Chapter III – The Province of Legal Systems Determined

This chapter adopts the same structure as the previous chapter. Section I is an outline of Greenberg's argument and its relevance for Hart's theory. Section II critiques the application of the practice theory to Hart and Greenberg's use of it, which is crucial in rendering the critique of Hart. Section III develops criticisms regarding key parts of the argument, notably in Greenberg's exclusion of legal systems from analysis and the 'rational-relational requirement'.

III.I – Greenberg's View

Originally in an essay titled 'How Facts Make Law' (hereafter "*HFML*") Greenberg began his project with the inquiry of what makes legal content the way it is.[114] This was followed by a criticism from Neta,[115] which Greenberg responded to in another essay clarifying some of his views from *HFML* and adopting some changes in terminology.[116] Then there was a significant follow up of the argument in 'How Facts Make Law II' (hereafter "*HMFL II*") with more terminological changes.[117]

114 Mark Greenberg, 'How Facts Make Law' (2004) 10 L Theory 157.
115 Ram Neta, 'On the Normative Significance of Normative Brute Facts' (2004) 10 L Theory 199.
116 Mark Greenberg, 'On Practices and the Law' (2006) 12 L Theory 113.
117 Mark Greenberg, 'Hartian Positivism and Normative Facts: How Facts Make Law II' in Scott Hershovitz (ed), *Exploring Law's Empire: The Jurisprudence of Ronald Dworkin* (Oxford UP 2008).

After this Himma made a critique of the argument in *HFML*,[118] to which Greenberg also responded making some minor clarifications.[119] It would be longwinded and redundant to outline the relevant parts of the argument from one work to the next and so this section will outline only the most recent state of the argument with the most recent terminology. Trickier still however is that these arguments were written before much of the literature developed on the metaphysical notions of 'grounding' and 'supervenience' so in places it is somewhat unclear what the actual extent of the argument is.[120]

Greenberg begins by setting out a couple of premises which are referred back to in order to direct his argument.

1. In a legal system under consideration there is a substantial body of determinate legal content, where 'determinate' is taken in a metaphysical sense that there is a fact of the matter as to what the law requires – there need not be consensus about this and there may be no way of explaining why it is this way.[121] In this respect 'metaphysical determination can be brute'.[122]
2. 'Law practices' partly determine the content of the law, this is not exhaustive but generally includes votes of the legislature, judicial decisions, etc – law practices generally consist of ordinary empirical facts.[123]
3. Law practices do not include facts about normative or legal content in them, thus consisting of 'descriptive facts'.[124] In contrast 'norm-

118 Kenneth Einar Himma, 'How Much Can a Theory of Law Tell Us about the Nature of Morality: A Response to Mark Greenberg's *How Facts Make Law*' (2012) 40 Direito, Estado e Sociedade 132.

119 Mark Greenberg, '*How Facts Make Law* and the Nature of Moral Facts' (2012) 40 Direito, Estado e Sociedade 165.

120 These terms are outlined in this paper along with the point about Greenberg, Samuele Chivlovi and George Pavlakos, 'Law Determination as Grounding: A Common Grounding Framework for Jurisprudence' (2019) 25 L Theory 53, 56–61.

121 Greenberg, 'How Facts Make Law' (n. 114) 162.

122 ibid, 164.

123 ibid, 162–3; Greenberg, 'Hartian Positivism and Normative Facts: How Facts Make Law II' (n. 117) 267.

124 Greenberg, 'How Facts Make Law' (n. 114) 167.

ative facts' are facts about what is good, bad, right, wrong, etc.[125] (Important to bear in mind is that this usage is different than how the word normative is usually used since it includes *inter alia* evaluative facts which provide reasons for action.[126])

Greenberg *expressly rejects* the view expressed in the first premise that there could simply be a bare or brute metaphysical determination that makes legal content the way it is, rather Greenberg argues against this holding a '*rational determination*' is involved in what makes the legal content the way it is.[127] Here the argument can be refined; if the way the practices determined the content of the law was explained simply as a modal relation then it seems to only show a supervening relationship but if 'rational determination' is also added to the explanation of what grounds legal content then the relation comes much closer to a grounded one, therefore there is a 'rational-relation requirement' present in understanding what makes the legal content the way it is. This requirement holds that the determining relation between the 'determinants of legal content' and the legal content, i.e. that which grounds the legal content, is reason based – where a reason is a consideration that makes an explanandum intelligible.[128] Importantly Greenberg stresses that it is not the legal content itself that must be rational but the determinants of the legal content making it that way, i.e. it must be intelligible why or how a determinant has the effect it does on the legal content.[129]

125 ibid, 157; Greenberg, 'On Practices and the Law' (n. 116) 114. References to normative in this chapter should be construed in Greenberg's sense when the discussion relates to Greenberg.

126 Greenberg, 'On Practices and the Law' (n. 116) 114–5, 120.

127 ibid, 116; Greenberg, 'How Facts Make Law' (n. 114) 163–4, 171–3.

128 Greenberg, 'How Facts Make Law' (n. 114) 164; Greenberg, 'On Practices and the Law' (n. 116) 116; Greenberg, 'Hartian Positivism and Normative Facts: How Facts Make Law II' (n. 117) 270.

129 Greenberg, 'How Facts Make Law' (n. 114) 165; Greenberg, 'On Practices and the Law' (n. 116) 117, 132; Greenberg, 'Hartian Positivism and Normative Facts: How Facts Make Law II' (n. 117) 270; Greenberg, '*How Facts Make Law* and the Nature of Moral Facts' (n. 119) 167.

Quite crucially it is outlined that 'rational determination' need not be normative.[130] Still however it is not enough for the practices to determine the content of the law intelligibly, there would still be various possible mappings as to what the content of the law could be – some other variable, *X*, must be added in order to fully understand what grounds legal content.[131] Another important point Greenberg makes is that the way that nonlegal content bears on the legal content is not a plain or simple mechanical conversion.[132] Greenberg proceeds to make a vital clarification about the scope of his argument here, which is that it does not address the necessary conditions for something to be a legal system nor is it concerned with related arguments between it and practice.

> "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… 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."[133]

What Greenberg is looking for is 'a model' for how law practices can determine the content of the law – importantly 'a model's being correct in a given legal system is what makes the corresponding theory of interpretation true'.[134] Though each legal system has its own 'correct model' for that system, which determines,

130 ibid.
131 Greenberg, 'How Facts Make Law' (n. 114) 166.
132 ibid, 177–8.
133 ibid, 173.
134 ibid, 178.

> "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."[135]

Greenberg, rightly, rejects the idea that the law practices could determine the correct model,[136] this is clearly so since 'surely law cannot just mean what officials do or courts will do since it takes a law to make an official or court'.[137] With that aside, Greenberg argues that the reason for needing a model is because one can be mistaken about what is legally required, i.e. they mistake the correct model for a 'bent model'.[138] Speaking before *Roe v Wade*[139] was overturned, Greenberg gives a hypothetical example of a judge in a US state court denying a woman a right to abortion, clearly, Greenberg argues, this hypothetical judge is using a bent model but how is it that one can know or differentiate the bent model from the correct one?[140] The deciding factor must be *X* and Greenberg proposes that *X* is normative facts to the extent that they are compatible with the operation of the legal system.[141] Thus, normative facts independent of descriptive facts are held to be a necessary part of what grounds legal content contrary to legal positivism.

In *HFML II* Greenberg sought directly to critique Hart's theory in light of his arguments. This will be important to understand for it will be deeply contested in the sections to come. Thus Greenberg constructs Hart in the following way. For Hart's theory a model of how the law practices determine the content of the law is correct in virtue of the rule of recognition specifying that model, and what makes it the case that the rule of recognition exists is an application of Hart's 'practice theory

135 ibid, 179.
136 ibid, 179–81.
137 The phrase is Hart's, HLA Hart, *The Concept of Law* (3rd edn, Oxford UP 2012) 2.
138 Mark Greenberg, 'How Facts Make Law' (n. 114) 182.
139 *Roe v Wade* 410 U.S. 113 (1973).
140 Mark Greenberg, 'How Facts Make Law' (n. 114) 182–4.
141 ibid, 193–198; Greenberg, 'Hartian Positivism and Normative Facts: How Facts Make Law II' (n. 117) 288–90; Greenberg, '*How Facts Make Law* and the Nature of Moral Facts' (n. 119) 166.

of rules'.[142] A 'Hartian disposition' is where a social rule is accepted, at least by the officials, and since it is accepted individuals will criticise or apply other social pressure towards others who fail to follow it and likewise will regard such actions as justified.[143] An example of a social rule Greenberg cites from Hart is that one must take their cap off in church.[144] However, Greenberg cites the example that Hart gave of the rule of recognition as 'what the Queen enacts in Parliament is law', holding that if one were to take 'such formulations of the rule of recognition seriously it would not fit into Hart's practice theory since that theory has nothing to say about rules that do not specify a course of action'.[145]

Thus according to Greenberg 'Hart simply proceeds on the assumption that the Hartian dispositions for a rule of recognition are what they would be if the rule were specified in terms of what standards an official is to apply in dealing with matters that come before them in an official capacity.[146] This warrants reformulating the rule of recognition to 'what the Queen in Parliament enacts is to be applied in deciding matters that come before an official'.[147] Following this it is held that Hartian dispositions cannot satisfy the rational-relation requirement because they are not binding on individuals nor do they specify reasons for actions, nor do they do so intelligibly.[148] Basically Greenberg is arguing that Hartian dispositions are insufficient because they do not, or cannot, successfully aid in determining the correct model.[149] How Greenberg argues this in detail will not be relevant for the forthcoming discussion so it can simply be accepted for the sake of argument.

142 Greenberg, 'Hartian Positivism and Normative Facts: How Facts Make Law II' (n. 117) 271.
143 ibid, 271–2.
144 ibid, 272.
145 ibid.
146 ibid.
147 ibid.
148 ibid, 273.
149 ibid, 274–89.

III.II – Refuting the Practice Theory's View of Hart

For the sake of Hart's theory and legal theory in general an argument must be made against the practice theory. The practice theory is currently so widely regarded as canon in legal theory, even other Hartian defenders tend to concede the problem and try to work around it, thus passing over it here would make the rest of the enterprises of this essay excessively difficult even if they are regarded as alternative arguments.[150] Moreover it follows that if the practice theory can be disputed in its application to Hart that Hart's theory would be defensible from Greenberg's argument since the alleged inadequacy of Hart's position is that it fails on account of the practice theory. The general argument of this section is that the practice theory fails to capture the difference between primary and secondary rules and is therefore an improper representation of Hart.

Raz is generally attributed with terming and constructing 'Hart's practice theory of rules' even though Hart never mentioned it in the main corpus of *CL*.[151] In *Practical Reasons and Norms* Raz was trying to understand the connection between rules and reasons for action.[152] In the process of this inquiry Raz regarded Hart as providing the most successful analysis of rules as practices, it is this analysis that

150 See for instance the following and additionally the relevant authors cited therein, Greenberg, 'On Practices and the Law' (n. 116) 126; Greenberg, 'Hartian Positivism and Normative Facts: How Facts Make Law II' (n. 117); Jules Coleman, *The Practice of Principle* (Oxford UP 2001); Scott Shapiro, 'Law, Plans, and Practical Reason' (2002) 8 L Theory 387; Veronica Rodriguez-Blanco, 'From Shared Agency to the Normativity of Law: Shapiro's and Coleman's Defence to Hart's Practice Theory of Rules Reconsidered' (2009) 28(1) L and Philosophy 59; Jeffrey Kaplan, 'In Defense of Hart's Supposedly Refuted Theory of Rules' (2021) 34(4) Ratio Juris 331.

151 For instance, Greenberg, 'On Practices and the Law' (n. 116) 126; Julie Dickson, 'Is the Rule of Recognition Really a Conventional Rule?' (2007) 27(3) Oxford J of L Studies 373, 382; Rodriguez-Blanco, 'From Shared Agency to the Normativity of Law: Shapiro's and Coleman's Defence to Hart's Practice Theory of Rules Reconsidered' (n. 150) 1–2; Kaplan, 'In Defense of Hart's Supposedly Refuted Theory of Rules' (n. 150) 331, 337.

152 Joseph Raz, *Practical Reason and Norms* (2nd edn, first published 1975, Oxford UP 1999) 1.

Raz termed the 'practice theory'.[153] This analysis is formulated in the following way. A rule that x should φ when conditions C obtain exists in society S if, and only if, the following conditions obtain:

> '(1) Most x's who are members of S regularly φ when C. In other words, the rule is regularly complied with by members of the society to whom it applies. (2) In most cases when an x does not φ when C, they encounter some critical reaction from other members of S. In other words deviation from the rule are the occasion for a critical reaction. (3) Such critical reactions do not themselves attract further criticism from members of S. Those who manifest critical reactions to deviations from the rule are not in turn subjected to criticism for doing so by members of S. (4) Members of S use expressions such as 'an x ought to φ when C' and 'it is a rule that an x ought to φ when C' to justify their own actions and to justify demands made of others or criticism of their behaviour.'[154]

The first defect Raz holds that the practice theory suffers from is that it does not explain rules that are not practices.[155] Here Raz argues that 'a legal rule is not legal if it is not part of a legal system likewise a social rule is not social if it is not practised by a society, but it may still be a rule'. Putting the point briefly, if it is possible to consider that there are rules even if they are not practised, then the explanation of what a rule is cannot be explained by the practice theory. Here Raz mentions moral rules as examples of rules which individuals, perhaps even as personal rules, may consider to exist even if they do not believe them to be valid or practised.

The second defect is said to be the failure to distinguish between practised rules and accepted reasons.[156] Here Raz cites Warnock's cricket example where one is a spectator at a cricket match. One would notice that after six balls have been bowled from one end the players

153 ibid, 51.
154 ibid, 52–3.
155 ibid, 53–5.
156 ibid, 55–6.

will move around, after which another six balls are bowled and so on, deviations from this are observed to be met with criticism. One would probably also notice that when a slow bowler is replaced with a fast one that some of the players stationed close will be moved further away, one would also notice as before that a failure to do this will be met with adverse criticism. A person would be right, according to the argument, to conclude there is a rule in the first case but not in the second. The practice theory however treats these as being the same.

The third and final defect of the practice theory is that it deprives rules of their normative character.[157] By condition (4) Raz holds that stating 'x ought to φ' or 'it is a rule x ought to φ' can be both to describe a practice but also more generally that one should do something. Saying 'it is a rule' presupposes a practice. Stating that there is a rule is therefore irrelevant to the normative import of the statement. Thus, these sorts of statements are statements that there is a reason, not reasons in themselves. This is therefore irrelevant for practical reasoning according to Raz and that means the practice theory must be rejected.

On the first defect. When Austin determined the province of jurisprudence he outlined that an inquiry about law is not concerned with anything and everything called 'law' such as scientific laws or 'the laws of fashion' but rather to distinguish 'positive law' from similar phenomena.[158] Kelsen qualified this holding that legal theory is an investigation of law as a specific social technique which has to be distinguished from other social phenomena.[159] Similarly, Hart held that his inquiry could be considered a work in descriptive sociology and clearly discussed law in a social context.[160] The sort of rule Raz is concerned with in this first defect is said to be one which may not even be social, in which case not finding a discussion of it by Hart should be unsurprising given

157 ibid, 56–8.

158 John Austin, *The Province of Jurisprudence Determined* (John Murray (London) 1832) 1–5.

159 Hans Kelsen, *General Theory of Law & State* (Originally published 1949, Routledge 2017) 15; Hans Kelsen, 'Law, State and Justice in the Pure Theory of Law' (1948) 57(3) Yale L J 377, 377–8.

160 Hart, *The Concept of Law* (n. 137) Preface, 1, 9–10, Ch VI.

it was not within the scope of his inquiry or even of legal theory in general. Similarly it signals that Hart was not trying to qualify precisely why an individual accepts a social or personal rule, of course Hart gives various examples here and there but generally the issue is left open since it is beyond his inquiry. Dickson shares the view that Hart was not attempting to provide reasons why individuals accept certain social or legal rules but largely worked from the position that *if* accepted as such those rules entail normative effects, which Hart sought to use to explain legal systems which were the subject of his inquiry.[161]

On the second defect. This defect is widely regarded as being decisive in dismissing Hart's account and is therefore deserving of a detailed treatment and criticism. Hart outlined this precise issue when discussing the persistent questions of legal theory saying, 'the account of the mandatory rule has soon to be abandoned, this account says that a rule exists only when a group of people or most of them behave 'as a rule' in a specified similar way in certain kinds of circumstances'.[162] Hart continues, saying that there may be 'mere convergence of behaviour of a social group yet no rule requiring it'.[163] Even here at this early stage in *CL* Hart qualifies 'mere convergences or habits' as that which the deviation from will not be met with punishment or even reproof, social rules however are likely to result in some sort of reproof if deviated from, and when legal rules are deviated from the consequence is 'definite and officially organised' which the non-legal rule specifically lacks.[164]

It is held in the cricket example that there is a rule requiring players to move after six balls are bowled but there is not any rule requiring the players to move further away when a fast bowler swaps with a slow one. This conclusion is imprecise and can be formulated better using

161 Dickson, 'Is the Rule of Recognition Really a Conventional Rule?' (n. 151) 379–82, 396, 398–9.
162 Hart, *The Concept of Law* (n. 137) 9.
163 ibid.
164 ibid, 10.

Hart's distinctions which can be applied *mutatis mutandis*.[165] There is no 'official rule of the game' requiring the players to move to certain positions depending on how fast the ball will be bowled, but it is a 'social rule of the game' that the players do so. Conversely, it is an 'official rule of the game' that the players move after six balls are bowled. How can the cricket spectator differentiate between the various behaviours in order to determine what the official rules are? Here Hart provides an answer. If the spectator observes that no criticism is made against players for bowling the ball with their left or right hand then they can conclude such rules are mere convergencies. If there is criticism made against the players for a particular act, *who* is making the criticism? Is it just amongst their teammates? In this case the rule is very likely to be a social one that has been deviated from, meaning it only applies to that subset of the overall group, i.e. that team. If there is criticism directed against a player by the umpire serving the function of an 'official of the game', and possibly the players of either team, then this is very likely to be an 'official rule of the game' that has been deviated from.

How, however, could the spectator figure out from observation whether the person serving as the 'official of the game' is actually one? Here Hart again provides an answer. If any of the players have a dispute about what to do or what should happen in a particular scenario and they appeal to that person to settle the doubt then that person is very likely to be an 'official of the game'. More importantly, if a player attempts to deviate from the instruction of that same person and suffers a significant consequence – they could be sent off and denied permission to play, or if the refusal is widespread amongst the players they may even cancel the game – in this case again it shows that the person is an official. What the spectator can observe from such occurrences is the existence of a 'rule of recognition of the game' where an authoritative figure is regarded as settling conclusively doubts as to what the 'official rules of the game' are. If they are not regarded

165 In what follows Hart's points about converging behaviour, social rules, official rules, and primary and secondary rules are adapted in order to show how the example has underappreciated Hart's contribution.

as settling the doubts then *ex hypothesi* they are not an 'official of the game'. Perhaps in certain instances the officials or simply the players themselves may refer to what is agreed to be an 'official manuscript' stating what the 'official rules of the game' are, here again there is an occurrence which shows the existence of a 'rule of recognition of the game'. If there are no instances which suggest the existence of a 'rule of recognition of the game' then *ex hypothesi* it appears there are no 'official rules of the game', though there may be 'social rules of the game'.

Raz's formulation of Hart's view completely fails to distinguish between converging behaviour, social rules, and official (or legal) rules which Hart expressly drew attention towards. In premises (1)–(4) Raz has only formulated what Hart would call a social rule, which can only be primary rules. It is the case in fact that Hart is eager to solve the very problems that Raz accuses him of suffering from. As was discussed in chapter II.III the rule of recognition, properly construed, is a rule on which it is agreed that it settles the doubt about what primary rules are. Raz's formulation is one of primary rules and social rules only, completely ignoring Hart's seminal contribution of secondary rules. As Dickson points out, Hart did not go into detail specifying the exact reasons there are for agreeing to or for following the rule of recognition, only holding, or giving basic examples that morality need not be a reason for agreeing to follow the rule.[166] Note that in the example it would be beside the point to ask why the players or officials play or agree to play cricket in the first place.

On the third defect. Here the main thing Raz takes issue with is that according to condition (4) a person could say 'it is a rule x ought to φ', presupposing in the process that the rule is practised. This premise is far too literal an interpretation of Hart because Raz is applying this to all cases, Hart likely would not say this about his own theory. This is so since Hart argued extensively that language is 'open-textured' and used this specifically to respond to 'rule sceptics', thus it would not be

166 Dickson, 'Is the Rule of Recognition Really a Conventional Rule?' (n. 151) 379–82, 396, 398–9.

hard to imagine that one person saying 'it is a rule x ought to φ' or 'x ought to φ' *could* be regarded as instances of the open texture of language.[167] Raz ignores this feature of Hart's theory and offers nothing to dissuade from using such arguments, rather Raz seems to rely on the open texture of language in order to facilitate his objection. Even still, suppose that one did use the expression 'it is a rule x ought to φ' in the way that Raz argues, it would not be much of a stretch to consider that an interlocutor might respond 'do you mean it is a rule enforced by the police or that people generally follow?' Ordinary citizens in general are capable of asking for basic clarifications like this, thus it seems far-fetched to regard Hart as considering that people are so simplistic that they do not ever differentiate one kind of rule from another, which is implied by condition (4).[168]

Furthermore, in *Essays on Bentham* Hart considered, among other things, the arguments offered by Raz on the 'practice theory'. Here Hart said that he did not share the cognitive interpretation of duty advanced by Raz and others, 'far better adapted to the legal case is a non-cognitivist theory'.[169] According to this theory of duty, statements asserting others have a duty do not refer to actions which they have a categorical reason to do but to actions which are due or owed from those 'having the duty or which may be properly demanded or extracted from them'.[170] Hart gives the following example, where a judge decides a case declaring that an individual has an obligation under a statute enacted by the legislature the judge will be making a 'committed statement' since they are holding in common with other judges of the system a rule of recognition according to which legislative enactments are identified as law.[171] The judge who accepts this rule of recognition,

167 Hart, *The Concept of Law* (n. 137) Ch VII.

168 Though it is the sort of simplistic scenario Hart has in mind when constructing primary rules from a hypothetical 'primitive society', but again this only reinforces the point that Raz was imprecise in constructing Hart.

169 HLA Hart, *Essays on Bentham: Studies in Jurisprudence and Political Theory* (Oxford UP 1982) 159.

170 ibid, 160.

171 ibid.

and the deriving subordinate laws in common with other judges of the system, constitutes a reason for them personally to conform to the laws, and to treat this as standards as to what is rightly or wrongly legally required from them and thus determine what demands are properly made from the laws generally.[172] Hart concludes this brief argument by saying that he does not think fleshing it out in an acceptable manner would involve abandoning these essentials.[173]

Here Hart is arguing in the same manner as has been argued in the foregoing of this section, that the secondary rules, especially the rule of recognition, form an important component of explaining the interactions among the officials, and between them and the citizens. Here, as in the original formulation of the rule of recognition, Hart does not elaborate on the reasons why the judges or officials have accepted the particular rule of recognition, what matters is that they do in fact accept it, whatever the reason. Many understand the rule of recognition as giving a reason for action, however this was never Hart's original formulation of the rule and it is argued that no other formulations of the rule should be entertained. This was pointed out in chapter II.III in relation to Hart's postscript and Dickson has issued a similar caution against the discrepancy Hart introduced into the rule of recognition in the postscript.[174]

Greenberg's formulation of 'Hart's practice theory' is quite interesting in relation to this discussion. Recall that Greenberg cited Hart's example of the rule of recognition as 'what the Queen in Parliament enacts is law' and said such formulations should not be taken seriously in order to yield Hart's practice theory. What Greenberg is noticing here is what has been argued; that Hart did not actually consider the rule of recognition to be a reason for acting in itself. To elaborate, even if the rule of recognition is accepted, that would still not mean that a specific course of action is entailed by it alone – those are what primary rules are. Primary rules are *ex hypothesi* rules of obligation, i.e. rules

172 ibid.
173 ibid.
174 Dickson, 'Is the Rule of Recognition Really a Conventional Rule?' (n. 151).

specifying a course of action.[175] The rule of recognition is what settles the doubt if there is disagreement about the primary rules which do specify a course of action.[176] For example, if the rule of recognition is 'what Rex I says is law' but Rex I in fact has yet to say anything, i.e. to specify any obligations, then for the time being there is no law. Thus Hart holds that a legal system exists where there is the union of primary and secondary rules.[177] As Greenberg, rightly, is showing, taking only secondary rules would not specify any course of action, hence it logically follows that law is the union of primary and secondary rules but not just secondary rules.

It should therefore be regarded that interpreting the rule of recognition as directly entailing reasons for acting is unsuccessful, since it does not logically follow based on the construction of the primary and secondary rules *ex hypothesi* that they should be interpreted in the way that the practice theory attempts to do. Additionally Hart reiterated this position in rejecting the 'cognitivist' approach to understanding rule acceptance. Now the question that arises is if Hart is not to be understood in accordance with the practice theory, and therefore that Greenberg's argument is not a direct counter-argument, then what is the relationship between Hart and Greenberg? Does Greenberg succeed in making an indirect argument? This question occupies the final section of this chapter.

III.III – Between Models and Legal Systems

To begin this section it will provisionally be assumed that it is correct to talk about models and rational determination in the way Greenberg uses these terms, ultimately with the goal of showing that it is misleading to speak in such ways about law or about what makes legal content the way it is. The argument is that when the rational-relation requirement is applied to legal practices they still cannot account for the

175 Hart, *The Concept of Law* (n. 137) 92.
176 ibid, 94–5, 100.
177 ibid, 97–99

grounding of legal content, thus Greenberg offers normative facts as a viable addition to the explanation of what grounds legal content. Thus if it can be shown that practices plus the rational-relation requirement can account for the grounding of legal content in this way, or that even adding normative facts into the equation does not aid in explaining the grounding of legal content, then a counter-example will have been adduced. Rather than try to discuss these elements in the abstract a proper examination of real legal instruments would be more fruitful for explicating what is at issue.

After the Irish war for independence Ireland separated from the United Kingdom and became a dominion of the British Empire in 1922 as the Irish Free State. In 1937 Ireland adopted a new Constitution which is still in force, and which signified the creation of an independent Irish legal system. In 1948 Ireland declared itself a Republic and became independent from the Empire. Article 50 of the Constitution provides that laws which were in force in the Irish Free State prior to the Constitution coming into force shall continue to have the same force and effect, unless they are incompatible with the Constitution or are repealed or amended by legislative enactments. The practice of the legislature in both the Free State and in the Republic means that most of the legal rules established at common law by the courts in England and Wales prior to 1937 remain in force in Ireland, there being no statutes enacted in relation to them. Thus having such similar legal regimes decisions in the English and Welsh courts are highly persuasive and often followed in Irish courts. In tort law for instance there is hardly any divergence between the two regimes. But there is one very explicit point of divergence in the law surrounding nervous shock that poses a significant explanatory challenge for Greenberg.

Following the Hillsborough disaster in 1989 in England a number of families of the victims sued for nervous shock – a type of negligence claim where the negligence causes a psychiatric illness (or 'illness of the mind' according to older precedents). In *Alcock v Chief Constable of*

South Yorkshire Police[178] the House of Lords held that none of the victims, as secondary victims not involved in the incident, had sufficiently proximate relationships – meaning that they had to have sufficiently close relationships to the victims (e.g., parent-child), and have close proximity in space and time to witness the incident or its immediate aftermath. Further it was held viewing the incident through mediums such as television or radio did not count as witnessing, and hours after the fact did not count as being immediate.[179] Influential in that determination was the dicta of Lord Wilberforce in the earlier case of *McLoughlin v O'Brian*[180] where the spatial and temporal restriction were introduced, but no specific limits were set out. In the Irish High Court shortly after the *Alcock* decision Denham J considered *McLoughlin* but not *Alcock* in *Mullaly v Bus Éireann*,[181] holding that even though a number of hours had passed the plaintiff had witnessed the immediate aftermath of her husband and sons having been gruesomely injured in a traffic accident, she could still be successful under a claim of nervous shock. Later in *Kelly v Hennessy*[182] the Irish Supreme Court set down five criteria necessary for a successful claim of nervous shock in Ireland but did not include a distinction between primary and secondary victims among them, Denham J (then a Justice of the Supreme Court) explicitly held that the fact that plaintiff found out about the accident from a phone call and then witnessed the aftermath did not prevent her from satisfying the proximity criteria. Finally, the Irish Court of Appeal recently in *Sheehan v Bus Éireann*[183] after considering these developments in Irish and English law held that "the primary/secondary classification developed by the English courts… have not, at least to date, been adopted into the law of this jurisdiction."[184]

178 [1991] UKHL 5, [1992] 1 AC 310.
179 ibid.
180 [1983] 1 AC 410.
181 [1992] ILRM 722 (HC).
182 [1995] IESC 8, [1995] 3 IR 253.
183 [2022] IECA 28.
184 ibid, judgment of Noonan J, para 68.

To return to Greenberg. Despite having ostensibly the same legal content and legal determinates prior to the Hillsborough disaster, i.e., the same set of precedents and related principles in relation to the law of torts, the legal content of nervous shock law in Ireland and England has diverged. Such that a secondary victim in England who is informed via phone or some other non-physical media of an accident and takes some hours to arrive at the aftermath cannot succeed in a claim of nervous shock and has no legal remedies, but in Ireland such a person does.

An apparent objection here might be to say that since these are two different legal systems the law practices are in fact different, thus leading to a divergence in legal content. But this objection would be misplaced since the point of departure has been identified and the question posited as to why it has happened, to simply assert 'the legal practices are different' entirely ignores *why* they are different, it ignores Greenberg's inquiry: what makes the legal content the way it is. Especially since in this special case they were not always different but became so.[185] To be faithful to the spirit of Greenberg's argument the proper path is to try to argue that 'normative facts' provide the answer for this divergence, thus explaining what makes the legal content the way it is. In this example then where or what are the normative facts? To simply state that 'normative facts' are the best candidates to explain the divergence is insufficient because *there must be an intelligible reason as to why these particular facts obtain* in order to uphold the rational-relation requirement. No obvious normative facts present themselves here as candidates for this explanatory position.

There is a far better explanatory alternative which could supply the tools for more fruitful analysis, which is theories of argumentation.

185 If the argument were to be followed that the practices are different and not the same up until post *McLoughlin* as is argued here, then could it not be supposed that in every case where there is different legal content that legal practices *must* be different so as to ground it? If this were true Greenberg's argument has failed since there is no place for normative facts in the explanation of differing legal content. For the sake of argument, if nothing else, this line of thought should not be followed.

Since the legal practices in the example are argumentative as are some of the examples Greenberg gives, it is plausible that argumentative practices with a whole or partial basis in formal logic, which is not normative *per se*, could explain how legal content obtains from legal practices. This exemplifies Greenberg's rational relational requirement by reinforcing the notion that legal practices and content are reason based to the detriment of normative facts. As Greenberg said, 'even with a rational-relation requirement there would be various possible mappings as to what the legal content could be', would it not be equally plausible then for divergence in legal content to be explained by this rather than normative facts?

MacCormick for instance holds that arguments support a given way to interpret something and that there are certain kinds of arguments 'that legal systems characteristically deploy in the justification of interpretations where these are themselves reasons for decisions.'[186] MacCormick offers the following typology of the main sorts of arguments that possess this quality; 'linguistic arguments' in which interpretations are favoured based on linguistic context (e.g. ordinary and technical usage), 'systematic arguments' of which there are a few kinds but which in general are made with the overall coherence of the legal system in mind, and finally 'teleological and deontological arguments' which are two basic forms of practical argument but which "are restricted by the institutional setting".[187] MacCormick also points out that positive law may resolve conflicts between these types of arguments, through argument, citing a maxim of English law, 'the Golden Rule', where the ordinary reading of a statute should be taken as its meaning unless it would entail absurd results.[188] A more prominent theory in this domain

186 Neil MacCormick, 'Argumentation and Interpretation in Law' (1993) 6(1) Ratio Juris 16, 20.

187 ibid, 21–6.

188 ibid, 26–9. This is substantially the same point made in the last chapter against Dworkin that the legal system may affect what the law is, here it is stated in an argumentative context, which would only be applicable to legal systems which possess this quality.

is Alexy's theory of legal argumentation though it is beyond the scope of present purposes to summarise it here.[189]

Another interesting author in this connection is Sartor who has made serious strides in formalising legal argumentation, holding 'we must come to consider the legal system as an argumentation framework, that is, as a repertory of material to be used in the struggle of competing arguments and meta-arguments.'[190] Another significant account that has numerous examples applying itself to legal cases and statutes is the 'logocratic method' offered by Brewer which is a theory of argumentation.[191] According to this method the various premises of legal argument can be a mixture of different modes of formal argumentation (deduction, induction, abduction, and analogy), which can be formally represented when one realises that legal argument is often enthymematic, i.e. some of the premises are not expressed.[192] According to these theories of argument the use of particular interpretive methods arises due to their argumentative merit, and this is entailed by the fact that the practices are argumentative. Thus in contrast to Greenberg arguing that the model is what determines the interpretive method which the practices use, it would seem it is practices that may determine the method of interpretation in virtue of their argumentative nature.

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189 Robert Alexy, *A Theory of Legal Argumentation: The Theory of Rational Discourse as Theory of Legal Justification* (Originally published 1978, Ruth Adler and Neil MacCormick trs, Oxford UP 2009).

190 Giovanni Sartor, 'A Formal Model of Legal Argumentation' (1994) 7(2) Ratio Juris 177, 200. On Sartor see the preceding article generally and see also his partly formal account of statutory interpretation, Giovanni Sartor, 'Interpretation, Argumentation, and the Determinacy of Law' (2023) 36(3) Ratio Juris 214.

191 Scott Brewer, 'Logocratic Method and the Analysis of Arguments in Evidence' (2011) 10 L, Probability and Risk 175; Jack Weinstein, Norman Abrams, Scott Brewer and Daniel S Medwed, *Evidence: Cases and Materials* (10th edn, Foundation Press 2017) 10–24; Scott Brewer, 'Interactive Virtue and Vice in Systems of Arguments: A Logocratic Analysis' (2020) 28 Artificial Intelligence and L 151.

192 Brewer, 'Logocratic Method and the Analysis of Arguments in Evidence' (n. 191) 176–80; Weinstein, Abrams, Brewer and Medwed, *Evidence: Cases and Materials* (n. 191) 14–24; Brewer, 'Interactive Virtue and Vice in Systems of Arguments: A Logocratic Analysis' (n. 191) 152–69.

Hart's theory is perfectly compatible with these theories of argument since the rule of recognition is *ex hypothesi* the way in which doubts about primary rules (or obligations) are settled, that this is done argumentatively is permissible – there are links to these ideas in Hart's work on the open texture of language. Sartor's considering of the legal system as 'an argumentative framework' seems to follow from the rule of recognition being a marker of what makes a legal system a legal system. Important to remember is that these points about argumentation do not apply to all legal systems but namely only to those under present consideration, which is common law legal systems, though civil law systems appear to possess similar argumentative processes. Such argumentative processes are not however necessarily present in a legal system like that in the examples of Rex I.

Nonetheless, the diverging rules of nervous shock in Ireland and England could be better explained by way of argumentative differences, or that the arguments are the same but the facts that apply differ. These are perfectly intelligible differences explained without any reference to normative facts about what is right or wrong in a moral or evaluative sense. Similarly, if this were ignored there are no intelligible normative facts that could explain this difference in legal content. It could be supposed that a staunch Greenberg defender might argue that the reason for the argumentative practices to operate in the way they do is because of the model making it so but there are two significant flaws to this response. The first is that the diverging legal content in the nervous shock example is explainable entirely in terms of descriptive facts about what the relevant officials said and did. The second is that if the model does indeed make the practices this way, which are core parts of the legal system of Ireland and the United Kingdom, then it is also a claim about legal systems, but legal systems were explicitly excluded from analysis.

At this point it can no longer be assumed that to talk of models in the way they have been spoken of is acceptable, rather it must be questioned. This point of departure arises from the two flaws that were just drawn. Especially, since Greenberg begins his analysis by working

from the position of a particular legal system but without qualifying what a 'legal system' is, specifically excluding it as being a concern to address. Greenberg's basic argument is that in order to find the 'correct model', i.e. the model that grounds what the legal content is, normative facts about what is right and wrong are the best candidates. Recall that a model explains, among other things, what the law practices are and how disputes between 'aspects' of different practices and legal content are resolved. But this is what the rule of recognition does, as was observed in the preceding section, if the judges share a rule of recognition that legislative enactments are law then this will outweigh or surpass any other obligations and is regarded as decisively determining what the obligations are. It could therefore be supposed that Greenberg's model and Hart's rule of recognition are ostensibly the same thing – an explanation of the conditions, agreements, or understandings between a society of individuals, or at least the officials, for settling the doubt as to what obligations they owe.

It could further be supposed that Greenberg is arguing on one side that the best underlying motivations or reasons that explain acceptance of such an agreement are normative ones about what is right and wrong, whereas Hart is arguing that it need not be.[193] On this construction however a quandary arises if the model and rule of recognition are treated as being the same, this is that Greenberg's model explicitly ignores the legal system but Hart held that the rule of recognition was at the core of the legal system. To explicate this difference, suppose there was a society comprised mostly of monarchists who believe that it is right that the monarchy should lead them, holding 'whatever Rex I says is law'. Here a model for determining the legal practices has come about in Greenberg's normative sense, but also a legal system via a rule of recognition in Hart's sense.[194] Thus, there is an important interplay between the legal system's existence and Greenberg's 'correct model'

193 On Hart see, Hart, *The Concept of Law* (n. 137) 185–6, 250.

194 If it is denied that a model would allow the normative belief of the hypothetical monarchists then it appears that the account denies such legal systems can exist, which would be a much more significant issue for the account to address.

which was somewhat acknowledged by Greenberg when saying that normative considerations must be 'in advance of consideration of the practices of the legal system'.[195] Greenberg's phrasing however suggests that Greenberg has in mind that normative considerations will determine, or guide in an intelligible way, how legal content follows from law practices. This is an implication of the *Roe v Wade* example, which further implies that legal practices should tend towards the same result, i.e. those that are regarded as morally correct or seen as right and proper. A similar point as this was addressed by Greenberg who said that nothing in the argument showed that moral facts and such were real but if all such facts were denied and it was not possible to conceive how the law practices intelligibly contributed to the legal content then the argument would lend support to the existence of moral facts.[196]

There is therefore a significant absence in Greenberg's thought which is that instead of normative considerations comprising *X* such that *X* along with practices contribute to the legal content in virtue of *X* determining the correct model and thus grounding the legal content, it could simply be that *X* is an all-things-considered conclusion about what the legal system can or cannot do. This is supported by the discussion of theories of argumentation and the explanation of divergence in the nervous shock example, particularly relevant is MacCormick's point that legal arguments may be invoked in virtue of the nature of the legal system. The example given of a bent model is that a hypothetical state court judge reads *Roe* such that it denies a woman a right to abortion, which is a non-starter as a model for what makes the legal content the way it is, according to Greenberg, '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.'[197] Greenberg then seeks to offer normative facts as a way to explain what makes the legal

195 Mark Greenberg, 'How Facts Make Law' (n. 114) 193.
196 Greenberg, '*How Facts Make Law* and the Nature of Moral Facts' (n. 119) 173–4.
197 Mark Greenberg, 'How Facts Make Law' (n. 114) 184.

content the way it is, i.e. what makes this hypothetical ruling seem absurd.

If, however, one considers the hypothetical case from the point of view of the legal system, as suggested by theories of argumentation, then the argument would be something along the lines of what follows. The courts in America operate by a principle of *stare decisis* (as do the courts of all common law jurisdictions) whereby judgments of the superior courts must be upheld by the lower courts, for federal law this principle applies in the same way such that decisions of the federal courts are binding on the state courts which are of inferior standing on such matters. Hence a hypothetical decision reading *Roe v Wade* such that a right to abortion is denied, would be a violation of the principle of *stare decisis*, which is a crucial part of the American legal system via the operation of its courts. Nothing about this argument is normative yet it perfectly explains why the content is the way it is, and it does so intelligibly, further it explains the absurdity of the hypothetical argument. The worry for Greenberg should be clear, if an understanding of legal systems can fulfil this explanatory role then it seems that the exclusion of such considerations from the inquiry *ab initio* would, unsurprisingly, lead to an absence of determinacy which was provided by understanding the legal system.

As was pointed out in the previous chapter Hart argues that in order to say 'there is a law', or to the same effect that 'a law exists', one needs to know if there is a legal system in operation with the ability to make, enforce, and change the laws, since 'every law necessarily comes from and belongs to a legal system'. To say similarly that one has a legal right is to say that some provision is a law which gives one the right, which in turn is supported in its existence by the legal system. By excluding legal systems from examination Greenberg's argument is reliant on something else supplying the explanatory role of what a legal system does, which seems to be where a model comes into play. Either that or the analysis means to contest that 'every law necessarily belongs to a legal system', this alternative appears dubious however in light of Greenberg's exclusion of legal systems from analysis. Overall, the

exclusion of legal systems from analysis appears therefore to be entirely detrimental to the argument.

The overlap of Greenberg and Hart seems quite clear when it is said 'models come at different levels of generality, more specific ones include the metaphysical counterparts of theories of constitutional, statutory, and common-law interpretation.'[198] To come straight to the point whichever of these theories of interpretation is used in a particular legal system depends solely on that legal system rather than the model. In the previous chapter it was shown that in many common law jurisdictions there are statutes of the legislature setting out what interpretive methods are to be employed by the courts. Now even if one falls back on constitutional interpretation as exclusive to the courts this will not do, for in the United Kingdom there is no written constitution and there is a doctrine of 'Parliamentary Supremacy'. Greenberg asks what makes such a model the 'correct one' but this is *suggestio falsi*, since for the 'law practices' to be taken as practices with legal effects they have to be socially accepted as such, asking what makes this in turn correct is an unnecessary reduplication of the simple fact that they are socially approved to have that capacity.[199]

Even though the foregoing objections are all important to understand, there is something even more fundamental about Greenberg's challenge that is deeply misplaced. Greenberg's motivation is ultimately to say that morality or other evaluative reasons, conceived as normative reasons for actions, guides in large part what the legal content of a particular legal system is. But Hart already conceded that this may be true. As was said at length in objecting to the practice theory's view of Hart, nothing in Hart's theory provides an answer as to *why* a society accepts the secondary rules that they do. Hart thus concedes that in large part the underlying motivations for this may be moral.

198 Mark Greenberg, 'How Facts Make Law' (n. 114) 179.

199 If the argument sounds familiar it may be because it appears to be analogous to when Hart argued that Kelsen's *Grundnorm* was an unnecessary reduplication of the fact that a rule is obeyed, Greenberg's argument seems to suffer the same sort of problem, see, Hart, *The Concept of Law* (n. 137) 292–3.

> "Of course it is true that many judges and many ordinary citizens in most legal systems believe and often assert that they have a moral obligation to conform to law as such, and unless this were true and generally believed to be true, legal systems might be much less stable than they are."[200]

This should be unsurprising since Hart said himself that 'it was explicitly acknowledged that the rule of recognition may incorporate as criteria of legal validity conformity with moral principles or substantive values; so my doctrine is what has been called soft positivism'.[201] It would of course be difficult to understand the way in which Hart can be said to be a soft or inclusive positivist if one followed the mistaken understanding of Hart propagated by the practice theory. But with that misunderstanding dissipated it should be clear that much of what Greenberg argues against has already been conceded.

III.IV – Conclusion

After outlining Greenberg's account in its most updated form section II moved to address 'Hart's practice theory' and to discuss Greenberg's use of it. An examination of Raz's formulation of the practice theory showed that this was imprecise and failed to take proper regard of Hart's distinction of primary and secondary rules but also of mere convergences of behaviour, social rules, and official or legal rules. Greenberg's first reading of Hart tentatively supports this view of Hart, however Greenberg considered that it was more important to render the practice theory. This move makes sense since, as was acknowledged earlier, even other Hartian defenders tend to concede this view of Hart and try to work around it. Here however it was rejected for it was untrue to Hart's original formulation in *CL* and restatement of that view in *Essays on Bentham*.

200 Hart, *Essays on Betham* (n. 169) 160–1.
201 Hart, *The Concept of Law* (n. 137) 250.

Section III went on then to consider if Greenberg's position posed an indirect argument against Hart. At this point theories of argumentation showed significantly more promise in explaining the diverging legal content like that of the nervous shock example than the correct model and normative facts. This led to questioning the interplay present between an analysis of legal systems and the correct model. Most importantly it was held that though there are similarities between the rule of recognition and the correct model, the correct model does not account in any way for the legal system as being capable of impacting the content of the law. Likewise the absence of analysis on legal systems has shown to be detrimental to the account and criticism against Hart. Thus on many fronts Hart's account survives Greenberg's critique.