

APA Newsletters

Volume 05, Number 2

Spring 2006

NEWSLETTER ON PHILOSOPHY AND LAW

FROM THE EDITORS, JOHN ARTHUR & STEVEN SCALET

ARTICLES

KENNETH EINAR HIMMA

“Introduction: Unresolved Problems for Legal Positivism”

ANDREI MARMOR

“The Conventions of a Legal Order”

BRIAN BIX

“Legal Positivism and ‘Explaining’ Normativity and Authority”

MATTHEW H. KRAMER

“Legal Positivism and Objectivity”

KENNETH EINAR HIMMA

“Positivism and the Problem of Explaining Legal Obligation”





FROM THE EDITORS

John Arthur

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We are pleased to take over from Ted Benditt as co-editors of the *Newsletter on Philosophy of Law*. Ted has done a superb job, and we are sure we speak for the many readers of the *Newsletter* in expressing our thanks to Ted. We only hope that we can continue in the tradition he has established.

Our plan is to follow his lead and devote each *Newsletter* to a single theme or, in some cases, a particular philosopher. The next edition will be devoted to articles on Joel Feinberg. We hope in the future to include responses to articles by the subject of the articles, as well as short book reviews and abstracts of articles that are of particular interest.

Finally, we'd like to thank the guest editor of this edition, Ken Himma. We think that the four articles make a real contribution to the on-going debates about positivism and want to express our gratitude to him as well as to the authors.

ARTICLES

Introduction: Unresolved Problems for Legal Positivism

Kenneth Einar Himma

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It is fair to say that, at this point in time, legal positivism has achieved theoretical ascendancy among legal theorists. Neo-classical natural law theorists, like John Finnis and Mark Murphy, deny the view of William Blackstone and Thomas Aquinas that an unjust norm cannot, as a conceptual matter, count as a "law" and hence accept the positivist's view of law as a social artifact. While many positivists (including myself) regard the seminal work of Ronald Dworkin as utterly crucial to understanding legal practice in Anglo-American legal systems (especially the practices of judges), Dworkin's view that the law of any system is, as a matter of conceptual necessity, determined by the moral norms that show that system in its best moral light has few contemporary defenders.

In this connection, it is especially worth noting that the way in which the substantive rules and principles of law are taught in the law schools presupposes that the core tenets of legal positivism are. In every casebook that I have ever seen, the properly promulgated utterances of courts and legislatures are taught as having the status of "law" without regard to whether those utterances conform to moral norms or succeed in showing existing legal practice in its most favorable moral light (i.e., succeed in justifying the exercise of the state's coercive power against citizens). Those latter concerns are treated as extrinsic to the question of whether something counts as law. Mainstream pedagogy in law school transparently presupposes that law is a social artifact manufactured by courts and legislatures according to norms that are contingent in character; in consequence, what law is and what law ought to be are, as far as this pedagogy is concerned, two distinct questions.

None of this, of course, implies that legal positivism is the correct theory of law. The empirical fact that most theorists and teachers of law explicitly or implicitly accept a view about law does not imply that the view is correct. Indeed, it might very well turn out that some sort of conclusive refutation of positivism is right around the corner—although I would be quite surprised if someone produced such an argument.

Nor should the ascendancy of positivism be thought to imply that the story is complete. Natural law theorists continue to insist that a full understanding of the concept of law requires some reference to morality—even as they concede that the content of the law does not necessarily depend on whether it conforms to moral norms of any kind. And positivists themselves realize that there is much that must be done to fully understand law at a conceptual level and hence much that must be done if positivism is genuinely to prevail as a theory of law: again, it is one thing to win a consensus; it is another to be correct.

The essays in this section address some important unsolved problems in the conceptual theory of law from the perspective of legal positivism. In "The Conventions of a Legal Order," Andrei Marmor explores the character of the norm that defines the criteria for what counts as law, considering both Hart's view that it is conventional in character and Kelsen's view that it is a political presupposition. In "Legal Positivism and 'Explaining' Normativity and Authority," Brian Bix evaluates various positivist explanations of authority and argues that many are inconsistent with positivism's core assumptions. In "Legal Positivism and Objectivity," Matthew Kramer argues that a conception of objectivity as involving mind-independence is, contrary to the views of many positivists and anti-positivists alike, compatible with the positivist view that the criteria of legality are conventional in character. In "Positivism and the Problem of Explaining Legal Obligation," I argue that legal positivism is missing a comprehensive theory of legal obligation that explains both the obligations of citizens and officials and that legal positivism cannot succeed without a plausible account of these obligations.

Marmor, Kramer, and Bix are three of the most influential legal theorists writing today on the concept of law. I am indebted to them for contributing to this issue of the *Newsletter* and am very honored to have an essay of mine appear alongside theirs.

The Conventions of a Legal Order

Andrei Marmor

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There is a widespread view amongst legal philosophers, particularly in the legal positivist tradition, that there are certain norms that determine what counts as law in any given legal system. There is also a famous disagreement about what kind of norms these are. Kelsen argued that a legal order can only make sense if one presupposes its Basic Norm, the norm that grants validity to the entire system.¹ H. L. A. Hart, on the other hand, famously maintained that there is a Rule of Recognition that determines what counts as law in a given society. The Rule of Recognition is not a presupposition, however, but a social rule, or, as Hart later clarified, it is a social rule of a special kind, namely, a social convention.² Both of these views are very similar in that they both claim that there is some kind of a Master Norm that determines what counts as law in any given legal order. The disagreement is about the nature of this Master Norm: Is it, as Kelsen argued, a practical presupposition or, as Hart would have it, a social convention? My aim here is (1) to clarify this disagreement, (2) to show that there are some difficulties with both positions, and finally (3) to argue that though Hart's position is more promising, it is in need of much further development.

Consider the following sequence of propositions:

- 1: According to the law in Si (at time T1), it is the law that P.³
- 2: 1 is true because P has been enacted (prior to T1) by Q.⁴

Now 2 clearly presupposes something like 3—

- 3: If Q enacts a norm N in Si, N is legally valid in Si.
- 4: 3 is true in Si because it is generally the case that X.

There is a logical sequence here: if there is a doubt about a statement of type 1, we would normally expect it to be resolved by an account of type 2.⁵ And if there is a doubt about 2, we would expect it to be resolved by an account of type 3. And then we need an explanation of what makes 3 true, and so we get to 4. This much, I take it, is common ground. But now the question that needs to be answered is this: Why should we assume that 4 has to be grounded in pointing to *norms*? Why could it not be something else?

Kelsen had a detailed answer to this question.⁶ The law, according to Kelsen, is first and foremost a system of norms. Norms are “ought” statements, prescribing certain modes of conduct. Unlike moral norms, however, Kelsen maintained that legal norms are created by acts of will. They are products of deliberate human action. For instance, some people gather in a hall, speak, raise their hands, count them, and promulgate a string of words. These are actions and events taking place at a specific time and space. To say that what we have described here is the *enactment of a law* is to *interpret* these actions and events by ascribing a normative significance to them. Kelsen, however, firmly believed in Hume's distinction between “is” and “ought,” and in the impossibility of deriving “ought” conclusions from factual premises alone. Thus Kelsen believed that the law,

which is comprised of norms or “ought” statements, cannot be reduced to those natural actions and events that give rise to it. The gathering, speaking, and raising of hands, in itself, is not the law; legal norms are essentially “ought” statements, and, as such, they cannot be deduced from factual premises alone.

How is it possible, then, to ascribe an “ought” to those actions and events that purport to create legal norms? Kelsen's reply is enchantingly simple: we ascribe a legal ought to such norm-creating acts by, ultimately, *presupposing* it. Since “ought” cannot be derived from “is,” and since legal norms are essentially “ought” statements, there must be some kind of an “ought” presupposition at the background, rendering the normativity of law intelligible.

What makes it the case, then, that a particular act of will is interpreted as an act that creates a legal norm? An act can create law, Kelsen argues, if it is in accord with another, “higher” legal norm that authorizes its creation in that way. And the “higher” legal norm, in turn, is legally valid only if it has been created in accordance with yet another even “higher” legal norm that authorizes its enactment. Ultimately, Kelsen argued, one must reach a point where the authorizing norm is no longer the product of an act of will but is simply presupposed, and this is what Kelsen called the Basic Norm.⁷

According to Kelsen, then, it is necessarily the case that an explanation of type 4 must point to a master *norm* that makes it the case that certain acts of will create law and others don't. Without assuming such a norm, the normativity of the entire legal order remains unexplained. H. L. A. Hart seems to have concurred, with one crucial caveat: the master norm is not a presupposition, as Kelsen would have it, but a social norm, a social convention that people (mostly judges and other officials) actually follow. This is what the Rule of Recognition is: the social rule that a community follows, a social rule that grounds the answer to the question of what makes statements of type 3 true or false in that particular society.⁸

But now, if you take Kelsen's question seriously, you should be puzzled by this. How can a social fact, that people actually follow a certain rule, be a relevant answer to Kelsen's question of what makes it the case that certain acts of will create the law and others don't? Crudely put, if you start with the question of how can an “is” generate an “ought,” you cannot expect an answer to it by pointing to another “is.” Has Hart failed to see this? Yes and no. Consider, for example, the game of chess. The rules of the game prescribe, for instance, that the bishop can only be moved diagonally. Thus, when players move the bishop, they follow a rule. The rule is, undoubtedly, an “ought”; it prescribes permissible and impermissible moves in the game. What is it, then, that determines this “ought” about rules of chess? Is it not simply the fact that this is how the game is played? The game is constituted by rules or conventions. Those rules are, in a clear sense, social rules that people follow in playing this particular game. The rules of chess have a dual function: they constitute what the game is, and they prescribe norms that players ought to follow.⁹ Similarly, Hart seems to have claimed, the Rules of Recognition define or constitute what law in a certain society is, and they prescribe (that is, authorize) modes of creating law in that society. Social rules can determine their ought, as it were, by being followed by a certain community, just as the rules of chess determine their “ought” within the game that is actually followed by the relevant community.

This cannot be so simple, however. In fact, the complications go both ways. Something seems to be missing from Hart's account, but something is missing from Kelsen's account as well. Let me begin with Hart. The obvious difficulty with the chess analogy is that the rules of the game are “ought” statements only for those who actually decide to play this

particular game. To the extent that there is any normative aspect to the rules of chess, it is a conditional one: *if* you want to play *chess*, these are the rules that you need to follow. But of course, you don't have to play at all, nor do you have to play this particular game. Leslie Green was one of those who observed this difficulty in Hart's account of the Rule of Recognition. As he put it, "Hart's view that the fundamental rules [of recognition] are 'mere conventions' continues to sit uneasily with any notion of obligation," and, thus, with the intuition that the Rule of Recognition points to the sources of law that "judges are legally bound to apply."¹⁰

Green is wrong to focus the problem, however, on the notion of legal obligations. Hart's account of *legal* obligations is sound as is. The Rule of Recognition, just like the rules of chess, determines what the practice is. There is no particular difficulty in realizing that such rules have a dual function: they both determine what constitutes the practice and prescribe modes of conduct within it. The legal obligation to follow the Rule of Recognition is just like the chess players' obligation to move the bishop diagonally. Both are prescribed by the rules of the game. What such rules cannot prescribe, however, is an "ought" about playing the game to begin with. But that is true of the law as well. If there is an ought to play the game, so to speak, then this ought cannot be expected to come from the rules of recognition. The obligation to play by the rules, that is, to follow the law, if there is one, must come from moral and political considerations. The reasons for following the law cannot be derived from the norms that determine what the law is.

But now one should wonder whether we have contradicted Kelsen at all. Have we not just conceded that the normativity of law, like that of any other conventional practice, has to be presupposed? When a couple of people sit down to play chess, they just presuppose that the rules of chess are those they are obliged to follow. In playing chess, they presuppose its normativity. And in "playing by the law," lawyers, judges, and other participants presuppose the normativity of the legal order. This is basically what the concept of the Basic Norm is supposed to capture: the underlying presupposition of the normativity of the relevant practice. Is there anything more to it than a presupposition?

The problem is that even on Kelsen's own account, one can see that there must be more to it than a presupposition. Why is that? Because the specific content of any particular Basic Norm is crucially determined by actual practice. As Kelsen himself repeatedly argued, a successful revolution brings about a radical change in the content of the Basic Norm. Suppose, for example, that in a given legal system the Basic Norm is that the constitution enacted by Rex One is binding. At a certain point, a *coup d'état* takes place and a republican government is successfully installed. At this point, Kelsen admits, "one presupposes a new basic norm, no longer the basic norm delegating law making authority to the monarch, but a basic norm delegating authority to the revolutionary government."¹¹

Has Kelsen violated his own categorical injunction against deriving "ought" from "is" here?¹² The answer depends on how we construe the explanatory function of the Basic Norm: neither Kelsen nor his critics seem to have been careful to distinguish between the role of the Basic Norm in answering the question of how we *identify* the law as such, and in answering the question of law's *normativity*. An answer to the question of what counts as law or as law creating acts in a particular community cannot be detached from practice, namely, social conventions. As Kelsen himself basically realized, it is the actual practice of judges and other officials that ultimately determines *what* counts as law in their society. On the other hand, Kelsen seems to be right to insist that social conventions, by themselves,

cannot explain the "ought" that is associated with the law as a normative system. Such an "ought" cannot be constituted by the conventions. Social conventions can only determine what the practice is and how one would go about in engaging in it; conventions cannot determine that one ought to engage in the practice.

So perhaps contrary to first impression, Hart's Rule of Recognition and Kelsen's Basic Norm are not really competing accounts of the same thing. Perhaps these two types of Master Norm do not answer the same question. The Rule of Recognition, as a social convention, determines what the law in a given community is. By pointing to the Rule of Recognition, one answers the question: What counts as law in this community? Whereas the Basic Norm is an account of law's normativity. By pointing to the Basic Norm, one answers the question: What makes these actions and events normatively significant? In other words, we seem to have two separate accounts here: the normativity of law has to be presupposed. The identification of law, the answer to the question of what counts as law in any given community, is determined by practice, by the conventions that prevail in the relevant community.

Whether there are rules of recognition is basically a matter of observation, not something that can be determined by abstract argument. Nevertheless, there is a lesson to be learned from the failure of Kelsen's anti-reductionism. The idea of the Basic Norm was intended by Kelsen to avoid a reduction of legal validity to social facts, precisely of the kind that Hart later suggested in the form of the Rule of Recognition. Kelsen thought that he could avoid such reductionism by insisting that the Basic Norm is a presupposition, not a social norm. But as we have seen, Kelsen's account of the Basic Norm actually violates his own anti-reductionist aspirations. Even if, in certain respects, the Basic Norm is a presupposition, its content is always determined by practice. The Basic Norm of, say, the U.S. legal system, and that of the U.K., differ precisely because judges and other officials actually apply different criteria in determining what the laws in their respective legal systems are. The *content* of the Basic Norm is entirely practice-dependent. Once we see that this practice is rule governed, namely, that in applying the criteria for determining what the law is in their legal systems, judges and other officials follow certain rules, it becomes very difficult to deny that there are rules of recognition, more or less along the lines suggested by Hart.¹³

Two questions remain: What kind of norms the Rules of Recognition are, and to what extent those rules shape our understanding of what the law is. A widely held view, reinforced by Hart's comments in his Postscript to *The Concept of Law*, maintains that the rules of recognition are social conventions, more or less along the lines of David Lewis's analysis of coordination conventions.¹⁴ Lewis claimed that conventions are social rules that emerge as practical solutions to wide-scale, recurrent, coordination problems. A coordination problem arises when several agents have a particular structure of preferences with respect to their mutual modes of conduct: namely, that between several alternatives of conduct open to them in a given set of circumstances, each and every agent has a stronger preference to act in concert with the other agents than his own preference for acting upon any one of the particular alternatives. Most coordination problems are easily solved by simple agreements between the agents to act upon one, more or less arbitrarily chosen alternative, thus securing concerted action amongst them. However, when a particular coordination problem is recurrent and agreement is difficult to obtain (mostly because of the large number of agents involved), a social rule is very likely to emerge, and this rule is a convention. Conventions, in other words, emerge as solutions to recurrent coordination problems, not as a result of an agreement but as an alternative to

such an agreement, precisely in those cases where agreements are difficult or impossible to obtain.

I doubt, however, that the rules of recognition are coordination conventions. Let's consider a concrete example, say, the rules of recognition of the U.S. legal system. There are two main rules of recognition in the United States: the convention that settles on the supremacy of the U.S. Constitution, and the convention that determines the system of common law in the United States.¹⁵ There is a long and complex history that lies behind these two main rules of recognition in the United States. Neither looks like a rule that is there to solve a coordination problem. The convention about the supremacy of the U.S. Constitution manifests a deeply entrenched political ideology that epitomizes important aspects of the United States' social and political history. It is an ideology that people feel proud of and fight to defend. People do not fight to defend their coordination conventions. In other words, rules of recognition are politically important, and this political importance is difficult to reconcile with the idea that such rules are there to solve a coordination problem.

If rules of recognition are politically important, does it not undermine the idea that such rules are conventions at all? Not necessarily. Consider natural language, for example. A vernacular is, undoubtedly, conventional in some profound ways and is widely recognized as such. Nevertheless, people often feel proud of their vernacular and certainly think that it has cultural and other values worth preserving. There are two ways in which social conventions can be valuable. First, there may be values in having the conventions, and second, there may be values constituted by the conventions. Let me explain.

There are many reasons for having conventional rules. Solving a recurrent coordination problem is only one of such reasons. Others are more directly related to specific social, moral, or political needs and values. Consider, for instance, the idea of respect. We have good reasons to respect others, and, crucially, often we have good reasons to demonstrate respect in a socially recognized way. Different cultures have different conceptions of what respect is, when it is due, and when it is important to show respect in socially recognized ways. Hence, different cultures have different conventions that determine ways in which respect to others needs to be demonstrated and how. Some natural languages, for example, have elaborate grammatical structures that constitute different ways in which a person should address another, according to various social requirements and expectations about the kind of respect that needs to be shown in various circumstances.¹⁶ We need not assume, of course, that the various values and conceptions of respect that are instantiated by such vernaculars are necessarily good and worthy of appreciation. Some of them may be pointless or plain wrong. There are two points, however, that need to be noticed: first, that social conventions often emerge as a response to social needs, and in responding to such needs they can be valuable. Conventions serve a wide variety of values by constituting ways in which people interact with each other, linguistically and otherwise. Second, it would be a huge simplification to assume that all the social needs that engender conventional solutions are coordination problems. Social life is much more complex than that. A complex cultural construction of respect instantiates a wide range of values and social functions. Social conventions tend to develop as responses to such needs, shaping social behavior in appropriate ways. The rules of recognition are no exception. They instantiate complex responses to complex social and political needs. Some of those needs are more or less universal, while others are local and specific to the social political history of the particular society in which they evolve.

Furthermore, as I have argued at length elsewhere,¹⁷ once a conventional practice evolves, the conventions that constitute the practice often constitute some of the specific values inherent in the practice. In other words, even if social conventions tend to emerge as responses to some antecedent needs, once the conventions emerge, they often constitute further values that could not be realized without the conventional setting that is already in place.

Realizing that the rules of recognition are not necessarily, or even typically, coordination conventions should make it easier to see that rules of recognition tend to instantiate a deeper layer of conventions about what the law is. Consider the analogy of respect again. As we noted, there are certain reasons to show respect for people under various circumstances. And there are sometimes reasons to show respect in socially recognized or even (partly) institutionalized ways. This is what gives rise to the emergence of deep conventions about respect that are manifest in the surface conventions that determine specific ways of showing respect in particular contexts. Similarly, I want to suggest, there are deep conventions that determine what counts as law and a legal order, conventions that are manifest in the surface conventions of recognition of particular legal systems at any given time and place. In other words, I would suggest that between the general reasons to have law, and the particular rules of recognition of a specific legal system, there is an intermediary layer of conventions that determine what the law is, the *deep* conventions that are instantiated by the surface conventions of recognition. What are those deep conventions?

Consider these three (hugely simplified) possible models of what the law is. According to one familiar conception, law is a product of the act of will of particular individuals or institutions. Let me call this the institutional model of law. At least two other models, however, are familiar from history: the customary model and the religious one. According to the customary model, law is not created by acts of will but by long-standing social customs; roughly, law is just those norms that have been followed in the community for a long period of time. And then there is a third familiar model, which is basically religious: law is grounded on the interpretation of some holy scripture, like the Bible or the Quran.¹⁸ These three models instantiate very different conceptions of legal authority. They instantiate different conceptions of what the law is. As one should expect, they have a great deal in common. That is why they are different models of law; they form conventional solutions to similar problems and social needs. For example, the social needs to have political authority, to have mechanism for resolution of conflicts in society, to solve collective action problems, to produce public goods, and so forth. Let us assume that these and similar concerns constitute the basic reasons for having law and legal institutions in our societies. But these reasons, universal as they may be, can be instantiated by different types of deep conventions. According to the institutional model, the one that more or less prevailed in the modern world, law is the deliberate product of recognized and institutionalized authorities. According to religious models, law is the expressed will of God, not of human institutions. And then there were times and places where law was just a little bit of both of these, but mostly it consisted of the customs and traditions that have been followed for generations. These different models of law are the deep conventions I have in mind. As with any other type of deep conventions, they are actually practiced by their corresponding surface conventions of recognition that are particular to the specific society in question. For example, a religious conception of law must have certain surface conventions that determine what counts as the relevant holy scripture, the "expressed" will of God, who gets to determine

its interpretation, and so forth. Similarly, a customary model must have some surface conventions of recognition about what counts as a legal custom as opposed to norms about etiquette or desirable but not obligatory behavior, who gets to resolve interpretative questions about such matters, who gets to apply them to particular conflicts, etc.

Needless to say, all this was a very sketchy account. A great deal more needs to be said on the kind of conventions the rules of recognition are, and even more needs to be explained about the idea of deep conventions. My purpose here was to point out that (1) there are considerable difficulties with an explanation of the rules of recognition in terms of coordination conventions and (2) that a more nuanced and complex theory of social conventions should be able to explain how conventions constitute, to some extent, the concept of law itself, and its particular shape in any given legal order. I tried to suggest that a distinction between deep and surface conventions may be such an avenue to explore, and I hope to do that in greater detail elsewhere.

Endnotes

1. See, for example, H. Kelsen, *Pure Theory of Law*, Knight trans. (UC Berkeley Press, 1967) or *General Theory of Law and State* (1945), Wedberg trans. (Russell & Russell, NY 1961). For a detailed bibliographical note on Kelsen's writings in legal philosophy, see my entry on Pure Theory of Law in the *Stanford Encyclopedia of Philosophy*.
2. H. L. A. Hart, *The Concept of Law* (Oxford 1961), chapter 5. The conventional nature of the rules of recognition is in Hart's Postscript, published posthumously in the 2nd ed. of *The Concept of Law* (Oxford, 1994).
3. Assume that "P" stands here for the following type of claim: 'under circumstances Ci, A has a right/duty/power (etc...) to Φ ,' where A is a defined class of legal entities, and Φ is an action/omission type.
4. Assume that Q stands here for an individual or an institution.
5. Dworkin famously denies that this is the only type of answer to the question of what makes statements of type 1 true. (See R. Dworkin, The Model of Rules, in his *Taking Rights Seriously*, London, 1977.) But even Dworkin does not deny that a statement of type 2 can be, and often is, a perfectly adequate answer to the question of what makes 1 true.
6. See note 1 above.
7. More concretely, Kelsen maintained that in tracing back such a chain of validity, one would reach a point where a first historical constitution is the basic authorizing norm of the rest of the legal system, and the Basic Norm is the presupposition of the validity of that first constitution.
8. There is a separate question here, that I will largely ignore, whether it makes sense to assume that in each and every legal order there is only one master norm of the kind Hart and Kelsen had in mind. Arguably, legal systems are constituted by a multiplicity of such norms that do not necessarily form a neat hierarchical structure that can be subsumed under one master norm.
9. This dual function of constitutive rules has been noted by J. Searle. See his *Speech Acts* (Cambridge, 1969).
10. L. Green, "The concept of law revisited," *Michigan L Rev*, 94 (1996): 1687, at 1697.
11. *Pure Theory of Law*, 1st ed., [Reine Rechtslehre, 1934], translated to English as *Introduction to the Problems of Legal Theory*, Paulson and Paulson trans. (Oxford 2002), 59.
12. Kelsen was not unaware of the difficulty. In the first edition of the *Pure Theory of Law*, he suggests the solution to this problem by introducing international law as the source of validity for changes in the basic norms of municipal legal systems. It follows from the basic norm of international law, Kelsen maintains, that state sovereignty is determined by successful control over a given territory. Therefore, the changes in the basic norm that stem from successful revolutions can be accounted for in legalistic terms, relying on the dogmas of international law (61-62). The price Kelsen had to pay for this solution, however, is rather high: he was compelled to claim that all municipal legal systems derive their validity from international law, and this entails that there is only one Basic Norm in the entire world, namely, the Basic Norm of public international law. Although this solution is repeated in the second edition of the *Pure Theory of Law* (214-15), Kelsen presented it there with much more hesitation, perhaps just as an option that would make sense. It is not quite clear whether Kelsen really adhered to it. The hesitation is understandable; after all, the idea that municipal legal systems derive their legal validity from international law would strike most jurists and legal historians as rather fanciful and anachronistic. (We should recall that the development of international law is a relatively recent phenomenon in the history of law.)
13. Famously, Dworkin denies precisely this; he denies that in identifying the law judges follow rules or conventions. Dworkin's arguments are very complex, and I cannot deal with them here. I have argued against his position in some detail elsewhere. See my *Positive Law and Objective Values* (Oxford, 2001), chapter 1.
14. David Lewis. *Convention: A Philosophical Study* (Oxford, 1968); For my critique of Lewis's account of social conventions, see Marmor, "On Convention," *Synthese*, 107 (1996): 349. The thesis that the rules of recognition are coordination conventions has been endorsed, for example, by Jules Coleman. See his *Practice of Principle*....
15. Historically, in reverse order: first there was common law, and then the constitution imposed on it.
16. Hungarian is an extreme example: In Hungarian there are at least three or four ways of speaking that manifest different levels of respect the speaker is expected to manifest toward the hearer. These layers vary according to elaborate social conventions regarding degrees of acquaintance, social status, gender, etc.
17. *Positive Law and Objective Values* (Oxford 2001), chapter 1.
18. I am not claiming that these are the only models we are familiar with. There is, for example, something like a popular sovereignty model, instantiated to some extent in Soviet Russia, whereby the law is basically conceived of as "the will of the party." And there may be others.

Legal Positivism and "Explaining" Normativity and Authority

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Introduction

Legal positivism is an approach to law that assumes or asserts that it is both possible and valuable to have a descriptive or conceptual theory of law, separated from any prescriptive claims about what the content of law ought to be.¹ It is an approach to law that is both one example of analytical legal philosophy, in competition with others (e.g., Natural Law theory,² or a Dworkinian approach³), and the paradigmatic form of the analytical approach. This paper will focus on those theorists who offer an "explanation" of authority or normativity as central to the project of legal positivism. This paper will emphasize that such "explanations" come in quite different forms, and some are more consistent with the legal positivist (and analytical legal theory) project than are others.

In particular, I will argue that certain purported explanations are inconsistent with the basic claims and purposes of legal positivism.

Analytical Approaches to Normativity and Authority

The difference between an analytical and a normative approach to law is well-illustrated by H. L. A. Hart's classic work, *The Concept of Law*,⁴ which remains the paradigmatic work of analytical legal philosophy (and of legal positivism) for most contemporary scholars of English-language legal theory.⁵ For Hart, it is important that a theory of law take into account those who accept the law, i.e., those who treat it as giving them reasons for action (the internal point of view).⁶ However, it is also important for Hart that the theorist and the theory remain neutral on the question of whether such treatment of the legal system and its rules is morally justified.⁷

Hart's analysis begins with *the fact* that some people treat the law as giving them reasons for action, without focusing on either the normative question of whether such treatment is objectively (morally) justified or the psychological question of why these people have this attitude toward the law.⁸ Similarly, Hans Kelsen's well-known legal positivist analysis begins with *the fact* that some people view actions normatively, without focusing on whether such a view of official actions is justified.⁹ In these paradigmatic forms of legal positivism, one sees the basic project of this approach to legal theory: to see law as a distinct sort of social practice or institution to be studied descriptively, analytically, or conceptually.

However, because law is a social practice or institution that purports to give citizens (and officials) reasons for action, and it is viewed or used in that way by some of its participants, theorists must face the problem of giving a descriptive, analytical, or conceptual analysis of a normative practice, and the contrast between the neutral or scientific approach of the theorist and the normative, reason-giving nature of the object of study creates tensions and difficulties.

There are at least two quite distinct (if related and overlapping) senses of the terms "explaining [legal] normativity" and "explaining authority," and one can find both senses exemplified in the literature. First, there is the analytical question: What is the nature of legal normativity or authority? Second, there is the evaluative question: Under what circumstances do people or institutions have authority, and under what circumstances do the actions or decisions of people or institutions create obligations?

This section will consider the analytical question. The following section will look at the evaluative question. Here is how Hart saw the analytical problem (as summarized by Gerald Postema):

Hart insists [that] the "standard normal form of descriptions of the content of Law" is that of statements in the normative vocabulary of "obligation," "rights," "powers," and the like. The problem of explaining the normativity of law, he suggests, is...that of explaining the possibility of this characteristic use of normative language, while remaining faithful to the separation thesis.¹⁰

Consider also the following helpful summary by Jules Coleman:

In saying that law is normative, one is saying that the language of the law is the language of obligation, right, duty, privilege, and so on. An account of the law's normativity must at a minimum make this fact about law intelligible. In claiming that the language of law is the language of "ought," one is not thereby

committed to a certain view of the *nature* of the legal "ought"; nothing about whether it is a moral "ought," a prudential "ought," or some other kind altogether. One illuminating way to read Hart's objection to Austin is to see him as claiming that Austin's theory—which reduces law to power, habit, and command—lacks the resources to make intelligible the appropriateness of the normative vocabulary of the law; that it lacks the resources to make out distinctions that are central to legal practice, for example, between being obligated and being obliged.¹¹

Thus, there are important *analytical* questions to be asked regarding what the normative claims of and within law entail—in particular, what the connections are, if any, between legal normative claims and either factual claims or other sorts of normative claims (especially the claims of morality). For example, one might focus on obtaining a better (analytical) understanding on the role legal norms have, or purport to have, in practical reasoning. Here, both Hart and Joseph Raz have viewed law as giving, or purporting to give, content-independent, peremptory, and perhaps exclusionary reasons for action.¹²

On the relation between legal norms and facts, for Hart, it is because (some) citizens and officials treat legal norms as creating reasons for action (separate from whatever sanction may attach to the norms)—Hart's internal point of view—that reduction to empirical terms does not succeed.¹³ In his responses, on one hand, to the early Utilitarian legal positivists, Jeremy Bentham and John Austin, and, on the other hand, to the Scandinavian legal realists, Hart consistently resisted the notion that propositions of or about law could be reduced to empirical claims (about the legislative will, the habit of obedience, the likelihood of punishment, the subjective feeling of empowerment, etc.).¹⁴ Most commentators have found Hart's arguments here persuasive. The question of the relation between legal normativity and other forms of normativity has come to seem less susceptible to easy resolution.

The most common view in the literature appears to be that the law claims to create *moral*¹⁵ obligations¹⁶ but that many or most legal systems fail to do so. Alternatively, a few theorists have thought of legal normativity as *sui generis*: a whole separate kind of normativity (as contrasted with the view that law makes basically a moral claim). Thus, "legally, one ought to do X" becomes a statement within a distinct normative system, just as one might say: "given the rules and objectives of chess, one ought not to move that bishop," or "if one is a vegan, one should not eat that dish." The idea of law as a *sui generis* form of normativity was accepted by H. L. A. Hart¹⁷ and has been recently endorsed also by John Finnis.¹⁸ As some commentators have pointed out, this seems to leave legal systems as simply systems of hypothetical imperatives, however much both their surface logic and the way they are experienced by many participants appear to be consistent with systems of categorical imperatives.¹⁹

As regards explaining legal authority, Joseph Raz's work has exemplified both analytical and normative work on authority generally, and on its application to law.²⁰ On the analytical side, Raz has argued that practical authority is best understood as entailing peremptory and exclusionary reasons within our practical judgments.²¹ On the normative side, Raz has made detailed (and controversial) arguments regarding the conditions under which persons or institutions should be held to be practical authorities: in general terms, they have authority in those situations where following their advice would be more likely to lead to the right result than deciding on one's own.²²

There is thus a significant amount of interesting analytical work “explaining” legal normativity and authority—and, with no consensus in sight on the intricate issues raised, there is much work that is still to be done.

Non-Analytical Claims: Confusing “Is” and “Ought”?

A different understanding of the task of “explaining normativity” is that the theorist could be (or should be) explaining how it is that law could or does create moral obligations. This reading of the phrase is not surprising; what is surprising is how frequently the task thus understood is offered as part of—or even central to—the project of legal positivism.

For example, in their overview and summary of legal positivism, Jules Coleman and Brian Leiter take as one of their central questions: “If law is a matter of fact, not value, then what can explain its normative force? How can we derive a normative conclusion (about law’s authority) from a factual premise (its legality)?”²³ They add:

Accounts of legality are often driven by accounts of authority. Indeed, positivism has often proved attractive because of natural law theory’s failure to account adequately for either.²⁴

* * *

In place of Austin’s reliance on sanctions as a source of law’s authority, Hart emphasizes the idea that law consists in *rules*, in particular, *social rules*.

* * *

Acceptance...from the internal point of view may be both a necessary condition of a normative practice constituting a social rule and a reliable indicator that a practice or rule is normative. But it is not this fact about social rules that explains their normative force. Instead, convergence does the normative work—at least with respect to the rule of recognition. We still require, however, an account of the authority of rules subordinate to the rule of recognition.²⁶

Similarly, Scott Shapiro has characterized legal positivism as being centrally concerned with showing that “[social] facts are the sort of things that are capable of creating obligations.”²⁷ Jules Coleman’s recent observations run along similar lines:

The positivist project demands an account of the normativity of the rule of recognition. This is because the capacity of almost all legal rules to *govern* conduct depends on their bearing a certain relationship to another rule—the rule of recognition—whose capacity to govern the behavior of those to whom it is addressed (namely, officials) depends on its *guiding* their behavior. A rule guides an individual’s behavior only if it is his reason for acting in compliance with it. A philosophical account of the very possibility of governance by law, then, rests on the possibility of a philosophical account of how the rule of recognition can be a reason for action.²⁸

One needs to emphasize here that it is certainly legitimate—and quite important—if Jules Coleman, Scott Shapiro, Brian Leiter, or some other theorist can show how normative conclusions follow from conventions,²⁹ joint intentional activity,³⁰ shared cooperative activities,³¹ or any comparable collection of facts. However, that task, despite its undeniable importance, is not *central* to the legal positivist project. If anything, it is in strong tension with that project. As David Lyons pointed out, asserting that there cannot be law unless the legal

rules or legal conventions succeed in giving reasons for action (or assuming that such rules *normally* succeed in this way) contradicts the basic separation of law and morals central to legal positivism.³²

And independent of their consistency with the legal positivist project, there are obvious philosophical problems with arguments along the lines described above. They attempt to derive normative conclusions from factual premises, and this seems contrary to the well-accepted (though, to be sure, not universally accepted³³) view, ascribed originally to David Hume, that one cannot derive normative conclusions from purely factual premises.³⁴ (It is not coincidental that Hans Kelsen, among other legal positivists, emphasized Hume’s is/ought doctrine as a prime justification, motivation, and foundation of his advocacy for a legal positivist approach.³⁵)

Legal positivism generally has always presented itself as a form of study that separated law and morality, or, to put the point differently, separated law as it is from law as it ought to be.³⁶ This approach saw itself as being in sharp contrast to natural law theories, which legal positivists portray (rightly or wrongly³⁷) as conflating law and morality and law as it is with law as it ought to be.³⁸ (It is not accidental that a number of prominent legal positivists have argued that there is no general moral obligation to obey the law.³⁹ It follows naturally, if not quite inevitably, from the premise of a conceptual separation of law and morality, that legal status, alone and as such, would likely not carry intrinsic moral weight.)

Again, nothing in this article is meant to imply that it is wrong to try to solve the problems regarding the grounds of normativity (or even to refute the “is”/“ought” divide, if a refutation is available). However, I think it can be unhelpful and misleading to portray *legal positivism* as being centrally about “explaining normativity and authority,” *in the sense of* deriving normative conclusions from factual premises.

Why Does It Matter?

One possible response to the above discussion is that the underlying issue is merely an unfortunate by-product of a bad academic tendency: worrying about the detailed criteria and boundaries of “schools of thought.” The argument goes roughly as follows: the inclination to talk of the views of schools of thought is understandable, given the human desire to impose order on the chaos of ideas we face (and to create convenient categories for dealing with other views in one’s articles or one’s courses). However, this critique continues, talk of schools of thought, or similar ways of thinking, has two pernicious consequences: (1) the view constructed for a school of thought other than one’s own (e.g., when a legal positivist talks about natural law theory) may be a view assembled from a variety of theorists in such a way that the constructed view is one that no individual theorist actually holds—and thus the critique, or defense, of this constructed view becomes an irrelevant exercise that distracts from more important work⁴⁰; and (2) too much time is wasted over questions (perhaps including the one discussed in this essay) regarding what is or what is not properly part of a particular viewpoint or school of thought. Thus, one can have long—but perhaps pointless—discussions about whether natural law theory does or does not think that unjust laws are “not laws at all”⁴¹ or what position “liberalism” takes on affirmative action.

On the other hand, whatever the harms and benefits of thinking in terms of “schools of thought,” one can still certainly evaluate those who write in such terms regarding the consistency and attractiveness of the positions they advocate. If deriving reasons for action from conventions or shared projects is inconsistent with claiming a conceptual separation

of law and morality, it is worth knowing that we must choose between them.

Endnotes

1. I discuss the nature and history of legal positivism at greater length in Brian Bix, "Legal Positivism." In *The Blackwell Guide to the Philosophy of Law and Legal Theory*, edited by Martin P. Golding and William A. Edmundson (Oxford: Blackwell Publishing, 2005), 29-49; see also Leslie Green, "Legal Positivism." In *The Stanford Encyclopedia of Philosophy*, edited by Edward N. Zalta <<http://plato.stanford.edu/entries/legal-positivism/>> (2003). While I think the view of legal positivism I present in my article above (and, in rough summary form, here) reflects the view of most legal positivists, it is not a universally held view. For an example of an unconventional view of legal positivism, see John Gardner, "Legal Positivism: 5½ Myths," *American Journal of Jurisprudence*, 46 (2001): 199-227.
2. E.g., John Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980).
3. See Ronald Dworkin. *Law's Empire* (Cambridge, MA: Harvard University Press, 1986).
4. H. L. A. Hart. *The Concept of Law*, 2nd ed. (Oxford: Clarendon Press, 1994).
5. In non-English speaking countries, the work of Hans Kelsen probably plays that role.
6. Hart, *The Concept of Law*, *supra*, at 82-91.
7. In Hart's work, he originally argues that one's perspective is either "internal" (accepting the law) or "external" (viewing the law in a purely empirical way). In his later writings, he accepted Joseph Raz's suggestion that there was a third option: detached normative judgments (giving the perspective of someone who accepts the norms, but without the speaker himself or herself being committed to that perspective). *Id.* at 242-44; see Joseph Raz, *The Authority of Law* (Oxford: Clarendon Press, 1979), 153-57.
8. E.g. Hart, *The Concept of Law*, *supra*, at 203; H. L. A. Hart. *Essays on Bentham* (Oxford: Clarendon Press, 1982), 256-57.
9. See, e.g., Hans Kelsen, *Introduction to the Problems of Legal Theory*, edited by Bonnie Lischewski Paulson and Stanley L. Paulson (Oxford: Clarendon Press, 1992), 8. With Kelsen, his theory (with its central notion of "the Basic Norm") can be seen as focusing on *the fact* that some citizens view official actions normatively, and drawing out what follows from that fact. For Hart, the fact of the internal point of view is somewhat less central (though clearly still very important). Hart's and Kelsen's analyses diverge in a number of ways, most distinctively, in the way that Hart's theory is grounded on social facts and the internal point of view, while Kelsen's theory is a neo-Kantian analysis. See Brian Bix, *Jurisprudence: Theory and Context*, 3rd ed. (London: Sweet & Maxwell), 60-62.
10. Gerald J. Postema, "The Normativity of Law." In *Issues in Contemporary Legal Philosophy*, edited by Ruth Gavison (Oxford: Clarendon Press, 1987), pp. 81-104, at 82.
11. Jules L. Coleman. *The Practice of Principle* (Oxford: Oxford University Press, 2001), 89-90 n.26.
12. Hart, *Essays on Bentham*, *supra*, 18, 256; Joseph Raz, *Practical Reasons and Norms* (Princeton: Princeton University Press, 1990), 58-84.
13. See Hart, *The Concept of Law*, *supra*, 83-91.
14. See Hart, *Essays on Bentham*, *supra*, 143-45; H. L. A. Hart, *Essays in Jurisprudence and Philosophy* (Oxford: Clarendon Press, 1983), 164-69.
15. Of course, any analytical claims about the relationship of law and morality must not only be grounded on an analysis of the nature of law but also on a comparable analysis of morality. Most discussions of the connection between legal normativity or obligation and moral normativity or obligation are grounded on a conventional (but not universally accepted) view of morality—as universal, reason-giving, and not arbitrary or indefensible. See Neil MacCormick, "Comment." In *Issues in Contemporary Legal Philosophy*, edited by Ruth Gavison (Oxford: Clarendon Press, 1987), 105-13, at 110; David Lyons, "Comment," in *id.*, 114-26, at 116.
16. The best known formulation of this idea may be Joseph Raz, *Ethics in the Public Domain* (Oxford: Clarendon Press, 1994), 199-204, but similar characterizations are common in the literature.
17. See Hart, *Essays on Bentham*, *supra*, 146-47. In his work, Hans Kelsen seems to view legal norm systems as just a normative system that any person may adopt instead of (not along with—as that would create unacceptable normative conflicts) other normative systems.
18. Comments by John Finnis, Conference: "Natural Law and Natural Rights in Contemporary Jurisprudence," Princeton University, September 2005.
19. See Postema, "The Normativity of Law," *supra*, 89. For another critique of Hart's view here, see Joseph Raz, "Hart on Moral Rights and Legal Duties," *Oxford Journal of Legal Studies*, 4 (1984), 123-31, at 129-31.
20. See, e.g., Joseph Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986), 23-69; Joseph Raz, "Authority: Revisiting the Service Conception," *Minnesota Law Review*, 90 (2006), forthcoming.
21. See Raz, *Practical Reason and Norms*, *supra*.
22. See Raz, *The Morality of Freedom*, *supra*, 38-69 ("The Justification of Authority").
23. Jules L. Coleman and Brian Leiter, "Legal Positivism." In *A Companion to Philosophy of Law and Legal Theory*, edited by Dennis Patterson (Oxford: Blackwell, 1996), 241-60, at 244.
24. *Id.* at 243.
25. *Id.* at 245 (emphasis in original).
26. *Id.* at 248.
27. Scott Shapiro. "Law, Plans, and Practical Reason," *Legal Theory*, 8 (2002): 387-441, at 389.
28. Jules Coleman. *The Practice of Principle* (Oxford: Oxford University Press, 2001), 95.
29. Andrei Marmor offers interesting ideas about how constitutive conventions might be central to understanding law, see Andrei Marmor, *Positive Law and Objective Values* (Oxford: Clarendon Press, 2001), 1-48, but he expressly denies that these conventions explain why people should treat the law as creating obligations. See *id.* at 25, 31-32.
30. See Scott Shapiro, "Law, Plans, and Practical Reason," *supra*.
31. See Coleman, *The Practice of Principle*, *supra*, 74-102; see also Shapiro, "Law, Plans, and Practical Reason," *supra*; Michael E. Bratman, "Shapiro on Legal Positivism and Jointly Intentional Activity," *Legal Theory*, 8 (2002), 511-17.
32. Lyons, "Comment," *supra*, 122.
33. See, e.g., John R. Searle, "How to Derive 'Ought' from 'Is,'" *Philosophical Review*, 73 (1964): 43-48.
34. The passage is in David Hume, *Treatise of Human Nature*, book III, part I, section I, 2nd ed., edited by L. A. Selby-Bigge (Oxford: Clarendon Press, 1978), 469:
In every system of morality, which I have hitherto met with, I have always remark'd, that the author proceeds for some time in the ordinary way of reasoning, and establishes the being of a God, or makes observations concerning human affairs; when of a sudden I am surpriz'd to find, that instead of the usual copulations of propositions, *is*, and *is not*, I meet with no proposition that is not connected with an *ought*, or an *ought not*. This change is imperceptible; but is, however, of the last consequence. For as this *ought*, or *ought not*, expresses some new relation or affirmation, 'tis necessary that it shoul'd be observ'd and explain'd; and at the same time that a reason should be given, for what seems altogether inconceivable, how this new relation can be a deduction from others, which are entirely different from it.

35. Hans Kelsen. *Introduction to the Problems of Legal Theory*, *supra*, 7-14.
36. It is true both that the separation thesis can be interpreted in a number of ways, e.g., David Lyons, *Moral Aspects of Legal Theory* (Cambridge: Cambridge University Press, 1993), 64-101, and that a too-narrow reading of the separation thesis can make it simply false. Joseph Raz. "About Morality and the Nature of Law," *American Journal of Jurisprudence*, 48 (2003): 1-16. However, this is not the occasion to explore those issues.
37. For one view to the effect that the legal positivists have badly misunderstood natural law theory, see John Finnis, "On the Incoherence of Legal Positivism," *Notre Dame Law Review*, 75 (2000): 1597-1611, at 1606-08.
38. John Finnis has duly noted the irony that while legal positivists have frequently accused natural law theorists of trying to derive "ought" from "is," in fact it may be legal positivists who are more often guilty of that. Finnis, "On the Incoherence of Legal Positivism," *supra*, 1606-08.
39. See, e.g., Raz, *Ethics in the Public Domain*, *supra*, 325-53; Matthew H. Kramer. In *Defense of Legal Positivism* (Oxford: Oxford University Press, 1999), 266-307.
40. Joseph Raz, "Postema on Law's Autonomy and Public Practical Reasons: A Critical Comment," *Legal Theory*, 4 (1998), 1-20, at 1 ("...[O]ne of the unattractive tendencies of contemporary legal and political philosophy [is]...not discuss[ing] anyone's view, but a family of views. This allows one to construct one's target by selecting features from a variety of authors so that the combined picture is in fact no one's view, and all those cited as adhering to it would disagree with it.")
41. Compare Finnis. *Natural Law and Natural Rights*, *supra*, 363-66 with Mark C. Murphy, "Natural Law Jurisprudence," *Legal Theory*, 9 (2003): 241-67, at 243-54.
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Legal Positivism and Objectivity

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Legal positivism's multi-faceted insistence on the separability of law and morality includes an insistence on the thoroughly conventional status of legal norms as legal norms. Positivists disagree with one another about the character of the relevant conventions, and they likewise disagree over the question whether the conventionality of the status of legal norms is inconsistent with the incorporation of moral principles into the law. Nonetheless, positivists are at one in opposing the natural-law view that the status of some legal norms as such is convention-independent. (Positivists' opposition to that view is best regarded as an aspect of their insistence on the separability of law and morality, because the convention-independent grounds for legal validity invoked by natural-law theorists have always been overtly moral. No one has ever seriously broached any other sort of convention-independent ground for legal validity.)

Now, many philosophers writing on legal objectivity have rightly contended that the theses of legal positivism do not entail any particular position concerning the objectivity of morality.¹ Yet the positivist affirmation of the conventionality of legal norms may initially seem at odds with the objectivity of law in certain respects. This essay will argue that, despite superficial appearances to the contrary, there is no tension between law's conventionality and its objectivity.

Legal objectivity is a property with many dimensions.² Because of constraints of space, only one of those dimensions will be under consideration here: the mind-independence of the contents and implications of legal norms. This central aspect of legal objectivity has been seen by some theorists as incompatible with the conventionality of law. Such a perception of incompatibility has led some anti-positivist theorists to reject the notion of law's conventionality, and has led some positivist theorists to query law's objectivity (in the sense just specified). What will be contended here is that both camps are mistaken.

I. Objectivity qua Mind-Independence

Every variety of objectivity is opposed to a corresponding variety of subjectivity. Nowhere is that opposition more evident than in connection with objectivity as mind-independence. This conception of objectivity is perhaps more commonly invoked than any other, both in everyday discourse and in philosophical argumentation. When this conception is operative, a proclamation of the objectivity of some phenomena is an assertion that the existence and character of those phenomena are independent of what anyone might think about them. Within a domain to which such a proclamation applies, the facts concerning any particular entity or occurrence do not hinge on anybody's beliefs or perceptions.

For a proper grasp of this type of objectivity, we need to take note of some salient distinctions. One such distinction lies between the views of separate individuals and the shared views of individuals who collaborate in a community or in some other sort of collective enterprise.³ Sometimes when theorists affirm the mind-independence of certain matters, they are simply indicating that the facts of those matters transcend the beliefs or attitudes of any given individual. They mean to allow that those facts are derivative of the beliefs and attitudes shared by the individuals who compose some organized group (such as the judges and other legal officials who together conduct the operations of a legal system). These theorists contend that, although no individual's views are determinative of what is actually the case about the matters in question, the understandings that individuals share as an organized group are indeed so determinative. Let us designate as "weak mind-independence" the type of objectivity on which these theorists insist when they ascribe a dispositive fact-constituting role to collectivities while denying any such role to separate individuals. That mild species of objectivity is obviously to be contrasted with *strong* mind-independence, which obtains whenever the nature and existence of the phenomena in some domain of enquiry are determined neither by the views of any separate individual(s) nor by the common views and convictions that unite individuals as an organized group. Insofar as strong mind-independence prevails within a domain, a consensus on the bearings of any particular state of affairs in that domain is neither necessary nor sufficient for the actual bearings of the specified state of affairs. How things are is independent of how anyone thinks that they are.

Now, before we can come to grips with the question whether legal requirements are strongly mind-independent or weakly mind-independent (or neither), we need to attend to another major dichotomy: the dichotomy between existential mind-independence and observational mind-independence.⁴ Something is existentially mind-independent if and only if its occurrence or continued existence does not presuppose the existence of some mind(s) and the occurrence of mental activity. Not only are all natural objects mind-independent in this sense, but so too are countless artefacts such as pens and houses. Although those artefacts would never have materialized as such in the absence of minds and mental activity—that is, although

in their origins they were existentially mind-dependent—their continued existence does not similarly presuppose the presence of minds and the occurrence of mental activity. A house would persist for a certain time as the material object that it is, even if every being with a mind were somehow straightaway whisked out of existence.

Something is observationally mind-independent if and only if its nature (comprising its form and substance and its very existence) does not depend on how any observer takes that nature to be. Whereas everything that is existentially mind-independent is also observationally mind-independent, not everything that is observationally mind-independent is existentially mind-independent. Consider, for example, an intentional action. The occurrence of any such action presupposes the existence of a mind in which there arises the intention that animates the action, yet the nature of the action does not hinge on what any observer(s)—including the person who has performed the action—might believe it to be. Even if every observer thinks that the action is of some type *X*, it may in fact be of some contrary type *Y*.

When pondering the mind-independence of legal requirements, then, we should be attuned to both the strong/weak distinction and the existential/observational distinction. A bit of reflection on the matter should reveal that, if the *existential* status of legal requirements is our focus, some of those requirements (general legal norms) are weakly mind-independent while some other such requirements (most individualized directives) are not even weakly mind-independent. That general legal norms are at least weakly mind-independent is quite evident. The existence and contents of those norms do not stand or fall on the basis of each individual's mental activity; it is not the case that multitudinous different sets of legal norms exist for multitudinous different individuals, or that no legal norms at all exist for anyone who does not give them any thought. Whereas someone's beliefs and fantasies and attitudes and convictions are existentially dependent on the mind of the particular individual who harbors them, general legal norms differ in not being radically subjective.

Some other legal requirements, however, are not even weakly mind-independent. Typically, if not always, an individualized order addressed to a particular person—by a judge or some other legal official—will not remain in effect as such if its addressee's mental activity permanently ceases. Any result sought through the issuance of the order will typically have to be achieved through some other means (perhaps through the issuance of a directive to some alternative individual or set of individuals who will act in lieu of the original addressee). To the utmost, then, an individually addressed legal requirement is existentially mind-dependent; its continued existence as a legal requirement presupposes the occurrence of mental activity in a particular person's mind.

By contrast, the continuation of the sway of general legal norms will transcend the mental functioning of any given individual. Even so, the existential mind-independence of such norms is weak rather than strong. They cannot persist in the absence of all minds and mental activity. They abide as legal norms only so long as certain people (most notably, judges and other legal officials) collectively maintain certain attitudes and beliefs concerning them. Unless legal officials converge in being disposed to treat the prevailing laws as authoritative standards by reference to which the juridical consequences of people's conduct can be gauged, those laws will cease to exist. To be sure, some of the general mandates within a legal system—such as ordinances that prohibit jaywalking—can continue to exist as laws even though they are invariably unenforced. The requirements imposed by such mandates

are inoperative practically, but they remain legal obligations. However, the very reason why inoperative legal duties continue to exist as legal duties is that myriad other legal obligations are quite regularly given effect through the activities of legal officials, who converge in being disposed to treat those obligations as binding requirements. Only because those manifold other legal duties are regularly given effect does a legal regime exist as a functional system. In the absence of the regularized effectuation of most mandates and other norms within a system of law, the system and its sundry norms will have gone by the wayside. In sum, the continued existence of laws (including inoperative laws) as laws will depend on the decisions and endeavors of legal officials. Yet because those decisions and endeavors inevitably involve the beliefs and attitudes and dispositions of conscious agents, the continued existence of laws as laws is not strongly mind-independent. Legal norms' existential mind-independence is only weak.

To what extent are legal norms observationally mind-independent? Are they strongly so or only weakly so? We can know straightaway, in regard to their observational status, that general legal norms are at least weakly mind-independent. After all, as has already been remarked, everything that is existentially mind-independent is also observationally mind-independent. The mental states and events presupposed by the existence of a legal system are those shared by many officials interacting with one another. What those mental states and events are is manifestly independent of what any particular individual thinks that they are. Matters become more intricate, however, when we turn from inquiring whether legal norms are observationally mind-independent to inquiring whether their observational mind-independence is strong or weak. A number of legal philosophers, not least some positivists such as Andrei Marmor, have had no doubt that the observational mind-independence of laws is merely weak. Marmor first notes that, when a concept pertains to something that is strongly mind-independent, "it should be possible to envisage a *whole community of speakers* misidentifying [the concept's] real reference, or extension." He then declares: "With respect to concepts constituted by conventional practices [such as the operations of a legal system], however, such comprehensive mistakes about their reference is implausible. If a given concept is constituted by social conventions, it is impossible for the pertinent community to misidentify its reference." He emphatically proclaims: "There is nothing more we can discover about the content of the [norms of our social practices] than what we already know."⁵ In fact, however, things are more complicated than Marmor suggests. His comments are not completely wrong, but they are simplistic. (In the following discussion of the strong observational mind-independence of laws, incidentally, there is no need for me to distinguish between general norms and individualized directives. In each case, the observational mind-independence is strong.)

On any particular point of law, the whole community of legal officials in some jurisdiction can indeed be mistaken. Legal officials can collectively be in error about the attitudes and beliefs (concerning some point of law) which they themselves share. They can collectively be in error about the substance and implications of those shared beliefs and attitudes and can therefore collectively be in error about the nature of some legal norm which those beliefs and attitudes sustain. To assume otherwise is to fail to differentiate between (i) their harboring of the first-order attitudes and beliefs and (ii) their second-order understanding of the contents of those first-order mental states. The fact that the officials hold certain attitudes and beliefs with regard to the existence and content of some legal norm is what establishes the existence and fixes the content of that norm; but the fact that they hold those attitudes and beliefs does not

exclude the possibility that they themselves will collectively misunderstand what has been established and fixed by that fact. A gap of misapprehension is always possible between people's first-order beliefs and their second-order beliefs about those beliefs.

The observational mind-independence of legal norms is therefore strong rather than weak. However, Marmor is not flatly incorrect. If the legal officials in a jurisdiction do collectively err in their understanding of the contents and implications of some legal norm(s) which their own shared beliefs and attitudes have brought into being, and if they do not correct their misunderstanding, that misunderstanding will thenceforth be determinative of the particular point(s) of law to which it pertains. It will in effect have replaced the erstwhile legal norm(s) with some new legal norm(s). Such an upshot will be especially plain in any areas of a jurisdiction's law covered by Anglo-American doctrines of precedent, but it will ensue in other areas of the law as well. The new legal norm(s) might be only slightly different from the previous one(s)—the difference might lie solely in a few narrow implications of the norm(s)—but there will indeed be some difference, brought about by the legal officials' mistaken construal of the content and implications of the superseded norm(s). Subsequent judgments by the officials in accordance with the new legal standard(s) will not themselves be erroneous, since they will tally with the law as it exists in the aftermath of the officials' collective misstep. The officials go astray in perceiving the new standard(s) as identical to the former standard(s), but, once their error has brought the new standard(s) into being, they do not thereafter go astray by treating the new standard(s) as binding. (There can be limited exceptions to this general point. If the officials in some legal system adhere to a norm requiring them to undo any mistaken judgment whenever they come to recognize their mistake within a certain period of time, and if they comply with that norm in most circumstances to which it is applicable, then their nonconformity with it in some such set of circumstances would temporarily vitiate the new legal standard that has been engendered by their original misstep. However, the additional error of nonconformity—if left uncorrected—will itself quickly be absorbed into the workings of the legal system, along with the original misstep, as something that is binding on the officials.)

Of course, a new legal norm engendered by the officials' collective misunderstanding of a pre-existent legal norm may itself become subject to misapplication in the future. If it does indeed undergo distortion in that manner, it will have been displaced by some further legal norm that is the product of the distortion. The process through which a collective error on the part of officials will have led to the supersession of some legal standard(s) by some other legal standard(s) is a process that can recur indefinitely. Legal change can occur by many routes, but a succession of errors is one of them.

Thus, although Marmor is incorrect in contending that the observational mind-independence of legal norms is weak rather than strong, his remarks can serve to alert us to the fact that the *existential* mind-independence of those norms is never strong. Legal officials can collectively be wrong about the implications of the laws which their own shared beliefs and attitudes sustain, but their errors (unless subsequently corrected) quickly enter into the contents of those laws and thereby become some of the prevailing standards. Moreover, we should note that—in the remarks quoted above—Marmor does not initially assert that community-wide mistakes about the referential extensions of conventional concepts are impossible. He initially asserts merely that they are implausible. Such an assertion is overstated, but it is not entirely misguided. There is some merit

to the tenet that our epistemic access to the products of our own practices is more intimate than our epistemic access to the phenomena of the natural world. Though that tenet should never obscure the possibility of disaccord between people's first-order beliefs and their second-order beliefs about the contents and implications of those first-order beliefs, it aptly suggests that we can sometimes feel greater confidence in our grasp of our own ideas than in our grasp of entities that we have not fashioned. Within limits that prevent it from hardening into a dogma about the incorrigibility of our apprehension of our own practices, a doctrine about relative levels of confidence is pertinent. That doctrine is particularly cogent in connection with very narrowly and precisely delimited conventions such as the rules of chess, but it also has some force in connection with more diffuse conventions such as those that make up a large legal system.

In short, when we ponder whether the general norms of a legal system are objective in the sense of being mind-independent, we should arrive at a complex conclusion. Such norms are both existentially and observationally mind-independent, but their existential mind-independence is weak whereas their observational mind-independence is strong. The weakness of the existential mind-independence minimizes any gaps between perception and actuality that have arisen because of the strong observational mind-independence. It does so not by averting errors on the part of legal officials collectively but by ensuring that any of their uncorrected errors will quickly be incorporated into the law of the relevant jurisdiction. In other words, any gaps between the officials' collective perceptions and the actuality of the law are defused through the recurrent reshaping of the actuality in accordance with the perceptions. Furthermore, because legal officials are intimately familiar with their own practices and the products of those practices, the gaps between what is collectively perceived and what is actual should be relatively uncommon.

II. Objectivity and Legal Positivism

We should note, in closing, two links between this discussion of law's mind-independence and the debates over legal positivism. First, a potential objection should be allayed. My comments on objectivity qua mind-independence have presupposed that legal systems and the norms within them are conventional in character. Those comments might thus seem additionally to presuppose that legal positivism is correct as a theory of law. Some readers may feel disquiet. They may argue that, whether or not positivism is true, an account of legal objectivity should not take its truth as given. They would complain that my own account has not been neutral in the debates between legal positivists and natural-law theorists. Any such query would be misdirected. Although legal positivists do insist on the conventionality of law, so does every minimally credible natural-law theory. Legal positivists and most natural-law theorists disagree not over the question whether law is conventional, but over the question whether law is exclusively conventional. Many natural-law theorists maintain that the norms of every legal system encompass basic moral principles whose status as legal norms does not depend on the conventional practices of officials. A number of natural-law theorists further submit that some of the norms classified as laws in the conventional practices of officials within some legal systems are not genuinely laws; appallingly heinous norms are excluded from such a status, or so we are told. Natural-law theorists are at odds with positivists on these points, but not on the question whether most of the laws in any legal system are conventional in origin. Everyone, or virtually everyone, recognizes that the answer to that latter question is affirmative.⁶ Hence, in application to all the legal norms that would be classified as such by jurisprudential

positivists and natural-law theorists alike—and therefore in application to the vast majority of legal norms that would be classified as such by jurisprudential positivists and the vast majority of legal norms that would be classified as such by natural-law theorists—my account of the mind-independence of such norms is neutral between positivism and natural-law doctrines. Moreover, the account can easily be amplified to accommodate the distinctive contentions of natural-law theorists. Such theorists should accept the account and add to it the claim that the existential mind-independence (as well as the observational mind-independence) of some general legal norms is strong rather than weak. More specifically, strong rather than weak is the existential mind-independence of the basic moral principles that are characterized by natural-law theorists as legal norms irrespective of any conventional practices.

A second link between the topic of this paper and the debates over legal positivism is more complicated. In arguing that the observational mind-independence of legal norms is strong rather than weak, this paper has distinguished between two sets of beliefs and attitudes harbored by legal officials: the first-order beliefs and attitudes that sustain the existence and fix the contents of legal norms, and the second-order beliefs and attitudes concerning those first-order beliefs and attitudes. This distinction is in some respects quite similar, though by no means straightforwardly identical, to a distinction invoked by Jules Coleman and others (including me) in defense of positivism against the onslaughts of Ronald Dworkin. Dworkin has contended that the criteria for ascertaining the law in any particular jurisdiction cannot be conventional—because legal officials such as judges disagree over those criteria, whereas conventions always involve convergence. Let us here leave aside the fact that nontrivial disagreements among officials occur in relation to only a very small proportion of the situations that are regulated by any legal system. Even if that important point is pretermitted, Dworkin's argument does not succeed. As Coleman and others have maintained,⁷ Dworkin fails to distinguish between disagreements over the *contents* of various criteria and disagreements over their *applications*. That is, Dworkin fails to distinguish between disagreements over the intensions of those criteria and disagreements over their extensions. Though some juridical disputes are undoubtedly of the former type, many others are of the latter type.

To quite a considerable degree, the content/application dichotomy resembles my distinction between first-order constitutive beliefs and second-order observational beliefs. The two dualisms are perfectly consistent, and the latter nicely supplements the former as a means of parrying Dworkin's attacks on the positivist account of the conventionality of law. When Dworkin declares that the positivist account is belied by the occurrence of disagreements among judges concerning the substance of the basic criteria for ascertaining the existence and contents of legal norms, he is implicitly assuming that the observational mind-independence of conventional standards is weak rather than strong. Or, at the very least, he is assuming that positivists contend that the observational mind-independence of conventional standards is weak rather than strong. To be sure, some positivists such as Marmor have indeed advanced contentions along those lines. Nonetheless, as has been argued, any such contentions are mistaken. They can and should be eschewed by legal positivists. Neither positivists nor anyone else should think that an acknowledgment of the strong *observational* mind-independence of legal norms is tantamount to a natural-law insistence on the strong *existential* mind-independence of some such norms. Confusion on that point can be overcome through a firm grasp of the distinction between legal officials' first-order beliefs and their second-order beliefs—that is, between the first-order beliefs that underpin the

existence and fix the contents of legal norms, and the second-order beliefs about the bearings or implications of those first-order beliefs. (Of course, nothing in this paragraph is meant to imply that the disagreements among legal officials in difficult cases are always at the second-order level. They are sometimes first-order disagreements. Dworkin's misstep resides in his thinking that the divergences among legal officials in difficult cases are *always* at the first-order level.)

This rejoinder to Dworkin is especially apt for those legal positivists—including Coleman and me—who maintain that in any particular jurisdiction it can be true, though it need not be true, that a norm's correctness as a moral principle is a sufficient condition for the norm's status as a law in difficult cases. After all, as Dworkin would emphatically agree, the observational mind-independence of every correct moral principle is strong rather than weak. (Also strong is the existential mind-independence of every such principle qua moral precept. However, the existential mind-independence of any such principle qua legal norm—a status that it occupies solely by dint of being collectively regarded as a legal norm by legal officials—is weak rather than strong.) That is, even if Dworkin joins Marmor in erroneously thinking that the observational mind-independence of purely conventional norms is only weak, he would not make any similar claim about the observational mind-independence of moral principles. Hence, when some legal positivists submit that such principles can be legal norms, they are particularly well positioned to retort effectively to Dworkin.

Still, even positivists who deny the potential status of moral principles as legal norms should recognize that the observational mind-independence of legal norms is strong rather than weak. In making the mistake of adopting a contrary view, Marmor and some other legal positivists have in effect partly aligned themselves with Dworkin. They have lent unwarranted credibility to his anti-positivist critiques. The distinctions drawn in this essay can help to dispel that credibility.

Endnotes

1. See, for example, Jules Coleman, "Truth and Objectivity in Law," *Legal Theory*, 1 (1995): 33-68, 35-36; Michael Moore, "Moral Reality," *Wisconsin Law Review*, (1982): 1061-1156, 1066 n10, 1154; Michael Moore, "Moral Reality Revisited," *Michigan Law Review*, 90 (1992): 2424-2533, 2425 [hereinafter cited as Moore, "Revisited"]; Jeremy Waldron, "The Irrelevance of Moral Objectivity." In Robert George (ed.) *Natural Law Theory* (Oxford: Clarendon Press, 1992), 158-87, 161.
2. In the opening chapter of my *Objectivity and the Rule of Law* (New York: Cambridge University Press, 2006), I explore six main dimensions of legal objectivity along with several ancillary dimensions.
3. Of course, the shared views to which I refer will not be merely shared. A key reason for the holding of those views by each participant is his knowledge that virtually every other participant holds them and expects him to hold them. This complicated interlocking of outlooks among the participants in a collaborative endeavor is not something on which I need to dwell here.
4. For some good, crisp statements of this distinction—which has been drawn in various terms by many writers—see Moore, "Revisited," 2443-44; Sigrún Svavarsdóttir, "Objective Values: Does Metaethics Rest on a Mistake?" In Brian Leiter (ed.), *Objectivity in Law and Morals* (Cambridge: Cambridge University Press, 2001), 144-93, 162.
5. Andrei Marmor. *Positive Law and Objective Values* (Oxford: Oxford University Press, 2001), 138, emphasis in original. A complicated variant of Marmor's position underlies the famous discussion in John Locke, *An Essay Concerning Human Understanding* (Oxford: Clarendon Press, 1975 [1689]) (Peter Nidditch ed.), book IV, chapter IV. Quite close

to Marmor's position, but somewhat milder, is the brief discussion in Kent Greenawalt, *Law and Objectivity* (Oxford: Oxford University Press, 1992), 48.

6. Ronald Dworkin, perhaps in a moment of polemical hyperbole, comes close to denying that the answer to the latter question is affirmative. See Ronald Dworkin, *Law's Empire* (London: Fontana Press, 1986), 136-39. For a critical rejoinder to Dworkin, see Matthew Kramer, *In Defense of Legal Positivism* (Oxford: Oxford University Press, 1999) [hereinafter cited as Kramer, *Defense*], 146-51. Whatever may be the merits of Dworkin's position with specific reference to American constitutional law, it is wildly implausible as a general jurisprudential thesis applicable to all the main components of every legal system. At any rate, even if I were to accept Dworkin's view that a legal system operates not through conventions but through arrays of independent moral convictions that converge with one another, I would not need to modify anything said here about the weak mind-independence of legal norms. Dworkin clearly accepts that law is only weakly mind-independent. What would need to be modified is simply my suggestion that law's weak mind-independence consists in its conventionality. A follower of Dworkin would insist that the weak mind-independence consists instead in law's nature as a product of medleys of overlapping moral convictions harbored by officials and citizens.
7. Coleman has argued this point in most of his writings on legal positivism. For one of his most recent discussions, see his *The Practice of Principle* (Oxford: Oxford University Press, 2001), 115-18. For my own reflections on the content/application distinction, influenced to some degree by Coleman's discussions, see the first four chapters—especially chapters 2 and 4—of my *Where Law and Morality Meet* (Oxford: Oxford University Press, 2004).

Positivism and the Problem of Explaining Legal Obligation

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The concept of legal obligation is utterly central to legal practice. Statutes, case law, and legal arguments are characteristically framed in terms of what some person or class of persons is obligated to do. Such practices presuppose that legal norms—at least those making certain actions mandatory—regulate behavior by creating legal obligations. Accordingly, no conceptual theory of law can be fully successful without either explaining the sense in which legal norms obligate subjects or explaining why these common practices and usages are incorrect.

Despite the obvious importance of the notion of legal obligation, Anglo-American positivists have focused on the more narrow issue of whether a social rule of recognition can create legal obligations that bind officials. Positivists have had little to say about the sense in which laws obligate *citizens* since Hart rejected Austin's view that legal obligation could be explained entirely in terms of coercive commands. In consequence, positivism lacks a comprehensive theory of legal obligation.

I argue that the failure to provide a comprehensive theory of obligation is a significant shortcoming. Given the central role that the concept plays in ordinary legal discourse and practice, no conceptual theory can be successful without explaining legal obligation.

I. The Centrality of Legal Obligation to Legal Talk and Practice

The concept of obligation is ubiquitous in ordinary legal practice. Lawyers characteristically make claims about what someone is “obligated” to do. A lawyer for a plaintiff in a contract dispute will claim the defendant is obligated to perform some act, while the lawyer for the defendant argues that the defendant’s performance is excused by the plaintiff’s own breach of obligation. Likewise, a prosecutor will argue that the defendant breached some obligation or duty defined by the criminal law, while the defense will argue that the defendant did not breach such a duty or obligation.

Lawyers also use what I will call “strongly deontic” language (i.e., language that picks out obligations) to speak of what judges and juries ought to do. It is generally believed that some party to a legal dispute with a determinate correct answer (i.e., an easy case) has a “right” to win the dispute based on that answer.¹ A criminal defense attorney, for example, will commonly argue on appeal that her client was entitled to an acquittal as a matter of law and that the judge or jury violated some duty in electing to convict. Indeed, lawyers frequently state in their written and oral arguments in cases of all kinds that the judge/jury is obligated to decide an issue of law/fact in favor of their clients.

This understanding of the way in which law requires behavior is shared by judges. Judges frequently couch their decisions in terms of what some party was, or was not, obligated to do. In an ordinary negligence case, a judge might find that the defendant did, or did not, breach a duty of reasonable care owed to the plaintiff. For example, in *Henningsen v. Bloomfield Motors, Inc.*, the court held that “[i]n a society...where the automobile is a common and necessary adjunct of daily life, and where its use is so fraught with danger to the driver, passengers and the public, the manufacturer is under a special obligation in connection with the construction, promotion, and sale of his cars.”²

Judges characteristically regard themselves as obligated to render decisions that conform to the law. In *Riggs v. Palmer*, the dissent stated a common view about the conservative role of the court in interpreting statutes: where the language of a statute is clear, the court is obligated to render a decision according to the plain meanings of this language.

Further, the law itself is often stated using strongly deontic terminology; constitutions, statutes, and the common law all make use of such terms as “duties,” “obligations,” and “rights.” The First, Second, Fourth, Sixth, Seventh, Ninth, Twelfth, Fourteenth, Fifteenth, Nineteenth, Twentieth, Twenty-Fourth, and Twenty-Sixth Amendments to the U.S. Constitution contain the term “right” and implicitly define obligations on the part of the state or other entities. The common law of negligence is characteristically framed in terms of a “duty of reasonable care.” The law of contracts is concerned to define not only the conditions for producing an enforceable contract but also the duties to which such contracts give rise.

It would not be unreasonable to hypothesize that nearly every major area of first-order law that defines behavioral standards to which citizens are expected to conform is characteristically expressed using strongly deontic terms. There are, of course, large bodies of second-order law, such as administrative law, that purport not to create duties but rather to empower official agencies to perform certain acts. Still, nearly all first-order law that constrains the behavior of citizens uses deontic language that is generally appropriate only in speaking about “obligations” or “duties.”

Moreover, these patterns of usage are foundational in the sense that they ground essential substantive features of ordinary legal practice. It is not just that people do not ordinarily refer to norms that do not state behavioral requirements as a matter of linguistic convention; it is also that lawyers and court do not treat such norms as defining legal obligations regardless of their source. A law that *requires* nothing is simply, as a matter of common legal practice, not “actionable” and cannot support a claim for damages or punitive measures.

In this connection, it is helpful to note that the locution “A should (or ought to) do *p*” is ambiguous between two different ideas: (1) A is obligated to do *p*; and (2) it is good that A do *p*, but A is not obligatory under the relevant standards. If the terms “should” and “ought” are not being used to pick out some sort of obligation, then they will not support a cause of action; again, a law that *requires* nothing is simply not actionable.

Indeed, the meaning of (2) in the context of a legal argument is not clear. There are, of course, many contexts in which statements like (2) make perfect sense. It might be true, for example, that charity is morally good but not morally required. It might also be true that all purely prudential uses of “ought” assert statements like (2); one might plausibly think, after all, that there are no obligations that one owes to oneself. But the legal context is clearly not one of these contexts. The idea that some state of affairs is *legally* good but not required is very difficult to make sense of; the law does not typically have formal or informal mechanisms for praising or exhorting behaviors (the characteristic response to behaviors that are good but not required). At the very least, the notion of legal good presents a host of difficulties not presented by the more familiar notion of legal obligation.

Accordingly, it is reasonable to characterize the concept of obligation as central to ordinary legal practice. It is not just that the concept is characteristically used in a variety of ordinary legal practices that seem to be essential to law; it is also that it is hard to make sense of those practices without the concept of obligation. Ordinary linguistic usage and deeper assumptions grounding essential features of ordinary legal practice seem to converge on the idea that all and only valid legal norms that state some sort of (coherent) behavioral requirement give rise to legal obligations.

As these obligations purport to arise under the law, they should be thought of as *legal* in character—rather than moral. If talk of obligations is ubiquitous in legal practice, talk about *moral* obligations is not. Lawyers characteristically argue about constitutional, statutory, or common-law rights and obligations—obligations that are directly created by law; they do not characteristically argue about rights or obligations directly created by principles of morality. To the extent that morality enters into legal arguments, the issue will be whether the law does or should incorporate those moral considerations; that is to say, the argument will focus on showing either (1) that the law does (or does not), as a matter of law, make certain moral obligations *legally* obligatory or (2) that the judge should (or should not) make those moral obligations legally obligatory by deciding the case in a way that incorporates the relevant moral considerations into the law. Talk of a judge’s or party’s moral obligations that does not contain any reference to the official acts of judges or legislators is a last-ditch argument for a position that lacks a sound foundation in the law—one that is rarely successful.

This is not to suggest that moral obligation is irrelevant to law and legal obligation. It is probably true, for example, that legislators and other officials typically regard—and *ought* (as a moral matter) to regard—themselves as morally obligated to comply with their legal obligations. It is also probably true that

legislators and other officials typically attempt—and *ought* (as a moral matter) to attempt—to ensure that the legal obligations of citizens conform to certain moral obligations. From a moral point of view, it would be *prima facie* problematic to incarcerate a citizen for doing what she is morally obligated to do; at first glance, it would appear that some sort of special moral justification would be needed for a legal system to impose and enforce a legal obligation to do what is otherwise morally problematic. There is nothing above that suggests that recourse to moral considerations in judicial or legislative decision-making is conceptually barred and hence nothing that would require a denial of these altogether sensible claims.

It is rather to suggest that the two notions are conceptually distinct and that the notion that characteristically figures into statutes, case law, and legal argument is *legal*, as opposed to moral, obligation.³ Legal obligation is defined by the content of the law, while moral obligation is defined by the content of morality; even if there is some sort of necessary relationship between the two, they are two different concepts. And it should be clear from many of our own ordinary legal practices that the one that characteristically figures into legal practice is legal obligation.

II. Legal Obligation and Legal Requirements

A. A Conceptual Relation between Legal Obligation and Mandatory Legal Norms

The centrality of legal obligation to ordinary practice is neither mysterious nor surprising. Legal norms characteristically require or prohibit certain behaviors of subjects, and the notion of a legal requirement is conceptually related by ordinary linguistic practices to the notion of a legal obligation in the following way: the phrase “is legally obligated to do *a*” is *extensionally* equivalent to “is required to do *a* by a valid legal norm” such that these phrases can be substituted for the other in any sentence without change of truth value. Though such substitutions can result in subtle changes of meaning or intension, they are not significant enough to change the truth value.

This fact about our practices and conceptual usages, however, has an important consequence regarding the logical relationship of certain obligation-statements and norm-statements. It implies that the formula “*P* is legally obligated to do *a*” is logically equivalent to “*P* is required to do *a* by a valid legal norm” and hence that the following is presupposed or implied by ordinary practices regarding the terms “law” and “obligation”:

The Equivalence Thesis: It is a conceptual truth that *P* is legally obligated to do *a* in circumstance *C* if and only if there is some valid legal norm that, in circumstance *C*, requires *P* to do *a*.

The Equivalence Thesis asserts that, as a conceptual matter, mandatory legal norms (i.e., norms requiring some act or omission) create legal obligations. While a mandatory legal norm might not give rise to a moral (or real) obligation, it creates a legal obligation if, as ordinary usage and legal practice suggest, the Equivalence Thesis is true.

This seems to be the view that Hart takes. Hart rejects John Austin’s command theory of law because he thinks the materials Austin provides cannot explain the fact that the requirements of law create obligations. On Hart’s view, since a command backed by force, by itself, can oblige but not obligate compliance, Austin’s theory fails. But the inability of Austin’s account to explain obligation is a defect only insofar as the concept of law is part of a network of concepts that include logical interconnections with the concept of obligation. It is not a criticism of a conceptual theory of law that it cannot

explain some non-conceptual, purely contingent feature of law; conceptual theories must explain only those features of law that are conceptually required for something to count as an instance of “law.” That Hart rejected Austin’s conceptual account of law because it could not make sense of legal obligation shows that Hart believes it is a conceptual truth that at least certain kinds of law define obligations.

Indeed, Hart makes it a point to observe that Austin correctly assumes that it is a conceptual truth that (at least some) laws create legal obligations:

[T]he theory of law as coercive orders, notwithstanding its errors, started from the perfectly correct appreciation of the fact that where there is law, there human conduct is made in some sense non-optional or *obligatory*. In choosing this starting point the theory was well inspired, and in building up a new account of law in terms of the interplay of primary and secondary rules we too shall start from the same idea.⁴

On Hart’s view, then, it is a conceptual truth that at least some legal norms define legal obligations to comply with their requirements.

But while many commentators have attributed to Hart the idea that the rule of recognition necessarily defines some second-order legal obligations binding officials,⁵ few have noticed that Hart seems also to endorse the view that so-called primary legal norms requiring or prohibiting certain behaviors of citizens, as a conceptual matter, define first-order legal obligations binding citizens:

It is true that the idea of a rule is by no means a simple one: we have already seen...the need, if we are to do justice to the complexity of a legal system, to discriminate between two different though related types. Under rules of the one type, which may well be considered the basic or primary type, human beings are required to do or abstain from certain actions, whether they wish to or not. Rules of the other type... provide that human beings may by doing or saying certain things introduce new rules of the primary type, extinguish or modify old ones, or in various ways determine their incidence or control their operations. *Rules of the first type impose duties*; rules of the second type confer powers, public or private (*CL* 80-81).

Hart, then, appears to believe that every conceptually possible legal system contains two sets of rules that define legal obligation: (1) the set of recognition norms that constrain the behavior of officials (as opposed to empowering them); and (2) the set of primary legal norms requiring citizens to behave in certain ways. Either way, it seems clear that Hart believes that legal rules making behaviors or omissions mandatory create legal obligations.

Conversely, where there is no valid legal norm of any kind *requiring* behavior *B*, there is no legal obligation to *B* because not-*B* is legally permissible. This is true not only of a situation where the law is agnostic with respect to *B* in the sense that no valid legal norm says anything about the performance or non-performance of *B*, but also of a situation where the law encourages the performance (or non-performance) of *B* but does not, in any theoretically significant sense, make the performance (or non-performance) of *B* mandatory. For example, the enactment of a statement that the government encourages citizens to be charitable might fairly be characterized as a “law” if enacted by the proper procedures and recorded in a book of statutes (though I have doubts about even this much), but it does not give rise to anything fairly characterized as a legal obligation.

B. An Adequacy Constraint on Theorizing about the Concept of Legal Obligation

The central role of the concept of legal obligation in ordinary legal practice suggests an adequacy constraint on conceptual theories of law—regardless of whether the Equivalence Thesis is true. While conceptual theories of law are most conspicuously concerned with giving an analysis of the concept of law, they must also be concerned to provide an account of all concepts that figure prominently into legal practice.⁶ As there are few concepts more central to law than that of legal obligation, the proponent of a conceptual theory of law is obliged to provide an analysis of the concept of legal obligation.

There are two general directions that such an analysis can take. Either it will validate our intuitive understanding of legal practice by explaining the sense in which legal norms create legal obligations, or it will vitiate that understanding by explaining why our standard practices and conceptions presuppose a mistaken view of legal obligation.⁷ It should be clear that no conceptual theory of law can be wholly successful without doing one of these two things; one way or another, our linguistic and legal practices involving the notion of legal obligation must be dealt with.

C. Denying the Equivalence Thesis

It is, of course, open to the positivist simply to deny the Equivalence Thesis and take the position that our pre-theoretical understanding is mistaken. Jules Coleman believes that the positivist need not explain how mandatory legal norms obligate because it is not a conceptual truth that mandatory legal norms obligate; contrary to our pre-theoretical understanding and practices, sometimes a law stating behavioral requirements creates a legal obligation and sometimes it does not. On Coleman's view, the most that can be said of the conceptual relationship between mandatory legal norms and legal obligation is this: it is a conceptual truth that law *purports* to create legal obligations.

As Coleman acknowledges, this does not relieve the positivist of the burden of saying something about legal obligation, but it does change the nature of the task significantly. Instead of having to explain how it is that any particular class of laws creates a legal obligation in virtue of its, so to speak, essential features (i.e., the features that constitute a norm as law according to our conceptual practices), the positivist need only, as Coleman puts it, "make intelligible" law's claim to obligate citizens by showing that it is *possible* for law to obligate citizens.⁸

This, of course, makes the theorizing about legal obligation considerably easier for a positivist. All that positivism needs to say by way of legal obligation is to show that, on the assumption that positivism is correct, there is one conceptually possible legal system in which some valid legal norms create obligations that are distinctively legal in character. And this requires no more than showing a positivist account of law it is not logically inconsistent with the possibility that some mandatory legal norms give rise to, or create, legal obligations (i.e., that the central claims of positivism do not contradict the claim that it is possible that some laws create obligations that are legal in character).

The fact that Coleman's view alleviates the theoretical burden might very well be a point in its favor, but it is a non-standard view about legal obligation inconsistent with practices that contribute to core understandings of *our* legal concepts.⁹ While there is clearly nothing in our ordinary conceptual and legal practices that entails that it is a conceptual truth that law gives rise to *moral* (or real) obligations, the claim that legal norms stating coherent behavioral requirements necessarily

define legal obligations is entrenched in both ordinary linguistic and legal practice. It seems clear, for example, that Nazis were morally obligated to disobey the many reprehensible Nazi laws that, according to ordinary views, created *legal* obligations. Indeed, it is precisely this tension between the two competing obligations that explains why the Nuremberg trials raised such important debates within the philosophy of law and political philosophy.

This is a problem because any conceptual analysis of law must minimally respect the core conventions that define the conditions for properly using the word "law" in ordinary talk and legal practice. Since positivists ultimately ground law in social practices and conventions, there are limits on the extent to which they can coherently claim that our central practices and pre-theoretical understandings of these practices are mistaken; these practices and understandings, after all, help to determine the content of *our* legal concepts.

In consequence, these ordinary practices and understandings have a special epistemic status in theorizing about legal concepts: one should reject them only if there is some very good reason for doing so. As far as I can see, there are only two adequate reasons for rejecting some core convention regarding the use of a concept as central to legal practice as that of the concept of obligation: (1) the convention is self-contradictory or logically incoherent; and (2) the convention is logically inconsistent with core conventions regarding the use of some concept that is more central to legal practice.

There is little, if any, reason to think that the Equivalence Thesis is either logically incoherent or inconsistent with more central conceptual assumptions regarding law and legal practice. Again, while it is undoubtedly false (though not incoherent) that legal norms stating coherent behavioral requirements, as a conceptual matter, necessarily create *moral* (or "real") obligations, the claim that such norms, as a conceptual matter, create or define *legal* obligations, if not obviously true, is surely self-consistent and coheres with other legal concepts and practices.

Indeed, Coleman's view that all legal theory has to do is to make intelligible the possibility of legal obligation concedes the overall *coherence*—though not the truth—of the Equivalence Thesis. Insofar as one can tell a coherent story about how mandatory legal norms might give rise to legal obligation, the idea that they do give rise to legal obligation coheres with the core assumptions informing ordinary use of legal concepts. That is, if there is a conceptually possible legal system in which some valid legal norms define legal obligations, then the idea that valid legal norms define legal obligations, whatever else its defects might be, cannot be inconsistent with core conventions regarding the use of legal concepts.

It is true, as we will see in Section III, that the only serious attempts on the part of positivists to provide an analysis of legal obligation that coheres with the Equivalence Thesis have well-known flaws. But the temptation to reject the Equivalence Thesis because positivists have failed to reconcile it with a comprehensive account of legal obligation should be resisted until we have better reason to think that there is no way for a positivist to explain legal obligation consistent with the Equivalence Thesis. In the absence of some stronger reason than the failure of positivism to produce such a theory, Coleman's denial of the Equivalence Thesis lacks plausible motivation and support.

III. Hart and Austin on Legal Obligation

Despite the centrality of the concept of legal obligation to legal practice, positivists have focused on one particular species of legal obligation: the obligations that persons have as officials

of the legal system. Instead of working out a general theory of obligation that would provide a framework for understanding the legal obligations of citizens, officials, and the state, positivists have focused on the more narrow issue of whether a social rule of recognition can create legal obligations that bind officials. Positivists have had little to say about the sense in which laws obligate *citizens* since Hart rejected Austin's view that legal obligation could be explained entirely in terms of coercive commands. In consequence, positivism lacks a comprehensive theory of legal obligation—a particularly significant shortcoming given the central role that the concept plays in ordinary legal discourse and practice.

John Austin explains legal obligation in terms of coercive sanctions imposed by a sovereign. Austin argues that the distinguishing feature of a legal system is the presence of a sovereign who is habitually obeyed by most people in the society but who is not in the habit of obeying anyone else. On Austin's view, a rule *R* is legally valid in a society *S* if and only if (1) *R* is the command of the sovereign in *S*; and (2) *R* is backed up by the threat of a sanction. Thus, a subject *P* is legally obligated to do *a* if and only if there is a sovereign command, backed up by the threat of a sanction, that requires that *P* do *a*. For Austin, then, it is the sovereign's ability and willingness to enforce sanctions for noncompliance that constitutes the command as legally obligatory.¹⁰

Hart rejects Austin's command theory of law for a number of reasons, but the important one for our purposes is that Hart believes it cannot explain how law obligates. Hart argues that a coercive command, by itself, can never create an obligation or a duty:

A orders B to hand over his money and threatens to shoot him if he does not comply. According to the theory of coercive orders this situation illustrates the notion of obligation or duty in general. Legal obligation is to be found in this situation writ large.... The plausibility of the claim that the gunman situation displays the meaning of obligation lies in the fact that it is certainly one in which we would say that B, if he obeyed, was "obliged" to hand over the money. It is, however, equally certain that we should misdescribe the situation if we said, on these facts, that B "had an obligation" or a "duty" to hand over the money. So from the start it is clear that we need something else for an understanding of the idea of obligation (*CL* 82).

The subject of such a demand can, according to Hart, plausibly be characterized as "obliged" (presumably by self-interest) to comply but not as "obligated" to do so.

On Hart's view, the gunman example not only shows that Austin lacks an adequate account of legal obligation but also that Austin's theory fails to explain the existence conditions for law. If, as Hart reasonably believes, (1) it is a conceptual truth that every legal system contains primary norms requiring people to perform or refrain from performing certain acts and (2) it is a conceptual truth that the primary legal norms of any legal system define legal obligations, then every conceptually possible legal system defines some legal obligations. But this means that, as a conceptual matter, any institutional system that fails to define the appropriate kind of obligation is not fairly characterized as a "legal system" or "system of law." Since the existence of legal obligation is therefore a necessary feature of a legal system, Austin's failure to explain legal obligation entails a failure to adequately explain the existence conditions for law.

Accordingly, on Hart's view, Austin's failure to explain legal obligation is symptomatic of a much deeper problem—namely, the foundational inadequacy of Austin's account of legal

validity: Austin's account simply lacks the resources needed to distinguish systems that count as "law" from those that do not. For this reason, Hart concludes that there must be more to the concept of law than that law is a coercive command of a sovereign habitually obeyed by the bulk of the relevant population. In the absence of a deeper conceptual connection between legal validity and legal obligation, Hart could not wholly reject, as he does, Austin's theory as flawed at its very foundation on the strength of its inadequacy as an account of legal obligation. That Hart rejects the Austinian account at its foundations shows that he believes that legal obligation is a conceptually necessary feature of law.

Hart goes on to reconstruct the theory of law at its very foundations, explaining the existence conditions for law—and hence for legal obligation—in terms of a social rule of recognition that governs officials in making, changing, and adjudicating law.¹¹ On Hart's view, the rule of recognition is defined by a convergence of behavior and attitude on the part of officials: officials converge in their behavior by satisfying the requirements of the rule and converge in their attitude by criticizing deviations from these requirements. It is, on this line of interpretation, these elements of official practice that bring the rule of recognition into existence and create standards that *obligate* officials.

While it is therefore the officials alone who bring a rule of recognition into existence, citizens also play a role in bringing legal obligation into existence. According to Hart's minimum conditions for the existence of a legal system, there is a legal system in *S* if and only if (1) there is a social rule of recognition *R* accepted by persons serving as officials in *S*; and (2) the behavior of citizens in *S* generally conforms to the rules valid under *R*. Accordingly, since, as a conceptual matter, the existence of a legal system entails the existence of laws and hence of legal obligations, it follows, on Hart's view, that the satisfaction by a society of the minimum conditions described above is sufficient for the existence of legal obligation in that society.

Unfortunately, Hart's account of obligation is vulnerable to his own criticism of Austin.¹² Hart rejects Austin's view on the ground that a sovereign's coercive threat can no more define an obligation than a gunman's; a coercive threat can *oblige* compliance but cannot, as a conceptual matter, *obligate* compliance. But the situation is no different if the gunman takes the internal point of view toward his authority to make such a threat. Indeed, even if the gunman believes that he is *morally entitled* to make the threat, the victim is obliged, but not obligated, to comply with the gunman's orders. The gunman's behavior is no more capable of creating an obligation simply because he takes the internal point of view toward his authority or believes he is entitled to make the threat.

The problem is that there seems to be no way for Hart to distinguish the officials of a minimal legal system (i.e., one in which the citizens do not accept the system) from a gunman who believes he is entitled to make such a threat.¹³ While the officials take the internal point of view toward the standards endowing them with the capacity to create law, citizens of the minimal legal system do not. Insofar as the primary legal norms are enforced by the state's police power, they are, on Hart's own analysis, every bit as plausibly characterized as commands backed by threats as the gunman's demand—and are, thus, problematic for exactly the same reason as the gunman's orders. A system of primary norms is no less coercive simply because the officials take the internal point of view toward their authority to make such demands.

IV. The Precarious State of Legal Positivism

The failure to provide an account of citizen obligation leaves legal positivism in a remarkable position. It is fair to say that, as a purely descriptive theory of law, legal positivism is currently the prevailing theory of law in Anglo-American analytic legal philosophy; indeed, even neo-classical natural law theorists like John Finnis accept legal positivism as being the correct account of the purely descriptive account of law.¹⁴ But, for all its apparent victories, positivism continues to lack a viable theory of legal obligation. While only positivists who believe officials are obligated by the rule of recognition must explain how it gives rise to *official* obligations, every positivist must explain how primary legal norms give rise to *citizen* obligations—and it is precisely this part of Hart’s theory that seems refuted by his own gunman argument.

The theoretical significance of positivism’s failure to produce a viable theory of legal obligation should not be underestimated. Assuming the Equivalence Thesis is true, the conceptual intimacy of the relationship of legal obligation to legality ensures that the success of positivism’s theory of legal validity depends on the success of its theory of legal obligation. If it is a conceptual truth that legal norms define legal obligations and positivism proves incapable of producing a viable story about legal obligations, then this ultimately casts doubt on positivism’s story about legal validity. If legal obligation cannot be explained in terms of the social facts that the positivist believes explain legal validity, then there must be more to the explanation of legal validity, given the conceptual relationship between the two notions, than those social facts. And this, of course, threatens the view that the law can be explained entirely in terms of social facts, which is the very core of positivism’s conceptual foundation. A comprehensive account of legal obligation is absolutely crucial to the continuing viability of legal positivism.

An earlier version of a longer paper of which this is a portion was presented at the University of Bristol School of Law; I am indebted to Julian Rivers, Patrick Capps, and Marc McGee for their comments and suggestions. I am also grateful to the following individuals for their very helpful comments on earlier drafts of this paper: Larry Alexander, Brian Bix, Brian Tamanaha, Stephen Layman, Patrick McDonald, and Phil Goggans.

Endnotes

1. Ronald Dworkin believes this is true of both easy and hard cases. See Ronald Dworkin, “Hard Cases.” In *Taking Rights Seriously* (Cambridge, MA: Harvard University Press, 1977).
2. 161 A.2d 69 (1960), at 85.
3. I have sometimes heard it said that bad laws do not create “real” obligations. If, as I suspect, “real obligations” means “obligations with morally normative force,” it seems to me that this is certainly correct. It does not, however, follow that such laws do not create obligations that are legal in character; it follows only that such legal obligations are not real and hence do not create obligations with morally normative force. Though I find talk of “real obligations” somewhat mysterious, this interpretation of it results in very sensible claims that a positivist need not deny.
4. H. L. A. Hart. *The Concept of Law*, Rev. ed. (Oxford: Oxford University Press, 1994), 82; emphasis added. Hereinafter *CL*.
5. Not every recognition norm defines a legal obligation on the part of officials, but some presumably will. The rules of adjudication will certainly include power-conferring norms that empower judges to decide cases but will also contain rules that purport to constrain their discretion to some extent; at the very least, disputes that arise under the law will have to be decided some of the time by reference to the law.
6. As Jules Coleman compellingly puts this important point: “To provide a conceptual analysis of a social institution [like

law] is to identify the central concepts that figure in it, and to explicate their content and their relationships with one another: we identify the criteria for the proper application of each key concept in the domain and, to the extent possible, show what these various criteria have in common.” Jules Coleman. *The Practice of Principle: In Defence of a Pragmatist Approach to Legal Theory* (Oxford: Oxford University Press, 2001), 13.

7. This, however, cannot be done by showing that some legally valid first-order norms do not give rise to moral or real obligations. There is nothing in our conceptual practices regarding the use of “legal obligation” that suggests that legal obligations are moral or real in character. Indeed, most people would freely admit that not all legal obligations give rise to such obligations.
8. See, e.g., Coleman 2001, 98.
9. Indeed, it is fair to characterize the denial of the Equivalence Thesis, to use John Mackie’s language, as an “Error Theory” for the positivist. Given the annotation stating, “The meaning of the term *duty*”: “Being liable to evil from you if I comply not with a wish which you signify, I am *bound* or *obliged* by your command, or I lie under a *duty* to obey it. If, in spite of that evil in prospect, I comply not with the wish which you signify, I am said to disobey your command, or to violate the duty which it imposes.” Austin, *The Province of Jurisprudence Determined* (Cambridge: Cambridge University Press, 1995), 22. Hereinafter *PJ*.
10. It is worth noting that Austin’s intent is to explain the concept of obligation. In *The Province of Jurisprudence Determined*, Austin writes, alongside an annotation stating, “The meaning of the term *duty*”: “Being liable to evil from you if I comply not with a wish which you signify, I am *bound* or *obliged* by your command, or I lie under a *duty* to obey it. If, in spite of that evil in prospect, I comply not with the wish which you signify, I am said to disobey your command, or to violate the duty which it imposes.” Austin, *The Province of Jurisprudence Determined* (Cambridge: Cambridge University Press, 1995), 22. Hereinafter *PJ*.
11. It is clear that one of Hart’s central objectives in *The Concept of Law* is to give an analysis of the concept of obligation, in general, and legal obligation, in particular, that will withstand his own objections to Austin. Consider, for example, the following statements from a long discussion about obligations: (1) “[I]t is crucial for the understanding of the *idea* of obligation to see that in individual cases the statement that a person has an obligation under some rule and the prediction that he is likely to suffer for disobedience may diverge”; (2) “It is clear that obligation is not to be found in the gunman situation, though the *simpler notion* of being obliged to something may well be *defined* in the elements present there”; (3) “To understand the *general idea of obligation* as a necessary preliminary to understanding it *in its legal form*, we must turn to a different social situation which, unlike the gunman situation, includes the existence of social rule; for this situation contributes *to the meaning* of the statement that a person has an obligation in two ways”; (4) “The statement that someone has or is under an obligation does indeed imply the existence of a rule”; and (5) “Rules are *conceived and spoken* as imposing obligations when the general demand for conformity is insistent and the social pressure brought to bear upon those who deviate or threaten to deviate is great” (*CL* 85-86; emphasis added). Hart is attempting, as he must, to give a full-blown analysis of the concept of obligation.
12. What follows is a variation on the so-called Payne Problem. Michael A. Payne, “Hart’s Concept of a Legal System,” *William and Mary Law Review*, 18 (1976): 287. See also Roger Shiner, *Norm and Nature: The Movements of Legal Thought* (Oxford: Clarendon Press, 1992), 160-61.
13. See Shiner, *Norm and Nature*, 160-61.
14. Finnis intends his natural law view (and believes that Aquinas and Blackstone intended their views) as an explanation of an evaluative sense of “law.”