In a recent paper, “How Facts Make Law” (Greenberg 2004; hereafter HFML), I launch an attack on a fundamental positivist doctrine. I argue that non-normative facts cannot themselves determine legal norms. In response, Ram Neta (2004) defends the view that non-normative social facts, such as practices, are sufficient to determine norms, including both moral and legal norms. Neta’s paper provides a useful opportunity to address a spelled-out version of this view, which in various forms is widely held in philosophy of law and other areas of philosophy.2

1. Rational determination

I begin by summarizing my argument and Neta’s response. My argument starts from the relatively uncontroversial premise that non-normative, contingent facts – descriptive facts, for short – are among the determinants of the content of the law. The relevant descriptive facts, which include facts about decisions of legislatures, courts, administrative agencies, and constitutional conventions, I call law-determining practices, or law practices, for short.3

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1 I am grateful to Ram Neta for his rich and interesting paper, which I am not able to do full justice here. Thanks to Pamela Hieronymi, Kinch Hoekstra, Stephen Munzer, Ram Neta, Scott Shapiro, Seana Shiffrin, and Nicos Stavropoulos for comments on drafts and helpful discussions.

2 For examples in the philosophy of law, see Coleman (2001, chaps. 7, 11); Hart (1997, chaps. 5-6); Himma (2002); Raz (1983, chaps. 3-4; 1994); Shapiro (1998). For examples outside philosophy of law, see Gilbert (2000, chap. 5); Schapiro (2003).

3 For elaboration of the notion of a law practice, see HFML, Sections II.B. & II.C..
What is controversial is whether descriptive facts can alone determine the content of the law or whether normative facts must also play a part. I argue that a full account of what makes it the case that the law has the content that it does will have to appeal to normative facts.

A variety of domains – the aesthetic, the political, the humorous, the legal – are plausibly not metaphysically or ontologically basic. That is, the facts of those domains are constituted by more ontologically basic facts. In each domain, the obtaining of the more basic facts makes it the case that the higher level facts obtain. For example, perhaps facts about the arrangement of paint on a surface make it the case that a painting is elegant or clumsy.

I take for granted that legal content is not a metaphysically basic aspect of the world (HFML, pp. 158-159). In the legal case, the more basic determining facts include practices – facts about the behavior of and mental states of various people – and may or may not include various normative facts as well.

The making-it-the-case or determination relation – the relation between determining facts and target facts – may vary from domain to domain. To make progress on the central issue of the determinants of legal content, we need to get clear about the nature of the determination relation in the legal domain – the relation between the

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4 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. Thus, I use the term to include what are sometimes called “evaluative facts” such as facts about what is good or bad. For further explanation of the notion, see HFML, fn. 22. It is worth noting that some non-normative facts are not descriptive facts, for descriptive facts do not include necessary truths. Therefore, even if descriptive facts cannot alone determine the content of the law, it does not follow that normative facts must play a role. See HFML, pp. 165-166, 187-188.

5 To be precise, for a given domain, there may be more than one (sufficient and non-redundant) set of determining facts at different levels of ontological basicness. For example, in the legal case we could consider the relation between microphysical facts and legal content facts, rather than the relation between facts about the behavior and legal content facts. In the present paper, I focus on the relation between facts about behavior and the content of the law. See also note 8 below.
determining facts, including law practices, and the content of the law. I claim that this relation is what I call rational determination.

To say that the X facts rationally determine the Y facts is to say not only that the X facts are ontologically more basic facts the obtaining of which makes it the case that the Y facts obtain, but also that the obtaining of the X facts must provide a reason for the Y facts to obtain. A reason, in the relevant sense, is a consideration that makes something intelligible to a rational creature. So the obtaining of the Y facts must be rationally intelligible in light of the obtaining of the X facts.

In general, when the X facts make it the case that the Y facts obtain, there need be no reasons of the relevant sort why particular X facts have specific consequences for the Y facts. I mentioned above the view that aesthetic facts obtain in virtue of physical facts. A painting is elegant or clumsy in virtue of the arrangement of paint on the canvas. But the facts about the arrangement of paint need not provide a reason for the painting’s elegance or clumsiness (though those facts will no doubt be part of a causal, for example psychological, explanation of our reactions).

The claim that the relevant determination relation in law is rational determination is a claim that the relation is different in this respect from the relation between physical and aesthetic facts. There must be reasons why the relevant facts, for example about

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6 The claim is not merely that the obtaining of the X facts provides reasons why the Y facts obtain, but that it is necessary that this be the case.
7 For more on the notion of a reason, see HFML, pp. 164-166.
8 On another possible view, facts about the artist’s intentions are also determinants of the aesthetic facts. On that view too, it is plausible that the determining facts need not provide reasons for the obtaining of the aesthetic facts.
9 It might be asked whether, for a given domain, the nature of the relation between determining facts and target facts could be different for different sets of determining facts at different levels. I take it that this cannot be the case, though I will not argue for it here. If rational determination is the nature of the determination or making-it-the-case relation in the legal domain, then it has to be so at whichever level we consider the determinants of legal content. At any rate, as noted above, when I discuss the nature of the
decisions of legislatures and courts, have the effects on the law that they do. (This metaphysical truth is reflected in the requirement that judges must articulate reasons for their decisions.) For example, it could not be a brute fact – one that cannot be rendered intelligible – that a particular change in the wording of a statute produces a particular change in the content of the law.\(^\text{10}\) (Again, contrast the case of aesthetics here. It may be brute that a certain change in the shape or color of a line may alter a painting’s beauty. Imagine trying to explain the impact on the painting’s beauty to a rational Martian or to a fully rational human being who lacked the relevant sensitivity.)

It will be important for what follows “that what must be rationally intelligible is not the content of the law but the relation between the determinants of legal content and legal content. . . . For example, there must be a reason that deleting a particular word from a statutory text would have the impact on the law that it would in fact have” (HFML, p. 165) (emphasis added). Rational determination does not require that what the law requires be reasonable or rational.

In HFML, I do not try to give a knock-down argument for the proposition that the relation between law practices and legal content is rational determination. But I give reasons for thinking that this proposition is fundamental to our ordinary understanding of the law and taken for granted by much contemporary legal theory, though seldom articulated (HFML, pp. 170-172).

I then argue that practices cannot themselves rationally determine legal content facts, or indeed norms of any kind. In brief, the argument is that practices cannot

\(^{10}\) This point will not make sense unless one is careful to distinguish between, on the one hand, legal texts (and the meaning of those texts) and the content of the law. Neither a statutory text, nor its meaning, is the content of the law, though they may be determinants of the content of the law. See HFML, Section III.
unilaterally determine their own relevance. Factors independent of the practices must be part of what makes the contribution of practices intelligible to a rational creature. In the case of law, the plausible candidates for such factors are normative facts. (In other domains, there may be other candidates (see HFML, p. 161, Section VI.A.).) For example, facts about democracy and fairness explain the relevance of the publicly promulgated decisions of elected legislators to the content of the law.

Neta’s leading idea is that descriptive facts – practices – can alone provide a full account of normativity. He first argues that, in all normative domains, descriptive facts in part determine the content of the norms, and the relevant determination relation is rational determination. Next, he tries to show that a full account of moral norms need appeal only to descriptive facts. In particular, he offers a purported account of the wrongness of promise breaking entirely in terms of descriptive facts. He concludes that it does not follow from the fact that rational determination is the relevant determination relation that normative facts must play a role. Neta also gives a purported counterexample in the legal domain – a case in which he claims that descriptive facts can themselves rationally determine the content of the law.

I begin by addressing Neta’s attempts to show that descriptive facts can alone determine norms in the moral and legal domains. First (section 2), Neta’s account of why it is wrong to break promises fails. It begs the question by taking for granted that a person’s desires or other motivational states necessarily justify the actions that they motivate. Second (section 3), Neta’s alleged legal counterexample has similar defects.

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11 Neta uses “brute fact” instead of “descriptive fact,” but I follow the terminology of HFML (see above p.1). It is important to note that in HFML and here, I use “brute fact” in way different from Neta’s. See text accompanying previous note and HFML, pp. 160, 171. To avoid confusion, I replace Neta’s “brute fact” with “descriptive fact” in all quotations (using square brackets to indicate the change).
Finally, in section 4, I turn to the larger issue of how far my argument applies to other normative domains.

2. Neta’s account of promising

Neta uses the case of promising to argue that the full metaphysical explanation of normative facts need appeal only to descriptive facts. He offers an example in which “Alice mowed the lawn because John promised to pay her 400 dollars” and tries to explain “what makes it wrong for John to break his promise.” (p. 9). According to Neta, “any plausible answer” involves the claim that “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” (p. 18). This first step appeals directly to a normative fact – that “it’s generally wrong to break promises.” The success of Neta’s argument depends on whether he can explain, without appealing to any normative (or evaluative) facts, why it is generally wrong to break promises.\(^\text{12}\) Let’s call the moral requirement that one not break promises – the requirement that Neta is trying to explain – “the promising norm.”

Before proceeding, we need to get clear about one terminological matter. There is a broad sense of the term “norm” according to which, roughly, for there to be a norm in a particular group or community requiring that people Φ, it is sufficient that members of the group believe or claim that people should Φ, criticize or impose sanctions on those who fail to Φ, and so on. In a narrower sense of the term, nothing counts as a norm unless it actually provides reasons for agents to act in accordance with it. (To say that a norm provides a reason to act in a certain way is to say that there is a reason to do what

\(^{12}\) When Neta writes that it is “generally wrong to break promises,” I assume that he means that it is wrong to break promises without good enough reasons, or that it is wrong \textit{prima facie} or \textit{pro tanto}. For brevity, I will follow his way of talking.
the norm requires as such or because the norm requires it.) Consider the putative norm of a crime gang that its members to commit an assassination once a year. In the narrow sense of “norm,” the fact that the gang members regularly comply with the putative norm, believe that they should do so, enforce it by punishing those who fail to comply, believe that they are justified in doing so, and so on – does not make it the case that the putative norm is a norm. Neta is very clear that he uses “norm” in the narrow sense (p. 2 & n. 8), and I will do the same. I will use “putative norm” to express the broader sense of “norm.” And sometimes I will use “genuine norm” rather than “norm” to emphasize the contrast with merely putative norms.

Neta’s attempted explanation appeals crucially to the existence of “the practice of promising.” In what follows, I show that Neta’s practice-based explanation of the wrongness of breaking promises doesn’t work. I want first to note a problem with the whole approach, however. Neta seems to assume, as many writers do, that promising could not take place in the absence of a particular kind of social practice. In my view, this is a mistake. A Robinson Crusoe who encounters a castaway for the first time can promise to help him (and it would be wrong for Crusoe to break that promise without good enough reasons). The fact that breaking promises is wrong in the absence of any practice supports the view that the existence of a practice is not what accounts for the wrongness of breaking promises even in cases where there is a practice. On this view, the appeal to practices is misguided from the start. But for present purposes, I consider Neta’s practice-based explanation on its own terms.

Neta’s attempted explanation begins with the claim that “[t]he practice of promising essentially involves” the promising norm (p. 18). This claim might be taken to
suggest that he is using the notion of a practice in such a way that the existence of a practice is constituted in part by the obtaining of normative facts. If that were the case, it would be question-begging to appeal to a practice as a necessary part of the explanation, for the goal is to explain normativity. (See HFML, Sections II.C, V). Neta soon makes clear, however, that his claim is that “the institution of promising would quickly cease to exist if people were generally permitted to break their promises” (p. 18-19). There is no suggestion here that the existence of the practice is constituted by normative facts. Rather, when Neta claims that the norm is essential to the practice, he means that as a causal or historical matter, if people did not treat promises as creating obligations, the practice would cease to exist.

We need to be clear what exactly is necessary for the practice to exist. Is it that breaking promises be wrong? Or is it that people believe that it is wrong, criticize others for breaking their promises, think it is appropriate to criticize others for this reason, and so on? Neta uses phrases that are ambiguous with respect to this point. That it is “permitted” to break promises could mean either that people permit each other to break promises with impunity (i.e., that they act as if promising were not wrong) or that breaking promises is in fact not wrong. What is required in order for people’s expectations not to be disappointed and thus for the practice to continue is that many people believe it is wrong to break promises, not that it actually be wrong. In fact, even this formulation seems too strong: what is necessary is that many people generally comply with the promising norm, not that they believe that it is wrong to violate the

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13 We need a qualification similar to that of the previous note. I assume that Neta means that the institution would quickly cease to exist if people were generally permitted to break their promises without good enough reasons, or if people did not even count the existence of a promise as a prima facie or pro tanto reason for acting in accordance with it.
norm. Whether in practice people will not comply with the norm unless they believe that it is wrong to violate it (as opposed to believing, for example, that others believe it is wrong and will punish violations) is simply an empirical question. In sum, all that Neta has shown to be necessary for the promising practice is that people often act in accordance with the putative promising norm, not that it be wrong to violate it.

Neta sees that this kind of dependence of a practice on a putative norm does not suffice to show that violating the putative norm is wrong, i.e., that it is a genuine norm. But he thinks that all that needs to be added to complete the account is that a person has a reason to participate in the practice:

[That the norm is essential] just pushes the 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 (p. 19).

At this point, Neta takes himself to have established what he set out to show – that it is wrong to break promises (pp. 19-20). In short, Neta’s argument is that if a person (believes he) could obtain something he wants14 or enjoys by participating in a practice that would not exist if people did not generally comply with certain putative norms, then

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14 I interpret John’s having “an interest in having his lawn mowed” as John’s wanting his lawn mowed (or wanting other things that require having his lawn mowed), as opposed to some evaluative fact, e.g., that it is good for John to have it mowed. Neta is supposed to be appealing only to descriptive facts. Moreover, if Neta intended to appeal to the goodness of John’s lawn being mowed, as opposed to John’s motivation, there would be no need for him to appeal to John’s recognition “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.” (p. 19).
those putative norms are genuine norms, and it is wrong, even morally wrong, not to comply with them.

Neta’s account cannot be right. There are many silly, corrupt, or evil practices that would “cease to exist” if the participants did not generally comply with certain putative norms. The practices of operating fraudulent investment schemes, hazing new recruits, and selling children into sexual slavery are examples. People can obtain things they want by participating in these practices. It hardly follows that it is wrong, even *pro tanto*, not to comply with the putative norms of the practices.

It is useful to develop one example a little more fully. Consider the protection racket – organized crime’s practice of providing “protection” for restaurants, shops, and other businesses in return for regular payments. It is essential to the existence of the practice that many of the lower-level criminals who carry out the work of extorting protection money follow putative norms requiring them to use violence against shop owners who fail to pay on time, and requiring them not to inform on their bosses. Similarly, it is essential to the continued existence of the practice that many of the small business owners follow putative norms requiring them to pay on time and not to complain to the police. Therefore, the protection-racket practice “essentially involves” the putative norm that it is wrong to report the organizers to the police and the putative norm that it is wrong to refuse to pay protection money in exactly the sense in which Neta claims that the promising practice essentially involves the norm that breaking promises is wrong.15

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15 It might be suggested that it matters not only that participants comply with putative norms but that they believe that it would be wrong not to do so. In response, we may suppose that it is essential to the protection racket that many of the lower-level criminals believe that it would be wrong of them to refuse to extort money, to report their bosses to the police, and so on. And we could even suppose that it is essential to the continued existence of the practice that many of the small business owners who pay for protection believe that it would be wrong of them not to pay. It would not follow that it would be wrong for anyone to violate the putative norms.
The criminals who extort the protection fees can obtain things they want by participating in the practice – they earn a living and avoid being punished by their bosses. Even the business owners have self-interested reasons for participating in the practice. They avoid having their shops burned down or worse, and they may in fact receive some protection from petty criminals and other benefits from being on good terms with the organized crime gangs. According to Neta’s position, it is enough that they have “some reason to participate,” not that the all-thing-considered balance of reasons supports participating (though in some cases it may do so). It hardly follows that the putative norms of the practice are genuine norms, let alone that it would be wrong not to comply, for example, by reporting the organizers to the police or refusing to pay protection money.

Where does Neta’s argument go wrong? First, it is not warranted to move from John’s wanting to have his lawn mowed to John’s having reason to comply with the essential norms of the practice of promising. That someone could obtain something he wants by participating in a practice does not show that he has even a narrowly self-interested reason for complying with all the putative norms necessary for the practice to exist. One might get what one wants by making promises without keeping them. Perhaps in the case of promising it is plausible that one must generally comply with the promising norm in order to be able to use promises effectively to get what one wants. It is easy, however, to imagine practices such that one can obtain their benefits through partial or apparent participation, i.e., without complying with all of their putative norms. Moreover, at most John’s wanting to have his lawn mowed gives him a reason for keeping his promises when not doing so will hurt his reputation (or hurt his reputation
more than the benefit from breaking it). It is a commonplace that there may be cases in which it is evident that breaking a promise will not harm his reputation. For instance, John might make an unwitnessed promise to a dying friend moments before the friend dies.

Neta might respond that John’s behavior does not really count as promising unless he intends to keep his promises, believes that it is wrong to break them, and so on. In order to promise, one must be participating in the practice, and the promising norm is “an essential feature” of the practice. As emphasized above, however, Neta’s argument that the promising norm is essential establishes only that the practice wouldn’t exist if many or most people didn’t comply with (or believe in) the putative norm. It doesn’t follow that John or any particular person must believe it is wrong to break promises or intend to keep his promises in order to count as promising. But suppose that we waive this point and grant that one does not count as promising unless one accepts the promising norm. In that case, however, Neta has not shown that John has reason to promise, only that he has reason to make apparent or pseudo-promises. For pseudo-promises may well be enough for John to get what he wants. Hence, even given the assumption that one does not count as promising unless one accepts the promising norm, it does not follow, so far as Neta has argued, that John has any reason to accept the promising norm. Neta here runs into a problem that dogs attempts to show that it is rational to act morally. That one would be worse off if no one complied with a putative norm does not show that one has reason to comply (even if others do comply). Neta is not free to assume away the free-rider problem.

16 As noted above, in my view, one need not be participating in a practice in order to make a promise. For purposes of argument, I set this point aside.
A second problem with Neta’s argument is the move from John’s having a reason to comply with a putative norm to its being a genuine norm that is applicable to him (“he has reason to comply with the norms of that practice, and so they are norms for him”). This step in the argument seems to depend on an equivocation on the term “reason.”

Michael Smith helpfully distinguishes between “normative reasons,” which are considerations that count in favor of, or justify $\Phi$ing, and “motivating reasons,” which are factors that (potentially) motivate someone to $\Phi$. (Smith 1994, pp. 14, 94-98). Neta’s examples of John’s reasons are John’s wanting to have his lawn mowed and his enjoyment in participating in the practice. Neta takes it as obvious that these are reasons, and offers no further explanation. Consequently, in pointing out that John has reasons to engage in the practice, Neta must be using the term to mean motivating reason. For the fact that John has a desire that would be satisfied by $\Phi$ing or enjoys $\Phi$ing shows immediately that John has a motivating reason to $\Phi$ but, without further argument, does not show that he has a normative reason to $\Phi$.

But the plausibility of moving from John’s having reason to comply with a putative to its being a genuine norm depends on the reason being a normative reason. That someone believes that he can get what he wants by $\Phi$ing cannot be sufficient to show that there is a norm requiring him to $\Phi$. Since the issue is whether normative facts can be accounted for entirely in non-normative terms, it obviously begs the question to

17 For convenience, I will use Smith’s terminology in this paper. But my point does not depend on accepting his view of the underlying issues. It suffices for my purposes that a desire or other factor that explains an action does not necessarily justify the action or count in favor of it.

Pamela Hieronymi gives an illuminating account of reasons, according to which there is only one kind of reason. On her view, the relevant distinction is between two types of questions on which reasons can bear. Hieronymi (MS). For my purposes, we can be neutral between Smith’s, Hieronymi’s, and other accounts. For helpful discussion of different accounts, see Hieronymi (MS).
move without argument from the existence of a motivating reason – a descriptive fact – to the existence of a normative reason – a normative fact.

It might be objected that the term “reason” is not simply ambiguous. Many motivating reasons are, or involve, normative reasons. For example, at least one kind of motivating reason to act in a particular way is in part constituted by a belief that there is a normative reason to act in that way.

There are certainly important connections between motivating reasons and normative reasons. But because motivating reasons need not be normative reasons, in order to explain the existence of a normative reason it is necessary to do more than point to the existence of a motivating reason. The critical question is whether it is necessary to appeal to normative facts as well. Even when a motivating reason constitutes a normative reason, the question remains whether normative facts are part of the explanation of what makes the motivating reason a normative reason. Taking for granted that no explanation is needed to get from the existence of a motivating reason to the existence of a normative reason begs the question of whether the wrongness of promising can be explained without appeal to normative facts.

It might be wondered whether Neta’s position could be defended by appeal to a substantive theory according to which any desire or other state that (potentially) motivates someone’s taking a certain action counts in favor of the person’s taking that action. In the first place, such a theory is highly implausible. Moreover, the theory makes a normative claim, a claim about what kinds of things provide justifications. So an account of normativity that relies on the theory does not restrict itself to descriptive facts.
At this stage, an obvious suggestion is that only good practices, or practices that it is right to engage in, generate genuine norms. The problem, again, is that the suggestion explains normativity only by appealing to normative facts – facts about which practices are good or which courses of action are right.

There are further problems with Neta’s account. That it is wrong to break promises (even *prima facie* or *pro tanto*) is a stronger claim than that there is some normative reason for not doing so. I will not try to elucidate exactly how it is stronger, though one point is that there can be reasons to take actions that are supererogatory. I have reasons to give half of my income to charity. It does not follow that it is wrong for me not to do so, not even *pro tanto*. And invoking a practice to which the putative norm is essential in Neta’s sense does not help. Finally, that it is wrong to fail to comply with a particular norm doesn’t show that it is *morally* wrong; for example, the wrongness could be prudential. Neta’s account lacks the resources to explain specifically moral wrongness.

3. Neta’s legal counterexample

I now turn to Neta’s purported counterexample to my claim that normative facts are needed to determine the significance of the law practices to the content of the law. He supposes that the framers of the U.S. Constitution “had included a clause that stated explicitly and precisely how the content of the law was to depend upon the law practices” (p. 23).

In HFML (pp. 180-181), I considered the possibility of a “foundational practice” – one that determines the bearing on the content of the law of other practices, but whose
own bearing does not depend on that of any other practice. I argued that a putative foundational practice could not non-question-beggingly determine that it was in fact foundational. More fundamentally, it could not determine its own significance to the law.

Neta concedes that if there were “two putatively foundational but inconsistent practices,” some additional factor would be needed to explain why one practice rather than the other is foundational. In the case where there is only one putatively foundational practice, however, Neta suggests that that practice can make it the case that it is foundational (p. 24).

But what makes it the case that there is no other (putatively) foundational practice? We cannot assume that a practice is foundational only if it involves the adoption or publication of a text that says that the practice is foundational. For that would be to assume an particular answer to the question of how practices bear on the content of the law (not to mention an answer that is inconsistent with the current understanding in our legal system).

To put the point in the terms of my original argument, the question of which model is legally correct – i.e., of what contribution law practices make to the content of the law – is logically prior to the questions of which practices are putatively foundational and whether those practices are in tension with each other. For example, for a law practice to be the only putatively foundational practice it must be the case that no other law practice has a bearing on what the putatively foundational practice contributes to the content of the law. Whether that condition is satisfied depends, however, on which model is correct. Therefore, which model is correct cannot be determined by the fact that there is only one putatively foundational decision.

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18 For the term “model,” see HFML, pp. 178-179.
In HFML, I argue that the determination relation in the case of law is rational determination (pp. 170-172). If that is correct, then there has to be a reason why a particular law decision has a foundational role. Neta thinks that the full reason could be that the law practice in question contains a sentence that so asserts, and no other law practice contains an inconsistent sentence. Thus, Neta implicitly assumes that whether a law practice bears on which model is correct depends on whether it contains sentences that explicitly say something about which model is correct. But we know that this assumption is false. For example, the fact that judicial decisions have interpreted law practices in a particular way bears on the contribution of law practices to the content of the law, regardless of whether the interpreting judicial decisions explicitly say anything about how law practices are to be interpreted. More generally, as I argued in the original article, the contribution of law practices to legal content is not the conjunction of the content of sentences associated with those practices (HFML, Section III).

A final point is that Neta neglects the possibility that normative facts play a role in explaining the bearing of his hypothetical constitutional clause. It is plausible that the clause would have great, even foundational significance. But the best explanation is not simply that the clause says so. Rather, it is that there are important reasons, for example of democracy and stability, for giving great weight to what the ratifiers of the Constitution believed themselves to be ratifying. In order to see that such reasons are playing a silent role in Neta’s example, consider how effective the example would be if the single putatively foundational clause were in an unpublished decision of a minor administrative official.19

19 For discussion of a related objection, see Greenberg 2005, pp. 7-9.
4. Other normative domains

I have thus far criticized Neta’s attempts to explain moral and legal norms entirely in terms of non-normative facts. The relevance of the moral domain to my original paper depends on a more general claim that Neta makes. The claim is that my argument generalizes to all normative domains: more precisely, all normative domains have the structural features of the legal domain that are necessary to generate my original argument. In order to defend the argument of HFML against Neta, I don’t need to deny this claim, for I have already argued against Neta’s attempt to explain moral norms in non-normative terms. But the issue of how far my argument generalizes is of independent interest. In this final section, I first consider and reject Neta’s argument that purports to show that all normative domains have the relevant features of the legal domain. I then offer a competing picture of some other normative domains.

A crucial premise of my original argument is that descriptive facts are among the determinants of content of the law, and the determination relation between the determinants and the content of the law is rational determination (see HFML, section IIB). A version of the argument can be developed only in domains in which a corresponding premise is true. I suggest, for example, that the determination relation in the domains of aesthetics, humor, and mental content is not rational determination (HFML, pp. 160, 170-171 & fns. 18, 25). If that suggestion is correct, a version of the argument cannot be developed in those domains.20

Neta claims that all normative domains have the structure that I attributed to law. Call this claim the generalized premise:

20 For discussion of the scope of the argument, see HFML, p. 161 and Section I.E.
In all normative domains, descriptive facts are among the determinants of the content of the norms, and the relevant determination relation is rational determination.

I am sympathetic to a view that generalizes my conclusion to all normative domains. In particular, I am sympathetic to the view that a full explanation of the existence of any genuine norms cannot be given entirely in terms of descriptive facts. I did not argue for this view in the original article, however, and will not do so here. As I will now show, Neta’s argument for the generalized premise is not successful. Moreover, the generalized premise is not plausible. Hence, the specific argument that I gave does not generalize in the way that Neta claims.

A number of passages in Neta’s comments suggest that he is working with a determination notion different from the notion of rational determination. For example, when he explains the determination notion, he writes:

> 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. . . . In contrast, it is at least somewhat reasonable for the law to require that people who are not convicted of crimes not receive punishment. . . . Thus, whatever makes it the case that the law requires this, . . . rationally determines that the law requires it (p. 4).

Similarly, he writes: “there must be some reason for the law to require some things and forbid other things – the law’s requirements, unlike the boiling point of water, must be at least somewhat reasonable.” (p. 8).

Neta here contrasts domains in which the notion of reasonableness applies to the content of the relevant propositions and domains in which it does not. It is neither reasonable nor unreasonable that water boils at a certain temperature. It is reasonable that the law imposes certain requirements and not others. Moreover, the quoted passages
taken together suggest that Neta thinks the content of the law is rationally determined if
and only if the content of the law is “somewhat reasonable.”

Neta’s notion of the reasonableness of a norm’s content is not the same as my
notion of rational determination.21 As noted above, to say that the A facts rationally
determine the B facts is to say that the obtaining of the B facts must be intelligible in light
of the A facts. Consider the legal requirement that contracts for the sale of land be in
writing. The intelligibility issue is not whether this requirement is a reasonable or wise one, but whether the existence of the requirement is explained by, or intelligible in the
light of, for example, statutes and judicial decisions. Rational intelligibility concerns not
the content of the higher-level facts, e.g., that contracts for the sale of land must be in
writing, but the relation between the determining facts and the higher-level facts (HFML,
pp. 164-165), e.g., between statutes and judicial decisions and the fact that contracts for
the sale of land must be in writing. The reasonableness of the content of a norm is
consistent with its being opaque why the determinants have the consequences that they
do for the content of the norm. For example, one could consistently think that it is a good
idea for the Constitution to ban the death penalty, yet that the relevant facts, e.g., about
the text of the Constitution or the intentions of its ratifiers, do not make the existence of
such a ban rationally intelligible. Conversely, even if it is a terrible idea to allow a tax

21 If Neta has misunderstood what I mean by “rational determination,” my lack of clarity in HFML is surely
to blame. Neta tells me (personal communication) that he was assuming that if the A facts rationally
determine the B facts, the B facts “must be at least prima facie somewhat reasonable.” I disagree. Suppose
that facts about microphysics rationally determined facts about the boiling points of liquids. It would not
follow that the notion of reasonableness even has application to facts about the boiling points of liquids.
Whether rational determination places some constraint on the content of the law is an interesting
and complicated question. For discussion, see HFML, VI.B. But such subtleties are unnecessary for
present purposes. As we will see shortly, Neta’s argument on the first horn of his dilemma relies not on the
assumption just mentioned, but on its converse – that if the relevant determination relation is not rational
determination, then the content of the norms is not reasonable. Given my notion of rational determination,
there is no basis for this assumption. With respect to the second horn of the dilemma, the problem that I
identify with Neta’s argument would remain even if both the assumption and its converse were true.
deduction for mortgage interest, the existence of that deduction might be perfectly
intelligible in light of the Internal Revenue Code. (Indeed, the relation between the
arrangement of microphysical particles and macrophysical facts, such as the fact of
water’s boiling point, might be intelligible even if the notion of reasonableness is not
applicable to the macrophysical facts.) In evaluating Neta’s argument for the generalized
premise, we need to ensure that we evaluate it with respect to the correct notion.

Neta’s argument takes the form of a reductio. He begins with the following
conditional: “If the [descriptive] facts do not make it reasonable for the norms to be what
they are, then either nothing makes it reasonable for the norms to be what they are, or
else the reason for the norms to be what they are includes something independent of the
[descriptive] facts.” He then argues that both possibilities lead to contradictions, so the
antecedent of the conditional must be rejected. The argument is phrased as if the
question is the reasonableness of the content of the norms. But as I have just explained,
that is not the right question. So it is important to reformulate the argument in terms of
rational determination.

We first need to clarify one point about the antecedent of Neta’s conditional.
Substituting rational determination for reasonableness (and switching to my
terminology), the antecedent becomes: “the descriptive facts do not rationally determine
the normative facts.” Does this mean that the descriptive facts do not even in part
rationally determine the normative facts or that they do not alone do so? Remember that
the crucial premise of my argument in the legal case is that the descriptive facts in part
rationally determine the normative facts. Since Neta is trying to show that the

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(i.e., the premise of his reductio) must be the negation of that premise. Therefore, the correct understanding of the antecedent has to be that the descriptive facts do not even in part rationally determine the normative facts.

We can now address Neta’s dilemma. As to the first horn, he argues that if “nothing makes it reasonable for the norms to be what they are,” then “there is no reason to follow those norms,” and thus they are not really norms at all (p. 12). The relevant condition is not, however, that nothing makes it reasonable for the norms to be what they are. It is that the determination relation in the domain in question is not rational determination – i.e., that it is possible that the obtaining of the norms is not intelligible in light of the determinants of the norms. Why should we assume that, in that case, there is no reason to follow those norms? From the fact that the determination relation is not rational determination, nothing follows about the content of the norms. Hence one possibility is that the content of a norm can be the source of reasons, quite apart from the relation between the determining facts and the content of the norm. For example, it might be that the reasons to follow moral norms derive from their content. (Indeed, it is common to contrast legal and moral norms with respect to whether the content of a norm is the source of the relevant reasons.)

More generally, it cannot simply be assumed that putative norms have no normative force if the relevance of the determinants of those norms to the norms need not be reason-based. For that is to assume precisely what is at issue – that rational determination is the relevant determination relation.

With respect to the second horn, Neta argues that “if the reason for the norms to be what they are is independent of the [descriptive] facts that determine those norms . . .
it’s arbitrary that the norms are binding on all and only those creatures of which the determining [descriptive] facts obtain.” In that case, he concludes, “there’s nothing that makes the norms in question binding on creatures like us,” which is to say again that they are not norms after all (p. 14). Neta seems to think that the relevant condition is that 1) descriptive facts determine the norms, and 2) the relevant determination relation is rational determination, yet 3) something independent of the descriptive facts provides the reasons that explain the existence of the norms. But it is hard to see why one would take this to be the relevant condition. If rational determination is the relevant determination relation (so we are not on the first horn of the dilemma) and the descriptive facts do not even in part rationally determine the content of the law (by hypothesis), then descriptive facts are not among the determinants of the normative facts at all. For example, the normative facts might be necessary truths that do not depend on contingent practices. (Shortly, I will sketch a picture on which fundamental moral and epistemic norms have such a status.) If descriptive facts are not determinants of the normative facts, there is no concern that “it’s arbitrary that the norms are binding on all and only those creatures of which the determining [descriptive] facts obtain.”

So far I have criticized Neta’s argument that rational determination is the determination relation in all normative domains. I now say something about a few illustrative cases. Consider first the moral domain. According to a plausible and widely held view, fundamental moral truths are necessary truths that are independent of any descriptive facts. Applied (or “mixed”) moral truths are applications of the fundamental moral truths to particular circumstances. Perhaps it is a fundamental moral truth that it counts in favor of an action, other things being equal, that it would reduce suffering. In

22 For what I mean by “fundamental moral truths,” see HFML, p. 159 fn. 7.
combination with contingent facts about the sources of suffering (and perhaps also with other fundamental moral truths), that fundamental truth yields many applied moral truths, for example, that we should provide infants with nurturing environments.

Given the limitations of a reply, I take this picture for granted here (pace Neta). On this picture, the interesting metaphysical question is the explanation of the fundamental moral truths. Given that explanation, the explanation of the applied moral truths follows straightforwardly. And it is obvious that normative facts – the fundamental moral truths – play a role in that explanation. I will not of course offer an account of fundamental moral truths here. The present point is that the legal case is a non-starter as a model for such an account. It is uncontroversial that the content of the law obtains in virtue of law-making practices. Fundamental moral truths do not obtain in virtue of practices. That reducing suffering counts in favor of an action (say) is a necessary truth, not something that is contingent on what people do or decide. There is no legal analogue of fundamental moral truths – legal norms that could not be otherwise and that yield more specific, applied legal norms when applied to particular circumstances. The question of the explanation of the fundamental moral truths is not one on which my argument is intended to shed light.

An interesting example is provided by the assumption that all desires or motivating states justify the actions that they (potentially) motivate provides an interesting example. This assumption, we saw, was necessary to Neta’s account of promising. Notice that it is better understood as a candidate for a necessary truth than a contingent one. It would be very strange to maintain that some contingent social practice makes it the case that all desires justify actions. The defender of such an assumption
would presumably take it to be a necessary truth, which, in combination with facts about what desires people happen to have, yields truths about what justifies particular actions. Hence, Neta’s account of the normativity of promises, once we make explicit the assumption that all desires justify actions, can be seen to instantiate the picture of the moral domain that I have sketched.23

In my view, the epistemic case is similar to the moral one. Fundamental epistemic norms do not depend on contingent social practices. Again, more specific, applied epistemic norms are the result of applying the fundamental norms to particular circumstances.

Neta also considers the case of “the normative content of a particular linguistic system” (p. 9). I am not sure what he has in mind, but we can consider an example I mention in passing in HFML (fns. 18, 25). It is plausible that facts about a person’s or community’s use of words are among the determinants of what those words mean. I do not think that the facts about what words mean are normative facts, so this issue may be a point of disagreement between Neta and me. But this case nonetheless provides a helpful comparison with the legal case. As I say (HFML, fn. 25), it may be that the relation between facts about our use of words and facts about meaning is not rational determination. In sharp contrast to the legal case, I see no reason to think that the relation between the use of words and their meaning is necessarily rationally intelligible. It may be that many possible meanings are ruled out arbitrarily (i.e., in ways for which reasons cannot be given) and that we have non-rational mechanisms that exclude these possibilities from consideration.

23 I thank Seana Shiffrin for pointing this out.
I can sum up these brief remarks in an intuitive way. At bottom, we do not create the epistemic and moral norms. Fundamental moral and epistemic normative truths are necessary, and do not depend on the contingencies of our practices. We do create the facts about what words mean, but we do so in a way that need not be rationally accessible. In the legal domain, we create the facts, and we do so in a way that must be rationally accessible.
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