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Brian Leiter, "Objectivity and the Problems of Jurisprudence (reviewing Kent Greenawalt, Law and Objectivity (1992))," 72 Texas Law Review 187 (1993).

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Book Review

Objectivity and the Problems of Jurisprudence

LAW AND OBJECTIVITY. By Kent Greenawalt.[†] New York: Oxford University Press, 1992. Pp. x; 288. \$45.00.[‡]

Reviewed by Brian Leiter^{*}

I. Introduction

Problems about objectivity have been central to philosophy from antiquity to the present. In fact, perhaps no other issue is so distinctive of philosophical inquiry.¹ In their various guises, problems about the objectivity of the world and our knowledge of it constitute much of the subject matter of traditional and contemporary metaphysics and epistemology.² Even writers—like the various deconstructionists and postmodernists³—who seem to eschew philosophy as traditionally conceived are in fact simply taking certain substantive positions on the objectivity of the world, texts, and knowledge.⁴

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[‡] Hereinafter cited by page number only.

^{*} Assistant Professor of Law, University of San Diego School of Law. A.B. 1984, Princeton University; J.D. 1987, Ph.D. candidate, University of Michigan. For helpful comments or discussion, I thank Larry Alexander, Jack Balkin, Jules Coleman, Dennis Patterson, Peter Railton, and Sheila Sokolowski. I would like to express my deep gratitude to two of these individuals, in particular, for their extraordinary support and encouragement: Patterson, whose skillful advocacy and guidance in August, 1992 set me on “the path of the law” professor; and Coleman, whose tireless efforts, good will, and confidence ensured that I met with success on that path. I should also like to acknowledge my debt, intellectual and personal, to Maurice Leiter.

1. See, e.g., CRISPIN WRIGHT, *REALISM, MEANING AND TRUTH* 1 (1987) (“If anything is distinctive of philosophical enquiry, it is the attempt to understand the relation between human thought and the world.”).

2. For a small sampling, see generally PLATO, *THEAETETUS* (Francis M. Cornford trans., 1935); IMMANUEL KANT, *CRITIQUE OF PURE REASON* (Norman K. Smith trans., 1929); CLARENCE I. LEWIS, *MIND AND THE WORLD-ORDER* (1929); WILFRID SELLARS, *SCIENCE, PERCEPTION AND REALITY* (1963); RICHARD RORTY, *PHILOSOPHY AND THE MIRROR OF NATURE* (1979); CRISPIN WRIGHT, *TRUTH AND OBJECTIVITY* (1992).

3. For examples of deconstructionist and postmodernist thought in the legal literature, see Jack M. Balkin, *What Is a Postmodern Constitutionalism?*, 90 MICH. L. REV. 1966, 1971-76 (1992), and Pierre Schlag, *Missing Pieces: A Cognitive Approach to Law*, 67 TEX. L. REV. 1195, 1217-20 (1989).

4. As shall become clear below, these positions are not so much *postmodern* as *pre-Platonic*. (I should hasten to add that this relabeling is not meant to constitute any objection to these positions.)

In jurisprudence, too, issues of objectivity have been important. Such topics as the determinacy of legal rules and interpretation, the existence of right answers in hard cases, and the extent to which facts about race and gender determine legal understanding all pose questions about the objectivity of law and adjudication. Yet, to date, the philosophical issues relating to objectivity in jurisprudence have rarely been carefully, or even very explicitly, formulated.⁵ Work in jurisprudence has been influenced

Writers like Balkin and Schlag seem keen to deny this affinity with the tradition, though they are not very clear about why. Balkin seems to want to associate postmodernism, properly enough, with what I would call "the Heidegger thesis." This is the idea that all propositional knowledge is parasitic upon various sorts of practical competence in the world, and that those sorts of competence are not themselves articulable in cognitive terms (*e.g.*, as tacit propositional knowledge). *Cf.* Balkin, *supra* note 3, at 1975-76. Thus, for example, we know that "cutting the lawn" is different from "cutting the cake" or from "cutting your hair" because we know how to cut lawns, cut cakes, and cut hair. Hubert Dreyfus's influential interpretation of Heidegger provides the clearest explanation of this thesis. Compare HUBERT L. DREYFUS, *BEING-IN-THE-WORLD* (1991) (commenting on Heidegger's *Being and Time*) with MARTIN HEIDEGGER, *BEING AND TIME* 188-95 (John Macquarrie & Edward Robinson trans., 1962). Balkin does not explain, however, how the truth of the Heidegger thesis negates the sense of traditional philosophical questions about objectivity. Both Heidegger and Dreyfus believe (wrongly, I think) that it does undermine the sense of such questions; but nothing like their reasons can be found in Balkin. Schlag, by contrast, suggests that a commitment to, for example, truth and coherence simply constitutes a "rationalist" framework that is "incommensurable" with the framework of postmodernism. Schlag, *supra* note 3, at 1203, 1212-13. There is never any explanation, however, of why Schlagian postmodernism is really *incommensurable* with rationalism, rather than simply irrational.

Fortunately, a more accurate account of postmodernism is presented by Dennis Patterson. See Dennis Patterson, *Postmodernism/Feminism/Law*, 77 CORNELL L. REV. 254, 262-79 (1992). Patterson makes clear the pre-Platonic character of postmodernism when he addresses the modernist worry that postmodernism, by attacking objective truth and epistemological foundationalism, yields "abject relativism." Patterson characterizes the postmodernist reply this way: "The fact that we cannot demonstrate how language 'cuts reality at the joints' does not mean that we cannot come up with better or worse ways of carrying on our practices." *Id.* at 276 (citation omitted). This substitution of questions about "better and worse" for modernist worries about "true and false" is precisely the course recommended in antiquity by Protagoras against Socrates, see PLATO, *supra* note 2, at *167a-*167c, and it also characterized Sophistic thought generally. W.K.C. GUTHRIE, *THE SOPHISTS* 169-72 (1971); see also F.C.S. SCHILLER, *PLATO OR PROTAGORAS?* 15-18 (1908) (setting forth the Protagorean view that superior beliefs are "better" but not "truer"); *cf.* MYLES BURNYEAT, *THE THEAETETUS OF PLATO* 23-27 (1990) (considering whether Protagoras is actually reshaping the notion of truth itself or merely appealing beyond truth to considerations of what is "better").

Whether characterized as postmodern or Protagorean, this position does not view objectivity as irrelevant. To the contrary, it explicitly denies the existence of objectivity but then attacks the idea that objective truth provides the only criterion for belief and action. Nietzsche also embraces this latter theme—the attack on truth as the only criterion of belief and action. He does not, as so many postmodernists assert, embrace the broader attack on truth, although he does reject a certain conception of the objectivity of truth. Compare the penetrating discussions in MAUDEMARIE CLARK, *NIETZSCHE ON TRUTH AND PHILOSOPHY* (1990), and Ken Gemes, *Nietzsche's Critique of Truth*, 52 PHIL. & PHENOM. RES. 47 (1992), with Brian Leiter, *Perspectivism in Nietzsche's Genealogy of Morals*, in *NIETZSCHE, GENEALOGY, MORALITY* (Richard Schacht ed., forthcoming 1994).

5. See, *e.g.*, Joseph W. Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1, 25-39 (1984) (rejecting the view that morality, legal rules, and political institutions can be judged and legitimated by objective standards).

primarily by developments in Anglo-American⁶ and Continental⁷ moral and political philosophy; work in metaphysics and epistemology has played only a minor, and generally superficial, role.⁸

Like much jurisprudential work, Kent Greenawalt's interesting new study, *Law and Objectivity*, approaches its topic not from the standpoint of metaphysics or epistemology, but from a rough, intuitive sense of what problems fall under the "broad rubric"⁹ of objectivity. Thus, for example, he devotes major sections of the book to discussing the determinacy of law and language¹⁰ and the existence of correct answers in hard cases.¹¹ In each case, Greenawalt's remarks add clarity and depth to our understanding of these issues. All students of these topics will want to read what he has to say. At the same time, it is something of a surprise that in a book titled *Law and Objectivity* there is nowhere to be found a systematic discussion of what exactly objectivity is, what problems of objectivity are about, or what general philosophical positions regarding objectivity are available to the jurist. Throughout the book, one feels the absence of the philosophical threads—metaphysical and epistemological—needed to weave Greenawalt's disparate discussions into a systematic work about law and objectivity.

I begin by identifying some of these missing philosophical threads in the hope that they will both illuminate aspects of Greenawalt's discussion and contribute to the discussion of objectivity in jurisprudence generally. After exploring some of the philosophical issues in Part II, I return to Greenawalt's text in Part III to see what light the philosophical treatment of objectivity can throw on problems of objectivity in law.

II. Philosophy and Objectivity

A. *Metaphysical and Epistemological Objectivity*

There are two distinct sets of philosophical problems about objectivity: metaphysical and epistemological. Questions about metaphysical objectivity concern the extent to which the existence and character of particular

6. See, e.g., JOHN RAWLS, *A THEORY OF JUSTICE* (1971); ROBERT NOZICK, *ANARCHY, STATE AND UTOPIA* (1974).

7. See, e.g., HEGEL'S PHILOSOPHY OF RIGHT (T.M. Knox trans., Oxford Univ. Press 1967); KARL MARX & FRIEDRICH ENGELS, *THE GERMAN IDEOLOGY* (R. Pascal ed. & trans., 1947); JÜRGEN HABERMAS, *LEGITIMATION CRISIS* (Thomas McCarthy trans., 1975).

8. But see Michael S. Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 277, 397 (1985) (drawing on recent Anglo-American work on metaphysical realism, the causal theory of reference, and coherentist epistemology to defend a modern version of natural law theory); ANDREI MARMOR, *INTERPRETATION AND LEGAL THEORY* (1992).

9. P. vii.

10. Pp. 11-89.

11. Pp. 207-31.

entities (such as physical objects, moral facts, semantic facts, right answers in hard cases, or unobservable theoretical entities) depend on the states of mind of persons (that is, on their beliefs, evidence, theories, dispositions, or responses). By contrast, questions about epistemological objectivity concern the extent to which persons can have epistemic or cognitive access to objective entities.

Thus, questions of metaphysical objectivity concern "what there is" and to what extent "what there is" is a function of what we take there to be. Questions of epistemological objectivity, by contrast, concern what we are capable of *knowing* about what there is. Notice, however, that for there to be any question about epistemological objectivity with respect to some class of entities (such as physical objects), the entities in question must be metaphysically "objective"—that is, their existence and character must *not* depend in some sense on the states of mind of persons. Problems about epistemological objectivity always concern how elements of our subjectivity¹² intercede between us and the "objective" items in the world. If there are no objective items in the world, there can be no worry about epistemological objectivity.

Problems of metaphysical and epistemological objectivity crop up frequently in jurisprudence, although they generally are not explicitly formulated as such.¹³ For example, questions about criteria for legal validity, the determinacy of law, and the existence of right answers in hard cases present issues of metaphysical objectivity. Similarly, worries about the influence of gender and race on knowledge (in and out of law), methods of justification in law, and the capacity to ascertain determinate or right answers in legal disputes present issues of epistemological objectivity. In this Review, I concentrate on problems of metaphysical objectivity, because these are most central to one of Greenawalt's recurring concerns, the determinacy of law.

B. *Metaphysical Objectivity: The Philosophical Issues*

Recall that questions of metaphysical objectivity concern the extent to which the existence and character of particular entities depend on the states of mind of persons. The central notion in this characterization of meta-

12. Subjectivity encompasses feelings, theoretical preconceptions, ideological biases, and such psychosocial characteristics as class, race, and gender.

13. Indeed, positivists, natural lawyers, Critics, feminists, and postmodernists are distinguished in large part precisely by the stands they take on issues of metaphysical and epistemological objectivity. See generally Jules L. Coleman & Brian Leiter, *Determinacy, Objectivity and Authority*, 142 U. PA. L. REV. (forthcoming Dec. 1993). In that essay, we also broach explicitly the distinction between semantics and metaphysics. In this Review, I ignore semantics as a separate domain, though the discussion of metaphysical objectivity will have obvious applicability to questions about the objectivity of facts about meaning.

physical objectivity is clearly that of "dependence."¹⁴ The existence and character of some entity might *depend* on the states of mind of persons in three senses:

(1) *Causally*. States of mind may *cause* the entity to exist or to have a certain character. For example, the existence of a certain sort of shoe depends on a cobbler having certain beliefs and desires, specifically, a desire to make this kind of shoe and true beliefs about what needs to be done to make it.

(2) *Constitutionally*. States of mind may *constitute* the existence and character of the entity. For example, facts about my emotional state depend on facts about my state of mind.

(3) *Epistemically*. The existence and character of the entity may depend on what we *believe* or would be *justified* in believing about it. For example, according to some versions of scientific antirealism, facts about unobservable theoretical entities depend on what our best scientific theories say about those entities.¹⁵

For purposes of objectivity, it clearly is not causal dependence that is at issue: Shoes can be objective even though they depend causally on the states of mind of cobblers. In general, we are concerned with the degree of *constitutional* or *epistemic* dependence—that is, with whether certain facts are simply facts about our mind or are simply a function of what we believe, or have reason to believe, about them. Neither constitutional nor epistemic dependence, however, will suffice to characterize questions about metaphysical objectivity in all cases. For example, psychological facts can be "objective," in the sense of being *epistemically* independent of states of mind, even though they are *constitutionally* dependent on facts about states of mind. That is, facts about my psychology (that I am paranoid, for example) may not depend on what I or others are *justified* in believing about my psychological state.¹⁶ Indeed, in the majority of cases where we are

14. For two useful discussions of dependence, see Elliott Sober, *Realism and Independence*, 16 NOÛS 369 (1982), and Bruce W. Brower, *Dispositional Ethical Realism*, 103 ETHICS 221, 238-46 (1993). Cf. DAVID O. BRINK, MORAL REALISM AND THE FOUNDATIONS OF ETHICS 15-16 (1989) (noting that realists usually agree with "the metaphysical claims that there are facts of a certain kind which are independent of our evidence for them"); Crispin Wright, *Realism, Antirealism, Irrealism, Quasi-Realism*, 12 MIDWEST STUD. PHIL. 25, 27 (1988) (stating that in the realist view, the truth of a statement does not need a connection to the availability of any supporting grounds to be believed true).

15. See Brower, *supra* note 14, at 238-46.

16. This characterization of objectivity only works with the supposition that mental content is "narrow" rather than "wide"—that is, that the individuation of psychological states does not depend on matters external to the individual. See, e.g., JERRY A. FODOR, PSYCHOSEMANTICS 27-53 (1987) (defending narrow content); Tyler Burge, *Individuation and Causation in Psychology*, 70 PAC. PHIL. Q. 303 (1989) (critiquing Fodor); Tyler Burge, *Individualism and the Mental*, 4 MIDWEST STUD. PHIL. 73 (1979) (defending wide content). Defining mental content as "narrow" or "wide" is a technical difficulty for the characterization of objectivity, one that need not concern lawyers.

worried about objectivity, it is the degree of *epistemic* independence that is at issue.

A large philosophical debate might be had here about how best to characterize objectivity and the relevant notion of "independence,"¹⁷ but it is almost certainly not a debate that matters for lawyers. We can simply speak loosely and say that a metaphysical question about the objectivity of some thing or property (such as a chair or the morality or legality of an act) is typically a question about whether the existence and character of that thing or property depends, epistemically, on our beliefs about it or our evidence for it.

What sort of views, then, about questions of metaphysical objectivity are possible? We can distinguish four possible positions, important both historically and at present, that may even exhaust the field. One view rejects metaphysical objectivity outright, while the other three recognize varying degrees. We can characterize such views as follows: Take any judgment like "This contract is unenforceable for lack of consideration," "There is a table in front of me," or "Bell-bottoms are unfashionable." For any such judgment, we can ask about the relation between what "seems right"¹⁸ with respect to the truth of the judgment and what "is right." For example, we can conceive that while it might *seem right* that there is a table in front of me, it might not *be right* that there really is a table there—the table might have been an optical illusion. In the table case, what seems right can diverge from what is right.

Perhaps all philosophically important positions regarding objectivity can be characterized in terms of the relation they posit between what *seems* right and what *is* right, as follows:

- (1) According to "subjectivism," what seems right to the *judger* determines what is right.
- (2) According to "minimal objectivism," what seems right to the *community* determines what is right.
- (3) According to "modest objectivism," what seems right *under appropriate or ideal conditions* determines what is right.
- (4) According to "strong objectivism," what seems right *never* determines what is right.

At the extremes we have the two classic philosophical positions of antiquity, Protagoreanism (subjectivism)¹⁹ and Platonism (strong objectiv-

17. For a sampling, see *supra* note 14.

18. "Seems right" should be read broadly to encompass judgments, dispositions to respond in certain ways, and the like. So, too, "judgers" should be read as encompassing both the makers of judgments and those who have responses, perceptions, or wants.

19. PLATO, *supra* note 2, at *152a, *166a-168b. Note that subjectivism as defined in the text will render as necessarily subjective all incorrigible reports of subjective experience, thus endangering the objectivity of many psychological predicates—an unwelcome result! As with the discussion of

ism).²⁰ The Protagorean position denies the objectivity of the world and everything in it: Whatever each individual takes to be the case *is* the case, and thus the existence and character of any particular thing depends on whatever it is the individual believes about it.²¹ By contrast, the Platonist affirms the complete and absolute objectivity of the world and its contents: What really is the case about the world is never fixed by what persons believe or have evidence for believing.²² Mistake on a global scale, even under ideal epistemic conditions, is a possibility for the Platonist.

Between Platonism/strong objectivism and Protagoreanism/subjectivism are two other positions that capture recognizable notions of objectivity. According to minimal objectivism, whatever the community takes to be the case is the case. This position is a form of objectivism, in the sense that what is the case does not depend simply on what seems right to the individual. It is, however, a *minimal* conception of objectivity: At a minimum, talk about objectivity requires that subjectivism be false, that is, that we at least abstract away from dependence upon the single individual. The notion of objectivity that results is, admittedly, a very weak one, but it has its applications. For example, some interpretations of Wittgenstein's remarks on rule-following seem to suggest that the only objectivity that rules can have is minimal objectivity.²³

We abstract even further from elements of subjectivity when we say that an entity is modestly objective. According to modest objectivism, the existence and character of the entity is determined not by the beliefs (responses, dispositions, and so forth) of an individual or community, but by what "judgers" would believe under certain *idealized* conditions. Thus, everyone on the planet can be wrong in his or her beliefs about a modestly objective entity; the beliefs of everyone under ideal epistemic conditions, however, cannot be wrong.²⁴

"independence," it turns out that there is no fool-proof characterization of the relevant concepts that works in all domains. The typology will, I venture, prove fruitful in many domains, however, including the legal.

20. See PLATO, PHAEDO *74a-*75b (R. Hackforth trans., 1955); PLATO, SYMPOSIUM *211a-*211b (John A. Brentlinger ed. & Suzy Q. Groden trans., 1970); PLATO, THE REPUBLIC *475-*480, *508d-e (Paul Shorey trans., 1956). Properly speaking, strong objectivism is only one characteristic of Platonism, which also involves characteristic commitments about the nature of objective entities and the mechanisms by which we come to know of them. While strong objectivism has been a recurring view in philosophy, the full baggage of Plato's view has not.

21. See SCHILLER, *supra* note 4, at 17.

22. See, e.g., PLATO, SYMPOSIUM, *supra* note 20, at *211b.

23. See José L. Zalabardo, *Rules, Communities and Judgments*, CRÍTICA: REVISTA HISPANOAMERICANA DE FILOSOFÍA, Dec. 1989, at 33, 45; see also SAUL A. KRIPKE, WITTGENSTEIN ON RULES AND PRIVATE LANGUAGE (1982); CRISPIN WRIGHT, WITTGENSTEIN ON THE FOUNDATIONS OF MATHEMATICS (1980).

24. Modest objectivism has been appealing to many philosophers' discontent with Platonism. See, e.g., HILARY PUTNAM, REASON, TRUTH AND HISTORY 49-50 (1981).

To certain ways of thinking, Platonism is what objectivity demands, and anything short of it represents the absence of objectivity. In fact, all three positions short of strong objectivism honor, to varying degrees, the Protagorean doctrine that "[m]an is the measure of all things."²⁵ Thus, for the subjectivist (the *pure* Protagorean), each individual person is the measure of what there is; for the minimal objectivist, the community of persons determines what there is; and for the modest objectivist, persons under ideal epistemic conditions determine what there is.²⁶ At the same time, talk of "objectivity" is not misplaced in the two cases that fall short of strong objectivism, and it had best not be if the legions of critics of Platonism are right when they argue that its ideal of objectivity is unintelligible or unrealizable.²⁷

Indeed, different conceptions of objectivity seem intuitively appropriate in different domains. Thus, for example, most of us are inclined to regard the property of "tastiness" as completely subjective: If chocolate ice cream seems tasty to me then it actually *is* tasty. In the case of tastiness, what *seems* right determines what *is* right, and hence we typically speak of taste as subjective. We would think it strange to say that even though chocolate ice cream seems tasty, it really is not.

25. PLATO, *supra* note 2, at *152a. At different points in Plato's *Theaetetus*, the positions I am calling subjectivism and minimal objectivism both are attributed to Protagoras. See *id.* (discussing subjectivism); *id.* at *167c, *168b (discussing minimal objectivism). Similarly, Mark Johnston construes a type of modest objectivism as Protagorean. See Mark Johnston, *Objectivity Refigured: Pragmatism Without Verificationism*, in *REALITY, REPRESENTATION AND PROJECTION* (John Haldane & Crispin Wright eds., 1993).

26. The typology developed in this Review does not capture one recent conception of objectivity associated with British philosophers like John McDowell and David Wiggins. See, e.g., John McDowell, *Anti-Realism and the Epistemology of Understanding*, in *MEANING AND UNDERSTANDING 225* (Herman Parrett & Jacques Bouveresse eds., 1981); DAVID WIGGINS, *A Sensible Subjectivism? and Truth, and Truth as Predicated of Moral Judgments*, in *NEEDS, VALUES TRUTH* (1987); John McDowell, *Projection and Truth in Ethics*, The Lindley Lecture at The University of Kansas (Oct. 21, 1987). These writers view the necessary dependence of certain "anthropocentric" properties (e.g., evaluative and semantic properties) on human sensibilities and responses as no threat to their objectivity, as long as within the human practices in which we make judgments about these properties we can nurture a sufficiently rich practice of giving reasons for and against such judgments. See WIGGINS, *supra*, at 95. In a paper composed prior to (but published after) this Review, I characterized this type of view as, again, involving a certain type of "modest" objectivity. See Leiter, *supra* note 4. That characterization plainly does not work here on the proposed definition of modest objectivism. In any event, because I do not find this approach to objectivity very promising or clear, I ignore it in the discussion in the text. For a powerful critique of the McDowell-Wiggins view, see Stephen Darwall et al., *Toward Fin de siècle Ethics: Some Trends*, 101 *PHIL. REV.* 115, 152-65 (1992).

27. Thus, Susan Hurley writes:

Of all the possible objectivist positions available in the logical space left by the denial of subjectivism, Platonism is one of the least tempting. Hardly anyone holds it, there is little point in arguing against it, and there is not very much to say about it. Any subjectivists who take it to be their most serious opposition are wasting their time on a straw man, and underestimating the strength of their objectivist opposition.

S.L. HURLEY, *NATURAL REASONS: PERSONALITY AND POLITY* 14-15 (1989).

By contrast, judgments about fashionableness (such as, "Bell-bottoms are unfashionable") are naturally thought of as minimally objective: What seems fashionable *to the community* (or a majority of the community) determines what actually is fashionable.²⁸ Individuals can be wrong about what is fashionable ("He has no taste in clothes"), but communities cannot be. We have no conception of something being *really* fashionable even though no one at present thinks it is.

On the other hand, we tend to think of facts about color (such as, "This chair is red") as being modestly objective: What most people *under appropriate conditions* would judge to be red determines what is red. Thus, even the judgment of many observers will not be dispositive as to the color of an object if the observers are poorly situated—if, for example, they lack adequate light. But our concept of color seemingly does not allow us to say that even though observers under ideal viewing conditions would judge the chair to be red, it is really blue. The color of an object, then, is simply what ideally or appropriately situated observers would judge its color to be.²⁹

Finally, the commonsense position with respect to such ordinary physical objects as chairs and rocks is that they are strongly objective—their existence and character is not a function of what seems to us to be the case about them, even if our judgment is made under ideal conditions.³⁰ Strong objectivism is typically the conception of objectivity involved in the position known as "metaphysical realism," or simply "realism," though there is more to realism than its conception of objectivity.³¹

28. This is not to deny that a few individuals and corporate entities usually market particular conceptions of fashionableness to the community as a whole. But if the marketing fails—if the bulk of the community does not take up that year's fashion—then the marketed styles would not be fashionable.

29. A number of recent writers have also argued that *value* is modestly objective. See, e.g., Brower, *supra* note 14, at 235.

30. This position underlies perhaps the most common mistake in the legal literature, the confusion of questions about epistemological objectivity with questions of metaphysical objectivity. Compare Steven Winter, *Transcendental Nonsense, Metaphoric Reasoning, and the Cognitive Stakes for Law*, 137 U. PA. L. REV. 1105 (1989) (attempting to argue against the metaphysical objectivity of the world by appealing to the essential mediating role of metaphors in our knowledge of the world) with Brian Leiter, *Intellectual Voyeurism in Legal Scholarship*, 4 YALE J.L. & HUMAN. 79, 95 n.58 (1992) (finding "completely mysterious" Winter's view that the nature of human cognitive abilities has any relevance to the truth of a metaphysical doctrine).

In fact, strong metaphysical objectivity is perfectly compatible with the idea that our epistemic or cognitive processes might not be objective at all. Thus, what *is* right still would not depend at any level on what *seems* right, but because of the failure of complete epistemic objectivity, we would never *know* what is right. (This view is similar to Kant's position, though he thinks the failure of complete epistemological objectivity is still compatible with something worth calling knowledge and truth. See generally KANT, *supra* note 2.)

31. To be a realist about some domain is to hold (1) that judgments in that domain are cognitive—that is, are apt for evaluation in terms of truth and falsity; (2) that the truth-value of such judgments is a strongly objective matter—that is, what seems right with respect to the truth-value of

In each of the examples above, I have shown how we apply different conceptions of objectivity in different domains (such as taste, fashionableness, color, and physical objects). But much of the most important and often controversial philosophical work—including work in jurisprudence—has been directed at showing that our conception of the objectivity appropriate in some domain is wrong, unintelligible, or incapable of explaining our ability to use or understand the concepts in that domain. Thus, in the domain of meaning, Platonism (or strong objectivism) views the meaning of, for example, a rule as independent of everything we might believe about what the rule means. Wittgenstein argues that Platonism is false in this context because it cannot explain our actual competence with meanings or the role meaning plays in constraining our linguistic activity. The upshot, at least on some readings,³² is that meaning cannot be strongly objective, but only minimally objective.

In the legal domain, then, we need to ask first, whether we have an intuitive or preexisting conception of the objectivity of law, much as we do for our concepts of color and fashionableness, and second, whether our conception of the objectivity of law is tenable—that is, whether it is intelligible and explanatorily adequate.

III. Law and Objectivity

A. *Metaphysical Objectivity and the Determinacy of Law*

In Part I and much of Part III of *Law and Objectivity*, Greenawalt equates the objectivity of law with its determinacy, and its determinacy

the judgment never determines what actually is right; and (3) that at least some judgments in the domain are true. Thus, a realist about morality must hold that moral judgments are cognitive (rather than being, for example, merely expressive of feelings or attitudes), that the truth or falsity of a moral judgment is independent of our beliefs about its truth or falsity, and that at least some moral judgments are true. (The philosophical character called the “error theorist” denies the last part; he denies that any of the judgments, though both cognitive and objective, are true. The classic articulation of this view is J.L. MACKIE, *ETHICS: INVENTING RIGHT AND WRONG* (1977).)

Michael Moore, who has written about realism more than anyone else in jurisprudence, typically gives a misleading characterization of it as demanding not cognitivism (that judgments in the domain are *apt* for evaluation in terms of truth and falsity, even if not all of them have a truth-value), but bivalence (that all judgments in the domain have a determinate truth-value). See, e.g., Michael S. Moore, *Moral Reality Revisited*, 90 MICH. L. REV. 2424, 2437 (1992) (“[The bivalence thesis] holds that for any proposition *p* within some discourse, *p* is either true or false.”). Most major contemporary philosophical realists, however, do not accept bivalence as a criterion for realism. Outside of pure mathematics almost every domain contains vague predicates—predicates whose truth-value is undecidable; realism about any of these domains thus would be impossible if bivalence were necessary. See WRIGHT, *supra* note 1, at 4 (noting that pervasive vagueness limits the utility of bivalence in non-mathematical discourse). Moore complains that to reject bivalence supposes “peculiar views of reality—it comes with gaps.” Moore, *supra*, at 2437-38. But the rejection of bivalence supposes nothing of the kind. Reality may be gapless, but there is no reason to think that a gapless reality must answer to all our concepts for describing it. Indeed, the existence of vague predicates suggests precisely that reality cannot always answer to certain of our concepts.

32. See *supra* note 23 and accompanying text.

with the existence of correct answers to legal questions. Thus, for example, he writes, "If every legal question has a correct answer, the law is fully objective in the sense of having determinate answers."³³ This equation should be uncontroversial and it serves to highlight the central metaphysical question about the objectivity of the law. That is, when we ask whether the law is objective, we are asking whether there exist objectively correct answers—that is, answers that have some degree of independence from the states of mind of persons—to many or most legal questions. If the law is minimally objective, the correct answers are independent of the judgments of particular judges and lawyers, but are not independent of the judgment of the majority of the legal community. If the law is modestly objective, the correct answers are independent even of the opinion of the majority of the legal community, but are not independent of what judges and lawyers *under appropriate conditions* (those who are fully rational and informed, and sufficiently unhurried) would believe. Finally, if the law is strongly objective, the correct answers are independent of what even ideal lawyers and judges would believe to be the case. Though such answers might still be accessible to lawyers and judges, their correctness would not depend on what lawyers and judges believe.

The claim that law is objective thus involves two claims, one about the objectivity of correct answers and one about the objectivity or determinacy of law. For law to be objective it must be true both (1) that the correctness of answers is an objective matter (that is, correctness is sufficiently independent from the states of mind of persons); and (2) that most legal questions have objectively correct answers (that is, the law is largely determinate). If the correctness of answers were essentially subjective, the law could not be objective because the answers to legal disputes would lack any degree of independence. But even if the correctness of answers were an objective matter, the law still might not be objective if most legal questions lacked correct answers. When we claim that the law is "objective" (or determinate), we simply mean that all or most legal questions have objectively correct answers.

Part I of Greenawalt's book is devoted to showing that the resources of language are adequate for a high degree of determinacy in many, if not all, cases (both legal and nonlegal); Part III concentrates largely on the existence of correct answers that might derive from "sources," such as morality, that are broader than the language of the law itself.³⁴

33. P. 207.

34. Between these two clearly related discussions comes an altogether different section entitled "How the Law Treats People." Questions about determinacy and correct answers figure almost not at all in that section, and its placement contributes to the book's somewhat disjointed feel. In that section, Greenawalt discusses with characteristic care and patience such topics as reasonable-person standards, intent, and motivation in torts and criminal law; fairness in classification and related

Greenawalt concludes that the law is highly, but not completely, objective because most legal questions have objectively correct answers once the broader sources in Part III are considered.³⁵

But what sort of objectivity is at stake here? Greenawalt presents a multitude of formulations. Thus, in an early passage he writes,

The main criterion for judging the existence of a determinate answer is whether virtually any lawyer or other intelligent person familiar with the legal system would conclude, after careful study, that the law provides that answer. This standard well reflects the notion that the answer is there, not dependent on an individual's particular opinion.³⁶

In this conception, then, the law clearly is not strongly objective; it depends on what persons would judge to be the case. As the last sentence makes clear, however, this conception does involve the denial of subjectivism: Whether "the answer is there" is "not dependent on an individual's particular opinion."³⁷ This denial, however, is compatible with the weakest claim of objectivity: minimal objectivity. Greenawalt does say that only the judgments of "intelligent" persons who have engaged in "careful study" should be used in assessing the existence of a correct answer. This comment suggests that some idealization conditions are built into the particular "seems right" that determines what is right; it implies a conception of the law as modestly objective. Only what seems right to "intelligent" and "careful" lawyers determines what is right.

That Greenawalt is aiming for a conception of the law as modestly objective becomes clearer in other remarks. Thus, he rejects the position of minimal objectivity when he declares, "I am not asserting that somehow near unanimity *automatically* constitutes a determinate answer."³⁸ A bit later, Greenawalt explains that he is "counting as determinate only applications upon which virtually all *informed* people agree."³⁹ Thus, only informed, intelligent, and careful judgments determine the existence of right answers.

When Greenawalt finally provides an explicit statement of his view about the objectivity or determinacy of law, he introduces yet another

problems of public and private discrimination, including disparate impact; and the justification for the generality of legal rules and principles, including a defense of generality against recent feminist criticisms. Readers interested in these issues could simply skip Parts I and III. Those more interested in problems of objectivity and determinacy might omit Part II; indeed, doing so is helpful in understanding the thread of the argument on these issues.

35. Greenawalt also holds the unusual view that all moral and political questions have determinate answers, even though not all legal questions do. I return to this peculiarity of his view *infra* note 47.

36. Pp. 12-13.

37. *Id.*

38. P. 13.

39. P. 22 (emphasis added).

formulation: “[M]any legal questions have determinate answers that (1) would be arrived at by virtually all those with an understanding of the legal system, and (2) are unopposed by powerful arguments, consonant with the premises of the system, for contrary results.”⁴⁰ Thus, Greenawalt’s “standard” for determinacy is twofold.⁴¹ The first requirement is simply that the answer be minimally objective.⁴² The second, which is supposed “to meet the objection that wide agreement by itself, even among lawyers and judges, does not establish the determinacy of an answer,” is “that no powerful argument for a contrary result be consonant with the premises of the legal system.”⁴³ With this second requirement, Greenawalt starts to sound like a modest objectivist: Even large numbers of judges and lawyers could be wrong regarding the determinacy of a legal answer insofar as they failed to fully consider contrary arguments “consonant with the premises of the legal system.”⁴⁴ Reformulated as a positive doctrine about objectivity or determinacy, Greenawalt’s view might read as follows: The answer that seems right to lawyers and judges who have considered all arguments consonant with the premises of the legal system is right—that is, it is the objectively correct answer. Given the constraints of time, competence, and bias, it would be unsurprising if many lawyers and judges failed to canvass all the arguments consonant with the premises of the legal system; thus, it is possible, and perhaps likely, that what the community of lawyers and judges takes to be the case on some legal issue is *not* the case. The law, then, would be modestly objective.

When Greenawalt turns explicitly to consider the existence of correct legal answers in Part III, he clearly formulates the position I am calling modest objectivism.⁴⁵ Thus, he says that a correct answer is simply the answer “that would be indicated by the ‘best reasons’ and reached by an

40. P. 34.

41. P. 39.

42. Greenawalt’s first requirement resembles the minimal objectivism embraced by Judge Richard Neely, whom Greenawalt quotes:

[M]y test for whether there is a clear legal principle is whether if ten lawyers were put in a room, given a legal principle and a set of facts as to which that principle could be applied . . . to reach legal resolution of a dispute, nine out of ten would arrive at the same answer. I leave room for a tenth because in such a group one lawyer will inevitably be either stupid or eccentric.

P. 244 n.13 (quoting RICHARD NEELY, *HOW COURTS GOVERN AMERICA* 4 n.2 (1981)). Greenawalt’s adding a second requirement suggests that Greenawalt envisions a stronger type of objectivity for law than Neely. See P. 39.

43. P. 39.

44. *Id.*

45. In this discussion, as elsewhere, Greenawalt could have clarified the continuity between the first and third parts of the book—and the positions defended therein—had he more explicitly addressed the philosophical question of what sort of objectivity is at stake.

'ideal judge,' that is, a judge who can evaluate all the reasons, "even if able lawyers now disagree about the answer that judges should reach."⁴⁶

Thus, we should think of Greenawalt as having given us a picture of the law as modestly objective—that is, as capable of providing correct answers to many, but not all, legal questions. These answers are correct independent of what judges and lawyers may now believe and are thus compatible with a high degree of disagreement about what the law requires; they are not, however, independent of what judges and lawyers would acknowledge as correct under appropriate conditions—if, for example, they had evaluated all the "best reasons" on point and all the arguments consonant with the premises of the legal system.⁴⁷

46. P. 210. Greenawalt qualifies this position by saying that "'best reasons' are to be conceived in terms of understandings of which people are then capable and that the ideal judge is not superhuman, but the most competent human being imaginable." *Id.* Greenawalt introduces this restriction because of his view that "[s]tandards of legal correctness *must* be accessible to human beings; they cannot rest on some truth that is wholly undiscoverable by human beings." P. 208 (emphasis added). To say that correct answers *must* be accessible to human beings is to say that they cannot be strongly objective; as we have seen, strongly objective answers might not be accessible to human beings. Strangely, Greenawalt provides no argument for this restriction even though as I discuss in subpart III(B), it is not a restriction that all jurists accept. Greenawalt's position could, however, be construed as an analysis of our ordinary concept of the objectivity of correct answers; given such a reading, Greenawalt's argument that correct answers cannot be strongly objective is probably right.

47. I have not mentioned one peculiar complication of Greenawalt's view, his belief that all moral and political questions have correct answers. Greenawalt asserts:

[T]here are moral and political answers that are correct in the sense of better fitting with God's plan for human welfare. . . . Some people will be fortunate enough to reach a religious understanding that approaches truth more nearly than other understandings. Religious insight helps guide political and moral judgment and those with more nearly true religious insights will have an extra source to help them toward moral and political truth.

P. 181; *cf.* P. 222 ("[I]f truths about moral and political life that connect to religious truths are ones to which human beings have access, it makes sense to say that answers that actually conform with that truth are correct."). In Greenawalt's view, then, all moral and political questions have correct answers, and those answers appear to be strongly objective. That is, they are independent of what anyone, other than God, thinks is the proper answer.

Given this view, we might expect Greenawalt to argue that all legal questions have strongly objective correct answers. But here the perhaps surprising religiosity of Greenawalt's view is tempered by his constitutional liberalism:

Given principles of religious liberty and separation of church and state that guide us, a reason that rests on a theological truth that is not generally accepted should not count as a reason for what the existing law provides. In other words, if we ask whether there is a correct answer to a legal question based on a balance of reasons, we need to limit ourselves to arguments and reasons that do not rest directly on unshared theological claims.

P. 222. (Greenawalt would, however, allow judges to consider religious reasons in cases where the judge must resolve the issue in the absence of any "correct" legal answer. P. 273 n.31 (citing KENT GREENAWALT, *RELIGIOUS CONVICTIONS AND POLITICAL CHOICE* 239-41 (1988))).

This response, however, confuses metaphysical and epistemological questions. For Greenawalt, there are correct answers to all legal questions because there are correct answers to all moral questions—that is, the answers exist. But for the constitutional reasons Greenawalt gives, these correct legal answers are "unknowable" (or unjustifiable) by a lawyer acting *qua* lawyer. The law, for Greenawalt, is fully determinate in the metaphysical sense, but the constitutional doctrine of separation

B. *The Objectivity of Law*

Now that we have seen Greenawalt's account of the conception of objectivity he thinks appropriate to law, we should return to the two questions posed at the end of subpart II(B). Thus, we must ask, first, whether we have an intuitive or prereflective conception of the objectivity of law, much as we do for our concepts of color and fashionableness, and, second, whether our conception of the objectivity of law is tenable—that is, whether it is intelligible and explanatorily adequate. We can approach both questions by comparing Greenawalt's conception with the conceptions defended by three other thinkers who have influenced the jurisprudential literature: Ronald Dworkin, Michael Moore, and Stanley Fish.⁴⁸

Dworkin, like Greenawalt, embraces a conception of the law as modestly objective⁴⁹ though, unlike Greenawalt, Dworkin believes *all* legal questions have correct answers. Indeed, Greenawalt acknowledges the affinity: "I agree[] with Dworkin and others who urge that answers may be objectively correct in a significant sense even when reasonable lawyers disagree."⁵⁰ Dworkin's position, in other words, is that an answer to a legal

of church and state renders it epistemologically indeterminate. Cf. Ken Kress, *A Preface to Epistemological Indeterminacy*, 85 NW. U. L. REV. 134, 138-39 (1990) ("Metaphysical indeterminacy speaks to whether *there is* law; epistemic indeterminacy, to whether the law *can be known*.").

48. With the exception of Moore, these writers have not been very clear about the philosophical issues surrounding the objectivity status of their claims. Indeed, it is fair to say that on the topic of "objectivity," Dworkin has betrayed an uncharacteristic confusion about the philosophical issues. See, e.g., RONALD DWORIN, *LAW'S EMPIRE* 78-86 (1986) (criticizing external skeptical challenges to objectivity and asserting that internal skepticism provides the only meaningful challenge to objectivity). I address Dworkin's confusion in Brian Leiter, *Objectivity, Morality, and the Dworkinian Maneuver* (1993) (unpublished manuscript, on file with the *Texas Law Review*); for a criticism of Dworkin on related grounds, see Michael S. Moore, *Metaphysics, Epistemology and Legal Theory*, 60 S. CAL. L. REV. 453, 494-506 (1987) [hereinafter Moore, *Metaphysics*] and Michael S. Moore, *The Interpretive Turn in Modern Theory: A Turn for the Worse?*, 41 STAN. L. REV. 871, 953, 949-57 (1989) (characterizing Dworkin's external/internal and wholesale/retail point of view distinction, used to draw his antimetaphysical and anti-epistemological conclusions, as "false, . . . dangerous, and . . . irretrievably paradoxical").

49. For more on Dworkin in this regard, see generally Coleman & Leiter, *supra* note 13. Some writers have construed Dworkin as a "realist." See, e.g., Dennis Patterson, *Conscience and the Constitution*, 93 COLUM. L. REV. 270, 282 & n.44 (1993) (reviewing PHILIP BOBBITT, *CONSTITUTIONAL INTERPRETATION* (1991)). On this point, Patterson follows Geoffrey Sayre-McCord, *Introduction: The Many Moral Realisms*, in *ESSAYS ON MORAL REALISM* 1, 16 n.42 (Geoffrey Sayre-McCord ed., 1988). Sayre-McCord's introductory material is misleading on several scores, however, one of which is that its characterization of realism omits any requirement of objectivity. See *id.* at 5. Sayre-McCord describes realism as requiring only cognitivism and that some claims in the relevant domain be true. *Id.* Yet as the discussion in note 31, *supra*, demonstrated, some type of objectivity is an essential component of all existing realist positions in philosophy. (Even Putnam's misnamed "internal realism" demands modest objectivism. See PUTNAM, *supra* note 24, at 54.) Dworkin thus could be considered a realist only if modest objectivism is compatible with realism—as, for example, Putnam believed at one point. In any event, I try to eschew the "realism" and "anti-realism" labels precisely because of the debates attending their usage.

50. P. 234.

question is correct only if Hercules would judge it to be correct. In this formulation, Hercules is simply a judge who has various idealized capacities: full information (about prior decisions, for example), unlimited time, and unlimited powers of rational and philosophical reflection.⁵¹ The law, by this account, is not strongly objective: What is legally the case depends on what Hercules believes, and Hercules is best understood as a judge with idealized judicial abilities.⁵²

Michael Moore and Stanley Fish occupy the extremes on either side of the Greenawalt/Dworkin view: Moore embraces a conception of the law as strongly objective,⁵³ while Fish construes the law as minimally objective.⁵⁴ For Moore, as for Dworkin, the correctness conditions for any legal claim include the truth of some moral claim. Unlike Dworkin, however, Moore believes the truth-value of a moral claim is strongly objective: What seems right to us in moral matters never determines what is right.⁵⁵

Fish, by contrast, at one point occupied the other extreme—subjectivism. In his pure Protagorean phase, Fish could say things like: “The meaning of an utterance, I repeat, is its experience—all of it—and that experience is immediately compromised the moment *you* say something about it.”⁵⁶ Fish abandoned this brand of “subjective” Protagoreanism in favor of “communal” Protagoreanism: “[M]eanings are the property neither of fixed and stable texts [strong objectivism] nor of free and independent readers [subjectivism] but of interpretive communities that are

51. See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 105 (1977).

52. If Dworkin and Greenawalt differ, it is in their account of the relevant idealization conditions—that is, the appropriate conditions under which what “seems right” will determine what “is right.” Dworkin gives us, I would venture, a richer conception of the idealized capacities relevant to the determination of correctness. Dworkin’s account is, however, also more controversial, presupposing as it does the truth of his view that non-utilitarian moral considerations are among the correctness conditions for any legal claim. See *id.* at 98-100.

53. See generally Moore, *supra* note 31.

54. STANLEY FISH, *DOING WHAT COMES NATURALLY* 91-95 (1989).

55. See Moore, *supra* note 31, at 2460. Moore’s metaphysical view that morality is strongly objective should not be confused with his epistemological view that we gain knowledge of moral and other truths by maximizing coherence—for example, consistency and inferential connections—in our beliefs. Moore does not claim that coherence in our beliefs fixes what is the case. Rather, he argues that coherence gives us *access* to what is the case; what is the case is still fixed independently of what might seem right to us. *Id.* at 2460-62.

The marriage of metaphysical realism and epistemological coherentism is, however, an unhappy one. Certainly the most ambitious defense of this position in the philosophical literature—found in Part Two of LAURENCE BONJOUR, *THE STRUCTURE OF EMPIRICAL KNOWLEDGE* (1985)—has been widely, and rightly, adjudged a failure. See generally *THE CURRENT STATE OF THE COHERENCE THEORY* 105-204 (John W. Bender ed., 1989). Moore hardly makes any advance upon BonJour’s account, and thus his view is most charitably taken as an extreme but coherent metaphysics in need of a suitable epistemology. In this area, Moore might have followed the lead of the vast majority of contemporary realists, who are causal externalists in epistemology, although such an approach has its own problems. For further discussion, see generally Coleman & Leiter, *supra* note 13.

56. STANLEY FISH, *IS THERE A TEXT IN THIS CLASS?* 65 (1980) (emphasis added).

responsible both for the shape of a reader's activities and for the texts those activities produce."⁵⁷ Thus, Fish views meaning as minimally objective: What seems right to the community with respect to the meaning of a text actually is right. Similarly, with regard to the correctness of answers to legal questions, what seems right to the "interpretive community" determines what is right.⁵⁸

Before we consider which of these accounts best captures our intuitive commitments regarding the objectivity of law, we should note a perplexing similarity between Fish and Greenawalt. In Part I of his book, Greenawalt considers a variety of ordinary situations in which people issue such imperatives as "shut the door."⁵⁹ The examples are intended to illustrate the determinacy possible through the use of ordinary language, but both the legal and the non-legal examples instead illustrate the importance of context and shared social assumptions in determining the meaning of the language.⁶⁰ Thus, Greenawalt gives the example of an ordinance that says, "Persons walking dogs in public parks must have their dogs leashed."⁶¹ We then are asked to imagine a person named Olive whose dog Angus is unleashed in the park. "Olive might claim," says Greenawalt, "that she has had Angus leashed on other occasions, and that the ordinance does not specify *when* the dog must be leashed."⁶² But unless we "divorce the language from this particular social context," it is clear that "[n]o reasonable person could think that the leashing referred to is other than at the time the dog is walked."⁶³ Greenawalt puts the general moral this way: "The

57. *Id.* at 322.

58. See STANLEY FISH, *DOING WHAT COMES NATURALLY* 303-04 (1989) (explaining that "be it literary or legal," interpretive activity is invariably informed by the pre-existing disposition of the interpretive community).

59. P. 26.

60. As Greenawalt notes, he is presupposing the account of literal meaning presented in JOHN R. SEARLE, *EXPRESSION AND MEANING* 117-36 (1979). P. 239 n.13. For Searle's more recent treatment of the subject, see JOHN R. SEARLE, *THE REDISCOVERY OF THE MIND* 175-96 (1992). Searle argues that "[i]ntentional phenomena such as meanings, understandings, interpretations, beliefs, desires, and experiences only function within a set of Background capacities that are not themselves intentional," with the result that "all representation, whether in language, thought, or experience, only succeeds in representing given a set of nonrepresentational capacities." *Id.* at 175. Searle's notion of the "Background" is significantly similar to what I referred to earlier as "the Heidegger thesis." See *supra* note 4. For an explicit comparison of the two, see DREYFUS, *supra* note 4, at 347 n.8; see also PIERRE BOURDIEU, *THE LOGIC OF PRACTICE* 52-65 (Richard Nice trans., 1990).

Searle, Heidegger, and Bourdieu emphasize the nonintentional (Searle) or noncognitive (Heidegger, Bourdieu) character of the Background. SEARLE, *supra*, at 175; see BOURDIEU, *supra*, at 53; HEIDEGGER, *supra* note 4, at 188-95. Greenawalt, however, is less clear on this point; his "background," as the discussion in the text illustrates, often sounds like a background of assumptions or beliefs. A more rigorously and self-consciously Searlian/Heideggerian approach might have interesting consequences for legal theory. I hope to take this up elsewhere.

61. P. 42.

62. P. 43.

63. *Id.*

meaning, even the literal meaning, of . . . language depends on social understandings not only about what particular words mean but also about the point of using the words in context."⁶⁴ Similarly, he notes that his "claims about determinacy rest on the presence of shared assumptions about linguistic meaning and social practices."⁶⁵

The puzzle is how this view is different from Fish's. Fish, for example, writes about a contract (though it could just as easily be an ordinance such as Greenawalt's), concluding that

[t]he document is neither ambiguous nor unambiguous in and of itself. The document isn't *anything* in and of itself, but acquires a shape and a significance only within the assumed background circumstances of its possible use, and it is those circumstances—which cannot be *in* the document, but are the light in which "it" appears and becomes what "it," for a time at least, is—that determine whether or not it is ambiguous and determine too the kind of straightforwardness it is (again for a time) taken to possess.⁶⁶

It is hard to see how this position differs from Greenawalt's claim that "even the literal meaning[] of . . . language depends on social understandings."⁶⁷ For both Greenawalt and Fish, language considered by itself—"divorce[d] . . . from . . . social context,"⁶⁸ as Greenawalt puts it—lacks

64. *Id.* For a similar view, see Frederick Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399, 414-23 (1985). As Jeremy Waldron observes, this account of meaning may create more difficulties with respect to the objectivity of legal rules than it does with respect to the mundane cases Greenawalt considers. See Jeremy Waldron, *Assurances of Objectivity*, 5 YALE J.L. & HUMAN. 553, 559 (1993).

65. P. 48. Note that if Greenawalt's view is right, then the law cannot possibly be strongly objective. Insofar as the objectivity of law depends on the meaning of language, and insofar as the meaning of language depends on our assumptions, then what the law requires depends on *us* in a way that is incompatible with strong objectivism. Thus, contrary to Greenawalt's claim in a footnote, p. 247 n.29, he does not appear to be a realist about meaning at all. That is, he does not seem to hold that the meaning of a statement is given by its possibly evidence-transcendent truth conditions. To the contrary, by emphasizing the importance of "social understandings," Greenawalt suggests an anti-realist semantics, one in which the meaning of a statement is given by its assertibility conditions—that is, the conditions under which our shared social understandings and assumptions will permit us to assert the statement. The implications of anti-realist semantics are discussed below. See *infra* notes 69-72 and accompanying text.

66. FISH, *supra* note 54, at 301. Fish's view contains a number of philosophical oddities. For example, a document that "isn't *anything* in and of itself" sounds very much like what we would call in Kantian language a *noumenal* document—a document that exists, but whose identity is unknown to us. See KANT, *supra* note 2, at 471-72. Similarly, when Fish declares, "[T]he text, while always there, is always an interpreted object; and when the conditions of interpretation change, the text is not merely recharacterized but changed too," FISH, *supra* note 54, at 563 n.31, one wonders what exactly it is that is "always there" if not the noumenal text—that is, the characterless text-in-itself. But the question that legions of Kant's critics asked about the noumenal world seems equally appropriate here: Why posit this noumenal text, about which we know nothing?

67. P. 43.

68. *Id.*

meaning; its meaning always depends on social understandings, background assumptions, and circumstances of use.

There are two points worth noting about this perhaps surprising convergence of views. First, even if Fish is right, his position arguably has no bearing on the determinacy of law. The claim that the language of the law is determinate or objective need not be the claim that language is determinate in itself—that is, that language is strongly objective. Indeed, as should surely be evident by now, Fish is a perfect example of Hart's rule-skeptic, a "disappointed absolutist" whose "conception of what it is for a rule to exist" is "an unattainable ideal."⁶⁹ For example, Fish asserts that for rules to constrain the behavior of judges, the rules themselves "must be available or 'readable' independently of interpretation; that is, they must directly declare their own significance to any observer, no matter what his perspective."⁷⁰ This, however, is an extreme and unwarranted requirement; it presupposes that the meaning of a rule must be strongly objective if it is to be an objective meaning at all—that is, if it is to be a meaning that might constrain the individual judge. But why must objectivity demand this?⁷¹ Indeed, the most powerful recent philosophical arguments suggest that characterizations of meaning as strongly objective are inconsistent with our ability to learn it, display our knowledge of it, and have it constrain our linguistic practices.⁷²

69. H.L.A. HART, *THE CONCEPT OF LAW* 135 (1961).

70. FISH, *supra* note 54, at 121.

71. See HURLEY, *supra* note 27, at 14-15 (criticizing those who limit objectivity to the strong objectivist position).

72. See, e.g., WRIGHT, *supra* note 1, at 13-29. Readers of Michael Moore could, again, get a misleading impression on this score. See *supra* note 31 (discussing Moore's misleading characterization of the demands of realism). Rarely does his work provide any real indication of the extent to which realist semantics—in both its American and British versions—has been undermined by a series of powerful criticisms. See RORTY, *supra* note 2, at 284-95; ALAN SIDELLE, *NECESSITY, ESSENCE, AND INDIVIDUATION: A DEFENSE OF CONVENTIONALISM* (1989); WRIGHT, *supra* note 1; Thomas Blackburn, *The Elusiveness of Reference*, in 12 *MIDWEST STUDIES IN PHILOSOPHY* 179 (Peter A. French et al. eds., 1988); Gareth Evans, *The Causal Theory of Names*, in *NAMING, NECESSITY, AND NATURAL KINDS* 192 (Stephen P. Schwartz ed., 1977). Putting aside the other problems with Moore's program, see *supra* note 31, it seems a strong *desideratum* in the theory of adjudication not to make the theory depend on highly contentious philosophical theories.

Of course, the problem with Moore's strong objectivism is probably worse than this, for while the causal theory of reference is contentious as a general theory of meaning, it is clearly a bad theory when used, as it is by Moore, to underwrite realism. See, e.g., Moore, *supra* note 8; Moore, *supra* note 31. In order to underwrite semantic realism, the causal theory must establish that meaning is strongly objective; to do this it must provide a nonsemantic account of meaning. (That is, the theory must provide an account of the causal facts, in virtue of which some expression *X* "means" *Y*, that does not itself appeal to what we mean or intend.) But the causal theory cannot possibly discharge this obligation. It is impossible to distinguish proper from improper transmissions of reference down the historical/causal chain without smuggling in semantic notions—what the word really means, or what the transmitter intended to refer to. So, too, for any use of a word to be part of the relevant causal/historical chain, the speaker must *intend* to refer to the usages that comprise that chain; but intention is, again, a semantic notion.

Second, even if the socially dependent nature of meaning is compatible with the determinacy of law (as Greenawalt urges), there is still a striking inconsistency in his position. On the one hand, Greenawalt, like Fish, seems committed to the claim that meaning is minimally objective: What the language of an ordinance means depends on what the community takes it to mean. That is, its meaning is fixed by shared social understandings and assumptions. Yet, as discussed in subpart III(A),⁷³ Greenawalt seems to want to formulate a conception of the law as modestly objective—dependent not on what the community takes the answer to be, but only on what judges under ideal or appropriate conditions would take the answer to be. But if language is only minimally objective, then it seems that the correctness of answers to legal questions cannot be modestly objective; even where the truth of some legal proposition depends on the truth of some moral claim, the *language* of both law and morality will itself be only minimally objective. Minimal objectivity in semantics will trump Greenawalt's attempt to formulate a conception of modest objectivity about law. It seems, then, that Greenawalt's position is incoherent as it stands.

We can easily imagine a reformulated position, however, that would bring the semantics in line with the modestly objective conception of law. Thus, we should still ask the questions I posed earlier. First, do we have an intuitive or prereflective conception of the objectivity of law, much as we do for our concepts of color and fashionableness?

From the standpoint of this question, Greenawalt's generally abrupt and dismissive attitude towards strong objectivism seems warranted.⁷⁴ Lawyers and judges by and large do seem to draw the natural anti-realist conclusion that where there is deep and pervasive disagreement about a matter, such as the correct legal outcome in a given case, there is no *fact* of the matter. My armchair sociology—as an academic and a lawyer—tells me that the idea of answers that are correct independent of what all lawyers and judges believe is not part of existing legal consciousness.

Subjectivism is probably also not part of any lawyer's conception of the law. The law, then, is like neither tastiness (which is subjective) nor ordinary physical objects (which are strongly objective). It is a harder question, however, whether legal intuition comes down on the side of

In any event, whatever intuitive plausibility the causal theory enjoys for the sort of puzzle cases made famous by Keith Donnellan, *see, e.g.*, Keith S. Donnellan, *Reference and Definite Descriptions*, 75 PHIL. REV. 281 (1966), or for the exceptional case of natural kind terms, *see, e.g.*, HILARY PUTNAM, *The Meaning of "Meaning,"* in MIND, LANGUAGE AND REALITY 215 (1975), it is far from obvious that the theory is similarly plausible for moral predicates. But this is a very large topic—involving, as it would, a demonstration (once again!) of the falsity of moral realism—and it will have to await examination elsewhere.

73. *See supra* text accompanying notes 36-47.

74. *See supra* note 46.

minimal or modest objectivity. I am inclined to think it is the former,⁷⁵ although the real philosophical issues ultimately do not turn on this question. At this stage, it is probably best to conclude that although our view falls within the boundaries just described, we lack a clear conception of the objectivity of law similar to our conceptions of the objectivity of color or fashionableness. This still leaves open the second, and central, philosophical question: What conception of objectivity in law is really adequate to explain our practice? Greenawalt never really tackles that question head-on; much of his argument seems instead to analyze our existing conception of objectivity. I will therefore conclude with some remarks about how we might begin to think about this question, which is perhaps the central metaphysical question in jurisprudence.

IV. The Normativity Argument

One important type of philosophical question that can be asked in any domain is whether our intuitive or prereflective concepts of the domain are, in fact, adequate to explain the features of that domain. In this Part, I sketch a short argument—what I will call the “Normativity Argument”—to show why a conception of the law⁷⁶ as modestly or strongly objective could not adequately explain our existing legal practice.⁷⁷

It is central to our practices involving law that we think of the law as essentially normative: On any given point, the law constrains what must be done. We speak of the “requirements” of the law, of what the law “commands,” and of what the law “obligates” the judge to do. We talk as well of trying to conform behavior to the “demands” of the law. This should be familiar enough. The important philosophical point is this: No essentially normative concept, like law, can be modestly or strongly objective. Why not? The short answer, according to the Normativity Argument, is that it is impossible to give an account of how a modestly or strongly objective concept discharges its normative role.

If the law is strongly objective, then the actual law on some point is independent of what any lawyer or judge believes the law to be; in prin-

75. See *supra* note 42 (quoting Richard Neely's view of law as minimally objective).

76. Though I speak loosely of a “conception of the law,” this Part of the Review really concerns our conception of the objectivity of the correctness of answers to legal questions.

77. The broad outlines of the argument are derived from the philosopher Crispin Wright, who applies it in the context of arguing against realist semantics. See WRIGHT, *supra* note 1, at 24-26. The same style of argument appears also in Nietzsche's attack on Kant's metaphysics of morals; as Nietzsche asks regarding Kant's placement of the moral will in the noumenal realm, “[H]ow could something unknown obligate us?” FRIEDRICH W. NIETZSCHE, TWILIGHT OF THE IDOLS, in THE PORTABLE NIETZSCHE 463, 485 (Walter Kaufmann ed. & trans., 1954). The import of this question should become clear in the discussion that follows.

principle and perhaps in fact, the law is undetectable by lawyers and judges. But how could an undetectable yet correct legal answer constrain or command or obligate? If the correctness of a legal answer could transcend all existing views about the proper answer in the legal community, how could that answer be thought to discharge its normative role of regulating or guiding what lawyers and judges ought to do? How could judges or citizens conform their practice to it?⁷⁸

Things may not be much better if we think of the law as modestly objective. In this view, what the law is depends on what lawyers and judges *under ideal circumstances* would take it to be. Unless we have some additional reason for thinking lawyers and judges are now in these circumstances,⁷⁹ however, we confront the same specter: a legal answer that is correct yet undetectable by the existing legal community, and whose normative role is consequently rendered unrealizable.

The Normativity Argument, then, proceeds as follows: For any essentially normative concept, an adequate account of the concept must explain how the concept could discharge its normative role. Any account of a concept that makes its satisfaction (or applicability) potentially undetectable violates this constraint—as Nietzsche asks, “[H]ow could something unknown obligate us?”⁸⁰ If the law is strongly or modestly objective, then the correct legal answer in a particular case may transcend what every existing lawyer and judge believes it to be. Such an objective answer, however, could not play the normative role that law is supposed to play. Conversely, if the law is minimally objective, the correct answer is simply what the majority of the legal community takes it to be. Such an answer is accessible because it is fixed by the community. Moreover, we can aim to conform our practice to it, and in this sense objective law may constrain practice through the normative force exercisable by communities.

78. This problem is generated by a metaphysical conception of objectivity, and no epistemology can solve it. For no epistemological theory can guarantee access to answers that are strongly objective. Only an epistemically constrained metaphysic—that is, one that makes the character of things depend on how they seem to us—can do that. (Even then there is room for worry, as I discuss below.)

79. This possibility, of course, opens a window of opportunity for modest objectivity that is unavailable to strong objectivity. See generally Coleman & Leiter, *supra* note 13 (suggesting ways in which modest objectivism can withstand objections related to the Normativity Argument).

80. NIETZSCHE, *supra* note 77, at 485. Larry Alexander, in a written comment on a draft of this Review, has rightly remarked that this way of presenting the argument suggests a very wide scope for its conclusions, one that would encompass not just law but morality. But is it not part of our moral practice to allow for precisely the sort of moral mistake that minimal objectivity cannot acknowledge? In that case, does not an explanation of the concept of objectivity appropriate to our moral practices require a stronger conception of objectivity? I would answer both questions in the negative, but explaining my answer would take me far beyond the scope of this Review. I hope to return to this topic elsewhere.

V. Conclusion

Greenawalt contributes much by way of analyzing our *existing* concepts of the objectivity of language and of law, but he never really broaches the most important philosophical topic: namely, what concept of objectivity can actually explain our practice. The Normativity Argument presents one sort of pertinent consideration, but there are no doubt others.⁸¹ The clear, methodical, and quietly commonsensical approach that readers have come to expect from Kent Greenawalt is certainly evident in *Law and Objectivity*. It is my hope that the philosophical issues raised in this Review, in conjunction with Greenawalt's thoughtful and patient analysis, will form the basis for a more far-reaching philosophical consideration of the objectivity of law.

81. See, e.g., Coleman & Leiter, *supra* note 13 (raising doubts about minimal objectivism).