

UCLA

UCLA Public Law & Legal Theory Series

Title

Reasons Without Values?

Permalink

<https://escholarship.org/uc/item/95q9x1cq>

Author

Greenberg, Mark

Publication Date

2005-08-31

Peer reviewed

Reasons Without Values?

Mark Greenberg¹
UCLA

In “How Facts Make Law” (Greenberg 2004; hereafter HFML), I argue that non-normative contingent facts are not sufficient to determine the content of the law. In the present paper, I take up a challenge raised by Enrique Villanueva (2005).

My argument in HFML begins from two premises. First, the determinants of legal content include non-normative, contingent facts – *descriptive facts*, for short.² The relevant descriptive facts are *law-determining practices* (or *law practices*), for example facts about decisions of legislatures, courts, and administrative agencies.³ Second, the determinants of the content of the law *rationaly determine* the content of the law.⁴ A consequence is that the determinants of the content of the law must include reasons⁵ why law practices make the contribution that they do to the content of the law. Law practices – and, indeed, descriptive facts more generally – cannot themselves provide the necessary reasons.⁶

In section 1 of this paper I address a preliminary question raised by Villanueva, concerning the relationship between rational determination and supervenience. On this matter there is no fundamental disagreement between us, and I am grateful for the opportunity to clarify the nature of rational determination.

¹ I am grateful to Enrique Villanueva for his challenging and thought-provoking paper. I would also like to thank Andrea Ashworth, Kinch Hoekstra and Seana Shiffrin for valuable comments.

² In order to make my terminology more standard, I use the term “normative facts” here in the way that I used “value facts” in HFML. For more on the term “descriptive facts,” see Greenberg 2005a, this volume n. 4.

³ See HFML, pp. 162-163, Section II.C..

⁴ For elaboration, see HFML, pp. 160, 163-166, 170-172 and Greenberg 2005a, section 1.

⁵ For more on the relevant notion of a reason, see HFML, pp. 164-166.

⁶ For a fuller summary of my argument, see Greenberg 2005a, this volume.

In section 2 I turn to Villanueva's main challenge. He suggests that, to put it very briefly, descriptive facts can be reasons. Therefore, even if the content of the law depends on reasons, it does not follow that law practices cannot themselves determine the content of the law.

Villanueva proposes a value-neutral criterion – textualism. In other words, he suggests that the descriptive facts about the meaning of legal texts are themselves reasons that determine the contribution of law practices to the content of the law. This suggestion depends on too shallow a conception of the requirement of reasons. For the law to be rationally determined, it is not enough that there be some value-neutral criterion that specifies that law practices have certain consequences for the content of the law. There have to be reasons that explain why that criterion, as opposed to all others, is the *legally correct* one – the one that, in the relevant legal system, determines the contribution of law practices to the content of the law.⁷ Normative facts are the best candidates for such reasons. And, in fact, Villanueva's textualist criterion derives its appeal from normative facts.

1. Rational determination and supervenience

It is uncontroversial that the content of the law supervenes on descriptive facts – that is, that the descriptive facts *modally* determine the content of the law (HFML, p. 159). I claim, however, that the descriptive facts are not the whole story about what

⁷ The notion of legal correctness here is metaphysical not epistemic. In other words, the legally correct criterion is not the one that judges use to ascertain the content of the law, but the one that determines the content of the law. Of course, judges' beliefs and practices will have an impact on what is legally correct. See also HFML, p. 179.

constitutively determines, or *makes it the case*,⁸ that the law has its content. The making-it-the-case relation in the legal domain is rational determination. And descriptive facts alone are inadequate to rationally determine the content of the law.

Villanueva questions the need for me to appeal to rational determination. His suggestion seems to be that I could substitute a thesis about the supervenience base of the content of the law – i.e., about the modal determinants of the content of the law – for a thesis about the rational determinants of the content of the law (Villanueva 2005, p. 2).

Rational determination is a kind of ontological relation, more specifically a kind of constitutive or making-it-the case relation. Supervenience, by contrast, is a modal relation. In my view, it is a mistake to try to cash constitutive claims in modal terms, though this is not the place to argue the point (see Greenberg 2005c). In fact, it is natural to appeal to constitutive truths to explain modal ones. For example, that the A facts constitute the B facts explains why the B facts supervene on the A facts.

I maintain that descriptive facts and normative facts together rationally determine the content of the law. It follows that the content of the law supervenes on descriptive facts and normative facts (HFML, p. 163).⁹ But normative facts supervene on descriptive facts (see HFML, p. 159). Hence, it follows from my claim that descriptive facts and normative facts rationally determine the content of the law that the content of the law supervenes on descriptive facts.

⁸ In this paper, I will use the term “makes it the case” for constitutive rather than modal determination. For discussion of the distinction between constitutive and modal determination, see Greenberg 2005c.

⁹ In HFML (pp. 163-164), I make a supervenience condition an explicit part of the account of rational determination. I now think that a better explication of rational determination, along the lines indicated in the text, would not use any modal notion. In order for the A facts (wholly) to rationally determine the B facts, the obtaining of the A facts must make it the case that the B facts obtain. This condition entails that the B facts supervene on the A facts. For suppose that the B facts do not supervene on the A facts. In other words, it is possible for there to be a difference in the B facts without a difference in the A facts. In that case, however, the A facts must not be the whole story about what makes it the case that the B facts obtain.

There are at least two reasons why a supervenience thesis is inadequate for my purposes. First, my central question is whether the full ontological story about the content of the law must make reference to normative facts as well as to descriptive facts. This question cannot even be posed in terms of supervenience, since normative facts are modally redundant (HFML, pp. 159).

Second, I argue that descriptive facts cannot themselves provide the reasons that rational determination requires (HFML, pp. 160-161; 172-173; 184). Since (bare) modal determination does not require reasons – the subvening facts need not provide reasons why they have the implications that they do for the supervening facts – substituting modal determination for rational determination in my argument would produce a non-starter of an argument.

Villanueva suggests that rational determination “is the form that . . . the supervenience relation” takes in the case of law (Villanueva 2005, p. 2). In light of what I have just said, it would be better to say that rational determination is, in the case of law, the form taken by the constitutive relation between determining facts and the facts they determine.

2. Reasons all the way down

Villanueva begins the second, main part of his paper by raising a question about the nature of my argument that legal content depends on normative facts. He takes me to begin from the claim that judges, in ascertaining the law, must appeal to normative facts. He then finds it “obscure” how the argument moves from this claim about the

epistemology of law to a conclusion about the metaphysics of law—that normative facts are part of what makes the content of the law what it is (Villanueva 2005, p. 3).

My argument does not move from a claim about the epistemology of law to a claim about its metaphysics, however, but is metaphysical through and through. Rational determination is an ontological relation, not an epistemic one. (See HFML pp. 158, 163.) The claim that law practices cannot, without normative facts, rationally determine the content of the law is not a claim about what is necessary to *ascertain* the content of the law, but a claim about what is necessary to *make* the content of the law what it is.¹⁰ The role of normative facts is, accordingly, a metaphysical one: normative facts help to make the content of the law what it is.

Some side remarks in HFML are no doubt the source of the misunderstanding (pp. 160, 164 & fn. 17). I point out that my explanation of the rational determination relation employs the notion of a reason, which may well be best understood as an epistemic notion. Thus, one interesting feature of rational determination is that it may be an example of an ontological relation that has an epistemic component. As an example, I consider the possibility that the notion of a reason might be spelled out in terms of the notion of an ideal human reasoner. In that case, “what the law *is* would depend in part on what an ideal human reasoner would find intelligible” (HFML, p. 164 fn. 17).

The situation is therefore somewhat delicate. Rational determination is an ontological relation. To say that the A facts rationally determine the content of the law is to say something about what *makes* the content of the law what it is, not to say anything

¹⁰ As I say in HFML: “It is only because of this underlying metaphysical relation [between law practices and the content of the law] that we ascertain what the law is by consulting those practices” (p. 158).

about how we *discover* that content. But the way in which the making-it-the-case gets accomplished may involve an epistemic element.¹¹

Villanueva next argues that my conclusion that normative facts must play a role in determining the content of the law does not follow from my claim that the determination relation in the legal domain is rational determination. A judge can appeal to value-neutral criteria in order to decide the relevance of the law practices to the content of the law. Villanueva's objection is based on an important point: it is not built into the notion of rational determination that the necessary reasons must be normative facts. But he underestimates the difficulty of finding an alternative to normative facts that could do the necessary work.

A preliminary point is that the relevant question is not whether a judge can reach a decision about what the law is without appealing to normative facts, but whether the content of the law depends on normative facts. In explaining a decision about what the law is, a judge can often provide reasons that are adequate for ordinary purposes without appealing to normative facts. But this observation does not resolve the question whether normative facts are among the determinants of the content of the law. For one thing, a judge may make a mistake about what makes the law what it is. More importantly, in practice a judge typically gives only an incomplete account of what makes the law what it is. Even if a judge does not mention normative facts, they may be among the reasons supporting the relevance of the factors that the judge does mention.

¹¹ Another example of a position that makes the metaphysics of a domain depend on an epistemic element is Donald Davidson's well-known view of the mental. According to Davidson (1984a; 1984b), what beliefs and desires a person has depends constitutively on which overall interpretation would make the person most intelligible. See HFML, p. 164 fn. 18 and p. 171, fn. 25

In light of this clarification, Villanueva's objection has to be not that a judge could cite only value-neutral criteria, but that value-neutral criteria could by themselves determine the contribution of law practices to the content of the law. In HFML, I introduced the notion of a model of the role of law practices in contributing to the content of the law – a *model*, for short (pp. 178-179). In these terms, Villanueva urges that the legally correct model – the one that determines the contribution of law practices to the content of the law¹² – can be (or can be supported by) a value-neutral criterion.

Villanueva's main example of a value-neutral criterion is "keep[ing] as close as possible to the law's text" (Villanueva 2005, p. 5).¹³ A judge can give as a reason for a conclusion about the content of the law that the conclusion "fitted better the legal texts than any of the alternatives available" (p. 5).

Let us waive internal problems with the fitting-the-text criterion,¹⁴ and assume for purposes of argument that we can construct a coherent and workable model that resolves questions about the relevance of law practices to the content of the law in a value-neutral textualist way. Villanueva suggests the model for law practices generally, but in order to make the discussion concrete, I will focus on statutes and judicial decisions. Presumably a fitting-the-text model would take a statute to contribute to the content of the law the plain meaning of the statutory text. The case of judicial decisions is more complicated. A decision can involve multiple opinions or no opinion, and judicial opinions do many

¹² For the notion of legal correctness, see above note 7.

¹³ For a related objection, see Ram Neta's purported legal counterexample to my argument (Neta 2004, 12-13). My reply to Neta is relevant to Villanueva's objection as well (Greenberg 2005a, see especially the last three paragraphs but one of section 2 and the last paragraph of section 3).

¹⁴ Fitting the text does not seem to be a criterion that does the work required of it. Even if we ignore aspects of law practices other than texts, the law does not have *a* text. Rather, there are a vast number of texts associated with law practices. In HFML, I show that there is no direct or automatic route from the meaning of texts to the content of the law. The problem of legal content is not the problem of somehow amalgamating the meanings of myriad texts (HFML, Section III).

things other than (purport to) announce legal norms. To fix ideas, we can understand a fitting-the-text model for judicial decisions as follows: in a judicial decision where the majority opinion makes a clear statement of the decision's relevance to the law, the decision's contribution to the content of the law is that stated by the majority opinion. (This model is of course not the correct or operative one in Anglo-American law; consider, for example, a judicial opinion that purports to announce a legal rule that goes beyond what is necessary to resolve the case before the court.)¹⁵

Why isn't the fitting-the-text model a reason that could determine the contribution of law practices to the content of the law? That the model would, if applied to law practices, yield some legal norm does not by itself provide a reason why law practices support that norm.¹⁶ What is further needed is a reason why the significance of law practices is determined by the fitting-the-text model, as opposed to competing models. In the case of statutes, there are competing models that would make the contribution of a statute depend on, for example, the intentions of legislators, legislative history, or the principles that would best justify the enactment of the words of the statute. In the case of judicial decisions, competing models would make the contribution of a judicial decision depend on the narrowest rationale that would justify the result in the case, the rationale that would best justify the outcome, or the reasoning that the judges relied on (which may be in tension with what the judges say the impact of the decision is).

¹⁵ This model could not by itself determine the relevance of all judicial decisions to the content of the law, but I will focus on it for simplicity.

¹⁶ A judge might well cite plain meaning as a reason for taking a statute to make a particular contribution to the law, and might feel no compulsion to give reasons why plain meaning matters. But, as noted above, even assuming that a judge's account of the relevant reasons is correct, the account will typically be incomplete. (If one is at all tempted by the position that no reason is needed for taking a text to contribute its plain meaning to the content of the law, consider the application of the fitting-the-text model to judicial decisions, which is not only plainly in need of support, but is incorrect. Or, for that matter, consider the fitting-the-text model as applied to legislative history.)

What sorts of reasons could support the fitting-the-text model over others? The content of the law could itself support the model. Legal norms have a great deal to say about the relevance of law practices to the content of the law (HFML, pp. 179). But since the present issue concerns how it is possible for the law to have content at all, we cannot appeal to the content of the law.

It is easy to find reasons, other than ones deriving from the content of the law, for and against the fitting-the-text model. In the case of statutes, for example, it might be argued that democratic values support the fitting-the-text model. According to this argument, very roughly, the will of the people's elected representatives should govern, and the plain meaning of a statutory text is the best embodiment of that will. Similarly, it might be argued that the model is fair because it gives citizens the best chance of having notice of what the law is. By contrast, in the case of judicial decisions, democratic values arguably cut against the model, for the model makes it possible for judges to lay down legal norms that are not required for the resolution of cases that come before them.

The point is that these reasons for and against the model are, or appeal to, normative facts, such as facts about whose will should govern or about what is fair. These normative facts lie behind the plausibility of the fitting-the-text model with respect to statutes. When one appeals to the plain meaning of the words of a statute, one implicitly appeals to the familiar reasons why the meaning of statutory texts *should* be respected. Villanueva neglects the possibility that normative facts are playing this role.¹⁷

In HFML, I argue more generally that normative facts are the best candidates for reasons favoring some models over others. For example, I discuss the possibility that conceptual truths (that are not normative truths) could determine which models are

¹⁷ See Greenberg 2005a, last paragraph of section 3.

correct (pp. 185, 187-188). Villanueva offers no new candidates for the necessary reasons.

I close by briefly addressing an objection that arises naturally at this juncture. By reasoning parallel to my own, an objector could claim, an appeal to a normative fact would get us nowhere because we would need a reason for the relevance of the normative fact. Hence, the objection would continue, my argument launches us on a vicious regress.

I discuss this objection more thoroughly in Greenberg (2005b). In brief, the parallel drawn by the objector (between an appeal to normative facts and an appeal to descriptive facts) is merely formal. Descriptive facts cannot determine their own relevance to the content of the law (HFML, pp. 178-184, 185, 187). By contrast, normative facts determine their own relevance.

The point is clearest in the case of the all-things-considered truth about the relevant values. Given what it is to be the all-things-considered truth about the relevant values, there is no need for further reasons that determine that *that* truth is relevant or in what way. As pointed out in HFML (p. 187), it would obviously be a mistake to maintain that the all-things-considered truth about the bearing of values on the contribution of, say, judicial decisions to the content of the law has no bearing on the contribution of judicial decisions to the content of the law.

* * *

Reasons play a central role in the ontology of law. The determinants of the content of the law, which include law-determining practices such as statutes and judicial decisions, influence the content of the law in a systematic way. But their influence on the content of the law cannot be brute: there have to be reasons that explain why the

determinants have the particular significance that they have. These reasons are part of what makes the determinants have that significance. Hence, the reasons are part of what makes the content of the law what it is. Descriptive facts cannot themselves provide the necessary reasons: given any descriptive fact that is a candidate reason, its significance itself depends on reasons – and, unlike normative facts, descriptive facts cannot determine their own significance. Descriptive facts therefore cannot alone determine the content of the law.

References

- Davidson, D. 1984a: “Radical Interpretation,” in his *Inquiries into Truth and Interpretation*. Oxford: Oxford University Press.
- 1984b: “Belief and the Basis of Meaning,” in his *Inquiries into Truth and Interpretation*. Oxford: Oxford University Press.
- Greenberg, M. 2004: “How Facts Make Law,” *Legal Theory*, 10, 157-198, reprinted in Villanueva, ed. [THIS VOLUME] (cited as HFML).
- 2005a: “Practices and Norms,” in Villanueva, ed. [THIS VOLUME].
- 2005b: “Normative facts as Regress Blockers,” in Hershovitz, ed., *Exploring Law’s Empire*. Oxford: Oxford University Press (forthcoming).
- 2005c: “A New Map of Theories of Mental Content: Locating Normative Theories,” *Philosophical Issues*, 15 (forthcoming).
- Villanueva, E. 2004: “Supervenience, Value, and Legal Content,” in Villanueva, ed. [THIS VOLUME].