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.

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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 phenomenon is an assertion that the existence and character of that phenomenon are independent of what anyone might think. Within a domain to which such a proclamation applies generally, 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 (i) the views of separate individuals and (ii) 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

²In 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.

³Of course, the shared views to which I refer will often not be merely shared. Frequently, 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
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 individuals who interact as a 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 which individuals share as a group are indeed so determinative. Let us designate as
"weak mind-independence" the type of objectivity on which these theorists insist when they
aspire 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 a 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 they are thought to be.

Before we turn to a second major division between types of mind-independence, a brief
clarificatory comment is advisable. When some phenomenon is weakly mind-independent, its
existence or nature is ordained by the beliefs and attitudes (and resultant patterns of conduct) that
are shared among the members of a group. However, the beliefs and attitudes need not be shared
among all the members of a group. In any large-scale association or community, very few beliefs
and convictions will be shared by absolutely everyone. What is typically present in a state of
weak mind-independence — a state that is equally well characterized as "weak mind-dependence" —
is not some chimerical situation of unanimity, but instead a situation of convergence among most
of a group's members. Consider, for example, the loosely knit group of competent users of the

of outlooks among the participants in a collaborative endeavor is not something on which I need
to dwell here.
English language in Canada. If most of those users regard the employment of "ain't" as improper in any formal speaking or writing (except when the term is deliberately wielded for comical effect), and if most of them accordingly eschew the employment of that slang term in formal contexts, then Canadian English includes a weakly mind-independent rule proscribing the employment of "ain't" in formal discourse. Probably, some competent users of the English language in Canada do not eschew "ain't" in formal contexts. Such a fact, if it is a fact, is perfectly compatible with the existence of the aforementioned rule. Indeed, the exact difference between the status of some entity $X$ as a weakly mind-independent phenomenon and the status of some entity $Y$ as a strongly mind-dependent phenomenon is that the existence or nature of $X$ (unlike the existence or nature of $Y$) is not ordained by the outlook of any particular individual. Instead, it is ordained by outlooks and conduct that prevail among most of the members of some group. Typically, convergence among a preponderance of a group's members — which falls short of convergence among all those members — will be sufficient to ground the existence or to establish the nature of some weakly mind-independent phenomenon. Note furthermore that, when there is very little convergence among a group's members on some particular issue, and when the lack of convergence precludes the existence of some weakly mind-independent entity $X$ (such as a linguistic norm that proscribes "ain't" in formal contexts), the weakly mind-independent character of $X$ is evidenced by the very inexistence of such an entity. Precisely because $X$ is weakly mind-independent rather than strongly mind-independent, the meagerness of the convergence among the outlooks of the group's members is something that matters to $X$'s existence.

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

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⁴For 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:
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 occurrence, 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 \(Y\).

**TYPES OF MIND-INDEPENDENCE**

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<th>Existential</th>
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<td>Weak</td>
<td>The occurrence or continued existence of something is not dependent on the mental activity of any particular individual.</td>
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Does Metaethics Rest on a Mistake?” in Brian Leiter (ed.), *Objectivity in Law and Morals* (Cambridge: Cambridge University Press, 2001), 144-93, 162.
When pondering the mind-independence of laws, 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 laws is our focus, some laws (most general legal norms) are weakly mind-independent while some other laws (most individualized directives) are not even weakly mind-independent. That most general legal norms are at least weakly mind-independent is quite evident. The existence of those norms does not stand or fall on the basis of each individual's mental activity; it is not the case that multitudinous different sets of general legal norms emerge and vanish as multitudinous different individuals undergo birth and death, 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, the existence of any general legal norm differs in not being radically subjective. (There can be exceptions in rather unusual circumstances. In a monarchical regime, the officials might adhere to a practice whereby some general laws go out of existence whenever the reigning king's mental activity permanently ceases. Such an arrangement would be peculiar, but it would plainly be possible. Still, in a legal system that is to endure beyond a single person's lifetime, the incidence of any such strongly mind-dependent general laws would have to be highly circumscribed.)

When we move away from general laws and concentrate on individualized directives, we seldom find any existential mind-independence. Typically if not always, an 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 individualized 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 almost always 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 requirements 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. The existential mind-independence of general legal norms is only weak.
In what manner 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."\(^5\) Actually, 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 always 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 share certain attitudes and beliefs in 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 share 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.

In fact, Marmor's elision of the first-order/second-order distinction will land his analysis in incoherence when it is applied to many credible situations. Suppose that the courts in some jurisdiction declare that their previous interpretation of a particular law was incorrect. They now maintain that that law should have been understood and applied (and will henceforth be understood and applied) in some alternative way. If the members of the judiciary are collectively infallible at the current juncture when they pronounce on this matter of legal interpretation, then we have to conclude that they were fallible at the earlier juncture when they espoused the now-disowned reading of the particular law. Conversely, if they were collectively infallible at that earlier juncture, then they are currently mistaken when they deem themselves to have been in error. However Marmor might try to analyze such a situation, he will be led to the conclusion that legal officials have collectively erred about a matter of legal interpretation. His insistence on the officials' collective infallibility will have undermined itself.

The observational mind-independence of legal norms is therefore strong rather than weak. Nevertheless, Marmor is not flatly incorrect. If the legal officials in a jurisdiction do
collectively err in their understanding of the substance 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 differences might lie solely in a few narrow implications of the norm(s) _ but there will indeed be some differences, brought about by the legal officials' mistaken construal of the substance 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 thesis 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 thesis 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 which 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 tenet about relative levels of confidence is pertinent. That tenet 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 actualities of the law are defused through the recurrent reshaping of the actualities 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 existential 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 by the officials within certain 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. 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 existential 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. (Of course, the natural-law theorists would not contend that the status of those moral principles as laws of some particular jurisdiction is strongly mind-independent existentially. No legal system can endure if the minds of all the people within it have permanently ceased to function; hence, the natural-law theorists would accept that moral principles qua laws of some particular jurisdiction are only weakly mind-independent existentially. However, they would ascribe strong existential mind-independence rather than weak existential

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 H. 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 existential mind-independence of legal norms. Dworkin clearly accepts that law is only weakly mind-independent existentially. What would need to be modified is simply my suggestion that law's weak existential mind-independence consists in its conventionality. A follower of Dworkin would insist that the weak existential mind-independence consists instead in law's nature as a product of overlapping medleys of moral convictions harbored by officials and citizens.
mind-independence _ to those principles qua laws tout court. Even in the absence of any minds and consequently even in the absence of any legal systems, those principles will abide as laws that would belong to every such system if there were any. So, at least, the natural-law theorists believe.)

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 which sustain the existence and fix the contents of legal norms, and the second-order beliefs and attitudes concerning the substance and implications of 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 legal positivism against the onslaughts of Ronald Dworkin. Dworkin has contended that the standards for ascertaining the law in any particular jurisdiction cannot be conventional _ because legal officials such as judges disagree over those standards, 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, Dworkin fails to distinguish between disagreements over the contents of various law-ascertaining standards and disagreements over their applications. That is, Dworkin fails to distinguish between disagreements over the intensions of those standards and disagreements over their extensions. Though some juridical disputes are undoubtedly of the former type, many others are of the latter type.

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7Coleman has elaborated the content/application distinction 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).
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 touchstones 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 which 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.