—and, indeed, the current way of framing the debate might obscure what some of those dividing lines in fact are.

However, that being said, for the purposes of this paper, I leave this issue aside. Instead, following my reading of Greenberg, I take it that proponents of both positivism and antipositivism can be neutral with respect to the metaphysics of moral facts. This is because even if I am skeptical about how this assumption currently structures much discussion about positivism in philosophy of law, and, more importantly, discussion of the metaphysics of law in general, this assumption will help keep us on track with the main arguments that really matter in the context of this particular paper. In order effectively to sidestep these issues, it will be helpful in what follows to assume that at least *some* of the moral facts that antipositivists claim are among the ultimate determinants of law are not themselves identical to or *solely* determined by social facts. This is most plausible for fundamental moral facts; roughly, moral facts that are not explained by the obtaining of any further moral facts—such as, perhaps, *causing pain is morally wrong*.

It is worth pausing here to underscore some important points about the constitutive role that moral facts play according to antipositivist theories of legal content. Consider the idea of *inclusive legal positivism*. In broad terms, according to inclusive legal positivism, moral facts *might* be among the determinants of legal facts in some legal systems, even though they are never among what, following Shapiro in *Legality*, one might call the "ultimate" determinants of legal facts.[18] Roughly, the inclusive-legal-positivist thesis is this: there can be foundational social criteria of what it would take for something to be part of the law (for instance, a Hartian rule of recognition) that make it the case that certain moral facts, such as facts about equality or fairness, for instance, determine what further things count as law. As I understand it, the inclusive positivist idea, one that so-called "exclusive positivists" reject, is that the obtaining of certain social facts can make it that certain moral facts are among the determinants of legal facts. However, what is crucial is that these moral facts (1) are not *necessarily* among the determinants of legal content in all legal systems, and (2) are not among the *ultimate* determinants of legal facts in the following sense: the moral facts owe all of their relevance to the legal facts to the obtaining of other, nonmoral social facts.

However this is meant to work—an issue that I do not want to take up here—the crucial thing is that it is meant to be a different claim from the one that antipositivists intend to make, namely, that there are certain moral facts that are necessarily among the determinants of law and, moreover,

18. SHAPIRO, *supra* note 2, at 269.

https://doi.org/10.1017/S1352325212000079 Published online by Cambridge University Press

are among the determinants of law *not* solely in virtue of the obtaining of other, nonmoral social facts. Both inclusive and exclusive legal positivists, in whatever other ways they differ, disagree with both of these claims of antipositivists.

With this understanding of what is at issue between positivism and antipositivism, Greenberg's argument in HFML then proceeds by focusing on a particular feature of the relationship between the legal facts and the legal-determinant facts. As I state at the start of this paper, Greenberg's thesis is that this relationship is one that is intelligible to us as legal reasoners and, moreover, that this must be so, given the nature of legal content as such. Greenberg stipulates that we can therefore say that the determinants of legal facts *rationally determine* the legal facts.[19] The fact that the legal facts are rationally determined, argues Greenberg, sets up a requirement that "any full constitutive account of legal facts"[20] must meet: it must show that the nonlegal facts stand in this relation of intelligibility to the legal facts and, moreover, demonstrate that this fact itself plays a role in making the legal facts what they are. Greenberg calls this *the rational-relation requirement* on theories of law.[21] In order better to understand this requirement, I begin by explaining what Greenberg means by a "full constitutive account of legal content." In turn, this will allow us better to grasp what the rational-relation requirement consists in and then, finally, how Greenberg uses this requirement to argue against positivism.

A. Constitutive Accounts

Let us start with the idea of a "full constitutive account." For Greenberg, a full constitutive account of a given fact F (or domain of facts) involves a distinctively *metaphysical* explanation of what "makes it the case that"[22] fact F obtains rather than a causal (or teleological) explanation of why fact F obtains. As I briefly touch on later in this paper, what exactly the metaphysical explanations are that form the heart of constitutive accounts is an important question and one that matters for the prospects of my argument in this paper. But for now, the basic outline of what Greenberg has in mind with the idea can be grasped by way of an example. Consider the case of Europe being at war in 1939. For Greenberg, a full constitutive account of this fact would need to explain *what it is* to be at war rather than giving a causal or teleological explanation of Europe being at war in 1939. Assuming that wars are not things that are ontologically primitive, in giving such a constitutive account, one will usually make reference to

19. Greenberg, *How Facts Make Law*, *supra* note 1; and Greenberg, *Hartian Positivism*, *supra* note 1.

20. Mark Greenberg, *Reasons without Values?*, *in* 2 LAW: METAPHYSICS, MEANING, AND OBJECTIVITY: SOCIAL, POLITICAL, & LEGAL PHILOSOPHY 133–143 (Enrique Villanueva ed., 2007), at 136.

21. Greenberg, *Hartian Positivism*, *supra* note 1, at 265.

22. *Id.* at 287.

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certain lower-level facts that make it the case or *determine* the higher-level fact that Europe was at war in 1939. For Greenberg, insofar as a given thing X is not ontologically primitive, a "full constitutive account" of X will need to be one that explains the facts about X in terms of such-and-such lower-level facts that determine the facts about X.

Greenberg claims that the debate between positivism and antipositivism concerns which types of lower-level facts (or equivalently, "more fundamental" facts) necessarily play such a determination role in the full constitutive account of law. To repeat, on Greenberg's picture (which I think is roughly correct), the debate between positivism and antipositivism is a debate about what sorts of facts necessarily determine legal content; in particular, it is a debate about whether moral facts necessarily play such a role in addition to the relevant social facts (which Greenberg calls the "law-determining practices" or "law practices").

There are two crucial things that should be underscored about Greenberg's understanding of the determination relations that hold in constitutive accounts. These points are both crucial for evaluating my eventual positive proposal for how to develop a positivist account of legal content and, in particular, for evaluating my proposal for how the positivist can appeal to conceptual facts to meet the rational-relation requirement. The first is that these relations are fundamentally metaphysical and not epistemological. For instance, in the legal case that is our focus, the issue is with what makes the legal facts what they are and not with how we understand or come to know about what they are.[23]

The second point concerns Greenberg's understanding of the relation between constitutive accounts and supervenience relations. As it is normally understood, supervenience is a purely modal notion. One common way of explaining what the notion involves is as follows: one set of facts (the Z facts) supervenes on another set (the Y facts) when no two possible situations are the same with respect to their Y facts while differing in their Z facts. To take a common example, it is likely the case that the biological facts supervene on the physical facts in the following sense: two situations that are the same with respect to the physical facts are also the same with respect to the biological facts. As this example illustrates, supervenience is the name for a type of relationship that holds between facts (or properties, or some other relata). Importantly, however, it is not itself an *explanation* for why that relationship holds, nor is it an account that seeks to explain the Z facts in terms of the Y facts. Thus, as Jaegwon Kim puts it, "supervenience itself is not an explanatory relation. It is not a 'deep' metaphysical relation; rather, it is a 'surface' relation that reports a pattern . . . suggesting the presence of an interesting dependency relation that might explain it."[24]

23. As shown in section II.B, on my reading of Greenberg, Greenberg thinks that an epistemic point about the intelligibility of the determination of legal content itself plays a role *in* the metaphysics of law. Thus, as Greenberg puts it, "we have an epistemic notion playing a role a metaphysical relation." GREENBERG, *How Facts Make Law*, supra note 1, at 228.

24. JAEGWON KIM, SUPERVENIENCE AND MIND: SELECTED PHILOSOPHICAL ESSAYS 167 (1993).

https://doi.org/10.1017/S1352325212000079 Published online by Cambridge University Press

For Greenberg, a constitutive account of facts in a given domain must be one that *explains* in virtue of what these facts are what they are. Thus simply pointing to supervenience relations does not by itself suffice for this purpose. Rather, we need to locate facts that do actual explanatory work—and, moreover, that do explanatory work of the sort that matter for the specifically *metaphysical* explanations that Greenberg is concerned with. Keeping this issue in mind is crucial for evaluating my eventual positivist account later in this paper.

In order to have a helpful way of talking about these sorts of facts and explanations, I use a notion that has received increased attention in metaphysics in the years following Greenberg's initial publication of HFML. This is the notion of *ground*. In rough terms, the A facts ground the B facts when B facts obtain *in virtue of* the A facts. Thus, to say that Europe's being at war in 1939 is grounded in the actions of its citizens is to say that it is *in virtue of* facts about the actions of its citizens that Europe was at war.

Now, it should be stated up front that there are currently many important debates about how to understand what the notion of ground amounts to, as well as what role, if any, it should have in doing serious work in metaphysics.[25] These debates are inextricably tied up with many other important debates, including ones about the nature of explanation and ones about the nature of metaphysical inquiry in general. Importantly, however, the details of these debates are not crucial at this stage—though, as I touch on later in the paper, the details of these debates *do* matter for the viability of the basic positivist account that I propose in this paper, as well as, more generally, for how to understand what is involved in doing the metaphysics of law. At this stage, what matters for us here is simply the outline of what Greenberg is driving at: that there is a constitutive "in-virtue-of" relation that holds between some basic facts (the determinants of legal content, whatever they are) and some target facts (the legal facts).

"Ground" is a helpful way to speak of what that relation is insofar as it helps us keep clear on the facts (1) that this relation is an *explanatory* one, (2) that this explanatory relation is constitutive rather than causal (whatever exactly that contrast turns out to involve), and (3) that merely modal notions such as supervenience by themselves therefore will not suffice to capture everything that Greenberg thinks is important about the relationship of legal facts to the determinants of those facts. Moreover, it is helpful for another reason

25. For some of the recent discussion of what grounding might amount to, *see* Jonathan Schaffer, *On What Grounds What*, *in* METAMETAPHYSICS: NEW ESSAYS ON THE FOUNDATIONS OF ONTOLOGY 347–383 (David J. Chalmers & David Manley eds., 2009); Gideon Rosen, *Metaphysical Dependence: Grounding and Reduction*, *in* MODALITY: METAPHYSICS, LOGIC, AND EPISTEMOLOGY 109–135 (Bob Hale & Aviv Hoffmann eds., 2010); Kelly Trogdon, *An Introduction to Grounding*, *in* BASIC PHILOSOPHICAL CONCEPTS (Miguel Hoeltje, et al. eds., Philosophia Verlag, forthcoming), *available at* http://web.me.com/kellytrogdon/KT/research_files/GO.pdf; Kit Fine, Guide to Ground (2011) (unpublished manuscript on file with author); Shamik Dasgupta, On the Plurality of Grounds (Sept. 2011) (unpublished manuscript), *available at* http://www.shamik.net/Research.html; and Carrie S. Jenkins, *Explanation and Fundamentality*, *in* DEPENDENCE (Miguel Hoeltje, et al. eds., forthcoming).

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as well: because the details of what grounding amounts to are very much up for debate, we can use the notion here as a general placeholder notion that is consistent with a wide range of views about the sort of metaphysical explanations that Greenberg appeals to in his account of what is at issue with the debate over legal positivism.

I follow Greenberg (and one widespread convention that he discusses in HFML) and call those accounts that concern supervenience relations ones about *metaphysical determination*. In contrast, when the account also makes use of what I am here calling "grounding relations," I say that the account is one about *grounding*.[26] Furthermore, in order to avoid any possible confusion relating to this terminology, I use the label "rational grounding" to refer to what Greenberg calls "rational determination." I do so in order to underscore that the relation in question does not simply involve metaphysical determination in the sense of supervenience, but rather that it involves grounding. For reasons that I explain later, I have reservations about this label of "rational grounding" as well. But for the purposes of this paper, I think it is the best label to use, given its connection to Greenberg's own terminology.

Why does Greenberg think that the issue about legal positivism concerns grounding relations and not just supervenience relations? The core issue stems from the simple fact that when positivists and antipositivists enter into the debate about legal content, they take it for granted that the question they are addressing is an explanatory question about *in virtue of* what legal facts obtain, rather than simply the question of what modal pattern holds between the legal facts and other facts. This, for Greenberg, is enough to make what I am calling "grounding" the natural place to start in framing the debate, rather than with a modal notion such as supervenience. A second issue stems from the fact that some moral facts might plausibly be taken to be necessary facts—as indeed they are so understood by many of the major contemporary philosophers of law. This is an issue because, as Greenberg puts it, necessary facts "cannot be a nonredundant element of a supervenience base," and hence, "both positivists and antipositivists

26. Greenberg, *How Facts Make Law*, *supra* note 1, at 227 n.8, writes that "the term 'metaphysical determination' is typically used in a way that implies nothing about the order of explanation or about relative ontological basicness." This is so on the use of "metaphysical determination" already mentioned in this paper: namely, where it is used to refer to supervenience. However, after citing this convention, Greenberg then goes on to say the following:

> In this paper, we will be concerned only with cases in which the putative determinants are more basic than and part of the explanation of the determined facts. For convenience, I will therefore say that the A facts metaphysically determine the B facts only when the B facts obtain at least in part in virtue of the obtaining of the A facts.
>
> *Id.*

I think this is potentially misleading, given the existing convention that Greenberg himself cites in the first part of the note, and therefore I do not follow Greenberg's lead here. Greenberg has agreed in conversation that this was an unfortunate and potentially misleading choice. However, nothing of philosophical substance hangs on this.

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can agree that descriptive facts alone metaphysically determine the content of the law."[27] Given this fact, Greenberg thinks that if we believe that the positivist/antipositivist dispute is a meaningful one, which he does, then we have no choice but to believe that the issue does not involve solely supervenience relations. Instead, he thinks that what is at issue is what I am here calling "grounding relations."[28]

B. Rational Grounding

We now have the basic picture of what sort of account Greenberg thinks positivists and antipositivists are both after: namely, one that explains what facts necessarily ground legal content. With this in hand, let us now turn to Greenberg's idea of the rational-relation requirement. This requirement stems from Greenberg's thesis that the type of grounding relation involved between the legal-determinant facts and the legal facts is a particular kind of grounding: namely, one that he calls "rational determination" and which, for the reasons stated earlier, I am calling "rational grounding."

In order to understand the outline of what Greenberg thinks rational grounding is, start with the broad idea that *how* lower-level facts ground other, higher-level facts might vary in important ways from domain to domain. As part of this, there might be different sorts of relations that facts stand in relationship to each other that make it the case that some of those facts ground other facts. For instance, insofar as lower-level mathematical facts ground higher-level mathematical facts, Greenberg thinks it likely that this is not in exactly the same way as lower-level facts about the distribution of microphysical particles ground facts about the distribution of water in my backyard.[29] Greenberg's background motivation for introducing the idea of rational grounding stems from the thought that however grounding works in the legal domain, it is likely to do so in a way that is different from how grounding works in many other domains, and especially those domains

27. *Id.* at 227.

28. *Id.* at 227–228. For a similar line of thought on why the positivism/antipositivism debate must be understood in terms of ground rather than supervenience, *see* Rosen, *supra* note 25. I am quite sympathetic to this line of argument. However, I also think that there is more to be said in favor of casting the positivism/antipositivism debate in terms of supervenience than what Greenberg has said here. Among other things, this is for the following reasons: (1) we can use a two-dimensionalist framework of the sort advocated in FRANK JACKSON, FROM METAPHYSICS TO ETHICS: A DEFENCE OF CONCEPTUAL ANALYSIS (1998); or in David J. Chalmers, *Two-Dimensional Semantics*, *in* OXFORD HANDBOOK OF THE PHILOSOPHY OF LANGUAGE 157–178 (Ernie Lepore & Barry Smith eds., 2006) to model more complex supervenience relations than what Greenberg discusses in his work; and (2) some of those relations might likely be ones that mark important dividing lines in the theory of law, dividing lines that are worth thinking of as the crucial ones in the positivist/antipositivist debate. However, it is beyond the scope of this paper to explore this issue with the care it needs. I plan to explore this issue in depth in future work. Thanks to David Manley, David Braddon-Mitchell, and Tristram McPherson for helpful discussion on this issue.

29. I owe these examples, as well as this general way of introducing what the core thought behind rational grounding amounts to, to correspondence with Greenberg.

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that concern issues of material constitution. The question then is: What, in general, can we say about how grounding works in the legal domain?

As I read him, Greenberg's core thesis on this front concerns what facts are among the grounds of the legal facts. The thesis is that the legal facts are grounded partly in the fact that creatures like us (in certain conditions) are able to make sense of (or find intelligible) the precise grounding relation that holds between the legal facts and their grounds.[30] Somewhat more precisely, in order to avoid worries of circularity, I think the thesis in fact likely concerns the relationship that holds between the legal facts and a particular *subset* of their grounds—the subset that includes all of the grounding facts *other* than the fact that creatures like us (in certain conditions) are able to make sense of (or find intelligible) such-and-such facts.

I argue that this claim—that the legal facts are grounded partly in the fact that creatures like us (in certain conditions) are able to make sense of (or find intelligible) the precise grounding relation that holds between the legal facts and their grounds (or an important subset of those grounds)—is equivalent to the claim that legal facts are rationally grounded. Thus I argue that one's endorsement of the claim that legal facts are rationally grounded need not commit one to the idea that grounding works differently in different domains—or even that *how* some facts ground such-and-such other facts varies from one domain to another. All we need, I argue, is one basic grounding relation (or whatever number of grounding relations we independently need) and then a thesis about what sorts of facts are among the grounds of legal facts. I take it that this way of proceeding is in fact perfectly consistent with the basic thought that I claim is driving Greenberg's work on rational grounding: namely, a thought about the differences in grounding from one domain to another. In short, we can see this thought as amounting to the claim that the grounding relation is *instantiated* in different ways in different domains and that this in turn provides us with a good framework for understanding rational grounding.

In order to help get a better grip on what I think rational grounding amounts to, let us start with the contrast between a few different cases of grounding that Greenberg himself discusses in HFML as part of his attempt to clarify rational grounding. Consider the case of weather.[31] It is reasonable to hold that the weather facts are grounded (at least partly) in microphysical facts. As Greenberg understands the situation, one crucial feature of this grounding relationship is that even if we are confident that the weather facts are *grounded* in the microphysical facts, we do not have much ability to understand precisely how changes in the microphysical facts have an impact on what the weather facts are. More importantly, any facts about our ability to make sense of, understand, or find intelligible the relationship

30. This way of thinking about rational grounding draws on the opening pages of Greenberg, *How Facts Make Law*, *supra* note 1.

31. *Id.* at 238.

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between the weather facts and the microphysical facts seem irrelevant to uncovering the correct metaphysical account of what grounds the weather facts. Perhaps these facts could be intelligible to us if we learned enough about the world. But even if that turned out to be the case, it would be merely a point about our ability to gain epistemic access to certain facts rather than something that is crucial to the correct metaphysical account of what in fact grounds the weather facts.

Contrast this with the case of mental content, according to Donald Davidson's theory of it. Greenberg argues that one way of reading Davidson yields something like the following thesis: the content of a subject's propositional attitudes is grounded in the fact that rational interpreters would find it intelligible that a given subject S in circumstances C has such-and-such particular propositional attitudes. In turn, Davidson argues that the grounds of these propositional attitudes (e.g., beliefs and desires) must make this intelligibility possible.[32] As Greenberg puts it, "roughly, the thesis is that the constitutive determinants of one's propositional attitudes must make it intelligible that the person has the beliefs and desires they have."[33] This is because, according to one dominant reading of Davidson, Davidson holds that what it is for a person to have a particular propositional attitude *just is* for it to be the case that the most intelligible overall interpretation of that person's actual and counterfactual behavior yields a theory that attributes that propositional attitude to that person.

For our purposes here, what is crucial about the Davidsonian account is not that the grounds of propositional attitudes (or what Greenberg calls the "constitutive determinants of one's propositional attitudes") must themselves *make* it intelligible that a subject has such-and-such propositional attitudes. Rather, what is crucial is that, according to the Davidsonian account, the fact that this intelligibility obtains—whatever facts make it so—is part of the grounds of propositional attitudes. In other words, on this account, the fact of intelligibility itself is among the grounds of the propositional attitudes. This is different from the case of facts about weather, where, as shown above, it is reasonable to hold that it is *not* the case that facts about epistemic access or intelligibility themselves are among the grounds of the weather facts.

Greenberg himself rejects Davidson's theory of mental content as a positive thesis in the philosophy of mind. But by providing a different model for what sorts of facts can be in the grounds of other facts, Davidson's theory nonetheless helps illustrate the sort of thing that Greenberg has in mind for the case of legal content. Using these examples of weather and Davidson's theory of mental content as orientation, we can separate out cases of what we can call *standard* or *arational* grounding from *rational* grounding.

32. D. Davidson, *Radical Interpretation*, *in* Inquiries into Truth and Interpretation (1984); D. Davidson, *Belief and the Basis of Meaning*, *in* Inquiries into Truth and Interpretation (2d ed. 2001).

33. Greenberg, *Hartian Positivism*, *supra* note 1, at 287.

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For Greenberg, the crucial point seems to be that in cases of standard or arational grounding, certain facts might or might not be unintelligible to us: those facts (which I henceforth call the "grounding-relationship" facts) that concern the grounding relationship between the ground*ing* (or base) facts and the ground*ed* (or target) facts.

As I understand things, the grounding-relationship facts tell us how changes in the grounding facts affect the grounded facts. Thus to say that in cases of arational grounding, the grounding-relationship facts might or might not be intelligible to us is to say that we might or might not find it intelligible why certain specific changes in the grounding facts yield other specific changes in the grounded facts. In contrast to this, in cases of rational grounding, where one set of facts rationally grounds another set of facts, the grounding-relationship facts are always intelligible to us. Moreover, this is no accident. For in cases of rational grounding, the fact of intelligibility is itself among the grounds of B facts.[34]

Putting this together, I think that rational grounding can be understood as follows. To start with, we have some higher-level (or "less fundamental") facts that are our target of explanation. These are what we are calling the "B facts." We then have the lower-level facts (or "more fundamental" facts) that are those facts that ground the B facts. The totality of those facts that play this role are what we are calling the "A facts." On my reading, the core idea behind rational grounding is that *among* the A facts is the fact that the relation between the A facts and the B facts is an intelligible one to certain specified creatures in certain specified conditions, including, importantly,

34. Greenberg dramatizes the contrast between rational and arational grounding by considering cases of grounding that he calls "brute." He puts this point in terms of cases of what he calls "metaphysical determination" (in the nonstandard sense of "metaphysical determination" that I discuss in note 26), but the basic thought carries over to cases of grounding that are Greenberg's ultimate target. He writes:

> Metaphysical determination can be brute. If the A facts are more basic facts that metaphysically determine the B facts, there is a sense in which the A facts explain the B facts, for the A facts are more basic facts, the obtaining of which entails that the B facts obtain. But there need be no explanation of why the obtaining of particular A facts has the consequence that it does for the B facts. To dramatize the point, even a perfectly rational being may not be able to see why it is that particular A facts make particular B facts obtain.

Greenberg, *How Facts Make Law*, *supra* note 1, at 231. Suppose we take the basic thought in this passage to be one about grounding. If so, in this passage, Greenberg suggests there might be cases of grounding where, even if a rational being were to try to understand why certain changes in the A facts yielded certain other changes in the B facts, she would not be able to do so. The thesis that there are arational grounding facts that have this particular additional feature is a controversial claim. However, as I am reading Greenberg, the existence of such brute grounding facts is not crucial for understanding the difference between rational and arational grounding. This is because it might well be that in cases of arational grounding there are facts that we (or perfectly rational beings) could discover that would make intelligible the relationship between the A facts and the B facts. Indeed, in cases of arational grounding, it might even be that we already grasp these facts and *do* find the relationship to be an intelligible one. What is crucial is simply that the fact of that intelligibility is not itself among the grounds of the B facts.

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conditions that concern which concepts they possess as well as *use* to understand this relationship. Or more precisely, the idea is that among the A facts is the fact that certain specified creatures in certain specified conditions find it intelligible that such-and-such specific grounding-relationship facts obtain that concern the relation between the B facts and the A facts (or more likely some important subset of those A facts—e.g., in order to avoid worries about circularity or regress, the subset not including this fact of intelligibility itself).[35]

Thus, on the way I am reading it, what differentiates rational grounding from arational grounding is simply *what sorts of facts* are among the A facts: namely, in cases of rational-grounding, particular sorts of facts about what certain creatures under certain conditions are able to find intelligible are among the A facts. More specifically, in cases of rational grounding, among the A facts is the fact that certain specified creatures under certain specified conditions are able to find intelligible the obtaining of the B facts, given the other A facts. In contrast, such facts are not in the grounds of the B facts in cases of arational grounding.

On this proposed way of thinking about what rational grounding amounts to, it is a nonstandard union of two different broad types of explanation.[36] One type of explanation is an epistemic one. In the sense of "explanation," to give someone an explanation of something is to try to explain it to them such that they understand it. For instance, I might try to explain to you where the nearest parking structure is on campus or what the rules of squash are. This is the type of explanation where the idea of *intelligibility* has its home, insofar as "intelligibility" picks out a notion that essentially involves someone who is trying to grasp or make sense of a proposed explanation. In contrast to this epistemic notion of explanation, there is also what is sometimes called an "ontic" notion of explanation.[37] As Boris Kment puts it, when used in the ontic sense, "explanation" "expresses an objective metaphysical, non-epistemic relation. To say that fact *f* is one of the facts that jointly explain fact *g* is to say . . . that *f* is one of the factors that jointly give rise to, or are responsible for, *g*."[38] Causal explanations (at least of a certain type) are a paradigmatic example of such ontic explanations.[39] Greenberg's core idea behind rational grounding, I take it, is that in cases of rational grounding, explanations (in the epistemic sense) play a crucial role in grounding explanations (explanations that are a species of ontic explanation).

There are a couple of important points that should be emphasized about my proposed way of understanding rational grounding. The first point

35. I drop this qualifier in what follows for ease of presentation.

36. Thanks to David Braddon-Mitchell for the suggestion of thinking of rational grounding in this way.

37. Boris Kment, *Counterfactuals and Explanation*, 115 MIND: Q. REV. PHIL. 261–302 (2006).

38. *Id.* at 283.

39. *Id.*

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is that on this way of understanding what rational grounding is, rational grounding is importantly *not* a radically different type of relation from ones that we already are familiar with. To say that the A facts rationally ground the B facts is simply to make a claim about what facts are among the grounds of the B facts. It is not, however, to assert that in addition to grounding the B facts, the A facts stand in some other, quite distinct relationship to the B facts (as they would, for instance, if they also *caused* the B facts).

The second point about my way of understanding rational grounding concerns the use of the term "rational." One might naturally think of "rational" in a normative or evaluative sense, such as senses of "rational" where to call something "rational" is in some way to endorse or praise it.[40] When used in a normative or evaluative sense, the term "rational" is naturally connected with the idea of a normative reason, that is, something that *counts in favor of* or *justifies* an action or an attitude (such as a belief, desire, or intention).[41] This issue is especially important because of the way that Greenberg explicitly makes use of the term "reasons" in discussing rational grounding, for instance, in claims such as "reasons play a central role in the ontology of law."[42]

Greenberg is explicit that the rational-relation requirement does *not* involve a justificatory sense of "rational." For instance, he writes:

> the rational-relation requirement is not a requirement that the legal facts be shown to be good or valuable. I express the requirement by saying that the determining facts must provide reasons for the legal facts, but as noted above, a reason in the relevant sense is a consideration that accounts for an explanandum in rational terms, not a justification. In general, non-normative considerations can constitute such reasons.[43]

As Greenberg himself emphasizes, if one were to set up the rational-relation requirement using a justificatory sense of "rational," then it is clear that rational grounding should not be accepted as common ground between positivists and antipositivists alike. This is because it is simply not the case that positivists should grant that the grounds of law *justify* the content of the law in any familiar, normative sense of "justify." In short, if positivists are right that legal facts are grounded in social facts and not moral facts, then there is no reason to suspect that the legal facts are any more justified by their grounds than any other set of facts that are solely determined by contingent

40. For a reading of "rational" that emphasizes this point, *see* ALLAN GIBBARD, WISE CHOICES, APT FEELINGS: A THEORY OF NORMATIVE JUDGMENT (1990).

41. This way of glossing what normative reasons are stems from T.M. SCANLON, WHAT WE OWE TO EACH OTHER (2000). *See also* STEPHEN L. DARWALL, THE SECOND-PERSON STANDPOINT: MORALITY, RESPECT, AND ACCOUNTABILITY (2006); and MICHAEL SMITH, THE MORAL PROBLEM (1994).

42. Greenberg, *Reasons without Values?, supra* note 20, at 142.

43. Greenberg, *Hartian Positivism, supra* note 1, at 270. He also emphasizes this point in Greenberg, *How Facts Make Law*, supra note 1, at 232–233; and Greenberg, *On Practices and the Law, supra* note 10, at 119.

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descriptive facts. Because of this, I think that Greenberg is correct that we should not use a justificatory sense of "rational" (or, similarly, the idea of a normative reason) in setting up the rational-relation requirement.

Instead, I think the rational-relation requirement involves a sense of "rational" that is connected with the idea of an *explanatory* reason. Here, I follow Greenberg's suggestion that the sense of "reason" involved in rational grounding is simply "a consideration that makes the relevant explanandum intelligible in rational terms, not a justification."[44] What exactly does this suggestion amount to? As I take it, what Greenberg is after here is that the notion of a "reason" involved in rational grounding is an explanatory and not justificatory one. In turn, as I understand it, the phrase "in rational terms" is meant to put some restriction on what concepts (and from what domain of thought and practice) we can use in giving that explanation, for example, the specifically legal concepts involved in legal inquiry as opposed to those we use in aesthetics. If this reading of Greenberg is correct, then I am skeptical that the use of the term "rational" is the best way for Greenberg to put things, given how easily it might be confused with a justificatory reading of "rational" and given that the phrase "in rational terms" is obscure.

At this juncture, it is also worth noting yet another potentially unfortunate connotation of Greenberg's use of the terminology of "rationality" and "reasons." Greenberg sometimes claims that in order to meet the rational-relation requirement, one needs to cite "reasons that explain the contribution of law practices to the content of the law."[45] Suppose that we take "reason" here in an explanatory (and not justificatory) sense of the term. If so, this phrasing might naturally lead one to think that the rational-relation requirement means that one needs to identify the grounds of the fact that the legal facts are grounded in such-and-such facts (including, importantly, those social facts that comprise the law-determining practices). In turn, this might naturally lead one to think that rational grounding concerns the issue of what facts ground the fact that the legal facts are grounded in such-and-such facts. But this, I think, would be a mistake. For while it is an interesting and important issue about what grounds the correct constitutive account of law, one does *not* need to give those grounds in order to identify the correct constitutive account of law. In short, in order to identify a successful constitutive account of law (or anything else), one need not answer the question of what grounds the fact that the constitutive account is correct. One simply needs to identify what the correct constitutive account is.[46] To put it another way, the second-order question of what grounds the correct

44. Greenberg, *Hartian Positivism*, *supra* note 1, at 270.
45. Greenberg, *Reasons without Values?*, *supra* note 20, at 141.
46. This important point about constitutive explanation is underscored in Mark Schroeder, *Cudworth and Normative Explanations*, 1 J. ETHICS & SOC. PHIL. 1–27 (2005); and SCHROEDER, *supra* note 17. David Enoch draws on this point in the context of discussion of Greenberg in David Enoch, That's Just What It *Is* to Be Legally Valid: A Quick Refutation of Greenberg's "How Facts Make Law" (2011), *available at* http://law.huji.ac.il/upload/ThatsJustWhatItIs.doc.

https://doi.org/10.1017/S1352325212000079 Published online by Cambridge University Press

account of what grounds legal content is simply a different question from the question of what grounds legal content.[47]

Because of the two different issues discussed above about the use of the terms "rational" and "reasons" in describing the metaphysical issue involved in rational grounding, the use of either term might likely obscure the issues more than it helps to illuminate them. Nonetheless, for purposes of continuity with Greenberg's work, I have decided to keep the label of "rational" in describing the relation of rational grounding. Doing otherwise, I think, would make it unnecessarily difficult to explain how my view of rational grounding links up with Greenberg's own statements about the rational-relation requirement.

An important consequence of this way of thinking about rational grounding is that in order for facts to be rationally grounded, there must be some facts that enable the relation between the grounding and grounded facts to be an intelligible one for the relevant creatures (e.g., creatures like us) in the relevant conditions.[48] Suppose the B facts are rationally grounded in the A facts. This means that the B facts are grounded in part in the fact certain specific creatures (e.g., us, creatures like us, etc.) in certain specific conditions (e.g., using certain concepts) find intelligible the specific grounding relation that holds between the B facts and the A facts. If so, this means that there must be *some* facts that obtain that explain the ability of these creatures in these conditions to find these facts intelligible. That is, there must be some facts that allow such creatures to find intelligible the

47. I take the essential point that I am driving at in this paragraph to be at the heart of what Greenberg is saying in the following passage:

> I sometimes summarize the argument that shows that law practices alone do not constitute sufficient reasons for legal facts by writing that we need reasons that explain the contribution of law practices to the content of the law. In putting the point this way, I may have misled readers into thinking that rational determination requires not only reasons for the legal facts, but also reasons why those reasons are relevant. The requirement is only that the constitutive determinants of the legal facts together provide reasons for the legal facts. A constitutive account appeals to normative facts not to satisfy a second-order explanatory requirement, but simply to meet the first-order explanatory requirement that law practices do not meet themselves. Saying that we need reasons for the contribution of law practices to the content of the law is just an intuitive way of summarizing why something must be added to the law practices if the determining facts are to constitute reasons for the legal facts.

Greenberg, *Reasons without Values?*, *supra* note 20, at 141–142. Given the many different notions of "reason" at work here, I am not sure that Greenberg *is* giving us an intuitive way of putting forward the issue. However, what is important at this juncture is not whether this is so. Rather, it is that, in this passage, Greenberg makes clear that the rational-relation requirement does not require one to give an account of what grounds the correct constitutive account. That would be the sort of second-order explanatory project that he thinks is not required. Rather, as I argue, the rational-relation requirement involves a particular sort of constraint that is internal to the first-order explanatory project of giving a successful constitutive account of legal content.

48. Thanks to Shamik Dasgupta and Tristram McPherson for encouraging me to clarify these points.

https://doi.org/10.1017/S1352325212000079 Published online by Cambridge University Press

grounding relation between, on the one hand, the A facts and, on the other hand, the B facts. Call those facts the *intelligibility-enabling facts*.

What role must such facts play? As I understand the role that such intelligibility-enabling facts must play, it is not that they must make intelligible the relation that the A facts stand to the B facts in the sense of explaining the general (and difficult) question of what the *grounding* or *in-virtue-of* relation *is* that holds between those facts. That is a separate and important question for substantive philosophical work in metaphysics and meta-metaphysics. Rather, what the intelligibility-enabling facts must do is the following: they must be facts that make it possible for certain creatures under certain conditions to find it intelligible how differences in a certain set of facts (the A facts) affect another set of facts (the B facts).

To put the thought somewhat more precisely, suppose we draw up a list of ordered pairs that pair certain sets of facts (e.g., social facts) with other sets of facts (e.g., legal facts). The intelligibility-enabling facts will be facts that allow certain creatures (under certain conditions) to find intelligible the fact that particular pairs of such facts stand in the grounding relation with each other. Thus what the intelligibility-enabling facts are making intelligible is a certain fact: namely, the fact that such-and-such facts ground such-and-such other facts (namely, whatever the target facts are in the case at hand).[49] Moreover, as I explain shortly, the facts need to be ones that allow not just anyone to find those facts intelligible but rather certain creatures under certain conditions (what those creatures and conditions are likely varies in different cases of rational grounding). In the case of law, the creatures are ones largely like us, working with a limited set of concepts and limited cognitive capacities. Therefore, in any given case where a set of facts is rationally grounded, there must be some such facts that enable creatures like us (in certain conditions) to find that fact of grounding intelligible.[50]

According to my way of understanding the basic nature of rational grounding, the intelligibility-enabling facts might themselves be among the A facts or they might not be. That is, the intelligibility-enabling facts might or might not themselves be among the grounds of the B facts in question. Nothing in what rational grounding *is* settles that question. What matters is simply that a specific fact about intelligibility is among the A facts: namely,

49. Thanks to Alex Silk for encouraging me to clarify this issue.

50. In principle, there might be lots of intelligibility-enabling facts in any case in which creatures find something intelligible. There is a difficult question, then, about which of these facts are really the ones we need to focus on. As I see it, this question is deeply tied to questions about the nature of explanations in general. For our purposes, though, we can largely put this issue aside. This is because even if there might be many facts that would count as intelligibility-enabling facts in many situations (including, perhaps, background conditions such as what the creatures involved are like), the focus of my debate about Greenberg's argument for HFML does not involve arguing for any particularly radical claim about what kinds of facts might be intelligibility-enabling facts in the case of legal facts. Greenberg explicitly grants that the kind of facts that I think are the intelligibility-enabling facts (namely, conceptual facts) are, in general, the kind of facts that could be the intelligibility-enabling facts in cases of rational grounding.

https://doi.org/10.1017/S1352325212000079 Published online by Cambridge University Press

the fact that the grounding relation between the A facts and the B facts is intelligible to certain creatures under certain conditions (including, importantly, what concepts those creatures are using to make sense of the relation between the A facts and the B facts).

In his own antipositivist proposal for legal content, Greenberg argues that the intelligibility-enabling facts (which he thinks are moral facts) are among the grounds of legal content. On this proposal, it is *not* that certain moral facts ground the fact that social facts ground the legal facts but without the moral facts themselves being part of the grounds of the legal facts. Rather, it is that certain moral facts are themselves among the grounds of the legal facts. In contrast, on the positivist proposal I present later in the paper, the relevant intelligibility-enabling facts (which I think are conceptual facts) are not themselves among the grounds of legal content, or at least, I am not committed to them being so. My proposal for how to meet the rational-relation requirement in the case of law is thus importantly different from Greenberg's proposal.

Furthermore, I am also not committed to the thesis that these conceptual facts ground the fact that such-and-such social facts ground the legal facts. Rather, all I am committed to is the idea that certain conceptual facts are facts that enable certain creatures under certain conditions (roughly, creatures like us, using the legal concepts that we already have) to find it intelligible why certain changes in certain social facts yield certain changes in legal facts. In other words, all I am committed to is the thesis that these conceptual facts are the intelligibility-enabling facts that the positivist needs to meet the rational-relation requirement, even if those facts are not among the grounds of law and even if these facts do not ground the fact that law is grounded in such-and-such social facts.

It should be noted here that Greenberg sometimes seems to assume that whatever facts enable this intelligibility in question are necessarily among the grounds of law. For instance, as I explain later in this paper, this assumption seems to be at work in Greenberg's discussion of the idea that conceptual facts might include or depend on moral facts. In short, Greenberg argues that if one accepts this idea, and then one accepts the idea that the conceptual facts are the intelligibility-enabling facts in the case of legal content, then one will be forced into antipositivism. I am sympathetic to this argument. But it seems to me that Greenberg moves too quickly here.

Recall the distinction I make above between accounts of what the grounds of the legal facts are versus accounts of what grounds the fact that certain facts are among the grounds of the legal facts. As Greenberg sets things up, the positivism/antipositivism debate concerns the former issue but not the latter. Therefore, one might accept that moral facts are the grounds of the fact that certain creatures find certain facts intelligible *without* thereby obviously committing oneself to the idea that moral facts are among the grounds of the legal facts. Or, more precisely, this move seems to me to be at least an open possibility that would require significant argument to rule out.

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In short, the opponent of this view would need to show that if X grounds Y and Y grounds Z, then it follows that X grounds Z. This might be so in many cases, but it would, I think, require significant argument to establish that it always holds or even simply that it holds in this case. Among other things, I think it would require taking a more detailed stand on what exactly is grounding itself that goes beyond the very broad definition we are working with in this paper.[51] Nonetheless, in terms of establishing my own positive proposal, this issue will not prove to be crucial. This is because, as I explain later in this paper, the conceptual facts that I claim are the intelligibility-enabling facts do not include or depend on moral facts. Thus, even if one assumes that if the intelligibility-enabling facts turn out to include or depend on moral facts then this entails antipositivism, this will not matter for the positivist position that I am advancing in this paper.

The picture that we now have on the table of rational grounding is this: rational grounding is a case of grounding in which certain higher-level facts are grounded in the fact that certain creatures under certain conditions find intelligible the grounding relation between certain facts. In order for Greenberg's proposed rational-grounding relation to do work in thinking about the grounds of facts in a given domain, for example, the legal domain, we therefore need to specify many more details of the story about what rational grounding amounts to in that domain. For instance, we need to have answers to *at least* the following questions: (1) To whom precisely must this relationship be intelligible? (2) Under what conditions? and (3) How intelligible must it be to them? In order to understand the outlines of how Greenberg thinks about these questions, it is worth pausing here to explain first why Greenberg thinks that legal facts are rationally grounded.

In broad terms, Greenberg appeals to certain salient facts about legal reasoning and argument in order to argue that the legal facts are rationally grounded. To start with, consider the minimal antiskeptical premise that we aren't hopeless at learning about legal facts. In other words, the premise is that we have some ability to learn what legal obligations, permissions, powers, and so on obtain in a given jurisdiction at a given time. It is hard to deny this premise—and indeed, without holding that we have this ability for at least *some* legal facts, we risk losing our justification for thinking that there are such facts here in the first place. For, in general, if we have no good account of what a workable epistemology of X facts is likely to be, this suggests that there might not in fact be X facts at all.

With this basic idea in hand, consider some of the schematic ways in which we might come to know about some higher-level B facts (such as legal facts) that are grounded in some other lower-level A facts. Greenberg begins by considering two possibilities here. The first possibility is that we might have

51. For more on this issue about the transitivity of grounding relations, *see* Trogdon, *supra* note 25. Greenberg touches on some of the important issues about the transitivity of grounding in Mark Greenberg, *A New Map of Theories of Mental Content: Constitutive Accounts and Normative Theories*, 15 NOUS: PHIL. ISSUES 299–320 (2005).

https://doi.org/10.1017/S1352325212000079 Published online by Cambridge University Press

knowledge of the B facts independently of the A facts. For instance, this seems likely to be the case for facts that concern the content of conscious experiences: we can come to know the content of our conscious experience in ways that do not depend on our working out this content based on what grounds that content (e.g., the microphysical facts).[52] The same thing, says Greenberg, also seems to be true about the weather facts.[53] The second possibility is that, as Greenberg puts it, "we do work out the B facts from the A facts but that we have a nonrational, perhaps hardwired, capacity to do so."[54] An example here, says Greenberg, is perhaps the case of facts about what is funny (which Greenberg calls "humor facts"). Greenberg claims that it is likely that we can know facts about what is funny, facts that are grounded in what was said and done, even though that relationship is possibly (and, indeed, perhaps likely) unintelligible to us. The explanation, suggests Greenberg, might be species-specific capacities that we have for working out what is funny.[55]

As I understand it, this second possibility essentially involves the following: creatures learn about the B facts by way of thinking about the A facts that ground them but without any capacity to understand (or find intelligible) that such-and-such B facts are grounded in such-and-such A facts. This is reflected in the fact that such creatures need not understand why changes in certain A facts result in other changes in the B facts. For instance, such creatures need not understand why a small change in the way a given joke is told makes it much less funny.

Greenberg thinks neither of these above schemas provides a plausible explanation of the epistemology of legal content. This is for two reasons. The first reason is that, as Greenberg puts it:

> our only access to the content of the law is through law practices. It is not as if we can find out what the law *is* directly or through some other route. And the whole enterprise of lawmaking is premised on the assumption that the behavior of legislators, judges, and other law-makers will have understandable and predictable consequences for the content of the law.[56]

The point here can be put like this. To start with, even if there are facts among the grounds of law other than the law-determining practices (as indeed antipositivists such as Greenberg think), all sides of the debate take it that the law-determining practices are among the grounds of law. Moreover, all of us take it that when certain of the law-determining practices are changed (e.g., when a judge writes or says certain things as opposed to others), this can have an impact on the content of the law that has

52. Greenberg, *How Facts Make Law*, *supra* note 1, at 238.
53. *Id.*
54. *Id.*
55. *Id.*
56. *Id.* at 238–239.

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the following feature: we can understand why those changes in the law-determining practices resulted in *this* specific change in the content of the law as opposed to another one. Indeed, claims Greenberg, the only sort of method that creatures like us have for learning about what specific content of the law *is* requires us to took at facts about law-determing practices (perhaps coupled with certain moral facts if the antipositivist is right).

The second reason is that "we are able to work out what the law is and predict the effect on the law of changes in law practices through *reasons,* not through some non-rational human tendency to have correct law reactions to law practices."[57] What does this mean? Given the broad view of rational grounding I am suggesting, I think the best way to read Greenberg here is to understand a "reason" not as something that *justifies* or *lends normative support* to something else but rather simply as "a consideration that makes the relevant explanandum intelligible."[58] When understood in this way, I think that Greenberg's point here is this: when we try to work out what the law is, we cite considerations that we think explain why the law is what it is. This is central to legal practice. Indeed, it is so central, says Greenberg, that when someone is unable to cite such considerations—or simply refuses to do so, perhaps by saying "it is just a brute, un-explainable fact that the law requires you to pay your taxes by April 15"—then that person is forced to withdraw her claim. As Greenberg puts it: "when lawyers, judges, and law professors work out what the law is, they give reasons for their conclusions. Indeed, if we find that we cannot articulate reasons that justify a provisional judgment about what the law is in light of law practices, we reject the judgment."[59]

With this understanding of *why* Greenberg thinks we should accept the rational-relation requirement in hand, we can now return to the following questions raised above about what the rational-relation requirement looks like in the case of law: (1) To whom must the grounding-relationship facts be intelligible? (2) Under what conditions? and (3) How intelligible must it be to them? As I understand Greenberg, he answers these questions as follows. First of all, the grounding-relationship facts must be intelligible to creatures roughly like those of us engaged in standard legal argument and reasoning, creatures of limited cognitive capacity that possess and use but have not fully analyzed a basic set of legal concepts. Moreover, the grounding-relationship facts must be intelligible to those creatures in terms of those legal concepts—rather than some other disconnected set of concepts that these creatures also happen to possess (e.g., aesthetic ones).[60] Finally, the

57. *Id.* at 239.
58. *Id.* at 232.
59. *Id.* at 239.
60. I take this point to be part of what Greenberg is getting at in his discussion of the grounds of aesthetic facts toward the start of *id.* He writes that "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 reasons why the painting is elegant." *Id.* at 228. Here, Greenberg distinguishes explanations that make sense of things in certain concepts (e.g., those describing the underlying psychological mechanisms) as opposed

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grounding relations must be intelligible enough that these creatures do not inevitably demand further explanation when presented with the grounding-relationship facts, even if there are things that they do not immediately find fully intelligible about those grounding-relationship facts. There are obviously more details to be spelled out here. But for now this is enough detail to have on the table the basics of what Greenberg thinks rational grounding amounts to in the legal domain and therefore for us to understand what his rational-relation requirement amounts to for constitutive accounts of legal content.

However, before moving on, I want to emphasize here that I myself do not fully endorse the rational-relation requirement. My aim here is to provide, as best as possible, a clear and plausible proposal for what Greenberg is driving with the rational-relation requirement. In so doing, I hope to make both a contribution to our understanding of Greenberg's work as well as, more importantly, a contribution to mapping the sorts of relations that might matter for the philosophy of law. But I do not intend to endorse the rational-relation requirement as a constraint on constitutive accounts of legal content. With this in mind, I want to register four important points that make me skeptical of the rational-relation requirement.

The first point concerns the core idea of *intelligibility* in cases of rational grounding. In short, this idea of intelligibility has yet to be fully explicated. There is certainly some intuitive notion here that Greenberg is drawing on—and perhaps he does not need to say much more about it to convince us of the rational-relation requirement. Yet, given how crucial this notion is to the idea of rational grounding, it would be good to know more about what exactly it amounts to.

The second point of skepticism about the rational-relation requirement is that I am worried about delineating the range of cases that are subject to it. For instance, one would presumably not want constitutive accounts of social conventions in a given social group to be subject to the rational-relation requirement. While Greenberg does have things to say about why such facts are not rationally grounded whereas legal facts are, given the sorts of evidence Greenberg cites for why legal facts are rationally grounded, I am worried that similar evidence might be found in cases where the facts are likely *not* rationally grounded. This, of course, is not an argument against Greenberg but rather simply a place where I think further inquiry is required.

The third point of skepticism stems from the fact that Greenberg cites few places other than the law where he thinks facts are rationally grounded. Indeed, there are seemingly no noncontroversial cases of rational grounding to which he can appeal. This is, I think, well reflected by the fact that Greenberg appeals to Davidson's highly unorthodox (even if highly

to others (e.g., those of aesthetics). On my reading, this distinction is crucial to understanding what the rational-relation requirement consists in.

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influential) theory of mental content (a theory that Greenberg himself thinks is false) to help illuminate the nature of rational grounding. In short, I am not sure that we have any good examples of when facts are grounded in part in the sorts of facts about intelligibility that (purportedly) ground facts in cases of rational grounding. Thus it might turn out that law is the only domain in which facts are rationally grounded. This, of course, might simply serve to reinforce Greenberg's own view that the metaphysics of law is an interesting branch of metaphysics. However, at the same time, the lack of uncontroversial examples outside the case of law should make us more cautious in appealing to the notion of rational grounding than we would be if we had some clear instances of rational grounding outside the legal domain.

The fourth point of skepticism concerns Greenberg's use of the rational-relation requirement in the case of law in particular. In short, I am not convinced Greenberg gives us sufficient evidence to show that legal facts are rationally grounded. It seems to me that much of the evidence Greenberg cites might well be taken to support other conclusions instead. Perhaps, for instance, the evidence I discuss in this section simply shows that some legal systems, ones wherein we are thoroughly hopeless at correctly identifying when a set of paired social and legal facts stands in the grounding relation to each other, would be very strange or seriously defective legal systems, given the role we hope legal systems can play in our lives. But that need not necessarily show us that there is no legal content in those legal systems. It would just be that we lack epistemic access to certain facts that would be extremely helpful to know more about, given the role we want the law to play in our lives. And if that is right, then we should reject the rational-relation requirement. For if it is possible to have a legal system with legal content that is not grounded in facts of intelligibility, then such facts are not among the ultimate grounds of legal content in any legal system.[61]

Because of these and other reasons, I think it is at least reasonable for the positivist to respond to Greenberg's argument by rejecting the rational-relation requirement.[62] However, pursuing this path comes at a cost: it leaves open the possibility that Greenberg will be able effectively to undermine positivism if and when he develops a more precise understanding of rational grounding and the role it plays in the legal domain. Moreover, given that Greenberg does point to features of legal argument and practice that suggest something in the ballpark of rational grounding is on the right track, I think it is more philosophically fruitful to grant Greenberg a version of his rational-relation requirement and then see if we can develop a response on behalf of positivism. At the very least, doing so can help us better understand the space of possibilities for developing a positivist constitutive account of

61. My point here parallels the "all-or-nothing result" that Greenberg himself discusses in Greenberg, *Hartian Positivism*, *supra* note 1, at 266, in the context of discussing Hartian theories of legal content.

62. For an argument on behalf of this proposal, *see* Enoch, *supra* note 46.

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law and understanding what explanatory resources positivism might have at its disposal.

C. How Greenberg Uses the Rational-Relation Requirement to Argue for Antipositivism

Let us now take stock of where we are. In the previous two subsections II.A and II.B, we looked at two crucial features of how Greenberg understands the relationship between legal facts and the legal-determinant facts: (1) that the legal facts are *grounded* in the legal-determinant facts and, more specifically, (2) that the legal facts are *rationally* grounded in the legal-determinant facts. As shown, for Greenberg, the rational-relation requirement is the requirement that any full constitutive account of law must show that the legal-determinant facts—including, crucially, the law-determining practices—are related to legal facts in a way that meets both of those requirements. This now puts us in a position to state Greenberg's core argument in HFML.

Drawing on Greenberg's own summary of his argument,[63] we can put the core argument of HFML as follows:

> P1. Every legal fact is grounded in part in social facts (namely, those facts that comprise what Greenberg calls the "law practices").
> P2. There are many legal facts.
> P3. Every legal fact is rationally grounded.
> P4. The law practices cannot by themselves rationally ground any legal facts.
>
> C1. We need to identify other facts that enable the intelligibility that is necessary for the legal facts to be rationally grounded. These intelligibility-enabling facts (or fact) play the role of what we can call "the intelligibility enabler(s)."
>
> P5. Positivists cannot identify a viable account of what the intelligibility-enabling facts are.
> P6. Antipositivists can identify a viable account of what the intelligibility-enabling facts are: namely, moral facts.
>
> C2. We should accept antipositivism.

So far, I have been largely focusing on P3. But there are also other important premises here that one might put pressure on. For instance, take P4. Greenberg claims that P4 holds because social facts "cannot determine their own relevance"[64] to the content of law. For instance, he writes that "the basic problem with law practices is that there are many possible ways in which they could bear on the legal facts, and they cannot determine their

63. Greenberg, *Hartian Positivism*, *supra* note 1, at 268–271.
64. Greenberg, *How Facts Make Law*, *supra* note 1, at 252.

https://doi.org/10.1017/S1352325212000079 Published online by Cambridge University Press

own relevance."[65] As I read him, the thought is that in general, simply more facts about a set of social practices S cannot help explain why facts about S ground legal facts.

Greenberg gives an extended argument for this point in HFML.[66] To get the basic gist of this argument, consider a set of social facts (SF1) that contains something explicitly about the relevance of a subset of those social facts SF1. For example, suppose there was a document that said something along the lines of "the semantic content of the document in which this sentence appears constitutes the supreme norm of the legal system."[67] One might be tempted to think that this fact would establish the relevance of certain social facts among SF1. But Greenberg thinks this is not the case. In short, he thinks that without further facts beyond the facts in SF1, we lack a good account of why the proposition that this sentence expresses in ordinary English has any special status whatsoever. For example, why should we not care about the negation of the proposition that the sentence expresses rather than the proposition that it expresses? To answer such questions, Greenberg thinks that one needs facts beyond those in SF1. In short, one needs facts that explain the relevance of the social facts in SF1 to legal facts. For now, let us grant that this point is correct. I briefly return to P4 later in this paper. For now, however, I want to focus on the premise that I aim to show is wrong. This is P5.

P5 claims that positivists cannot identify a viable account of what the intelligibility-enabling facts are. We are already granting that P4 rules out certain accounts. What further grounds does Greenberg have for thinking that positivists cannot identify a viable account of what the intelligibility-enabling facts are? In order to answer this question, it should be first be stressed that, as I understand Greenberg, the claim is that the best overall positivist accounts do not meet the rational-relation requirement but that there are viable antipositivist accounts that do so. Importantly, Greenberg does not argue that it is *impossible* for positivist theories to meet this requirement. Rather, as I read him, he is making the more modest argument that no existing positivist account can meet this requirement while at the same time delivering a plausible theory of law. Moreover, he thinks that there are general reasons to suspect that new positivist accounts will fail for reasons that are similar to their predecessors.

In HFML and "Hartian Positivism and Normative Facts: How Facts Make Law II," Greenberg gives an extended argument against specific positivist proposals for what the intelligibility-enabling facts are. For instance, much of "Hartian Positivism" is an argument against Hartian proposals for what the intelligibility-enabling facts are—proposals that Greenberg calls different

65. Greenberg, *Hartian Positivism*, *supra* note 1, at 270.
66. Greenberg, *How Facts Make Law*, *supra* note 1, at 241–251.
67. I owe this example, and my way of understanding its relation to P4, to discussions with Mark Greenberg.

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"bridge principles."[68] This discussion is rich and complicated. However, given that I am *not* advocating a Hartian bridge principle, all that we need is a broad overview of what Greenberg's argument for P5 consists in. As I read him, his argument for P5 can be summed up as follows. Greenberg argues that there is nothing that the positivist can appeal to that would make intelligible the relation between the legal facts and the grounds of legal facts in a satisfactory way, given (1) the actual facts about the subject matter at hand (i.e., what law is actually like), and (2) the constitutive commitments of positivism as a position within the philosophy of law (i.e., that legal facts are ultimately grounded in social facts, and not in moral facts).[69] Greenberg makes this argument through a set of detailed attacks on positivist proposals for what could play this role of the intelligibility enabler.

For our purposes here, the most important of these attacks concerns the broad idea that conceptual facts are the intelligibility-enabling facts. Greenberg is explicit that, in principle, conceptual facts *could* be the intelligibility-enabling facts for cases of rational grounding. He writes: "in principle, conceptual truths (that are not value facts) [i.e., that are not moral facts] about law could, with law practices, make rationally intelligible the content of the law."[70] However, he simply thinks that there are no conceptual facts that do the necessary work here. Greenberg considers a number of different proposals on this front: ranging from the idea "that it follows from the

68. Greenberg, *Hartian Positivism*, *supra* note 1, at 266.

69. Following one standard convention, I sometimes claim in this paper that the positivist thesis is that legal facts are grounded *solely* in social facts. One worry with this way of speaking is that it might rule out the possibility of a positivist accepting that the legal facts are rationally grounded. This is because one might think that the fact of intelligibility that must necessarily be among the grounds of legal content (insofar as legal content is rationally grounded) should not be thought of as itself a social fact. One can get around this worry by claiming (I think plausibly) that this fact of intelligibility is itself a social fact, given how we have defined "social facts" in the context of the positivism/antipositivism debate. Another way to go is to say that the positivist thesis is that the legal facts are grounded in social facts and such-and-such other facts but not moral facts. Both of these are viable options for dealing with this complication. However, I put aside this complication in the body of this paper. This is because, insofar as the "solely" language is helpful in our discussion, it is so mainly insofar as it rules out the idea that moral facts are among the grounds of law. Since both contemporary positivists and antipositivists alike agree that social facts are among the grounds of law, I take it that the "solely" modifier is, in the first instance, meant to signal that these facts ground the legal facts but that the other facts whose role in up for debate (namely, moral facts) do not ground the legal facts. Given this context, I therefore think that claiming that the positivist thesis is that the legal facts are "solely" grounded in the social facts is an acceptable (although perhaps not entirely precise) way of speaking.

70. Greenberg, *How Facts Make Law*, *supra* note 1, at 233. This position is repeated later in *id.*, when Greenberg writes:

> It might be suggested that an appeal to conceptual truth offers a way to avoid the conclusion that the content of the law depends on value facts. The idea would be that the concept of law (or some other legal concept), rather than substantive value facts, determines that some models are better than others. As noted above, conceptual truth is the kind of consideration that could provide reasons of the necessary sort. The question is whether conceptual truth does so in the case of law.

Id. at 254.

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concept of law that a validly enacted statute makes true those propositions that are the ordinary meanings of the sentences of the statute"[71] to the idea that a Hartian bridge principle could be established as a conceptual truth. In short, Greenberg argues that all such proposals that he knows of fail.

Greenberg offers specific reasons for why each proposal he consider fails. For instance, in considering the proposal that a Hartian bridge principle holds as a conceptual truth or deep (but nonconceptual) truth about law, he thinks that there are simply enough conflicting intuitions that we have—intuitions that are in tension with each other in a reflective understanding of law and which are evident in the pervasive disagreement within legal practice about which social facts are relevant to legal content (and to what extent)—such that he concludes that our "reflective understanding of law does not support the Hartian position."[72] Moreover, at the same time that Greenberg attacks particular proposals for which conceptual facts are the intelligibility-enabling facts, Greenberg offers some general considerations against thinking that there are any such conceptual facts that could do the necessary work here.

In the context of this paper, the most important such consideration that Greenberg offers involves reflection on what conceptual facts *in general* are. In response to the proposal that "the concept of law (or some other legal concept), rather than substantive value facts [i.e., moral facts], determines that some models are better than others,"[73] Greenberg considers two different ways in which the conceptual facts at issue here might be understood.

The first way is as follows: "according to what we can call a *superficialist* notion, conceptual truths are truths about the use of concept-words, truths that are tacitly known by all competent users of those words or are settled by community consensus about the use of the words."[74] Greenberg firmly rejects this proposal. This is for two reasons.

The first reason is that it runs counter to what he thinks is a core truth about legal practice: there is widespread divergence and disagreement about when to count something as law. Moreover, he thinks that it is largely common ground in contemporary debate that we cannot point out any readily acknowledged facts about word usage that these disagreeing parties would recognize as settling the dispute. Greenberg thinks Dworkin's argument about the significance of legal disagreement helps illustrate that there are no such superficialist conceptual facts in the offing here. He writes:

> Ronald Dworkin famously argued that disputes about the grounds of law are substantive debates, not trivial quarrels over the use of words. Positivists have generally responded by denying that they hold the kind of view Dworkin was attacking. Thus, both sides agree that questions about which models are better

71. *Id.* at 233.
72. Greenberg, *Hartian Positivism*, *supra* note 1, at 267.
73. Greenberg, *How Facts Make Law*, *supra* note 1, at 254.
74. *Id.*

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> than others are not merely verbal questions that can be settled by appeal to consensus criteria for the use of words.[75]

As this quote underscores, Greenberg thinks that Dworkin's work supports the idea that facts about legal concepts—when understood on a so-called "superficialist" notion of conceptual truth—are unable to settle the dispute over positivism. Furthermore, he thinks that positivists have generally accepted this fact.

The second reason that Greenberg rejects this proposal of relying on what he calls a "superficialist" notion of conceptual truth is because of the general principle that facts about legal practice cannot determine their own relevance to facts about legal content. Because of this principle, Greenberg writes, "it follows that if conceptual truth is to be the source of the standards, conceptual truth must not be determined by the practices of participants in the legal system; it must depend on factors independent of our law practices."[76] The problem for the superficialist notion of concepts, says Greenberg, is that on the superficialist view, conceptual truths depend solely on facts about our law practices. Hence the appeal to such conceptual truths will not work for the positivist.

The second understanding of conceptual truth that Greenberg considers is one that "is not determined by consensus about the use of words and is not determined by our law practices."[77] Given Greenberg's previous terminology, call such an understanding of conceptual truth a *nonsuperficialist* understanding. Greenberg responds to this idea as follows:

> I am sympathetic to such a notion of conceptual truth. Given such a notion, however, it is not clear that an appeal to conceptual truth is a way of avoiding the need for substantive value facts [i.e., moral facts]. Instead, the conceptual truths in question may include or depend on value facts [i.e., moral facts], for example, facts about fairness or democracy. At this point, the burden surely rests on a proponent of the conceptual-truth suggestion to offer a position that avoids the two problems that I have just described without collapsing into a dependence on substantive value facts [i.e., moral facts].[78]

The challenge here, in other words, is as follows: to explain what a nonsuperficialist understanding of concepts would be such that conceptual truths do not themselves (1) depend on or (2) include moral facts. Greenberg is doubtful that this is possible and hence thinks this background view of concepts will not be helpful for locating a positivist account of what the intelligibility-enabling facts are. His main reason for this is as follows. Purported conceptual facts about legal content tell us the following: necessarily,

75. *Id.*
76. *Id.* at 255.
77. *Id.*
78. *Id.*

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when such-and-such facts obtain, there is a legal obligation, duty, permission, power, and so on. On a commonly accepted picture of what moral facts are, many fundamental moral facts are also necessary facts that tell us exactly the same sort of thing. In particular, on a commonly accepted picture of fundamental moral facts, many fundamental moral facts tell us that necessarily, when such-and-such facts obtain (e.g., descriptive facts about how things are), there is an obligation, duty, permission, power, and so on. So, according to Greenberg, purported conceptual facts about legal content have the same core features that we often attribute to fundamental moral facts—both provide necessary facts that cover the subject matter of obligations, duties, rights, and so on. Hence, he thinks, we should be skeptical that these purported conceptual facts do not themselves include or depend on moral facts.

In combination with his rejection of the other sorts of facts that the positivist might draw on in meeting the rational-relation requirement, Greenberg's argument against the possibility of a positivist appeal to conceptual facts concludes his argument against legal positivism. The conclusion is that the positivist has no good way of meeting the rational-relation requirement.

In contrast to his view of conceptual facts and other facts that the positivist could appeal to, Greenberg thinks that moral facts could provide the relevant intelligibility needed to meet the rational-relation requirement. He writes that such facts could be ones that "are precisely facts about the relevance of law practices to legal obligations, rights, powers, and so on."[79]

I have some hesitation about Greenberg's way of putting forward his antipositivist proposal here. This is because moral facts are not *uncontroversial* cases of things that would provide intelligibility to facts about legal content. For one thing, it might be that creatures like us cannot understand what the moral facts are. If so, it is hard to see how these moral facts (or any facts among the base facts that are epistemically inaccessible to us) could make intelligible the relationship between the base facts and the relevant target facts (namely, the legal facts). Thus Greenberg's antipositivist proposal might well rest on a claim about our epistemic access to certain moral facts.[80] Furthermore, even if the relevant moral facts turn out to be ones we have epistemic access to (which I think is likely the case), moral facts might indeed provide intelligibility in explaining when *genuine* moral obligations, duties, rights, and so on exist. But the positivist need not (and I think *should* not) grant that legal obligations, rights, and so on are always (or even usually) things of that sort.

This is not to suggest that Greenberg is begging the question against many positivist opponents. Indeed, I think he is not. This is because, as I read him, he is not saying that the moral facts that the antipositivist claims are the intelligibility-enabling facts in question are uncontroversial

79. Greenberg, *Hartian Positivism*, *supra* note 1, at 285.
80. Thanks to Alejandro Pérez Carballo for pressing this point.

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examples of things that could potentially be the intelligibility-enabling facts. Rather, his point is that *if* one took legal obligations, rights, duties, and so on to be genuine obligations, rights, duties, and so on, then such moral principles would be the sort of intelligibility-enabling facts that we need. He is therefore offering us an antipositivist package—one that he develops further in other work—that is an alternative to the positivist one. He is then claiming that his antipositivist package is preferable since it has an explanation of what the intelligibility-enabling facts are that the positivist lacks. There are lots of interesting questions to be raised about whether and how moral facts might help antipositivists develop a theory that meets the rational-relation requirement. However, our main concern at this stage is not with the merits of Greenberg's own antipositivist proposal for how to meet the rational-relation requirement. Rather, what matters is what sorts of facts the *positivist* might be able to appeal to in order to develop a theory that meets the rational-relation requirement. We are now in a position to turn to this task.

III. USING CONCEPTUAL FACTS TO RESPOND TO GREENBERG'S ARGUMENT

In the next two sections of this paper, I turn to the main positive components of my response to Greenberg's argument in HFML. In schematic form, I argue that the positivist can respond to Greenberg's argument by drawing on (1) the basic account of concepts and conceptual analysis (and the basic account of the role of conceptual analysis in metaphysics) put forward by David Chalmers and Frank Jackson in combination with (2) the basic account of the concept LEGAL INSTITUTION (and its conceptual connections to the concept LEGAL NORM) that we get from Scott Shapiro's Planning Theory of Law.[81] In short, I argue that conceptual facts about the concept LEGAL INSTITUTION (and its conceptual connections to the concept LEGAL NORM) are the intelligibility-enabling facts that the positivist needs to explain how social facts ground legal facts in a way that is consistent with Greenberg's rational-relation requirement. I break down this response into two sections. In this Section III I focus on the background view of concepts that this response relies on. In Section IV I turn to the concept LEGAL INSTITUTION and the treatment of this concept within the version of Shapiro's Planning Theory that I favor.

In order to explain some of the background motivation for this line of response, let me start by briefly stating one of the simple reasons I think that positivists should, by default, be responsive to the idea that conceptual facts are the intelligibility-enabling facts. The reason is this: if the positivist does not appeal to conceptual facts (which, remember, are facts that Greenberg

81. David J. Chalmers & Frank Jackson, *Conceptual Analysis and Reductive Explanation*, 110 PHIL. REV. 315–360 (2001); SHAPIRO, *supra* note 2.

https://doi.org/10.1017/S1352325212000079 Published online by Cambridge University Press

explicitly grants could in principle be the intelligibility-enabling facts), then it is not clear what other sorts of facts she can appeal to in this context. The basic reason for this can be put as follows. Given that we are concerned about the ultimate grounds of legal content, we have to be concerned about what grounds legal content across all possible legal systems. We therefore need to locate necessary truths about the nature of legal content across all possible legal systems. Conceptual facts of a paradigmatic sort—namely, conceptual facts that tell us about what is and is not conceptually possible—are a natural candidate for helping to identify such facts about what holds across all possible legal systems, even if those conceptual facts are not themselves among the grounds of legal content.

There might, of course, be other options here—for instance, perhaps the positivist could appeal to facts about *what grounds what* that are irreducible to conceptual facts or other facts.[82] I am open to there being such facts. But I have less understanding of what such facts are than I think I do of conceptual facts, as well as some serious doubts about how philosophers can gain epistemic access to these facts. Moreover, there is also the fact that the existence of such facts is likely to be seen as more contentious than the existence of conceptual facts (at least of some variety). Therefore, I think that conceptual facts provide a good place for the positivist to *start* (even if not to finish) in trying to meet the rational-relation requirement.

In order to pursue this idea, let us start by briefly revisiting the reasons Greenberg is skeptical that conceptual facts are the intelligibility-enabling facts that the positivist needs to identify. On the one hand, if the conceptual facts are superficialist ones, then Greenberg claims that these facts will not be substantive enough to do the heavy lifting they need to do in this context (because there simply are no readily recognized shared criteria for the application of the central legal terms that matter in this context). At the same time, Greenberg thinks that a philosopher who cites such superficialist facts might tacitly be relying on the false idea that practices themselves can determine their own relevance. On the other hand, if the conceptual facts are nonsuperficialist ones, then Greenberg argues that given that the purported conceptual facts involve necessary truths about when certain obligations, rights, duties, and so on obtain, the positivist owes us a story about why these purported conceptual facts do not themselves include or depend on precisely the sort of moral facts that the antipositivist thinks are among the grounds of legal content.

What should we make of these arguments? Let us start with the antisuperficialist front. On this front, we can distinguish two sorts of views: those that deny that conceptual facts include or depend on moral facts versus those that affirm that they do. If one accepts a view of the first sort, then I am not sure that Greenberg has in fact given us much to worry about. Greenberg claims that given that the purported conceptual facts involve necessary

82. *See, e.g.*, Schaffer, *supra* note 25.

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truths about when certain obligations, rights, duties, and so on obtain, the positivist owes us a story about why these purported conceptual facts do not themselves include or depend on precisely the sort of moral facts that the antipositivist thinks are among the determinants of legal content. But why should we even worry that this is a possibility? It seems to me that this thought has bite only insofar as one thinks of legal obligations, rights, duties, and so on as *genuine* moral obligations, right, duties, and so on. But, as I said earlier in this paper, positivists need not accept that picture. And, indeed, I think they should not. We might put the point like this. Following Shapiro, I think that both positivists and antipositivists alike should grant that legal content consists of legal norms in a weak sense of "norm," where it means something like a (perhaps badly mistaken, corrupt, or invalid) standard for judging success in a given domain. In *Legality*, Shapiro writes:

> In what follows, I will use the term "norm" to denote any standard—general, individualized, or particularized—that is supposed to guide conduct and serve as a basis for evaluation or criticism. Strict rules, rules of thumb, presumptions, principles, standards, guidelines, plans, recipes, orders, maxims, and recommendations can all be norms. Furthermore, moral, legal, religious, institutional, rational, logical, familial, and social standards are norms as well.[83]

If "norm" is taken in this weak sense, and the positivist also has a story about how these norms can be redescribed in terms of "obligations," "duties," and so on, then there need be nothing particularly suspicious about how conceptual facts could link social facts with facts of legal obligation. Or more precisely, this need be only as suspicious as the link between nonmoral facts and facts about the obtaining of norms in playing games, cooking dinners, and other activities that have (perhaps mistaken, corrupt, etc.) standards relative to that activity that allow us to evaluate the activity against that standard. Given this situation, unless one has independent evidence to support antipositivism about *all* standards that we might conceivably use to evaluate activities (a thesis that I take to be highly implausible), it is not clear to me why we should think the derivation of facts about legal obligation from conceptual facts should make us inclined to thinking that those conceptual facts include or depend on moral facts.

Furthermore, from another angle, one might have a view according to which certain conceptual facts provide a necessary connection between certain social facts and certain moral facts *without* those conceptual facts themselves including or depending on moral facts. Indeed, many philosophers who promote naturalistic descriptivist views in metaethics endorse precisely that claim.[84] One might of course have worries about such

83. SHAPIRO, *supra* note 2, at 41.

84. *See, e.g.*, SMITH, *supra* note 41; JACKSON, FROM METAPHYSICS TO ETHICS, *supra* note 28; and Frank Jackson & Philip Pettit, *Moral Functionalism, Supervenience and Reductionism*, 46 PHIL. Q. 82–86 (1996).

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proposals, perhaps in light of Moore-like objections in the vicinity of the famous Open Question Argument.[85] But the point here is that simply showing that two things play this similar functional role—namely, of establishing a necessary connection between social and moral facts—need not commit one to thinking they are the same sorts of thing or that one depends on the other. Greenberg, of course, is only presenting a challenge to such advocates to show why the things here are different, rather than claiming that they cannot be shown to be different. But given the way the view of concepts he is challenging dovetails with well-known views in metaethics, it is not clear to me how deep this challenge really is. When combined with the consideration given in the preceding paragraph—namely, that Greenberg's worry seems to be tied to a view of legal obligations that positivists should reject—it is not clear to me that Greenberg has a good criticism of nonsuperficialist views that deny that conceptual facts include or depend on moral facts.

What, though, about views of conceptual facts that *explicitly* claim that conceptual facts include or depend on moral facts? Here, I think Greenberg is wrong to think that such a view is necessarily incompatible with the constitutive commitments of legal positivism, at least on the understanding of legal positivism that he is working with. In pressing this criticism, Greenberg seems to assume that whatever facts are the intelligibility-enabling facts will necessarily be among the grounds of law. But as I discuss earlier in the paper, this need not be accepted. In short, one need not accept that if X grounds Y and Y grounds Z, then it follows that X grounds Z. One might therefore maintain that moral facts ground the intelligibility-enabling facts, which ground the legal facts, but that this does not commit one to the view that the moral facts are among the grounds of legal facts. Since antipositivism is (according to the picture I am here attributing to Greenberg) the view that moral facts are among the grounds of the legal facts—and not the view that they are among the grounds of the grounds of the legal facts—it is not clear that such a position would be incompatible with legal positivism.

That being said, it is nonetheless true that such a position *would* be incompatible with legal positivism if certain views about grounding turn out to be correct or if a positivist were explicitly to claim that the conceptual facts not only grounded the intelligibility-enabling facts but also grounded the legal facts. How much does that matter? Potentially quite a lot. For instance, consider the position about the nature of concepts that Joseph Raz stakes out at the end of his highly influential article "Authority and Justification." Raz here claims that he is engaged in conceptual analysis but that this project itself involves substantive normative argument. As he

85. George Edward Moore, Principia Ethica (1903). *See, e.g.*, Allan Gibbard, Thinking How to Live (Harvard University Press, 2003); and Gibbard, Wise Choices, *supra* note 40.

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puts it, "there is an interdependence between conceptual and normative argument"[86] such that any attempt to analyze the concept AUTHORITY must take a stand on not only descriptive facts but also normative ones. Raz claims that "the philosophical explanation of authority is not an attempt to state the meaning of a word. It is a discussion of a concept which is deeply embedded in the philosophical and political traditions of our culture"[87] such that the project of analysis in part involves something that "is inescapably a normative argument."[88]

There is possibly a way of taking Raz to mean the following: there are normative questions about which specific concepts to analyze and also about which specific concepts to employ in practice that are unavoidable normative questions. However, all sides can agree to that. Raz's point, here at least, is that the project of engaging in the analysis of a given concept *once that particular concept has been identified* itself involves normative argument. Moreover, since the normative argument in question is one that involves political principles about political authority, it is hard to see how such argument would not involve appeal to specifically moral facts. If so, Raz's line on concepts seems to grant precisely the point about the nature of the analysis of legal concepts that antipositivist interpretivists such as Dworkin and Stavropoulos have pushed against positivism: roughly, that such analysis inevitably involves moral argument and depends on the obtaining of certain moral facts as opposed to others.[89]

Given this situation, it therefore seems plausible to read Raz as endorsing the view that conceptual facts (at least about certain central legal concepts) include or depend on moral facts. Raz, of course, is routinely taken to be one of the leading legal positivists of our time. Thus, if Greenberg is right that this sort of position is incompatible with the constitutive commitments of legal positivism, then Raz faces a tension here that would need to be resolved.[90] I do not want to attempt to resolve that tension in this paper.

86. Joseph Raz, *Authority and Justification*, 14 PHIL. & PUB. AFF. 3–29 (1985), at 27.
87. *Id.*
88. *Id.*
89. *See* RONALD DWORKIN, LAW'S EMPIRE (1986); and Nicos Stavropoulos, *Interpretivist Theories of Law*, *in* 2 LAW: METAPHYSICS, MEANING, AND OBJECTIVITY: SOCIAL, POLITICAL, & LEGAL PHILOSOPHY 3–19 (Enrique Villanueva ed., 2007).
90. It should be stressed that this does not mean that there are no potential responses on Raz's behalf. For instance, Raz might argue as follows: even though the conceptual content of certain (or perhaps all) concepts depends on moral facts, this does not mean that the content of all concepts itself is moral. For example: perhaps the fact that the concept DOG has the conceptual content that it does depends on moral facts. But that would not mean that the concept DOG itself would involve moral criteria for something to fulfill in order to fall within the extension of that concept and thereby count as a dog. If Raz were to hold that this sort of result was true in the case of such legal concepts as LEGAL VALIDITY—as well for the other concepts such as AUTHORITY that the concept involves, on a Razian analysis—then this might allow him to sidestep the issue Greenberg is pressing here. (As Tristram McPherson has pointed out to me, this would be essentially to invoke something like the semantic-versus-metasemantic distinction.) The viability of this response depends in part on the issue I touch on above: whether or not grounding relations are transitive. If they are, then it is not clear that this response works.

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Therefore, this gives us reason to see whether there is another route we can go in thinking about the nature of conceptual facts: one that does not involve the idea that conceptual facts include or depend on moral facts.

Let us turn to Greenberg's attack on the idea of using a superficialist notion of conceptual truth. On the superficialist front, I grant that Greenberg's reasoning shows why positivists would run into trouble if they were to accept certain views of concepts. For instance, it would surely make trouble for anyone who thinks that we can ascertain conceptual facts by looking at readily agreed-upon theories about how we use our words. This, I think, is part of what Greenberg rightly takes away from the sorts of facts that Dworkin is attuned to: facts about how people seem to have widely divergent views about when to apply the term "law" to different cases. Thus, Greenberg is right that Dworkin's argument helps illustrate the fact that there are no readily agreed-upon facts about the application of legal terms that the positivist can appeal to in this context. Insofar as one defines "superficialist" views as ones that hold that the facts in question are easily accessible or readily agreed upon, then I think that Greenberg is correct that there are no superficialist conceptual facts that we can locate to do the work we need to respond to his argument in HFML.

But this does not mean that there are no conceptual facts that the positivist might appeal to here. To see this, we can begin by noting that although Greenberg himself is quite careful to appeal to Dworkin's work on legal disagreements only for a limited dialectical purpose in HFML, many antipositivists might be tempted to draw more general lessons from Dworkin's work on legal disagreements. I think it is easy to overstate what those lessons are. It is one thing for positivists to grant that it would be *difficult* to identify shared criteria for the application of the term "law" that would make sense of how and why people say what they do. It is, however, quite a different matter altogether to follow Dworkin and deny that there are any shared criteria—or at least not some basic overlapping criteria that make up what we can functionally think of as a core, shared meaning to the term—that are reflected in our use of words. Furthermore, it is also not at all clear that positivists should grant Dworkin's point that none of the cases he considers are ones where the legal actors are simply using a word in a different way such that it expresses a different concept or concepts that involve deep conceptual confusion.[91]

91. On these points, *see* Brian Leiter, *Explaining Theoretical Disagreement*, 76 U. CHI. L. REV. 1215–1250 (2009). Finally, on another front, we should be careful to conclude that a debate is "trivial" simply because it concerns the meaning of words. Debates about the meaning of words can, in many contexts, be quite important—signaling, for instance, a debate about what concepts are the best ones to use in a given realm of thought and practice. Tim Sundell and I take up this theme in David Plunkett & Tim Sundell, Disagreement and the Semantics of Normative and Evaluative Terms (2011) (unpublished manuscript on file with author). On this theme, *see also* David J. Chalmers, *Verbal Disputes*, 120 PHIL. REV. 515–566 (2011).

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The upshot of this, I think, is that we should not conclude that there are no complex conceptual facts reflected in our word usage—or, more strongly, conceptual facts constituted by complex facts about our word usage—that are not the intelligibility-enabling facts in the case of law. For example, to take a parallel case from metaethics, it might be argued that we will not be able to discover any shared criteria for the application of the term "morally right" between a deontologist and an act utilitarian, given how different their moral views are. But this argument would take much care to develop. For there are well-known attempts to identify higher-order criteria that both parties agree to (and perhaps tacitly know)—for instance, criteria having to do with what ideal agents would desire—that could serve as setting the meaning of the term "morally right."[92]

Such attempts might of course fail. But if such attempts do in fact fail, it will not be simply because there is widespread disagreement *at some level* about when to apply the term "morally right" (e.g., whether or not affirmative action policies in American public universities are moral or not). It will rather be because there is no further fundamental agreement about when the term should be applied, agreement that reflects the application of a shared concept. The lesson is that the sorts of facts about word usage that the positivist might appeal to might be sufficiently complex enough for her to meet Greenberg's criticisms of superficialism or else they might, depending on how Greenberg decides to understand the boundaries of superficialism, not actually be superficialist facts at all. Either way, Greenberg's remarks against the idea of the positivist using conceptual facts constituted by facts about word usage are not sufficient to rule out this broad way of proceeding.

To put it another way, Greenberg's initial characterization of the superficialist and nonsuperficialist options might lead the reader to run together two separate issues. These issues are: (1) how "superficial" or easily epistemically accessible the facts about conceptual content are; and (2) what sorts of facts help constitute conceptual content (e.g., facts about word usage, facts about dispositions, moral facts, nonmoral normative facts, etc.). What I am suggesting is that the positivist can a) grant that Greenberg's reasoning about the cases he discusses provides some serious worries for appealing to views of conceptual content that take a certain stand on the first issue but b) deny that his reasoning means that this thereby settles the second issue.

Suppose that this is so. How, then, might we articulate a general view of concepts that could help the positivist establish that conceptual facts are the relevant intelligibility-enabling facts in the case of law? In recent years, a number of philosophers—including, perhaps most importantly, David Chalmers and Frank Jackson—have advocated the idea that we should understand a given concept C as essentially a complex set of conditionals that identifies what must be the case in order for something to fall in the

92. *See, e.g.*, SMITH, *supra* note 41.

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extension of that concept.[93] This is the idea that I want to suggest that the positivist draws on in order to meet Greenberg's rational-relation requirement. More precisely, I want to draw on this idea about what concepts are to defend the following *two* claims: (1) even if conceptual facts are not taken to be among the grounds of legal content, conceptual facts can nonetheless reasonably be thought to play a crucial role in work on the grounding relations that Greenberg claims are at stake in the philosophy of law; and (2) conceptual facts (of the sort that Chalmers and Jackson believe in) are the intelligibility enablers that the positivist needs to meet Greenberg's rational-relation requirement for constitutive accounts of law. In combination with a conceptual reading of the heart of Shapiro's Planning Theory of Law, these two claims eventually allow us to produce a viable constitutive account of law that is both thoroughly positivist as well as meeting Greenberg's rational-relation requirement.

A. Chalmers and Jackson on Conceptual Analysis

In "Conceptual Analysis and Reductive Explanation," Chalmers and Jackson argue that "if a subject possesses a concept and has unimpaired rational processes, then sufficient empirical information about the actual world puts a subject in a position to identify the concept's extension."[94] For example, consider the case of the concept WATER. Chalmers and Jackson state that "if a subject possesses the concept 'water,' then sufficient information about the distribution, behavior, and appearance of clusters of H_2O molecules enables the subject to know that water is H_2O, to know where water is and is not, and so on."[95] Developing this line of thought, Chalmers and Jackson argue that what it is for a subject to possess a given concept C is for that subject to possess a conditional ability to identify the extension of that concept C in a given possible world, given sufficient information about that possible world and sufficient reasoning.[96]

For instance, take the concept KNOWLEDGE. According to Chalmers and Jackson, possession of the concept KNOWLEDGE gives one the capacity to evaluate conditional statements of the form "PW $\supset$ K" where "PW" is a statement that gives sufficient information about a possible world—where, in basic terms, we understand a possible world as a complete description

93. *See, e.g.*, JACKSON, FROM METAPHYSICS TO ETHICS, *supra* note 28; Chalmers & Jackson, *supra* note 81; and DAVID J. CHALMERS, THE CONSCIOUS MIND: IN SEARCH OF A FUNDAMENTAL THEORY (1996). David Braddon-Mitchell also develops this basic view of concepts in such work as David Braddon-Mitchell, *The Subsumption of Reference*, 56 BRIT. J. PHIL. SCI. 157–178 (2005). I am particularly sympathetic to Braddon-Mitchell's way of developing this basic view of what it is to possess a concept. However, for the purposes of this paper, I focus on the helpful schematic ways the core points are put in Chalmers & Jackson, *Conceptual Analysis*, *supra* note 81.

94. Chalmers & Jackson, *Conceptual Analysis*, *supra* note 81, at 323.

95. *Id.*

96. *Id.*

https://doi.org/10.1017/S1352325212000079 Published online by Cambridge University Press

of the way things might be[97]—and "K" is a statement that both uses the concept KNOWLEDGE and characterizes its extension (such as the statement "Bob doesn't have much knowledge about property law"). We can thus say that on this view, a concept C determines a function from possible worlds to extensions.[98] For convenience, let us stipulate that this function is the concept's *conceptual content*. In turn, we can then individuate different concepts as follows: a given token concept is individuated by the exact function from possible worlds to extensions that it determines.[99] In other words, we can say that concepts are individuated by their precise conceptual content.

For Chalmers and Jackson, the aim of *conceptual analysis* is to identify the division among possible worlds that a concept effects. To put it another way, the aim is to uncover the set of conditionals that an agent needs to have the capacity to evaluate in order to count as possessing a particular concept. How might this be done? To get the basic outline of Chalmers and Jackson's view, I think it is helpful to think of concepts as what our terms in a natural language express—to think of them, in other words, as another way of talking about the meaning of our words. On this way of thinking about concepts, one might potentially possess concepts without speaking a language. This is because, on this picture, concepts are a type of *constituent component of our thoughts*, and one can have thoughts without communicating them in a spoken or written language. Nonetheless, given the tie between words and concepts, facts about when creatures like us apply our words provide a way of getting at the facts about when we apply certain concepts. Indeed, for creatures like us, who express our concepts with words, the conditionals that we are interested in on Chalmers and Jackson's theory of conceptual analysis can essentially be seen as a set of complex descriptive facts about how and when we are disposed to apply our words, given sufficient reasoning and given sufficient information about the possible world in question.

Such descriptive facts are, of course, not easy to discover. Chalmers and Jackson argue that this is part of what explains why all (or almost all)

97. JACKSON, FROM METAPHYSICS TO ETHICS, *supra* note 28, at 11.

98. There is a slight complication here having to do with Chalmers and Jackson's two-dimensionalism. Roughly, the two-dimensionalist idea is built around the idea that we can consider a given possible world either as a counterfactual possibility or an alternative to actuality that we evaluate counterfactual possibilities from. This gives rise to two different dimensions of meaning: what Chalmers calls a "primary" and a "secondary" intention. Because of Chalmers and Jackson's embrace of two-dimensionalism, we can say that a concept C determines a function from possible worlds to extensions, given sufficient information about the possible world that we are supposing is actual. For our purposes in this paper, the details of Chalmers and Jackson's two-dimensionalism do not matter. For a discussion of what two-dimensionalism amounts to, *see* Chalmers, *Two-Dimensional Semantics*, *supra* note 28; and JACKSON, FROM METAPHYSICS TO ETHICS, *supra* note 28.

99. In presenting Chalmers and Jackson's view this way, I reiterate my basic summary of Jackson's view in David Plunkett, *Expressivism, Representation, and the Nature of Conceptual Analysis*, 156 PHIL. STUD. 15–31 (2011). *See* that paper for a longer critical discussion of Jackson's view of conceptual analysis.

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the success stories of conceptual analysis in philosophy are ones where we make progress as identifying the conditionals that constitute a given concept rather than exhaustively identifying *all* of them. Nonetheless, Chalmers and Jackson think that such complex descriptive facts about our dispositions do exist. This is because, for Chalmers and Jackson, there must be patterns underlying our conceptual competence in order successfully to explain our ability effectively to categorize using bits of language in the first place.[100] On the picture we get from Chalmers and Jackson, we apply words to cover certain situations as opposed to others based on facts about the situation at hand—for example, there are facts that make it apt for us describe something as a "cat" that are other than the fact of this application of the term "cat" itself at that given time. If so, we can then ask what the pattern is that is implicitly guiding the application of the term in question (e.g., "cat"). As Jackson puts it in *From Metaphysics to Ethics*:

> There are patterns underlying our conceptual competence. They are often hard to find—we still do not know in full detail the rules that capture the patterns underlying our classification of sentences into the grammatical and the ungrammatical, or of inferential behaviour into the rational and the irrational—but they must be there to be found. We do not classify sentences as grammatical, or inferential behaviour as rational, by magic or at random![101]

If Jackson is right about this, it then raises the methodological question of *how* we can uncover the patterns that are guiding our application of terms. For Chalmers and Jackson, the key tool we have here is to pay careful attention to how we are disposed to apply our words in response to the information given to us in possible scenarios. But the methodological question of how exactly we might discover the conceptual facts (as Chalmers and Jackson conceive of them) is not the crucial juncture at this stage. Rather, for our purposes, the question that we now need to turn to is this: How could such conceptual facts (whether uncovered by this methodology just sketched above or some other methodology) play a role in helping positivists meet the rational-relation requirement?

B. Conceptual Facts as the Basis for a Positivist Explanation of How Facts Make Law

Given my earlier reading of what the rational-relation requirement is, the basic import of Chalmers and Jackson's view of conceptual analysis for responding to the rational-relation requirement can be put as follows. On their view, given what a given concept C is, this concept tells you that if the

100. This point is emphasized in JACKSON, FROM METAPHYSICS TO ETHICS, *supra* note 28; and Frank Jackson, *Precis of From Metaphysics to Ethics*, 62 PHIL. & PHENOMENOLOGICAL RES. 617–624 (2001).

101. JACKSON, FROM METAPHYSICS TO ETHICS, *supra* note 28, at 64.

https://doi.org/10.1017/S1352325212000079 Published online by Cambridge University Press

substantive facts about the way things might be are thus-and-so, then here is what necessarily falls under that concept C. Hence, if someone wonders why true claims about the world that are made in one vocabulary (e.g., the vocabulary of the social sciences) necessarily determine true claims about the world that are made in some other vocabulary (e.g., the vocabulary of legal content), the basic answer is that this connection is (or is at least usually) explained by a conceptual fact that links the concepts used in the two vocabularies.[102] Hence, on Chalmers and Jackson's view, there is a sort of *intelligibility* that is produced when one makes progress in conceptual analysis. Namely, one finds it more intelligible why true claims about the world that are made in one vocabulary (e.g., the vocabulary of the social sciences) necessarily determine true claims about the world that are made in some other vocabulary (e.g., the vocabulary of legal content).

What, though, does this tell us about the intelligibility that matters in the rational-relation requirement? I argued above that this requirement entails that there must be intelligibility-enabling facts making intelligible the relation between the grounds of legal content and the legal content itself. This is different from the issue of making intelligible certain supervenience relations. It is therefore not clear how making progress in conceptual analysis (conceived of along the lines advocated by Chalmers and Jackson) can help with the rational-relation requirement. To bring out this point, consider a godlike creature that possesses all relevant concepts (defined in some prior way), and has those concepts fully analyzed (which would be no small feat), and has full information about the possible world in question (also, obviously, no small feat). Chalmers and Jackson's picture of conceptual analysis suggests that then there would be no *supervenience* relations that would be unintelligible to such a creature in the sense of "unintelligible" that Greenberg seems to have in mind. But it is not obvious that such a creature would thereby understand all the grounding relations there are to understand. Indeed, one might in fact think it is likely that she would not. So how, then, can conceptual facts of the sort that Chalmers and Jackson believe in help the positivist meet the rational-relation requirement?

In order to answer this question, I think that we need to make an argument about what sort of concepts the relevant legal concepts are. In some of his recent work, Chalmers suggests distinguishing between *revelatory* and *nonrevelatory* concepts. In short, for Chalmers, a concept C about a property P is a *revelatory concept* when a subject's possessing the concept C puts that subject in a position to know (through a priori reflection) what the property P is.[103] What does this mean? Importantly, it does *not* mean that when

102. *Id.* It should be noted that there is also a stronger nearby thesis viewed sympathetically in JACKSON, FROM METAPHYSICS TO ETHICS. This is the thesis that conceptual facts not only *often* provide this link but in fact they are always the central part of what provides that link.

103. David J. Chalmers, Revelation, Humility, and the Structure of the World (2005) (available at http://consc.net/papers/revelation.ppt). For connected discussion, *see* the discussion of "epistemic rigidity" in DAVID J. CHALMERS, CONSTRUCTING THE WORLD (forthcoming).

https://doi.org/10.1017/S1352325212000079 Published online by Cambridge University Press

a subject possesses a revelatory concept, that this puts her in a position to grasp the nature of concrete reality in the actual world (including, e.g., facts about what sorts of entities do and do not exist in the actual world). Instead, when a subject possesses a revelatory concept, it puts her in a position to know (through a priori reflection of the sort that Chalmers and Jackson think characterizes conceptual analysis) something about abstract reality: namely, the correct constitutive account of what property P consists in and, thus, what it would take for an actual or possible entity to instantiate the property that the revelatory concept is about.[104]

Following Chalmers, we might try to clarify further what revelatory concepts are by putting Chalmers's initial gloss into the context of a two-dimensionalist framework in which we consider possible worlds either as counterfactual possibilities (worlds that we consider holding fixed a view of which world is actual) or as alternatives to actuality (and hence worlds that we can evaluate counterfactual possibilities from).[105] If so, we might try saying "that a revelatory concept is one such that it picks out the same property in all worlds considered as actual."[106] Alternatively, if we are inclined to a modally based view of property individuation, we might try saying that "concept is revelatory iff [if and only if] whether an object in a world considered as counterfactual falls into the extension of the concept is independent of which world is considered as actual."[107]

Which concepts are revelatory concepts and which ones are not? Chalmers does not stake out any definitive answer to this question. Instead, he gives us some preliminary hypotheses. In the course of his discussion of revelatory concepts, Chalmers suggests that the following concepts might be revelatory ones: FRIEND, PHILOSOPHER, CONSCIOUSNESS, REDNESS (and other secondary quality concepts), ACTION, and CAUSE. In contrast, candidates for nonrevelatory concepts include theoretical concepts that refer to the actual thing that plays a certain functional role (which might include concepts such as HEAT), REDNESS (and other secondary quality concepts), and concepts of the property of being a certain individual. As the fact that REDNESS is on both lists underscores, even if one grants Chalmers's idea of revelatory concepts, there is still going to be significant argument about which concepts are on which list.

For our purposes, however, the crucial question is not exactly which concepts are on which list but *why* certain concepts would be on one list as opposed to another. On this front, it is helpful to consider the concept FRIEND as opposed to the concept WATER. Part of the concept WATER is, at least arguably, an actuality operator that makes the property of *being water*

104. Thanks to David Chalmers for helpful correspondence about his understanding of the nature of revelatory concepts.

105. For further discussion of two-dimensionalism, *see* Chalmers, *Two-Dimensional Semantics*, *supra* note 28; and JACKSON, FROM METAPHYSICS TO ETHICS, *supra* note 28.

106. Chalmers, Revelation, *supra* note 103, slide 5.

107. *Id.*

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depend on the chemical composition of a certain sort of stuff in the *actual* world. If so, it is then clear why one needs to do a posteriori investigation into how things are in the actual world to understand what specific chemical composition a thing must have to make it instantiate the property of *being water*. In turn, on many theories of essential properties, it is likely going to turn out that the essential property of water is that it is has this chemical composition that is identified through scientific inquiry. Many concepts, however, seem to include no such actuality operator. For instance, this is likely so with the concept FRIEND. If the property of *being a friend* just is the property of falling under this concept—and there is no actuality operator involved here—then in order to understand what the property of *being a friend* involves, one need only engage in a priori reasoning (of the sort that characterizes Chalmers and Jackson's style of conceptual analysis), rather than a posteriori reasoning of the sort that characterizes empirical investigation into the chemical composition of things. In turn, on many theories of essential properties, it is likely going to turn out that the essential properties of friends can be identified using this a priori method.

The distinction between revelatory and nonrevelatory concepts that we get from Chalmers opens up a clear move to make on behalf of the idea that conceptual facts can make intelligible the relation between the grounds of legal content and legal content. The move is this: claim that the relevant legal concepts are revelatory concepts.[108] If this is true, then possession of those concepts puts one in a position to have a *constitutive* understanding of what the relevant properties are, and not just a constitutive understanding of the conceptual content of the given concepts. In turn, it is then reasonable to hold that such conceptual facts, in illuminating the constitutive nature of these properties, are capable of illuminating something important about their grounding and, in particular, are capable of illuminating the fact that certain facts ground the legal facts. This is not to say that these conceptual facts ground the fact that such-and-such facts ground the legal facts. Rather, it is to claim that grasping the conceptual facts (in cases of revelatory concepts) can help us gain epistemic access to such facts about ground and thereby make intelligible what needs to be made intelligible on the rational-relation requirement.

Thus, to move forward in responding to Greenberg's argument in HFML, I submit that the positivist should take on board (1) the thesis that the relevant legal concepts are revelatory ones, and (2) the thesis that revelatory concepts can play the epistemic role I am describing in making intelligible certain relations between grounded and grounding facts (even though these conceptual facts themselves often do not play the metaphysical role of being among the grounding facts).

108. Thanks to Shamik Dasgupta for suggesting to me that I consider appealing to the idea of revelatory concepts at this juncture in my argument.

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Now, in order for this to work in developing a complete constitutive account of law that meets the rational-relation requirement, we of course need to produce an argument on behalf of the claim that the legal concepts relevant here (those that help the positivist meet the rational-relation requirement) are revelatory concepts. It is beyond the scope of this paper to give an extended argument for this proposal. Instead, I give a limited argument that suffices for our purposes here: namely, to show that we lack reason to favor antipositivism on the basis of Greenberg's argument in HFML. Take the concept LEGAL INSTITUTION. In what follows, I draw on Shapiro's Planning Theory of Law to suggest that it is a conceptual truth that legal institutions are institutions of shared planning that have such-and-such specific features. If this is right, then the concept will pick out a property in a way that is much more similar to FRIEND than to HEAT or REDNESS: the concept LEGAL INSTITUTION does not involve reference to the actual thing that plays a certain functional role, nor does it involve reference to our actual or hypothetical responses (in a way that resembles paradigmatic views of response-dependent or secondary-quality concepts). Hence, if Shapiro's general Planning Theory is on the right track, then we have good reason to suppose that it is a revelatory concept.

In fact, the idea that proponents of the Planning Theory should hold that the concept LEGAL INSTITUTION is a revelatory one is likely one that Shapiro already accepts, despite the fact that he does not put the issue in these terms. In a crucial footnote in *Legality*, he writes:

> Traditionally, legal philosophers have not treated the concept law like the concept water, namely, they have not supposed that discovering the nature of law requires deference to another outside a posteriori theory. Even though Hart claimed that *The Concept of Law* was "an exercise in descriptive sociology" (CL vi), his analysis bears little resemblance to standard procedure in the social sciences—he didn't perform or examine any detailed case studies, engage in statistical analysis, etc.—nor did he consult findings in that field. He seemed to have assumed that the nature of law could be determined exclusively by conceptual analysis. . . . My own view is that Hart was right with respect to the concept of law.[109]

If I am right, then the idea that this passage is gesturing at—that the concept LEGAL INSTITUTION is a revelatory one—is a crucial component of the positivist response to Greenberg's argument in HFML. This is because if it is the case that the concept LEGAL INSTITUTION is a revelatory one, then, if my thinking in this section has been on the right track, we thereby have good reason to suspect that conceptual facts about this concept are the intelligibility-enabling facts that the positivist needs to identify. Or, more precisely, we have reason to suspect this *if* there are conceptual facts about

109. SHAPIRO, *supra* note 2, at 406 n.16. For Hart's discussion of his work as an exercise in descriptive sociology, *see* H.L.A. HART, THE CONCEPT OF LAW (2d ed. 1994).

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revelatory concepts that in fact support positivism.[110] In the next section, I argue that it is plausible to hold that there are in fact such conceptual facts.

However, before moving on, there is a vital issue that I need to flag. Recall Greenberg's argument that social practices cannot determine their own relevance. Because of this argument, one might want to argue that views of concepts as complex facts about dispositions will not work for the positivist in responding to the argument in HFML. In short, the argument here would be that since social facts (such as facts about dispositions) cannot "determine their own relevance," it follows that conceptual facts that are equivalent to facts about dispositions cannot help explain the relevance of legal practices to legal facts.

I think that such an argument would take a great deal of further work to develop. To start with, as I discuss earlier in this paper, in order to identify a successful constitutive account of law (or anything else), one need not answer the question of what grounds the fact that the constitutive account is correct. One simply needs to identify what the correct constitutive account is. Second, it is not clear that the dispositions that constitute concepts will be the *same* dispositions that are identified with the legal practices (indeed, it is unlikely they will be). Less importantly, it is also not clear that legal practices consist solely of dispositional facts as opposed to dispositional facts in combination with other social facts. More broadly, we can distinguish between the following two claims: (1) there are certain social facts that both (a) ground legal facts, and (b) determine the relevance of those social facts; versus (2) there is a set of social facts that (a) ground the legal facts, and another set of social facts that (b) make it that those token social facts are relevant to constituting the legal facts. It is not clear to me why proponents of conceptual facts who see them as grounded in social facts need be committed to the first schema.[111] Put together, this means that Greenberg's argument that legal practices cannot determine their own relevance is not sufficient by itself to establish that appealing to conceptual facts (where, in turn, one understands concepts in terms of dispositions) undermines one's ability to develop an effective response to the argument in HFML.

110. This is perhaps an obvious point. But it is nonetheless important to bear in mind. The fact that the relevant legal concepts are revelatory does not guarantee that they are ones conducive to *positivism*. For the relevant a priori reasoning mentioned in the definition of what a revelatory concept is might in fact be a priori moral reasoning that seeks to uncover moral facts. Thus, if we are to argue in favor of positivism, we need to identify an account of a central legal concept that does not rely on moral facts in the a priori reasoning that allows one to go from possession of a concept to a conclusion about the nature of a property.

111. Moreover, on another front, the conceptual facts might, strictly speaking, be facts about abstract objects that the dispositions latch onto in some way rather than the dispositional facts themselves.

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IV. SHAPIRO'S PLANNING THEORY

Let us now take stock of where we are. In Section III, I explained why I think that the broad view of concepts we get from Chalmers and Jackson provides a good reason to think that conceptual facts (and in particular conceptual facts concerning revelatory concepts) are the intelligibility-enabling facts that the positivist needs to meet the rational-relation requirement. But this still leaves us with the following important question: Which specific conceptual facts might those be?

I think that the best conceptual facts to *start* with are not ones about the concept LEGAL CONTENT or the concept LEGAL NORM, but rather facts about the concept LEGAL INSTITUTION. In order to develop this line of thought, I turn to Shapiro's Planning Theory of Law. This is for the following three basic reasons. The first is that Shapiro's work illustrates how conceptual facts about LEGAL INSTITUTION are likely closely linked to conceptual facts about LEGAL NORM such that understanding the conceptual facts about LEGAL INSTITUTION yields a positivist account of what the intelligibility-enabling facts are. The second is that Shapiro's overall Planning Theory provides, I think, one of the best positivist constitutive accounts of legal content currently on offer—and indeed, I think that it is essentially correct in basic outline. The third is that Greenberg has argued at length why other leading positivist accounts—including, importantly, the Hartian view of law—do not offer a good basis for meeting his rational-relation requirement.[112]

One could, of course, challenge Greenberg's criticisms of the Hartian or other positivist views. But since I share many of Greenberg's concerns about the Hartian view—and because that aspect of Greenberg's work is not the main focus of this paper—I think it is better to turn to a new theory that Greenberg has yet to engage with in the context of his argument in HFML. Put together, I think that these three reasons provide ample reason to turn to Shapiro's positivist theory of law rather than others.

That being said, given that many philosophers reading this article no doubt disagree with Shapiro's views that I am about to discuss, it is worth flagging that a similar argument to the one I sketch here (i.e., one using conceptual facts about certain central legal concepts) might in principle be made to work using other views of law—perhaps, for instance, a Hartian or Razian view of some sort. I have no objection to exploring that idea further. However, for the three reasons given above, I do not think that such views are promising places to start in the context of this paper. I therefore put them aside for what follows.[113]

Let us now turn to Shapiro's Planning Theory of Law. In basic terms, according to Shapiro, the fundamental nature of legal institutions is that

112. This argument is at the heart of Greenberg, *Hartian Positivism*, *supra* note 1.

113. Thanks to Brian Leiter for helpful conversation and written correspondence that encouraged me to clarify my focus on Shapiro's Planning Theory.

https://doi.org/10.1017/S1352325212000079 Published online by Cambridge University Press

they are a particular type of institution of social planning; that is, they are a subset of institutions that, in short, are engaged in the activity of creating, carrying out, and enforcing social plans for guiding and coordinating the activity of agents. To understand the nature of legal norms, argues Shapiro, we need to understand what this activity is and how it works. Shapiro holds that (1) the norms that are created, applied, and enforced by these institutions are plans, and (2) the norms that are applied and enforced by these institutions—but not created by the activity of planning—are *planlike* norms. According to the Planning Theory, the legal norms that comprise legal content are the plans and planlike norms that are applied and enforced by legal institutions, regardless of the moral merit of those institutions or norms.

At the core of Shapiro's Planning Theory is the idea that we can understand what it is to be a legal institution by understanding the specific sort of activity that is constitutive of legal institutions. This activity, claims Shapiro, is best understood as the exercise of legal authority. With this on the table, Shapiro's central claim in *Legality* is that the exercise of legal authority (what he calls "legal activity") consists in the activity of planning.[114] All of us are familiar with the activity of planning in our everyday lives. For instance, I might make the plan to go see a movie tomorrow night, or you and I might make plans jointly to fix my broken bike. For Shapiro, legal activity consists in the same sort of planning that is distinctive of such mundane activity.

Shapiro's basic picture is that legal activity consists of a group of officials creating, applying, and enforcing a group of plans for a broader group of people (including the officials themselves). What is distinctive of legal activity, claims Shapiro, is that the planning involved in legal activity takes place in a certain way that is different from the planning that other similar groups engage in. In *Legality*, Shapiro offers seven key theses about what is distinctive of the planning involved in legal activity. To put it in the technical terms that Shapiro introduces in *Legality*, his thesis is that legal activity is the shared, official, institutional, compulsory, self-certifying activity of social planning with a moral aim. Or, to put it in terms about the nature of legal institutions, terms that are equivalent, given Shapiro's background understanding of the connection between legal activity and legal institutions, the thesis is that legal institutions are compulsory self-certifying planning organizations with a moral aim.

Shapiro's discussion in *Legality* of the seven key theses that characterize legal activity is rich and complicated. However, for our purposes at this stage in the argument, the details of the seven key theses that Shapiro advances about legal activity are not important. Rather, what is important is that according to Shapiro's Planning Theory, (1) legal institutions are

114. SHAPIRO, *supra* note 2, at 195.

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instances of an important general kind (namely, groups that engage in the activity of planning), and (2) legal institutions have a collection of features that other planning groups lack. In developing these restrictions on what groups involved in planning must be like in order to be instances of a legal institution—and, more importantly, in developing the idea that legal institutions can be understood in terms of the activity of planning in the first place—Shapiro advocates the view that we have robust intuitions about when something counts as a legal institution. These intuitions might not support the idea that there is a sharp, entirely determinate line here.[115] But, he thinks, they do support the idea that there is a core set of criteria that we have for distinguishing legal institutions from nonlegal institutions. And these are the criteria that Shapiro seeks to identify in his Planning Theory of Law.

In turn, by identifying these criteria, Shapiro aims to accomplish his main stated goal in *Legality*. This goal is to give a systematic account both of the nature of legal institutions and of the nature of legal norms. Put together, Shapiro holds that these form a unified account of the "nature of law."[116] In what follows, I explain how Shapiro's account of legal institutions forms the basis for a positivist theory of legal content. However, before I do, we first need to ask a crucial question: What is the status of Shapiro's account of the nature of law? To put it another way: What sort of theory is the Planning Theory of Law?

In order to answer this question, it will be helpful to understand the way in which Shapiro himself understands what it is to ask about the nature of something. Shapiro writes that "to ask about the nature of X is to ask what it is about X that makes it X and not Y or Z or any other such thing."[117] Thus, according to Shapiro, a correct account of X's nature must "supply the set of properties that make (possible or actual) instances of X the things that they are."[118] Following one standard convention in contemporary philosophy—though not one that Shapiro himself employs in *Legality*—we can call these properties X's *essential properties*. On at least most leading accounts of essential properties, it is not the case that all of X's necessary properties will be among X's essential properties. For instance, to draw on a famous example from Kit Fine, it is a necessary property of Socrates that he is the only member of a particular singleton set (the one that consists only of Socrates), but this is not an essential property of Socrates; it is not, to put it in the intuitive language that Shapiro is using, a property that *makes* Socrates what he is in the sort of constitutive (rather than causal) sense of "make."[119]

In providing an account of the nature of law, Shapiro wants to locate those properties that *make* law what it is. Shapiro uses the example of the

115. *Id.* at 223.
116. *Id.* at 8.
117. *Id.*
118. *Id.*
119. Kit Fine, *Essence and Modality*, 8 PHIL. PERSPECTIVES 1 (1994).

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(purportedly accurate) theory that "being H_2O is what makes water *water*" in order to illustrate his goal in *Legality*.[120] He claims that he wants to develop a theory that is analogous to the account that water is H_2O; he wants to "discover what makes all and only instances of law instances of *law* and not something else."[121] In other words, Shapiro wants to give an account of the essential properties of law that is akin to the account that the essential property of water is that it is H_2O. Such a theory of law, claims Shapiro, would be a *metaphysical* theory. I think there is good reason to think that this is so. For Shapiro's Planning Theory essentially gives us an account of the metaphysics of legal institutions—giving a constitutive explanation of what those institutions *are* in terms of planning.

The fact that the Planning Theory is put forward as a metaphysical theory raises an issue for my argumentative strategy in this paper. This is because the sorts of facts that we are after to be intelligibility enablers are *conceptual facts* rather than metaphysical ones. So how could Shapiro's theory be of help here? In order to answer this question, we need to be clear about (1) our understanding of the relationship between conceptual facts and metaphysical facts, and (2) which specific parts of Shapiro's Planning Theory involve which sorts of facts. In short, what I argue is that we should see a crucial component of Shapiro's metaphysical theory as resting on a conceptual analysis of our concept LEGAL INSTITUTION, where this conceptual analysis is conceived of along the lines advocated by Chalmers and Jackson. This move, however, raises an important issue. As I have discussed, Chalmers and Jackson think that the projects of metaphysics and conceptual analysis are importantly distinct: conceptual analysis does not *itself* deliver any results in metaphysics in the sense of identifying substantive facts about the nature of reality in the actual world (aside from certain cases, such as judgment-dependent facts or other facts that are in some way about or involve our concepts). Rather, conceptual analysis about a given concept C simply tells us facts about how we represent things as being, insofar as we use that concept. Thus, it tells us how things must be in a possible world to count as falling within the extension of concept C but without taking any stand on which possible world is the actual one.

This sort of conception of what conceptual analysis involves leads Jackson to make an important distinction between *immodest* and *modest* views of conceptual analysis. For Jackson, *immodest* forms of conceptual analysis take it that claims about conceptual analysis support conclusions about the nature of reality in the actual world (other than facts about our concepts). For example, in *From Metaphysics to Ethics*, Jackson considers the case of four-dimensionalism, which is roughly the thesis that an object persists through time in a way that is essentially the same as how we normally think of objects being in extended in space. On this view, an object that persists through

120. SHAPIRO, *supra* note 2, at 9.
121. *Id.*

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time consists of a number of distinct temporal subparts that are located in different subregions of time such that, roughly, my dining room table yesterday and my dining room table today are in fact are only parts of a bigger whole (just as the engine of my car is only part of my car rather than the whole car). Jackson claims that it would be a form of immodest conceptual analysis to reason as follows about the thesis of four-dimensionalism:

> Pr. 1. Different things (temporal parts or whatever) having different properties is not change (conceptual claim illustrated in the case of temperature).
> Pr. 2. Things change (Moorean fact).
> Conc. Four-dimensionalism is false (claim about the nature of our world).[122]

As Jackson puts it, this is an example of immodest conceptual analysis, because a conceptual claim "is being given a major role in an argument concerning what the world is like."[123] The first premise concerns a fact about how we represent things as being when we represent them as being one way or another. And yet, combined with only a further minimal Moorean fact, (i.e., a fact that, as David Lewis puts it, "we know better than we know the premises of any philosophical argument to the contrary"),[124] this first premise about how we represent things as being is used to support a conclusion about the nature of concrete reality in our world. Jackson thinks this means that something has gone wrong: including, possibly, that the seemingly innocent Moorean fact is perhaps doing much more work than first meets the eye (e.g., perhaps it is in fact building into it a robust theory of *what it is to change*, a theory robust and controversial enough that we are not entitled to hold it on Moorean grounds). Whatever the case, Jackson thinks that this argument is giving conceptual claims too big a role in arguments about how things actually are. For him, given that four-dimensionalism is a thesis about the nature of concrete reality in our world, this sort of thing can be discovered only by actually investigating what the world is like. Conceptual facts about how we *represent* things as being therefore will not settle the issue.

Jackson is deeply suspicious of immodest conceptual analysis and thinks that conceptual analysis should not be practiced in its immodest form. Instead, he thinks that it should be practiced in its *modest* form, in which a conceptual analysis of a given concept C simply tells us facts about how we represent things as being, insofar as we use that concept, but does not go on to make any claims about the concrete reality of the actual world. Thus, on the modest form of conceptual analysis, conceptual analysis tells us how things must be in a possible world to count as falling in the extension of

122. JACKSON, FROM METAPHYSICS TO ETHICS, *supra* note 28, at 43.
123. *Id.*
124. David Lewis, *Elusive Knowledge*, *in* SKEPTICISM: A CONTEMPORARY READER 220–242 (Keith DeRose & Ted A. Warfield eds., 1999), at 220.

https://doi.org/10.1017/S1352325212000079 Published online by Cambridge University Press

concept C but without taking any stand on which possible world is the actual one.

For my purposes in this paper, the important question is this: Can Shapiro's Planning Theory be read as involving a modest form of conceptual analysis? Or is it committed to an immodest form? There are aspects of Shapiro's presentation that seem to suggest he is committed to an immodest form. For instance, Shapiro calls the method he is using in *Legality* "conceptual analysis" despite his wanting to give a theory akin to the theory of water as H_2O, which seems like a paradigm instance of something that requires substantive scientific inquiry and not just modest conceptual analysis.[125] Yet consider how things look if one takes the view (as Shapiro does) that LEGAL INSTITUTION is a revelatory concept. In such a case, we can simply take on board Chalmers and Jackson's modest view of the role of conceptual analysis. Having done so, we can then read the heart of Shapiro's Planning Theory of Law as offering us an account of what something must be like in order to fall under our concept LEGAL INSTITUTION and thereby count as a legal institution. If read in this way, then Shapiro's view of conceptual analysis in *Legality*—and, more importantly, the role that I am here granting to a purported conceptual analysis of LEGAL INSTITUTION—does not rely on an immodest view of conceptual analysis. Instead, it relies on a modest overall view of conceptual analysis coupled with the particular claim that LEGAL INSTITUTION is a revelatory concept.[126]

At this juncture, it should be underscored that my above proposal to view a core part of Shapiro's work as a piece of modest conceptual analysis does not mean that we should not see Shapiro as giving a metaphysical account as well. In order to meet the challenge of HFML, we ultimately need to develop a *constitutive* account of law and not just an account of certain legal concepts. With Shapiro, I think that the overall Planning Theory of Law is in fact ultimately a constitutive (and hence metaphysical) account of legal content, at least on a plausible broad understanding of what counts as a "constitutive account." My point here is simply that we can identify certain components of the Planning Theory as involving certain conceptual facts, conceptual facts which we can then use to meet the rational-relation requirement if we hold fixed the idea that the relevant concepts are revelatory ones.[127]

This then puts us in a position to address the question of which specific parts of Shapiro's Planning Theory involve conceptual facts and which ones

125. *See* SHAPIRO, *supra* note 2, ch. 1.

126. Thanks to Shamik Dasgupta and Brian Leiter for helpful discussion about the relationship between Shapiro's methodological remarks in LEGALITY and Chalmers and Jackson's modest view of conceptual analysis.

127. Thinking of Shapiro's work in this way raises a number of important issues, including the crucial methodological question of what role conceptual analysis can play in metaphysical inquiry, such as inquiry into constitutive accounts. Chalmers and Jackson both have views on this subject that are intimately connected to their view of concepts that I am discussing. *See* CHALMERS, CONSCIOUS MIND, *supra* note 93; Chalmers & Jackson, *Conceptual Analysis*, *supra* note 81; and JACKSON, FROM METAPHYSICS TO ETHICS, *supra* note 28.

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do not. If it is plausible to read Shapiro's overall view of metaphysics in terms that are compatible with the modest view of conceptual analysis, then I think it is plausible to read many of the core points Shapiro makes about the nature of legal institutions as essentially facts about our concept LEGAL INSTITUTION. This is because many (though not all) of the arguments he makes for why legal institutions are the way that he maintains they are stem from the classic source of evidence when doing conceptual analysis (as conceived of by Chalmers and Jackson): careful attention to possible scenarios and our dispositions to count certain things as legal institutions or not. Hence, for the sake of pursuing my proposed positivist strategy for explaining how facts make law, we can thus assume that the core part of the Planning Theory of Law involves conceptual facts about the concept LEGAL INSTITUTION.

If this is so, then we can now ask how the particular conceptual facts about LEGAL INSTITUTION that we get from this version of Shapiro's Planning Theory matter for the positivism/antipositivism debate. The results here, I think, are quite striking. For the norms produced, applied, and enforced by institutions of social planning are simply plans. Shapiro argues that in some cases, institutions of social planning also apply and enforce *planlike* norms (roughly, norms such as the norms of *custom* that are the same as plans in every essential way except for the fact that are not created by a process of planning in order to be norms). As Shapiro argues, it seems very difficult to accept antipositivism about either *plans* or *planlike norms*.

To see why this is so, consider that Shapiro understands plans as the objects of intentions in a way that is analogous to how many philosophers (including Shapiro) understand propositions to be the objects of beliefs.[128] In turn, Shapiro thinks of plans in the following way: "for my purposes, plans are abstract propositional entities that require, permit, or authorize agents to act, or not act, in certain ways under certain conditions."[129] Now, consider that even if facts about the content of attitudes ranging from beliefs or desires, to intentions are in some way grounded in normative facts—which we might take to be part of the popular idea that "meaning is normative" or "content is normative"—it seems harder to hold that they are grounded in the sort of specifically *moral* facts that are at issue in the debate over antipositivism. For instance, the fact that a set of terrorists has the shared plan to blow up a building (as well as, crucially, what that plan involves) does not depend on moral facts being one way or another. Rather, it relies on psychological facts about the terrorists, perhaps in combination with certain environmental factors (if a form of externalism about the content of plans is correct) or certain epistemic norms that are part of the idea of the so-called "normativity of meaning."

128. SHAPIRO, *supra* note 2, at 127.
129. *Id.*

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This line of thinking shows why it is hard to resist positivism about plans and similarly positivism about planlike norms. Hence it seems that once Shapiro can identify that the norms applied and enforced in legal activity are plans and planlike norms—and, furthermore, if one holds that the legal norms just *are* the total set of those norms applied and enforced by legal activity—this yields legal positivism.

Or, more precisely, we can insure legal positivism *if* we can show that the plans and planlike norms that are enforced by legal institutions are themselves what constitutes legal content. It is not immediately obvious that this must be so. For ease of presentation here, let us focus on the case of plans, leaving planlike norms to the side. Recall that, on Greenberg's definition of "legal content" that we are working with (and which Shapiro mostly uses as well), legal content consists in those legal obligations, duties, rights, permissions, and so on that obtain in a given jurisdiction at a given time. Thus, even if one knows that the legal institutions produce, apply, and enforce plans, we still need an account of how those things comprise legal obligations, duties, rights, permissions. To put it another way, even if we are confident that plans are some sort of normative entity that legal institutions produce, why should we assume that they are the very same *legal norms* that constitute legal content? Shapiro's basic answer on this front is this: when one is speaking of "legal obligations" (or "legal permissions" etc.) one is simply redescribing those plans in a specific way. This way of redescribing the plans involves two crucial things: (1) using certain formulations that have their normal home in moral theory; and (2) making use of the broadly Razian idea of the "legal point of view," which is roughly the point of view according to which the law is actually fully morally legitimate. Shapiro glosses this basic idea here by starting with an interpretation of "legal authority." He writes:

> The key here is to recognize that, although the term "authority" in claims of legal authority refers to a moral power, the word "legal" often does not modify this noun-phrase; rather, its role is to qualify the statement in which it is embedded. When we ascribe legal authority to someone, in other words, we are not necessarily imputing any kind of moral authority to her. To the contrary, we are qualifying our ascription of moral legitimacy. We are saying that, *from the legal point of view,* the person in question has morally legitimate power. Similarly, to say that one is legally obligated to perform some action need not commit the asserter to affirming that one is really obligated to perform that action, that is, has a moral obligation to perform that action. The statement may be understood to mean only that from the legal point of view one is (morally) obligated to perform that action.[130]

On this view of the meaning of the term "legal obligation," talk of "legal obligation" is simply one particular way of redescribing the content of the shared plans of specific given legal institutions. If this is right, then Shapiro is

130. *Id.* at 185.

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correct that his positivism about plans ensures positivism about legal norms and legal content. There are, of course, objections one might have to this reading of "legal obligation." But for the purposes of our paper, this is not the central part of the Planning Theory that matters. What matters is simply that this is a plausible move one can make in developing a positivist theory of law and therefore that it can legitimately taken to be one of the many moving parts in developing a positivist route for explaining how nonlegal facts ground legal content.

Let us then return to the connection between Shapiro's view of legal institutions and positivism about legal norms (i.e., those norms that constitute legal content). In order to drive home the import of this connection, suppose that one accepts Shapiro's view about legal institutions but thinks that legal content is not equivalent to the total set of plans produced by those institutions. In particular, suppose we combine Shapiro's view of legal institutions with an antipositivist view about legal content. For example, suppose we accept Dworkin's view in *Law's Empire*, according to which, depending on how you read Dworkin, either (1) the content of law consists of the set of principles (or standards) that best justify legal practices, or (2) the content of the law is determined by such principles.[131] Or, to take another example, suppose one were to accept Greenberg's own favored version of antipositivism. Greenberg summarizes this view as follows:

> When the law operates as it is supposed to, the content of the law consists of a certain general and enduring part of the moral profile [i.e., the set of moral obligations, rights, etc., that obtain at a given time and place]. The relevant part of the moral profile is that which has come to obtain in certain characteristic ways, typically as a result of actions of legal institutions such as the enactment of legislation and the adjudication of cases.[132]

On this view, which Greenberg calls the "dependence view," "the relation between the content of the law and the content of legal utterances is, roughly speaking, that the content of the law is a certain aspect of the impact of legal utterances (and other actions) on obligations, powers, and so on."[133] Dworkin's and Greenberg's views are different in important respects.[134] Nonetheless, what these views share in common is the basic antipositivist thesis that moral facts are necessarily part of the grounds of legal facts. In *Legality*, Shapiro argues that the problem with such views is that they are inconsistent with the fundamental aim of plans. Drawing on Bratman, Shapiro argues that one of the major reasons we have plans is in order

131. DWORKIN, *supra* note 89.
132. Greenberg, *Standard Picture*, *supra* note 9, at 57.
133. *Id.*
134. However, it should be noted that Dworkin's view is perhaps becoming closer to Greenberg's view in more recent work. For instance, in RONALD DWORKIN, JUSTICE FOR HEDGEHOGS (2011), Dworkin's view seems to be, roughly, that legal content is equivalent to those moral norms that are coercively enforceable on demand. On such a view, as on Greenberg's dependence view, the legal norms turn out to be a particular subset of the moral norms.

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to minimize the need to deliberate about *what the thing to do is* in given situations by settling on a certain course of action for those situations prior to being in them.[135] That does not mean that we need *conclusively* to settle on that course of action—most of our plans, after all, have implicit "out" clauses—but we must settle in some sense if plans are to be useful tools at all. This means that if, in order to identify the content of plans, we *always* needed to ask about moral facts about what *should* be the case—facts that depending on one's views in metaethics, are either identical to or closely tied to facts about *what to do*—then plans would be essentially useless tools for us.[136] Therefore, what Shapiro calls the "general logic of planning" creates a deep problem for any antipositivist who wants to grant Shapiro's view of legal institutions. In short, such a view is unstable given what sorts of tools plans *are* and why we go in for planning in the first place.

At the core of Shapiro's argument here—or at least the argument as I am understanding it—is a crucial connection between the concepts LEGAL NORM and LEGAL INSTITUTION. In short, the connection is roughly this: it is a conceptual fact that legal norms are norms that are produced by or endorsed by legal institutions in a particular way (the "particular way" needs to be included to rule out accidental ways and so on in which those institutions produce norms). Something like this is, I think, a basic conceptual truth. It is part of why, for instance, we see changes brought about by certain powerful institutions, for example, Congress, as part of American law and not changes brought about by other powerful institutions, for example, the Gates Foundation. And it is also part of why, for instance, when we think that customs can help determine legal content, it is in part because of how these customs are related to the practice of legal institutions, even if those institutions themselves did not create these customs.

In any case, this core idea—the idea that legal norms are norms that are produced by or endorsed by legal institutions in a particular way—is not a solely positivist idea that is parochial to Shapiro, Raz, Kelsen, or other positivists. Indeed, it is arguable that Greenberg *himself* tacitly accepts something like this in his own antipositivist view of legal content. To repeat, for Greenberg, legal content (at least legal content in what he calls "properly functioning legal systems") is equivalent to a specific part of the moral profile (i.e., the set of moral obligations, rights, etc., that obtain at a given time and place). As he puts it, it is that part of the moral profile "which has come to obtain in certain characteristic ways, typically as a result of actions of legal institutions such as the enactment of legislation and the adjudication of cases."[137] The fact that Greenberg includes this clause about legal

135. *See* MICHAEL BRATMAN, INTENTION, PLANS, AND PRACTICAL REASON (1987); and MICHAEL BRATMAN, FACES OF INTENTION: SELECTED ESSAYS ON INTENTION AND AGENCY (1999).

136. For an argument for a particularly tight connection between asking "What should I do?" and "What to do?," *see* GIBBARD, THINKING, *supra* note 85.

137. Greenberg, *Standard Picture*, *supra* note 9, at 57. It is an important question for Greenberg what legal content is in legal systems that are *not* properly functioning. Greenberg has yet

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institutions is essentially to grant the point here about the basic connection between legal norms and legal institutions. Greenberg could of course maintain that the connection does not stem from a conceptual fact. But, given that this connection seems to be a robust and necessary one that covers scenarios across all possible worlds, I submit that we should see it as a conceptual fact.

With such conceptual facts in hand, we are now in a position to give a positivist account of the grounds of legal content that meets the rational-relation requirement. The explanation goes as follows. To start with, we have on the table Shapiro's overall constitutive account of legal content, according to which legal content consists of the plans of a certain type of planning organization. For our purposes here, we can understand this account as a metaphysical one that tells us what grounds legal content. This account is then combined with certain conceptual facts, which are understood on the broad model of conceptual facts that we get from Chalmers and Jackson.

The first of these conceptual facts is the one just sketched above: that it is a conceptual fact that legal norms are norms that are produced by or endorsed by legal institutions in a particular way. The second of these conceptual facts is that legal institutions are planning organizations of a certain specified kind. In turn, this allows us to establish that it is a conceptual fact that legal content is equivalent to a set of shared plans. From Shapiro's and Bratman's basic theory of the nature and purpose of plans, we then get that the content of plans rests on social facts alone (or social facts plus certain environmental facts or nonmoral normative facts). It should be noted here that the question of exactly *which* social facts those are is a further question in the theory of plans, as is the question of how exactly a change in a specific subset of social facts matters for the content of an agent's (or a group's) plans. These are questions that Shapiro takes up at length in *Legality* but which I set aside here, given the abstract focus of my paper.

To return to the main line of argument, if I am correct that the relevant conceptual facts in the account sketched above—most importantly, conceptual facts about LEGAL INSTITUTION—concern revelatory concepts, and if I am further right about the import of revelatory concepts for illuminating grounding relations of a certain sort, then such conceptual facts can make intelligible the facts that we need in order to meet the rational-relation requirement. In particular, creatures like us, using the legal concepts that we have, can understand the fact that certain social facts ground legal content. In combination with the overall constitutive account of legal content that we get from Shapiro's Planning Theory, the existence of these thoroughly positivist intelligibility-enabling facts forms the basis for a viable positivist account of the grounds of law that meets the rational-relation requirement.

to commit to a view about this subject. For some of his initial proposals, *see id.* I think this issue poses one of the biggest challenges facing Greenberg's form of antipositivism.

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Hence we have a positivist route for answering Greenberg's challenge in HFML.

Or, rather, we almost have a route for so answering his challenge. To see why the argument is not yet complete, recall that on Greenberg's rational-relation requirement, it is not just that there *happen* to be intelligibility-enabling facts (such as my proposed conceptual facts). Rather, it must also be that the fact of intelligibility itself, a fact that is made possible by the intelligibility-enabling facts, is itself among the grounds of legal content. So we therefore need to ask: Can my proposed positivist route for explaining how facts make law endorse this thesis? I think that indeed it can. This is because there is no reason that my strategy precludes one from incorporating the idea that part of what makes law *what it is* is that it is grounded in part in the fact that a specific relation between certain grounding and certain grounded facts is in principle intelligible to us. Moreover, there is also an attractive option for capturing this fact that fits smoothly with the basic view of concepts that I am working with: we can claim that it is a conceptual fact about legal content that it must be grounded in part in such-and-such facts (e.g., the fact that the grounds of law and legal content stand in an intelligible relation to each other) in order to count as legal content. If one is moved by Greenberg's arguments for the rational-relation requirement, then I see no good reason why one cannot think that this is part of the conceptual content of LEGAL CONTENT.

Indeed, I think that one might be able to go even further than this with respect to the rational-relation requirement. For if Shapiro's theory is right that legal content is in fact equivalent to a set of plans and planlike norms, then we in fact have the start of a good *explanation* of why something along the lines of the rational-relation requirement holds. The explanation is as follows. To start with, take the basic idea from Shapiro and Bratman that an essential part of planning is as follows: "planning guides and organizes our behavior over time, enabling us to achieve ends that we might not be able to achieve otherwise."[138] This includes, importantly, making plans for a future situation in order to reduce the thinking that one must do when one actually finds oneself in that situation. Then consider that if plans are to be successful at performing this basic function, then it cannot be that the content of plans is something we as planners are incapable of gaining epistemic access to. Nor can it be that we have no idea what sorts of other nonplanning facts we might be able to change in order to change our plans. Hence, if legal content is equivalent to a set of plans and planlike norms, then it seems that it is subject to an epistemic accessibility constraint given the sort of thing that it is. In short, in order to avoid being completely hopeless planners, we must have some ability to recognize how the nonplanning facts ground facts about what our plans are.

138. SHAPIRO, *supra* note 2, at 122–123.

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This, of course, is not a full explanation of why the rational-relation requirement holds. For we would still need to argue for why this is part of what it is to be law. However, the point here is simply that the basic line of argument that we get from Shapiro not only helps provide us with the resources to meet the rational-relation requirement but, moreover, offers us the basic resources to begin to construct an explanation of why something like the rational-relation requirement is there in the first place.

This brings us to the close of my proposed argument for how positivists should respond to Greenberg's challenge in HFML. The argument given here by no means shows that the positivist can successfully meet the challenge in the end. What I have done is to provide the outlines for what a successful route would look like by which the positivist can show how conceptual facts of a certain sort are the intelligibility enablers we need to meet the rational-relation requirement in giving a constitutive account of law. But I do not conclusively show that such conceptual facts exist. As I said above, doing so would require defending the claim that certain parts of Shapiro's Planning Theory of Law are specifically *conceptual* truths. Moreover, fully carrying out the strategy outlined here would require a systematic defense of the broad view of conceptual facts that I am working with, as well as looking more carefully at how such facts in general matter for constitutive accounts.

Finally, there is the issue that in order to meet Greenberg's challenge in HFML, the alleged conceptual facts I cite ultimately need to be coupled with a broader constitutive account of legal content, which I suggest should be Shapiro's Planning Theory. My overall response to Greenberg thus relies on the viability of Shapiro's overall constitutive account and not just on certain conceptual facts that I have developed from that account. Furthermore, the viability of Shapiro's constitutive account of law likely also depends on defending a) a broader view of what constitutive accounts in general *are* and b) defending a broader view of what sort of metaphysical explanations philosophers of law should be trying to give.

At this juncture, my broad and noncommittal account in this paper of what grounding is—an understanding that is likely incompatible with many developed views on this subject—likely also matters, as does Greenberg's reasons for thinking that the central question about legal content concerns grounding and not supervenience. Any full defense of the account of legal content that I put forward in this paper would thus need to look further into these issues as well. All of these above tasks are, of course, ones that raise difficult issues that would require significant further work to address. However, if I am right, then there is good reason to think that it is at least plausible that such tasks can be carried out. Or, more precisely, it is at least no less plausible to think that positivists can carry out these tasks than it is plausible to think that Greenberg can effectively meet the challenges he faces in explaining how antipositivists can develop a viable constitutive account of legal content that meets the rational-relation requirement. In

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turn, if this is right, then it means that Greenberg is wrong to conclude that his argument in HFML gives us good reason to accept antipositivism.

Before I close, there is an important question I want to address about the argument advanced in this paper. The question is this: What if someone has a different view of conceptual facts from the one I adopt here? Or, similarly, what if one is skeptical of conceptual facts altogether (perhaps for broadly Quinean reasons of the sort that motivate some leading contemporary legal positivists such as Brian Leiter)?[139]

The first thing to say here is that by no means do I think that Chalmers and Jackson's view of concepts is the *only* sort of view of concepts that can be used in the basic form of argument I have given here. Many other views of conceptual facts might have the core features of Chalmers and Jackson's view that matter here, for example, that concepts determine functions from worlds to extensions and that their content is understood in broadly internalist terms. I focus on Chalmers and Jackson's view because their broad view of concepts seems particularly well suited for carrying out the strategy I am pursuing in this paper. But, again, this is not to suggest that other views of conceptual facts, perhaps even ones quite different from Chalmers and Jackson's view, are incapable of playing a similar functional role in developing a positivist account of law. Furthermore, it might be that even the Quinean could construct something that plays a roughly similar functional role to conceptual facts to use in the basic form of argument given here.

The second thing to say is related to a more general fact: I do not claim here that my proposed response to Greenberg is the *only* possible response that the positivist can give to his argument in HFML. There might indeed be other options for responses here, and perhaps ones that are more attractive to those with different commitments from my own about the basic nature of concepts or metaphysics or the nature of law. Nothing I say in this paper rules that out. But explaining the merit of such responses, including the issue of how (if at all) they would support a viable constitutive account of law, is beyond the scope of this paper.

V. CONCLUSION

At the start of this paper, I said that my primary aim is to develop a positivist response to Greenberg's argument in HFML. In Section IV, I completed this response. However, in addition to this primary aim, I said that I have a secondary aim as well. This is to put pressure on antipositivism in one of the places where I think it is weakest: its account of legal institutions. I

139. By "broadly Quinean reasons," I have in mind skepticism about the distinction between conceptual and nonconceptual facts stemming from Quine's attack on the analytic/synthetic distinction. *See* BRIAN LEITER, NATURALIZING JURISPRUDENCE: ESSAYS ON AMERICAN LEGAL REALISM AND NATURALISM IN LEGAL PHILOSOPHY (2007).

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now explain how my work in this paper puts pressure on this front for the antipositivist.

Recall from the previous section that Shapiro's Planning Theory of Law (at least on my proposed way of reading the Planning Theory) suggests that there is a deep *conceptual* connection between facts about legal institutions and facts about legal norms. Roughly, I suggest the connection is that it is a conceptual fact that legal norms are norms that are produced by or endorsed by legal institutions in a particular way. If we see legal norms as those norms that constitute legal content (as I think we should), this can also be put as follows: it is a conceptual fact that legal content consists of norms produced by or endorsed by legal institutions in a particular way. In the context of this paper, the major reason that this conceptual connection matters is the following: it helps show that conceptual facts about legal institutions might be the best sort of conceptual facts to appeal to if the positivist is going to argue that conceptual facts are the intelligibility-enabling facts we need to cite in order to meet the rational-relation requirement for law.

However, let us now put aside the argument in HFML and simply ask about the import of this conceptual connection in general terms for the positivism-versus-antipositivism debate. The connection that I discuss in this paper is the foundation for an important general challenge to antipositivism. As shown above, Shapiro argues in *Legality* that given the general logic of planning, antipositivist views are incompatible with an account of legal institutions as planning institutions. Suppose that something like the conceptual connection between legal institutions and legal norms that I identify is correct. It therefore seems that if something akin to Shapiro's view of legal institutions is correct, then the conceptual connection I sketch between legal institutions and legal norms creates a serious problem for the antipositivist. In short, it shows that if the antipositivist theory is going to work as an alternative to legal positivism, then it needs an alternative account of legal institutions—or, alternatively, a much more robust argument than is given so far about why such an account is irrelevant to the question of legal content. Furthermore, given that some antipositivists (such as Greenberg) focus on legal content only in well-functioning legal systems, it is important to stress that in the context of my challenge here, we need an argument that concerns both well-functioning and poorly-functioning legal institutions.

What prospects are there for a viable antipositivist response to this challenge? In order to set the groundwork for further discussion, I discuss three possible avenues that the antipositivist might pursue to resist the import of this conceptual connection between LEGAL INSTITUTION and LEGAL NORM.

To start with, an antipositivist could claim that there are no robust conceptual facts about what makes something a legal institution in particular. The trouble with this strategy is simply that we do seem to have robust intuitions about how to distinguish legal institutions from nonlegal ones when we engage in thought experiments about what we would reflectively

https://doi.org/10.1017/S1352325212000079 Published online by Cambridge University Press

classify as a legal institution—and, moreover, thought experiments that are precisely the sort that Chalmers and Jackson think of as constituting the core method of conceptual analysis. If Chalmers and Jackson are right, this suggests that there is a robust pattern guiding the application of the concept LEGAL INSTITUTION that we are uncovering.

A second possible antipositivist strategy would be to claim that we should understand the category of *legal institution* as itself at least partly a moral kind, such that we can discover which things are actually legal institutions only by doing substantive moral theory. For instance, this might be so if the category *legal institution* is an honorific that we use only for certain types of morally admirable institutions, or, similarly, that we use only for institutions that play a certain functional role in well-functioning democracies. The trouble with that for the antipositivist is that given the possibility of doing things such as legal anthropology and legal history—where we certainly seem to be coherently discussing *legal institutions* without having to have done moral theory to identify them as such—it seems there is good reason to think that the category of *legal institution* is *not* a fundamentally moral kind. In other words, even if one finds it initially appealing to think of "law" in the sense of legal content as being a moral kind—say, for example, for the sorts of reasons about the nature of legal reasoning that I start the paper with—it is much less plausible to begin an argument for antipositivism by arguing that "law," in the sense of legal institutions, picks out a moral kind rather than a purely sociological or anthropological one.

This, though, opens up a third strategy for the antipositivist to pursue: to suggest that the concept that she is using, and which then defines her subject of inquiry, is not the same one used by others, for example, by the folk, legal anthropologists, positivists such as myself, or practicing lawyers. I think this is not a bad strategy to pursue. This is for two reasons: (1) given the view of concepts that we get from Chalmers and Jackson, it is very likely that many of us do not share precisely the same concepts; and (2) given the different claims people have made over the years about things such seemingly normative ideas as "the rule of law," it is likely that there is *some* use of the term "law" that expresses a distinctively moral concept. Because of these reasons, I think there is likely important conceptual variance among ordinary citizens, among practicing legal actors, and also among philosophers of law (not to mention philosophers engaged in normative political philosophy)—and, moreover, that this variance is an important and underappreciated reality.

Nonetheless, that being said, I think it would come at a big cost if the antipositivist were to rely *at this juncture* on the idea that she is using a concept that is distinct from that used by folk, legal anthropologists, positivists, or practicing lawyers. The cost is that it would then not be clear how and why the positivist and antipositivist were engaged in an overlapping explanatory project. To be sure, this still might be possible: I am not suggesting that people can disagree with each other or be involved in the same explanatory

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project only when they employ the same concepts.[140] But if the antipositivist were to pursue this strategy and claim that her concept is different from the one that is being used by positivists such as myself or Shapiro, then, especially given how different many leading antipositivist views are from positivist ones, it would raise the important question of which intuitions (if any) are helping define the shared subject of inquiry here. In turn, without a good understanding of what is defining our subject of discussion, it is not clear why the proposed antipositivist constitutive accounts of law get to count as constitutive accounts of the same thing that positivists such as Shapiro are trying to give an account of.[141]

Given that all three of these responses run into significant problems, I conclude that contemporary antipositivists are stuck in an uncomfortable position: lacking (1) a good developed account of what it is essential for being a legal institution, or (2) a good explanation of why such an account would be irrelevant to giving a constitutive account of legal content. Figuring a way out of this situation is one of the main tasks that contemporary antipositivists must take on in the years to come.

WORKS CITED

Braddon-Mitchell, David. (2005) "The Subsumption of Reference." *British Journal for the Philosophy of Science* 56: 157–178.

Bratman, Michael. (1987) *Intention, Plans, and Practical Reason* (Harvard University Press).

———. (1999) *Faces of Intention: Selected Essays on Intention and Agency* (Cambridge University Press).

Chalmers, David J. (1996) *The Conscious Mind: In Search of a Fundamental Theory* (Oxford University Press).

———. (2005) Revelation, Humility, and the Structure of the World. Available at http://consc.net/papers/revelation.ppt.

———. (2006) "Two-Dimensional Semantics." In Ernie Lepore & Barry Smith, eds., *Oxford Handbook of the Philosophy of Language*, 574–606 (Oxford University Press).

———. (2011) "Verbal Disputes." *Philosophical Review* 120: 515–566.

———. (forthcoming) *Constructing the World*.

Chalmers, David J. and Jackson, Frank. (2001) "Conceptual Analysis and Reductive Explanation." *Philosophical Review* 110: 315–360.

Darwall, Stephen L. (2006) *The Second-Person Standpoint: Morality, Respect, and Accountability* (Harvard University Press).

Dasgupta, Shamik. (2011) On the Plurality of Grounds. Available at http://www.shamik.net/Research.html.

140. For an extended discussion of in what way disagreement does and does not require the use of shared concepts, *see* Plunkett & Sundell, *supra* note 91.

141. The issues here are closely connected with the question of whether (and to what extent) the debate over legal positivism is what Chalmers calls a "verbal dispute." I plan to address this issue in future work.

https://doi.org/10.1017/S1352325212000079 Published online by Cambridge University Press

Davidson, D. (1984) "Radical Interpretation." In *Inquiries into Truth and Interpretation* (Oxford University Press).

———. (2001) "Belief and the Basis of Meaning." In *Inquiries into Truth and Interpretation*, 2d ed. (Oxford University Press).

Dworkin, Ronald. (1986) *Law's Empire* (Belknap Press).

———. (2011) *Justice for Hedgehogs* (Harvard University Press).

Enoch, David. (2011) That's Just What It *Is* to Be Legally Valid: A Quick Refutation of Greenberg's "How Facts Make Law." Available at http://law.huji.ac.il/upload/ThatsJustWhatItIs.doc.

Fine, Kit. (2011) Guide to Ground. On file with author.

Gibbard, Allan. (1990) *Wise Choices, Apt Feelings: A Theory of Normative Judgment* (Harvard University Press).

———. (2003) *Thinking How to Live* (Harvard University Press).

Greenberg, Mark. (2005) "A New Map of Theories of Mental Content: Constitutive Accounts and Normative Theories." *Nous: Philosophical Issues* 15 (suppl.): 299–320.

———. (2006) "Hartian Positivism and Normative Facts: How Facts Make Law II." In Scott Hershovitz, ed., *Exploring Law's Empire: The Jurisprudence of Ronald Dworkin*, 265–290 (Oxford University Press).

———. (2006) "How Facts Make Law." In Scott Hershovitz, ed., *Exploring Law's Empire: The Jurisprudence of Ronald Dworkin*, 225–264 (Oxford University Press).

———. (2007) "On Practices and the Law." In Enrique Villanueva, ed., *Law: Metaphysics, Meaning, and Objectivity: Social, Political, & Legal Philosophy*, vol. 2, 95–125 (Rodopi Philosophical Studies).

———. (2007) "Reasons without Values?" In Enrique Villanueva, ed., *Law: Metaphysics, Meaning, and Objectivity: Social, Political, & Legal Philosophy*, vol. 2, 133–143 (Rodopi Philosophical Studies).

———. (2011) "Legislation as Communication? Legal Interpretation and the Study of Linguistic Communication." In Andrei Marmor & Scott Soames, eds., *Philosophical Foundations of Language in the Law*, 217–256 (Oxford University Press).

———. (2011) "The Standard Picture and Its Discontents." In Leslie Green & Brian Leiter, eds., *Oxford Studies in the Philosophy of Law*, vol. 1, 39–106 (Oxford University Press).

Hart, H.L.A. (1994) *The Concept of Law*, 2d ed. (Oxford University Press).

Jackson, Frank. (1998) *From Metaphysics to Ethics: A Defence of Conceptual Analysis* (Clarendon).

———. (2001) "Precis of *From Metaphysics to Ethics*." *Philosophy and Phenomenological Research* 62: 617–624.

Jackson, Frank, and Pettit, Philip. (1996) "Moral Functionalism, Supervenience and Reductionism." *Philosophical Quarterly* 46: 82–86.

Jenkins, Carrie S. (2011) "Explanation and Fundamentality." In Miguel Hoeltje, et al., eds., *Dependence*. Basic Philosophical Concepts Series (Philosophia Verlag, forthcoming).

Kelsen, Hans. (1945) *General Theory of Law and State* (Harvard University Press).

Kim, Jaegwon. (1993) *Supervenience and Mind: Selected Philosophical Essays* (Cambridge University Press).

Kment, Boris. (2006) "Counterfactuals and Explanation." *Mind: A Quarterly Review of Philosophy* 115: 261–302.

Leiter, Brian. (2007) *Naturalizing Jurisprudence: Essays on American Legal Realism and Naturalism in Legal Philosophy* (Oxford University Press).

https://doi.org/10.1017/S1352325212000079 Published online by Cambridge University Press

———. (2009) "Explaining Theoretical Disagreement." *University of Chicago Law Review* 76: 1215–1250.

Lewis, David. (1999) "Elusive Knowledge." In Keith DeRose & Ted A. Warfield, eds., *Skepticism: A Contemporary Reader*, 220–242 (Oxford: Oxford University Press).

Margolis, Eric and Laurence, Stephen. (1999) *Concepts: Core Readings* (MIT Press).

Moore, George Edward. (1903) *Principia Ethica* (Cambridge University Press); (1993) rev'd ed. with preface to 2d ed., T. Baldwin, ed. (Cambridge University Press).

Plunkett, David. (2011) "Expressivism, Representation, and the Nature of Conceptual Analysis." *Philosophical Studies* 156: 15–31.

Plunkett, David and Sundell, Tim. (2011) Disagreement and the Semantics of Normative and Evaluative Terms. On file with author.

Quine, W.V.O. (1951) "Two Dogmas of Empiricism." *Philosophical Review* 60: 20–43.

Raz, Joseph. (1985) "Authority and Justification." *Philosophy and Public Affairs* 14: 3–29.

———. (1999) *Practical Reason and Norms* (Oxford: Oxford University Press).

Rosen, Gideon. (2010) "Metaphysical Dependence: Grounding and Reduction." In Bob Hale & Aviv Hoffmann, eds., *Modality: Metaphysics, Logic, and Epistemology*, 109–135 (Oxford University Press).

Scanlon, T.M. (2000) *What We Owe to Each Other* (Harvard University Press).

Schaffer, Jonathan. (2009) "On What Grounds What." In David J. Chalmers & David Manley, eds., *Metametaphysics: New Essays on the Foundations of Ontology*, 347–383 (Oxford University Press).

Schroeder, Mark. (2005) "Cudworth and Normative Explanations." *Journal of Ethics and Social Philosophy* 1: 1–27.

———. (2007) *Slaves of the Passions* (Oxford University Press).

Shapiro, Scott. (2011) *Legality* (Harvard University Press).

Smith, Michael. (1994) *The Moral Problem* (Blackwell).

Stavropoulos, Nicos. (2007) "Interpretivist Theories of Law." In Enrique Villanueva, ed., *Law: Metaphysics, Meaning, and Objectivity: Social, Political, & Legal Philosophy*, vol. 2, 3–19 (Rodopi Philosophical Studies).

Street, Sharon. (2008) "Constructivism about Reasons." In Russ Shafer-Landau, ed., *Oxford Studies in Metaethics*, vol. 3, 207–245 (Oxford University Press).

Szabo Gendler, Tamar and Hawthorne, John, eds. (2002) *Conceivability and Possibility* (Oxford University Press).

Trogdon, Kelly. (2011) "An Introduction to Grounding." In Miguel Hoeltje et al., eds., *Basic Philosophical Concepts* (Philosophia Verlag, forthcoming). Available at http://web.me.com/kellytrogdon/KT/research_files/GO.pdf.

https://doi.org/10.1017/S1352325212000079 Published online by Cambridge University Press