

## ON THE NORMATIVE SIGNIFICANCE OF BRUTE FACTS

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SUMMARY: I. *Introduction*. II. *Greenberg's Argument for Legal Emergentism*. III. *The Generalization of Greenberg's Argument*. IV. *What's Wrong with this General Argument for Normative Emergentism?* V. *The Consequences for Greenberg's Local Argument for Legal Emergentism*. VI. *Works Cited*.

### I. INTRODUCTION

Sometimes, we think or act in certain ways because we have *reason* to do so. We pay our taxes, we show up on time for our classes, we refuse to assent to claims that we recognize to be inconsistent, and we refrain from wanton violence, and we do each of these things because we have reason to do so. More generally, we have reasons for thinking or acting in certain ways. I'll express this point by saying that there are *norms* that apply to us, and more specifically to our thought and action. For a norm to apply to a person is for that person to have a reason for thinking or acting in a particular way, the way indicated by the norm. The fact that a norm applies to someone in this way is what I'll call a "normative fact". All other facts I will call "non-normative".

This distinction between normative and non-normative facts has often been thought to have great metaphysical importance. In order to explain why it has been thought to have this importance, I should first draw a different distinction between two mutually exclusive and jointly exhaustive kinds of facts. There are the "evaluative" facts, which are facts about what is good, what is bad, what is better than what, what is worse than

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what, and so on. All other facts are “non-evaluative”. So there are normative facts and non-normative facts, and there are evaluative facts and non-evaluative facts. For present purposes, we need not take a stand on how the first pair of categories is related to the second pair of categories.

Now, philosophers have often been inclined to think of the world as consisting fundamentally of nothing more than the non-normative, non-evaluative facts.<sup>1</sup> I’ll use Anscombe’s phrase “brute facts” to denote all and only those facts that are both non-normative and non-evaluative.<sup>2</sup> Using this terminology, I will say that philosophers have often struggled to understand how the brute facts can somehow add up to normative facts of various kinds. How —they have wondered— can the brute facts make it the case that we have reason to think or act in a particular way? Typically, philosophical attempts to address this question lead to one of three results: reductionism, eliminativism, or emergentism. Reductionists attempt to show how a conglomeration of brute facts can somehow add up to a fact of the normative kind in question. Thus, we might try to reduce moral facts to facts about what behavior would maximize utility or fitness, epistemic facts to facts about the reliability of our belief-forming processes, semantic facts to facts about the covariation of neural events and external events, and so on. Eliminativists claim that such reduction is impossible, and so conclude that there really are no facts of the normative kind in question (*i. e.*, no moral facts, no epistemic facts, no semantic facts). And finally, emergentists claim that reduction is impossible, and so conclude that the world contains facts over and above the brute facts.

In his paper “The Strange and Intelligible Metaphysics of Law”,<sup>3</sup> Mark Greenberg offers an elegant and simple argument for emergentism about legal normative facts, or what I will call “legal emergentism”. In

<sup>1</sup> I will not attempt to document this historical claim, nor will I attempt to explain it. I refer the interested reader to the classic work on this topic, Burtt, *The Metaphysical Foundations of Modern Physical Science*, New York, Doubleday, 1924.

<sup>2</sup> Anscombe, G. E. M., “On Brute Facts”, *Analysis*, 18, 1958. As Anscombe uses the term, a fact A is “brute” only relative to another fact B. She leaves it open whether there are facts that are brute relative to any other facts. She also leaves it open whether the relative bruteness of a fact has to do with its being normative or non-normative, evaluative or non-evaluative. So I’m not sure that my use of the term “brute fact” bears any significant resemblance to her use. Nonetheless, the term strikes me as both convenient and appropriately evocative.

<sup>3</sup> Greenberg, Mark, “The Strange and Intelligible Metaphysics of Law” (forthcoming).

other words, he argues that facts about what we have legal reason to do or not to do cannot be reduced entirely to brute facts. This is not to suggest that Greenberg thinks that the legal normative facts are metaphysically basic or primitive: he explicitly denies this. Rather, what Greenberg claims is that, while the legal normative facts might be reduced to some other facts, they cannot be reduced entirely to brute facts. For Greenberg, unless there were some evaluative facts, there could be no legal normative facts. In this sense, then, Greenberg's metaphysics includes more than simply the brute facts. It also includes the evaluative facts, and it must, for Greenberg, include the evaluative facts if it is to include the legal normative facts. This is what I am calling his "legal emergentism".

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

## II. GREENBERG'S ARGUMENT FOR LEGAL EMERGENTISM

In this section, I'll state Greenberg's argument for legal emergentism. First, I'll briefly summarize Greenberg's explanations of the terminology that he uses in his argument: "Legal decisions" are decisions that legislators, judges, and other people make, as well as other legally relevant his-

torical events that can be fully characterized in brute terms. (I leave aside the difficult but irrelevant issue of what's involved in being able to understand a historical event "fully": let that issue be settled by whatever account, Greenberg can then define "legal decisions" in terms of that account.) "Legal content" is the normative content of the law, *i. e.* what is legally forbidden or required, or more generally, what legal norms there are. "Legal propositions" are propositions articulating legal content.

Finally, to say that one thing A "provides reason for" another thing B is to say that A makes it the case that B, and makes it the case in a way that makes it at least somewhat *reasonable* for it to be the case that B. Equivalently, we can say that A "rationally determines" B. To illustrate: there is nothing reasonable or unreasonable about the fact that water boils at 212 degrees Fahrenheit, and so whatever makes it the case that water boils at 212 degrees Fahrenheit does not rationally determine that fact. Nothing rationally determines the fact that water boils at 212 degrees Fahrenheit. In contrast, it is at least somewhat reasonable for the law to require that people who are not convicted of crimes not receive punishment. It's not just a fact that the law requires this, but it is a reasonable fact. Thus, whatever makes it the case that the law requires this, *provides a reason* for the law to require it, and so *rationally determines* that the law requires it. These examples should provide one with a general sense of how Greenberg is using the terms "provide a reason" and "rationally determine". Admittedly, I have not given a rigorous account of these notions, but then Greenberg doesn't offer a rigorous account either, and I'm following his practice for now in order to state his argument. It will turn out that his argument is subject to criticism no matter how precisely these notions are explicated.

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

- 1) Premise D: In the legal system under consideration, there is a large body of determinate legal propositions.
- 2) Premise L: The legal decisions in part determine the content of the law.
- 3) The legal decisions can determine the content of the law only by providing reason for the content of the law being what it is (in other words, the legal decisions can determine the content of the law only by *rationally determining* it).
- 4) The legal decisions provide reason for the content of the law being what it is. (From 2, 3)

5) In a legal system with a large body of determinate legal propositions, the legal decisions by themselves cannot fully determine what reason they provide for the content of the law being what it is (that is, the legal decisions cannot fully determine exactly how they rationally determine the content of the law.)

6) Something else besides the legal decisions must help to determine what reason the legal decisions provide for the content of the law being what it is. (From 1, 4, 5).

7) Evaluative facts are the only things that can play the role of helping to determine what reason the legal decisions provide for the content of the law being what it is.

8) Evaluative facts enter into determining the content of the law in the legal system under consideration (from 6, 7)

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

Here's one intuitive way to think about Greenberg's thesis: The law requires us to act in all sorts of determinate ways, and it forbids us to act in all sorts of determinate ways. But there must be some reason for the law to require some things and forbid other things – the law's requirements, unlike the boiling point of water, are either reasonable or unreasonable, and something makes them either reasonable or unreasonable. The brute facts by themselves cannot provide reason for the law to issue these determinate requirements. The brute facts cannot, on their own, make the legal requirements either reasonable or unreasonable. So there must be something over and above the brute facts that provides reason

for the law to issue these determinate requirements. And this extra factor is the value facts. Greenberg thus argues that no version of legal reductionism can be right. If we grant premise 2, and so reject legal eliminativism, Greenberg makes it look as if we must accept legal emergentism.

### III. THE GENERALIZATION OF GREENBERG'S ARGUMENT

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

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

Premise 1': In the normative system under consideration, there is a large body of determinate normative propositions (hereafter, "norms").

Premise 2 of Greenberg's argument says that the legal decisions in part determine the content of the law. But again, it seems that something analogous will be true of any interesting normative system. For instance, the normative content of a moral code depends to some extent upon various brute facts about the creatures to which the code applies (*e. g.* that they are mortal, that they are capable of suffering pain, that they can communicate, they are susceptible to certain kinds of temptation, and so on). The normative content of a particular scientific methodology depends to some extent upon various brute facts about the theoretical practice and practitioners to which that methodology applies (*e. g.* that they have certain sense organs and not others, that they are capable of making certain sorts of calculations easily but others only with great difficulty, that their sense organs can be trained to respond reliably to certain ranges of energies and not others, and so on). And the normative content

of a particular linguistic system depends to some extent upon various brute facts about the creatures that employ that linguistic system (*e. g.* that they have a certain universal grammar hard wired, that they have learned to speak a SVO language instead of a SOV language, that they have learned to pronounce certain phonemic combination and not others, and so on). So it seems that we can generalize premise 2 as follows:

Premise 2': The brute facts in part determine the norms.

Now it may be objected against premise 2' that there are some normative facts that are metaphysically basic: they do not depend on any contingent features of the creatures to whom they apply. For instance, one might think that the categorical imperative, or modus ponens, is such a rule. I will not contest such claims here (even though I do think that they are false).<sup>4</sup> But even if they are true, we can still accept that premise 2 holds for all normative systems of which premise 1' is true, *i. e.*, all normative systems that generate many determinate norms. The categorical imperative, all by itself, doesn't generate many determinate norms. It can only generate many determinate norms when it's conjoined with lots of contingent facts about the features of the actual agents to whom it applies. The same holds of any other allegedly necessary and basic normative fact. So, even if there are necessary and basic normative facts, this does not threaten premise 2'.

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

<sup>4</sup> Briefly, the categorical imperative is not a reason for anyone to do anything: rather it is a constraint upon something's being a good practical reason. Again, modus ponens is not a reason for anyone to think anything, but, in tandem with the laws of logic, places a constraint upon what it is for something to be a good theoretical reason.

Now, we might worry that these examples do not give us a firm grasp on the metaphysical notion of “providing reason” or “making it reasonable”. Greenberg tells us a bit more about this notion, at least in its application to the law. Here’s what he says:

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

I’m eventually going to raise a question about how to interpret this passage. But for now, I’ll allow the passage to stand without comment, and I’ll ask whether something analogous to this passage could be said about the determination of norms in other kinds of normative system. For instance, do the brute facts that enter into determining the norms of a moral code make it reasonable for the norms to be what they are? Do the brute facts that enter into determining the norms of a particular methodology make it reasonable for the norms to be what they are? Do the brute facts that enter into determining the semantic norms of a particular linguistic system make it reasonable for the norms to be what they are? I think it’s not entirely clear how to answer these questions. But I shall now argue that there is at least some plausibility in answering each of them affirmatively.

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

If the first hypothesis is right, then nothing makes it reasonable for the norms to be what they are. In that case, it’s arbitrary that the norms are what they are, *i. e.*, there is nothing reasonable about the norms being what they are rather than some other way; they just are that way. But if there is nothing reasonable about the norms being what they are, then those norms are like the rules of a game that there is no reason to play, or the rules of a practice that there is no reason to participate in. That is to

say, there is no reason to follow those norms, and so they are not really norms at all. But this contradicts our hypothesis that they are *norms*. Therefore, the first hypothesis cannot be right, and so something must make it reasonable for the norms to be what they are.

This line of reasoning will give rise to two objections: first, it may be objected that it generates an infinite regress of norms. But this isn't so. We can avoid the infinite regress either by appeal to a big circle of norms, or by appeal to some foundation that makes it reasonable for the norms to be as they are, but is not itself a norm. We needn't choose between these strategies here.

Second, it might be objected that, many of our actual norms *are* arbitrary, but are, for all that, still norms. For instance, it may be said, we have reason to follow the particular linguistic norms of our language community, even though those norms are arbitrary. Again, we have reason to stay within the speed limit, even though that is arbitrary as well. The problem with this objection is that these are not cases of our having reason to follow arbitrary norms. Rather, they are cases in which the specific norms that we have reason to follow are determined by more general norms, together with various non-normative contingencies. For instance, there is a general norm to the effect that we should speak in such a way as to make ourselves understood. But this general norm makes it reasonable for us to comply with the more specific norms of our linguistic community, whatever those happen to be. Again, there is a general norm to the effect that one should do what one can to avoid punishment and promote social coordination. This general norm makes it reasonable for us to comply with the laws of our land, whatever those happen to be (at least within limits). In each of these cases, one has a reason to do some specific thing because it is dictated by one's reason to do some more general thing, along with the contingencies of one's particular situation. These are not cases of having a reason to do something for no reason at all. And so these cases do not invalidate the principle used in the preceding argument: if nothing makes it reasonable for a norm to be as it is, then there is no reason to follow the norm, and so it is not really a norm at all.

I conclude that the first hypothesis cannot be right. If the second hypothesis is right, then the reason for the norms to be what they are is independent of the brute facts that determine those norms. In that case, it's

arbitrary that the norms are binding on all and only those creatures of which the determining brute facts obtain. For instance, it's arbitrary that the norms are binding on mortal creatures who are capable of feeling pain, rather than on angels. And in that case, again there's nothing that makes the norms in question binding on *creatures like us*. And that is just to say that, while the norms might really be norms for some creatures, they are not really *norms for us*. They are like rules of a game that *creatures like us* have no reason to play.

We can conclude that neither the first nor the second hypothesis can be right. It seems then, that for any normative system of which premises 1' and 2' are true (*i. e.*, any normative system that has determinate norms that are binding on us), the brute facts that determine the norms of that system must provide reason for us to comply with those norms, and so provide reason for those norms to be what they are. If the preceding line of thought is correct (and I will return to re-examine it below), then we can generalize premise 3 as follows:

Premise 3': The brute facts can determine the norms only by providing reason (*i. e.*, making it reasonable) for the norms being what they are.

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

Premise 5': In a normative system with a large body of determinate norms, the brute facts by themselves cannot fully determine what reason they provide for the norms being what they are.

Finally, premise 7 says that evaluative facts are the only things that can play the role of helping to determine what reason the legal decisions provide for the content of the law being what it is. Greenberg explains this point in the following passage:

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

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

Premise 7: Evaluative facts are the only things that can plausibly play the role of helping to determine what reason the brute facts provide for the norms being what they are.

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

1') Premise D: In the normative system under consideration, there is a large body of determinate norms.

2') Premise L: The brute facts in part determine the norms.

3') The brute facts can determine the norms only by providing reason for the norms being what they are.

4') The brute facts provide reason for the norms being what they are. (From 2', 3').

5') In a normative system with a large body of determinate norms, the brute facts by themselves cannot fully determine what reason they provide for the norms being what they are.

6') Something else besides the brute facts must help to determine what reason the brute facts provide for the norms being what they are. (From 1', 4', 5')

7') Evaluative facts are the only things that can play the role of helping to determine what reason the brute facts provide for the norms being what they are.

8) Evaluative facts enter into determining the norms in the normative system under consideration. (From 6, 7).

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

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

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

Premise 5' says that in a normative system with a large body of determinate norms, the brute facts by themselves cannot fully determine what reason they provide for the norms being what they are. But let's consider whether or not this general claim is borne out by cases. For instance, suppose that Alice mowed the lawn because John promised to pay her 400 dollars if she mowed the lawn. Now, what makes it wrong for John to break his promise? What makes it wrong for John to break his promise is that it would be a case of breaking a promise, and it's generally wrong to break promises. That's an essential feature of the practice of promising: making a promise places one under an obligation to keep it (except in very special circumstances). The practice of promising essentially involves norms that are binding on all those who participate in that practice, and these norms include the norm that it's wrong to break a promise. When I say that the practice of promising "essentially" involves these norms, I mean that it's not just true by convention that the practice of promising involves the norm that it's wrong to break one's promise. It's not just that we happen to use the word "promising" to designate practices that have this feature. Rather, the practice of promis-

ing essentially involves the norm in question because there's no way for the practice of promising to exist over time without that norm. If people were generally permitted to break their promises, then people would know this, and so would not expect other people to keep their promises, and so would tend not to act on any such expectation. Everyone would quickly be able to notice this fact, and so no one would continue to expect her own promises to have any impact. Each person would thereby lose incentive to make promises. In short, the institution of promising would quickly cease to exist if people were generally permitted to break their promises. For there to be an institution of promising, it must be wrong for people to break their promises. Thus, it's an essential feature of the practice of promising that it involves the norm that it's wrong to break your promises.

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

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

Now, it seems that, in the story that I've told about promising, I've shown how the wrongness of John's breaking his promise follows from the general prohibition against breaking promises. But that general prohibition is an intelligible consequence of various brute facts about the practice of promising. And John's reasons for engaging in that practice are themselves intelligible consequences of various brute facts about John (e. g., what he likes and doesn't like). Thus, it seems, I've articulated the reason why it's wrong for John to break his promise. I've provided an explanation of what makes it wrong for John to break his promise, and my explanation adverts solely to brute facts about the social function of the institution of promising, and about John. If my explanation is correct, then premise 5' is false.

Of course this is not because of something special about promising. Many other norms are equally susceptible of explanation in terms of brute facts. In order to rescue premise 5' from these apparent counter-examples, the defender of normative emergentism seems to have only one way out, and that is to claim that these explanations are not explanations of the right kind at all – they do not explain what *reason* there is for the norms being what they are. Now, I'm not sure how strong a case can be made for or against this way of avoiding the objection that I've just leveled, and that's because I'm not sure exactly what's involved in the metaphysical constitutive relation that Greenberg uses the term "providing a reason" to designate. What exactly is involved in the relation between normative facts and their brute determinants being "a matter of reasons" or "in principle intelligible to a rational creature"? Since I'm not sure how to answer these questions, I will not attempt to argue against this proposed way of avoiding my objection to premise 5'.

Instead, I'll point out that it does the normative emergentist no good. For if my aforestated explanation of why it's wrong to break a promise doesn't "provide a reason" (in the relevant sense) for why it's wrong to break a promise, then I don't see why we should think that anything else "provides a reason" (in the relevant sense). In other words, if I haven't provided a reason for why it's wrong to break a promise, then why should we think that there is any reason (in the relevant sense) for why it's wrong to break a promise? Why shouldn't we just think that the wrongness of breaking a promise is a metaphysically basic fact of the world? Or it obtains not by virtue of something else providing a reason

for it, but rather by virtue of something making it obtain, in some non-rational way?

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

In sum, if we grant that premise 5’ is false, then we have no reason to believe premise 3’. Either way, the argument for normative emergentism is not compelling. Now what, if anything, does this show about Greenberg’s local argument for legal emergentism?

## V. THE CONSEQUENCES FOR GREENBERG’S LOCAL ARGUMENT FOR LEGAL EMERGENTISM

In the preceding section, I argued that the generalization of Greenberg’s argument is not compelling: either premise 5’ is false (for the brute facts do fully determine that John must pay Alice 400 dollars), or else we have no reason to believe premise 3’ (for we don’t know enough about the rational determination relation). I will now argue that an analogous, but somewhat weaker, conclusion is true of Greenberg’s local argument for legal emergentism: either premise 5 is *subject to historical falsification* (for all we know a priori, the legal decisions may be such as to fully determine their own rational significance), or else we have no reason to believe premise 3 (for we don’t know enough about the rational determination relation).

Recall that premise 5 says that in a legal system with a large body of determinate legal propositions, the legal decisions by themselves cannot

fully determine what reason they provide for the content of the law being what it is. Now, in defending this premise, Greenberg considers a foundationalist challenge to it and a coherentist challenge to it. I would like to focus on the foundationalist challenge, and Greenberg's response to it. Here is the relevant text:

Can the legal decisions determine which model is correct, thus determining how the decisions contribute to the content of the law? If the decisions are to determine which model is correct, there are two possibilities. First, a privileged foundational decision (or set of foundational decisions) can determine the role of other decisions. There is then the problem of how the decisions themselves can determine which decisions are foundational. ...A putatively foundational decision cannot non-question-beggingly provide the reason that it is foundational. In sum, a foundationalist solution is hopeless because it requires some independent consideration that determines which decisions are foundational.

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

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

I can imagine, on Greenberg's behalf, the following response to this question: suppose that there are two putatively foundational but inconsistent decisions. In that case, neither decision can provide a reason why it, rather than the other, is really the foundational decision. And so neither decision can be foundational, except by dint of the help of some additional factor. In that case, each decision has its rational significance for the content of the law only by dint of the help of this additional factor. I'll grant that this is true in the case in which we have two putatively foundational but inconsistent decisions. But I don't see why it should

also be true for the case in which we have only one putatively foundational decision, the dictates of which are consistent with all of the legal decisions. In short, I don't see why there cannot be a genuinely foundational decision that provides the reason why it is itself foundational.

Now, it is open to Greenberg to object that, in the case that I've described, what we have is a legal decision that metaphysically determines the correct model, but not a legal decision that *provides a reason* why one model is correct. Since I don't have a fully firm grip on the notion of "providing a reason", I will not object to this response. But then, if that is the response, I wonder what reason we have to think that decisions determine the content of the law by "providing reason" (in the relevant sense) for that content being what it is.

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

## VI. WORKS CITED

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