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EXPLAINING LEGAL FACTS

by

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Explaining Legal Facts

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{This paper was presented at the American Philosophical Association's 2007 Berger Prize session. It is a reply to Jeffrey Brand-Ballard's comment on my paper, "How Facts Make Law," which was awarded the 2007 Berger Memorial Prize for the outstanding paper in philosophy of law published during 2004 and 2005. This is a rough draft. Please do not cite or quote without permission of the author.}

1. The background/foreground or enabler/favorer distinction

Jeffrey Brand-Ballard's excellent paper[1] raises three sets of questions about *How Facts Make Law* (hereafter HFML).[2] His first point relies on the idea that, in other domains, we sometimes distinguish explanatory factors that play a background or "enabling" role from the principal explanatory factors. If there is such a distinction within the class of factors that determines the content of the law, positivists might be able to reply to my argument by accepting that normative facts are part of the full constitutive account of legal facts, but claiming that normative facts have merely a background role in determining the content of the law.

I will devote about half of my response to Brand-Ballard to a discussion of this first point, both because I think it's important and because it takes up a substantial portion of his paper – almost as much as his other points combined.

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[1] Brand-Ballard, *Comments on Mark Greenberg's "How Facts Make Law,"* unpublished ms. on file with author, delivered at the 2007 Berger Memorial Prize Session at the APA's Pacific Division Meeting. Brand-Ballard divides his discussion into four sections. The second and third sections raise closely related points, so I discuss them together (in section 2).

[2] Greenberg, *How Facts Make Law,* 10 LEGAL THEORY 157 (2004), corrected version reprinted in SCOTT HERSHOVITZ, ed., EXPLORING LAW'S EMPIRE (2006) and in 2 SOCIAL, POLITICAL, AND LEGAL PHILOSOPHY 21 (2007).

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The first point I want to make is that according to Brand-Ballard's main way of characterizing his distinction, the distinction does not apply to my argument (as he seems to recognize in passing at one point). His main way of putting his point is that there are *distinctions between determining factors that don't show up in counterfactual analysis*. In other words, he understands his point to be that factors that are equally modally relevant may not be equally explanatorily relevant for the purposes of some kinds of explanation.

As I emphasize in the original paper, however, given the plausible assumption that fundamental normative facts are necessary, not contingent, the dependence of the law on normative facts does not show up in counterfactuals. For example, anti-positivists and positivists can agree that the content of the law *does* supervene on descriptive facts alone. (Why? Since the fundamental normative facts cannot be different from what they are – and the less fundamental normative facts cannot be different unless the descriptive facts are different – the law cannot be different from what it is unless the descriptive facts are different from what they are.)

To the extent that Brand-Ballard's point is that it is in general illegitimate to infer from the modal relevance of some fact to its explanatory relevance, I'm very sympathetic. But this point has no impact on my argument. I don't argue from the counterfactual relevance of normative facts to their constitutive relevance. Rather, I argue directly for their constitutive relevance (and emphasize that they are not in fact counterfactually relevant).

Therefore, despite his own characterization, we should take Brand-Ballard's point to be the more general type of point I mentioned at the start. Roughly, the point is that all

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factors that are part of a full explanation aren't necessarily explanatorily relevant in the same way. Some may be relevant in a background or subsidiary way.

This brings me to my second point. When we say that factors may take a background role, we need to recognize that there are a variety of kinds of backgrounding. In particular, it's going to be very important to distinguish epistemic or pragmatic backgrounding from constitutive backgrounding. Let me give a couple of examples. The presence of oxygen is a factor that, in typical contexts, it would be inappropriate to mention in ordinary responses to questions about why a fire started. This is an example of pragmatic backgrounding. To take another example, even if I am right that the content of the law depends on normative facts, *in figuring out what the law is,* we typically don't need to consult normative facts. This is an example of epistemic backgrounding. I don't have a good example of constitutive backgrounding, and I'm not even sure what it would be. The important point is that only constitutive backgrounding would matter to my argument.

In my view, Brand-Ballard's examples really support pragmatic or other sorts of superficial backgrounding, not constitutive backgrounding. And in fact, although I don't have space here to explain in detail, this is true even according to the views of the authors who are the sources of Brand-Ballard's examples. I've already mentioned the example of oxygen. I think it's pretty clear that from a metaphysical point of view the oxygen is just as much part of the causal explanation as the match. (And in fact, J. L. Mackie, who is the source of the example, takes this view.)[3]

Brand-Ballard's use of Dancy's enabler/favorer distinction seems at first to be a little closer to what we need, but I don't think the analogy does the work it needs to do

[3] See J.L. MACKIE, THE CEMENT OF THE UNIVERSE xx (1974).

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even if we grant Dancy's claims. (That's a big "if" because, like many philosophers, I'm inclined to think that Dancy is precisely making the mistake of taking something epistemic and pragmatic to be something metaphysical.) I don't have space to spell it out here, but Dancy, correctly in my view, accepts that what he calls "enablers" are a non-background part of the constitutive explanation *of what makes an action right or wrong*. He simply denies that the enablers are part of "our reason" for the action. But the explanation of what makes an action right or wrong – where Dancy does not make the enabling/favorer distinction – strikes me as the closest analogy in the moral domain to the explanation we're concerned with in the legal case.

(The proximate cause case, which Brand-Ballard doesn't list as one of his main examples but brings up later, strikes me as not really a backgrounding case at all. Rather, it's straightforwardly a case where counterfactual relevance is just a necessary but not a sufficient feature for what is at issue – legal liability. In other words, there is no reason to believe that but-for causation is not really part of the explanation of proximate cause, but merely an enabler.)

The fact that Brand-Ballard's examples don't really illustrate constitutive backgrounding doesn't mean that we can't find it in the legal case of course. In the legal case, there are a few ways in which normative facts are in the background. First, as I've mentioned, they are not modally relevant. We could characterize this is a way in which they are metaphysically in the background: they remain constant from legal system to legal system and over time, while the social facts change.

Second, partly as a result of the fact that they are necessary truths, normative facts typically need not be mentioned in ordinary accounts of what legal propositions obtain.

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There are both pragmatic and epistemic points here. As a pragmatic matter, it's inappropriate in most contexts to mention something that is constant across all cases. The epistemic point is that we don't ordinarily need to think about normative facts in figuring out what the law is. Since the relevance of the descriptive facts is in ordinary cases settled and uncontroversial, we needn't appeal to the normative facts to rethink it from scratch.

Brand-Ballard does not try to offer a reason for thinking that normative facts are also somehow constitutively in the background. I think, though, that one might have a feeling that there is something different about the role that normative facts play, as opposed to the role that social facts play. Perhaps even something "background-like." But I've just discussed a few ways in which the role of normative facts is a background role. Hence we already have an explanation of any such feeling about the differentness of the role of normative facts, an explanation that does not suggest that they are constitutively in the background.

My third main point about Brand-Ballard's invocation of the background/foreground distinction is that what really matters is not whether normative facts are in the background in some way or other, but whether they play a role that is inconsistent with positivism's core claims. Brand-Ballard suggests that positivists might not mean to deny the type of role for normative facts that I have argued for (p. 5). I don't agree. Positivists deny a necessary connection between moral facts and legal facts. They insist that law is determined at the most basic level by social facts – that any role for moral facts depends on social facts. They insist that we never need to look at moral facts to figure out what the law is (except to the extent that the social facts incorporate moral

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facts).[4] All of these familiar and central positivist claims would be false if normative facts play the role I've argued for, regardless of whether that role is, in some sense to be specified, a background or enabling, role.

Finally, toward the end of his discussion of his first point, Brand-Ballard briefly seems to suggest a much stronger position: that rationally adequate explanation need not be complete in order to provide intelligibility. And he even suggests that it cannot be complete because there are infinitely many enablers, and we have finite minds.

Here Brand-Ballard is working with a context-, knowledge-, and interest-dependent notion of intelligibility. As Brand-Ballard in effect points out, what we find intelligible depends on our assumptions, knowledge, and interests. So for a person with a great deal of background knowledge, very little can be enough to make some explanandum intelligible.

This is not the notion of intelligibility that my argument appeals to. My initial claim about the metaphysics of law – that law is rationally determined – is that the full constitutive story about the content of the law must do more than specify determinants that modally determine the legal facts; the constitutive determinants must constitute *reasons* why the legal facts obtain. The notion of a reason involved in this claim is not one that is dependent on background knowledge or context. In HFML, I tentatively suggested that the relevant notion of a reason was an epistemic notion that might ultimately be explicated in terms of idealized human reasoning ability (HFML, 164 n.17). Such an account would certainly abstract away from the background knowledge of particular individuals. (I now believe that the relevant notion of a reason is thoroughly metaphysical but equally independent of knowledge and interests.) Thus, to put it

[4] Citations.

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another way, my claim is that the determinants of the law must themselves explain the content of the law in a way that is independent of anyone's interests or background knowledge.

Of course, one might deny this metaphysical claim. But the fact that we often, because of our knowledge, assumptions, interests, etc., find intelligible explanations of the sort that Brand-Ballard mentions is no objection to my claim.

What about Brand-Ballard's suggestion that the sort of explanation that would be required to make an explanandum fully intelligible is in general infinite? Here I may simply not understand what Brand-Ballard has in mind.

Brand-Ballard's examples don't support the suggestion that full explanations are always infinite. First, the suggestion seems false in the causal case – certainly Brand-Ballard's examples give us no reason to believe otherwise.

Second, moral particularists sometimes argue that complete explanations of our reasons would be infinite. I think that that their mistake is to take the putative reasons at too low a level of generality.[5] Suppose that (taking Roger Crisp's example) we take the reason for returning a book to be that one had borrowed it. In that case, the fact that the lender had not stolen the book seems to be an enabler. It may seem that there are infinitely many such enablers. But, if one takes the reason for returning the book to be the fact that one had borrowed it from someone who was entitled to have it, then we eliminate a whole set of complications. Using similar moves to a higher level of generality, it's plausible that the particularists' argument for infinitely many enablers goes away.

[5] Citation to Crisp and Raz on Dancy.

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In the legal case, I see no reason to think the necessary explanation is infinite.[6] (As in the moral case, however, if you take the reasons at too low a level of generality, it might appear that way.) Here's a schematic version of the full story: the content of the law is determined by the law-determining practices of the legal system in combination with what the normative facts all-things-considered say about the relevance of those practices to the law. (Actually, as I spell out in the original paper, the story is more complicated because the law-determining practices themselves have a bearing on their own relevance to the content of the law. But that complication doesn't matter for present purposes.)

There is one possible source of misunderstanding that I want to clear up. It is true that one might not be able to understand the explanation of the content of the law without having, among other things, certain concepts. And in order to have those concepts, one might need to have various beliefs and to have had certain experiences. But that is very different from saying that those beliefs and experiences are part of the explanation. Compare the distinction in the theory of a priori knowledge between experience that justifies one's belief and experience that is necessary to have the concepts involved in the belief.)

[6] Moreover, since the issue is the constitutive determination of legal facts, it is not obvious that the need for an infinite explanation would be problematic. Suppose that the full constitutive explanation has to include infinitely many factors. Brand-Ballard might object that it then cannot make the law intelligible to humans since they are finite creatures. But even if we explain the notion of a reason in terms of intelligibility to human minds, it will have to be intelligibility to *idealized* human minds. So it's not clear that infinitude is a problem.

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2. Are facts about rightness or goodness really essential?

Brand-Ballard points out – absolutely correctly – that what matters in the debate with positivists is whether facts about specifically rightness or goodness are among the determinants of law. So it's not enough for me to argue that normative (or evaluative) facts of some kind are part of the full constitutive story. That conclusion is consistent with the possibility that the needed normative facts are semantic, epistemic, or rational normative facts – a possibility that positivists are not concerned to deny. (Brand-Ballard also makes a similar point by saying that although an appeal to coherence would necessitate some kind of norm or standard independent of the law practices, it doesn't require facts about rightness or goodness. Again, I agree.)

My basic response is very straightforward. I don't see any serious possibility that semantic, epistemic, or rational normative facts – or for that matter aesthetic ones – will do the job that needs doing. Let me explain.

Remember that my argument for the role of normative facts was that there's a certain explanatory role they must fill. Therefore, in order to determine which normative facts are determinants of law, we can start by asking which ones could fill the explanatory role in question. (See HFML, 188-190.)

Since what has to be explained is how law practices – past decisions of legislators, judges, etc. – affect people's obligations, rights, powers, and so on, the relevant facts have to be ones that bear on such questions. (To save words, I'll say simply "obligations"). Here are some examples from my *Hartian Positivism and Normative Facts* (275-76, 285):

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i. Fairness requires giving some precedential weight even to incorrectly decided previous court decisions.

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

iii. Fairness supports a criminal statute's contributing its plain meaning to the content of the law.

iv. Democratic reasons cut against a judicial decision's being able to create a standard that goes beyond what is necessary for resolution of the dispute before the court.

As these examples show, facts about fairness and democracy seem to be perfectly suited to the explanatory role at issue. And it's very hard to see how epistemic, semantic, or rational normative facts could fill the role. For example, epistemic facts concern how to manage our beliefs – such things as how much inquiry is necessary and how to change our beliefs in the face of new evidence. But the questions at stake – questions of how past actions affect our obligations – don't concern how to manage our beliefs. They are questions of political morality, not epistemic questions.

One way in which Brand-Ballard develops his point is by appealing to the case of linguistic rules. He points out that linguistic practices somehow manage to determine linguistic rules without the need for facts about rightness or goodness. Either they must do so with the help of normative facts other than facts about rightness or goodness or without the help of normative facts at all. (Ken Himma also makes a similar claim that my argument is problematic because it applies to rules of language.)[7]

My response is very simple. My view is that the kind of constitutive determination that is operative in the legal domain – which I call rational determination –

[7] Himma, *How Much Can a Theory of Law Tell Us about the Nature of Morality: A Response to Mark Greenberg's 'How Facts Make Law,'* available at http://ssrn.com/abstract=975997, 16-17.

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is a very special kind of constitutive determination precisely because it requires that the obtaining of the lower level determining facts makes intelligible the obtaining of the higher level target facts. By contrast, in many, perhaps most, domains, the determination of high level facts by low level facts is not reason based. I think the language case, like the case of humor, is one such case.

In other words, I see no grounds for the assumption that the way in which facts about our use of words determine their meaning is fully reason based.[8] It is certainly not a priori that such a reason-based metaphysics is required for us to be able to understand language. We may well have a species-specific, hardwired mechanism that rules out many mappings from use to meaning that are not ruled out by reasons. Notice that in sharp contrast to law, it is no part of our linguistic practice that we be able to explain why certain facts about the use of words make it the case that the words mean what they do.

Even if I were wrong and meaning facts were rationally determined, here it is plausible that the relevant normative facts would not be facts about rightness or goodness, but something else. After all, how could facts about rightness or goodness bear on how our use of words affects their meaning? So it would be well motivated to hold that semantic or epistemic normative facts play a role in the determination of meaning facts, but that facts about rightness play the parallel role in the case of law. There's also another possibility, which is that nonnormative conceptual truths about meaning could play the necessary role in the case of meaning facts. I argue in HFML that in the legal case there simply are no plausible candidates that are not normative facts.

[8] See HFML 171, n.25. As I point out in HFML (164, n.18), many philosophers have assumed otherwise. For brief further discussion, see Greenberg, "Does How *Facts Make Law* Prove Too Much?" available at http://ssrn.com/author=336071

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3. Reasons that support one legal proposition as opposed to all others

Brand-Ballard's final point concerns whether there really have to be reasons that support one set of legal propositions over all others. He suggests that the requirement of reasons may be merely that there be reasons that favor some sets of legal propositions over others, but not reasons sufficient to eliminate all but one candidate sets of legal propositions.

Brand-Ballard maintains that this suggestion would appeal to those "who are true believers in the ineffable 'knowing how' capacity that constitutes 'thinking like a lawyer.'"[9] I take it that the point of "ineffable" here is that the person who has the capacity can do something but can't explain how he or she does it.

First, there are many different capacities that one might mean by "the capacity to think like a lawyer." In order to be relevant to my argument, the relevant kind of capacity must be a capacity to figure out what the law is.

Now there is no tension whatsoever between my argument and the claim that some people have abilities to figure out what the law is that they can't articulate and that others lack, *as long as these abilities are tracking reasons or something based on reasons*. Some people may just be better than others at perceiving, in ways they can't articulate, the reasons that make the law what it is.

Compare the favorite philosopher's example of an ineffable knowing how – chicken sexing. The existence of such an ineffable ability is perfectly consistent with the ability's being a sensitivity to something objective and real. Just as chicken sexers are

[9] Brand-Ballard, supra note 2, at 13.

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tracking something real without being able to say exactly what it is and without being able to explain to others how to track it, skilled lawyers may be tracking the existence of reasons without their being able to say exactly how they do it and without their always being able to say what the reasons are, even on reflection.

In order to have any bite against the argument of HFML, Brand-Ballard's claim has to be not just that some people have a capacity to figure out what the law is in a way that they can't articulate, but that what is going on at the metaphysical level is parallel. In other words, the key claim would be that the determinants of the law – past decisions by legislatures and courts and so on – can make legal proposition A rather than proposition B true, though *there is no reason-based explanation of why the law is A rather than B.* It's just a brute fact.

Let's distinguish between two categories of candidate interpretations of the law. The first category includes candidates that legal practitioners would take seriously. The second includes weird or bent candidates that only an outsider or a philosopher would consider. Call the interpretations in the first category serious candidates.

I think it's clear that there have to be full reasons that eliminate all but one serious candidate. Otherwise, we would have the following type of situation. A lawyer would argue that the law was X and the judge would decide that it was something else – Y. But the judge would be unable to explain why it was Y rather than X. The judge would be able to say only that that's what her ineffable legal sense tells her. And there would be nothing problematic about the judge's being in this position.

But that's not the case. Our practice does not allow judges and lawyers simply to rest on what their ineffable capacities tell them is the law. (They can use such capacities

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to figure out what the law is. But if they can't justify their views, then they have to withdraw them. They may still be right, since there may still be reasons. But if there is in fact no justification for their position, they are wrong.) In sum, if there needn't be full reasons for eliminating some (incorrect) candidate interpretations, those candidate interpretations must be non-serious ones, ones that no competent legal practitioner would consider.

Two points about this possibility. First, in my view, our practice doesn't tolerate a judge's not having reasons even when the alternative interpretation is not a serious one. For example, if a lay person asks why the decision went against him or her on a particular legal question, the judge must be able to explain why the lay person's interpretation is wrong, even if it is a candidate no legal practitioner would take seriously. The judge can't simply say "that's just how it is." This fact suggests that at the metaphysical level there have to be reasons that eliminate even non-serious candidates.

Even if that is wrong, however, and non-serious candidates may be eliminated in a brute way, my argument can accommodate this. In order to derive my conclusion that normative facts are included in the full constitutive story of the law, it's enough that normative facts are necessary to eliminate any candidate interpretations – so it's enough if they are necessary to eliminate serious candidates. Therefore, all that is needed for my argument to accommodate the possibility that non-serious candidates are eliminated brutely is the modest assumption that there is sometimes determinate law in cases where there is more than one serious candidate. If there is more than one serious candidate interpretation, and the law is nonetheless determinate, then there have to be reasons that

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eliminate the incorrect serious candidates. But, as I argue in the paper, descriptive facts alone are not able to provide such reasons.

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