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Why law is law

Sebastian Baldinger^{a,b}

^aFaculty of Law, University of Antwerp, Belgium; ^bDepartment of Philosophy, University of Vienna, Austria

An *explication of law's nature* answers to the question of what governance by law essentially consists in, or to which class or category of things legal things pertain.¹ The essentialist and sortal variants of inquiry into the nature of law provide the most traditional methodological framework for adjudicating the debate between positivist and non-positivist theories of law. An alternative approach to understanding the *foundations* of law focuses on the question of how and why facts about what the law requires are *grounded* in certain types of non-legal facts (social, moral, political, economic etc).² The latter approach has surged into jurisprudential prominence partly as an uptake of recent advances in general metaphysics regarding the notion of 'ground' and cognate concepts such as 'fundamentality', 'relevance', and 'constitutive explanation'. Whereas Ken Ehrenberg's focus in *The Functions of Law*³ is clearly on the former, traditional type of venture, his project also carries interesting implications for the latter.

In order to bring these implications to the fore, I will provisionally resort to a competing theory of law, the premises of which operate as an ideal trigger for the sort of treatment Ehrenberg would, arguably, reserve for the metaphysical explanation of legal facts. In a series of articles published over the course of the past two decades, Mark Greenberg developed a rejoinder to legal positivist theories of law, which aspire to mitigate, if not deflate, the role of normative premises in explaining facts about the existence and content of the law (legal facts).⁴ Greenberg's argument to this effect targets what he takes to be the

CONTACT Sebastian Baldinger  sebastian.baldinger@univie.ac.at

¹For an account of the distinction between 'explication' and 'explanation', see Paul Audi, 'Explanation and Explication' in Chris Daly (ed), *The Palgrave Handbook of Philosophical Methods* (Palgrave Macmillan 2015).

²David Plunkett and Scott Shapiro, 'Law, Morality, and Everything Else: General Jurisprudence as a Branch of Metanormative Inquiry' (2017) *Ethics* 128, 37; Mark Greenberg, 'How Facts Make Law' (2004) 10 *Legal Theory* 157; David Plunkett, 'A Positivist Route for Explaining How Facts Make Law' (2012) *Legal Theory* 18, 139; Gideon Rosen, 'Meta-physical Dependence: Grounding and Reduction' in Bob Hale and Aviv Hoffmann (eds), *Modality: Metaphysics, Logic, and Epistemology* (OUP 2010); Scott Shapiro, *Legality* (Cambridge University Press 2011).

³Kenneth M. Ehrenberg. 2016. *The Functions of Law*. Oxford: Oxford University Press.

⁴Mark Greenberg, 'How Facts Make Law' (n 2); 'Hartian Positivism and Normative Facts: How Facts Make Law II' in Scott Hershovitz (ed), *Exploring Law's Empire* (OUP 2006) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=887418> accessed 06 October 2018 (Referenced page numbers refer to the online version.); 'On Practices and the Law' (2006) 12 *Legal Theory* 113; 'Reasons without Values?' (2007) 2 *Social, Political, and Legal Philosophy*, UCLA School of Law Research Paper No. 05-27 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=803007> accessed 06 October 2018; 'Explaining Legal Facts' (2008) UCLA School of Law Working Paper Series, Public Law & Legal Theory Working Paper 08-19 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1139135> accessed 06 October 2018; 'The Communication Theory of Legal Interpretation and Objective Notions of Communicative Content' (2010) UCLA School of Law Working Paper Series, Public Law & Legal Theory Working Paper 10-35 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1726524> accessed 06 October 2018; 'The Standard Picture and Its Discontents' in Leslie Green and Brian Leiter (eds), *Oxford Studies in Philosophy of Law: Vol. 1* (OUP 2011); 'Legislation as Communication? Legal Interpretation and the Study of Linguistic Communication' in Andrei Marmor and Scott Soames (eds), *Philosophical Foundations of Language in the Law* (OUP 2011); "'How Facts Make Law" and the Nature of Moral Facts' (2012) 40 *Direito, Estado, e Sociedade*

*standard picture*⁵ of law's metaphysical explanation, which he attributes to a broad array of general jurisprudential views. Importantly, this picture is understood to exclude normative considerations from law's ontological foundations, and is therefore deemed incompatible with his own non-positivist alternative.

While arguably making for an instance of the standard picture, I shall argue that Ken Ehrenberg's artefactual account of law's nature is sufficiently rich in metaphysical resources for being at least partially reconcilable with Greenberg's claims. My argument derives from the contention that these competing general jurisprudential views are best appreciated if characterised as operating on two distinct conceptions of analytical metaphysics.

While Ehrenberg may be best understood as opting for a metaphysical path that focuses on explicating the nature of law, and of laws, more specifically, as a matter of legally meaningful abstract objects, and on explaining their existence and persistence⁶ conditions, Greenberg's normative explanatory project assigns priority to the conditions that render intelligible the structural dependence of facts about the existence of ontologically derivative entities (such as chairs, universities, or statutes) on non-derivative or fundamental facts. In the case of law, this explanatory desideratum, Greenberg argues, imposes a theoretical burden that legal positivism cannot shoulder.⁷

The point of bringing these distinct theories of legal metaphysics to intelligible confrontation is to advance the argument that a central upshot of Ehrenberg's approach is that it neither makes, nor implies to license, a direct transition from talk about the existence conditions of 'laws', understood as public abstract artefacts, to a 'Greenbergian' talk about the grounding of facts about legal obligations and rights in non-legal facts about the actions of legal institutions.

Ehrenberg's artefact view

The project advanced in *The Functions of Law* is based on legal positivism's characteristic assumption that the law is but a human creation ultimately generated from social facts.⁸ It unpacks this contention in terms of three specific tenets concerning the nature and ontology of law – not only to elucidate what the law is, but also to offer the key to decoding its normativity. By order of explanatory 'basicness', these tenets are enumerated as follows:

- (1) At the highest level of abstraction, what is created as law are individual *abstract artefacts*, whose structural or other design features allow for their *public recognition* as being what they were intentionally produced to be: *legal norms* specifically purposed to serve particular *social functions*.⁹

(Pontifícia Universidade Católica do Rio de Janeiro) 165; 'The Moral Impact Theory of Law' (2014) 123 *Yale Law Journal* 1288; 'The Moral Impact Theory, The Dependence View, and Natural Law' in G. Duke and R. George (eds), *Cambridge Companion to Natural Law Jurisprudence*, Cambridge University Press 2017; 'How Law Affects Behaviour' (2018) 9 (2) *Jurisprudence* 374.

⁵Greenberg, 'The Standard Picture and Its Discontents' (n 4).

⁶For a seminal exposition of the existential mode of metaphysical inquiry, see Willard Van Orman Quine, 'On What There Is' in *From a Logical Point of View. Nine Logico-Philosophical Essays* (Harper and Row 1955/1980).

⁷For an overview of the grounding-theoretic view indicated here, see Jonathan Schaffer, 'On What Grounds What' in David Chalmers, David Manley and Ryan Wasserman (eds), *Metametaphysics: New Essays on the Foundations of Ontology* (OUP 2009).

⁸Kenneth Ehrenberg, *The Functions of Law* (n 3), 4, 18.

⁹The same is true, mutatis mutandis, for legal systems and the law as distinct genre of social phenomena. *ibid* 10–13, Ch. 2-C, Ch. 7, Ch.8. For the sources of Ehrenberg's preferred take on (public) artefacts, see Randall Dipert, *Artefacts, Art Works, and*

- (2) Their generation by virtue of purely descriptive social facts proceeds along the lines of a two-tiered *Hartian model*: At the most basic level, certain practices of legal officials provide a contextual normative standard – the ‘rule of recognition’, which authorises the further production by lawmakers of individual legal norms (legal artefacts).¹⁰
- (3) These procedures are best understood as operating within the ambit of law conceived as a *social institution*, in which normatively charged status functions are assigned to various entities and events by virtue of Searlian constitutive rules.¹¹

This conception of law’s nature and generation allows Ehrenberg to point out three aspects he considers crucial for explaining law’s normative import. One is taken to follow directly from law’s nature as a *codified social institution*. Following John Searle, such institutions are regarded as generally fit for shaping the normative relationships among their members by virtue of their characteristic assignment of normatively charged statuses *in general and abstract terms*. Since this authorises, among other things, certain institutional agents to create *desire-independent* reasons for action for others, the legal artefacts produced within law’s social institutional ambit are considered to apply to a broad range of legal addressees independently of their assent to the institution of law, or to its particular requirements. Accordingly, this feature may be said to secure the widest scope of law’s normative hold.¹²

Another crucial element is taken to derive directly from legal artefacts’ *signalling function*. By way of publicly inviting their recognition, identification, and practical treatment as norms of legal pedigree purposed to serve specific social functions, law’s very ontological profile is considered to already feature respective norms of identification and treatment.¹³

This picture is also complemented by an amended version of Raz’s *service conception of authority*, according to which what is created as law will provide robustly normative reasons for action, and therefore amount to full-bloodedly normative requirements, whenever the law acts as a *legitimate authority*. It will do so when taking its directives to settle the question of what to do facilitates individual compliance with antecedent moral reasons.¹⁴

Agency (Temple University Press 1993); Amie Thomasson, ‘Realism and Human Kinds’ (2003) 67 *Philosophy and Phenomenological Research* 580; ‘Public Artefacts, Intentions and Norms’ in Maarten Franssen and others (eds), *Artefact Kinds: Ontology and the Human-Made World* (Springer 2013). For an argument on how to reconcile the conjunction of Ehrenberg’s claims that the law is a practice, an artefact, and an institution, see: Kenneth Ehrenberg, ‘Law Is an Institution, an Artefact, and a Practice’ in Lukas Burazin, Kenneth Einar Himma and Corrado Rovorsi (eds), *Law as an Artefact* (OUP 2018).

¹⁰H.L.A. Hart, *The Concept of Law* (OUP 1961); Ehrenberg, *The Functions of Law* (n 3); ‘Law Is an Institution, an Artefact, and a Practice’ (n 9); Raimo Tuomela, *The Philosophy of Social Practices: A Collective Acceptance View* (Cambridge University Press 2002).

¹¹Kenneth Ehrenberg, ‘The Institutional Validity of Law’ (2018) *Philosophy and Phenomenological Research* <doi:10.1111/phpr.12536> accessed 06 October 2018; ‘Law Is an Institution, an Artefact, and a Practice’ (n 9); *The Functions of Law* (n 3), Ch.s 2-D, 5-C, 7; John Searle, *The Construction of Social Reality* (Free Press 1995); ‘Language and Social Ontology’ (2008), 37 *Theory and Society* 443; *Making the Social World: The Structure of Human Civilization* (OUP 2010).

¹²Ehrenberg, *The Functions of Law* (n 3), 4, 8–10, Ch.s 2-B, 2-D, 7; and references in n 11.

¹³See references in n 9. While law’s feature of validity is grounded in its institutionality and its Hartian sources, its membership question is therefore mainly determined by law’s functionality (Ehrenberg, *The Functions of Law* (n 3), Ch. 2-E).

¹⁴Kenneth Ehrenberg, ‘Law’s Authority is not a Claim to Preemption’ in Wilfrid J. Waluchow and Stefan Sciaraffa (eds), *Philosophical Foundations of the Nature of Law* (OUP 2013); ‘Functions in Jurisprudential Methodology’ (2013) 8 (5) *Philosophy Compass* 447; ‘Law’s Artefactual Nature: How Legal Institutions Generate Normativity’ in George Pavlakos and

Greenberg's challenge

Greenberg's explanatory account, on the other hand, sets out from a characterisation of what he calls the *standard picture*¹⁵ of how legal requirements come to obtain. He attributes this picture to a broad array of contemporary general jurisprudential theories. The standard picture itself is typically based on what is to this day the most popular starting point for many legal philosophical views, including Ehrenberg's own: Hart's foundational account of law.

Recall Ehrenberg's Hartian premise that the law arises from a particular type of social practice. This type of practice is rooted in certain regularities of official conduct, which legal institutional actors internalise as a source of contextually provided normative standards.¹⁶ This cluster of standing normative attitudes lays out the conditions under which lawmakers' more particular practices of enacting laws count as the legally authoritative mode of producing individual legal norms. Importantly, any factors concerning these practices are typically treated by standard picture views as *purely descriptive*. In virtue of their being so authorised by their system's rule of recognition, lawmakers are then conceived as agents to whom we may attribute the production of a plethora of legal norms whose content is more or less directly derived from the linguistic content of the utterances used to produce such norms.¹⁷ Arguably, Ehrenberg's account makes for another version of this picture, as he conceives of lawmakers' authoritative directives as *vehicles for communicating* the collectively designated functions of institutionalised abstract public artefacts (legal norms).¹⁸

Greenberg's critical reception of this broadly positivist framework rests on the assumption that, upon closer inspection of how lawmaking facts produce legal obligations and rights, it becomes evident that law's most fundamental determination base (i.e. what necessarily figures in the ontological relation which generates instances of law) *cannot be exclusively comprised of descriptive facts*.¹⁹ This is, because the particular type of jurisgenerative relation at stake here must be reconfigured as a relation of *rational determination*²⁰ rather than presumed to be a *metaphysically brute* relation.²¹ More precisely, the obtaining of this relation must amount to a rational explanation as to why certain but not other descriptive facts actually contribute to making the content of law what it is in any given legal system at any given time. However, since Greenberg generally regards descriptive facts as insufficiently reasoning in the required sense, he concludes that only an inclusion of fundamental normative facts among law's necessary determination base can do the trick.²²

His argument to this effect begins with the observation that what happens in lawmaking practices is, in a first instance, no more than the production by lawmakers of a broad array

Veronica Rodriguez-Blanco (eds), *Reasons and Intentions in Law and Practical Agency* (Cambridge University Press 2015); *The Functions of Law* (n 3); 'Ontology and Reason Giving in Law' in Pawel Banas, Adam Dyrd and Tomasz Gizbert-Studnicki (eds), *Metaphilosophy of Law* (Hart Publishing 2016); Joseph Raz, *Practical Reason and Norms* (Hutchinson 1986); *The Authority of Law: Essays on Law and Morality* (Clarendon Press 1979); 'Authority and Justification' (1985) 14 (1) *Philosophy and Public Affairs* 3; *The Morality of Freedom* (OUP 1986); *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (OUP 1994); 'The Problem of Authority: Revisiting the Service Conception' (2006) 90 *Minnesota Law Review* 1003; *Between Authority and Interpretation: On the Theory of Law and Practical Reason* (OUP 2009).

¹⁵Greenberg, 'The Standard Picture and Its Discontents' (n 4).

¹⁶Hart, *The Concept of Law* (n 10).

¹⁷Greenberg, 'How Facts Make Law' (n 4), 176; 'The Communication Theory of Legal Interpretation' (n 4); 'The Standard Picture and Its Discontents' (n 4); 'Legislation as Communication' (n 4).

¹⁸See: Ehrenberg, 'Law Is an Institution, an Artefact, and a Practice' (n 9), 183–88.

¹⁹Greenberg, 'How Facts Make Law' (n 4), 160–65, 170, 191–97.

²⁰*ibid* 163, 165.

²¹*ibid* 164.

²²*ibid* 159, 166.

of *candidate* descriptive input data. Given their production, there will, however, always be a plurality of *possible mappings* between them and putative instances of law. For any given case, therefore, our mere consultation of such sets of candidate descriptive facts of law-making practices will not provide sufficient reasons for believing that only certain mappings actually deliver law. We may call this Greenberg's *multiple-mappings thesis*.²³

Importantly, however, Greenberg considers this thesis to raise not only an epistemic issue of identification, but also an *ontological issue of determination*. As long as we fail to appreciate that there must be reasons rendering certain candidate descriptive input data decisive for the (rational) determination of legal facts, and that those reasons must function as *metaphysical determinants* to law's generation, it will necessarily remain *ontologically underdetermined* what is actually created as law. In other words, there will simply be no clear-cut instances of law to be epistemically ascertained in the first place.

Accordingly, to the extent that Ehrenberg's conception of how the functions of legal artefacts are communicated by their creators can be seen as isomorphic to the standard picture, which undergirds legal positivist views of how the communicative intentions of lawmaking officials are encoded by authoritative directives, there seems to be room for suggesting that the artefactual theory of law remains vulnerable to the very line of argument, which Greenberg used to against legal positivism.

More specifically, Greenberg would consider any stage of Ehrenberg's explanatory account as answerable to the question of why it should be decisive for the generation of some artefact *as law* that legal officials treat their own practices as providing a rule of recognition, or that they collectively distribute certain institutional status functions, or that they consider their authoritative directives as communicating collective intentions to create particular norms vested with certain functional attributes. Without standards *extrinsic* to such descriptive aspects of lawmaking, Greenberg would argue, it will remain an open question as to what actually counts as an instance of binding legal content.²⁴ While this may not preclude the possibility that lawmakers create certain artefacts by virtue of their collective intentions' contents, the rational underdetermination of those artefacts would preclude their specific ontological determination as (rationally discernible) instances *of law*.

An artefactual rejoinder

If my characterisations so far withstands scrutiny, Ehrenberg's metaphysical commitments with respect to how descriptive facts generate legal artefacts cannot bypass the very line of criticism Greenberg voiced against the standard picture. However, I believe that Ehrenberg's particular conception of law's artefactual nature exhibits the resources to provide a new route for addressing Greenberg's explanatory challenge.²⁵

The Functions of Law is a jurisprudential endeavour which aptly, in my view, upholds a distinction between the *ontological question* of what exists as such or in a certain mode, and the *explanatory question* of what grounds or otherwise metaphysically explains what and why. Whereas *The Functions of Law* does a formidable job in addressing

²³ibid 164–69.

²⁴ibid 165–66, 187–90.

²⁵For other attempts to face his challenge, see, for instance, Plunkett, 'A Positivist Route' (n 2); Ram Neta, 'On the Normative Significance of Brute Facts' [2004] 10 *Legal Theory* 199; Samuele Chilovi and George Pavlakos, 'Law-determination as Grounding: A Common Grounding Framework for Jurisprudence' [forthcoming] *Legal Theory*.

head on the first, ontological, question as a compass for locating law's artefactual nature in the fabric of human creation, it leaves open the question of whether an artefactual approach to legal positivism entails a certain view on how exactly non-legal facts about the creative intentions of lawmakers should operate in the context of an *all-things-considered calculus* that would be used to ground the truth of specific propositions about what the law requires here or there.

It is a sign of methodological virtue, rather than weakness, that Ehrenberg's argument neither makes, nor implies to license, a direct transition from talk about the existence conditions of 'laws', understood as public abstract artefacts, to talk about the grounding of legal facts about the particular types of conduct required by the existence of these artefacts in a given jurisdiction.²⁶

Accordingly, there seems to be room for arguing that a distinct, albeit not fully elaborated, answer to Greenberg's worry about the inadequacy of descriptive, non-legal facts to render *intelligible* their contribution to the content of the law has its roots in Ehrenberg's recurrent reference to the *public recognisability* of legal artefacts. My contention is that a way to address the objection that nothing about the artefactual nature of law can elucidate the question of what makes it *rationally intelligible* that the law requires X rather than Y as a matter of general legal fact, is to resist the premise that we should privilege an understanding of *intelligibility* as a *ground-theoretic concept*.

Ehrenberg's frequent appeal to the notion of *public recognisability* as a distinct feature of legal artefacts invites this type of rejoinder by making available two distinct options, both of which conceive of legal intelligibility in terms of the recognisability of an artefact qua law. At several junctions of his argument about the artefactual essence of laws, Ehrenberg invokes a tight connection between the creation of artefacts and their public recognisability as instruments vested with the promotion of certain ends. In his words:

Laws are artefacts in that they are specialised creations of human intentionality that serve specific purposes and are designed in order to be recognised as such. Laws are fashioned and implemented in such a way as to be recognised and used precisely as laws by following the procedures for such recognition and use set by the system that validates them.²⁷

What is crucial about the possibility of recognising laws and other artefactual objects as imbued with a certain type of function is the *communicative relationship* the creator(s) of the relevant artefact purport to establish with those whose lives are expected to be affected should they 'come into contact' with the artefact in question.²⁸ Ehrenberg flags this point when he notes that:

(...) the creator of the artefact has in mind that others will see the artefact for the kind of thing it is supposed to do (where, as with law, we are dealing with public artefacts that are understood in terms of the function they are to perform).²⁹

The legal recognisability of a certain artefact includes the possibility of its sortal recognition as a member of the 'legal kind', as well as that of its functional recognition as being crafted for a certain use (e.g. as a rational standard of conduct). These general remarks are

²⁶For a methodological defence of the ontological/ground-theoretic divide, see Schaffer, 'On What Grounds What' (n 6).

²⁷Ehrenberg, *The Functions of Law* (n 7), 175.

²⁸Here, Greenberg might object that any notion of public recognisability may meet his constraint only insofar as it involves precisely the type of normative considerations for which he argued.

²⁹Ehrenberg, *The Functions of Law* (n 7), 176.

robust enough to invite two alternative analyses of how the notion of intelligibility can be read as roughly co-extensive with that of public recognisability.

The first reading retains the metaphysical character of intelligibility, but *denies* its *ground-theoretic* role. The idea is that legal intelligibility, qua recognisability, is a *dispositional* property of institutionalised artefacts – including legal institutions and the norms produced by them. In other words, to say that certain non-legal facts make certain other facts legally intelligible, is to say that they *make it the case* that certain artefacts are *disposed to be recognised* by an intended audience *as distinctly legal*. Although recognisability is primarily a dispositional property of publicly engaged individuals³⁰ (e.g. a famous politician or an artist), nothing precludes the possibility of talk about publicly recognisable artefacts, such as the Mona Lisa, Venus de Milo or, in our case, a promulgated text. As with individual recognisability, artefactual recognisability can be understood as an extrinsic property of certain objects in the sense that it is not the case that any perfect duplicate, say, of the US Constitution, would be recognisable as such. In a possible world that lacks the historical background that accompanies its creation and implementation, an identical counterpart of this document might be recognised by the denizens of that world as a literary work, a political essay or, more crudely, a textual sample of English.

The second reading divests intelligibility of its metaphysical role and treats it as an *epistemic* concept through and through. On this approach, to say that certain non-legal facts make certain other facts legally intelligible, is to say that certain *norms of treatment* accompanying the promulgation and interpretation of sources of legal content (statutes, appellate decisions, administrative orders, constitutions) provide compelling *evidence* as to what should be recognised (i.e. accepted) as the proper contribution that these sources make to the overall content of the law. An instructive source of intelligibility-enabling norms of treatment can then be seen in the corpus of interpretive canons (common law, doctrinal, or codified), which guides the reasoning of participants in a legal practice. This would be particularly so in cases where the proper legal meaning of different types of sources of legal content appears to clash with contrary indicia of ordinary linguistic meaning and legislative intent. According to a doctrinally dominant view³¹, textual canons such as *eiusdem generis* or substantive canons, such as the avoidance of unconstitutional interpretations of statutes, are just a special kind of norms of treatment of statutory and constitutional artefacts. Their role is that of an epistemic tiebreaker allowing interpreters of a legal text to draw inferences about – or, in Ehrenberg's artefactual language, to recognise – the actual, or reasonably attributable, content of legislative intention.

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³⁰For dispositional account of recognisability see Jennifer McKittrick, 'A Case for Extrinsic Dispositions' (2003) 81 (2) *Australasian Journal of Philosophy* 155.

³¹See Antonin Scalia and Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* (Thomson West 2012).