

THE OBJECTIVITY OF MORALITY, RULES, AND LAW: A CONCEPTUAL MAP

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I am honored to have been invited to present a Meador Lecture on this year's Meador Lecture Series topic of objectivity. Because this is a law school, and because this lecture is appearing in the *Alabama Law Review*, I shall assume that the relevant form of objectivity for this lecture is that of objectivity in law. There are, of course, many other domains in which questions about objectivity arise. The only other domain the objectivity of which I shall discuss, however, is that of morality. And I shall discuss it only briefly and only insofar as it bears on legal objectivity.

Here is how I shall proceed. I will approach legal objectivity by asking what must be true for a proposition expressing a legal norm to be true. What things in the world are the "truthmakers" of legal propositions such as "the maximum speed limit in California is 70 miles per hour"? Once we know what those truthmakers are, we can then ask whether they are objective and in what sense. More specifically, I shall ask about the possible relationship between a norm's having the status of a legal norm and that norm's consistency with moral norms. I shall also ask, what are the truthmakers of different types of legal norms—rules and standards? And I shall ask as well, is there a third type of legal norm, the legal principle, and if so, what are its truthmakers?

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I. MORAL OBJECTIVITY AND THE LAW

On various views of what law is, the law must be consistent with morality. One common version of such views is that of the natural lawyer who, to put it crudely, believes that a sufficient deviation between what a putative legal norm requires and what is morally required undermines the putative legal norm's status as "law." A sufficiently unjust law is not really a law in that it lacks whatever normative force that law, properly conceived, is supposed to possess.

Although the natural lawyer deems consistency with morality to be a necessary condition for a norm to be law, the so-called inclusive legal positivist contends that consistency with morality *can* be a necessary condition for legal status, not that it must. So, for example, some inclusive legal positivists claim that the Constitution of the United States of America incorporates several moral norms and renders laws that violate those norms unconstitutional and thus not valid as laws.

On both the natural law and inclusive legal positivist accounts of law, then, the status of a norm as a legal norm will involve inquiring about its moral status. But can the latter inquiry be objective? That is, is morality itself objective?

This question, to be answered properly, would take me into waters that are far too deep for present purposes. There are a number of takes on moral objectivity in the vast and difficult metaethical literature. Perhaps the central questions are whether there are moral facts that are independent of our beliefs and attitudes and whether those facts are natural—scientifically respectable—or non-natural, perhaps like mathematical facts. Alternatively, one might claim that moral propositions express only our attitudes of a certain type about real or hypothetical acts or states of affairs, and that there are no *moral* facts to which those attitudes refer.

If we can call this expressivist or noncognitivist position nonobjective, then if that position is correct, on the natural law account, no legal proposition will be objective, and on the inclusive legal positivist account, some legal propositions may not be objective.

Even if morality is objective in a cognitivist, realist sense, there are problems that remain for the natural law and inclusive positivist accounts of law. One problem is that if morality is a mind-independent realm of reality, there is no guarantee that any view we have of its contents will be correct. We have no error-free way of ascertaining what objective morality demands of us. Therefore, any view of those demands will be fallible and most likely controversial.

What this means is that on the natural law view, we can never be sure what the law is. And if the law is supposed to provide guidance to citizens and officials, then if citizens and officials have moral disagreements, they

will have legal disagreements, and law's guidance function will break down. And the same problem will afflict the inclusive legal positivist view if all or some legal norms must be consistent with morality in order to be legally valid.

Nor can a supreme court or some other authority deemed to be supremely legally authoritative solve this problem. For no human institution can settle what morality requires. There is no guarantee that on the natural law or inclusive legal positivist view what the Supreme Court says is "the law" really is the law.

Thus, to the extent that consistency with objective morality is a necessary condition for valid law, morality will potentially undermine the validity of all posited legal norms that are subject to it, including those pronouncements of the Supreme Court or some other supreme legal authority that are supposed to settle questions of legal validity.

Elsewhere I concluded that the only relatively stable way that objective morality could be incorporated into law was if it were subordinated legally to decisionmakers' judgments as to its requirements.¹ In other words, if "equal protection" refers to a moral norm, and no law is valid if it is inconsistent with that norm, then once the highest authority decides what the meaning of equal protection is, its decision, even if wrong, must be deemed valid as law. That in turn means that at least some parts of the law would not meet the "morality as necessary for legality" requirement—namely, decisions of the highest authorities regarding the content of the moral norms.² Suitably constrained, morality could show up in law in the form of standards. That is, morality could function interstitially—hemmed in by rules and subordinated to judicial interpretations of its content. Even then, because of epistemological uncertainty if not ontological lack of objectivity, the controversiality of morality's content would make standards incapable of serving law's settlement function unless and until legal decisionmakers rendered them more rule-like through judgments that crystallized the decisionmakers' fallible moral views into determinate, possibly morally incorrect, but nonetheless legally superior (to morality) directives.

1. Larry Alexander & Frederick Schauer, *Law's Limited Domain Confronts Morality's Universal Empire*, 48 WM. & MARY L. REV. 1579, 1592–96 (2007).

2. *Id.* at 1599–1601. Schauer and I suggested, as well, that some other rules in addition to high court decisions would probably have to fail the "morality as necessary for legality" test, namely, those rules establishing constitutional structures and procedures, including the rules establishing the courts and the judicial power to review for legal validity.

II. LEGAL RULES

I have discussed how moral principles might play a role in law. They may show up in standards that operate in the interstices among legal rules. Compliance with moral principles might also be a necessary condition for the validity of legal rules and decisions, though I argued that having moral principles play such a role is fraught with danger due to the controversiality of their content, especially if the high court's or other final legal decisionmakers' *views* of such content are subordinated to the moral principles themselves.

I now turn to legal rules and their objectivity. Legal rules are sets of instructions issued by lawmakers to rule subjects—citizens, judges, administrators, and so forth—regarding what should and should not be done in various circumstances. They are as easily conceptualized as the instructions we find accompanying various items we purchase—the toy for children made in China, the home phone and voicemail equipment, the videocam—or, as Gary Lawson once put it, the recipes we find in a cookbook.³

Now surely legal rules exist and are objective in that sense—the same sense in which it is true that my new phone and videocam came with instruction booklets or that *The Joy of Cooking* contains recipes. Any question about objectivity in connection with legal rules cannot be a question of whether they actually exist. It must be a question, rather, about whether their *meaning* is objective.

Now I believe that the meanings of videocam instructions, goulash recipes, and legal rules are objective in the sense that there are facts about the world that are independent of the minds of the interpreters that make particular meanings correct or incorrect. My view is that those facts are the meanings intended by the authors of the instructions and rules at the time they authored the instructions and rules.

Notice that I am here rejecting a textualist account of legal rules' objectivity. I do not believe textualism is coherent. That something is a text, much less the language (or idiolect) it is in, cannot be ascertained without assuming an author and what he wishes to communicate. I have argued for this elsewhere and at great length and shall not repeat myself. Moreover—another point I have made before at greater length—when I read the instructions for operating my videocam or for assembling the Christmas toy, I want to discover what the authors intended to mean by the words they used, words that they may have chosen inaptly for communicating that meaning. (Anyone who has assembled toys made in foreign countries will acknowledge that assuming standard English

3. Gary Lawson, *On Reading Recipes . . . and Constitutions*, 85 GEO. L. J. 1823 (1997).

meanings frequently leads to disaster.) I want to know what meaning they intended to convey to me, for which standard dictionary meanings and rules of grammar and punctuation will frequently be imperfect guides.

Along with textualism, I also reject the so-called “original public meaning” account of the meaning of legal rules. That account purports to shift the focus from the authors’ intended meaning to what some hypothetical member of the public at the time of promulgation would have believed the authors’ meaning was. Notice, however, that the hypothetical member of the public—and it is unclear just what attributes and evidence that hypothetical person is supposed to possess and why—is himself trying to ascertain the authors’ intended meaning, which he believes is the actual meaning of the legal rule.

My sense is that both textualists and original public meaning proponents are motivated by the problems of fair notice and collective meaning. The fair notice problem, however, is inapplicable to most legal rules, and even where applicable, it is a problem about the *authority* of the authors’ intended meaning or about the practical effects of implementing that meaning but not about the meaning itself. The collectivity problem is different; it is a real problem, but not one that either textualism or original public meaning can solve.

Are authorially intended meanings objective—in instructions, in recipes, and in legal rules? I believe the answer is clearly affirmative. When we receive a list from our spouse of items to get at the grocery store, we believe that he or she really did intend to convey some meanings and not others, that there are facts in the world that make it true that this meaning and not that was intended, and those facts are independent of our minds and even of his or her mind *now* (as opposed to the time of authoring).⁴ There may be cases where the author cannot say whether he intended meaning M_1 by uttering “ X ”; but in a range of cases, the author can say (correctly) that he *did* mean M_2 , he did *not* mean M_3 , and he did mean M_4 even though, upon reflection, it was a mistake to do so.⁵

4. What was in the author’s mind at the time of authoring thereafter is mind-independent and thus fully metaphysically objective. Cf. MATTHEW H. KRAMER, OBJECTIVITY AND THE RULE OF LAW 10–11 (2007) (giving a similar account of the objectivity of legal rules).

5. Kent Greenawalt provides a nice example to illustrate the various possible responses an author might give to the question, “Did you mean *that*?” The boss asks an employee to remove all the ashtrays in the office, as a major client is coming who detests smoking and smokers. The employee duly carries out the boss’s request, including ripping a couple of built-in ashtrays from the walls, leaving gaping, unsightly holes in them. The boss had forgotten that there were such built-in ashtrays; and when he sees what the employee has done, and considers whether the employee should be praised or reprimanded, there are several possibilities. He might say that the employee did carry out his instructions properly—that is, that he did mean remove all the ashtrays, including the built-in ones. Or he might say that, even though he now realizes that his intended meaning was a mistake. Or he might say that the employee did not follow his intended meaning, as it was clear that he did not mean rip out built-in ashtrays. Finally, he might say that he does not know what his intended meaning was with respect to built-in ashtrays.

Most of us most of the time believe that there are authorially intended meanings and that they are objective in the sense that (1) there are facts in the world that make them true and (2) that are independent of what we think they are and (3) independent of what the author thinks they are after authoring. And if we are doing grocery shopping with our spouse's list, and we know that when she puts down "cherries," she means cherry tomatoes, we had better not come home with Bings—just as we had better not be too literal in following the mangled English in assembling the made-in-China Christmas toy.

There are two problems that bear on the objectivity of the meaning of legal rules on my account of that meaning. The first, alluded to above, is what to say about collectively authored legal rules, given that there is no collective "mind" and thus there are no intentions, authorial or otherwise, that the collective mind possesses. There are only the minds and authorial intentions of the individuals who comprise the collective, and these may conflict. Legislator 1 may vote for a rule consisting of symbols *X*, *Y*, and *Z* intending to convey meaning *A* rather than meaning *B*, and would not have voted for the rule if its meaning were *B*. Legislator 2 may have voted for it intending *B* rather than *A*, and would not have voted for it if its meaning were *A*. And Legislator 3 may have voted against the rule, and would have done so regardless of whether it meant *A* or *B*. If those three legislators make up the legislative body, then a rule has been passed by a majority that has two possible meanings, both of which have been rejected by a majority. Does it mean *A* or *B* or neither?

I believe the correct answer is that the rule has no meaning. It is a bunch of meaningless symbols. It is no more meaningful than a rule that a legislature constructs by having each legislator cut a word—any word—out of a magazine, having each word tossed into a tumbler, and then having the rule constructed by drawing words at random from the tumbler. If the word "cats" appears, it makes no sense, given the process, to ask whether it means all felines, only domestic tabbies, or perhaps jazz musicians. It has *no* meaning in the situation imagined.

The collectivity problem is a real one. We might have rules about assigning meaning to otherwise meaningless marks or sounds. But that meaning would not be one that the marks or sounds by themselves expressed. There is no mind to make those marks or sounds into *symbols* that convey a *meaning*.

In other words, where an application of what appears to be the intended meaning conflicts with the reasons motivating it, the intended meaning might have been (1) to establish a necessarily over-inclusive rule, so that some infelicitous applications were contemplated; (2) to establish a rule, which is now seen to be an infelicitous one given the unforeseen application; (3) to establish a rule that does not include the infelicitous application; or (4) to establish a rule that the author cannot say was or was not intended to include the infelicitous application.

Although there probably are meaningless pieces of legislation because there is no sufficiently shared authorially intended meaning that they can convey, I suspect they are less common than some might imagine. When they are encountered, it is true but misleading to say that their meaning is not objective—misleading, because they lack any meaning, objective or otherwise.

The more serious challenge to the objectivity of legal rules' meanings—their authorially intended meanings—has its source in Wittgenstein's puzzle about rule-following as that puzzle was elaborated by Kripke. If the meaning of a legal rule is its author's intended meaning, then the rule's meaning turns on something in the author's head—mental content. The author's mental content at the time of promulgating a rule is necessarily finite and quite limited. If he promulgates a rule “no vehicles in the park,” he may have a picture in his mind at the time of promulgation of a 2013 big, grey Ford SUV traveling near a field on which children are playing and others are picnicking.

Presumably, the intended meaning of the rule extends to an indefinite number and variety of other situations involving different makes and models of cars, as well as tanks, tractors, and riding lawn mowers. But if the picture in the author's head is inadequate to make it true that his intended meaning does or does not cover these applications that he did not picture and perhaps (for some applications) could not even imagine, what *does* make assertions regarding his intended meaning true? And does what makes such assertions regarding intended meaning true or false also make their truth or falsity objective?

The common example used to illustrate Wittgenstein's per Kripke problem—the Kripkenstein problem—comes from arithmetic. Take two numbers that you have never before added—say, 241 and 77. You may believe the rule you have been following dictates an answer of 318. But how can you be sure that the rule you were following was not one that dictates “until March 19, 2013, 318, and after that, 5”? After all, no matter how often you added numbers in the past, you could have been following the latter rule and not the rule that produces 318.

The articles produced attempting to solve the Kripkenstein problem have felled vast forests.⁶ This Article will not be one of them. All I wish to say here is I take authorially intended meaning to be real and objective, and that it extends, as it must, to examples never consciously contemplated by

6. See, e.g., authorities cited in LARRY ALEXANDER & EMILY SHERWIN, *THE RULE OF RULES: MORALITY, RULES, AND THE DILEMMAS OF LAW* 248 nn.57–61 (2001); see also ANANDI HATTIANGADI, *UGHTS AND THOUGHTS: RULE-FOLLOWING AND THE NORMATIVITY OF CONTENT* (2007); MARTIN KUSCH, *A SCEPTICAL GUIDE TO MEANING AND RULES: DEFENDING KRIPKE'S WITTGENSTEIN* (2006).

the author. I have no account of how the Kripkenstein problem can be overcome, but I am quite convinced that it can be.

I conclude then that legal rules mean what their authors intend them to mean, and that authorially intended meaning and thus the meaning of legal rules is objective in the sense of objective I am using.

III. LEGAL STANDARDS

I have now covered the objectivity of morality and the objectivity of one kind of legal norm, the legal rule. A second kind of legal norm is the legal standard. Here, I can be quite brief.

The legal standard is basically an invitation to those applying it to engage in interstitial first-order practical reasoning, that is, first-order practical reasoning within the boundaries and constraints set by legal rules. Essentially, a legal standard tells one to “do the right thing” within a domain defined by legal rules and taking into account all the legal rules that must be taken as fixed and that bear on what it is right to do within that domain.

Because, as I have said, what is the right thing to do will frequently be controversial even if morality is objective, legal standards cannot provide the settlement that legal rules can provide. Therefore, because I view law’s primary function to be that of settling what we are obligated to do, legal standards are really legal lacunae, apertures through which morality seeps in to guide us in the absence of legal guidance.

Legal standards can be of two types. One type basically tells us to do what is “reasonable,” “fair,” or “just” within a certain domain. “Drive safely,” “act as would the reasonable person,” and so on are legal standards of this type.

The other type of legal standard is one that tells the decisionmaker to take certain factors into account in applying the standard. If it does no more than this, then it is really just a standard of the first type, where first-order reasoning would take *every* relevant factor into account. But if the legal standard tells the decisionmaker to take *only* the named factors into account, then the decisionmaker is essentially told to use first-order practical reasoning but to assume all the factors other than the named ones are in equipoise. The named factors will then be the first-order practical reasoning tie-breakers.

IV. LEGAL PRINCIPLES

Ronald Dworkin made commonplace in jurisprudence the distinction between legal rules and legal principles.⁷ Legal rules have a canonical, algorithmic form and either apply or do not apply.⁸ They have no “weight.”⁹ (Or, as I would put it, their weight is infinite.)

Legal principles, in contrast, have no canonical, algorithmic form; they can be referred to by various verbal formulae but are not, as are rules, coextensive with any particular algorithmic formulation.¹⁰ And also unlike legal rules, legal principles are always applicable but never outcome-determinative just because they are applicable. They incline a decision toward a particular outcome but do not necessitate that outcome. That is, they have “weight.” When legal rules conflict, one of them must be inapplicable. When legal principles conflict, both are applicable, but one may be weightier than the other.

It is important to contrast *legal principles* on Dworkin’s account of them with legal *standards*, for many theorists confuse them. A standard, as I just explained, is a legal norm that requires recourse to moral considerations for its interpretation and application. A standard operates within the legal interstices not covered by rules. The standard “drive reasonably” directs one to consult moral norms only during the activity of driving, and probably then only in the gaps left open by specific rules of the road.

A legal principle, on the other hand, is, like morality itself, always potentially applicable, no matter the endeavor, and regardless of whether there are otherwise applicable legal rules. So, legal principles are quite different from standards.

If legal principles are neither rules nor standards, then how do they get into the law? What makes them “legal” principles?

My reply is that nothing accounts for their existence as legal norms because legal principles do not and cannot exist. Because most jurisprudents believe that legal principles do exist, I shall take some time here attempting to defend my heterodoxy on this matter.

How might legal principles be possible? I am going to identify two accounts of their possibility and proceed to cast doubt on each.

7. See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 22–28 (1977).

8. *Id.* at 24–25.

9. *Id.* at 25–27.

10. *Id.* at 28–31.

A. Legal Principles as Directly Posited

The most common account of how legal principles come about is that they come about in precisely the same way as legal rules and standards come about: they are enacted (posited) by lawmakers. Thus, it is quite common in legal arguments to see such claims as “the framers of the Fourteenth Amendment enacted an anti-caste principle,” or “the framers of the Bill of Rights enacted the free speech principle.”

To assess the possibility of legal principles being created through conscious enactment, keep in mind that legal principles are different from legal rules in not having a canonical formulation and in having the dimension of weight. That said, there are two conceivable ways that legal principles might be directly posited: they could be already existing moral principles that are intentionally incorporated into law by some lawmaking act; or they could be norms that have no extralegal existence but are intentionally created by some lawmaking act.

So one possibility is that when lawmakers enact legal principles, what they are really doing is referring to specific moral principles and incorporating them into the law. I have mentioned the risks of doing so unless the moral principles are to operate only in the interstices between legal rules and are subordinated to final decisions regarding their meaning and application. For real moral principles, not being repealable or limited by human will, threaten to run roughshod over legal rules and decisions unless thus domesticated and cabined.

Nonetheless, referring to and incorporating real moral principles is a real possibility, risky or not. Of course, there actually has to be a principle in the moral domain that is the principle that the lawmakers are attempting to incorporate into the law. For suppose in the moral domain that there is no “free speech principle” or “anti-caste principle.”¹¹ Then when lawmakers enact such principles, they cannot be referring to and incorporating actual moral principles. The principles they are referring to do not exist in the moral domain.¹²

11. See, e.g., LARRY ALEXANDER, *IS THERE A RIGHT OF FREEDOM OF EXPRESSION?* (2005).

12. In a recent paper, Tara Smith argues that when lawmakers refer to “concepts” in their enactments, the meaning those concepts possess is not the list of things the lawmakers had in mind, nor is it the criteria the lawmakers were employing in constructing that list. Rather, the meaning of such concepts is the things in the world the concepts themselves pick out. So when the lawmakers use terms like “cruel,” “speech,” or “equal protection” in the laws they enact, correct interpretation requires looking not at what the lawmakers meant by those terms but at what sorts of things in the world are really cruel, speech, or equal protection. See Tara Smith, *Why Originalism Won't Die—Common Mistakes in Competing Theories of Judicial Interpretation*, 2 *DUKE J. CONST. L. & PUB. POL'Y* 159, 189–92 (2007). I don't want to get into the deep waters of what concepts are and what the relationship is between words and concepts, between criteria and concepts, or among natural, artefactual, and fictional kinds as they relate to concepts. (Is there an “objective” concept of, say, a unicorn or a “table” that possibly differs from users' criteria?) I want to restrict my comments here to the kinds of concepts

If incorporation of actual moral principles is not what the enactment of legal principles represents, can legal principles be created through their enactment? The answer is “no.” For there is no way to “create” by an act of human will a real principle, namely, a norm without canonical form that possesses weight.

To see this, put yourself in the position of the lawmaker who wishes to create, say, a free speech principle. How can he accomplish this (again, keeping in mind that there is no such moral principle for him to refer to and incorporate by reference)? He could, of course, write out a set of instructions for how to apply the “principle,” but in that case he will merely have reduced it to a rule with canonical form that is either applicable or inapplicable but without weight. And I see no way that lawmakers can create weight, except by issuing instructions for how the principle applies in every conceivable case—which is not only impossible, but if possible would just be the enactment of a weightless rule, albeit an infinitely lengthy and complex one.

that Smith uses as her examples. For one might be tempted to believe that *these* are what legal principles are: that is, legal principles are the normative concepts referred to in legal enactments.

Now I have conceded that real moral principles can be referred to in legal enactments and thereby be incorporated into the law, though I have also alluded to the risks of doing so. I shall return to this possibility momentarily.

What I want to consider first is whether there are moral concepts that can exist apart from being part of morality as it actually is. For example, suppose, as I have argued elsewhere—see *supra* note 11—there really is no defensible principle of freedom of expression. Is there nonetheless an objective “concept” of freedom of expression to which a user of those terms could be referring? Or suppose the normative idea of equality is “empty.” See, e.g., Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982). Is there nonetheless an objective “concept” of “equal protection”?

Of course, even if there are no objective moral concepts other than those picked out by correct moral theory, we can refer to incorrect moral *theories*. I may not believe utilitarianism is correct as a moral theory, but I can refer to it and apply it. What is important, however, is that I can do these things based on the criteria that I and others use to define utilitarianism. Apart from the criteria that define it, utilitarianism *as a false moral theory* has no other ontological status. There is no independently existing “concept” of utilitarianism sitting in some ontological warehouse waiting for someone to come along and refer to it.

So my view is that the one possibility that is open is that when lawmakers use a moralized term like freedom of speech or equal protection, they are either enacting a determinate rule that is fixed by the specific criteria they have in mind, or they are referring to and incorporating actual moral principles. Legal principles, in other words, could just be actual moral principles referred to by laws.

Now I have said referring to actual moral principles is a risky business. One reason, already mentioned, is that moral principles, unless cabined, can overrun all positive law, including those decisions meant to settle their controversial content. Another reason is that there is no relation between the number of moral principles our vocabularies reveal and the number of moral principles there actually are. We have all sorts of moral principles as a matter of vocabulary. Thus, we can refer to freedom of speech, cruel and unusual punishment, equal protection, and so on. But suppose utilitarianism is the correct moral theory. There are no such “joints” in utilitarianism. Seeking to enact only a limb, we may have enacted an entire beast.

In short, if there are objective referents for our moralized enactments, there is no reason to assume that morality has the joints our terms reflect, or, if it does, that morality deems it morally permissible that it be carved at such joints.

If I am correct, then direct enactment of legal principles is not an option. If lawmakers believe that they are enacting legal principles, they are mistaken. If, for example, there is no free speech principle in the moral domain available for incorporation in the legal domain, then enacting a free speech principle is an impossibility, and lawmakers who believe *that* is what they are doing must be doing something else.

B. Legal Principles as the Joint Product of Legal Rules (and Decisions) and Moral Principles—The Dworkinian Account.

If legal principles cannot be created directly by enactment, perhaps they can be created indirectly. Indeed, indirect creation is precisely the account given by Ronald Dworkin, whose description of legal principles I am employing. For Dworkin, legal principles are not enacted as such. Rather, they arise out of those legal rules and judicial decisions that *are* directly enacted.¹³

Legal principles—again, legal norms that lack canonical form and have the dimension of weight—are, for Dworkin, those principles and their weights that “fit” (would justify) a sufficient number of legal rules and decisions and that have a sufficient degree of moral acceptability. Put differently, legal principles are those principles that are the most morally acceptable of the principles that are at or above the requisite threshold of fit.¹⁴

On Dworkin’s account, legal principles may turn out to be less than morally ideal. That is, legal principles will not be moral principles.¹⁵ For legal principles, unlike moral principles, are constrained by the requirement that they fit the legal rules and decisions, at least to a certain degree. That is why Dworkinian legal principles are not just moral principles consulted by judges. (Dworkin’s argument for legal principles actually implies that legislatures and constitution drafters no less than judges should be bound by legal principles.)

Now over a decade ago, Ken Kress and I wrote an article attacking Dworkin’s account of legal principles.¹⁶ The article was long and complex, and I shall give only an abbreviated version of it here. The nub of the argument, however, was that (1) the moral acceptability axis would dictate whatever threshold of “fit” correct *moral* principles will satisfy and thus make legal principles identical to moral ones, and (2) Dworkinian

13. Dworkin, *supra* note 7, at 28–31.

14. *Id.* at 340–41.

15. *Id.* at 28–31.

16. Larry Alexander & Ken Kress, *Against Legal Principles*, in *LAW AND INTERPRETATION: ESSAYS IN LEGAL PHILOSOPHY* 279 (Andrei Marmor ed., 1995).

legal principles, if not identical to moral principles, would be quite unattractive norms by which to be governed.

With respect to the first point, suppose a jurisdiction has a number of legal rules and judicial decisions on the books that are morally infelicitous or even iniquitous. Moral principles would tell us to follow only those legal rules and decisions that were morally sound or to follow unsound legal rules and decisions only when doing so is warranted according to moral principles—in other words, follow moral principles.

It might be objected that if we ignored legal rules and decisions that were morally infelicitous, various bad things would happen. People who relied on infelicitous rules and decisions would have their expectations, on which they may have relied in costly ways, dashed. Coordination with others would become more difficult and costly. And so on.

But notice that if those costs are morally cognizable, which is plausible, then application of *correct moral principles will have taken those costs into account*. Put differently, if a morally incorrect legal rule or decision is enacted, that changes the facts in the world to which correct moral principles apply. So it may be morally correct to follow a legal rule that it would have morally better not to have enacted *ab initio*.

So the moral acceptability axis will always dictate a threshold of fit that is precisely what following correct moral principles would produce. And that means that *unless the threshold of fit is determined independently of moral acceptability, legal principles will turn out to be identical to moral principles*.

The alternative of the thresholds of fit being independent of moral acceptability is quite unattractive, however. Any threshold less than one hundred percent looks arbitrary. But more importantly, if the threshold is independent of moral acceptability, legal principles will be normatively unattractive. For on this account, legal principles will lack the determinacy virtue of legal rules and decisions—they will have all of the indeterminacy of moral principles (because they can be ascertained only by recourse to morality and will therefore be as controversial as morality)—and they will lack, as well, the moral correctness virtue of moral principles (because they must fit morally incorrect legal rules and decisions). They will be neither determinate and predictable nor morally correct. They will have nothing to recommend them as norms, and thus there will never be any reason to consult them.

If a norm is not a norm of morality, if it has not been consciously enacted, and if it is not determinate and cannot (like customary norms) coordinate behavior, then it has no normative virtues. And if a norm lacks normative virtues, then I would argue it does not exist as a norm. Indirectly enacted Dworkinian legal principles do not satisfy this existence condition. Therefore, because legal principles cannot be directly enacted, I conclude

there are no legal principles. And if there are no legal principles, then their objectivity is not an issue.

V. COLEMAN AND LEITER ON LEGAL OBJECTIVITY

Twenty years ago, Jules Coleman and Brian Leiter published an important article on legal determinacy and legal objectivity.¹⁷ Their discussion of legal determinacy dealt in passing with the Kripkenstein problem regarding the determinacy of the intended meanings of rules, the problem that I discussed earlier. They, like me, concluded that the Kripkenstein problem did not undermine the determinacy of intended meanings.¹⁸

In the second half of the article, Coleman and Leiter turned to the topic of legal objectivity. They distinguished between *semantic* objectivity (linguistic meaning is independent of speakers' beliefs) and *metaphysical* objectivity (what is the case about the world is independent of beliefs about what is the case).¹⁹ And it is their discussion of metaphysical legal objectivity on which I wish to focus here.

Coleman and Leiter distinguished between strong metaphysical objectivity, minimal metaphysical objectivity, and metaphysical subjectivity.²⁰ An example of the latter is "tastiness," for what is tasty depends on the subjective reactions of each individual taster.²¹ An example of minimal objectivity is "fashionable," for although no *individual's* sense of what is fashionable determines what is in fact fashionable, a *community's* sense of fashionable is the arbiter of fashion.²² There is no deeper metaphysical backing for "fashionable" than the community's sense of it.

Strong metaphysical objectivity is what we attribute to those things studied by the natural sciences and, as well, artifacts like chairs, cars, books, and the like.²³ These things and their attributes are independent of what we think about them.

Coleman and Leiter rejected the idea that law is metaphysically subjective or minimally objective.²⁴ Neither view can explain rational

17. Jules L. Coleman & Brian Leiter, *Determinacy, Objectivity, and Authority*, 142 U. PA. L. REV. 549 (1993).

18. *Id.* at 568–72.

19. *Id.* at 601–07.

20. *Id.* at 607–12.

21. *Id.* at 609.

22. *Id.* at 608–09.

23. *Id.* at 607, 622.

24. *Id.* at 616–20.

disagreement about the law.²⁵ On these views, where people are divided about what the law is, then there is no fact of the matter for them to be divided about, and the division of opinion thus looks irrational.

More significantly, Coleman and Leiter also rejected strong metaphysical objectivity.²⁶ Their principal concern with metaphysical objectivity was epistemic: how can lawyers, judges, and citizens achieve reliable knowledge of legal facts if legal facts are independent of what we think they are?²⁷ I shall return to this worry in a moment.

Coleman and Leiter, having rejected metaphysical subjectivism, minimal objectivity, and strong objectivity regarding law, opted for what they called “modest objectivity.”²⁸ What the law *is* is what the law would *seem to be* to someone operating under “ideal epistemic conditions,” much as a color is how it would appear to someone under certain lighting. Law is not strongly objective, and legal facts are not evidence-transcendent, which is why they are accessible, at least in principle.

If law were like color—an appearance—then it would lack any further metaphysical reality (unlike light waves). But were Coleman and Leiter correct in treating legal judgments as analogous to color judgments? When a judge says “the law on this is *X*,” he or she is not typically understood to be saying “the legal appearance of this is *X*.” Any talk about what the law appears to be is usually taken to be an elliptical way of stating “it appears to me that the law *is*—metaphysically objectively—*X*.”

That is why whereas ideal conditions for ascertaining colors are those conditions that affect appearances, epistemically ideal conditions for rendering legal judgments are usually understood to be those conditions ideal for ascertaining a strongly objective fact. When the ideally epistemically-situated judge determines “the law is *X*,” he or she is not taken to be saying “the [what appears to me to be the [what appears to me to be the [what appears to me to be the . . . *ad infinitum*.”] It is not a matter of appearances “all the way down.”

Note also that the problem of access haunts modest objectivity about law, despite Coleman and Leiter’s protestations to the contrary. For how can we construct the epistemically ideal situation in the absence of strong metaphysical objectivity? For color that is possible because what counts as “ideal conditions” is ultimately stipulative. Red just is how a certain frequency of light waves appears to someone of normal eyesight under certain lighting conditions. But those conditions are no less arbitrary than the length of a meter.

25. *Id.* at 619.

26. *Id.* at 612–16.

27. *Id.* at 613.

28. *Id.* at 620–25.

On the other hand, we generally assume that the ideal epistemic conditions for determining the law are responsive to what the law is and therefore are not matter of arbitrary stipulation. In other words, our notion of epistemically ideal conditions for legal determinations assumes strong metaphysical objectivity. And if strongly objective law faces a problem of accessibility, so too does the notion of epistemically ideal conditions for determining the law.

I believe, however, that there is no problem of accessibility associated with strong metaphysical objectivity about law—especially if law consists in part of ordinary posited legal rules and decisions. We know that legal rules exist and what they require us to do in exactly the same way we know that our spouse’s shopping list exists and requires us to buy bananas. And we know these things in the same way that we know about chairs, gold, and the closing Dow averages—all strongly objective matters.

Well, if legal rules and decisions are strongly objective, could all of us not then be mistaken regarding their content, in which case they could not function as guides of our conduct? And is it not the idea of law that is incapable of guiding conduct nonsensical?

Yes and no. Yes in the sense that law that everyone misconstrues will fail to perform law’s function of guiding conduct. But no in the sense that when judges misconstrue law, their (erroneous) decisions about law typically become “the law” in pursuance of other legal norms.²⁹ That is why, for example, Supreme Court interpretations of the Constitution, even if erroneous, bind all actors in the system just as if those interpretations were correct. (That is why I argued that making morality a necessary condition for legality is risky unless morality is trumped by the highest decisionmaker’s view of morality, correct or incorrect. For what morality requires will almost always be more controversial than identifying what the highest decisionmaker has decided morality requires.)

VI. CONCLUSION

This concludes my cartography of legal objectivity. Legal rules and decisions are strongly metaphysically objective. Their content is determined by the intended meanings of their authors, and those intended meanings are objective, the Kripkenstein problem notwithstanding.

To the extent morality is incorporated into the law in legal standards, the objectivity of that part of the law is hostage to the objectivity of morality, a matter on which I voice no opinion. The same holds true if morality is a necessary condition for legal validity, though concern with morality’s and thus law’s objectivity is abated to a large extent if “morality

29. See KRAMER, *supra* note 4, at 11.

as necessary for legality” is legally subordinated to the highest authority’s view of morality (and perhaps to other constitutional rules in the legal system, such as those identifying the highest authority).

Finally, the objectivity of law is not dependent on the objectivity of legal principles. Legal principles do not exist because they cannot exist.