HOW FACTS MAKE LAW*

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SUMMARY: I. *Introduction.* II. *The Premises.* III. *Is there a Distinctively Legal Problem of Content?* IV. *Can Law Practices Themselves Determine how they Contribute to the Content of the Law?* V. *Objections.* VI. *The Need for Substantive Factors, Independent of Law Practices.* VII. *Conclusion.*

I. INTRODUCTION

Nearly all philosophers of law agree that non-normative, non-evaluative, contingent facts — *descriptive facts*, for short— are among the determinants of the content of the law. In particular, ordinary empirical facts about the behavior and mental states of people such as legislators, judges, other government officials, and voters play a part in determining that content. It is highly controversial, however, whether the relevant descriptive facts, which we can call *law-determining practices*, or *law practices* (or simply *practices*) for short,[1] are the only determinants of

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[1] For the moment, I will be vague about the nature of law practices. For more precision, see section II,.2 below.

legal content, or whether legal content also depends on normative or evaluative facts – *value facts*,[2] for short. In fact, a central —perhaps *the* central— debate in the philosophy of law is a debate over whether value facts are among the determinants of the content of the law (though the debate is not usually characterized in this way).

A central claim of legal positivism is that the content of the law depends only on *social facts*, understood as a proper subset of descriptive facts. As Joseph Raz says, "H. L. A. Hart is heir and torch-bearer of a great tradition in the philosophy of law which regards the existence and content of the law as a matter of social fact whose connection with moral or any other values is contingent and precarious."[3] In contemporary philosophy of law, there are two distinct ways of developing this tradition, *hard* and *soft* positivism. Hard positivism denies that value facts may play any role in determining legal content.[4] Soft positivism allows that the relevant social facts may make value facts relevant in a secondary way. For example, the fact that a legislature uses a moral term – "equality", say – in a statute may have the effect of incorporating moral facts – about equality, in this case – into the law.[5] On this soft positivist view, however, it is still the social facts that make the value facts relevant, and the social facts need not incorporate value facts into the law. Hence, according to both hard and soft positivism, it is possible for social facts alone to determine what the law is, and, even when they make value facts relevant, social facts do the fundamental work in making the law what it is – work that is explanatorily prior to the role of value facts. To put things metaphorically, hard and soft positivism hold that there could still be law if God destroyed all value facts.

Ronald Dworkin is the foremost contemporary advocate of an anti-positivist position. According to Dworkin, a legal proposition is true in a given legal system if it is entailed by the set of principles that best

2 For some explanation of what I mean by "value facts", see note 23 below.

3 Raz, Joseph, *Ethics in the Public Domain*, Oxford, Oxford University Press, 1994, p. 210. Raz also puts the point epistemically: the content of the law "can be identified by reference to social facts alone, without resort to any evaluative argument". *Ibidem*, p. 211.

4 See, for example, Raz, Joseph, *Ethics in the Public Domain*, ch. 10; Raz, Joseph, *The Authority of Law*, Oxford, Clarendon Press, 1979, ch. 3.

5 See, for example, Coleman, Jules, "Negative and Positive Positivism", *The Journal of Legal Studies*, 11, 1982, pp. 139-164; Hart, H. L. A., *The Concept of Law*, 2nd. ed., New York, Oxford University Press, 1997, postscript.

justify the practices of the legal system.[6] Since the notion of justification on which Dworkin relies is a normative notion, a consequence of Dworkin's view is that the content of the law depends on value facts.

Understanding and resolving the debate between positivists and anti-positivists requires understanding the nature of the relevant determination relation – the relation between determinants of legal content and legal content. The debate, as noted, concerns whether law practices are the sole determinants of legal content. It is difficult to see how one can systematically address the question whether A facts are the sole determinants of B facts without understanding what kind of determination is at stake. But the positivist/anti-positivist debate has so far been conducted with almost no attention to this crucial issue.

A preliminary point is that the determination relation with which we are concerned is primarily a metaphysical, or constitutive, one, and only secondarily an epistemic one: the law-determining practices *make* the content of the law what it is. To put it another way, facts about the content of the law ("legal-content facts") obtain *in virtue of* the law-determining practices. It is only because of this underlying metaphysical relation that we ascertain what the law is by consulting those practices.

A second preliminary point, which should be uncontroversial, is that no legal-content facts are plausibly metaphysically basic or ultimate facts about the universe, facts for which there is nothing to say about what makes them the case. Legal-content facts, like facts about the meaning of words or facts about international exchange rates (*e. g.*, that, at a particular time, a UK pound is worth 1.45 U. S. dollars), hold in virtue of more basic facts. The important implication for present purposes is that the full story of how the determinants of legal content make the law what it is cannot take any legal content as given. It will not be adequate, for example, to hold that law practices plus some very basic legal-content facts (for example, legal propositions concerning the relevance of law practices to the content of the law) together make the law what it is, for such an account fails to explain what it is in virtue of which the very basic legal-content facts obtain.

Descriptive facts about what people said and did (and thought) in the past are among the more basic facts that determine the content of the law. I claim that the content of the law depends not just on descriptive facts,

6 See Dworkin, Ronald, *Law's Empire*, Cambridge, Belknap Press, 1986.

but on value facts as well. Given the plausible assumption that fundamental[7] value facts are necessary rather than contingent, there is, however, a difficulty about expressing my claim in terms of counterfactual theses or theses about metaphysical determination. Even if the value facts are relevant to the content of the law, it is still true that the content of the law could not be different from what it is without the descriptive facts being different (since it is impossible for the normative facts, being necessary, to be different from what they are). Necessary truths cannot be a non-redundant element of a supervenience base. Hence, both positivists and anti-positivists can agree that descriptive facts alone metaphysically determine the content of the law.[8]

In order to express the sense in which the content of the law is claimed to depend on value facts, we therefore need to employ to a notion different from, and richer than, metaphysical determination. We can say that the full metaphysical explanation of the content of the law (of why certain legal propositions are true) must appeal to value facts. I earlier put the point metaphorically by saying that if God destroyed the value facts, the law would have no content. The epistemic corollary is that working out what the law is will require reasoning about value.

As we will see, a full account of what it is in virtue of which legal-content facts obtain has to do more than describe the more basic facts

[7] The point of the qualification "fundamental" is to distinguish basic or pure value facts–that, say, harm is a relevant moral consideration – from applied or mixed value facts–that returning the gun to John tomorrow would be wrong. The fundamental value facts are plausibly metaphysically necessary, while the applied value facts obviously depend on contingent descriptive facts as well as on fundamental value facts. This qualification does not affect the point in the text since the contingent facts are encompassed in the supervenience base of descriptive facts. That is, if the fundamental value facts supervene on the descriptive facts, the applied value facts will do so as well.

[8] The term "metaphysical determination" is typically used in a way that implies nothing about the order of explanation or about relative ontological basicness. In this sense, that the A facts metaphysically determine the B facts does not imply that the B facts obtain in virtue of the obtaining of the A facts. Positivists and anti-positivists can agree not only that descriptive facts alone metaphysically determine the content of the law, but also that the obtaining of the relevant descriptive facts is part of the explanation of the obtaining of legal—content facts. In this paper, we will be concerned only with cases in which the putative determinants are more basic than and part of the explanation of the determined facts. For convenience, I will therefore say that the A facts metaphysically determine the B facts only when the B facts obtain at least in part in virtue of the obtaining of the A facts.

that are the metaphysical determinants of legal content. The relevant determination relation is not bare metaphysical determination. (As we have just seen, if that were the relevant relation, there would be no debate between the positivists and the anti-positivists. Positivists would win the debate trivially, since the descriptive facts alone fix the content of the law.) I argue for a particular understanding of the metaphysical relation (between the determinants and the legal content that they determine), which I call *rational determination*. Rational determination, in contrast with bare metaphysical determination, is necessarily reason-based (in a sense that I elaborate in section II.2).

A quick way to grasp the basic idea is to consider the case of aesthetic facts. Descriptive facts metaphysically determine aesthetic facts. A painting is elegant in virtue of facts about the distribution of color over the surface (and the like). But arguably there need not be reasons that explain why the relevant descriptive facts make the painting elegant. We may be able to discover which descriptive facts make paintings elegant (and even the underlying psychological mechanisms), but even if we do, those facts need not provide substantive aesthetic reasons why the painting is elegant (as opposed to causal explanations of our reactions). On this view, it may just be a brute fact that a certain configuration of paint on a surface constitutes or realizes a painting with certain aesthetic properties (as noted below, facts about humor provide an even clearer example). In contrast, if it is not in principle intelligible why the determinants of legal content —the relevant descriptive facts— make the law have certain content, then it does not have that content.

Rational determination is an interesting and unusual metaphysical relation because it involves the notion of a reason, which may well be best understood as an epistemic notion. If so, we have an epistemic notion playing a role in a metaphysical relation. (Donald Davidson's view of the relation between the determinants of mental content and mental content is plausibly another example of this general phenomenon).[9] For this reason, I believe that the rational-determination relation is of independent philosophical interest.

My main goal in this paper, however, is to show that given the nature of the relevant kind of determination, law practices-understood as descriptive facts about what people have said and done-cannot themselves

[9] See notes 18 and 19 below.

determine the content of the law. Value facts are needed to determine the legal relevance of different aspects of law practices. I therefore defend an anti-positivist position, one that is roughly in the neighborhood of Dworkin's, on the basis of very general philosophical considerations unlike those on which Dworkin himself relies.[10]

We have two domains of facts, a higher-level legal domain and a lower-level descriptive domain. It is, I claim, a general truth that a domain of descriptive facts can rationally determine facts in a dependent, higher-level domain only in combination with truths about which aspects of the descriptive, lower-level facts are relevant to the higher-level domain and what their relevance is. Without the standards provided by such truths, it is indeterminate which candidate facts in the higher-level domain are most supported by the lower-level facts. There is a further question about the source or nature of the needed truths (about the relevance of the descriptive facts to the higher-level domain). In the legal case, these truths are, I will suggest, truths about value.

The basic argument is general enough to apply to any realm in which a body of descriptive facts is supposed to make it the case *by rational determination* that facts in a certain domain obtain. For example, if the relation between social practices, understood purely descriptively, and social rules is rational determination, the argument implies that social practices cannot themselves determine the content of social rules. (At that point, we reach the further question of the source of the truths needed in the case of social rules; the answer may differ from that in the legal case). Hence, the argument is of interest well beyond the philosophy of law. In this paper, I will largely confine the discussion to the legal case.

In section II, clarify the premises of the argument and explain that they should not be controversial. In section III, examine why there is a problem of how legal content is determined. The content of the law is not simply the meanings of the words (and the contents of the mental

[10] Dworkin's theory of law depends on a view about the nature of "creative interpretation". In particular, he argues that to interpret a work of art or a social practice is to try to display it as the best that it can be of its kind. See Dworkin, *Law's Empire*, *cit.*, footnote 6, pp. 49-65. Dworkin's central argument for the position that legal interpretation is an instance of this general kind of interpretation is that this position is the best explanation of "theoretical disagreement" in law. *Ibidem*, pp. 45-96; see also Dworkin, "Law as Interpretation," in *The Politics of Interpretation*, Mitchell, W. J. T. (ed.), Chicago, University of Chicago Press, 1983.

states) that are uttered in the course of law practices. Something must determine which elements of law practices are relevant and how they combine to determine the content of the law. Next, in section IV, argue that law practices themselves cannot determine how they contribute to the content of the law. In section V, consider and respond to three related objections. Finally, in section VI, examine what the argument has established about the relation between law and value.[11]

II. The Premises

In this section, I set out the two premises of the argument and make a number of clarifications. The second premise will require a great deal more discussion than the first. I take both premises to be relatively uncontroversial in many contemporary legal systems, including those of, for example, the United States and the United Kingdom.

1. *Premise 1: Determinate Legal Content*

The first premise of the argument is the following:

(D) In the legal system under consideration, there is a substantial body of determinate legal content.

My use of the term 'determinate' (like my use of 'determine') is metaphysical, not epistemic. That is, for the law to be determinate on a given issue is not for us to be able to ascertain what the law requires on that issue (or still less for there to be a consensus), but for there to be a fact of the matter as to what the law requires with respect to the issue. Thus, when I say that there is a substantial body of determinate legal content, I mean roughly that there are many true legal propositions (in the particular legal system). What do I mean by "legal propositions"? [12] A legal proposition is a legal standard or requirement. An example might be the proposition that any person who, by means of deceit, intentionally deprives another person of property worth more than a thousand dollars shall be imprisoned for not more than six months. For a legal proposition

[11] There are interesting connections between this paper and G. A. Cohen's recent "Facts and Principles," *Philosophy and Public Affairs*, 31, 2003, pp. 211-245. Cohen's paper came to my attention too late for me to explore the connections here, however.

[12] The term is Dworkin's. See Dworkin, *Law's Empire*, *cit.*, footnote 6, p. 4.

to be true in a particular legal system is for it to be a true statement of the law of that legal system.[13] D is consistent with the law's being indeterminate to some extent, and it is deliberately vague about how much determinacy there is. I think it is obvious that D is true in the legal systems of many contemporary nations.

2. *Premise 2: The Role of Law-Determining Practices*

The second premise is:

(L) The law-determining practices in part determine the content of the law.

The basic idea behind L is that the law depends on the law practices. L thus rules out, for example, the extreme natural law position that the law is simply whatever morality requires. I take it, however, that very few contemporary legal theorists would defend this position or any other position that makes law practices irrelevant to the content of the law.

By the term "aw practices"(or, more fully, "Law—determining practices" I mean to include *at least* constitutions, statutes, executive orders, judicial and administrative decisions, and regulations. Although it is unidiomatic, I will refer to a particular constitution, statute, judicial decision (etcetera) as *a law practice*. Hence, a practice, in my usage, need not be a habitual or ongoing pattern of action. I need to clarify what I mean by saying that a practice can be, for example, a statute. Lawyers often talk as if a statute (or other law practice) is simply a text. It is of course permissible to use the word "statute" (or "Constitution", "judicial decision", etcetera) to refer to the corresponding text, and I will occasionally write in this way. But if law practices are to be determinants of the content of the law, the relevant practice must be, for example, the fact that a majority of the members of the legislature voted in a certain way with respect to a text (or, alternatively, the event of their having done so), not merely the text itself. So as I will generally use the term, "statute" ("Constitution", etcetera) is shorthand for a collection of facts (or events),[14] not a text.

In general, then, law practices consist of ordinary empirical facts about what people thought, said and did in various circumstances.[15] For

13 I will usually omit the qualification about a particular legal system.

14 I will hereafter ignore the possibility of taking law practices to be composed of events rather than facts.

15 Hypothetical decisions arguably play a significant role in determining the content of the law, but for purposes of this paper they will largely be ignored. Susan Hurley charac-

example, law practices potentially include the facts that, in a particular historical context, a legislative committee issued a certain report, various speeches were made in a legislative debate, a bill that would have repealed a statute failed to pass, a concurring judge issued a certain opinion, and an executive official announced a particular view of a statute.[16] Once I have clarified the claim that law practices partially determine the content of the law, I will be able to say something more precise about what counts as a law practice.

When L says that law practices determine (in part) the content of the law, what sense of "determine" is involved? As noted above, a preliminary point is that L's claim is constitutive or metaphysical, not epistemic. That is, it is not a claim that we use law practices to ascertain what the content of the law is, but that such practices make it the case that the content of the law is what it is.

I maintain that the relevant kind of determination is not bare metaphysical determination, but what we can call *rational determination*. The A facts rationally determine the B facts just in case the A facts metaphysically determine the B facts *and* the obtaining of the A facts makes intelligible or rationally explains the B facts' obtaining. Thus, L is the conjunction of two doctrines, a *metaphysical-determination doctrine* and a *rational-relation doctrine*. Let me elaborate.

I will make the (uncontroversial, I hope) assumption that there are facts that 1) are ontologically more basic than facts about legal content and 2) metaphysically determine that the content of the law is what it is. The *metaphysical-determination doctrine* is that these more basic facts that determine the content of the law non-redundantly include law practices.

Metaphysical determination can be brute. If the A facts are more basic facts that metaphysically determine the B facts, there is a sense in which

terizes hypothetical decisions as hypothetical cases that have a settled resolution. See Hurley, S. L., "Coherence, Hypothetical Cases, and Precedent," *Oxford Journal of Legal Studies*, 10, 1990, pp. 221-251. Another possibility is to include any hypothetical case that has a determinate right answer, even if there is disagreement on its resolution. There would be disagreement about which hypothetical cases had determinate right answers and therefore about which were determinants of legal content.

16 Nothing turns on how we individuate practices, at least in the first instance. For example, a legislative committee's issuance of a report could be considered part of the circumstances in which a majority of the legislature voted for a statute or could be considered a separate practice. Once the roles of different elements of law practices are determined, there may be a basis for individuation.

the A facts explain the B facts. For the A facts are more basic facts, the obtaining of which entails that the B facts obtain. But there need be no explanation of why the obtaining of particular A facts has the consequence that it does for the B facts. To dramatize the point, even a perfectly rational being may not be able to see why it is that particular A facts make particular B facts obtain.

The metaphysical-determination doctrine is not enough to capture our ordinary understanding (which L attempts to articulate) of the nature of the determination relation between the law practices and the content of the law. We also need *the rational-relation doctrine*, which holds that the relation between the determinants of legal content and legal content is reason-based. In the relevant sense, a reason is a consideration that makes the relevant explanandum intelligible.[17] Here is one way to put the point. There are indefinitely many possible mappings, from complete sets of law practices to legal content (to complete sets of legal propositions). As far as the metaphysical-determination doctrine goes, it could simply be arbitrary which mapping is the legally correct one. In other words, the connection between a difference in the practices and a consequent difference in the content of the law could be brute. For example, it is consistent with the truth of the metaphysical-determination doctrine that, say, the deletion of one seemingly unimportant word in one sub-clause of one minor administrative regulation would result in the elimination of all legal content in the United States – in there being no true legal propositions in the U. S. legal system (though there is no explanation of why it would do so). By contrast, according to the rational-relation doctrine, the correct mapping must be such that there are reasons why law practices have the consequences they do for the content of the law.

To put it metaphorically, the relation between the law practices and the content of the law must be transparent.[18] (For the relation to be

[17] I will not attempt to spell out the relevant notion of a reason more fully here. One possibility is that the best way to do so is in terms of idealized human reasoning ability. For example, the idea might be that practices yield a legal proposition if and only if an ideal reasoner would see that they do. The notion of a reason would thus be an epistemic notion. In that case, L would imply that the metaphysics of law involves an epistemic notion. That is, what the law *is* would depend in part on what an ideal human reasoner would find intelligible.

[18] A useful comparison can be made to certain well—known positions in the philosophy of mind. Donald Davidson's radical interpretation approach to mental and linguistic content presupposes that behavior determines the contents of mental states and the mean-

opaque would be for it to be the case that any change in law practices could have, so far as we could tell, any effect on the content of the law. The effects on the content of the law could be unfathomable and unpredictable, even if fully determinate).

It bears emphasis that what must be rationally intelligible is not the content of the law but the relation between determinants of legal content and legal content. Thus, L holds *not* that the content of the law must be rational or reasonable, but that it must be intelligible that the determinants of legal content make the content of the law what it is. 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.

In some cases in which more basic facts metaphysically determine higher-level facts, the more basic facts *a priori* entail the higher-level facts. Such cases provide a clear example of rational determination, for if the relation between the more basic facts and the higher-level facts is *a priori*, then *a fortiori* it is rationally intelligible (the converse may not be true. It may be that the way in which the A facts determine the B facts can be intelligible without its being the case that the B facts are an *a priori* consequence of the A facts). Before Saul Kripke showed that there are necessary *a posteriori* truths,[19] philosophers assumed that all necessary truths were *a priori*. If that assumption were correct, the metaphysical-determination doctrine would imply the rational-relation doctrine. Once we grant, however, that there are necessary truths that are not a priori, the rational-relation doctrine is a further premise. (I think it is plausible that law practices a priori entail the content of the law. But for the purposes of my argument, I need only the arguably weaker claim that law practices rationally determine the content of the law).

The rational-relation doctrine does not build in any assumption that there must be normative (or evaluative) reasons for the law's content —that it must be good for the law to have particular content—. This is important because otherwise L would build in the conclusion of my ar-

ing of linguistic expressions in a way that must be intelligible or transparent. Davidson, "Radical Interpretation" and "Belief and the Basis of Meaning," in his *Inquiries into Truth and Interpretation*, Oxford, Clarendon Press, 1984. Similarly, Saul Kripke's "Kripkenstein" discussion presupposes that we must be able to "read off" the contents of mental states from the determinants of content. Kripke, *Wittgenstein on Rules and Private Language*, Oxford, Blackwell, 1982, pp. 24, 29. See note 26 below.

19 Kripke, Saul, *Naming and Necessity*, Oxford, Blackwell, 1972.

gument. I have used the term "reason" in explaining L, but the reasons in question are considerations that make it intelligible why the law practices have certain consequences for legal content; the rational-relation doctrine leaves it open what kinds of considerations can make a conclusion intelligible. That *a priori* entailment is an example of the necessary kind of rational relation makes clear that the rational—relation doctrine does not assume that the reasons in question must be normative. Premises can a priori entail a conclusion without providing normative reasons.

For example, conceptual truth is capable of providing reasons in the relevant sense. (That John is walking entails that John is moving. This entailment is rationally intelligible in virtue of the conceptual truth that one who is walking is moving). Hence, L is consistent with the possibility that conceptual truths that are not value facts determine which mappings or kinds of mappings from law practices to legal content are acceptable. For example, it might be claimed that it follows from the concept of law that a validly enacted statute makes true those propositions that are the ordinary meanings of the sentences of the statute. On this view, that a statutory text says that any person who drives more than sixty-five miles an hour commits an offense makes it intelligible —in virtue of the concept of law— that the law requires that one not drive more than sixty-five miles an hour.

The general point, again, is that it is a matter for argument, not something presupposed by L, what kinds of considerations make it intelligible that one legal proposition is more supported than another by the determinants of legal content. In particular, L does not presuppose that one mapping from law practices to legal content can be better than another only to the extent that it better captures our reasons for action or only to the extent that it is morally better or better in some other dimension of value.[20]

Why have I made the qualification that law practices *partially* determine the content of the law? Law practices must determine the content of the law. But, my argument continues, there are many possible ways in which practices could determine the content of the law. (Put another way, there are many functions that map complete sets of law practices to

[20] At a later stage of analysis, we might find that there are restrictions on what kind of reasons law practices must provide. For example, it might turn out that legal systems have functions and that in order for a legal system to perform its functions properly, the reasons provided by law practices must provide reasons for action. See the last paragraph of section VI, 1 below. L does not presuppose any such restrictions, however.

legal content.) Something other than law practices —X, for short— must help to determine how practices contribute to the content of the law (that is, to determine which mapping is the legally correct one). So a full account of the metaphysics of legal content involves X as well as law practices.

This conclusion can be expressed in two equivalent ways. We could say that practices are the *only* determinants of legal content but that an account of legal content must do more than specify the determinants. This formulation is particularly natural if X consists of necessary truths.[21] (A related advantage is that this way of talking highlights that practices are what typically vary, producing changes in the content of the law.) The second formulation would say that X and law practices are *together* the determinants of the content of the law. Because it is convenient to express the paper's thesis by saying that X plays a role in determining legal content (and because I want to leave open the possibility that X may vary), this formulation seems preferable, and I will adopt it as my official formulation.Accordingly, I will say that law practices are only some of the determinants of the content of the law. (For brevity, however, I will sometimes omit the qualification 'partially' and write simply that law practices determine the content of the law.)

3. *Law Practices as Descriptive Facts*

Let me now return to the question of what counts as a law practice. I have said that law practices consist of ordinary empirical facts about what people have thought, said, and done, including paradigmatically facts about what members of constitutional assemblies, legislatures, courts, and administrative agencies have said and done. I want to be clear about the exclusion of two kinds of facts. First, law practices do not include legal-content facts. Second, law practices do not include facts about value, for example, facts about what morality requires or permits.[22]

21 See text accompanying notes 8 and 9 above.

22 By "facts", I mean simply true propositions. Thus, facts about value, or value facts, are true normative or evaluative propositions, such as true propositions about what is right or wrong, good or bad, beautiful or ugly. The fact that people value something or believe something is valuable is *not* a value fact, but a descriptive fact about people's attitudes. For example, the fact, if it is one, that accepting bribes is wrong, is a value fact;

The law practices thus consist of non-legal-content, descriptive facts. (For convenience, I will generally write simply 'descriptive facts' rather than "non-legal-content, descriptive facts". This shorthand does not reflect a presupposition that legal-content facts are value facts.) Let me explain the reasons for the two exclusions.

As I said, I am assuming that the content of the law is not a metaphysically basic aspect of the world but is constituted by more basic facts. The reason for the first exclusion —of legal-content facts— is that law practices are supposed to be the determinants of legal content, not part of the legal content that is to be determined.

Suppose an objector maintained that the law practices that determine legal content are themselves laden with legal content. It is certainly natural to use the term "law practices" in this way. After all, the fact that the legislature passed a bill is legal-content laden: it presupposes legal-content facts about what counts as a legislature and a bill. Since legal-content facts are not basic, however, there must be non-legal-content facts that constitute the legal-content-laden practices. At this point, we will have to appeal to descriptive facts about what people thought, said, and did – the facts that I am calling "law practices". For example, the fact that a legislature did such and such must hold in virtue of complex descriptive facts about people's behavior, and perhaps also value facts. (If, in order to account for legal-content-laden practices, we have to appeal not merely to descriptive facts, but also to value facts, so much the worse for the positivist thesis that the content of the law depends only on descriptive facts.) The convenience of talking as if law practices consisted in legal-content-laden facts about the behavior of legislatures, courts, and so on should not obscure the fact that there must be more basic facts in virtue of which the legal-content facts obtain. To build legal-content facts into law practices would beg the question at the heart of this paper – the question of the necessary conditions for law practices to determine the content of the law. (For ease of exposition, I will continue to use legal-content-laden characterizations of the law practices, but the law

the fact that people value honesty is a descriptive fact. The paper does not attempt to address a skeptic who maintains that there are no true propositions about value. One could use an argument of the same form as mine to argue that there must be value facts – for without them there would not be determinate legal requirements. But a skeptic about value facts would no doubt take such an argument to be a case of the legal tail wagging the value dog.

practices should, strictly speaking, be understood to be the underlying descriptive facts in virtue of which the relevant legal-content facts obtain).

It is uncontroversial that certain kinds of facts are among the supervenience base for legal content: roughly speaking, facts about what constitutional assemblies, legislatures, courts, and administrative agencies did in the past. Of course, as just noted, such characterizations are legal-content-laden and are thus shorthand for non-legal-content characterizations of the law practices. (I do not mean, of course, that it is uncontroversial exactly which facts of these kinds are relevant; I'll return to this point shortly). There are at least two kinds of controversy, however, about the determinants of legal content.

First, it is controversial whether value facts are among the determinants of content. The reason for the second exclusion —the exclusion of value facts— is that the paper tries to argue from the uncontroversial claim that law practices are determinants of the content of the law to the conclusion that value facts must play a role in determining the content of the law. If law practices were taken to be value-laden, it would no longer be uncontroversial that they are determinants of legal content. (On the other hand, even those theorists who think that value facts are needed to determine the content of the law can accept that descriptive facts also play a role). Moreover, unless we separate the descriptive facts from the value facts, we cannot evaluate whether the descriptive facts can themselves determine the content of the law. In sum, by understanding law practices to exclude value facts, I ensure that L is uncontroversial, and I prepare the way for my argument that descriptive facts alone cannot determine the content of the law.

The second kind of controversy about the determinants of legal content is controversy over precisely which descriptive facts are determinants. I have mentioned some paradigmatic determinants of legal content. But there are other kinds of descriptive facts, for example, facts about customs, about people's moral beliefs, about political history, and about law practices in other countries that are arguably among the determinants of legal content. Also, somewhat differently, it is controversial which facts about judicial, legislative, or executive behavior are relevant. There can be debate, for example, about the relevance of legislative history, intentions of legislators and of drafters of statutes, legislative findings, judicial *obiter dicta*, and executive interpretations of statutes. I propose to

deal with this second kind of controversy by leaving our understanding of law practices open and non-restrictive.

There are several reasons for this approach. First, my argument is that practices, understood as composed of descriptive facts, cannot themselves determine the content of the law. If I begin with a restrictive understanding of practices, my argument will be open to the reply that I failed to include some of the relevant facts. For this reason, I want to be liberal about which descriptive facts are part of law practices. Second, my argument will not depend on exactly which descriptive facts make up law practices. Rather, I will make a general argument that descriptive facts —in particular, facts about what people have done and said and thought— cannot by themselves determine the content of the law. Therefore, it will not matter precisely which such facts are included in law practices. Third, my view is ultimately that the question of which facts are part of law practices is-like the question of how different aspects of law practices contribute to the content of the law-dependent on value facts. (Indeed, I will often treat the two questions together as different aspects of the general question of the way in which law practices determine the content of the law.) As we will see, that we cannot in an uncontroversial way specify which are law practices and which are not is one consideration in support of my argument for the necessary role of value. All we need to begin with is some rough idea of law practices, which can be over-inclusive.

In sum, let law practices include, in addition to constitutions, statutes, and judicial and administrative decisions, any other non-legal-content descriptive facts that turn out to play a role in determining the content of the law.[23] Which facts these are and what role they play is controversial, so we can begin with a rough and inclusive understanding of law practices. One aspect of figuring out how law practices contribute to the content of the law will be figuring out which facts make a contribution and which do not. But there is no reason to expect a clean line between law practices and other facts.[24]

[23] This proviso does not make L the tautological claim that the determinants of legal content determine legal content. L says that constitutions, statutes, judicial decisions, and so on are (non—redundantly) among the determinants of content.

[24] One natural understanding of "law practices" is more restrictive than the way I use the term. According to this understanding, law practices are limited to (facts about) what legal institutions and officials do in their official capacities. If we used the term "law

The exclusion of value facts should not be taken to suggest that law practices are to be understood in solely physical or behavioral terms. To the contrary, as I explain in the next section, I take for granted the mental and linguistic contents involved in law practices. In other words, law practices include the facts about what the actors believe, intend, and so on, and about what their words mean.

4. *Why L Should be Uncontroversial*

The metaphysical-determination doctrine should be relatively uncontroversial, certainly for those who accept that there are determinate legal requirements. Positivists, Dworkinians, and contemporary natural law theorists, as well as practicing lawyers and judges, accept that constitutions, statutes, and judicial and administrative decisions are (non-redundant) determinants of the content of the law. That law practices also may include other descriptive facts to the extent that those facts are determinants of the content of the law obviously cannot make the metaphysical-determination doctrine controversial.

More generally, we began with the premise that there are determinate legal requirements. What makes them *legal* requirements is that they are determined, at least in part, by law practices. Contrast the requirements of morality (or, to take a different kind of example, of a particular club). If law practices did not determine legal content, there could still be moral requirements and officials' whims, but there would be no legal requirements. In order to think differently, one would have to hold a strange view of the metaphysics of law according to which the content of the law is what it is independently of all the facts of what people said and did that make up law practices, and law practices are at best evidence of that content. So I think it should be uncontroversial that law practices are among the determinants of the content of the law.

As to the rational-relation doctrine, it is fundamental to our ordinary understanding of the law and taken for granted by most legal theory, though seldom articulated. The basic idea is that the content of the law is in principle accessible to a rational creature who is aware of the relevant

practices" in this natural way, we would need, in addition to the category of law practices, a category of other descriptive facts that play a role in determining the content of the law.

law 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 law practices. In other words, that the law practices support *these* legal propositions over all others is always a matter of *reasons* – where reasons are considerations in principle intelligible to rational creatures. (A corollary is that, to the extent that the law practices do not provide reasons supporting certain legal propositions over others, the law is indeterminate.)

I will not attempt to defend the rational-relation doctrine fully here, but will mention a few considerations. Suppose the A facts metaphysically determine the B facts, but the relation between the A facts and the B facts is opaque. In that case, how could we know about the B facts? One possibility is that we have access to the B facts that is independent of our knowledge of the A facts. An example might be the relation between the microphysical facts about someone's brain and the facts about that person's conscious experience. Suppose that the microphysical facts metaphysically determine the facts about the person's conscious experience, but that the relation is opaque. The opaqueness of the relation does not affect the person's ability to know the facts about his conscious experience because we do not, in general, learn about our conscious experience by working it out from the microphysical facts. (Moreover, since we have independent knowledge of conscious experience, we might be able to discover correlations between microphysical facts and conscious experience, even if those correlations were not intelligible even in principle.) To take a different kind of example, the microphysical facts may metaphysically determine the facts about the weather, and the relation may be opaque, but, again, we do not learn about the weather by working it out from the microphysical facts.

A second possibility is that we do work out the B facts from the A facts, but that we have a non-rational, perhaps hard-wired, capacity to do so. For example, it is plausible that the facts about what was said and done (on a particular occasion, say) determine whether what was said and done was funny (and to what degree and in what way). And we do work out whether an incident was funny from the facts about what was done and said. It is plausible, however, that the relation between what was said and done and its funniness is not necessarily transparent to all rational creatures; our ability to know what is funny may depend on species-specific tendencies. That is, there may not be reasons that make the

humor facts intelligible; it may just be a brute fact that humans find certain things funny.[25]

Law seems different from both of these kinds of cases. First, our only access to the content of the law is through law practices. It is not as if we can find out what the law is directly or through some other route. And the whole enterprise of law-making is premised on the assumption that the behavior of legislators, judges, and other law-makers will have understandable and predictable consequences for the content of the law.

Second, we are able to work out what the law is and to predict the effect on the law of changes in law practices through *reasons*, not through some non-rational human tendency to have correct law reactions to law practices.

When lawyers, judges, and law professors work out what the law is, they give reasons for their conclusions. Indeed, if we find that we cannot articulate reasons that justify a provisional judgment about what the law is in light of law practices, we reject the judgment. By contrast, it is notoriously difficult to explain why something is or is not funny, and we do not generally hold our judgments about humor responsible to our ability to articulate reasons for them. A related point is that we believe that we could teach any intelligent creature that is sensitive to reasons how to work out what the law is.

It might be objected that although the epistemology of law is reason-based, the metaphysics might not be. It is difficult to see how such an objection could be developed. For present purposes, I will simply point out that when legal practitioners give reasons for their conclusions about what the law is they believe that they are not merely citing evidence that is contingently connected to the content of the law; rather, they believe that they are giving the reasons that make the law what it is. The point is not that lawyers believe themselves to be infallible. Rather, they believe that, when they get things right, the reasons that they discover are not merely reasons for believing that the content of the law is a

[25] Compare the issue of how facts about our use of words determine their meaning. Natural languages are a biological creation. Although many philosophers have thought differently (see note 19 above), we cannot take for granted that the correct mapping from the use of words to their meaning will be based on reasons. How, it may be objected, would we then be able to work out, from their use of words, what others mean? The answer may simply be that we have a species—specific, hard—wired mechanism that rules out many incorrect mappings that are not ruled out by reasons. In that case, an intelligent creature without that mechanism would not be able to work out what words mean.

particular way, but the reasons that *make* the content of the law what it is. Although they would never put it this way, lawyers take for granted that the epistemology of law tracks its metaphysics. And the epistemology of law is plainly reason-based.

Legal theorists generally take for granted some version of the claim that the relation between law practices and the content of the law is reason-based. An example is H. L. A. Hart's argument that the vagueness and open texture of legal language have the consequence that the law is indeterminate.[26] If bare metaphysical determination were all that was at issue —if it were not the case that the relation between practice and content were necessarily intelligible— the vagueness of language would in no way support the claim that law was indeterminate. Similarly, when legal realists or Critical Legal Studies theorists argue that the existence of conflicting pronouncements or doctrines in law practices results in underdetermination of the law, their arguments would be beside the point if what was at stake were not rational determination.[27]

In general, the large body of legal theory that has explored the question of whether law practices are capable of rendering the law determinate (and, if so, how determinate) presupposes that law practices determine the content of the law in a reason-based way. If the relation between law practices and the content of the law could be opaque, any set of law practices would be capable, as far as we would be able to judge, of determining any set of legal propositions. (As long as there are as many possible sets of law practices as there are possible sets of legal propositions, there is no barrier to the content of the law's being fixed by the practices, and we would have no warrant to rely on our assessment of other putative prerequisites for practices to determine the content of the law.) In sum, the doctrine that law practices rationally determine the content of the law captures a basic conviction about the law that is shared by law-makers, lawyers, and legal theorists and supported by the epistemology of law.

Why does it matter to my argument that the relation between law practices and the content of the law is reason-based? The paper explores

26 Hart, *The Concept of Law*, *cit.*, footnote 5, ch. 7.

27 See, *e. g.*, Andrew Altman, "Legal Realism, Critical Legal Studies, and Dworkin," *Philosophy and Public Affairs*, 15, 1986, pp. 205-235; Mark Kelman, "Interpretive Construction in the Substantive Criminal Law," *Stanford Law Review*, 33, 1981, pp. 591-673.

the necessary conditions for law practices' making the content of the law what it is. The central argument is that descriptive facts cannot determine their own rational significance – what reasons they provide. The argument therefore bdepends on the claim that the descriptive facts determine the content of the law in a reason—based way. It turns out that value facts are needed to make it *intelligible* that law practices support certain legal propositions over others.[28]

5. *The Scope of the Argument*

Premises D and L tell us something about the scope of my argument. The argument is sound only for legal systems in which D and L are true. So my conclusions are limited to legal systems in which there are legal requirements that are determined in part by law practices. If there is a legal system in which there are no determinate legal requirements, my argument would not apply to it. Similarly, if there is a legal system in which law practices, understood as (facts about) various people's sayings and doings, do not play a role in determining the content of the law, my argument would not apply to it. For example, perhaps there could be a legal system in which the content of the law is determined exclusively by the content of morality or exclusively by divine will. In this paper, I do not address questions of the necessary conditions for something's counting as a legal system. It might be argued that a substantial body of legal requirements that are determined by practices of various officials or institutions is a necessary condition for the existence of a legal system, but I do not intend to pursue such an argument.

III. Is there a Distinctively Legal problem of Content?

We begin with our two premises: that the law has determinate content and that law practices in part determine that content. Our question is: What conditions must be satisfied in order for law practices to determine legal propositions?

[28] Suppose that the relation between law practices and the content of the law were necessarily intelligible only in a way that depends on some human—specific tendency. As long as practices must provide considerations that are *intelligible* (even if only to humans), a version of my argument should still go through.

As I said above, since we are interested in problems of the determination of content only to the extent that they are peculiarly legal, we can take for granted the content of sentences and propositional attitudes.[29] So the question is: How a collection of facts about what various people did and said (including the facts about what they intended, believed, preferred, and hoped, and about what their words meant) determine which legal propositions are true?

At this point, however, it must be asked whether there is a peculiarly legal problem of content. Once we take for granted the relevant mental and linguistic content, it may seem that no problem of legal content remains. Legal content is simply the content of the appropriate mental states and texts. In this section, I consider this possibility and argue that it is not at all plausible. The ordinary mental and linguistic content of utterances and mental states of participants in law practices —*non-legal content*, for short— does not automatically endow the law with legal content. Something must determine which aspects of law practices are relevant and how they together contribute to the content of the law.

In the next section, I consider the possibility that, given the content of the relevant utterances and attitudes, law practices themselves determine how they contribute to the content of the law and thus can unilaterally determine the content of the law. But before we turn to whether law practices can solve the problem of legal content, we need to see what the problem is – why the non-legal content of law practices does not provide the content of the law. That is the topic of this section.

In legal discourse, both ordinary and academic, constitutional or statutory provisions and judicial decisions are often conflated with rules or legal propositions. For example, lawyers will sometimes talk interchangeably of a statutory provision and a statutory rule, or of a judicial decision and the rule of that case. In non-philosophical contexts, there is generally no harm in this kind of talk. Since our question, however, is how law practices determine the content of the law, it is crucial not to confuse law practices with legal propositions. For example, if one assumed that a statute was the rule or proposition expressed by the words

29 There is no practical problem with taking these matters for granted and proceeding without a solution to basic problems concerning how linguistic and mental content are possible. These problems do not concern difficulties we encounter in practice in attributing linguistic and mental content; the difficulty is in saying what it is in virtue of which a linguistic expression or mental state has its content.

of the statute, one might think that there was no problem of how law practices could determine legal content, or one might think that the only problem was how to combine or amalgamate a large number of rules or propositions.

Although it would beg the question to take legal propositions for granted, we do have the propositions that are the content of the utterances and mental states of participants in law practices. What is wrong with the idea that those propositions constitute legal content, so that law practices, once they are understood to include facts about mental and linguistic content, automatically have legal content?

I will begin with the least serious problems -those concerning the attribution of non-legal content. Although we are normally able to attribute attitudes to people based on what they say and do and to attribute standard meanings to a large number of sentences of a language we speak, there are difficulties in attributing non-legal content to aspects of a putative law practice. Here are a few examples.

First, when I say that we can take for granted mental and linguistic content, I mean that we need not ignore the mental and linguistic content that is available. We should not, however, assume that all of the contents of the mental states of all of the people involved in law practices are available. That would obviously be false. In general, what is available in the standard reports of law practices is not sufficient to attribute much in the way of attitudes to the people who actually performed the actions and made the utterances; the fact that a particular legislator voted for a bill or a certain judge signed an opinion is not in general sufficient to attribute beliefs, intentions, hopes, and so on to her. Moreover, the law restricts what *evidence* of the intentions and beliefs of legislators and judges is acceptable to determine the content of the law. Even when the intentions of a legislator or judge are relevant to the content of the law, it is not the case that, say, her private letters or diary may be a source of that intention. Something must determine which evidence of legally relevant attitudes is legally acceptable.

Second, though many sentences of natural languages have standard meanings, it is notorious that this is not true of some of the sentences uttered by those engaged in making law practices. The point here is *not* that, in legal contexts, linguistic expressions often have specialized meanings that are not straightforwardly connected to their ordinary meanings.

Rather, some of the contorted sentences in the law books have no standard meaning in a natural language.

Third, even when sentences taken alone have standard meanings, collections of those sentences may fail to do so. In other words, the property of having a standard meaning (on a notion of standard meaning appropriate for present purposes) is not closed under conjunction (for example, because context may introduce ambiguity into an otherwise unambiguous sentence).

Setting aside these problems with ascertaining non-legal content, we can turn to the more important question of the bearing of non-legal content on legal content. One problem is that the non—legal content of some elements of law practices has, or arguably has, little or nothing to do with the legal content determined by those practices. Consider sentences in statutory preambles, sentences in presidential speeches at bill-signing ceremonies, and sentences in judicial opinions that are not necessary to the resolution of the issue before the court. Another example is the actual, but unexpressed, hopes of the members of the legislature as to how the courts would interpret a statute. Countless sentences are written and spoken at different stages of law practice-making by people with myriad attitudes.[30] Something must determine which sentences' and attitudes' contents are relevant.

Another problem is that the contribution of a particular law practice to the content of the law may not be the meaning of any text or the content of any person's mental state. The actual attitudes of appellate judges may be irrelevant; instead the relevant question may be what a hypothetical reasonable person would have intended by the words uttered by the judges or what would be the best, or the narrowest, explanation of the result reached. Another possibility is that aspects of law practices that contribute to non-legal content in one way contribute to legal content in an entirely different way; facts about what was said and done may have peculiarly legal significance. An obvious example is that common words such as "malice" and "fault"are often used in legal dis-

[30] In the case of a judicial decision, for example, the possibly relevant sentences include sentences uttered by the parties to the controversy, by lawyers, and by judges to lawyers and other judges. They include sentences written by judges in orders and judicial opinions. Judicial opinions alone include a large number and variety of sentences: they state facts, give reasons, summarize, make general claims about the content of the law, state holdings; moreover, there are concurring and dissenting as well as majority opinions.

course in a technical sense. To take a more subtle instance, when a panel of several judges is badly split, it can be a complex and tricky matter to ascertain the relevance to legal content of the meanings of the words of the different judicial opinions.

Similarly, facts about the circumstances in which sayings and doings occurred that have little to do with the non-legal content of the people's attitudes and words may significantly affect the content of the law. For example, in a judicial decision, the fact that an issue is not in controversy arguably prevents the court's statements on that issue from making any contribution to the content of the law.

Even when the content of sentences and mental states is relevant to the content of the law, there can be no mechanical derivation of the content of the law. For example, how are conflicting contents to be combined? In general, there remains the problem of how the non-legal contents associated with different law practices interact with each other (and with other relevant aspects of law practices) to determine the content of the law.

We have surveyed a number of reasons why non-legal content —e meanings of sentences and contents of mental states— does not simply constitute legal content. But this way of thinking about the problem will have an artificial quality for those familiar with legal reasoning. The idea that the non-legal content of law practices constitutes their legal content presupposes roughly the following picture. Associated with each law practice is a text (and perhaps some mental states). Once we have the meanings of the texts and the contents of the mental states, each law practice will be associated with a proposition or set of propositions. Ascertaining the law on a particular issue is just a matter of looking up the propositions that are applicable to the issue. Even if this picture were accurate, we have discussed a number of reasons why non-legal content would not automatically yield legal content. But the problem is worse than these reasons would suggest. As I will now suggest, the whole picture is wrong-headed. Law practices do not determine the content of the law by contributing propositions, which then get amalgamated.

Here is the real problem of legal content. There are many different law practices with many different aspects or elements. There is an initial question of which facts are parts of law practices and which are not. Are preambles of bills, legislative findings, legislative committee reports, dissenting opinions, unpublished judicial decisions, customs, the Federalist Papers, and so on to be included in law practices?

In my view, this question is really just part of a second question: which aspects of, for example, judicial or legislative practices are relevant to the content of the law? Just to suggest the dimensions of the problem, here are some candidates for the relevant elements or aspects of practices. With respect to a judicial decision: the facts of the case, the judgment rendered, the words used by the court in the majority opinion, the reasons given for the outcome, the judges' beliefs, the judges' identities, the level and jurisdiction of the court; with respect to a legislative action: the words of the statute, the legislature's actual intention (if there is such a thing), the purposes that the words of the statute could reasonably be intended to implement, statements by the person who drafted the statute, speeches made during the legislative debate preceding passage, the circumstances in which the legislature acted, subsequent decisions not to repeal the statute.

Third, once we know which elements of practices are relevant, the problem of determining the content of the law is not simply a problem of adding or amalgamating the various relevant aspects of practices. One obvious point is that some elements of practices are far more important than others, and elements of practices matter in different ways. But, more fundamentally, as anyone familiar with legal reasoning knows, the content of the law is not determined by any kind of summing procedure, however complicated. For example, judicial decisions, constitutional provisions, and legislative history can affect what contribution a statute makes. It is not that those practices contribute propositions that are conjoined to a proposition contributed by the statute. The statute's correct interpretation may be determined by a potential conflict with a constitutional provision or by the outcome of cases in which courts have interpreted the same or related statutes.

To take a different kind of example, constitutional provisions, statutes, and judicial decisions can have an impact on the contribution of judicial and administrative decisions to the content of the law by affecting our understanding of the proper role of courts and administrative agencies. Or, differently, statutes can have an impact on what judicial decisions mean by making clear what the legislature cares about, thus affecting which differences between cases matter and consequently whether past precedents control the present issue. A final example is that the principle that a series of cases stands for is not the conjunction of the propositions announced in each case.

It is safe to conclude that the law does not automatically acquire content when actions, utterances, and sentences involved in law practices are attributed content. It is a mistake even to think that the issue is how to convert non-legal content into legal content. We need to reject the simplistic picture on which each law practice contributes to the content of the law a discrete proposition (or set of propositions), which is the result of converting the non-legal content of sentences and mental states into legal content. The bearing of non—legal content on the content of the law is not mechanical. Once we root out any idea of a mechanical conversion of non—legal content to legal content, it is clear that something must determine which aspects of law practices are relevant to the content of the law and what role those relevant aspects play in contributing to the content of the law.

IV. Can Law Practices Themselves Determine how they Contribute to the Content of the Law?

In this section, I consider the possibility that law practices can themselves determine how they contribute to the content of the law. I will argue that, without standards independent of practices, practices cannot themselves adjudicate between ways in which practices could contribute to the content of the law.

For convenience, let me introduce a term for a candidate way in which practices could contribute to the content of the law. I will call such a way *a model* (short for *a model of the role of law—determining practices in contributing to the content of the law*).[31] The rational—relation doctrine tells us that there are systematic, intelligible connections between practices and the content of the law. It thus guarantees that there are rules that, given any pattern of law practices, yield a total set of legal propositions. A model is such a rule or set of rules.

A model is the counterpart at the metaphysical level of a method of interpretation at the epistemic level. (A model's being correct in a given legal system is what makes the corresponding theory of interpretation true). Although the term is not ideal, I use "model" rather than 'method of interpretation' to signal that my concern is constitutive or metaphysical, not epistemic; that is, the issue is how practices make it the case that the

[31] My thanks to Nicos Stavropoulos for suggesting this term.

law's content is what it is, not how we can ascertain the law's content from law practices. Because it is more idiomatic, however, I will sometimes write in epistemic terms when discussing models.

(By way of analogy, it may be helpful to compare, on the one hand, the relation between practices and the content of the law with, on the other, the relation between words and the meaning of a sentence (or group of sentences). The meaning of a sentence depends in a systematic, intelligible way on the arrangement of constituent words; analogously, the content of the law —in a given legal system at a given time— depends on the pattern of law practices. A specification of the meanings of individual words and of the compositional rules of the language is a specification of the rules by which the words determine the meaning of the sentence. Analogously, a specification of a model is a specification of the rules by which law practices determine the content of the law. In this sense, a model is the analogue of the meanings of individual words and the compositional rules for the language).

I will use the term 'model' sometimes for a partial model – a rule for the relevance of some aspect of law practices, *e. g.*, of legislative findings or of dissenting judicial opinions, to the content of the law —and sometimes for a complete model— all of the rules by which law practices determine the content of the law. The context should make clear whether partial or complete models are in question. The *legally correct* (or, for short, *correct*) model in a particular legal system at a particular time is the way in which practices in that legal system at that time actually contribute to the content of the law (not merely the way in which they are thought to do so). Which model is correct varies from legal system to legal system and from time to time within a legal system since, as we will see, which model is correct depends in part on law practices.

Models come at different levels of generality. More specific ones include the metaphysical counterparts of theories of constitutional, statutory, and common-law interpretation. Models also can be understood to include very general putative ways in which law practices determine what the law requires. Thus, Hart's rule-of-recognition-based theory of law and Dworkin's "law as integrity" theory are accounts of very general models. Very general models give rise to more localized models of the contributions made by specific elements of practices.

Candidate models are candidate ways in which practices contribute to the content of the law. Since the issue of how practices contribute to the content of the law has several components, models have several, closely related roles: they determine what counts as a law practice; which aspects of law practices are relevant to the content of the law; and how different relevant aspects combine to determine the content of the law, including how conflicts between relevant aspects are resolved.

The question of what determines how practices contribute to the content of the law can thus be reformulated as the question of what determines which models are correct. What settles, for example, the question whether the original—intent theory of constitutional interpretation is true?

We can now turn to the main topic of this section: whether law practices can themselves determine which model is correct. Certainly, the content of the law, as determined by law practices, concerns, in addition to more familiar subjects of legal regulation, what models are correct. That is, the content of the law includes rules for the bearing of law practices on the content of the law. For example, it is part of the law of the United States that the Constitution is the supreme law, that bills that have a bare majority of both houses of Congress do not contribute to the content of the law unless the President signs them, and that precedents of higher courts are binding on lower courts in the same jurisdiction.

The content of the law cannot itself determine which model is correct, however, for the content of the law depends on which model is correct. If, for example, statutes contributed to the law only the plain meaning of their words, the content of the law would be different from what it would be if the legislators' intentions made a difference. Obviously, which legal propositions are true depends on which model is correct. But, as we have just seen, which model is correct depends in part on the legal propositions. The content of the law and the correct model are thus interdependent.

This interdependence threatens to bring indeterminacy. Consider the law practices of a particular legal system at a particular time and ask what the content of the law is. Suppose that if candidate model A were legally correct, a certain set of legal propositions would be true, according to which model A would be correct. And if candidate model B were correct, a different set of legal propositions would be true, according to which model B would be correct. And so on. Without some other stan-

dard, each mutually supporting pair of model and set of legal propositions is no more favored than any other pair.[32]

Can law practices determine which model is correct? The *prima facie* problem is that we cannot appeal to practices to determine which model is correct because which model a set of practices supports itself depends on which model is correct. But let us consider the matter in more depth. If practices are to determine which model is correct, there are two possibilities.

First, a privileged foundational practice (or set of foundational practices) could determine the role of other practices. This possibility encounters the problem of how practices themselves can determine which practices are foundational. For example, the fact that a judicial opinion states that only the rationale necessary to the decision of a case is contributed to the content of the law cannot determine that that is a correct account of the contribution of judicial decisions to the content of the law. Something must determine that the judicial opinion in question is relevant and trumps other conflicting practices. A putatively foundational practice cannot non-question-beggingly provide the reason that it is foundational. Moreover, it is unwarranted to assume that the significance of a putatively foundational practice is simply its non-legal content. Its significance depends on which model is correct – the very issue the practice is supposed to resolve. In sum, a foundationalist solution is hopeless because it requires some independent factor that determines which practices are foundational (and what their contribution is).

32 This footnote registers a rather technical qualification, and can be skipped without losing the main thread of the argument. A candidate model, given the law practices, may yield a set of legal propositions that lends support to a different, inconsistent model. To the extent that this is the case, we can say that the model is not *in equilibrium* (relative to the law practices). Models that are in equilibrium (or are closer to it) are plausibly favored, others things being equal, over those that are not (or are further from it). There is no reason to expect, however, that there will be typically be only one model that is closer to equilibrium than any other model. In fact, indefinitely many models are guaranteed to be in perfect equilibrium (yet yield different sets of legal propositions). For example, any model that includes a rule that practices (and thus the true legal propositions) have no bearing on which model is correct is necessarily in perfect equilibrium. Without some independent standard for what models are eligible, there is no way to rule out such models. Thus, the varying degree to which different candidate models are in equilibrium does not ensure a unique correct model and determinate legal content. See also the discussion of a coherentist solution in the text below.

Second, if no practices can be assumed to have a privileged status, the remaining possibility is that all law practices together can somehow determine their own role. Such a coherentist solution might at first seem to have more going for it than the foundationalist one. The idea would be, roughly speaking, that the (total) law practices support the model that, when applied to the practices, yields the result that the practices support that very model. If no model is perfectly supported in this way, the one that comes closest is the correct one.

The problem with this suggestion, crudely put, is that without substantive standards that determine the relevance of different aspects of law practices, the (total) law practices will support too many models. For any legal proposition, there will always be a model supported by the practices that yields that proposition. Or to put it another way, the formal requirement that a model be supported by or cohere with, law practices is empty without substantive standards that determine what counts as a relevant difference. Suppose a body of judicial decisions seems to support the proposition that a court is to give deference to an administrative agency's interpretation of a statute. It is consistent with those decisions for an agency's interpretation of a statute not to deserve deference when there is a reason for the different treatment. Such a reason could be, for example, that the agency in the earlier cases, but not in the present case, had special responsibility for administration of the relevant statutory scheme. But, since the facts of every case are different, if a model can count *any* difference as relevant, there will always be a model that is consistent with all past practices yet denies deference to agency interpretations of statutes.

As I have argued more fully elsewhere, such considerations show that practices cannot determine legal content without standards, independent of the practices, that determine which differences are relevant and irrelevant.[33]Hence law practices alone cannot yield determinate legal requirements. The point is a specific application of a familiar, more general point that Susan Hurley has developed.[34] Formal requirements

[33] See Greenberg, Mark and Litman, Harry, "The Meaning of Original Meaning", *Georgetown Law Journal*, 86, 1988, pp. 614-617.

[34] See Hurley, S. L., *Natural Reasons*, New York, Oxford University Press, 1989, pp. 26, 84-88. Hurley credits Ramsey's and Davidson's uses of arguments with similar import. See, *e. g.*, Davidson, Donald, "The Structure and Content of Truth", *Journal of Philosophy*, 87, 1990, pp. 317-320.

such as consistency are meaningful only in the light of substantive standards that limit which factors can provide reasons.

It would miss the point to suggest that law practices themselves can determine the appropriate standards. Without such standards, a requirement of adherence to practices is empty. In epistemic terms, we cannot derive the standards from the practices because the standards are a prerequisite for interpreting the practices.

It may be helpful to notice that the problem has a structure similar to that of two famous philosophical puzzles, Nelson Goodman's problem about *green* and *grue* and Saul Kripke's problem about *plus* and *quus*.[35] In order for there to be legal requirements, it must be possible for someone to make a mistake in attributing a legal requirement (if just *any* attribution of a legal requirement is correct, the law requires that P and that not P and so does not require anything). One makes a mistake when one attributes a legal requirement that is not the one the law practices yield when interpreted in accordance with the correct model. For any candidate legal requirement, however, there is always a non-standard or "bent" model that yields that requirement. It is therefore open to an interpreter charged with a mistake to claim that, in attributing the legal requirement in question, she has not made a mistake in applying one model but is applying a different model.

The proponent of the coherence solution will respond that law practices themselves support certain models. For example, in appealing to practices to decide cases, courts have developed well-established ways of understanding the relevance of those practices to legal content. The problem is that there will always be bent models according to which the judicial decisions (and other practices) support the bent models rather than the purportedly well-established ones. This kind of point shows that there must be factors, not themselves derived from the practices, that favor some models over others.

[35] See Goodman, Nelson, *Fact, Fiction, and Forecast*, 3d. ed., Indianapolis, Bobbs-Merrill, 1973, pp. 72-81; Kripke, Saul, *Wittgenstein on Rules and Private Language*, Oxford, Blackwell, 1982, pp. 7-32. These puzzles involve concepts that seem bizarre and gerrymandered. One challenge is to determine what it is that rules such concepts out (at least in particular contexts), for, if they are not ruled out, unacceptable results follow.

Here is an example.[36] Suppose that on february 1, 2005, a judge in a state court in the United States must decide whether a woman has a federal constitutional right not to be prevented from obtaining an abortion. Imagine that the judge holds that the woman does not have such a right. It seems that the judge has misread Roe *vs*. Wade,[37] the seminal decision of the United States Supreme Court. The judge claims, however, that according to the correct model of how judicial decisions contribute to legal content, when constitutional rights of individuals are at stake and strong considerations of justice support the claims of both sides, such decisions should be understood as establishing a form of "checkerboard" solution. According to such a solution, whether a person has the right in question depends on whether the person is born on an odd or even-numbered day.[38] Since Jane Roe was born on an odd-numbered day (let us assume), Roe *vs.* Wade's contribution to content is that only women born on odd days have a constitutional right to an abortion.

Before discussing the example, it must be emphasized that the point is not that the judge's position should be taken seriously; on the contrary, the example depends on the fact that the judge's position is plainly a nonstarter. Since it is evident that the position cannot be taken seriously, there must be factors that rule out models like the one in the example. The example makes the point that these factors must be independent of practices. Since the unacceptable positions that we want to exclude purport to determine what practices mean, the factors that exclude these positions cannot be based on practices. Moreover, there is no way to rule out such positions on a purely logical level, since, as will become evident, it is easy to construct self-supporting, logically consistent systems of such positions. The claim is, then, that our unwillingness to take the judge's position seriously suggests that we must be depending on tacit assumptions independent of law practices in determining which models are acceptable. Let us look at the example to see why practices themselves cannot exclude the judge's model.

The first objection to the judge's position may be that the Supreme Court in Roe *vs.* Wade said nothing about the abortion right's depending

36 The example borrows from Dworkin's discussion of a "checkerboard" solution to the abortion controversy. See Dworkin, *Law's Empire*, pp. 178-186. Dworkin cannot be held responsible, however, for my example.

37 *Roe vs. Wade*, 410 U.S. 113, 1973.

38 See Dworkin, *Law's Empire*, *cit.*, footnote 6, pp. 178 and 179.

on birthdates. The judge replies that on the correct model, the reasons that judges give in their opinions make no or little contribution to the content of the law. A second objection may move to a different level: the practices of the legal system do not support the judge's model. Judicial decisions, for example, do not interpret the contributions made by other decisions in such a checkerboard fashion, nor do they ignore the reasons judges give. The judge, however, claims that according to his model, judicial decisions have all along been using a bent model, according to which the reasons judges give are significant until February 1, 2005, but not afterwards. Similarly, the model specifies no checkerboard contributions to content until that date, then requires them afterwards. All of the judicial decisions so far are logically consistent with the hypothesis that they are using the bent model. Obviously, a third-level objection —that the practices do not support models that give dates this sort of significance— can be met with the same sort of response.

In another version of the example, the judge might claim that, according to the correct model, in all cases involving the right to abortion, a Supreme Court decision's relevance to content ends, without further action by the Court, as soon as a majority of the current Supreme Court believes that the decision was wrongly decided. Since the judge believes that that is now the situation with regard to Roe v. Wade, he claims that Roe *vs*. Wade no longer has any bearing on the content of the law. If it is objected that the judge's position is not an accurate account of how judicial decisions interpret past judicial decisions, the judge will claim that judicial decisions have been following his model all along. Since (let us suppose) it has never been the case before that a majority of the Supreme Court has disagreed with a past Supreme Court decision on the right to abortion, the evidence of past decisions supports the judge's model, which treats only abortion rights cases idiosyncratically, as strongly as a more conventional one.

The point should be obvious by now: these sorts of unacceptable models are unacceptable because there are standards independent of practices that determine that some sorts of factors are irrelevant to the contributions made by practices to legal content. The practices themselves cannot be the source of the standards for which models are permissible.

In this section, I have argued that practices themselves cannot determine how practices contribute to the content of the law. Although I will

not discuss the point here, it is worth noting that my argument is not limited to the law. For example, the argument shows that, without standards independent of the practices, no set of practices can rationally determine rules. What rules a set of practices rationally determines will depend on what aspects of the practices are relevant and how those aspects are relevant. And the practices cannot themselves resolve those issues. Similarly, my argument does not depend on the complexities of contemporary legal systems. My point holds even for extremely simple cases. Even if there were only one law-maker who uttered only simple sentences, and even if it were taken for granted that the law-maker's practices were legally relevant, the precise relevance of those practices would still depend on factors independent of the practices. For example, there would still be an issue of whether the relevant aspect of the practices was the meaning of the words uttered, as opposed to, say, the law-maker's intentions or the narrowest rationale necessary to justify the outcome of the law-maker's decisions.

V. OBJECTIONS

I want now to consider three closely related objections. First, it may be objected that in practice there is often no difficulty in knowing which aspects of a practice are relevant or which facts provide reasons. Bent models are not serious candidates. Second, it may be objected that practitioners' beliefs (or other attitudes) about value questions, not value facts, solve the problem of determining how practices contribute to the content of the law. Third, it may be said that, in limiting law practices to descriptive facts, I have relied on too thin a conception of law practices. Properly understood, law practices can themselves determine the content of the law.

I replied to a version of the first objection in discussing the example of the abortion-rights decision, but I will make the point in more general terms here. As I have emphasized, the question of the necessary conditions for law practices to determine the content of the law is a metaphysical, not an epistemic, question. The problems that I have raised concerning how law practices determine the content of the law are not practical problems that legal interpreters encounter in trying to discover what the law requires.Hence it is no objection to my argument that legal interpreters do not encounter such problems.

I have argued that there is a gap between law practices and the content of the law that can be bridged only by substantive factors independent of practices. If legal practitioners have no difficulty in crossing this gap —for example, in eliminating bent models from consideration— that must be because they take the necessary factors for granted. With respect to the example of the abortion-rights decision, I argued that practices themselves cannot rule out the judge's bent models. Therefore, our unwillingness to take the judge's position seriously is evidence that we are relying on tacit assumptions about what models are acceptable. The lack of difficulty in practice suggests not that substantive constraints are not needed, but that they are assumed.

This point leads naturally to the second objection, which holds that it is the assumptions or beliefs of participants in the practice that solve the problem of how practices determine the content of the law. For example, it might be that a consensus or shared understanding among judges or legal officials determines the relevance of practices to the content of the law. *Beliefs* about value, not value facts, do the necessary work.

As an epistemic matter, of course, we rely on our beliefs about value to ascertain what the law is. But that is exactly what we would expect if the content of the law depended on value facts. After all, in working out the truth in any domain, we must depend on our beliefs. That we do so in a given domain in no way suggests that the truth in that domain depends on our beliefs. Notice, moreover, that if the content of the law depended on beliefs about value, then, in order to work out what the law was, we would have to rely on our beliefs *about our beliefs* about value. For example, we might ask not whether democratic values favor intentionalist theories of statutory interpretation, but whether there is a consensus among judges that democratic values do so.

The most important point is that facts about what participants believe (understand, intend, and so on) could not do the necessary work because such facts are just more descriptive facts in the same position as the rest of the law practices. As with the facts about the behavior of law-makers, we can ask whether facts about participants' beliefs are relevant to the content of the law, and, if so, in what way. Since the content of the law is rationally determined, the answers to these questions must be provided by reasons. As I have argued, the law practices, including facts about participants' beliefs, cannot determine their own relevance.

More generally, the same kind of argument explains why the questions of value on which the content of the law depends must be resolved by substantive standards rather than by value-neutral procedures. In general, there are procedural ways to resolve value questions – flipping a coin and voting are examples. Such procedures are in the same position as other law practices, however. There have to be reasons that determine that a given procedure is the relevant one and what the significance of the procedure is to the content of the law.

The third objection claims that the additional substantive factors are part of law practices themselves. I have already addressed the suggestion that the law practices, conceived as facts about behavior and mental states, determine their own relevance. The present objection is that my conception is too narrow. It somehow fails to do justice to law practices to take them to consist of ordinary empirical facts about what people have done, said, and thought. If the objection is to be more than hand-waving, the objector needs to say what practices consist of beyond such facts, and how the enriching factor solves the problem. For example, it would of course be no objection to my argument to claim that the descriptive facts need to be enriched with value facts.

Another unpromising possibility, addressed in section II, 3 above, is for the objector to maintain that law practices are legal-content laden. According to this version of the objection, facts about what counts as a legislature, who has authority to make law, what counts as validly enacted, what impact a statute has on the content of the law – in general, legal-content facts concerning the relevance of law practices to legal content are somehow part of the law practices. As argued, however, unless legal content is to be metaphysically basic, there must be an account of what determines legal content that does not presuppose it. It simply begs the question to take law practices to include legal-content facts.

The objector challenges my conception of the law practices on the ground that it is too restrictive. Here is one line of thought in support of my conception. We normally assume that law practices can be looked up in the law books. But all that can be found in the law books, other than legal-content facts, are facts about what various people —legislators, judges, administrative officials, and so on— did and said and thought. If there is something else to law practices, how do we know about it? To put the point another way, if I tell you all the facts about what the relevant people said and did, believed and intended, you can work out what

the law is without knowing any more about the law practices. Thus, if there is an aspect of law practices other than these facts, it does not seem to play a role in determining the content of the law. (It is true that you may have to be skilled at legal reasoning to work out the content of the law, and that skill may include an understanding of the significance of the practices to legal content. But I have already addressed the suggestion that it is participants' understandings, rather than the substantive factors that are the subject of those understandings, that do the necessary work).

VI. The Need for Substantive Factors, Independent of Law Practices

I have argued that law practices cannot themselves determine the content of the law because they cannot unilaterally determine their own contribution to the content of the law. There must be factors, independent of practices, that favor some models over others. In this section, I sketch where this argument leaves us. In particular, I explain the sense in which the argument requires facts about *value*, and the nature of the claimed *connection* between law and value.

1. *Value Facts*?

In order for practices 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 law practices. Since practices 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.

We have seen that law practices cannot determine their own contribution to the content of the law. By contrast, value facts are well suited to determine the relevance of law practices, for value facts include facts about the relevance of descriptive facts. For example, that democracy supports an intentionalist model of statutes is, if true, a value fact. What about the relevance of the value facts themselves? At least in the case of the all-things-considered truth about the relevant values, its relevance is intelligible without further reasons. If the all-things-considered truth

about the relevant considerations supports a certain model of the law practices, there can be no serious question of whether that truth is itself relevant, or in what way. The significance for the law of the fact that a certain model is all-things-considered better than others is simply the fact that that model is better than others.

It might be suggested that an appeal to conceptual truth offers a way to avoid the conclusion that the content of the law depends on value facts. The idea would be that the concept of law (or some other legal concept), rather than substantive value facts, determines that some models are better than others. As noted above, conceptual truth is the kind of consideration that could provide reasons of the necessary sort. The question is whether conceptual truth does so in the case of law.

My response begins with two points about what notion of conceptual truth this kind of suggestion can rely on. According to what we can call a *superficialist* notion, conceptual truths are truths about the use of concept-words, truths that are tacitly known by all competent users of those words or are settled by community consensus about the use of the words. Given such a notion of conceptual truth, we should reject the idea that there are conceptual truths that can do the necessary work. Ronald Dworkin famously argued that disputes about the grounds of law are substantive debates, not trivial quarrels over the use of words.[39] Positivists have generally responded by denying that they hold the kind of view Dworkin was attacking. Thus, both sides agree that questions about which models are better than others are not merely verbal questions that can be settled by appeal to consensus criteria for the use of words. And both sides are correct on this point.

When, for example, Justices of the Supreme Court debate whether legislative history is relevant to the content of the law, the dispute cannot be settled by appeal to agreed-on criteria for the use of words. A lawyer or judge who challenges well-established models is not *ipso facto* mistaken. For example, a lawyer could advance a novel theory according to which New Jersey statutes make no contribution to the content of the law (on the ground, say, that there is a constitutional flaw in New Jersey's legislative process). The claim would not be straightforwardly wrong merely because it goes against the consensus model, though it is likely mistaken on substantive grounds.

[39] *Ibidem*, pp. 31-46.

Second, we have seen that the practices of participants in the legal system cannot be the source of the standards that support some models over others. It follows that if conceptual truth is to be the source of the standards, conceptual truth must not be determined by the practices of participants in the legal system; it must depend on factors independent of our law practices.

The consequence of these two points is that, if conceptual truth is to provide the needed standards, it would have to be conceptual truth of a kind that is not determined by consensus about the use of words and is not determined by our law practices. I am sympathetic to such a notion of conceptual truth. Given such a notion, however, it is not clear that an appeal to conceptual truth is a way of avoiding the need for substantive value facts. Instead, the conceptual truths in question may include or depend on value facts, for example, facts about fairness or democracy. At this point, the burden surely rests on a proponent of the conceptual—truth suggestion to offer a position that avoids the two problems that I have just described without collapsing into a dependence on substantive value facts.

A different kind of appeal to conceptual truth is possible. It could be argued not that there are conceptual truths about which models are better than others, but that conceptual truth determines that such issues are determined by a specific internal legal value. This appeal to conceptual truth does not attempt to avoid the need for value facts; it attempts to explain those value facts as internal to the law. I will turn now to the nature of legal value facts. It is worth noting, however, that an appeal to conceptual truth as the source of internal value facts will encounter the same challenge as the appeal to conceptual truth to avoid the need for value facts. Such an appeal requires an account of conceptual truth according to which truths about the concept of law are independent of our law practices, yet also independent of genuine value facts.

I have argued that the content of the law depends on substantive value facts. What is the nature of those value facts? The most straightforward possibility is that, other things being equal,[40] models are better to the extent that they are favored by the all-things-considered truth about the applicable considerations – *the Truth*, for short. In other words, the legally

40 "Other things being equal" because practices also play a role in determining which models are better than others. See section VI, 2 below.

correct standard or value is simply the truth about value. On this view, there is no special legal standard or value. For example, the bearing of legislative history on the content of the law depends on considerations of democracy, fairness, welfare, stability – on every consideration that is, in fact, relevant to the issue.

A second possibility is that, in the special context of the law, the all-things-considered truth about the relevant considerations is that the standard for models is not the general, all-things-considered truth about the relevant considerations, but some different standard. For example, it might be that, taking into account all relevant considerations, the Truth is that the legally correct resolution of value questions is the one that maximizes community wealth. According to this second possibility, special legal value facts are genuine value facts; they are the consequence of the application of genuine value facts —Truth— to the specific context of law.[41] On this view, the fact that, say, wealth maximization is the virtue of models is a genuine value fact. A version of this possibility would allow the special legal value facts to vary from legal system to legal system.

On the first and second possibilities, the content of the law depends on genuine value facts in a way that is inconsistent with both hard and soft positivism. A positivist might try to argue that even if my argument so far is sound, there is a third possibility. According to this possibility, there are substantive standards that, within the law do the work of value facts in resolving value questions, but are not genuine value facts. We might describe this possibility by saying that legal value facts are *internal* to the law.

The hypothetical positivist's suggestion that legal value facts are internal to the law would have to mean more than that they have no application outside of law. There could be legal value facts that were genuine value facts applicable only in the legal context. In that case, the second possibility would be actual, and the content of the law would at base depend on genuine value facts. The third possibility is supposed to avoid the conclusion that the content of the law depends on genuine value facts. Perhaps the idea would be that legal value facts matter only

41 The position Dworkin calls "conventionalism" could be advanced as a version of possibility two, though that is not exactly the way in which he presents it. See Dworkin, *Law's Empire*, *cit*., footnote 6, pp. 114-150.

to those who are trying to participate in the legal system (and only to that extent). (As with the second possibility, a version of the third possibility would allow that the internal legal value can vary from legal system to legal system).

I do not mean to suggest that the idea of internal legal values is unproblematic or even fully coherent. I therefore do not need to explain exactly what it would mean for there to be internal values. Nor do I need to explain what, other than the Truth, could make it the case that there is a special legal value. I mention the idea only because it seems to have some currency in philosophy of law circles. My point is simply that I do not claim in this paper to have ruled out the view that the content of the law depends on internal value facts, rather than genuine ones.

I will briefly comment on the problems facing this view. We have already ruled out the possibility that law practices determine their own relevance to legal content. Therefore, something other than law practices would have to determine the internal value standard – to make it the case that this standard was the relevant one for the law (or for the particular legal system). It is difficult to see what that could be other than the relevant considerations – the Truth. If we appeal to the Truth, however, we have returned to the first or second possibility.

Any account of internal value facts thus faces a challenge of steering between the law practices on the one hand and the Truth on the other. I have already described the way in which an attempt to ground internal legal facts in conceptual truth faces this challenge. But the challenge confronts any account of internal value facts. For example, suppose a theorist appeals to the *function* of law or legal systems to ground internal value facts. On the one hand, as we saw with conceptual truth, if the law's function is going to provide the value facts necessary for practices to determine the content of the law, that function must be determined by something independent of the law practices. On the other hand, if the law's function is determined by the all-things-considered truth about the relevant factors, an appeal to function is not a way of avoiding an appeal to genuine value facts. Until we have an account of internal value facts that meets the challenge, it is difficult to evaluate the potential of an appeal to internal value facts.

An internal-value view faces a more substantive challenge as well. Internal value facts would have to have appropriate consequences for the nature of law. In a normal or properly functioning legal system, the content

of the law provides reasons for action of certain kinds for certain agents. Whether the content of the law can provide such reasons may depend on the nature and source of the legal value facts. For example, it is plausible that for a legal system to be functioning properly, the content of the law must provide genuine reasons for action for judges. An internal-value theorist must explain how legal content determined exclusively by law practices and internal value facts can provide genuine, as opposed to merely internal, reasons for action. More generally, we can investigate the nature of legal value facts by asking what role such facts must play in a theory of law.

2. *The Role of Value Facts*

Let us now turn to the *role* of value facts in determining the content of the law. Since I do not want to beg the question against the possibility of a special legal value (whether internal or not), I use "X" for that property in virtue of which models are better than others. X might be, for example, (the promotion of) wealth maximization, the maintenance of the status quo, security, fairness, or morality. (If there is no special legal value, X is the Truth, in the technical sense explained above.) Note that the fact that a particular model is favored by X may be a descriptive fact (*e. g.*, if X is wealth maximization). In that case, the relevant value fact is that X is what the goodness of models consists in.

I will make two clarifications about the role of X and then consider the implications for the relation between law and value. The first point is that X only *helps* to determine which models are correct. X's favoring model A over model B is neither necessary nor sufficient for A to win out over B. As we saw in section 4, practices play a role in determining which model is better. Thus, the model that is best all things considered may not be the same as the model that is ranked highest by X alone. (For simplicity, I sometimes omit this qualification).

In section 4, we discussed the interdependence between models and legal content. We saw that if we hold law practices constant, different candidate models yield different sets of legal propositions. Without X, each mutually supporting pair of model and set of legal propositions is as favored as any other such pair, and indeterminacy threatens. X's independence makes it possible for the interdependence of model and legal content not to lead to global indeterminacy.

In particular, what bearing practices have on the legally correct model depends on which model is most X-justified *in advance of any particular practices*. For X constrains the candidate models of practices and thus makes it possible for practices to determine anything. Practices themselves have something to say about the second—order question of how practices contribute to the content of the law. But X helps to determine what practices have to say on that question. Roughly speaking, the legally correct model is the one that is most X-justified after taking into account practices in the way that it is most X-justified to take them into account.[42] In other words, the legally correct model is the one that is most X-justified all things considered.

The second point can be brought out with an objection. Suppose it is objected that X need determine only what considerations are *relevant* to the content of the law, but need not go further and determine how conflicts between relevant considerations are to be resolved. According to this suggestion, X would eliminate some candidate models as unacceptable, but would have nothing to say between models that give weight only to relevant aspects of law practices. The objector grants my argument that, without an independent standard of relevance, practices could not determine which models were correct. The objector points out, however, that once we have an independent standard of relevance, practices themselves might be able to determine which models are correct.

Here is a brief sketch of a reply to the objector. In order for there to be determinate legal requirements, X must do more than determine what considerations are relevant; X must favor some resolutions of conflicts between relevant considerations over others. Otherwise, given the diversity of relevant considerations and the complexity of factual variation, law practices will not yield much in the way of determinate legal re-

[42] In many legal systems, the practices, when taken into account in the way that is most X-justified in advance of the practices, will support a model that is not the most X-justified in advance of the practices. And when taken into account in accordance with *that* model, the practices may support yet a different model. Thus, the question arises how important it is for a model to be supported by the practices (taken into account in accordance with that model). (In the terminology of note 33 above, the more that a model is supported by the practices, the more the model is in equilibrium.) Since X is the virtue of models, X is what determines how important it is for a model to be supported by the practices. This is why it is fair to say, as I do in the text, that the legally correct model is the one that is most X-justified after taking into account the practices in the way that it is most X-justified to take them into account.

quirements. Inconsistent propositions of law (and inconsistent models) will typically have some support from relevant aspects of law practices. Therefore, in order for there to be determinate legal requirements, X must not only help to determine what considerations are relevant but must also help to determine the relative importance of elements of law practices and how such elements interact.

In fact there is a deeper problem with the objection. It assumes that there are discrete issues of what considerations are relevant to the content of the law and how the relevant considerations combine to determine the content of the law. It may be convenient to separate the two kinds of issues for expository purposes, but we should not be misled into thinking that they are resolved separately. It is not the case that there is an initial, all-or-nothing determination of whether a type of consideration is relevant and then an independent, further determination of the relative importance of the relevant considerations. Rather, the reason that a consideration is relevant determines how and under what circumstances it is relevant, and how much force it has relative to other considerations.

For example, legislative history's relevance to the content of the law derives, let us suppose, from its connection to the intentions of the democratically elected representatives of the people. Thus, in order to determine how important legislative history is, relative to other factors, we need to ask exactly how it is related to the relevant intentions and what the importance of those intentions is. The point is that the contribution to content of some aspect of a law practice and how it interacts with other relevant aspects depends on why the aspect is relevant. If this suggestion —that relevance and relative importance are not independent questions— is right, then in helping to determine the relevance of various considerations, X will necessarily be (helping to) resolve conflicts between relevant considerations.

I have argued that there is a certain kind of connection between law and value. I would like to conclude by saying something about the implications of this connection. Just for the purpose of exploring these implications, I will assume that X is morality. The point of this assumption is to make clear that *even if* morality were the relevant value, the consequences for the relation between law and morality would not be straightforward. As I will show, it would not follow that the content of

the law would necessarily be morally good or even that the moral goodness of a candidate legal proposition would count in favor of the proposition's being true.

First, although (by assumption) morality provides legally relevant reasons, independent of the content of the law, the legally correct model is not simply whatever model is morally best (or most justified). "Morally best" here means most supported or justified by moral considerations *in advance of consideration of the practices of the legal system*. The legally correct model need not be the morally best one in this sense because, as we have seen, practices also have an impact on which model is legally correct.

Second, morally good models do not guarantee morally good legal propositions. Even if the legally correct model was a highly morally justified one, the content of the law might be very morally bad. A democratically elected and unquestionably legitimate legislature could publicly and clearly promulgate extremely unjust statutes, such as a statute ostensibly excluding a racial minority from social welfare benefits. The judicial decisions may rely on highly morally justified models, ones that, among other things, give great weight to such morally relevant features of legislative actions as the clearly expressed intentions of the elected legislators. The most justified model, all things considered, will be a morally good one, yet will yield morally bad legal content. In fact, in such a legal system less justified models could yield morally better legal content than more justified models. (In such cases, a judge might sometimes be morally obligated to circumvent the law by relying on the less justified model).[43]

Although morally justified models do not guarantee morally good legal propositions, it might be suggested that *part* of what makes a model morally justified is that it tends to yield morally good legal requirements.[44] For example, assume that, other things being equal, a legal

[43] The relation between a judge's moral obligations and morally justified models raises interesting issues, but space does not permit discussion.

[44] At the extreme, for example, a model could hold that in some circumstances the goodness of a candidate legal proposition tips the balance in favor of that legal proposition and against competing candidates. (A different way to describe such a position would be to say that value not only can help to determine which model is best, thus indirectly favoring some candidate legal propositions over others, but also can favor candidate legal propositions directly. I will not use this terminology.) As I say in the text, such

re quire ment is mor ally better the more it treats peo ple fairly. Some models will in general have a greater ten dency to yield le gal re quire ments that treat peo ple fairly. Ac cord ing to the sug ges tion un der con sid er ation, that a model has such a ten dency would be one fac tor sup port ing that model.

Suppose that the suggestion were correct. According to one line of thought, it fol lows that the con tent of the law would sim ply be what ever it would be morally good for it to be (or more generally, whatever it would be most X-jus ti fied for it to be). In that case the prac tices would be ir rel e vant. This line of thought might there fore be taken to pro vide a reductio of my ar gu ment for the role of value in de ter min ing the way in which prac tices con trib ute to the con tent of the law.

The line of thought is not sound, however. First, even if the tendency of a model to yield morally good legal propositions counts in favor of that model, a variety of other moral considerations favor models that make the con tent of the law sen si tive to rel e vant as pects of law prac tices. A model may be mor ally better, for ex am ple, to the ex tent that it re spects the will of the democratically elected representatives of the people, protects ex pec ta tions, en ables plan ning, pro vides no tice of the law, treats relevantly similar practices similarly, minimizes the opportunity for officials to base their de ci sions on con tro ver sial be liefs, and so on.

Roughly, we have a distinction between content-oriented con sider ations and prac tice-ori ented con sid er ations. The rel a tive weight ac corded by morality to these two kinds of con sid er ations is a ques tion for moral theory that I will not take up here. On any plausible account, however, mo ral ity will give sub stan tial weight to prac tice-ori ented con sid er ations. So the mor ally best model (con sid ered in ad vance of law prac tices) will make the law sen si tive to rel e vant as pects of law prac tices.

Second, as we have seen, the legally correct model also depends on the law practices. Apart from the weight that morality gives to prac tice-oriented considerations, the practices themselves may support models that make the law sensitive to practices. (Contemporary positivists, my pri mary tar get in this pa per, are likely to be sym pa thetic to the view that practices support models that make the law sensitive to practices).

a model may be less sup ported both by mo ral ity and by prac tices than mod els that give less weight to content-oriented considerations. I suggest below (see the last four para graphs of this sec tion), that the role that such a model as signs to value facts is out side the role that this pa per's ar gu ments sup port.

For example, al though I will not de fend the claim here, in the U. S. and U. K. legal systems, practices themselves strongly support models that make the law sensitive to law practices. Practices are thus a second reason that the role of value need not have the consequence that the all-things-considered best model will be one that tends to yield morally good legal propositions. (Also, even a model that has a *tendency* to produce morally good legal propositions may not do so, given the law prac tices of a par tic u lar le gal sys tem).

Third, and fi nally, if we re flect on the ar gu ment for value's role in determining the content of the law, we see that it supports only a limited role for value, one that does not involve supplanting law practices or making them irrelevant. Our starting point was that law practices must determine the content of the law and that they must do so by providing reasons that favor some legal propositions over others. The crucial step in the ar gu ment was that law prac tices can not pro vide such rea sons without value facts that determine the relevance of different aspects of law practices to the content of the law. The argument thus supports the involvement of value facts in determining the con tent of the law only for a lim ited role: de ter min ing the rel e vance of law prac tices to the con tent of the law.

We can ap ply this point to the spe cific ques tion of to what ex tent a legal proposition's goodness can help to make it true: the goodness (in terms of mo ral ity or of value X) of a can di date le gal prop o si tion is rel evant to the proposition's truth only to the extent that its goodness contrib utes to mak ing it in tel li gi ble that an as pect of a par tic u lar law prac tice has one bear ing rather than an other on the con tent of the law. I will call this *therelevancelimitation*.

I want to emphasize that the point is only that the argument of this pa per sup ports no more than such a lim ited role for value facts; the ar gument does not show that the role of value facts must be so limited. Whether there is some other or more expansive role for value in de termin ing the con tent of the law is left open. This pa per's ar gu ment for the con clu sion that value facts play a role in de ter min ing le gal con tent is that value facts are needed in order to determine the relevance of law practices to the le gal con tent. The ar gu ment there fore sup ports only that role for value facts. There might, of course, be a different argument that shows, say, that mo ral ity or some other value sup plants the law prac tices

(though of course almost no contemporary legal theorist, least of all one of my positivist targets, thinks that there is such an argument).

Let us consider more specifically the implications of the relevance limitation. The limitation does not imply that the goodness of a legal proposition can never be relevant to its truth.[45] The goodness of a legal proposition will be relevant to the extent that it has a bearing on the intelligibility of law practices' supporting that legal proposition over others.

A Dworkinian theory of law provides a helpful example.[46] Consider a model according to which law practices contribute to the content of the law precisely that set of legal propositions that best *justifies* those law practices. Whether this model respects the relevance limitation will depend on the notion of justification involved in the Dworkinian model. Consider a simplistic understanding of justification that has the following implication: the set of propositions that best justify the law practices is that set that results from taking the morally best set of propositions and carving out specific exceptions for the law practices of the legal system-exceptions tailored in such a way as to have no forward-looking consequences. On this understanding of justification, the model would not respect the relevance limitation because value facts would not determine the significance of the practices; instead, the practices would simply be denied any significance by a kind of gerrymandering.

On a more sophisticated notion of justification, to the extent that a legal proposition is bent or gerrymandered, it will be less good at justifying law practices. (In the extreme case just considered, where a particular law practice is simply treated as an exception without further application, that practice is not *justified* at all by the propositions to which it is an exception.) I think it is plausible, though I will not argue the point here, that given a proper understanding of justification, the Dworkinian model I have described respects the relevance limitation. (In

[45] It is easy to see that the goodness of a legal proposition could have evidentiary relevance to the content of the law. Suppose that the intention of legislators matters to the content of the law. If there is reason to believe that the legislators would have intended what is morally better (at least other things being equal), the moral goodness of candidate legal propositions will have a bearing on their truth because it will have a bearing on what the legislators intended. The discussion in the text concerns the question whether the goodness of candidate propositions can have constitutive, rather than evidentiary, relevance.

[46] I say "a Dworkinian theory" rather than "Dworkin's theory" to avoid questions of Dworkin exegesis. I believe that the position I describe is the best understanding of Dworkin's position. See also note 48 below.

a mo ment, I will consider a different model, often at trib uted to Dworkin, that ar gu ably does not re spect that lim i ta tion).

The rel e vance lim i ta tion im plies that the good ness of a le gal prop o si-tion is never suf fi cient to make it true. That value facts are needed to de-termine the contribution of law practices to the content of the law does not pro vide a ba sis for mak ing law prac tices ir rel e vant. To put it an other way, that a candidate prop o si tion is a good one does not make it in tel li-gible that the law practices, regardless of what they happen to be, sup-port that proposition. It might be tempting to regard a model on which the goodness of a legal proposition can, at least in some circumstances, be suf fi cient to make it true as the de gen er ate or lim it ing case of a model that determines the relevance of law practices to the content of the law. The model determines that in the relevant cir cum stances, prac tices have no relevance. But though this description may be formally tidy, the argument that value facts are needed to enable law practices to de ter-mine the content of the law provides no support for a model on which value facts can make prac tices ir rel e vant. In other words, though we can describe a putative "model" according to which practices provide a reason favoring any particular set of legal propositions (the mor ally best ones, for example) it does not follow that practices could provide such a reason. What rea sons prac tices pro vide is a sub stan tive not a for mal ques tion.

We can ap ply this point to an in ter me di ate case. Con sider a model that includes rules for the contribution of law prac tices to the con tent of the law, but also in cludes a rule of the fol low ing sort:

> (R) If mo re than one le gal pro po si tion is sup por ted by the (to tal) law prac-ti ces (gi ven the ot her ru les of the mo del) to so me thres hold le vel, the le gal pro po si tion that is mo rally best (of tho se that reach the thres hold) is true.[47]

[47] Dworkin some times seems to sug gest such a rule, *e. g.*, *Law's Em pire*, pp. 284 and 285, 387 and 388; *Tak ing Rights Se ri ously*, Cam bridge, Har vard Uni ver sity Press, 1977, pp. 340, 342. And his com men ta tors typ i cally in ter pret him in this way. See, *e. g.*, Al ex-ander and Sherwin, *The Rule of Rules*, Durham and London, Duke University Press 2001, ch. 8; Finnis, "On Rea son and Au thor ity in Law's Em pire", *Law and Phi los o phy*, 6, 1987, pp. 372-374; Raz, *Ethics in the Public Domain*, Oxford, Oxford University Press, 1994, pp. 222 and 223. I think that this is not the best un der stand ing of Dworkin's view (and Dworkin has con firmed as much in con ver sa tion). On the best un der stand ing, fit is merely one as pect of jus ti fi ca tion, there is no thresh old level of fit, and how much fit matters relative to other as pects of jus ti fi ca tion is a sub stan tive ques tion of po lit i cal morality. (The idea of a thresh old of fit that in ter pre ta tions must meet to be el i gi ble, and

I suggest that R is not supported by this paper's argument for the role of value. In general, that legal proposition A has morally better content than legal proposition B does not *ipso facto* make it intelligible that law practices support A over B. Adding the hypothesis that law practices provide strong support for both A and B – support above some threshold level – does not change this conclusion. A moral reason for favoring proposition A over proposition B is not itself a reason provided by law practices, since it is independent of law practices. If this argument is right, my argument for the role of value facts does not support a role like that captured by R – one in which there is room for value facts to favor one legal proposition over another, independently of law practices. (Again, however, the point is only that this paper's argument does not support such a role for value facts, not that such a role is necessarily illegitimate).

In sum, even if value X were morality, it would not follow that the most morally justified model would be legally correct, and even a morally justified model would not guarantee morally good legal requirements. It is no part of the role of value argued for in this paper that the goodness of a proposition *ipso facto* counts in favor of the proposition's truth. The role of value is in determining the relevance of law practices to the content of the law.

VII. CONCLUSION

I have argued that law practices, understood in a way that excludes value facts, cannot themselves determine the content of the law. Different models of the contribution of practices to the content of the law would make it the case that different legal propositions were true, and a

beyond which substantive moral considerations become relevant, should be taken as merely a heuristic or expository device.) See Dworkin, *A Matter of Principle*, pp. 150 and 151; "«Natural Law» Revisited", *University of Florida Law Review*, 34, 1982, pp. 170-173; *Law's Empire*, p. 231, 246-247. A different point is that Dworkin sometimes seems to suggest that there is an aspect of the question of *the extent to which* interpretations fit law practices that is purely formal or at least not normative. See, *e. g.*, *Taking Rights Seriously*, *cit.*, footnote 47, p. 107 (suggesting that how much an interpretation fits is not an issue of political philosophy); see also *ibidem*, pp. 67 and 68 (perhaps suggesting that there are aspects of institutional support that do not depend on issues of normative political philosophy).

body of law prac tices can not uni lat er ally de ter mine which model is correct. In or der for there to be determinate legal requirements, the content of the law must de pend also on facts about value.

What is the role of such value facts? I have suggested that they support some models over others – that is, they help to determine which features of law prac tices mat ter and how they mat ter. It is not that the good ness of a can di date le gal prop o si tion counts in fa vor of its truth. Rather, the role of value is in help ing to de ter mine how prac tices con trib ute to the content of the law. This paper does not attempt conclusively to rule out the view that the needed legal value facts are internal to law. I have ar gued, how ever, that the pro po nent of such a view must over come significant obstacles to explain how internal legal value facts could be independent of both law practices and genuine value facts. The paper also sug gests a way for ward: We can ask what the na ture and source of le gal value facts must be in or der for law to have its cen tral fea tures, for ex am ple, for a le gal sys tem to be able to pro vide cer tain kinds of rea sons for ac tion.