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Where Objective Facts and Norms Meet (and What this Means for Law)

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Abstract
In this essay, I will engage with the controversy that has sprung up between the proponents of the sharp separation thesis and those of the entanglement thesis. What I will be defending is a variant of the entanglement thesis. By drawing on contemporary action theory and on epistemic conceptualism, I will argue that, while objective facts and practical norms are indeed distinct categories of thought, that distinction does not amount to a conceptual gap—a dichotomy or unbridgeable divide. Their relation, in other words, is not one of logical dualism but one of mere (analytical) distinction between interdependent categories of thinking. Hence the entanglement view on which distinction does not entail dichotomy.

Keywords Facts · Norms · Entanglement thesis · Theory of action · Epistemic conceptualism · Law

1 Introduction

A longstanding debate in philosophy concerns the relation between facts and norms. Central to this debate is the question: Is there a deep divide between facts and norms, or is it rather the case that facts and norms share the same nature? This question invites us to consider whether facts and norms are separated by some unbridgeable gulf or whether a relation of continuity obtains between them. This framing of the question is admittedly blunt, since it does not specify which facts and norms the relation is about or how facts and norms relate one to another. So let me fine-tune it. I will do so by making that question more specific, thereby defining the main topic that will be discussed in this contribution.

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Facts and norms come in several varieties. To begin with, there seem to be at least three main kinds, or categories, of *facts*: objective facts, social facts, and subjective facts.[1] *Objective facts* single out states of affairs that are traditionally understood as mind-independent. Examples of objective facts are the fact that Mount Everest is the highest mountain on Earth and the fact that there exist subatomic particles. *Social facts* are arrangements that owe their existence to intersubjective acceptance, or recognition, within a given community. An example is the fact that Paris is the capital of France: this fact exists because there is a group of people (the people of France) who recognize the city as the capital of their country. So, too, law is widely, if more controversially, understood as a social fact (albeit a complex, internally structured, and multilayered one): law does not exist in nature, like mountains and subatomic particles, for legal systems are collective artefacts, or joint human creations; as such, law exists as a factual entity insofar as it gains widespread social recognition. Finally, *subjective facts* are facts that exist so long as they are recognized or acknowledged by individuals as such, rather than as members of a group or community. Take the fact that dark chocolate tastes better than white chocolate. The existence of such a fact does not depend on any widespread agreement among chocolate lovers. Insofar as one individual acknowledges that much, the fact exists. There is no need to seek social consensus on the superior taste of dark chocolate over white chocolate in order for one to be able to conclude that dark chocolate tastes better than white chocolate. Nor can one regard dark chocolate as objectively more tasty than white chocolate. Hence the subjective quality of that fact.

Clearly, in a work of reasonable length the thesis that facts and norms are continuous or discontinuous can only be discussed once the notion of a fact is specified, thereby determining what kinds of facts we are talking about. For the claim that, say, objective facts are distinct from norms does not necessarily support, and should be kept separate from, the thesis that social facts are irreducible to norms or the thesis that subjective facts are normatively neutral. Similar considerations apply to *norms*, a broad class that also encompasses a variety of kinds. We can thus distinguish, for example, practical from theoretical norms, the former concerned with what one ought to *do* and the latter with what ought to *be*.[2] Moreover, practical norms can be classified as either instrumental or final: instrumental norms are standards establishing what one ought to do in order for certain goals to be achieved; final norms are prescriptions commanding obedience, or at least conformance, no matter what. Another important normative distinction that has been drawn in the literature is the one between prescriptive, or regulative, norms and constitutive norms. Prescriptive norms make use of the deontic vocabulary: they establish what *ought to* be done or what *ought to* be. By contrast, constitutive norms indicate what *counts as* something in a given context: they determine what *status* some entity, move, or activity has in certain settings, which settings are typically also regulated by prescriptive norms.

[1] Here I am following the taxonomy introduced in Hage [27, 26–37] and further enriched in Hage [28, 18–20] and [29].

[2] For a concise introduction to the typological varieties of norms, see Glüer and Wikforss [25, section 1.2].

This taxonomy of norms, which does not claim to be exhaustive, can be further enriched by considering additional types of norms that differ one from the other on a genetic, or genealogical, basis, examples being moral norms, social norms, rational norms, and religious norms. Equally importantly, norms can take the form of a specific instantiation of the normative: the directive, as is the case with deontic standards. Alternatively, norms can map onto what is generically normative, or anything that is not immediately or self-evidently descriptive, in which respect the notion of a norm also takes in the idea of a value: a norm can be an evaluative statement.

Finally, precisely because there is no single notion of "fact" or of "norm," there is no single way of understanding the *relation* that holds between facts and norms of different kinds. There are at least three different ways of understanding that relation. First, it could be understood as an *ontological* relation, under which the facts and norms brought into relation (be it a relation of connection or one of separation) are taken as metaphysical kinds, that is, as "things," or portions of the world. The question, then, is whether an ontological distinction is to be made between those parts of the world we call facts and those pieces of the furniture of the universe we refer to as norms. Second, the relation between facts and norms can be approached from an epistemic or cognitive viewpoint, from which we want to establish whether or not they are entirely separate categories of *thought*. So the relation at stake here is not metaphysical but rather *conceptual*, one of ideas and notions rather than of things. Third, the relation could be approached from the standpoint of the *language* we use to deal with it, where the focus is not on facts and norms as things or categories of thought but on the *claims* that can be made about their connection (or lack thereof). From this angle, the relation is thus primarily *semantic*, our primary interest being in the way in which *statements* about facts—or the *meanings* of such statements—relate to the meanings of statements about norms. So the question here is whether there is any disconnection between our factual language and our normative language.

Even if we can identify three ways in which the relation between facts and norms can be approached—from an ontological, an epistemic, or a semantic angle—this should not be taken to mean that those three debates are independent and unrelated. They are not, and the point of the taxonomy just offered is to provide conceptual clarity in this complex and multilayered debate. This should make it easier to grasp how the different types of facts relate at distinct levels with different kinds of norms. But I do not pretend that taxonomy to be definitive: it is more like a framing device, mapping out the main distinctions at issue. Nor does it rule out the possibility that further and more sophisticated distinctions and taxonomies may have to be brought into the picture in framing the debate on the relation between facts and norms. However, one thing the preliminary taxonomy does do is point out that the debate revolves around not just *two* main terms but *three*. For in addition to figuring out facts and norms, we also have to look closely at the *relation* between them. To do otherwise—that is, to discount that relation—would be to take a partial view of the problem, inevitably affecting the solution we can find to the question: Are facts and norms discontinuous, merely distinct, or continuous?

Moreover, the framing just offered makes it easy to locate the specific focus of the discussion that follows, which is to say that I will be specifically interested in

the *conceptual*, or *epistemic*, relation between *objective facts*, on the one hand, and *practical norms and values*, on the other. My concern, then, will be with the relation between facts and norms understood not as ontological entities (the furniture of the world) or as semantic constructs (linguistic statements) but as *concepts*. Nor will I take into account the full spectrum of facts that have been discussed in the literature: the focus will be on *objective* facts. In short, the relation under scrutiny will be that between objective facts and practical norms, the latter in turn understood as a category of thought—the category of the normative—broadly defined as the realm comprising both *norms* and *values*.[3] What I want to know in that regard, then, is whether objective facts are conceptually heterogeneous from practical norms. That is, I will be closing in on the question: Are objective facts and practical norms merely *distinct* ideas or do they differ radically (is there a proper *discontinuity* between them)?

There is no self-evident answer to the question of whether (objective) facts and (practical) norms are distinct categories of thought. This is partly due to the specific concern with *objective* facts, traditionally regarded as the kind of fact that is most remote from what is normative. That is in contrast to social facts and subjective facts, which are widely understood to be inherently mind-dependent, at least to some extent, for they cannot be said to exist unless they are so recognized by someone (where this "someone" may be an individual or a group). What this mind-dependence suggests, then, is that facts in this broad category (comprising subjective and social facts) are conceptually continuous or homogeneous with norms.[4] This fundamental, albeit tenuous, continuity is far from apparent when *objective* facts are at stake. Indeed, objective facts are traditionally understood as constitutively mind-*independent*, suggesting that (in contrast to subjective and social facts) they are *not* continuous with norms, the latter being widely regarded as constructions of *thought*. Hence the need to drill deeper into the question of whether the discontinuity understood to exist between objective facts and practical norms is really such, that is, whether it amounts to an unbridgeable divide or conceptual gap.

In order to probe that question, let me first consider the two main theses that have been advanced in relation to it, two mutually exclusive claims about the relation between (objective) facts and (practical) norms. The first of these posits a sharp divide between facts and norms, a wall of separation. Let us call this the "sharp separation thesis," on which (objective) facts belong to the "is," a category of thinking that is conceptually (i.e., cognitively) distinct from, and irreducible to, the category of thought to which norms belong, that of the "ought." On this view, there is a rigid dichotomy, or unyielding dualism, between facts and norms: facts are about what "is," whilst norms are about what "ought" to be, and there is no way to bridge the two worlds. The gap separating facts and norms is thus presented as unbridgeable, or absolute, since facts are mind-*independent* and objective, whereas norms are

[3] From now on the word *norm* will accordingly be used as shorthand for the normative at large, understood as a space encompassing both values and norms.

[4] This is not to deny that the mind-dependence of each of those entities is peculiar and possibly irreducible to the mind-dependence associated with the other entities. The claim is not that social facts, subjective facts, norms, and values are indistinguishable one from another; rather the claim is that they inhabit the same conceptual sphere, which is the sphere occupied by all that is mind-dependent.

intrinsically bound up with those who bring them into being and thus incorporate a subjective, mind-*dependent* component. On this view, any direct and unmediated transition from facts to norms (and vice versa) is illicit: no fact can be derived from any set of norms and no norm can be established exclusively on the basis of any set of mere facts, however selected.

On the other hand, we have what, for lack of any more specific name, I will refer to as the "entanglement thesis," the claim that facts and norms are, by contrast, conceptually intertwined. On this view, there is no dualism between facts and norms: facts and norms may well be distinct, but their distinction does not amount to a disconnection. Relatedly, even if the two categories of thought—facts and norms—are analytically distinguishable, they do not make up a conceptual dichotomy. So, while it is well to bear in mind the distinction between facts and norms, it would be a mistake to conceive of them as inhabiting two disconnected domains—the factual "is" and the normative "ought"—between which there can be no relation. Indeed, neither can be fully understood or be made sense of without taking the other into account. For, on the one hand, it is impossible to pick out and handle facts without some normative consideration—or at least this can be done only on pain of making the enterprise sterile and meaningless. On the other hand, there can be no normative human experience without making reference to facts, in that norms cannot be understood in isolation from the factual contexts they are embedded into.

In this essay, I will engage with the controversy that has sprung up between these two camps: between the proponents of the sharp separation thesis and those of the entanglement thesis. What I will be defending is a variant of the entanglement thesis, a modified view that will be introduced in Sect. 2. In what follows, then, I will argue that, while objective facts and practical norms are indeed distinct categories of thought, that distinction does not amount to a conceptual gap—a dichotomy or unbridgeable divide. Their relation, in other words, is not one of logical dualism but one of mere (analytical) distinction between interdependent categories of thinking. Hence the entanglement view on which distinction does not entail dichotomy.

The argument for this entanglement thesis will be two-pronged, one the one hand drawing on contemporary action theory (Sect. 3) and, on the other, on epistemic conceptualism (Sect. 4). I begin by arguing that facts cannot be reduced to objects standing before us as unconstructed states of affairs but are rather part of the practical domain, constituents of the framework in which our action unfolds. This makes facts conceptually more akin to *acts* than to objects, and this is where action theory comes into play. Today, action is widely conceived as an *inherently normative* construct. By virtue of the close relation linking facts to acts, the normative structure of action transmits to objective facts. Objective facts should accordingly be understood as constitutively imbued with the normative and as occupying the same territory in which norms unfold, rather than being decoupled from the latter.

The second prong of the argument in support of the entanglement thesis is that of epistemic conceptualism. On this view, objective facts are not merely recorded or apprehended in an immediate and mechanical fashion. Our encounters with objective facts are conceptually structured: in engaging with objective facts, we resort to conceptual schemata without which we would not be able to make sense of them or even identify them as distinct kinds of facts. This means that facts are fundamentally

and unavoidably concept-laden. And the concepts we use to access facts are in turn continuous with norms, since concepts (and our use of them) are defined and governed by normative standards and evaluative frameworks. Hence, insofar as objective facts are conceptually framed, they stand in a relation of continuity with norms, a relation that in turn entails a distinction but not a separation.

Once the entanglement thesis will be so firmed up with the twofold argument just summarized, I will consider two implications the thesis has on our understanding of the legal world. This discussion will be taken up in Sect. 5, before closing out the whole argument.

2 The Entanglement Thesis Introduced

Let me begin by outlining in greater detail the entanglement here defended. The entanglement thesis is best understood as a response to the sharp separation thesis, which informs a range of theories developed on empiricist premises. As mentioned, the *sharp separation thesis* is committed to a rigid dualism of facts and norms, which are claimed to be metaphysically, conceptually, and semantically separate.[5] This view, which has traditionally been traced back to Hume's discussion of is-statements and ought-statements,[6] has become mainstream within logical positivism,[7] wherein the thesis has served the dual purpose of (i) demarcating the normative sciences from the descriptive sciences and (ii) devaluing the normative sciences. In the most radical variants of logical positivism, the normative sciences have been not only separated from the descriptive sciences but also equated with sheer nonsense as forms of knowledge that fail to meet basic cognitive criteria.[8]

This view ultimately supports, and is buttressed by, a disenchanted worldview seeking to rely exclusively on the methods of the natural sciences in explaining the world and our practical engagement with it. From the standpoint of those who embrace such a worldview, normativity is a spurious category, one that is both metaphysically and conceptually dubious, since it is unobservable, and hence of a kind that best fits a premodern mentality and an enchanted world populated with spiritual entities. For this reason, normativity has no place in a scientific and rational account of the world.

The sharp separation thesis accordingly construes facts as unqualifiedly separate from norms, since only facts (i) are determined by the way in which the world *is*, (ii) can be ascertained by observation, and (iii) can be qualified as true or false. The three features are closely related: (i) *the way in which the world is* can be grasped

[5] The sharp separation thesis and the associated statement of the dichotomy of facts and norms has been consistently defended in logical positivism, where it has been a defining dogma. See, among many others, Carnap [14–17], Reichenbach [57], Frankena [24], and Hare [33].

[6] Hume's [35, 469–470] stance is in fact more nuanced and sophisticated than it is often made out to be. For a systematic treatment of Hume's position, see Creel [18].

[7] A concise introduction to the debate on facts and norms within logical positivist is offered in Putnam [52, 7–27]. See also Zammito [75].

[8] See, for instance, Carnap [14].

(ii) *by observation*; which is why (iii) factual statements can be *true or false* (they are true insofar as they correspond to the way in which the world is, as the world appears to our senses, and false insofar as they do *not* depict the world such as we observe it). Norms, by contrast, do not fit (and need not fit) the way in which the world is, so they cannot be claimed to be true or false. In addition, norms are the product of human decisions, as opposed to being determined by some makeup of the world; therefore, our understanding of norms is not primarily based on observation. In view of these fundamental differences between facts and norms, the transition from facts to norms (and from norms to facts) is regarded as questionable: arguments with normative conclusions are invalid unless they contain at least one normative premise; likewise, no factual conclusion can legitimately be derived from a set of exclusively normative premises.

The *entanglement thesis* is best understood as a radical alternative to the sharp separation thesis and its philosophical background—logical positivism. Indeed, as mentioned, the entanglement thesis rejects the stark opposition of facts and norms. For even in recognizing facts and norms as distinct categories of thought, the entanglement thesis sees a continuity between them, and indeed sees them as deeply intertwined, rather than as forming a dichotomy.[9] For this reason, on account of this interconnectedness, the concepts we use to shape our normative experience also fit into our scientific understanding of the world, and indeed are integral to that understanding. For, even if it is factual phenomena that science seeks to understand, its methods necessarily involve regulative standards, evaluations, purposes, principles, theories, and hypotheses—in a word, norms. Precisely because the worldview thus formed remains anchored to facts in its commitment to understanding and explaining them, it does not take us back to a premodern world of enchanted entities and spiritual creatures. What distinguishes the entanglement thesis, then, is that on the one hand it rejects the scientistic view of the world as a mere collection of facts, while on the other it seeks to explain and make sense of these facts on the basis of norms: it recognizes that the scientific outlook on the world is normatively charged—it is driven by ends and purposes and informed values, principles, and standards—without thereby becoming irrational.[10]

What this also means is that the entanglement of facts and norms is, on this thesis, not just a possibility but a structural and constitutive part of the relation that binds them to each other: insofar as that relation does not posit a dualism between facts and norms, facts cannot be claimed to be normatively inert and norms cannot be conceived as fully fact-independent. Accordingly, there are no bare facts that can exist apart from the norms through which they are understood. That is, we have no access to the world of facts in an evaluatively neutral way: only through a normative medium can we access that world. As a structural relation, then, the entanglement

[9] The entanglement thesis is paradigmatically defended in Searle [62], Putnam [48, 153–191], [49, 170–183], [50, 163–178], [52], Putnam [54, 55], and Railton [56]. For recent discussions of the thesis in the context of legal studies, see Hage [26] and Del Mar [21].

[10] This position is set out in Putnam [51, esp. 203–208].

of facts and norms means that the factual is distinct but not separable from the normative.

What also follows from the structural entanglement of facts and norms is that we can transition from the former to the latter (and vice versa) without ipso facto committing a logical fallacy. True, we need to be careful in making such transitions; but entanglement does make that a legitimate possibility. In fact, if facts are inherently normative—they cannot be made sense of except through a normative framework—and norms (however abstract they may be) cannot even be intelligible without making reference to facts, there is a sense in which transitions between facts and norms are not only appropriate but also called for, precisely to clarify the (structural) relation between them. And this often turns out to be an exercise that helps us not only understand the relation but also question consolidated boundaries, potentially leading to new insights about the objects of our investigations.

Having considered the entanglement thesis and its implications, we can now turn to the support that can be provided for it. This takes us to the two arguments previously mentioned: the practical one laid out in Sect. 3 and the epistemic one in Sect. 4

3 A Practical Argument for the Entanglement Thesis

The practical argument for the entanglement starts out from the observation that objective facts—as distinguished from social and subjective facts—can be understood in at least two mutually irreducible ways. On the one hand, they can be understood in the mind-independent way previously mentioned, that is, as pieces of the furniture of the universe, external *objects* that exist out there as discrete components of the outside world, to which we relate as things that we can only observe, come to know, and verify. This in turn means that we play no significant active role in relation to objective facts: we can form theories about them but not shape them according to our designs. Similarly, our agency in relation to them is limited, its scope being confined within the bounds of what facts so conceived will allow.

On the other hand, objective facts can be understood not as objects but as *products* or artefacts. They are things we (contribute to) *make* or bring into being, and are therefore action-dependent, as opposed to being objects that could potentially exist in an agent-free universe consisting entirely of things and states of affairs. This means that our agency here is not bounded by, but is, on the contrary, integral to the facts we bring into being, to which we relate not as bystanders or outside observers but at as a agents proper, as creators. So, whereas on the "furniture-of-the-world" conception, objective facts are mind-*independent*, on this "practical-agency" conception they are mind-dependent in a way that they are not when conceived as objects belonging to a world of unyielding objectivity. More precisely, they are mind-dependent so far as that is possible within a world that is otherwise mind-independent; they exist in an interspace between the mind-dependent and the mind-independent. But the point is that, as products of our activity, objective facts would not exist *but for* that activity. This makes our action *constitutive* of their existence

and makes them to that extent dependent on such action (with the caveat that what we can do with our action in turn depends on the makeup of the external world).

It is worth pointing out that this practical-agency understanding of objective facts is solidly anchored to the etymology of the factual. In the very etymology of the word we see the idea that a fact is a product of an activity that someone carries out, rather than an object existing in an agentless universe. For the word *fact* derives from *factum*, the Latin past participle of *facere*, which in turn can be translated into English as either "do" or "make." Etymologically, then, *fact* means "what is done or made." And what is done or made is the product of a doer or maker. So understood, then, facts are inherently agential, being dependent for their existence on what an agent does, that is, on an acting subject's activity. Activity and subjectivity—or active subjectivity, and hence agency—are thus, in this sense, essential to facts, which (so construed) cannot be claimed to be agent-independent states of affairs, or objects. So, while etymology does not prove anything per se, it does in this case show that embedded in the language, and so in our way of understanding the world, is a sense that an intrinsic connection exists between facts, on the one hand, and subjectivity and activity, on the other.[11]

Nor is this etymological root exclusive to languages deriving from Latin. In German, the word for a fact is *Tatsache*, and it is instructive that this is a compound word combining *Tat* and *Sache*. The first of these two stems, *Tat*, can be rendered into English as "act," "deed," or "action," while the second, *Sache*, translates to "thing" or "object." Captured in a single word, then, is the idea that on the one hand facts require agency (someone doing something), while on the other this agency is set in the world, meaning that the doing—the agent's action—is performed in a world that is external to the agent. What this single German word captures, in short, is one of the core insights of the entanglement thesis, namely, the idea of facts as the interface where action meets object.

Objective facts can thus be seen to be peculiar in that they face in two directions at the same time: on the one hand they face in the direction of the objects with which they interact (but without being conceptually or ontologically reducible to such objects), while on the other hand—as products of human action, without which they could not come into being—they are integral to the practical dimension of human experience. This dual status of objective facts places them at the intersection where, through action, we engage with the world around us. As products of human action, they occupy a liminal space between agents and objects. Objective facts can in this sense be understood as types of action—peculiar, *pro parte* types of action, to be sure, but types of action nonetheless: they are best conceived as parts of the practical domain, or elements of the framework within which our action unfolds.

Now, this interconnection between facts and action is of some theoretical moment. For, at least in contemporary studies, action is conceptualized as an inherently normative construct. To elaborate on this further point, three main families of conceptions of action have been particularly influential in recent times: action

[11] For further remarks on this point, see Ricca [58, 1090–1094].

as production, action as assertion, and action as participation.[12] *Action as production* depicts action as the outcome of a decision aimed at realizing some goal an agent takes to be good and is thus determined to pursue.[13] On this conception, what distinguishes action is its being thus purpose-driven and aimed at achieving a corresponding result. Action, in other words, is what an agent does in view of a goal. The conception thus contains a consequentialist element, for it defines action in terms of goals and purposes, absent which action cannot be said to make sense.[14] Action so conceived is thus is essentially *teleological*. In turn, this makes action continuous with the normative.

Action as assertion, for its part, is a conception associated with rational intuitionism that depicts action as the expression of one's agency.[15] Instead of making goals and consequences central to action, this conception lays emphasis on its intrinsic *value*. Action is thus presented as a statement about the *value* of action, of what is done. Which means that implicit in the things we do—in the courses of action we choose to pursue—is a claim about their value. This makes action as assertion an *expressive* conception of action: by acting, agents signal or assert what it is that they want to do (their plans or intentions), and ultimately their subjectivity. Equally important, action so conceived, as a mode of expression, is the medium through which we engage with the external world and position ourselves in relation to it. This world is understood to include things as well as other agents, including ourselves, and so the idea is that when we act, we do not simply produce effects and consequences: we also state where we stand in relation to other entities and agents, as well as in relation to ourselves as part of that world. Action so conceived, as assertional, is also at the same time relational in a twofold sense. For one thing, action expresses how we relate to ourselves and to the world around us; for another, through our action we bring values to bear on our action. And since these are values we embrace and make our own—they reflect who we are—the action through which we express them connects an internal, subjective element (our view of ourselves and the world around us) to an external, objective element, namely, the very world with which, through our action, we engage and to which we relate. In this conception too, then, action can be described as a conduit, the vehicle through which the natural realm comes into contact with the normative. For here, too, action is framed as a double-facing construct. On the one hand, what we do is empirical—it can be accounted for *naturalistically* as it is part of the chain of causation through which things happen in the world. On the other hand, action is *normatively charged*, and necessarily so, since there cannot be any action without an agent attaching some kind of value to it, nor would such action make any sense—it could not be recognized as such.

[12] For an introductory discussion of this taxonomy, see Schapiro [61] and Millgram [43].

[13] This conception is introduced and characterized in Schapiro [61, 94–95]. Original versions of this position are defended in Thompson [66] and Vogler [73].

[14] Relatedly, agency, on this conception, is presented as a kind of purposive efficient causality: an agent is someone who makes use of causal connections in the world in order to achieve a goal. On this point, see Darwall [19, 285], who links action as production to an instrumental conception of agency. This account of action emerges from [20], for instance.

[15] This conception is defended in Buss [13]. For an introduction to this view, see also Schapiro [61, 95–98].

This double-sidedness of action—and especially its normative side—comes through even more clearly when action is conceived as the thing we essentially do as agents participating in the practical realm. On this conception of *action as participation*, action is not just a means to an end or a phenomenon that can be described in light of its output or consequences. This barebones account of action is epiphenomenal and does not give us a complete picture of action. This is to say that we cannot fully understand action until we look at the *reasons* why agents do what they do as action.[16] These reasons cannot be reduced to the *aim* of action—the effects or consequences that agents intend to bring about through their action—but are what explain and justify what we do by thus giving it meaning and value. For an aim or endpoint cannot be considered as worthwhile until we know the reason why it is being pursued. The worth or value of an action, in other words, cannot be measured simply by the worth or value of its outcome, since we cannot fully appreciate what this outcome amounts to until we know what the rationale is that stands behind it, or what the justificatory reasons are for which it is sought. Justificatory reasons can in this sense be understood as the indispensable basis of action, such that no action proper can be said to take place unless what is done is not just intended but intended for a reason that justifies an action either to ourselves or to others. Action is thus essentially a reason-driven enterprise, where the reasons at stake here are at once practical and normative: practical in that they answer the question of what to do, or what course of action ought to be taken in any given situation; normative in that, in answering that question, they guide and justify our action. So here, too, we have a conception that merges two components into a single idea called action, which combines (a) the thing done (the act that was carried out) with (b) the reason for doing it. And neither of them can do without the other: just as a reason for doing something is not action until that thing is actually done, so the thing done cannot qualify as action proper unless it is done for a reason and that reason justifies the action.

In sum, justificatory reasons make action fundamentally normative. Indeed, on some variants of the conception of action as participation, justificatory reasons are themselves what action is fundamentally about: they are *constitutive* of action and they distinguish action as the enterprise that most essentially defines the practical realm.[17] On this view, action is a specific move in a background enterprise—the enterprise of acting—through which we signal that we are participating in the practical realm. But we cannot be said to so participate (or to be fully qualified participants) unless the action through which we move in that realm is backed by reasons that every other participant can understand. In this sense, reasons not only justify our action but also *make* it so, defining what it is and delimiting its boundaries—thereby also delimiting the boundaries of the practical sphere—and qualifying it as action proper. The more pressing point here is that in making action coextensive with the practical sphere, and defining action in terms of reasons—or conceiving of action as essentially governed by practical reasons,

[16] This view is defended in Velleman [67, 68] and Korsgaard [36]. For an introductory statement of this position, see also Millgram [43, section 2].

[17] See, for instance, Schapiro [61, 100–106].

reasons that set boundaries around the practical sphere and define what it is to be recognizably engaging with and participating in it, or properly making moves within it—we are saying that action so conceived (as participation in a practice essentially based on reasons) is fundamentally a normative phenomenon and one that cannot be naturalistically reduced to performance, or "what one does." Hence the idea of action as partaking of the natural and the normative at once.

Now, exactly in that idea lies the main takeaway we should get from this quick detour into action theory. That is to say, the three main conceptions developed in this field all see action as two-sided, a hybrid phenomenon combining a naturalistic component with a normative one. That is, they each advance their own version of the entanglement thesis, seeing the natural and the normative as entangled in action by virtue of the teleological, evaluative, or reasons-based structure of action (giving us the conceptions of action as production, assertion, and participation, respectively). The theoretical import here is that, by arriving at this conclusion, action theory supports the insight built into the etymology of languages as diverse as ancient Latin and contemporary German, namely, the insight that objective facts can be seen to be not just factual but normatively loaded and hence intertwined with norms. For that is the very makeup that action is shown to have across the spectrum of action theory, whether action is understood as conduct aimed at achieving a result, as expressive of values, or as backed by reasons. Since ends, values, and reasons belong with the normative, norms can be read off the very structure of objective facts as sorts of action. The normative structure of action therefore transmits to objective facts. It does so by virtue of the structural relation between action and facts, a relation that shows facts to be constitutively imbued with normative standards. Through this structural relation, in other words, ends, values, and reasons can be seen to be constitutive of objective facts—part of their essential fabric. And in virtue that makeup (with ends, values, and reasons as building blocks) objective facts become normative through and through.

Thus, objective facts cannot be separated from the norms that make up their DNA. They are not *reducible* to norms—because they are, after all, facts: this is their naturalistic component—but they are nonetheless normative. The argument, in capsule form, is that if action is part natural and part normative, and if it confers this dual status on facts as tokens of action, or as action-like events, then neither of these two components (the naturalistic or the normative) can be stripped away from the makeup of objective facts. These two components are glued together—entangled—such that, to take out the naturalistic component is to make objective facts ineffectual—literally inexistent—and to take out the normative component is to misrecognize objective facts as something they are not (as hardware stripped of software on which to run). Hence the intrinsic normativity of objective facts.

In sum, norms are *built into* objective facts, rather than being merely annexed to them as an afterthought. Again, this is not to suggest that norms are to be conflated with objective facts, since the conceptual distinction does remain. But it does mean that they should not be understood as separate entities divided by an unbridgeable gap: they are intertwined, and in that claim lies the restatement of the entanglement thesis being defended here.

4 An Epistemic Argument for the Entanglement Thesis

Having considered the practical argument in support of the entanglement thesis, we can now turn to the epistemic argument. This is the second prong of the argument for entanglement, introducing a new ground for the claim that objective facts are not normatively neutral. Here the argument will be made that there are not just practical norms that are constitutive of objective facts, but also epistemic norms, adding to objective facts a normative layer to which I will refer as thin and implicit epistemic normativity.

What this means is that our access to objective facts is not immediate and direct but rather mediated through concepts and categories of thought. This is a point that has been influentially and systematically argued by Wilfrid Sellars in his critique of the myth of the given.[18] In this discussion, however, I will not be engaging with Sellars's specific theses or his approach to epistemology. I will instead rely on the general insight by which they are underpinned, namely, the idea that the external world, such as it is immediately perceived by our senses, does not ipso facto by itself produce propositional knowledge.[19] On this approach—call it generic conceptualism in epistemology—mere sense data, bare observations, and unguided impressions are not sufficiently structured and organized to yield cognition. To put it the other way around, knowledge is not reducible to sense data, impressions, and observations, which unlike knowledge are a primordial and immediate experience.

On this view, since cognition cannot be reduced to the mere recording of self-authenticating chunks of unfiltered information, objective facts, as products of cognitive processes, cannot be reduced to what is given to us as part of the concept-free activities of immediate observation and raw apprehension. We are only able to cognize (and recognize) something as an objective fact by virtue of the conceptual frameworks and categories of thought we apply to sense data, impressions, and observations. Concepts and categories of thought are thus essential for one to become acquainted with the outside world. We are in a position to identify something as a mountain, for instance, because we have a corresponding concept or category: the notion of a mountain. It is this concept or category that distinguishes a mountain from, say, a heap of rocks, a hill, or a highland. Sense data, impressions, and observations alone do not establish what something, such as a mountain, is. That is, our cognition of (what we call) a mountain, or even the highest mountain on Earth, is not passive, immediate, direct, self-authenticating, and concept-free.

[18] This critique is found in Sellars [63]. By "myth of the given" Sellars [63, 255] means "the idea that empirical knowledge rests on a 'foundation' of non-inferential knowledge of the matter of fact," namely, the idea that we become aware of certain things in a direct, unmediated, and nonpropositional way, such that those things are simply given to sensory experience. What makes this a myth, Sellars argues, is that knowledge lies in mental states and activities that are conceptually structured. This position is introduced and discussed in Sellars [64, 65].

[19] This broad claim is also defended in Rorty [60], Brandom [12], and McDowell [41, 42]. For a critique of epistemic conceptualism, see Robinson [59], Alston [7–9], Peacocke [44–46], Heck [34], Bonevac [11], and Hanna [30–32].

All that is to say that knowledge is informed, and made possible, by concepts and categories of thought: as things are not merely given to us, we cannot cognitively interact with the outside world in a nonconceptual fashion. Knowledge requires the constitutive participation of conceptual frameworks and so depends heavily on our categories of thinking. The picture of knowledge that emerges from these remarks is one in which the external world is not simply recorded, but rather understood in an inferential and propositional fashion: we conceptualize rather than simply sense the external world. Our encounters with facts, as parts of the external world, are thus conceptually structured. When we engage with facts, we resort to conceptual frameworks and categories of thought, which enable us to appreciate what a fact consists in, distinguish it from other pieces of the furniture of the universe, and therefore ultimately grasp it as a specific and discrete item.

This means that knowledge is selective and structured by our mind, and this filtering and structuring role of the mind also applies to our cognition of objective facts. We would not even be able to recognize objective facts without the ideas, notions, presuppositions, hypotheses, precomprehensions, and even the prejudices we apply when we relate to the factual world. In gaining a knowledge of objective facts, we ultimately constitute and construe them: there is nothing like a bare, or concept-independent, objective fact out there. Objective facts are not ready to be mechanically and immediately grasped by us; our grasp of objective facts is fundamentally and unavoidably concept-laden. Far from being self-verifying, ready-made, and given states of affairs waiting to be discovered by us, objective facts are dependent on what we constitutively contribute to them: they are partly produced by the concepts and categories that shape our cognitive processes. To summarize the point made so far, because objective facts are at least to an extent established by, and dependent on, the conceptual system we develop and apply in cognitive processes, there is a close intertwinement between objective facts, on the one hand, and concepts and categories of thought, on the other.

In the picture just introduced, concepts and categories of thought are essential devices for organizing the factual world. Now, the point is that as constructs that impose a structure or organisation on an otherwise inaccessible domain, concepts and categories of thought are norm-governed. More specifically, concepts and categories of thought are governed by the epistemic standards, aims, and evaluations that determine what correct cognition amounts to and which forms of thinking are sound. For, whereas knowledge is made possible by concepts and categories of thought, not any use of concepts and categories of thought yields knowledge. Cognition of the external world requires a sound application of appropriate concepts and categories of thought, namely, a use of concepts and categories of thought consistent with fundamental epistemic norms, with the rules, principles, aims, evaluations, and standards that define, delimit, and govern knowledge. Contrariwise, when concepts and categories of thought are *not* applied in accordance with norms, they do not grant us any knowledge of the external world. That is, there are certain basic epistemic standards that determine whether and how concepts and categories of thought are applied correctly and so how we can secure cognitive access to the world of objective facts. This point is central (and rich with theoretical implications), since it means that the concepts and categories through which alone we can gain insights

into objective facts are structured and governed by norms. And, insofar as they are so structured and governed, they partake of the normative: the space of concepts and categories of thought is the space of normative thinking.

The epistemic picture that has emerged so far can be thus summarized: objective facts are cognizable only through concepts and categories of thought—there is no concept-free and category-independent way to come to a knowledge of objective facts—and concepts and categories of thought belong with the normative. This means that objective facts cannot be accessed except as normatively loaded items: what we cognize, and recognize, as an objective fact is not detached from norms. In short, facts are conceptually structured, and what is conceptual partakes of the normative; hence, normativity permeates objective facts.

To rephrase this point, objective facts are not brute or unmediated entities but are what we get when we apply concepts and categories of thought to the external world; and concepts and categories of thought (as well as their application) have a normative structure. This structure transmits to what concepts and categories of thought (contribute to) produce, namely, objective facts. Since we come to know objective facts as premixed with epistemic norms, facts cannot be understood as normatively neutral entities. That is to say, objective facts are thoroughly impregnated with norms. Stated otherwise, insofar as objective facts are conceptually framed, they are embedded in a normative and evaluative context. And, as much as this normative and evaluative context can be distinguished from objective facts, the two cannot be completely disentangled. So here, too, we have a picture of distinction but not separation between objective facts and norms—a picture of entanglement in which the normative, conceptual, and evaluative always filter and shape the natural and factual. Facticity can thus be distinguished from normativity but the two cannot be separated. Which means that it is not merely possible to transition from norms to facts, and vice versa; it is inevitable, precisely because norms (especially epistemic ones) are part of the very structure of facts.

What follows from the picture just outlined is that the continuity between objective facts and norms specifically applies to a given kind of norms and the normative. The layer of normativity that this prong of my argument has shown to be necessarily incorporated by, or built into, objective facts is thin and epistemic: the norms we are dealing with are the fundamental norms regulating the use of concepts and categories in the cognitive processes through which we access facts. What this argument shows, then, is not only that objective facts cannot be known, or established, in a normatively neutral way (since our cognition of objective facts is filtered through concepts governed by norms), but also that the norms that are constitutive of objective facts are the fundamental norms that guide our cognitive processes. These processes are not just those of perception, which can be understood as largely receptive and passive, but also those that form our understanding. And understanding is an active process that requires thinking and judging. In turn, understanding, thinking, and judging are processes shaped by concepts. As such, they are all governed, guided, and constrained by normative standards: if we are to understand, think, and judge, we need to follow certain norms governing the competent exercise of our understanding, thought, and judgement. These are the norms that are constitutive of (what we recognize as) objective facts. In sum, as the epistemic argument seeks to

establish, objective facts depend on norms of correct, or competent, understanding, thinking, and judging. Objective facts are thus normatively loaded in the specific sense that they cannot be separated from the fundamental norms of cognition.

Crucially, the norms of cognition that structure objective facts and contribute to constituting them occupy a foundational layer of what is epistemically normative. They are thus comparable to what Ludwig Wittgenstein refers to as the rules of grammar, namely, the set of norms, aims, and evaluative frameworks that determine which moves make or do not make sense in a given language game and form of life. The rules of grammar are the fundamental norms that anyone speaking a language and living in a setting with other agents needs to implicitly acknowledge and consistently follow for their statements and conduct to be meaningful and intelligible to others. Accordingly, the normative layer forming the substratum of objective facts can be equated with the thin layer of normativity that is implicitly shared by everyone who speaks and thinks clearly. What the notion of an objective fact presupposes and incorporates is the normative stratum defining the framework of sense we all inhabit and partake of.[20] Hence, the specific thesis that the argument introduced in this section supports is that *epistemic normativity* and objective facts are bound together: objective facts are intertwined with the rules, principles, concepts, and categories—all of them normative—that are implicit in and underpin our cognitive processes. This thin layer of normativity is presupposed by, conceptually prior to, and more basic than any cognition and statement of facts. For there is no cognition without compliance with the fundamental epistemic norms. In pithier terms, without certain fundamental epistemic norms there can be no fact, and, on the flip side, facts are not independent of epistemic normativity and so are not normatively neutral. In other words still, any objective fact is normatively coloured by the fundamental norms of cognition and competent understanding: because objective facts are seen through the lens of the fundamental epistemic norms, they are inseparable from norms and entangled with them.

There is one final point that needs to be highlighted in closing the epistemic argument for the entanglement thesis. The kind of normativity that was argued to be built into objective facts was characterized as thin, implicit, and epistemic. This is different from the normativity of practical norms and moral principles, which, as far as the argument deployed in this section goes, in contrast to the thin normativity of epistemic norms, *can* be separated from objective facts, since these facts need not necessarily be informed by or accessed through thick principles.[21] This means that objective facts are normatively loaded only in the thin epistemic sense of what makes them cognisable and not necessarily in the moral sense that is involved when we make judgments of good and bad or decisions about the course of conduct that ought to be taken in any given practical situation. Objective facts, as here conceived, can therefore be accessed or come to be known without being filtered through principles of thick practical reasoning—the kind involved in practical

[20] This understanding of grammar emerges in Wittgenstein [74, especially sections 109, 124, 496, 497, and 666].

[21] But see Putnam [52, 34–43], arguing that facts and thick moral norms are indeed connected.

decision-making—or through moral thinking—the kind involved in making judgments of moral worth. But, and herein lies the point that needs to be stressed, this limited separability and independence of objective facts from thick practical norms should not be taken to be incoherent with the entanglement thesis. That is, it should not in any way suggest that facts are not continuous with norms. Quite the contrary, they *are* continuous. Indeed, theirs is a *deep* continuity, the kind that is established through their dependence on norms of a more fundamental kind, namely, the epistemic standards that govern our use of the concepts through which we access objective facts and extract knowledge from them. And that is precisely what the entanglement thesis says: it sees objective facts as necessarily bound up with norms, or at least with the epistemic norms that make up the grammar of our cognition.

5 Legal Implications

The two-pronged argument has been made in support of the view that facts and norms are conceptually intertwined. But the entanglement thesis covers the full gamut of what counts as a fact or a norm. So the connection between the two is general, and it therefore holds for *specific* domains, too. Let me then consider a couple of implications which the entanglement thesis has for our understanding of the *legal* domain.

First, facts and norms are central to the realm of law. Not only would there be no way to make sense of legal systems if either facts or norms were taken out of the picture, but also the distinction between facts and norms is understood to be central to legal practice. In that regard it would be fair to say that the vast majority of practicing lawyers and legal academics alike take it as given that facts and norms are two clearly distinguished things, in that facts can be identified without making reference to norms, and norms, for their part, apply to facts simply by stating what the facts are to which they apply. This common-sense "gap view" of the relation between facts and norms finds a paradigmatic statement in the separation of "questions of fact" and "questions of law" in legal adjudication. In a number of legal systems, it is essential to adjudication to be able to distinguish an issue as being either factual (and so a matter of fact, *quid facti*) or legal (and so a matter of law, *quid iuris*). The two terms are generally understood to be mutually exclusive: if something is a matter of fact, it cannot also be a matter of law, and vice versa: it cannot be the case that something falls into both buckets, the factual and the legal. The implications of this intuitive "separate buckets" view are wide-ranging in litigation, especially in jurisdictions that have a jury system. Consider: it is up to the judge to state what the law is that applies to the case at hand, and up to counsel and jury to establish the facts of the case. And findings of fact, whether in the form of discovery or a verdict, are understood not to require any legal expertise: anyone can make these assessments without considering what the law says in relation to those facts.

The assumption that, in law, facts and norms are conceptually separate—the assumption behind the idea of a gap between questions of fact and questions of law—also bears on both the kinds of admissible evidence in adjudication and the types of legal proceedings available to the parties. On the one hand, questions of

law can often be decided without requiring the parties to present witnesses. On the other hand, in some legal systems, appeals are exclusively concerned with questions of law, not questions of fact. With notable exceptions, then, factual questions cannot be scrutinized and reassessed on appeal. In addition, in some legal orders, if the pleadings and initial evidence in a case show that there are no factual disputes between the parties, a court may grant a summary judgment, where the court makes a binding assessment of the merits of the case before the case even goes to trial. The view that facts are a separate thing from norms therefore will occasionally determine the kinds of legal proceedings the parties have access to. For, insofar as the facts are not in dispute, and the dispute therefore only concerns legal norms, a party may be entitled to a ruling without a full-fledged trial. However, this option is not available when the facts *are* in dispute.

This rigid separation of facts and norms in law—with its dichotomy of questions of law and questions of fact—may be blurred in practice. But the separation is nonetheless widely accepted at least as a matter of principle, and so its recognition can be considered the standard view. In other terms, the dualism of legal facts and norms is the default position that can be safely assumed to be the starting point in the study of law. As a result, anyone doubting the separation of facts and norms in law bears the burden of providing a justification for their challenge: those wishing to problematize the divide between legal facts and norms need to put forward specific arguments to that effect.

But those who do not take at face value the separation of facts and norms in the law, and who might want to challenge that received view, can to that end use as a toolbox the arguments previously offered in making the case for the continuity of facts and norms in general. That is because the specific duality they are confronted with—between facts and norms in the law—can be seen as a special case of the duality of facts and norms in general, as that duality is set out in the sharp separation thesis. If we can refute the sharp separation thesis and embrace the entanglement thesis, thereby recognizing that all facts are constitutively normative, we will be in a position to also close the purportedly unbridgeable gap between facts and norms in the law, as well as to challenge the rigid separation between questions of law and questions of fact, and consequently to problematize the adjudicative practices structured around that separation. Indeed the entanglement thesis supports the view that, while questions of fact can be distinguished from questions of law, the two cannot be rigidly separated. The entanglement thesis, backed by the practical and epistemic arguments previously introduced, can thus explain why it proves difficult in the law to arrive at "a rule or principle that will unerringly distinguish a factual finding from a legal conclusion" (*Pullman Standard v. Swint*, 456 U.S. 273, 288 (1982)). Similarly, the entanglement thesis can explain the sense in which "the appropriate methodology for distinguishing questions of fact from questions of law" is "elusive" (*Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485 (1984)).[22] Indeed, insofar as facts and norms are not conceptually separate, we should expect to be able to deal with them using methodologies that are accordingly

[22] See also *Baumgartner v. United States*, 322 U.S. 665, 671 (1944).

homogeneous. Methodological differentiations are therefore likely to be ad hoc, or even elusive. For similar reasons, the entanglement thesis reinforces Allen and Pardo's [6] claim that the dualism of facts and norms in the law—especially when this dualism is understood as an ontological, epistemological, and analytical separation—is a "myth."

In sum, the two-pronged argument offered in the previous section can be used to support the claim that the separation of facts and norms in law is untenable. If we take the entanglement thesis, with its two-pronged argument, and apply it to the legal domain, we will see that legal facts, not unlike facts in general, are bound up with norms, rules, principles, and standards. It is thus arbitrary to keep legal facts in their own bucket, separate from the normative considerations that inevitably bear on them. Assessing legal facts is a normative and evaluative process through and through, such that there can be no absolute distinction between legal facts and norms, precisely because legal facts incorporate norms and so cannot be insulated from them, or objectified, treated exclusively on their own terms. So the relation between facticity and normativity in legal practice is not one of otherness and alterity, but rather one of continuity and intertwinement. Again, this is not to deny the distinction between legal facts and norms: it is to claim that any such distinction has to be understood as purely functional, pragmatic, or even conventional, rather than ontological or conceptual.[23]

The legal implications of the entanglement thesis are even broader and deeper than has just been suggested, as they concern the very concept of law. To see this, it will be helpful to once again bring the entanglement thesis into contrast with its antipode, the sharp separation thesis. On this latter thesis, we can speak intelligibly or rationally about facts, but not about norms; we can reasonably disagree about facts, but disagreement about norms cannot make rational sense.[24] This is why facts need to be kept separate from norms, for otherwise we could not have rational discussions about facts, either. On the sharp separation thesis, then, normative reasoning is not subject to rational constraints. Since law is widely regarded as a normative social practice, we should be able to appreciate how dramatically and fundamentally different this practice would turn out to be depending on whether we look at it through the lens of the sharp separation thesis or that of the entanglement thesis. On the one hand, taking the view of the sharp separation thesis, we should reason that insofar as (i) norms and facts are constitutive of law as a distinct concept and domain, (ii) norms are a separate thing from facts, and (iii) norms are rationally intractable, it follows that law, as a normative practice, is a realm wherein rational discourse can at best play a marginal role. This view is sometimes expressed by saying that authority, not reason, makes law: law is whatever the authorities establish it to be, and not also the outcome of a rational debate. On the other hand, taking the opposite view of the entanglement thesis, we should reject claims (ii) and (iii) above and accordingly conclude that since facts and norms can both be rationally engaged with, law can be conceived of law as a practice that is not only social and normative but also rational.

[23] This claim is defended at length in Allen and Pardo [6].

[24] For further remarks in this regard, see Putnam [53, 38–39].

From this perspective, law can be shaped by rational argument—and indeed rational argument is central to the legal world and pervasive in it—a direct consequence of the entanglement-thesis view that facts and norms are distinguished yet continuous.

As mentioned, this conclusion, once embraced, goes to the very heart of the concept of law, laying the groundwork for a conception of law that the sharp separation thesis would instead rule out from the very outset. This is what I would call the "conception of law as rational argumentative practice."[25] This conception is defended by some theorists of legal reasoning who have put forward a revisionary account of law. This account, first introduced in the late 1970s, conceptualizes law as a practice structured around processes of rational argumentation, or reasoning.[26] On this account, rational argument plays a significant part in the law, not only affecting its development but also shaping its contents, structures, and boundaries. Indeed, this is what we find when we look at the inner workings of the law: we see that it consists of rational argumentative and interpretive activities taking place at different levels and carried out by different persons.[27] The conception of law as rational argumentative practice—a conception underpinned by the entanglement thesis—therefore commits us to a rethinking of the very *idea* of law. Law is to be conceived not as an object—something clearly marked off from nonlaw and independent of the reasoning by which we come to be aware of what the law is—but rather as a stream of deliberative activities. The conception of law as rational argumentative practice, in other words, constructs law as a distinctive kind of practical reasoning aimed at finding reasonable solutions to legal cases, namely, as a set of reconstructive activities by which we rationally manipulate, transform, and determine facts and norms. Relatedly, a legal system cannot entirely be defined without first reasoning normatively about it: legal orders do not precede, but rather follow, the rational arguments

[25] In the literature, this conception also goes by the name of "law as interpretation." This phrase is used by Dworkin [22, 23, 380–383], as well as by Barberis [10, 90], Viola [71, 1], Villa [69, 120], and Viola and Zaccaria [72, 202]. But I should not want this label to suggest that on the conception of law as rational argumentative practice, law essentially comes down to a set of interpretive practices narrowly defined. It does not. Rational argumentation and reasoning, as I am construing it, is a broader practice that *includes* interpretation next to other practices that cannot be reduced to it, such as ascertaining, systematizing, weighing, and justifying legal norms; settling conflicts within the legal order; following precedents; constructing statutes (in hard cases); and providing a legal classification of facts. For this reason, I am choosing "law as rational argumentative practice" as a label for the conception being defended here, staying away from "law as interpretation" even if the latter term is also used in the literature.

[26] Here I will be using "argumentation" and "reasoning" as synonyms. For a similar use, see Dworkin [23, VI], Alexy [4, 231–232] and [5], and MacCormick [37, 38].

[27] I believe that to a certain extent this thesis informs the work of scholars like Chaïm Perelman and Teodor Viehweg, who in the mid-1950s set about analyzing in depth the role played by reasoning in shaping the legal system. The same concept is also espoused by various legal theorists. Here a distinction can be of service between an analytical version of the conception and a hermeneutical one. The first position is defended by MacCormick [38–40], among others; the second position is paradigmatically endorsed in Dworkin [23]. An intermediate view is adopted in Aarnio [3], Alexy [4, 5], and Peczenik [47] where analytical concepts and theoretical frameworks are combined with hermeneutical ones. In this regard, see Aarnio [2, 22] and Aarnio et al. [1, 133–134]. The differences between these variants of the conception of law as rational argumentative practice may be significant, but they all share the same broad theoretical perspective, such that they can be understood as different *species* (or conceptions) of a same *genus* (or concept). For a similar take, see Villa [70, 223].

that judges, lawyers, and legal scholars advance in thinking about them as normative orders. The upshot of these remarks is that law cannot be described as an objective system exhausted by the directives of those in authority. Many pivotal legal norms exist without having been authoritatively issued, whether by legislative enactment or by way of judicial rulings; they rather exist only because they can be argumentatively (i.e., rationally) derived from other normative parts of the legal system. So, even as the conception of law as rational argumentative practice recognizes that law is shaped by authoritative issuances, it rejects the notion that all law resolves itself into such issuances. In other words, law is conceptualized not only as a set of authoritative statements about what the law is and says, but also as consisting of the practices and standards through which these statements are made reasonable, or of the very reasonableness so conferred on these statements. Which also means that law is to be considered a special case of practical rationality.[28]

This broad outlook points to an intriguing research programme calling on us to redirect the focus of legal studies and flesh out an argumentative conception of law, on which rational deliberation becomes a key element shaping the very idea of law, considering that there is scarcely any part of the law at any stage in its development that does not involve reasoning about norms. Crucially, if we are to pursue these theoretical developments we need to reject the sharp separation thesis and endorse the entanglement thesis, which alone provides support for the conception of law as rational argumentative practice. For, as mentioned, the sharp separation thesis states that only in relation to legal *facts* we can sort out our disagreements on a rational basis: we cannot do so when norms are at issue, since norms and normative claims, as opposed to facts and factual claims, delimit a realm in which rational deliberation, discussion, and discourse are out of place. It follows that, on a view informed by the sharp separation thesis, law cannot be at the same time a normative practice and a rational one. This is in stark contrast to what the entanglement thesis envisions. Indeed, as we saw, it follows from the entanglement thesis that, while factual

[28] The most fully developed attempts to conceptualize law as rational argumentative practice have arguably come from Robert Alexy and Ronald Dworkin. To make due allowance for the conceptual scope of reasoning, Alexy [5, 127] has defined law as a "system of norms that (1) lays claim to correctness, (2) consists of the totality of norms that belong to a constitution by and large socially efficacious and that are not themselves unjust in the extreme, as well as the totality of norms that are issued in accordance with this constitution, norms that manifest a minimum social efficacy or prospect of social efficacy and that are not themselves unjust in the extreme, and, finally, (3) comprises the principles and other normative arguments on which the process or procedure of law application is and/or must be based in order to satisfy the claim to correctness." From this definition—where law is made to consist not only of rules but also of principles, arguments, applicative procedures, and claims to correctness—we can appreciate that Alexy paradigmatically endorses the conception of law as rational argumentative practice. In a similar vein, Dworkin [23, 410] writes that "law is an interpretive concept. Judges should decide what the law is by interpreting the practice of other judges deciding what the law is." Here, the law is made out to be primarily a practice: "law is not exhausted by any catalogue of rules or principles, each with its own dominion over some discrete theatre of behaviour. Nor by any roster of officials and their powers each over part of our lives. Law's empire is defined by attitude, not territory or power or process… It is an interpretive, self-reflective attitude addressed to politics in the broadest sense" Dworkin [23, 413]. Accordingly, he rejects the thesis that "law exists as a plain fact" and that "what the law is in no way depends on what it should be" Dworkin [7, 23]. This way, Dworkin expressly acknowledges the role that rational arguments play in our conceptualization of law.

questions may be distinguished from normative ones, the two cannot be separated: both (not just the factual but also the normative) can be subjected to rational constraints, meaning that rational procedures can be set up to deal with normative disagreements in law, and rational discussions can thus be had in dealing with normative issues in law. What this also means is that law, on this view, can be conceived as both a rational practice and a species of reasoning with norms.

In sum, on a legal approach informed by the entanglement thesis, there is no obstacle to recognizing that even when law is understood as a normative practice, it affords a space in which rational debate is possible and normative disagreements can be worked out rationally. The entanglement thesis thus paves the way for the claim that rational deliberation is central to the legal domain and so that law is to be conceived as a practice structured around rational processes of deliberative argumentation—this being the core of the conception of law as rational argumentative practice. So, by showing that when it comes to determining the nature of law, the rational arguments that legal subjects engage in to find appropriate solutions to concrete cases can be as important as the general and abstract rules posited by authority, the entanglement thesis opens up a new possibility, enabling us to crucially rethink the concept of law itself as well as the theoretical framework the traditional theory is set in. None of this rethinking would be possible under the sharp separation thesis. Which makes it possible to appreciate what it means to approach law from the standpoint of the entanglement thesis, with its twofold supporting argument, and why it matters that we should be able to do.

6 Concluding Remarks

In this essay, I have looked critically at the thesis that posits a sharp separation between facts and norms. It was argued, contrary to that thesis, that while facts and norms are distinguished, they cannot be separated. Indeed, they are inextricably intertwined, and this is the core claim of the entanglement thesis, arguing that we cannot make sense of facts in a normative vacuum.

Those claims were buttressed with two independent arguments. The first of these, a practical argument, proceeded from the observation that there is a constitutive duality to facts, in that, on the one hand, a fact can be thought of as an object, a state of affairs, while, on the other hand, facts cannot entirely be *reduced to* objects. That is because facts are *made*—they are in that sense products, in effect *artefacts*. In that respect they ultimately come down to someone's action, the efficient cause that brings them about. Crucially, actions are not inert: they are understood as purposive (carried out in pursuit of an end), as bearing value (at least for the agent), and as undertaken for a reason. This feature of action, variously theorized by contemporary action theorists, transmits to facts as action-like occurrences. Accordingly, objective facts are likewise purposive, value-laden, and underpinned by reasons. And purposes, values, and reasons belong with the normative. Hence the continuity of objective facts and norms.

The second argument in support of the conceptual continuity of facts and norms was instead premised on an encompassing variant of epistemological conceptualism

that constructs knowledge as a concept-laden process. This means that we do not immediately come to know the world around us directly by way of sense perceptions but can only access it mediately by way of concepts and categories that structure and order what we cognize. Without these concepts and categories, we would not have the propositional knowledge needed to recognize things for what they are. It follows from this premise that the world of facts is at least in part constituted and constructed through the concepts and categories we apply to it. This constitutive concept- and category-laden process is governed by certain norms that determine when concepts and categories are properly applied and when they are misapplied. So there can be both uses and misuses of concepts and categories, depending on whether the governing norms are followed or disregarded. This makes the process of coming to know the world through such concepts and categories a normative practice. Now, if objective facts are accessed through and constituted by concepts and categories, and these concepts and categories are governed by norms, then we have to recognize that norms are part of the very makeup of these facts and that a connection obtains between the two. That is the connection in virtue of which we access and relate to the world of objective facts. We can think of this interface in terms of layers: there is the factual layer of the objective facts making up the outside world, but prior to it, and more fundamental, there is the underlying normative layer consisting of the norms governing our use of the concepts and categories through which we access those facts and work them into our cognitive processes and epistemic activities. Which is to say that factuality rests on a more fundamental and primitive structure: normativity.

I finally considered how these two arguments, and the entanglement thesis they support, setting out a *general* relation of continuity between facts and norms, have implications that specifically concern our understanding of law. For one thing, they can be used to problematize the traditional separation of questions of fact and questions of law. For another, they can be used to defend the view that the law cannot be reduced to a set of authoritative issuances, since central to the law, and pervasive within it, is the practice of subjecting its norms to rational argumentation about norms, and this is the conception of law as rational argumentative practice. This conception is often criticized for making central to the law a practice—arguing about norms—that cannot be rational. We can have rational discussions about facts but not about norms, and from that premise, coupled with the thesis of a rigid separation between facts and norms, critics argue that the conception of law as rational argumentative practice is inconsistent, for we need to recognize that law is either an argumentative practice or a rational one—it cannot be both. Or, if we do characterize it as an argumentative practice, we cannot claim it to be rational. In fairness to this criticism, it must be conceded that argumentation about norms does often lapse into the subjective, ideological, and political. But so does argumentation about facts (people often disagree even irrationally about facts). In addition, this is not an inherent feature of argumentation about either facts or norms. Even more importantly, addressing the criticism on its own terms, we saw that it only holds on the assumption that facts and norms are separate, entirely unrelated entities. However, as discussed, there are strong reasons to doubt that assumption: the factual can be distinguished from the normative, to be sure; but the distinction does not amount to

a discontinuity between them. Indeed, there is between them a definite continuity—so much so that the normative is *baked into* the factual. In virtue of that continuity the criticism of the conception of law as a normative and argumentative practice governed by rational standards loses much of its force. For, if facts are continuous with norms, and facts are susceptible of rational discussion, so must norms. Hence, there is no contradiction, as the critics claim, in holding that law is at one and the same time a normative practice and a distinctive form of rational argument, as the conception of law as rational argumentative practice argues.

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