

ARTICLES

DETERMINACY, OBJECTIVITY, AND AUTHORITY

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BRIAN LETTER‡

Since the 1970s, analytic jurisprudence has been under attack from what has come to be known as the Critical Legal Studies (“CLS”) movement. CLS has been joined in this attack by proponents of Feminist Jurisprudence, and, most recently, by proponents of Critical Race Theory. When the battle lines are drawn in this way, the importance of the distinctions between the Natural Law and Positivist traditions are easily missed. Whatever distinguishes Hart from Dworkin, and both from Lon Fuller, matters very little from this point of view, as compared to what (theoretically at least) unites them, and that, according to its critics, is a commitment to the ideals of “legal liberalism.”

If Joseph Singer’s *The Player and the Cards: Nihilism and Legal Theory*¹ is representative of the CLS critique, liberalism is committed to the law being determinate, objective, and neutral. According to CLS, the problem with liberalism is that none of these ideals obtain in legal practice. Law is neither determinate, objective, nor neutral.²

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¹ Joseph W. Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1 (1984).

² Critical Race Theorists have been especially critical of law’s claim to objectivity. See, e.g., Derrick Bell & Preeta Bansal, *The Republican Revival and Racial Politics*, 97 YALE L.J. 1609, 1611 (1988) (noting that many scholars have identified the “objective” stance as distinctively white and male); John O. Calmore, *Critical Race Theory, Archie Shepp, and Fire Music: Securing and Authentic Intellectual Life in a Multicultural World*, 65 S. CAL. L. REV. 2129, 2162 n.107 (1992) (“[C]ritical race theory unmasks certain themes that dominate mainstream legal discourse, such as formal equality, individualized opportunity, neutrality, objectivity, color blindness, and meritocracy.”); Anthony E. Cook, *Beyond Critical Legal Studies: The Reconstructive Theology of Dr. Martin Luther King, Jr.*, 103 HARV. L. REV. 985, 992 (1990) (noting “disproven values of neutrality and objectivity”); Kimberlé W. Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1341 (1988) (questioning Thomas Sowell’s “expectations that he will eventually

Although liberalism is sometimes associated with neutrality regarding alternative conceptions of the good,³ and less frequently with forms of neutral dialogue,⁴ the status of neutrality as a defining characteristic of liberalism is quite contestable—even among liberals.⁵ Liberalism is a political philosophy built on the premise that authorities often govern in the face of a *plurality* of conceptions of the good. Legitimate authority must respect and respond to pluralism, and while being neutral among divergent conceptions of the good is one way of doing so, it is neither the only way nor the uniquely liberal way. Let us, then, set aside the question of whether liberal legal institutions are neutral in a suitable way, and focus instead on the claim that legal authority presupposes or requires that the outcomes of legal disputes be determinate and the legal facts to which judicial opinions refer be objective.

We sympathize with many of the substantive concerns Critics, Feminists, and Critical Race Theorists have expressed about existing legal *practices*. We have two problems with the prevailing critique, however. First, and of most immediate concern, the arguments against determinacy and objectivity are unsound. Second, the prevailing critique often misunderstands the nature of philosophic argument and the manner in which philosophical theories bear on our understanding and evaluation of legal practice, and on legal

identify some determinate, clearly discernible version of [the] law"); Richard Delgado, *The Inward Turn in Outsider Jurisprudence*, 34 WM. & MARY L. REV. 741, 748 (1993) (reflecting on observation that "feminism and Critical Race Theory are defined by a commitment to the interests of people of color and women, by rejection of abstraction and dispassionate 'objectivity'"); Richard Delgado, *Shadowboxing: An Essay on Power*, 77 CORNELL L. REV. 813, 814 (1992) (arguing that powerful parties prefer "objective" to "subjective" standards); Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2441 (1989) ("Implying that objective, correct answers can be given to legal questions . . . obscures the moral and political value judgments that lie at the heart of any legal inquiry."); Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401, 404 (1987) (speculating that rights discourse may prove "contradictory, indeterminate, reified and marginally decisive"). *But see* Mari J. Matsuda, *Pragmatism Modified and the False Consciousness Problem*, 63 S. CAL. L. REV. 1763, 1769 (1990) (noting "contradiction between the critique of objectivity and the critique of present injustice . . . well known to . . . critical race theorists"); Symposium, *Minority Critiques of the Critical Legal Studies Movement*, 22 HARV. C.R.-C.L. L. REV. 297 (1987); Veronica Gentili, Comment, *A Double Challenge for Critical Race Scholars: The Moral Context*, 65 S. CAL. L. REV. 2361, 2366 (1992) (arguing that Critical Race Theory is committed ultimately to a form of moral realism).

³ See, e.g., RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* xiv (1977); JOHN RAWLS, *A THEORY OF JUSTICE* 136-42 (1972).

⁴ See BRUCE A. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* 357-59 (1980).

⁵ See JOSEPH RAZ, *THE MORALITY OF FREEDOM* 113-14 (1986).

practice itself. It appears to be essential to the critique that substantive problems with liberal legal regimes are either problems in the "philosophy of liberalism," or are otherwise connected with "liberal philosophy" because liberal practice and philosophy are somehow inseparable.⁶ Thus, some critics have suggested that the problem with liberalism (and why it is an enemy of women, for example) is its commitment to abstraction and the correspondence theory of truth.⁷ Others have claimed that the problem is essentialism.⁸ The most prevalent confusion is the identification of liberal theory with epistemological foundationalism.⁹ Then, citing Rorty, Kuhn, and Wittgenstein as if they were citing a holding in an unanimous Supreme Court decision, critics are satisfied to reject

⁶ Ironically, the same views we are concerned with rejecting here enjoyed a certain currency in Germany in the later stages of the first wave of Hegelianism in the 1830s and 1840s. Indeed, such views were lampooned by Marx and Engels in 1845-46. See Karl Marx & Frederick Engels, *The German Ideology: Part I*, in THE MARX-ENGELS READER 146 (Robert C. Tucker ed., 2d ed. 1978). It is a curious feature of the intellectual history of CLS that it should have revived—apparently unselfconsciously—the very neo-Hegelian critical themes that had been ridiculed by Marx and Engels more than a century ago. For a further discussion, see *infra* note 13.

⁷ See, e.g., Ann C. Scales, *The Emergence of Feminist Jurisprudence: An Essay*, 95 YALE L.J. 1373, 1377 (1986) ("The philosophical basis of [the liberal] approach is 'abstract universality.' . . . Underlying this approach is the correspondence theory of truth . . .").

⁸ See, e.g., Marie Ashe, *Inventing Choreographies: Feminism and Deconstruction*, 90 COLUM. L. REV. 1123, 1132 (1990) (reviewing ZILLAH EISENSTEIN, *THE FEMALE BODY AND THE LAW* (1988), which criticizes MacKinnon's "essentialist error"); Drucilla Cornell, *Sexual Difference, the Feminine, and Equivalency: A Critique of MacKinnon's Toward a Feminist Theory of the State*, 100 YALE L.J. 2247, 2264 (1991) (claiming that MacKinnon "remains a specific kind of essentialist"); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 591 (1990) (contending that "[d]espise its power, MacKinnon's dominance theory is flawed by its essentialism"); Allan C. Hutchinson, *Inessentially Speaking (Is There Politics After Postmodernism?)*, 89 MICH. L. REV. 1549, 1560 (1991) (reviewing MARTHA MINOW, *MAKING ALL THE DIFFERENCE* (1990), and observing "essentialist leanings" of MacKinnon's "standpoint epistemology"); Catherine A. MacKinnon, *From Practice to Theory, or What is a White Woman Anyway?*, 4 YALE J.L. & FEMINISM 13, 18-22 (1991) (responding to gender essentialism critiques); Jeanne L. Schroeder, *Abduction from the Seraglio: Feminist Methodologies and the Logic of Imagination*, 70 TEX. L. REV. 109, 193 (1991) (charging MacKinnon with "external essentialist understanding of woman's nature"); Jeanne L. Schroeder, *Feminism Historicized: Medieval Misogynist Stereotypes in Contemporary Feminist Jurisprudence*, 75 IOWA L. REV. 1135, 1149 n.33 (1990) (agreeing with Robin West that "there seems to be an underlying unadmitted strain of essentialism running through MacKinnon's work").

⁹ See Steven L. Winter, *Bull Durham and the Uses of Theory*, 42 STAN. L. REV. 639 (1990) (criticizing antifoundationalist denials of a concept of theory); Steven L. Winter, *Transcendental Nonsense, Metaphoric Reasoning, and the Cognitive Stakes for Law*, 137 U. PA. L. REV. 1105 (1989).

foundationalism, the possibility of objective epistemology, and liberalism all in one fell swoop.

Foundationalism, however, is only one of many possible epistemologies of justified belief, and not one currently favored.¹⁰ The correspondence theory of truth is simply one of many alternative accounts of the nature of truth, and a fairly controversial one at that.¹¹ Truth itself can hardly be the enemy. Remarks like these seriously misunderstand philosophy and its relationships to both legal theory and practice. Worse, to think that anything of substance hangs on a semantic, metaphysical, epistemological, or other philosophical thesis may well be counterproductive to the desirable goals of righting substantive wrongs and improving people's lives.¹²

¹⁰ There have been at least two different foundationalist traditions in epistemology: Cartesian foundationalism and logical empiricism. Foundationalism (roughly) is the view that beliefs are ultimately justified only if they rest on beliefs that themselves are not justified by appeal to yet other beliefs. Understood narrowly, foundationalism is associated with the view that those beliefs that are not justified by yet other beliefs are themselves indubitable or otherwise certain. In the Cartesian tradition, the foundation is the belief that "I think, therefore I am." In the logical empiricist tradition, ultimate beliefs are normally associated with reports of sensory experience, e.g., "I am now being appeared to greenly." Neither of the narrower forms of foundationalism have been favored in philosophy at least since the publication in the 1950s of W.V. Quine's *Two Dogmas in Empiricism*. See Willard V.O. Quine, *Two Dogmas of Empiricism*, in *FROM A LOGICAL POINT OF VIEW* 20 (3d ed. 1980); see also Wilfred Sellars, *Empiricism and the Philosophy of the Mind*, in *SCIENCE, PERCEPTION AND REALITY* 127-56 (1963). Richard Rorty popularized these Quinean and Sellarsian themes in *Philosophy and the Mirror of Nature*. See RICHARD RORTY, *PHILOSOPHY AND THE MIRROR OF NATURE* 170-209 (1980).

¹¹ See, e.g., Donald Davidson, *A Coherence Theory of Truth and Knowledge*, in *TRUTH AND INTERPRETATION: PERSPECTIVES ON THE PHILOSOPHY OF DONALD DAVIDSON* 307, 307-10 (Ernest LePore ed., 1986) (favoring coherence theory of truth over correspondence theory of truth); Donald Davidson, *The Structure and Content of Truth*, 87 *J. PHIL.* 279, 301-05 (1990) (same).

¹² This point was put well enough some 150 years ago by two writers whose credentials on the political left are, we imagine, still unimpeachable:

Since [the Crits] consider conceptions, thoughts, ideas, in fact all the products of consciousness . . . as the real chains of men . . . it is evident that [the Crits] have to fight only against these illusions of the consciousness. Since, according to their fantasy, the relationships of men, all their doings, their chains and their limitations are products of their consciousness, [the Crits] logically put to men the moral postulate of exchanging their present consciousness for human, critical or egoistic consciousness, and thus of removing their limitations. This demand to change consciousness amounts to a demand to interpret reality in another way, i.e., to recognize it by means of another interpretation. . . . They forget, however, that to these phrases [constituting the old interpretation] they themselves are only opposing other phrases, and that they are in no way combating the real

Phrases like “legal liberalism” have found their way into modern jurisprudence, but do little to clarify the underlying issues. There is no such thing as a “liberal philosophy,” that is, an all-encompassing philosophy that includes, among other things, a distinct metaphysics, epistemology, philosophy of language, meta- and normative ethics. Some liberals are metaphysical realists, others are antirealists. Some are epistemic coherentists, others are externalists. Some are ethical deontologists, others are consequentialists. And so on.

The same can be said about liberal jurisprudence. No analytic jurist—not Dworkin, not Hart, not Fuller, not Raz, nor anyone else—has ever referred to his or her *jurisprudence* as “liberal.” This is so in spite of the fact that Dworkin, Hart, and Raz are arguably among the most important figures in political liberalism of the last half of this century.

We will do two things in this Article. First we will consider and reject certain arguments about determinacy and objectivity. Second, we will get the debate back on the right track by eradicating several confusing confluences of ideas and concepts. It would be a mistake, however, to read us as being concerned primarily with responding to liberalism’s critics. Therefore, rather than arguing that liberalism’s critics have failed to show that liberal political philosophy is committed to legal determinacy, we will ask whether any of the deep commitments of liberalism require that the outcomes of legal disputes be determinate. In doing so, we hope to say something fresh about what determinacy consists of, as well as about its connection to predictability, stability, and the possibility of democratic rule. Similarly, rather than arguing that its critics have failed to establish liberalism’s commitment to objectivity, we will argue that liberalism is committed to objectivity and that our ordinary understanding of judicial practice presupposes a form of metaphysical objectivity with respect to legal facts. In making good on those claims, we distinguish among a number of senses of objectivity, introduce a new conception of it, and argue for its coherence and its plausibility as an account of the kind of objectivity presupposed by our legal practices.

existing world when they are merely combating the phrases of this world. Marx & Engels, *supra* note 6, at 149. There are obvious emendations to the text above. We do not mean to suggest that this passage is applicable to all the writings associated with CLS. Still, it is strikingly apt with respect to some of the best known CLS work.

Understood in this way, the criticisms of liberalism presented by Critics, Critical Race Theorists, and Feminists (among others) will be employed largely as a springboard to a wider discussion of determinacy and objectivity in their relationship to liberal political theory and the legitimacy of legal authority.

We begin by drawing some simple but important distinctions. Initially, there are political and legal institutions on the one hand, and there are philosophical, analytic, and normative theories about these institutions on the other. With respect to philosophical theories, we can distinguish the analytic from the normative. Analytic theories offer accounts of human practices, particularly their theoretical and conceptual commitments.¹³ The claim that philosophical theories are accounts of human practices might suggest that they are largely *descriptive*, that philosophy is really a branch of sociology, that metaphysics or philosophy of science is really something like a sociology of science, that epistemology is really sociology of knowledge, and so on.

Philosophical accounts are not mere descriptions, however. They are contestable conceptions or characterizations of practices and the concepts central to them. They provide *analyses*, not reports.¹⁴ They are pictures of our practices, windows through which we view the practices of making and defending moral judgments, carrying on scientific inquiry, making and sustaining claims to knowledge, and so on.

Not all philosophical theories seek to explain or provide an understanding of the theoretical and conceptual commitments of human practices. Some are *normative*. Instead of illuminating the conceptual or theoretical commitments of our practices, normative theories set out the conditions under which certain practices and institutions could be *justified* or defended. Though analytic and

¹³ Problems in a philosophical theory do not provide a reason for rejecting the practice it is designed to illuminate. By the same token, the moral undesirability of a practice is not a reason for rejecting the best philosophical account of it.

¹⁴ A report presupposes a well-defined or understood object. This is not true of all philosophical accounts, especially metaphysical ones, which are themselves accounts of the objects of understanding. A philosophical account, moreover, illuminates a practice from a point of view, in the light of certain interests or goals. Furthermore, arguments on behalf of one kind of philosophical account, say, a metaphysical theory, may point out how well that account fits with philosophical accounts of other practices, say, with more settled accounts of our linguistic and epistemic practices. Many of the considerations that support a philosophical account have little to do with the accuracy of the account, which would not be the case were philosophical theories primarily reports.

normative theories differ in their purposes, they are not always unconnected. As the following example illustrates, certain analytic theories have normative dimensions.

A philosophy of language provides an account of the conceptual and theoretical commitments of our linguistic practices, the central aspect of which is the ascription of meaning. As part of the practice of ascribing meaning to words and sentences, we intend that the meaning of the word or sentence serve to *constrain* the uses to which the word or sentence can be put. Linguistic constraint is a normative concept; thus, analysis of meaning will be partially normative, setting out the conditions of *justifiable* use of words or sentences. Accordingly, an account of meaning that focused entirely on the history of the use of a term would fail because it could not explain the sense in which the meaning was intended, not merely to describe customary practice, but to constrain future use.¹⁵

So we can distinguish between legal and political practices on the one hand and philosophical theories of those practices on the other. Similarly, we can distinguish between analytic and normative theories of those practices. The former illuminate the practice, especially its theoretical and conceptual presuppositions and commitments by providing analyses of the concepts implicated or presupposed by them. The latter set out justification conditions, that is, criteria that must be satisfied if a political practice or institution is to be defensible, worthy of our allegiance, or otherwise morally acceptable.¹⁶

¹⁵ For a further discussion of the normative aspects of meaning, see *infra* part II.A.2, discussing Kripkenstein's and Wright's rejection of realist semantics. There are normative dimensions to jurisprudential theories as well. In this regard, consider Ronald Dworkin's account of adjudication. His view is that in interpreting legal texts, judges are committed to seeing the law in its best light; that means that they are committed to seeing it as normatively defensible in a certain way. Thus, his view is that there is a normative or aspirational dimension of adjudication. See DWORKIN, *supra* note 3, at vii-viii ("A general theory of law must be normative as well as conceptual. . . . It must have a theory . . . of adjudication . . . [that views] normative questions of law from the standpoint[] of . . . a judge . . .").

Sometimes his critics charge Dworkin with confusing normative with descriptive jurisprudence, but they misunderstand his project. Like positivism, Dworkin's is not a normative jurisprudence; it is an *analytic* jurisprudence that claims that part of the practice being illuminated by the theory is normative. Judges share a commitment to seeing the law as *prima facie* defensible, as justifiably enforceable by the use of coercive means. The important point for our purposes is that the aspirational component is an element of the practice, not a statement of the conditions under which adjudication could be justified.

¹⁶ The distinction between analytic and normative theories may seem artificial in

Where does the term "liberalism" fit into these categories? Liberalism can refer both to a set of institutions and political and legal practices *and* to a *normative* philosophical theory of the conditions that must be satisfied in order that certain aspects of our practices, e.g., adjudication or coercion, can be justified.

To which of these categories does jurisprudence apply? It is plainly not a political or legal practice or institution. For the most part, jurisprudence is an *analytic* theory about certain legal practices. A distinction exists as well between particular and general analytic jurisprudence. Particular jurisprudence provides an

another way as well. We say that analytic theories offer accounts of our practices, whereas normative theories set out justification conditions. But, of course, that just means that there is a practice of justification—indeed, there are many practices of justification. If philosophical theories provide accounts of our practices, we would expect there to be accounts of our justificatory practices. Different theories will apply to different justificatory practices. A theory about the nature of political justification may not coincide with a theory about the nature of justification in legal argument.

Is it part of the practice of political justification that the norms that set forth the conditions under which authority is to be justified must themselves transcend the practices of the community, or might they be embedded in some ways within the practices of the community? Some have thought that it is part of our practice of political justification that the norms of justification be universal and practice-transcendent. Recently, however, liberal political theory has focused on the possibility of understanding our practices of justification differently; that, for example, justification begins with certain norms and practices that at a certain level of abstraction can be seen to be embedded in a particular community; that, moreover, justification is particular to communities of a particular type and need not be universal. According to John Rawls,

[Political liberalism] does not criticize . . . any particular theory of the truth of moral judgments. . . . [I]t simply supposes that judgments . . . are made from the point of view of some comprehensive moral doctrine. . . . Which moral judgments are true, all things considered, is not a matter for political liberalism, as it approaches all questions from within its own limited point of view.

JOHN RAWLS, *POLITICAL LIBERALISM* xix-xx (1993). As one important consequence, this trend in political philosophy undermines the very standard, oft-heard objection that because we are always situated in a particular time and place, we cannot have a view of the matter that transcends our "positionality." Because we cannot transcend our position, the objection continues, we cannot provide justifications that are objective. All our justifications merely reflect our positions (our contingency) and do so while hiding behind a mask of objectivity. In the first place, it may be no part of our practice of justification that justification proceed from an archimedean point. Second, there are a variety of senses of objectivity—as we explore below—that do not presuppose a position outside human practices altogether. Justification can rely on norms that are constitutive of practices, not external to them. And the mere fact that such practices or norms have a causal history or explanation does not entail that they lack justificatory force. To assume otherwise is to assume, in effect, that justification requires a view from nowhere.

account of the legal practice of a particular community; general jurisprudence provides an account of what, if anything, is true of the concept of law, of legal practice everywhere. Typically, analytic jurisprudence has an important normative component: It aims to set out the conditions that must be satisfied in order for something to count as law. It is normative with regard to the conditions for applying the concept; it is not normative in the sense of setting out the conditions that must be satisfied in order that legal practice be justified.¹⁷

When critics claim that the problem with liberalism is that it is committed (among other things) to determinacy and objectivity, what precisely is the target? Is indeterminacy an objection to *liberal judicial practice* in the sense that if such institutions are indeterminate that would in principle render them less (or in-)defensible? Or is it instead a problem in "liberalism" as an "analytic" account of our practices, in the sense that the best available "liberal" account of our practices coheres only because it treats adjudication as determinate? In establishing that law is indeterminate, then, have we lost hope of finding a way to see our practices as liberal? Or is the determinacy of adjudication part of normative liberalism in the sense that the only kind of adjudicatory process that could be defended on liberal grounds is one in which outcomes were determinate? In that case, establishing law's indeterminacy would show that our adjudicatory processes did not measure up to liberal ideals, and could not be defended on those grounds.

Similar remarks are in order regarding objectivity. Is the problem that important legal practices, like adjudication, are not objective in the relevant sense, and so less (or in-)defensible in principle? Or is it that the best available "liberal" jurisprudence of that practice is coherent just because it sees adjudication as objective when in fact it is not? The failure of objectivity, then,

¹⁷ One can run these two ideas together, of course, by advancing a normative jurisprudence according to which the term law could only be correctly applied to a practice if the practice itself were normatively defensible. Such an account could not be shown to be false by pointing out that we use the term "law" to refer to many practices that do not satisfy this condition, because as a normative account it makes no descriptive claim. It merely recommends or prescribes. Instead, one would have to argue against the attractiveness of the recommended use, and one obvious thing to say is that such a proposal makes it difficult, if not impossible, to criticize legal regimes as unjust. Rather than treating them as unjust, we are left treating them as not being law at all; and it is hard to see that anything would be gained by such a strategy.

would leave us without a way of understanding our practices as liberal. Or is the problem that whereas liberalism as a normative political theory is committed to objectivity, our adjudicatory practices do not exemplify objectivity of the relevant sort, and so can not be defended on liberal grounds?

As we shall understand them, the criticisms of liberalism as indeterminate and not objective have the same basic structure. The argument proceeds as follows:

- (1) Liberal political theory (liberalism as a normative theory) is committed to determinacy (objectivity).
- (2) Legal practice (adjudication) is indeterminate (not objective).
- (3) Therefore, existing liberal practices cannot be defended on (because they are inconsistent with) liberal principles.

In making this argument, the critic often does not argue for premise (1). Typically, citations to various philosophers, such as Rawls, are treated as if they suffice to establish its truth.¹⁸ Premise (2) is supported in a variety of ways, sometimes by appeal to contestable interpretations of our existing practice, often, however, by appeal to philosophical theories, typically about the nature of reasons generally, or legal reasons in particular.¹⁹ Proposition (3) is then said to follow from the premises, thus assuring the argument's validity. Given its validity, the truth of the premises assure its soundness.

We do not deny the *validity* of the argument with respect to its claims about either determinacy or objectivity; we do deny its *soundness* in both cases, however. Consequently, this Article falls into two distinct parts. In the first part we evaluate the above argument with respect to its claims about indeterminacy. In that Section, our first goal is to clarify the so-called "indeterminacy thesis." Then we argue that law can be and often is indeterminate in the way critics take it to be. Though we accept the truth of the second premise with regard to determinacy, we argue that many of

¹⁸ See Singer, *supra* note 1, at 25 n.74 (citing Rawls's statement that the principles of justice are objective).

¹⁹ See *id.* at 6 (stating that "legal reasoning is indeterminate and contradictory [and] cannot resolve legal questions in an 'objective' manner"); see also James Boyle, *The Politics of Reason: Critical Legal Theory and Local Social Thought*, 133 U. PA. L. REV. 685, 695 n.29 (1985) (agreeing with Legal Realists that "dogma of objectivity . . . in legal reasoning serves to obscure the fact that judicial opinions arise from a matrix of social and political forces"); Gary Peller, *The Metaphysics of American Law*, 73 CAL. L. REV. 1151, 1152 (1985) (noting that "legal analysis cannot be neutral and determinate").

the claims made on behalf of that premise are based on philosophical confusions, and are often (on other grounds) unpersuasive. In contrast to liberalism's critics, however, we reject the first premise. Instead, we argue that liberalism as a normative political theory is not committed to determinacy, though it has several other commitments with which determinacy might be easily confused.

In the second part of the Article, we reject the argument with respect to its claims about objectivity. With respect to objectivity, we accept the first premise, but reject the second. In our view, legal practice is objective in a suitable sense, and thus the argument against liberalism fails.

Our thought is that, as a first approximation, those who worry about law's objectivity are concerned about whether the decisions judges reach are *objectively* correct or whether instead they are correct just because the judge so regards them. Let us characterize this as a worry about the metaphysical objectivity of "legal facts." Any time a judge renders a decision, she asserts the existence of what we are calling a legal fact; for example, "Coleman's failure to inspect constitutes negligence," or "Leiter's failure to deliver constitutes a breach of contract." The question about metaphysical objectivity, then, is the question about the *status* of these facts, that is, about whether they hold independently of what a particular judge happens to think, or perhaps independently of what all lawyers and judges would think.

We distinguish among three conceptions of metaphysical objectivity: minimal, strong, and modest. Minimal and strong objectivity are, under different names, more or less familiar to philosophers of law; modest objectivity is not. The remainder of this Article is devoted to explaining and defending the plausibility of modest objectivity as the kind of metaphysical objectivity presupposed by our legal practice of adjudication.

I. DETERMINACY

A. *Varieties of Legal Indeterminacy*

1. Reasons and Causes

We begin by drawing a distinction between *(in)determinacy of reasons* and *(in)determinacy of causes*.²⁰ Often we want to know

²⁰ This distinction is drawn and explored in Brian Leiter, *Legal Realism and*

whether a particular legal outcome or result is *justified*. Justification is provided by reasons. The thesis that law suffers from indeterminacy of reasons is a claim about the relationship between the set of available legal reasons and the justification of legal outcomes. On other occasions, we seek an *explanation* of the outcome a judge (or panel of judges) has reached in a particular case. On the theory that explanations are primarily causal, an explanation of an outcome is provided by identifying its causes. The thesis that law suffers from indeterminacy of causes is a claim about the inadequacy of the set of legal reasons as causes of judicial opinions. In short, indeterminacy theses make claims about the relationship between legal reasons and the outcomes of cases: the indeterminacy of reasons thesis claims that the relationship of the former to the latter is *justificatorily* inadequate; the indeterminacy of causes thesis claims that the relationship of the former to the latter is *explanatorily* inadequate.

Our immediate concern is with indeterminacy of reasons. Given that, our next task is to distinguish between two forms of indeterminacy. In one sense, a rule is indeterminate if there is more than one way of fulfilling its demands. In the other, to say that a rule is indeterminate is to make a claim about the lack of uniqueness with respect to what the rule is. Indeterminacy of the first type is not only unavoidable; it is both necessary and desirable. The duty to be charitable, for example, imposes constraints on behavior even if no way of understanding it eliminates entirely one's latitude in discharging the duty it imposes. What is not legitimate is failing to discharge the duty in some plausible way. An agent who acts according to such principles is not subject to criticism simply because she took one rather than another justified course of conduct. One might even argue that the absence of latitude in satisfying the demands of moral rules would be a failing in a moral theory: a failing, because it would be based on an inappropriate conception of the person, of human cognitive and psychological capacities, and of the nature of practical reason. Because indeterminacy of this sort is both unavoidable and desirable in any system of norms, it cannot be the kind of indeterminacy that troubles liberalism's critics. Therefore, we take it that the kind of indetermi-

nacy that is thought to create a problem for liberalism is indeterminacy about what the rule is—not about how the rule can be satisfied.

Indeterminacy of reasons is a thesis about the inadequacy of legal reasons as (full) justifications of the outcomes they are offered to support. The set of legal reasons is a function of two elements: (i) the set of valid or binding legal sources; and (ii) the set of *interpretive* operations that can be legitimately performed on those sources (to generate rules and principles of law) and the set of *rational* operations that can be performed on law and facts (to generate outcomes). Valid sources will invariably include *at least* statutes and precedents; typical (interpretive and rational) operations will include canons of interpretation (e.g., for constructing the “rule” of a prior decision) as well as forms of legal reasoning, including deduction and analogy.

Every theory of law (or jurisprudence) provides an account of the conditions of membership in the class of legal reasons. The indeterminacy thesis is the claim that the set of legal reasons, regardless of its actual content, will be indeterminate with respect to its justificatory relationship to the outcomes judges reach. At its core, the indeterminacy thesis is a claim about the ability of reasons—legal reasons in particular, but perhaps also reasons in general—to justify fully the outcomes in favor of which they are adduced. And this is one way in which the indeterminacy argument might be said to draw, at least in part, on traditional philosophical theories about meaning and metaphysics—in this case, the meaning and essence of reasons. Before we explore the extent to which such efforts are warranted, we need to provide a more precise formulation of the indeterminacy thesis. In what sense is the class of legal reasons invariably indeterminate? What form of justificatory inadequacy is marked by indeterminacy?

One formulation of the indeterminacy of reasons thesis is the claim that:

- (1) The set of legal reasons is never adequate to warrant any result.

Understood in this way, law is indeterminate only if no legal outcome can be justified in the light of the class of available legal reasons. If that is so, then the possibility of legitimate legal authority is thrown into doubt, since, at the very least, authority presupposes that some of the outcomes that are enforced by law are warranted by law. This formulation is too strong, however. Even indeterminists who believe that proposition (1) is true are not likely

to believe that it must be true in order for indeterminacy to pose a serious obstacle to the possibility of legitimate governance by law. The claim can be weakened so that:

(2) The set of legal reasons is sufficient to warrant any result.

Instead of claiming that no outcomes are warranted, this version of the thesis holds that, theoretically at least, all outcomes are warranted by the set of legal reasons. If all outcomes can be warranted by the set of available legal reasons, then a judge would be justified in reaching any decision whatsoever. That too would pose a problem for legal authority since part of our ordinary understanding of authority is that judges are not generally free to pick any possible outcome and enforce it through the coercive power of the state. Again, even indeterminists who believe that proposition (2) is true are not likely to believe that it must be true in order for indeterminacy to pose a threat to the possibility of legitimate governance by law. Instead of claiming either that all outcomes are justified by legal sources or that none are, the indeterminist could be understood as claiming that:

(3) The set of legal reasons never uniquely warrants (or justifies) one and only one result in a particular case.

This indeterminist does not claim that the available legal resources justify all outcomes or no outcomes, nor does she deny that the set of legal reasons constrains or limits available outcomes. Instead, she claims that the set of legal reasons is inadequate to warrant outcomes uniquely. If proposition (3) poses a problem for the possibility of legitimate governance by law, it can only be because legitimacy requires that outcomes be uniquely warranted by the set of legal reasons. The indeterminist who accepts (3) clearly believes that legal liberalism adheres to what we might call, "the unique outcome" requirement. Whether analytic jurisprudence is committed to any such claim is not clear.²¹ For a very long time, the leading analytic jurist, Ronald Dworkin, appears to have defended the claim that adjudication was about finding the right answer to legal disputes,²² although he no longer claims that there are right answers to all cases.²³

²¹ See, e.g., STEVEN J. BURTON, *JUDGING IN GOOD FAITH* (1992).

²² See DWORKIN, *supra* note 3, at 81-130; Ronald Dworkin, *No Right Answer?*, 53 N.Y.U. L. REV. 1 (1978).

²³ One reason for the change is the following. In his earlier work, including *Taking Rights Seriously*, Dworkin had a "rights-based" political theory, according to

Whereas the typical indeterminist may well believe that either proposition (1) or (2) is true, she does not have to defend either in order to make indeterminacy a potentially interesting thesis; proposition (3) may be interesting enough. On the other hand, even (3) may be stronger than necessary. Instead of claiming that the set of legal reasons never uniquely warrants an outcome, the indeterminist might claim that even if legal reasons sometimes warrant unique outcomes, they do not do so in important or controversial cases—precisely the sorts of cases that make it to the stage of appellate review.²⁴ In this view, indeterminacy of reasons asserts:

- (4) The set of legal reasons never uniquely warrants (or justifies) one and only one outcome in important or hard cases.

Interestingly, if Dworkin is right about positivism, proposition (4) represents the classic positivist account of judicial discretion. In that account, there is a distinction between “easy” cases in which there are unique, determinate outcomes, and “hard” cases in which judges must exercise discretion precisely because the set of legal reasons is inadequate to determine or warrant one unique outcome.

If we accept proposition (4) as a plausible formulation of the indeterminacy of reasons thesis, we can draw some interesting connections among the indeterminists, the positivists, and Dworkin. In the first place, both the indeterminist and Dworkin accept the

which the point of adjudication was primarily to determine which of the litigants had the preexisting right. See DWORKIN, *supra* note 3, at 184-205. If there was a preexisting right in each case, then there was a right answer in each case: namely, that which answered the question: which litigant has the right?

In his more recent work, especially *Law's Empire*, adjudication is a practice within a differently conceived political morality—one that emphasizes the bonds of liberal community. See RONALD DWORKIN, *LAW'S EMPIRE* 95-96 (1986). In such an account, there is no need that adjudication settle on uniquely correct answers to all disputes, and thus Dworkin relaxes the constraint. That does not mean that he no longer believes that there are correct answers almost all the time. His continued use of the Hercules construct as a way of fixing right answers to legal disputes indicates that he is still committed to much more in the way of determinacy than most positivists. But, as we suggest below, the importance of judges aspiring to act like Hercules changes in the most recent work; there is a different political theory that motivates Hercules, and it is not one based on right answers. Consequently, the determinacy claim is no longer at the heart of Dworkin's jurisprudence. (The reader should note that we are offering an interpretation of the development of Dworkin's thinking; there are few, if any, explicit acknowledgements in Dworkin indicating that this is the way he sees his work developing.)

²⁴ Indeterminists should not dispute the existence of easy cases, but point out that the legitimacy of adjudication turns only on the cases that are *really* adjudicated—namely, the *hard* cases, in which indeterminacy seems indisputably to be a real threat.

claim that, if true, proposition (4) poses a serious problem for legal authority. They differ in that the indeterminist believes that proposition (4) is in fact true, while Dworkin believes it is almost always false. In the second place, both the indeterminist and the positivist believe that proposition (4) is true. They differ in that the indeterminist believes that the truth of (4) spells trouble for a liberal conception of legal authority, whereas the positivist does not believe that the truth of (4) is incompatible with liberal legal authority (neither, arguably, does the Legal Realist).

We now have a working formulation of the indeterminacy thesis. Next, we need to distinguish among the various arguments for the existence of indeterminacy. In doing so, we will put ourselves in a position to assess the truth of the claim that law is indeterminate. If the law is indeterminate, then the issue will be whether, and to what extent, indeterminacy poses a problem for the possibility of legitimate governance by law. We begin with a summary of the possible sources of legal indeterminacy, keeping in mind that different kinds or sources of indeterminacy may pose different challenges to the possibility of legitimate governance by law.

2. Sources of Indeterminacy

We begin by distinguishing between two levels of indeterminacy: *specific* and *general*.²⁵ Specific indeterminacy of reasons makes a claim about law. It makes no claim about any other domains of discourse. In contrast, general indeterminacy of reasons is a thesis about all domains of reason-giving discourse. We might distinguish, then, between those arguments for law's indeterminacy that follow from more general concerns about language or reason-giving discourse and those that derive from features peculiar to legal discourse. Let us begin with the former.

A range of arguments for legal indeterminacy draw support from considerations that bear on language generally. All natural languages contain *vague predicates* and *family-resemblance concepts*, and legal discourse is no exception. It may be impossible to determine whether, in some cases, a person without much hair is bald, a scribbling art, compensation just, or process due.

In law, these concerns have been addressed in H.L.A. Hart's discussion of the distinction between the "core" and "penumbra" of general terms.²⁶ Judges follow law when the rules apply to core

²⁵ See Leiter, *supra* note 20, at 6-7.

²⁶ See H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L.

instances of general terms, but must exercise discretion when the question is whether the rule applies to a case involving the penumbra of a general term. When faced with a case involving the penumbra of legal meaning, a judge has no option but to help fix the meaning through the exercise of a discretionary authority. In his earlier essays, Dworkin took issue with this argument for judicial discretion.²⁷ By allowing that moral principles as well as social policies are binding legal sources in terms of which other legal directives are to be understood, Dworkin argued that the extent to which judges must exercise a discretionary authority would be significantly reduced.²⁸ Understood in this way, the penumbra argument for judicial discretion appears to depend in part on the poverty of legal sources and is thought to be mitigated by a richer domain of legally binding standards.

This line of argument, however, cannot resolve a worry about vague predicates; the moral principles that are supposed to enrich the domain of legal sources will, themselves, contain vague predicates—namely, moral ones (e.g., “just,” “fair,” “equal”). Some writers—notably Dworkin and Michael Moore—think this does not in principle create a problem for legal determinacy; assessing their views, however, would require taking on their views about the determinacy of moral reasoning and the truth of moral realism. Instead, we propose to leave these tasks for another occasion.²⁹ We want to concentrate on a different and more far-reaching concern about language—the nature of meaning in general.

There are a variety of considerations normally associated with Wittgenstein’s Private Language Argument³⁰ that we can capture under the rubric of *semantic skepticism*. The semantic skeptic denies that there are objective facts of a suitable sort that constitute or

REV. 593, 607-15 (1958). We encounter the “penumbra” of a rule when the rule contains a vague predicate and the facts of the case at hand fall into the realm of vagueness.

²⁷ See Ronald Dworkin, *Judicial Discretion*, 60 J. PHIL. 624 *passim* (1963) [hereinafter Dworkin, *Judicial Discretion*]; Ronald Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14, 32-40 (1967) [hereinafter Dworkin, *Model of Rules*].

²⁸ For an application of this Dworkinian line of reasoning to various indeterminacy arguments, see Ken Kress, *Legal Indeterminacy*, 77 CAL. L. REV. 283, 295 (1989).

²⁹ For some doubts, see Brian Leiter, *Objectivity, Morality and the Dworkinian Maneuver* (Sept. 27, 1993) (unpublished manuscript, on file with authors); see also *infra* notes 147-53 and accompanying text (discussing the views of Moore and Dworkin).

³⁰ See LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* § 203 (G.E.M. Anscombe trans., 1953).

determine a word's or a sentence's meaning. Because there is no fact that *is* the meaning of a sentence, the meaning of a sentence, directive, command, or request invariably will be indeterminate. In other words, what a sentence means cannot be adduced by pointing to some fact that is its meaning. Thus, the meaning of a sentence is indeterminate because there are no objective facts that would render it determinate. If this is true of language generally, then it is true of law a fortiori.

Semantic skepticism supports a form of *general* indeterminacy of reasons, which applies to law as well as to any other semantic domain. We want to begin, however, by examining forms of indeterminacy that are *specific* to law. We will be concerned with two. First, one worry about the determinacy of law is that at some appropriate level of abstraction, legal sources are *inconsistent* or fundamentally *contradictory* (or that the legitimate operations performed on them lead to inconsistent rules or principles). If legal sources are contradictory in the formal sense, then any outcome can be derived from them; any proposition, true or false, can be derived from a contradiction.³¹ If all possible legal outcomes follow from inconsistent premises, then the law is indeterminate in the senses expressed by propositions (4), (3), and (2) above.

A second source of the indeterminacy thesis specific to law is the claim that the set of legal reasons is either too impoverished or too rich. This has the air of paradox about it and so needs clarification. There is a natural way of thinking about legal sources and the operations that can be performed on them that suggests both sources of indeterminacy. On the one hand, it is natural to suppose that a legal system that had few sources, few canons of interpretation, and few restrictive forms of reasoning from those sources would find itself with insufficient resources to resolve legal disputes authoritatively. Judges would often find themselves unavoidably having to resort to nonlegal sources and forms of argument in order to resolve disputes. This way of thinking

³¹ Sentences of the form "if *p* then *q*" are *conditionals*, written in logic as " $p \rightarrow q$." Such sentences are materially equivalent to sentences of the form "not *p* or *q*" written in logic as " $\neg p \vee q$." These two sentences have the same truth value which means that whenever one is true so too is the other. " $\neg p \vee q$ " is true whenever either " $\neg p$ " is true or "*q*" is true. " $\neg p$ " is true whenever "*p*" is false. Therefore, " $\neg p \vee q$ " is true whenever "*p*" is false. A contradiction always has the truth value "false." So whenever "*p*" is a contradiction, "*p*" is false: " $\neg p \vee q$ " is true. And whenever " $\neg p \vee q$ " is true so too is " $p \rightarrow q$ ". Thus, the claim is that anything follows from a contradiction: whatever "*q*" is, " $p \rightarrow q$ " is true.

suggests that the richer the stock of legal sources and operations on them, the less likely judges will be to appeal to extralegal norms to resolve disputes before them. The natural inference is that the degree of indeterminacy in a legal regime is a function of the richness of the set of legal reasons. The richer the set, the more complete it is; the more complete, the fewer the "gaps"; the fewer the gaps, the less indeterminate.

This argument suggests that indeterminacy is a byproduct of a poverty of available or authoritative sources and operations on them. It is natural to understand this argument as grounded in the idea that an impoverished set of authoritative standards and interpretive resources will yield numerous "gaps." Law is necessarily indeterminate simply because no matter how rich the set of authoritative standards and operations are, there will always be cases that fall under no binding standard; there will always be gaps. To be sure, the extent of the problem of indeterminacy that results from gaps will be diminished by ever enriching the set of authoritative standards and sources; still, it cannot be eliminated altogether. There will always be gaps in the law.

Enriching the class of legal reasons will reduce indeterminacy owing to gaps, but it creates its own set of problems and sources of indeterminacy. As a legal system enriches the set of available binding legal sources, judges will always have more than one norm or rule that is arguably applicable or controlling. If that is so, then there may be no one rule or norm that uniquely controls a case. There may, then, be too many standards available for adjudicating a case to claim that there is only one uniquely warranted outcome.

Arguments for indeterminacy, then, can be grounded on considerations of law's internal and unavoidable inconsistency, the relative poverty or richness of legal reasons, and general semantic skepticism. In the next few Sections, we explore these sources of indeterminacy. In doing so, we will try to assess the general merits of the arguments in favor of indeterminacy. Whereas we believe that the arguments for indeterminacy, as usually presented, are often unconvincing and typically overstate its scope, we do not deny that there are important ways in which the set of legal reasons will be indeterminate. Nor do we intend to deny that certain forms of indeterminacy can pose a problem for the possibility of legitimate governance by law. Nevertheless, the problems posed by indeterminacy are in no way fatal to the possibility of legitimate authority—or so we argue. In considering the sources of indeterminacy, we begin

by considering one type of general indeterminacy of reasons, what we have been calling semantic skepticism.

3. Semantic Skepticism

The core of semantic skepticism is the claim that there are no facts that constitute or determine a sentence's meaning, so that language is indeterminate at the most basic level: there are no *objective* facts that make it the case that language means one thing rather than another. Thus, there is no point to claiming that a legal rule can be satisfied by some actions but not others since the meaning of the rule is always "up for grabs."

This line of argument is motivated largely by Saul Kripke's skeptical reading of Wittgenstein's Private Language Argument.³² Let us briefly set out Kripke's interpretation of Wittgenstein's argument.³³ In philosophy, it is customary to draw a distinction between discourses that are *cognitivist* (or fact-stating) and those that are *noncognitivist*. A cognitivist discourse is one in which the sentences state facts, and in which the meaning of those sentences is given by the conditions in the world under which the sentences would be true (i.e., the meaning is given by the truth-conditions).³⁴ We typically identify cognitivist discourses by their *syntactic* form; thus, for example, sentences which are *assertoric* or *declarative* we generally view as cognitive. So the sentence, "Guido is in the room," asserts a particular fact—that Guido is in the room—and the meaning of the sentence is given by the circumstances under which it would be true (i.e., Guido is, in fact, in the room).

It has been an important lesson of twentieth-century philosophy that *syntactic* form can be misleading as to *semantics* (or meaning). *Noncognitivism* is the view that a particular discourse is not primarily descriptive or fact-stating, and thus that the meaning of its sentences is not given by truth-conditions (i.e., by the obtaining of the facts asserted in the sentences). Thus, noncognitivists about ethics, from

³² See SAUL A. KRIPKE, WITGENSTEIN ON RULES AND PRIVATE LANGUAGE 55-113 (1982). Kripke's reading was prefigured by others, notably, ROBERT J. FOGELIN, WITGENSTEIN (1976) and CRISPIN WRIGHT, WITGENSTEIN ON THE FOUNDATIONS OF MATHEMATICS (1980).

³³ We follow in broad outline the illuminating account in Alexander Miller, Kripke's Wittgenstein 2-13 (Sept. 2, 1990) (unpublished manuscript, on file with authors).

³⁴ See DONALD DAVIDSON, *Truth and Meaning*, in INQUIRIES INTO TRUTH AND INTERPRETATION 17, 17-36 (1984); Alfred Tarski, *The Semantic Conception of Truth*, 4 PHIL. & PHENOMENOLOGICAL RES. 341, 341-76 (1944).

A.J. Ayer to Allan Gibbard,³⁵ hold that, notwithstanding the surface syntax of moral discourse ("Guido is a just man"³⁶), such discourse states no facts, but instead gives *expression* to certain attitudes: its meaning, then, comes not from its truth-conditions (there are none), but rather from its expressive role.

Kripke's Wittgenstein—or Kripkenstein—can be read as arguing that sentences that ascribe meaning are, despite their syntactic appearance, also *noncognitive*: they state no facts, in the sense that there are no facts by virtue of which the sentence would be made true. When we say, "This rule *means* X," there are no facts we can identify that would constitute the rule's *meaning* X. While Hume had argued that sentences about morality or causation are essentially noncognitive—such sentences state no facts in the sense that there are no facts that constitute something *causing* something else—Kripkenstein advances the startling position that sentences about meaning itself are noncognitive: there are no facts constituting or determining an expression *meaning* one thing rather than another.

In order to establish this thesis, Kripkenstein allows that there might be two domains in which we might search for the relevant objective facts: the speaker's previous verbal and nonverbal behavior and the speaker's mental states. Kripkenstein then allows that we have full information about these domains. His argument is designed to show that there can be no facts that constitute meaning since even with full access to these domains, we can find no property or fact that constitutes the meaning of the sentence, i.e., no fact which establishes that the sentence *means* one thing rather than another.

Kripke offers the following (now) famous example to illustrate the argument. Take the sentence, " $57 + 65 = 5$," and compare it with the sentence " $57 + 65 = 122$." Suppose we wanted to know what the "+" expression *means*. The skeptical argument is that there is no fact about a person's past behavior with respect to "+" that would fix its meaning such that one, but not the other, of the above uses is correct. To see this, suppose that I have performed simple arithmetic sums in the past only involving numbers below 57. Then

³⁵ See ALFRED J. AYER, *LANGUAGE, TRUTH AND LOGIC* 20-22, 107-08, 110-12 (Dover Publications 1952) (1936); ALLAN GIBBARD, *WISE CHOICES, APT FEELINGS* 105-25 (1990).

³⁶ Compare this with the syntax of "Guido is a large man," which we are inclined to understand in cognitivist terms: i.e., it states a fact (about Guido's size), and its meaning is equivalent to the conditions under which the statement is true (i.e., Guido is, in fact, large in size).

that past behavior is perfectly compatible with “+” meaning either “the sum of the integers” (addition) or “the sum of the integers except when adding numbers above 56 in which case always give the answer 5” (quaddition).

Note what the argument here is *not*. The argument is not that we do not know that $57 + 65 = 5$ is wrong while $57 + 65 = 122$ is correct. We do know that the former is incorrect and that the latter is correct. Rather, the argument is that we can identify no objective fact that justifies our correctness judgments: i.e., no fact about our usage of the “+” sign, such that it is compatible with only one of the two sums. If we are still able to make correctness judgments about meaning—and we are—it is *not* because there are objective facts that constitute meaning: such correctness must have some other source. This source is identified in what Kripke calls the “skeptical solution.”

In short, the Kripkensteinian solution³⁷ is to accept the conclusion of the skeptical argument—there are no facts determinative or constitutive of meaning—but to suggest that we look for the criterion of correctness with respect to meaning elsewhere: not in some fact that makes it the case that X means Y , but rather in the circumstances and conditions under which our community will let us assert particular sentences. Meaning, then, is not a matter of truth-conditions, but rather of *assertibility-conditions* (i.e., the conditions under which a community of language users permits assertion of a particular sentence). The sentence “ $57 + 65 = 122$ ” is correct not because there is some fact that constitutes the meaning of the “+” sign, but rather because in our community, we are only permitted to use the “+” sign consistent with addition rather than quaddition.

Critics of liberalism might read Kripkenstein as showing that the law must be radically indeterminate. For if meanings are indeterminate—in the sense that there are no objective facts about meaning, only what the community will and will not allow us to assert—then

³⁷ Arguably, this solution is not Wittgenstein’s, because his original problem is not a skeptical one. See John McDowell, *Wittgenstein on Following a Rule*, 58 SYNTHESE 325, 331 (1984) (“The right response to the paradox, Wittgenstein in effect tells us, is not to accept it but to correct the misunderstanding on which it depends: that is, to realize that there is a way of grasping a rule which is *not* an *interpretation*.”); Crispin Wright, *Kripke’s Account of the Argument Against Private Language*, 81 J. PHIL. 759, 777-78 (1984) (“Wittgenstein’s conclusion, however, is emphatically *not* that there is no such thing as the fulfillment of a prior intention—the conclusion, in effect, of Kripke’s skeptic.”).

the law, which depends on meaning (e.g., on rules meaning one thing rather than another), must also be indeterminate. If language itself is indeterminate, then legal language is indeterminate a fortiori.

There are three possible responses to this line of argument. The first is to deny the soundness of Kripke's construal of Wittgenstein, for Kripke's reading is, in fact, quite controversial.³⁸ This line of response, however, is really beside the point since it is not the accuracy of Kripke's reading of Wittgenstein that is at issue. Kripke can be all wrong about Wittgenstein, but right about meaning. Instead of attacking the accuracy of the attribution of the argument to Wittgenstein, a good response will have to attack the argument itself, or its alleged consequences. In this vein, a second response might be this: even if Kripkenstein is right in his skeptical argument, it does not follow that meaning is indeterminate in any problematic sense. All that follows is that there are no facts about meaning that are completely independent of how we are disposed to construe meanings. Meaning is not radically indeterminate; instead, meaning is public—fixed by public behavior, beliefs, and understandings. There is no reason to assume that such conventions cannot fix the meaning of terms determinately. Indeed, such a response would be fully acceptable to Kripkenstein himself: the skeptical solution shows precisely how there can be "communal" facts—but not *objective* facts—about meaning. Moreover, even if communal conventions are themselves indeterminate in important ways, it will not be for the kinds of reasons we are considering in this Section, namely, that the meaning of sentences cannot be fixed by strongly objective facts about the speaker's previous verbal and nonverbal behavior or her mental states.³⁹

This response is closely related to a third response to the Kripkensteinian argument for legal indeterminacy. As we noted in

³⁸ See McDowell, *supra* note 37, at 330-32 (emphasizing the distinction between Kripke's endorsement of the "misunderstanding" and Wittgenstein's attempt to correct it); Wright, *supra* note 37, at 760 ("[T]here is strong prima facie reason to doubt whether accommodation with . . . the skeptical solution . . . which Kripke represents Wittgenstein as commending can really be lived with . . .").

³⁹ Other questions have been raised about the coherence and viability of the skeptical solution. For example, some writers have worried that skepticism about meaning facts will also warrant skepticism about other facts, like facts about communal dispositions of use. For some discussion, see Warren Goldfarb, *Kripke on Wittgenstein on Rules*, 82 J. PHIL. 471, 485 (1985); Wright, *supra* note 37, at 761-66. We do not pursue these difficult issues here.

the Introduction,⁴⁰ philosophical arguments are often offered primarily for the purposes of giving an explanation or a justification of our existing practices. Criticisms of philosophical theses are not normally intended to call into doubt the underlying practice; rather, they are offered to raise doubts about a certain picture or way of understanding the practice. This is an important point, but easy to miss.

Quine's indeterminacy of translation thesis, for example, is not designed to prevent us from buying or reading texts in translation, but to raise doubts about the picture of meaning that emphasizes intensionality.⁴¹ The very same point can be made about Wittgenstein. Wittgenstein's goal—as opposed to Kripkenstein's—is to call into question a certain Platonic picture of the foundation of semantics that some might have thought explains or justifies important features of our linguistic practices. If the argument completely succeeds, it does not, for example, raise doubts about our ability to know the determinate meaning of a rule, but only about the source of that knowledge. If Kripkenstein's skeptical solution is right, then that source is not some semantic fact in Platonic heaven, but rather the conventions of use that comprise our linguistic community. The practice of rule-following—by judges or anyone else—remains intact, but our philosophical picture of its possibility changes.

4. Legal Contradiction

Whereas semantic skepticism argues that legal discourse is fundamentally indeterminate, the claim that law is indeterminate because it is fundamentally and internally inconsistent or contradictory depends on legal rules having determinate meanings, or meanings sufficiently determinate to allow that they might contradict one another. At some level, it is obviously an empirical question whether the available set of legal sources is inconsistent. Suppose, however, that the set of binding legal standards has a formal contradiction embedded within it. Since every outcome is implied by a formal contradiction, all outcomes are entailed by the

⁴⁰ See *supra* text accompanying notes 6-12.

⁴¹ See WILLARD V.O. QUINE, *WORD AND OBJECT* 26-79 (1960). We are grateful to Yale law student Chris Kutz for suggesting this illustration of our general point.

set of legal reasons, and therefore all outcomes are warranted. No outcome is warranted uniquely, and the law is indeterminate.⁴²

It would be impossible to deny that law is indeterminate under these conditions. It is also true, however, that legal standards are rarely formally contradictory. If they were, the problem with legal authority would not be that outcomes would be indeterminate; rather, it would be that the law would be formally contradictory. Indeterminacy is just one of the many undesirable consequences of law's inconsistency—and hardly the most troubling either. If the indeterminacy thesis is really the claim that law is formally contradictory, then apart from noting that law is rarely formally contradictory in the way the argument envisions, there is no denying that under those conditions the law would be indeterminate.⁴³

The indeterminacy theorist may object that we are underestimating the extent to which legal regimes are contradictory. One idea, associated with CLS, is that liberalism suffers from a "fundamental contradiction."⁴⁴ The fundamental contradiction refers to the purportedly inescapable tension between our need for others and our fear of them, which has as one of its more significant political analogues our need for centralized powers to protect our autonomy and our fear that these same powers will usurp that autonomy.⁴⁵

As many writers have already observed, this is not, of course, a contradiction.⁴⁶ Indeed, it is a complex matter how one

⁴² See *supra* note 31 and accompanying text.

⁴³ In the next Section, we discuss a different—and genuine—source of legal indeterminacy under the rubric "conflicting norms." See *infra* part I.A.5. This rubric is often described as involving "contradictions." We eschew that loose usage in order to distinguish that case from the cases discussed in the present Section.

⁴⁴ See, e.g., ROBERTO UNGER, *PASSION* 20 (1984) ("We present to one another both an unlimited need and an unlimited danger, and the very resources by which we attempt to satisfy the former aggravate the latter."); Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 *BUFF. L. REV.* 209, 213 (1979) ("The fundamental contradiction—that relations with others are both necessary to and incompatible with our freedom—is not only intense. It is also pervasive.").

⁴⁵ The analogy is this: we need others to constitute our individual identity (through friendship, love, etc.), yet at the same time there is the risk that they will destroy our individual autonomy (through rejecting us, betraying us, objectifying us, etc.).

⁴⁶ See, e.g., Phillip E. Johnson, *Do You Sincerely Want to Be Radical?*, 36 *STAN. L. REV.* 247, 257 (1984) ("[W]hat Kennedy calls a 'contradiction' is not a logical contradiction at all but merely a reflection of the complexity of human relationships.").

mediates between the need for coercive political powers to protect autonomy and the threat those same powers pose to autonomy; and it has been a central theme of liberal political theory to explore the boundaries of legitimate coercion. But complexity is not contradiction, and simply calling it otherwise does not make it so. To be sure, there have been some powerful philosophical challenges to this liberal program—for example, from Robert Paul Wolff⁴⁷—which have met equally powerful replies.⁴⁸ But absent some demonstration of the impossibility of liberal political theory—that is, the impossibility of providing a theory of the terms of legitimate mediation between coercion and autonomy—there is little more that can be said at this juncture.⁴⁹

⁴⁷ See ROBERT P. WOLFF, *THE POVERTY OF LIBERALISM* 3-50 (1968) (arguing that insofar as our enterprises are inherently social, the central problem of government cannot be, as liberalism presupposes, the regulation of each person's infringement on the sphere of other persons' actions, but rather the coordination of actions and the choice of collective goals).

⁴⁸ See, e.g., RAZ, *supra* note 5, at 18 ("While not denying that governments can and often do pose a threat to individual liberty, there is another conception which regards them also as a possible source of liberty. [Governments] can create conditions which enable their subjects to enjoy greater liberty than they otherwise would.").

⁴⁹ Talk of the "fundamental contradiction" in the CLS literature has echoes of anti-Kantian and antiliberal arguments in Hegel. Hegel's arguments, however, can be reconstructed in ways that demonstrate his opponents' involvement in genuine *logical* contradictions once one grants Hegel certain strong metaphysical theses. Thus, in the famous master-and-slave section of *The Phenomenology of the Spirit*, Hegel shows that the putatively Kantian ideal of an independent self-consciousness is contradictory because: (i) to be *independent* is not to be *dependent* on anything or anyone; but (ii) to be *self-conscious* is to depend upon the recognition of other persons. See G.W.F. HEGEL, *THE PHENOMENOLOGY OF THE SPIRIT* 111-19 (A.V. Miller trans., 1977). Granted (ii), it follows that an independent self-consciousness is a contradiction in terms. Similar Hegelian arguments can be constructed against the liberal ideal of freedom as involving a separate and protected sphere of autonomy, into which the community cannot intrude. See *id.* at 211-17. But since freedom, for Hegel, involves rational action, and *rational action* is only possible for the person whose actions are harmonious with the purposes of a *rational* community, it is a contradiction to think of freedom in terms of separation from, rather than immersion in, the (perhaps coercive) purposes of the community.

These are hasty summaries of difficult arguments, but they should remind us that there is a genuine set of antiliberal arguments based on contradictions in liberal theory. While the Crits, through their superficial engagement with Hegel and Lukacs, have picked up similar-sounding themes, they have actually abandoned all the philosophical content of genuine antiliberal positions.

5. Gaps and Conflicting Norms

Indeterminacy that is thought to arise because of either the relative poverty or richness of legal sources and interpretive operations represents two very different, indeed, contrary ideas. One is that law is indeterminate whenever the set of legal reasons is impoverished; the other is that law is indeterminate whenever the set of legal reasons is too rich. The poverty claim draws on the notion of "gaps" in the law. The idea is simple enough. In a primitive or immature legal system, legally binding sources for resolving disputes will be in relatively short supply. Therefore, there are bound to be cases in which no controlling legal source exists. While enriching the set of sources will reduce the extent of indeterminacy, it can never eradicate indeterminacy altogether; it will always be possible to imagine a case in which no binding legal standard applies. Thus, because there will always be gaps in the law, there will always be some degree of indeterminacy.

Without denying the possibility that a legal system bereft of binding legal sources will be indeterminate in important ways, it is worth noting that the argument for indeterminacy from the existence of gaps can be more misleading than illuminating, for three separate reasons. In the first place, if there are gaps in the law, their existence is not likely to depend on features of the legal practice that are peculiarly liberal; gaps do not appear to discriminate between liberal and other legal regimes. Second, the existence of gaps is insufficient to establish the indeterminacy thesis, namely, proposition (4) above.⁵⁰ All that the possibility of gaps in the law establishes is the possibility of novel cases not governed by existing standards and interpretive resources; it does not establish that important or controversial cases (e.g., abortion, death penalty) lack determinate answers. Nor does the existence of gaps in the law establish, without the benefit of further argument, that indeterminacy is widespread or problematic.

Most importantly, the claim that there are genuine gaps in mature legal systems (which liberal regimes presumably are) is misleading at best. Given the set of standards and accepted tools for thinking about the relationship between binding standards and various fact patterns available in a reasonably mature legal system, it is unlikely that genuine gaps exist. For almost any dispute that we could imagine arising, there exists some legal norm or rule that

⁵⁰ See *supra* part I.A.1.

bears on its resolution. It may well be that the relationship between the rules from which judges could legitimately draw and the issue before them is so weak that no decision could be said to be warranted by the rules, but that is very different from saying that no rule applies, that, in other words, there is a genuine gap in the law.

There is an important distinction between the claim that no binding source—principle or rule—is available as a legitimate resource to enable a judge to think fruitfully about a dispute before her (a genuine gap), and the claim that in most legal systems, there will always be norms that bear on every dispute, but that, in some cases, the relationship between the norms and any outcome a judge might reach is too weak to warrant or justify the decision. In such cases, we might say that no outcome is warranted by the set of legal standards, and that the outcomes judges reach in those cases are indeterminate in the requisite sense. Thus, even in mature legal systems law can be indeterminate without its indeterminacy arising from the existence of gaps in the law. Talk of gaps is, at best, simply a misleading way of referring to indeterminacy that arises when the justificatory relationship between existing legal reasons and outcomes is too weak to support the claim that any of the available outcomes a judge could reach is justified or adequately warranted by the class of legal reasons. While we are not comfortable with the term “gaps-in-the-law,” we do not deny that the kind of indeterminacy intended to be signalled by that phrase exists in all legal systems. Still, as we note above, that form of indeterminacy does not discriminate between liberal and nonliberal legal regimes, nor does its existence establish the truth of the indeterminacy thesis.

If we focus instead on legal regimes rich in authoritative legal resources, we can identify at least two possible sources of indeterminacy. The first we have considered above:⁵¹ indeterminacy that arises because those reasons do not sufficiently support any outcome in particular, even though the set of legal sources provides resources with which a judge might reason fruitfully about cases. In contrast, we can focus on the case in which differing legal resources warrant conflicting outcomes. The idea is that in any legal regime richly endowed with argumentative resources, binding legal sources, while not strictly contradictory, will nevertheless support conflicting outcomes or decisions. Thus, instead of no legal reason sufficing to

⁵¹ See *supra* text following note 31.

warrant an outcome, the problem more often will be that different legal reasons to which we are otherwise committed warrant conflicting outcomes or decisions.⁵²

One obvious response to this line of argument maintains that even conflicting norms can be ordered in their appropriateness or importance, or their relative weights accounted for in some way that resolves the apparent conflict. Against this response, note that it is possible that no common scale along which the conflicting values are to be compared, measured, evaluated, and in virtue of which be ordered, exists. Norms and the underlying values they express may be incommensurable in important ways.⁵³

We need to distinguish between two conclusions a critic might draw from the incommensurability of values and the legal standards expressing them. The first is that legal outcomes will be indeterminate. The second is that legal argument cannot be rational. If the argument is sound, it implies that legal outcomes will be indeterminate—in the sense that no outcome is *uniquely* warranted. On the other hand, it does not follow that legal discourse cannot be largely rational. Rational disagreement about law (or morals) is perfectly compatible with the lack of unique determination, and so it does not follow from the fact that outcomes are indeterminate over some

⁵² Sometimes critics of liberalism who talk about the “contradictions” in law can be understood in a way that makes such “contradictions” equivalent to the source of indeterminacy we are now considering. In this sense, two or more valid legal sources each fully warrant conflicting outcomes. Thus, we might loosely say that the sources contradict each other. In some views, this type of contradiction is thought to arise because of the existence of the more fundamental, or global contradiction of liberalism, discussed *supra*, part I.A.4.

It is important to note, however, that this putative form of contradiction in virtue of conflicting norms or outcomes is no contradiction at all. It is just another way of saying that different norms that apply to us, that are part of the system of principles and policies that govern our actions, draw us in different directions. There is nothing contradictory in this fact alone, and it is hardly so much a misfortune of liberal political or legal theory as it is a consequence or feature of an enlightened sense of the complexity of human motivation.

⁵³ See RAZ, *supra* note 5, at 321-66 (defining the concept of incommensurability and explaining why values are incommensurable); see also ELIZABETH ANDERSON, VALUE IN ETHICS AND ECONOMICS 56 (1993) (“The more a given scale of value encompasses very different, categorically unranked ways of meeting it, the more scope there is for incommensurability.”); Charles Taylor, *The Diversity of Goods*, in 2 PHILOSOPHY AND THE HUMAN SCIENCES: PHILOSOPHICAL PAPERS 230, 230-47 (Charles Taylor ed., 1985) (arguing against those ethical and political theories which, informed by utilitarianism, ignore the fact that certain goals such as integrity, charity and liberation merit a special kind of pursuit and are incommensurable with our other goals).

domain or range of cases that all choices are equally defensible or that no exercise of rational judgment can be defended.

In our account, indeterminacy is a failure of *warrant*, of the justificatory relationship between reasons provided by legal sources and the outcomes they are presumed to support. Therefore, to the extent that rational judgment can be defended in the face of disagreement caused by the fact that different norms support conflicting conclusions, it will not follow that indeterminacy understood as a failure of justification or warrant exists, or, to the extent that it exists, that its existence is problematic. Indeterminacy is a problem when it suggests that the exercise of rational judgment cannot be defended as against a different exercise of judgment. If the existence of conflicting norms entailed the impossibility of defending the choice of one over another, *that* would be a problem.

Having said that, we have no reason to deny that sometimes the conflicts among norms will be sufficiently great and the arguments on all sides strong enough to justify the claim that no outcome can be uniquely defended to the exclusion of others. In that case, we do not intend to deny that in mature legal systems conflicting norms can present genuine cases of indeterminacy. Nor do we intend to deny that sometimes even when only coherent and non-conflicting norms apply to a case, the justificatory relationship between the norms and any outcome a judge might reach is too weak to claim that the norms warrant the outcome. Thus, we accept that indeterminacy is a feature of both mature and less well-stocked legal systems.

6. Summary

In sum: first, if employed to establish radical indeterminacy, arguments from general semantic considerations are unpersuasive. Second, the familiar argument for indeterminacy based on the fundamental liberal contradiction has the misfortune of being based on a false premise, namely, that liberalism is deeply and fundamentally contradictory. Third, there are nevertheless good reasons for thinking that law will be indeterminate in a range of important cases. Legal norms may not sufficiently warrant any outcome in a case. Different but binding norms within the legal system may each warrant conflicting outcomes.

B. Indeterminacy and Authority

1. Why Indeterminacy Matters

It would be foolish to deny the possibility of indeterminacy, though reasonable disagreement about the extent of it in particular legal systems is obviously possible. Given the likelihood, if not the inevitability, of indeterminacy, it is reasonable to wonder why someone might think that its existence poses a problem for the possibility of legitimate governance by law, or for the possibility of liberal authority. Why does indeterminacy matter?

There are a variety of plausible answers one could give to this question, only some of which we can take up here. One idea is that indeterminacy causes us to rethink the lawyer's conception of legal practice. In this view, the existence of determinate or right answers to legal disputes is part of the working framework of legal practice into which lawyers are socialized. This conception is part of a larger network of beliefs or presuppositions that form the conceptual framework of liberal, legal culture. The existence of nontrivial indeterminacy in the law requires a reconceptualization of liberal legal culture.⁵⁴

A second reason for thinking indeterminacy important is demonstrated by the following example. Suppose we discover a pattern of unjust decisions in some domain of law. We may feel it appropriate to criticize the law or judges for these decisions. To meet our objection, judges might respond that they too view the outcomes as unjust, but are incapable of doing otherwise; their hands are tied in that the decisions they have reached are determined uniquely by the law which binds them. The existence of legal indeterminacy might be thought to be important insofar as appeal to it would help undermine arguments of this sort. For if the law is indeterminate, it is not possible for a judge to say that he was compelled by law to reach and enforce an unjust decision.⁵⁵

⁵⁴ See Mark Tushnet, *The Indeterminacy Thesis* (1993) (unpublished manuscript, on file with authors). Tushnet argues that the lawyer's conception of adjudication presupposes determinacy. Thus, finding out that law is in fact indeterminate forces the lawyer to rethink the *descriptive* account of it. The problem with this argument is that it probably misdescribes the practicing lawyer's working conception of legal practice. Only ordinary citizens, some jurists, and first-year law students have a working conception of law as determinate.

⁵⁵ This line of argument was brought to our attention by Professor Jack Balkin.

This argument, however, has only a superficial plausibility, and legal indeterminacy has nothing to do with it. If a judge reaches a series of obviously unjust decisions by applying the law, then there is something morally reprehensible about the law; and what is reprehensible about it has nothing to do with its being either determinate or indeterminate. Moreover, liberal theory does not allow a judge to escape moral disapprobation or sanction by claiming that the law was determinate. If the law is determinate and does require morally unjust outcomes—that could not otherwise be defended (even slightly)⁵⁶—then liberal theory does not excuse the judge from doing what he ought morally to do, all things considered, and that is to reach some other, more just, solution.

There are at least three other motivations for attributing to liberalism (as a normative political theory) a commitment to determinacy as a *political ideal*. Two of these have to do with “rule-of-law” considerations. First, legal outcomes must be determinate if individuals are to be put on notice as to their duties under the law and be provided with an opportunity to conform their behavior accordingly. Second, legal outcomes are enforceable by force, and if those outcomes are not warranted by the set of legal reasons, then the exercise of coercion seems unjustified. The third concern of liberalism that bears on law’s determinacy has to do with the very possibility of democratic rule. Democracy presupposes that a duly elected legislature can form a judgment, enact it through legislation, and have its will followed by the courts. This presupposition of democratic rule is incompatible with indeterminacy, or, at least with more radical forms of it. In the remainder of this part of the Article, we take up each of these arguments.

2. Indeterminacy and Predictability

Sometimes we want to know not whether a particular outcome in a case is justified, that is, whether there are reasons sufficient to warrant it, but whether an outcome can be *explained or predicted*. Reasons can figure in explanations and predictions provided they are causes.⁵⁷ The set of legal reasons is causally indeterminate just in case it is inadequate to explain or predict the outcomes judges

⁵⁶ By appeal, for example, to the settled expectations of the litigants.

⁵⁷ See DONALD DAVIDSON, *Actions, Reasons and Causes*, in *ESSAYS ON ACTIONS AND EVENTS* 3, 3-19 (1980) (defending the position that “rationalization is a species of causal explanation”).

reach. If we put the two indeterminacy theses together, we get the claim that the set of legal reasons is insufficient uniquely to justify an outcome, or to predict or explain it.

Leiter has observed that the primary legacy of Legal Realism has been the indeterminacy of reasons hypothesis, whereas the realists themselves were at least as concerned with causal indeterminacy.⁵⁸ The Legal Realists were as interested in understanding why judges reach the decisions they do as they were in determining whether those decisions could be justified.⁵⁹ This emphasis on explanation and prediction is of a piece with well-known realist slogans including: "the law is what judges say it is," or that "the law is the best prediction of what judges will do in a particular case," and so on.

Not surprisingly, according to the realist, the ideal lawyer is the one who is in the best position to counsel his clients about what to expect from litigation. That lawyer will need to know what leads judges to decide as they do, not what legal reasons, if any, would justify their decisions. Of course, most judges are educated in a way that would suggest that binding legal reasons will play a prominent role in their decision-making, but the indeterminacy (of causes) thesis holds that even where binding legal reasons have a causal role, they are insufficient to predict or explain judicial decisions. The best explanation of judicial decisions may include the set of binding legal reasons, but cannot be limited to them. Instead, explanations will point to psychological and sociological facts about judges as part, if not all, of the causal story.⁶⁰

Legal Realists claim that the class of legal reasons is causally indeterminate. On the other hand, like the positivists, the realists do not seem to doubt the possibility of legitimate governance by law.⁶¹ Why? We cannot be sure, since the realists are relatively

⁵⁸ See Leiter, *supra* note 20.

⁵⁹ See, e.g., JEROME FRANK, *COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE* 20-21, 146-64, 262-89, 316-25 (Princeton Univ. Press 1973) (1949).

⁶⁰ For the complete picture of realism in this regard, see Leiter, *supra* note 20, at 145-67, and Brian Leiter, *Legal Realism, in A COMPANION TO THE PHILOSOPHY OF LAW AND LEGAL THEORY* (Dennis Patterson ed., forthcoming 1995).

⁶¹ This is clearest in KARL N. LLEWELLYN, *THE COMMON LAW TRADITION* (1960) (implicitly acknowledging that legitimate government by law is possible). We take Llewellyn as representative of the core of realism, though, admittedly, some who claimed the label took more extreme views. Of course, Llewellyn himself, by 1960, had perhaps retreated too far from some important realist themes. For a seminal discussion, see Charles E. Clark & David M. Trubek, *The Creative Role of the Judge: Restraint and Freedom in the Common Law Tradition*, 71 *YALE L.J.* 255, 256 (1961) (criticizing Llewellyn's work, *The Common Law Tradition*, for "recogniz[ing] judicial creativity as part of the common law tradition, but . . . reject[ing] the notion of

silent on questions like these. Still, one plausible reason for thinking that the realists do not view indeterminacy as incompatible with authority may have something to do with the relationship between determinacy and predictability.

How does the realists' emphasis on predictability relate to the claim that legal authority requires determinacy? To answer this question, we have to answer another question first, namely, what is the concern or problem for which determinacy is supposed to provide the only acceptable solution? Here's one possibility. Law is coercive. At a minimum, in order for the exercise of coercive power to be justified it must be imposed on individuals who are capable of conforming their behavior to its demands and who have the opportunity to do so. Thus, agents must be put on notice of what is expected of them. Indeterminate law is presumably a problem for the rule of law because if the law is indeterminate, then agents are left unaware of what the law requires of them and are unable to conform their behavior accordingly.

Here is where the realists' emphasis on prediction and causation comes in. If the need for agents to have the opportunity to conform their behavior to the law's demands is the concern that motivates the worry about indeterminacy, then all that is really required is predictability. If individuals can predict what the law will require of them, then, in principle, they are on notice and have the opportunity to conform their behavior to the law's demands. Notice requires predictability, not determinacy. And the very point of the realist tradition is that rationally indeterminate outcomes can nevertheless be reliably predictable—even if the prediction cannot be made entirely on the basis of the class of legal reasons.

The second reason for thinking that liberals require determinacy relates to the role of autonomy in the liberal tradition. Liberal autonomy requires stable, predictable frameworks within which agents are free to pursue their projects, plans, and aspirations.⁶² Only against this background in which much can be taken for granted, and is not otherwise "up in the air," can individuals formulate meaningful long term projects and goals and be confident in their investments in resources necessary to execute them. This is the kind of liberal political theory that Coleman has begun to

judicial freedom").

⁶² See, e.g., LOREN LOMASKY, *PERSONS, RIGHTS AND THE MORAL COMMUNITY* (1987) (developing a system of rights based on a view of human beings as individuals concerned with personal projects).

outline in *Risks and Wrongs*.⁶³ In this kind of liberal framework, determinate outcomes might be thought to matter because of their relationship to an agent's ability to form reliable expectations and to the rationality of his investments in resources—including human capital—necessary to their execution. Once again, if the concern is that determinacy is necessary for autonomy, then it is unfounded. Concerns about conformity and autonomy can be met by stability and predictability, not determinacy. An agent's ability to conform his behavior to the law's commands *ex ante* depends on his capacity to predict what judges will do in applying the law to various fact patterns, and the sort of stability required for liberal autonomy also invites the underlying concern for predictable authoritative actions.

In short, indeterminacy will not pose the threat to liberalism one would otherwise expect, provided that indeterminate judicial decisions are nevertheless reliably predictable. Establishing that indeterminacy is compatible with predictability is part of the unintended Legal Realist legacy, and is in fact a presupposition of the jurisprudence of liberalism's harshest critics.⁶⁴ The realists emphasize that indeterminate outcomes can be predictable, but what reason do we have for supposing that they are right? After all, the realists themselves claim that the class of legal reasons is itself causally indeterminate. That means that predictions cannot be based entirely on legal reasons.⁶⁵ On what else might such predictions be based?

One suggestion is that reliable predictions about how judges decide cases requires the existence of a suitable social scientific theory of judging. Several realists believed in the existence of such theories. Jerome Frank, for one, thought that Freudian psychoanalytic theory provided the right kind of social scientific theory for accomplishing just that.⁶⁶ Underhill Moore sometimes favored a form of Watsonian behaviorism.⁶⁷

⁶³ See JULES COLEMAN, *RISKS AND WRONGS* 436 (1992).

⁶⁴ See, e.g., Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 *YALE L.J.* 997, 1009-10 (1985) (asserting that the idea of indeterminate judicial decision-making is not inconsistent with the predictability of judicial decisions); David Kairys, *Legal Reasoning*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 11, 14-15 (David Kairys ed., 1982) (asserting that although judicial decisions are based on indeterminate judicial values and priorities, such decisions are not necessarily unpredictable).

⁶⁵ See, e.g., Dalton, *supra* note 64, at 1009-10 (asserting that because judicial decisions are indeterminate yet predictable, predictability must be based on something other than legal doctrine).

⁶⁶ See generally JEROME FRANK, *LAW AND THE MODERN MIND* (1930).

⁶⁷ See Leiter, *supra* note 20, at 81-90 (discussing Underhill Moore's theory of

The particulars of various theories do not matter for our current purposes. All we need do is assume that some such theory is a reliable predictor of what judges will do in particular cases. If such a theory is available, all agents can in principle predict with a reasonable degree of confidence what the law will expect of them. If that is the case, then even though the set of legal sources may be indeterminate both as reasons and causes, the law itself is predictable and “determinate” in the sense requisite for legitimate authority. The problem, then, is not indeterminacy *per se*. Rather, it is identifying and developing the right kind of reliable social scientific theory of judicial behavior. Ironically, in a rough and ready way that identification and development is precisely what the vast majority of liberalism’s critics are really pursuing.

3. Folk Theories and Predictability

Legal Realists like Frank and Moore believed in certain social scientific theories of judging, but there may be no reason to think that armchair psychoanalysis and Watsonian behaviorism are correct accounts of judicial behavior. The problem does not lie solely in the possibility that Frank and Moore might be wrong; rather, it is that there may be no social scientific theory of the appropriate sort. And if no theory of the appropriate sort exists, then prediction is not possible; and if prediction is not possible, then we are back where we started—with liberal concerns and worries that are not met by existing practice. That is only half the problem. Suppose such a theory did in fact exist. The relevant theory would be either insufficiently well-known to allow ordinary citizens to avail themselves of it (in which case, judicial outcomes will not be predictable for them), or it may be sufficiently well-known such that judges themselves will be aware of it (in which case, judges will respond to it in ways that will undermine its predictive power).⁶⁸ We now have two objections to respond to. The first is that prediction requires a full theory which may not be available. The second is that if such a theory is available, it will either be inaccessible, or, if accessible, self-defeating. Let us take these up in turn.

The existence of a full and satisfactory theory is less important than it first appears: lawyers can and do predict, with a fairly high

adjudication).

⁶⁸ We are indebted to Professor Andrei Marmor of the faculty of law at the University of Tel Aviv for this objection.

degree of accuracy, what outcomes judges will reach, and they do so without anything like Jerome Frank's armchair psychoanalysis or Underhill Moore's behaviorism. How do lawyers do it, then? Presumably they do it with some degree of informal psychological, political, and cultural knowledge constituting a "folk" social scientific theory of adjudication. The success of this folk theory, which is, after all, largely coextensive with the talents of lawyers (i.e., their ability to advise clients what to do, when to go to trial, when to settle, etc.), may constitute success enough for the purposes of predictability and authority, regardless of the prospects of social scientific theories. Even liberalism's harshest critics do not appear to deny the possibility of "folk" theories of judicial behavior.⁶⁹ Thus, Critics and Feminists correlate judicial decisions with wealth, gender, race, cultural mores, and ideologies. Indeed, doing so is essential to part of their program, which is to establish the ideological bases of adjudication.

If a correct social scientific theory of judging did exist, most ordinary citizens would not be aware of it. Then again, they need not have such a theory in mind in order to steer clear of the law's wrath. Most people, most of the time, can arrange their affairs to avoid coming into conflict with the law; like lawyers, ordinary people can avail themselves of informal psychological, political, and cultural knowledge in anticipating what courts will do. In those few cases in which they have genuine doubt about what the law requires of them, they can (and often do) consult counsel who can deploy the relevant folk theory. Thus, a theory that is not well-known across the population as a whole is compatible with legal authority as long as there is the relevant folk theory to fill in the gaps in their knowledge.

Suppose the predictive theory is well-known, however. We can assume that judges are familiar with it. Another possible objection suggests that judges will not passively participate in a fraud while the rest of the world knows the true grounds of their decisions. Surely, judges will respond by making decisions on other grounds, thus undermining the predictive power of the relevant theory.

The plausibility of this objection depends on the type of predictive theory at issue. Suppose someone has the following predictive "theory": "Coleman and Leiter eat when hungry."

⁶⁹ See, e.g., Kairys, *supra* note 64, at 15 (asserting that the "shared backgrounds, socialization, and experience of our judges . . . yield definite patterns in the ways they categorize, approach, and resolve social and political conflicts").

Suppose this hypothesis is widely known and becomes known to Coleman and Leiter. It hardly follows that either Coleman or Leiter will stop eating when each is hungry or start eating when either is not hungry. In fact, it may appeal to both Coleman and Leiter to learn why they eat when they do. Such a theory may give them an understanding of their behavior that they would not otherwise have, and so on.

This type of predictive or explanatory theory *vindicates* the behavior or decisions in question. But some of the predictive theories associated with Legal Realism do not seem to have this character. For example, if Jerome Frank is right, then judges make decisions because of various neurotic unconscious desires⁷⁰; bringing these causes of decision to light surely would change judicial behavior! Of course, Frank's armchair psychoanalysis never delivered a powerful predictive theory; and it is surely not the folk theory of which most lawyers avail themselves. More promising is the sort of theory envisioned by realists like Karl Llewellyn and Underhill Moore, according to which judges decide commercial law cases based on their sense of what would be fair or appropriate in the particular commercial context, rather than on the basis of legal rules or prior court decisions.⁷¹ This type of predicative theory, should judges become more aware of it, would presumably vindicate their decisions rather than cause them to act otherwise.

In short, prediction does not require a full theory of judicial behavior. It requires only an informal "folk" theory of judicial behavior, of precisely the sort that most lawyers and many citizens already seem to have. Moreover, no perverse consequences would follow from judicial knowledge of this theory.

We close this Section by considering one final concern about causation and adjudication. The argument we have offered accepts that legal reasons may be causally inadequate to explain or predict

⁷⁰ See FRANK, *supra* note 59, at 146-64.

⁷¹ See Underhill Moore & Theodore S. Hope, Jr., *An Institutional Approach to the Law of Commercial Banking*, 38 YALE L.J. 703, 719 (1929); Underhill Moore & Gilbert Sussman, *Legal and Institutional Methods Applied to the Debiting of Direct Discounts—Institutional Method*, 40 YALE L.J. 555, 560 (1931); see also LLEWELLYN, *supra* note 61. In Llewellyn's later works, and in Moore's work, this theory took on considerably more theoretical baggage, but its core is eminently simple and plausible, and a central component of any commercial lawyer's folk theory. It was common wisdom among the commercial litigators with whom Leiter practiced in New York City that judges want to "do what's fair"; the lawyer's job was, first, to present the facts in such a way that fairness seemed to demand a decision for her client and, second, to provide the judge with some law on which the judge could "hang his hat."

judicial behavior. However, it is based on the idea that such behavior is causally explicable. Thus, whereas our argument appears to accept the Legal Realist view of legal reasons as causally indeterminate, it is not skeptical about the causal efficacy of reasons generally. Is this a problem? Is it inconsistent? It is neither. In accepting the indeterminacy of causes thesis, we accept that legal reasons might not themselves fully cause judicial decisions. We are not rejecting the possibility that reasons can be causes. To accept the notion that judicial behavior is not fully caused by the legal reasons to which judges might be expected to appeal hardly entails that judicial behavior is itself mysterious or otherwise not subject to ordinary causal explanation.

4. Determinacy and Warrant by Reason

To this point, we have focused on concerns about determinacy that can be met by rationally indeterminate but predictable outcomes. These worries arise by virtue of liberalism's commitment to the rule of law and from a certain kind of liberal political theory that emphasizes the centrality of personal autonomy. At first blush, these considerations suggest that the indeterminacy of the law is inconsistent with liberal normative theory because rule-of-law and autonomy considerations essential to the theory require determinacy. If our analysis is correct, however, closer examination reveals that these concerns require only that the law be reliably predictable, not that it be determinate.⁷² So indeterminate, but predictable, law satisfies these rule-of-law and autonomy considerations, and does not, on these grounds at least, fall short of the liberal normative ideal.

There is no doubt that predictability and stability are important elements of liberal normative theory. There are, however, other aspects of liberal normative theory that have considerably less to do with predictability and stability; aspects of liberalism that one might think entail a commitment to determinacy. Conceptually at least, determinacy and predictability are mutually exclusive. Recall that an outcome is determinate,⁷³ provided it is uniquely warranted by the set of legal reasons.⁷⁴ Outcomes may be uniquely warranted without being predictable. The right decision in a case may not

⁷² See *supra* part I.B.3.

⁷³ Determinate in the sense associated with indeterminacy of reasons.

⁷⁴ See *supra* part I.A.1.

have been predictable *ex ante*, even if it comes to be viewed as the natural solution *ex post*. The determinacy thesis makes a claim about *justification*: the set of legal reasons uniquely justifies the outcome. The focus on predictability has nothing to do with justification, whereas determinacy has everything to do with justification.

In the previous Sections we have explored the ways in which certain constraints of liberal political theory draw our attention to the predictability and stability of judicial decisions.⁷⁵ Which commitments, if any, draw our attention to the justificatory relationship between legal reasons and judicial decisions?

Once again, the obvious candidate is the fact that legal outcomes are coercively enforceable.⁷⁶ Because the decisions judges reach are coercively enforceable, it is not enough that those decisions be predictable. For coercion to be justified, individuals must be able to conform their conduct to the law's demands and have the opportunity to do so. This condition is not sufficient, however. Predictable, but nevertheless unwarranted (or unjustified) outcomes may not be justifiably enforceable by coercion. In order for the coercive power of the state to be legitimately employed, judges' decisions must be justified by something more.

In order to be justified, judicial decisions must be warranted by the available set of legal reasons. Depending on one's theory of justification (and of law), being warranted by legal reasons may also be insufficient to justify coercive enforcement, since even legally required outcomes may sometimes prove morally indefensible. At the very least, though, compelling compliance with judicial decisions can be justified only if those outcomes are warranted by the class of legal reasons. Thus, predictability may allay some of the concerns liberals have about coercion, but it cannot allay all of them. The missing component is determinacy.

This argument correctly points out that concerns about justification are not reducible entirely to considerations of predictability. In order to be justified, coercion must, at least, enforce outcomes warranted by the set of legal reasons. That seems right. But it does not follow that such outcomes must be determinate, that is, warranted uniquely by the class of legal reasons. Political coercion is unjustified when it is employed to enforce an *unjustifi-*

⁷⁵ See *supra* parts I.B.1-3.

⁷⁶ See *supra* part I.B.1.

able decision, not when it is used to enforce a justifiable (if not uniquely so) decision. The problem with coercion is its use to enforce outcomes that are not justified; it is not that coercion is being employed to enforce justified outcomes that happen not to be uniquely warranted. Coercion requires warrant, not uniqueness. Uniqueness, we shall argue, is not a requirement of legitimate authority.

Is it enough to say that the coercion argument requires only warrant by dint of legal reasons and not uniqueness (determinacy)? Consider the situation of the losing litigant, say, the plaintiff in a suit. Is it enough that a decision for the defendant is warranted by the class of legal reasons even in the case in which a decision in favor of the losing litigant could have also been warranted by the class of legal reasons? Surely, the plaintiff will feel that the power of the state has been unjustly imposed against him.

Of course, two outcomes could be warranted by the class of legal reasons, but one could be more warranted than the other. Warrant has both a threshold and an ordinal dimension. It is not the case that outcomes are either warranted or not, and that those which are warranted are equally warranted, while those that are not warranted are equally unwarranted. Among those outcomes that are warranted will be some that are better supported by the class of relevant reasons than others. So from the fact that the losing plaintiff "has a case" (that is, a decision in his favor would be rationalizable under the class of legal reasons), hardly leads to the conclusion that he has a claim in justice when a decision against him is rendered.⁷⁷ In order to make this line of argument interesting, we have to restrict it to cases in which a decision either way would have been equally warranted by the class of legal reasons.

Before considering what to say about this kind of case, notice how this line of argument could lead a thoughtful theorist to wonder whether the best interpretation of the practice will reflect a commitment to legal determinacy. The plaintiff says, in effect, "to justify a decision against me it is not enough that the defendant has

⁷⁷ The losing plaintiff may have a valid complaint, however, when a decision in his favor is better supported by the class of legal reasons than the decision reached in support of the defendant's claim—even if that outcome is warranted by the class of legal reasons. In that case, it is not sufficient that an outcome be warranted by reason in order justifiably to compel compliance with it. If both outcomes are warranted, then only the argument that is given greater support by the class of legal reasons is justifiably enforceable. The real dilemma occurs when both outcomes are equally warranted. We consider this problem next.

as good a case; the case on his side has to be better than mine." Coercion can be justified only to support the best case, not a case that is merely good enough. A plausible way of understanding the notion of a correct answer is in precisely this way: the correct answer is the better one. Thus, litigants may have a working conception of the practice that commits them to the view that there are correct answers to legal disputes; otherwise, the exercise of coercion against them lacks justification. This is one kind of reason a theorist might have for trying to understand adjudication as being committed to determinate outcomes.⁷⁸

Getting back to the issue before us: we are imagining a case in which decisions for either the plaintiff or the defendant is equally warranted by the set of legal reasons. What can we say to the losing plaintiff in such a case that could justify (to her) the use of coercion to force her compliance (if necessary)? Would it help matters if a decision against her was the *predictable* outcome? Predictability will not do all the work we need. Initially, the original defense of coercion based on the predictability of outcomes was not intended to apply to each and every case; instead, it was intended to justify the general use of force. All that was required was that outcomes be predictable enough to provide guidance and allow individuals to conform their behavior to the law. The argument did not require that each outcome be predictable with certainty, and the decision in our example may not have been.

For the sake of argument, suppose that the plaintiff's loss was predictable by her. In that case, she would not have been justified in forming any expectations of winning the suit. If her claim is that the decision against her is unjust because it frustrates expectations she has about winning, the following response is appropriate: her expectations are not well-grounded, and so frustrating them is not unjustified. This suggests that whether predictability of outcome is helpful to fend off the charge of injustice depends in part on the source of her claim of unjust treatment.

The plaintiff's claim, after all, may not be that her expectations were frustrated. Instead, her claim may simply be that she has just as solid a case as does the defendant. She wonders why the coercive power of the law is being used against her rather than for her?

⁷⁸ An argument very much like this is part of the pre-*Law's Empire* argument Dworkin has for the right-answer thesis. See Dworkin, *supra* note 22, at 28 (citing Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057 (1976), reprinted in DWORKIN, *supra* note 3, at 81).

There are several points to be made at this juncture. First, it does not follow that when the class of legal reasons is inadequate to distinguish the plaintiff's from the defendant's case that the judge's decision for the defendant is arbitrary in the sense of being *unreasoned* or *unreasonable*. The charge of injustice cannot be seen as the charge that the decision lacks a justifying reason. More likely, the objection is that the decision lacks a conclusory reason. But even this may not be the case. Recall the important distinction between the class of legal reasons and the class of reasons that the state has authority to implement or act upon.⁷⁹ Not every area in which a state has authority to act has its authority fully implemented in legislation or prior adjudication. The class of legal reasons may fall within the set of reasons the state can implement, but it is not identical to that set. The scope of legal reasons will be set by "a rule of recognition" or binding sources and conventions, whereas the scope of legitimating reasons for acting will be set by the relevant political theory of the state.

In the event that there is a tie as judged by the class of legal reasons, there may be other reasons a judge may be authorized to apply. While these are not strictly speaking legal reasons, they fall within the judge's *discretionary* authority to implement. Such reasons may ground a decision for one litigant rather than the other even when the class of legal reasons cannot. It may be part of our existing legal practice that when legal reasons are indeterminate a judge has authority to appeal to applicable extralegal reasons to resolve a dispute. Our losing plaintiff would surely have grounds for complaint were the judge to appeal to reasons that were not applicable to the case, or that the judge was not authorized to consult, but she would have no complaint otherwise.⁸⁰

⁷⁹ See *supra* part I.B.3.

⁸⁰ Most commentators agree that something like this is what occurs in our practices, but disagree about how to describe it. Dworkin, for one, has argued that in appealing to such reasons, judges are actually appealing to *legal* standards, not to reasons beyond law (but nevertheless within their authority to consult). It is easy to see how this view of the class of legal reasons fits with Dworkin's earlier views about determinacy and right answers. Positivists, notably Raz and Coleman, argue that not every reason a judge may appeal to is, for that reason alone, a legal reason, that is, one, given the criteria of legality, they must consult. Part of the difference is that Dworkin constructs his theory of law—his account of what law is—from a theory of adjudication, whereas positivists like Hart, Raz, and Coleman claim that the theory of law and adjudication are distinct but related components of a jurisprudence. See DWORKIN, *supra* note 3, at xii (identifying legal rights as an "institutional right to the decision of a court in its adjudicative function"); JOSEPH RAZ, *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* 180, 206-09 (1979); Jules L. Coleman, *Negative*

Our losing plaintiff will not be satisfied, however, if in addition to the extralegal reason adduced in favor of the defendant, there existed similar reasons to support her case. Her concerns will simply arise at a different level. Rather than claiming that the outcome is unjust because she has just as good a case under the law as the defendant does, she now claims that she also has just as good a case given whatever other legitimate sources or reasons for deciding a judge might have. What can we say when there is no substantive reason of law or of political morality that distinguishes the plaintiff's case from the defendant's?

There are at least two things we might say. In some cases, there will exist cultural norms and practices that are shared by both plaintiffs and defendants. These norms and conventions may make one outcome more salient than another; in certain settings, the community understands that the right decision is of a certain sort. To the extent that both litigants participate in the same culture, adopt the same practices, and follow the same norms, these informal considerations will reinforce the decision even if there is no binding or authorizing reason that requires it. This view reflects the realists' conception of the commercial realm.⁸¹

This kind of response has only a limited application, however. The more general argument is simply that in cases in which the reasons offered are equally strong on both sides, if the judge decided against the defendant, the defendant would have been in a position to make the same allegation. As long as we opt for a system of formal resolution, someone has to win and someone has to lose. Provided that the operative political theory of the state is that decisions based on reasoned judgment are better than no decision at all, that it is better to have authorized decisions than no decision, the judgment against the plaintiff can be justified. In the end, a decision for either the plaintiff or the defendant will be arbitrary, but it does not necessarily follow that the decision will be utterly unreasoned or unreasonable. Thus, the objection that deciding against the plaintiff is unjust rings hollow.

and *Positive Positivism*, 11 J. LEGAL STUD. 139, 148-49 (1982).

⁸¹ See Moore & Hope, *supra* note 71, at 719; Moore & Sussman, *supra* note 71, at 560; see also LLEWELLYN, *supra* note 61.

5. Determinacy and Democracy

Liberal autonomy requires stable political, social, and economic institutions. ("Stable" does not mean "fixed.") At the same time, liberal constraints on coercion require predictability and warrant by dint of legal reasons. We have found no deep commitment of liberalism that requires determinacy. In addition, although liberalism requires that the decisions judges reach be warranted by the class of legal reasons, we have found no argument that requires that those same decisions be *caused* by the class of legal reasons. For all we have shown, a judge could decide cases on bases other than the class of legal reasons provided that her decision could be independently warranted by the class of legal reasons.⁸² Is this a problem?

The answer is "yes" and "no." The problem does not involve the determinacy of reasons, which is a claim about justification—warrant by reason. Indeterminacy of causes and indeterminacy of reasons occupy different places in liberal theory. Nevertheless, liberal political theory envisions judges acting responsibly, reaching decisions based on the reasons that apply to them. If it happens that judges typically decide cases on other grounds in which the class of legal reasons plays no causal role or only an insignificant one, then that may well mark a serious failing in the practice, not in the theory. The theory would neither endorse nor rationalize it. The determinacy objection draws our attention to the scope of judicial leeway or discretion, not to the causal mechanism by which decisions are reached.

Before closing this part of the Article, let us pursue briefly one last argument for the claim that liberalism is committed to determinacy: the argument from democracy. The basic idea is that duly elected legislatures can only reflect the will of the populace if judges are in a suitable sense bound by democratically created legislation. Since liberalism is ordinarily committed to some form of democratic legislation, liberalism is committed to determinacy, as judges must decide cases on the basis of the reasons legislatures provide. To the extent those reasons fail to constrain judicial behavior, the very possibility of democratic rule is in doubt.⁸³

⁸² See *supra* part I.B.4.

⁸³ The argument applies primarily to statutory law and not to the common law, where no analogous problem about democratic rule would be thought to arise.

There are several things to note about the argument, not all of which, strictly speaking, bear on the problem of determinacy. First, the argument implies that judges must be constrained by the reasons provided in legislation, not just that their decisions be defensible by appeal to those reasons. If sound, the argument from democratic rule is that the outcomes judges reach must be in some significant way *caused* by the reasons legislation supplies. This is not a matter of determinacy, although critics of judicial behavior would be justified in complaining that judges who did not so regard the class of legal reasons were acting in bad faith.

Second, even if democratic rule requires that the outcomes judges reach be constrained by legislation, it does not follow that judges are unconstrained when the reasons legislation provides do not uniquely warrant outcomes. To have leeway within boundaries, is, after all, to be constrained.

The argument of this part of the Article can be summed up very briefly. Liberal political theory is committed to a variety of ideals that can be confused with a commitment to determinacy. In fact, however, liberalism is not committed to determinacy in the sense of uniquely warranted outcomes. The existence of indeterminacy in adjudication, therefore, poses no substantial threat to the possibility of legitimate governance by law.

II. OBJECTIVITY

A. *The Importance of Objectivity*

1. Procedural Objectivity

Recall the argument about law's objectivity:

- (1) Liberal political theory is committed to objectivity.
- (2) Legal practice is not in fact objective in the relevant sense.
- (3) Therefore, existing practices cannot be defended on liberal grounds.

The burden of establishing premises (1) and (2) would normally fall to the critic who would advance premise (3). In fact, no critic has yet met this burden for two different, but related reasons. First, there are too many political theories that claim to be liberal, so that as a practical matter it is simply too difficult to *establish* that "political liberalism" is committed to the objectivity of adjudication. Second, the concept of objectivity is itself quite complex, cutting across a variety of philosophical disciplines, including epistemology,

semantics, and metaphysics. No existing critical discussion has even tried to address problems of objectivity in all these areas of philosophy or examined the possible connection of each to a distinctly liberal conception of adjudication.

Since no one who argues that liberalism is committed to a kind of objectivity that legal practice fails to exhibit has ever presented anything like a satisfactory argument to this effect, perhaps we should simply suggest that until such an argument is offered there is no reason to suppose that liberalism is committed to objectivity, or, if it is, that the kind of objectivity to which it is committed, is not in fact exemplified by legal practice. This is not the tack we have chosen. Our view is that liberalism may well be committed to objectivity, and, more importantly, that legal practice is objective in the relevant sense.⁸⁴ To put this in terms of the argument about objectivity sketched above, we accept premise (1), but reject premise (2).

Before moving to a discussion of premise (2), we would like to outline some of the reasons for thinking that liberalism is committed to objectivity. Doing so will have the additional benefit of allowing us to introduce different senses of objectivity, while identifying different domains in which concerns about objectivity arise. We can distinguish between two different kinds of reasons for thinking that legal practice is objective in an important sense. The first of these has to do with concerns in *political philosophy*; the second has to do with concerns in *jurisprudence*. We consider both in turn.

With respect to objectivity and liberal political theory, the important distinction is between procedural (or epistemic) and metaphysical objectivity. A familiar view about the foundations of liberalism begins with the idea that, in order to endure, political associations must find a compromise among conflicting conceptions of value and the good, as well as among conflicting all-encompassing philosophical theories. In a liberal political community, law allows

⁸⁴ We argue below that there are good reasons for ascribing objectivity to liberalism, but the argument in this part of the Article does not depend on this ascription being fully warranted. For even if liberalism is not, and need not be, committed to objectivity of any sort, important aspects of legal practice are in fact objective. The critic who claims that liberalism fails to justify existing legal practice because that practice is not objective will be mistaken insofar as legal practice is in fact objective. The central issue is not whether liberalism is committed to objectivity, but whether law is objective in the appropriate sense. Thus, much of this part of the Article is devoted to specifying the relevant conception of objectivity.

individuals with competing conceptions to coexist (more or less) peacefully.⁸⁵

Legal decision-making procedures are designed to forge compromises among conflicting interests as well as to establish ground rules on which individuals with conflicting all-encompassing theories or political and philosophical conceptions might agree. These procedures are defensible, not because they provide correct answers to legal and political disputes, but because they resolve such disputes in a fair and impartial, that is, objective manner. This is a rough and ready formulation of the classic conception of procedural or epistemic objectivity. The decisions judges come to, by applying such procedures, may or may not be correct in the sense of corresponding to some independent set of moral or political facts; indeed, some proponents of procedural objectivity are themselves skeptical about the existence of such facts (though skepticism is not a necessary condition for subscribing to procedural objectivity). Whether motivated by skepticism or not, procedural objectivists share the view that what justifies the outcomes of legal disputes is the fact that judges reach them by following objective procedures.

Though objectivity is all that matters to the procedural objectivist, it matters to different procedural objectivists for different reasons. We have already considered the case of the skeptic who is

⁸⁵ "Objectivity" in this procedural sense essentially involves the absence of *partiality*: a procedure for reaching decisions is objective by virtue of its relative freedom from partiality to one side or the other. We could also think of this type of objectivity as *epistemological*, i.e., pertaining to the cognitive procedures by which we form beliefs about which side is entitled to a decision in its favor. In general, we form our conceptions of what features should comprise an objective epistemic procedure by reference to some conception of what outcomes would be correct: an epistemologically objective procedure is a "reality-tracker." Thus, impartiality is a mark of epistemic objectivity in adjudication because preexisting partiality to one side or the other is not relevant to what outcome the law deems correct; impartiality helps judicial decision-making track (legal) reality because legal reality is not partial. ("Legal reality" here means "what the law requires" not "what actually happens in court," which may be tainted with partiality, and so not objective.) As we observe in the text below, procedural or epistemological objectivity, though typically characterized by implicit reference to a conception of a reality-to-be-tracked, need not be defended by reference to what is really legally correct. It can instead be defended on the grounds that it is an impartial procedure for resolving disputes that is acceptable to individuals wedded to conflicting claims about what is right. Procedural objectivists need not deny that there are correct answers to political disputes, nor need they believe that objective decision-making procedures are unconnected to those answers. Their point is that the defense of those procedures is independent of the relationship between the procedures and the correctness (or incorrectness) of the answers secured by following the procedures.

dubious about objectively correct answers to legal, moral, and political questions. For her, objective procedures are all that she could hope for. We can distinguish between at least two other kinds of procedural objectivists whose commitment does not depend on skepticism about the existence of correct answers to pressing legal, moral, and political questions. First there are the Hobbesians. Hobbesians see procedural objectivity as a *modus vivendi*—a strategically motivated compromise among self-interested parties.⁸⁶ Having decisions reached by objective procedures is the only way to forge compromise among individuals with conflicting interests and philosophical conceptions. Objective decision procedures can be defended on Hobbesian grounds even if there are correct answers to most pressing legal, moral, and political questions. All that is required to support agreement on objective procedures are (1) sufficient disagreement about what those answers are, and (2) a collective interest in mutually advantageous cooperative endeavors.

We can now distinguish Rawlsians from Hobbesians. Like Hobbesians, Rawlsians need not be skeptics about the existence of correct answers to pressing moral, legal, and political questions. Unlike Hobbesians, however, Rawlsians believe that there are substantive grounds of political morality, not merely of self-interest or expediency, for agreeing to objective decision procedures; Rawlsians believe that liberalism requires that objective procedures be employed to settle disputes in a pluralistic setting.⁸⁷ In sum, procedural objectivity can be defended on skeptical grounds (as in the case of James Buchanan⁸⁸), substantive grounds of political morality (as in the work of the later Rawls⁸⁹), or strategic grounds (as in Hobbes⁹⁰).

In contrast to procedural objectivity, we can distinguish *metaphysical* objectivity. According to metaphysical objectivity, there are correct answers to pressing legal, political, and moral questions: answers whose correctness is independent of people's beliefs about them and are, in a sense to be clarified below, objectively correct. The legitimacy of authority depends, not on judges following

⁸⁶ See, e.g., THOMAS HOBBS, *LEVIATHAN* 228 (E.P. Dutton & Co. 1950) (1651).

⁸⁷ See, e.g., RAWLS, *supra* note 16, at 38.

⁸⁸ See generally JAMES M. BUCHANAN, *THE LIMITS OF LIBERTY: BETWEEN ANARCHY AND LEVIATHAN* (1975).

⁸⁹ See RAWLS, *supra* note 16, at 137.

⁹⁰ See HOBBS, *supra* note 86, at 107-08.

objective procedures, but rather on the accuracy of their decisions in reporting objective legal facts.⁹¹ Recall that a "legal fact" is simply any statement of what the law requires on some point: for example, "it is a legal fact that Coleman's failure to inspect constitutes negligence just in case it is true that as a matter of law Coleman's failure to inspect really does constitute negligence." Adjudication is objective in the metaphysical sense when the outcome of the adjudication coincides with the relevant legal fact. Some liberal political theories accept the view that the justification of coercion depends in part on the state's having an adjudicatory system whose outcomes track the objective legal facts; indeed, natural lawyers typically hold such a view.⁹²

To see why political liberalism might be committed to objectivity in either the procedural or the metaphysical sense, notice what subjectivity would consist in. Adjudication is subjective in the procedural sense just in case judges reach decisions by relying on their feelings of bias and partiality toward one side or the other. Adjudication is subjective in the metaphysical sense when something is a legal fact by virtue of the individual judge believing it to be a legal fact. Were adjudication subjective in either sense, there would be little reason to suppose that a citizen would have a *prima facie* duty or moral reason to comply with the judgments of officials. Similarly, it would be hard to see how the use of coercion to enforce such decisions could be justified. The liberal conception of political obligation and the conditions under which coercion is justified both support the view that liberalism is committed to either epistemic or metaphysical objectivity.

The above arguments for objectivity are drawn from normative considerations. The view that legal practice has an important objectivist component need not rely entirely on normative considerations, however. For it is part of our ordinary conception of adjudication that judges seek to resolve disputes by determining what result the law requires. What the law requires, in turn, is thought to be independent of how judges regard the law in the sense that judges and lawyers can be wrong about what the law requires, and in the additional sense that adjudication is about discovering the law's requirements. This suggests that the ordinary conception of legal facts treats them as being objective in some

⁹¹ See *infra* part II.A.2.

⁹² See, e.g., Michael Moore, *Moral Reality Revisited*, 90 MICH. L. REV. 2424, 2477 (1992).

sense. Our goal is to specify that sense of objectivity.

One consequence of defending objectivity on liberal normative grounds is that if liberalism's critics are correct in arguing that legal practice is not objective in either the procedural or the metaphysical sense, then current legal practice cannot be defended on liberal grounds. If our current practices are to be defended, we will have to look to other political conceptions. If, however, the claim about objectivity is motivated by considerations of analytic jurisprudence rather than substantive political theory, then the failure of legal facts to be metaphysically objective would imply something else: not that liberal legal practice is indefensible, but rather that our ordinary understanding of legal practice is deeply mistaken. If it were the case that the objects referred to in the domain of legal discourse were not objective, we would need to provide another explanation of our practice of referring to legal facts as if they were objective, when in fact they are not.

As our mission here is to uncover the relevant conception of objectivity, we do not assume adjudication will turn out to be objective in any sense. Some sort of metaphysical objectivity may be a theoretical or conceptual commitment of our discourse about law, but upon closer inspection it may well turn out that our discourse is misleading, and that our apparent commitment to objectivity is based on a "mistake." John Mackie famously held a similar view about our ethical discourse.⁹³ That is, when we make moral judgments we talk as if moral facts were part of the fabric of the universe in the same way that tables and chairs are. Our ethical discourse is based on a commitment to this kind of objectivity of moral facts. Thus, because moral facts are not objective in this sense, Mackie argues that our ethical views are based on a mistake.⁹⁴

⁹³ See J.L. MACKIE, *ETHICS: INVENTING RIGHT AND WRONG* 40 (1977).

⁹⁴ More precisely, Mackie agrees with the realist that ethical discourse is essentially cognitive, i.e., it aims to describe and state facts. But for various reasons, Mackie argues there are no such facts. Thus, ethical discourse is systematically in error because it purports to describe and state facts where there are none. See *id.* at 35. In metaethics, this doctrine is called "error theory." Most who agree with Mackie on the metaphysical point—that there are no moral facts—disagree with him on the semantic point—that ethical discourse is essentially cognitive. While it is hard to understand the point of a putatively fact-stating discourse that never succeeds in stating any facts, ethical discourse seems to play *some* important role in our lives. The noncognitivist suggests that we look for that role not in any ability of ethical language to state facts, but rather in its ability to *express* certain sorts of important attitudes and feelings.

The same may be true of our legal discourse. We talk as if some legal decisions are right whereas others are not, and not just because a judge so regards them. This suggests that judgments are not merely reports of a judge's preference, but that there is a sense in which legal facts that make such judgments right or wrong are, or can be, objective. It is perfectly possible that we are wrong, our discourse misleading. We cannot assume that our discourse has it right. That is what needs to be argued.

It is important, at this point, not to confuse objectivity with determinacy.⁹⁵ To say that the law is determinate is to say that there are correct answers to legal disputes. An answer is correct if it coincides with the relevant legal fact of the matter. Thus, the judge's ruling that Coleman's failure to inspect is negligent is correct if the legal fact of the matter is that Coleman's failure to inspect constitutes negligence. The determinacy thesis claims in effect that in all cases, there are legal facts-of-the-matter: the point of adjudication is to reach decisions that coincide with what those facts are.

The worry about objectivity concerns the status of those legal facts—when there are such facts. Are they facts because a judge or most lawyers would regard them as such, or are they facts independent of whether judges or lawyers so regard them? In this Section of the Article, we presume that, to the extent that the law is determinate (as it is, for example, in easy cases), the correct answers must be *objectively* correct; our concern, however, is with what sense of objectivity is at issue here. Of course, indeterminacy is still compatible with legitimate authority for the reasons given in the first half of this Article.⁹⁶ But to the extent that the law is determinate, objectivity (of some sort still to be specified) is required.

To accept indeterminacy, then, is to allow that sometimes there are no legal facts of the matter: e.g., it is not a legal fact that Coleman's failure to inspect constitutes negligence and it is not a legal fact that Coleman's failure to inspect does not constitute negligence. To accept (metaphysical) subjectivity is to allow that where there are such facts what makes them so is that judges or lawyers so regard them.

⁹⁵ The natural tendency to conflate objectivity and determinacy stems from the fact that we sometimes say that the law is objective just in case it is largely determinative of outcomes in individual cases. In spite of this tendency, and perhaps because of it, we need to distinguish the claims of determinacy from those of objectivity.

⁹⁶ See *supra* part I.B.

While we are on the subject of exploring the relationships between determinacy and objectivity, it is worth noting that there is an important connection between *indeterminacy* and subjectivity, a connection that raises a serious concern about the cogency of the critical attack on liberalism. Liberalism's critics reject both determinacy and objectivity, and therefore accept both indeterminacy and subjectivity. The problem is that one cannot coherently maintain both indeterminacy and subjectivity. Once one accepts subjectivity, one is committed to the view that legal facts are as judges regard them, because they regard them as such. Since correct answers are those that correspond to the facts and the facts are simply those that the judge regards as such, there must be determinate answers to all legal disputes. Thus, because subjectivity entails determinacy, no critic of liberalism can coherently maintain both subjectivity and indeterminacy. This means that when liberalism's critics claim that law is indeterminate, they must really have in mind an objectivist account of legal facts!

In what follows, we reject the procedural conception of objectivity in favor of the metaphysical one, at least as a first approximation. We are attempting to provide an analytic jurisprudence, that is, a philosophic account of our practices—including adjudication—and our pretheoretic view is that legal discourse presupposes a form of metaphysical objectivity.⁹⁷

With these preliminaries out of the way, let us now turn our attention to the second premise.

2. Metaphysics and Semantics

Claims about the objectivity of law can be cast in either metaphysical or semantic terms. That is, they might be expressed as claims about legal discourse (semantics) or about the objects referred to by the discourse (metaphysics). While we focus on the metaphysical side of the divide, it will prove helpful to understand the relationship between objectivity in metaphysics and semantics. We begin with metaphysics. In its simplest and most basic form,

⁹⁷ As we noted before, it may well happen that there is no satisfactory conception of metaphysical objectivity that applies to law. If that turns out to be the case, legal facts would not be objective, but subjective. But it would not follow, and this is the important point, that adjudication would be subjective, for it might yet be procedurally or epistemically objective. That form of objectivity is compatible both with metaphysical subjectivity about legal facts and with our liberal tradition regarding the terms of legitimate coercion.

metaphysics is concerned with "what there is."⁹⁸ *Metaphysical realism*⁹⁹ is the view that what there is—the world—is independent of human minds in two senses. First, the existence and character of the world is not simply the extension of human mind (metaphysical or constitutive independence). Second, the existence and character of the world does not depend on the evidentiary tools available to us for gaining access to it (epistemic independence). For the time being, we shall speak simply of the "independence" of the world from evidence and belief, and that because of its conception of the independence of the world, metaphysical realism is committed to the "strong objectivity" of "what there is."

Metaphysical antirealism denies that the world is independent in one or both senses, though the epistemic sense has been the most important in the twentieth century ("what there is" depends on what we take there to be). If realism entails strong objectivity, then it would be natural to assume that antirealism entails subjectivity. But that would be a mistake, or so we will argue. The view that we want to press below is that one can reject metaphysical realism and yet embrace objectivity.

Note two further points. First, one can be a metaphysical realist about certain objects in certain domains (midsize physical objects, e.g., tables and chairs) and an antirealist about the objects in other domains (e.g., moral properties or the theoretical entities in scientific theories). Second, metaphysical realism typically involves more than a view about the objectivity of the world. Crispin Wright has helpfully characterized metaphysical realism as the conjunction of both a modest and a presumptuous thesis.¹⁰⁰ The modesty derives from its view of the world as independent of our experiences of it and our beliefs about it. The presumptuousness derives from its view that, in spite of this independence, individuals can come to know important truths about the world, including those

⁹⁸ There are reasons and contexts in which it makes sense to distinguish metaphysics from ontology; in our usage here, metaphysics encompasses ontology.

⁹⁹ The reader should not confuse Legal Realism which is the name of a jurisprudential school with metaphysical or semantic realism which are theses about the nature of what there is and meaning respectively. Metaphysical realists believe that there is a way the world is that is independent of human beliefs and minds, whereas Legal Realists sometimes seem to believe, among other things, that legal facts are what judges determine them to be. So one reason for insisting that the reader keep the distinction in mind is that, though the two views share the word "realism," they stand for nearly opposite claims with respect to the status of (legal) facts.

¹⁰⁰ See CRISPIN WRIGHT, *REALISM, MEANING AND TRUTH* 1-2 (1987) (stating that "[r]ealism is a mixture of modesty and presumption").

concerning its deep structure. Thus, the metaphysical modesty of realism is typically conjoined with an epistemological presumptuousness: yes, the world is the way it is independent of our beliefs and evidence; nevertheless, we can come to know things about the way the world really is.

We need now another set of preliminary distinctions between realism and antirealism in semantics. Semantic theories provide accounts of what meaning itself consists of—that is, what kind of property it is—as well as how sentences (or words) get their meaning. Semantic realists make two claims. The first is that the meaning of a sentence is given by its truth conditions; the second is that those truth conditions can themselves be evidence-transcendent. Thus, evidence-transcendence is a central element of both metaphysical and semantic realism.

Antirealism in semantics is characterized by its denial of either or both of these claims. So a semantic antirealist might deny that meaning is given by truth conditions, or she might deny that meaning is evidence-transcendent. An antirealist can accept that the meaning of sentences is given by truth conditions and deny that truth-conditions can be evidence-transcendent.¹⁰¹ Or an antirealist can deny that meaning is given by truth conditions. Instead, for example, she could argue that the meaning of a sentence is given by its “assertibility conditions” (i.e., the conditions under which it can be asserted); this is the approach many semanticists who have been influenced by Wittgenstein have taken.¹⁰² The fact remains, however, that most antirealists deny both of the central tenets of semantic realism.

Before moving on, we have to say something about conventionalism in its relationship to both realism and antirealism. There are many senses of conventionalism, but there is one usage of “conventionalism” that is common to both realism and antirealism. We take note of this usage because failing to distinguish it from other senses of conventionalism invites the confusing and mistaken view that all theories of meaning are ultimately conventional. Choosing a particular word to stand for something is conventional. We choose

¹⁰¹ This is a recurring theme in Crispin Wright’s form of antirealism. See, e.g., Crispin Wright, *Realism, Antirealism, Irrealism, Quasi-Realism*, in 12 *MIDWEST STUD. IN PHIL.* 25, 27 (Peter A. French et al. eds., 1988) (stating that antirealism “is exactly the view that the notion of truth cannot intelligibly be evidentially unconstrained . . . [but that an antirealist has] no motive to forswear all use of the notion of truth”).

¹⁰² See, e.g., KRIPKE, *supra* note 32, at 74.

the word "water" to refer to something when we could have just as easily made up another word to serve the same function, say, "wetski." Languages are always conventional in this sense, but this sort of conventionality is independent of the realist/antirealist divide. For the realist, once we use the word "water" to stand for something that has the chemical property of being H₂O, the meaning of water is fixed by the way the world is. The word "water" cannot be correctly employed in some other way to refer to objects that do not have the appropriate chemical structure. In contrast, for the antirealist, water is just whatever the community of language-users permits us to say it is, whether or not it has the property, H₂O.¹⁰³

Semantic realism presupposes metaphysical realism. The claim that meaning is fixed by the way the world is (semantic realism) presupposes that there is a way that the world is independent of human evidence and belief (metaphysical realism). Metaphysical realism, however, does not entail or presuppose semantic realism. One can believe that the character of the world is independent of our epistemic access to it, but that the nature of meaning itself is not. In such a case, semantic antirealists would provide us with a picture of language that would be inadequate for depicting the world as the metaphysical realist conceives it; not surprisingly, then, it is common for metaphysical realists to be semantic realists.

Given our concerns regarding objectivity, realism is important because of its relationship to objectivity. If one wanted to establish the objectivity of legal discourse, then one might be inclined to defend a semantic realist's perspective of the legal domain. And if one wanted to defend the objectivity of the facts or the objects referred to in the legal domain, then one natural way of doing that would be to defend a metaphysical realist conception of legal facts. Among contemporary jurisprudes, Michael Moore defends realism about both legal facts and the semantics of legal discourse.¹⁰⁴

¹⁰³ The confusion is similar to another confusion that applies to metaphysics. It is common to accept realism about tables and chairs, which means that tables and chairs exist independently of human beliefs about them. But we have heard many otherwise intelligent people deny the objectivity of tables and chairs on the grounds that people construct tables and chairs. Neither exists in nature as a natural kind. They are constructed by humans. But the metaphysical realist's claim is not that tables and chairs are *causally* independent of human behavior, but rather that they are epistemically and constitutively independent of human minds.

¹⁰⁴ See Moore, *supra* note 92, at 2469-70.

There are, however, serious problems for all forms of semantic realism, whether in the legal domain or not, and there are specific problems with pursuing a metaphysical realist conception of legal facts. We take up some of the problems facing realism about legal facts below. For now we want to draw the reader's attention to familiar concerns about semantic realism in all domains of discourse. The key arguments here are associated with Kripkenstein, Michael Dummett, and Crispin Wright.¹⁰⁵

One way of understanding the semantic skepticism associated with Kripkenstein is to view it as an attempt to undermine what we might call semantic Platonism: the view that meaning is given by facts that exist independently of the semantic practices and beliefs of humans.¹⁰⁶ Kripkenstein is not alone in this effort. Dummett's influential essays have raised doubts about the ability of semantic realism to explain "meaning acquisition" and "manifestation,"¹⁰⁷ and Crispin Wright has formulated a novel and important objection to realist semantics that is based on the normativity of meaning (of which Kripkenstein's argument may be just a special case).¹⁰⁸ Here is the basic idea behind Wright's objection.¹⁰⁹

According to the realist, the meaning of a sentence is given by its truth conditions, the set of conditions that must obtain in order for it to be true. Sentences, for the realist, may be true even if we are unable to grasp their truth or to have access to it. On the other hand, it is central to our concept of meaning that it play a norma-

¹⁰⁵ Purely for reasons of philosophical currency, *not* cogency, we concentrate on Kripkenstein and Wright.

¹⁰⁶ See WRIGHT, *supra* note 32, at 10.

¹⁰⁷ See generally MICHAEL DUMMETT, *TRUTH AND OTHER ENIGMAS* (1978) (discussing the philosophical interrelationship between meaning and understanding). McDowell, in criticizing Dummett, identifies a core of shared assumptions between Dummett and Platonists and proposes a new way to move beyond both. See John McDowell, *Anti-Realism and the Epistemology of Understanding*, in *MEANING AND UNDERSTANDING* 225, 242 (Herman Parret & Jacques Bouveresse eds., 1981) (proposing that the issue of understanding be viewed in epistemological terms rather than at the phenomenological level).

¹⁰⁸ See WRIGHT, *supra* note 100, at 23-26.

¹⁰⁹ We do not mean to slight Dummett, though we think Wright's argument is particularly meaningful in the legal context. Dummett argued that the semantic realist will have trouble explaining both how we can acquire new meanings, and how we can manifest our understanding of a meaning, when meaning, for the realist, is given by possibly evidence-transcendent truth-conditions. See DUMMETT, *supra* note 107, at 420-30. That is, the dilemma facing the realist is that if it is possible that we could never detect the conditions that would constitute the meaning of a sentence, how then can we acquire this meaning (i.e., come to understand it) or manifest our grasp of the meaning (i.e., display our understanding of it)?

tive role by constraining the uses to which sentences can be legitimately put. For example, the *meaning* of "the cat is on the mat" constrains the uses to which the sentence can be put; thus, it prevents us from "correctly" using it to refer to a pig being on my bed.¹¹⁰ But if the meaning of a sentence is given by its truth conditions in a world independent of our evidentiary capacities to access it, then how can the meaning constrain our use of it? How can we be constrained by something possibly beyond our access?¹¹¹

In short, meaning constrains usage. But meaning that is given by facts that we may have no access to cannot constrain our use in the appropriate way. Semantic realism has the problem of explaining the way in which meaning can be normative, i.e., how it can constrain usage. The antirealist semantics of the Kripkensteinian communitarian, for example, do not face this problem. If the meaning is set by what the community of language users will allow Leiter to assert, then the meaning of "the cat is on the mat" may not prevent Leiter from using it to refer to a pig being on the bed, if that is an allowable assertion under the prevailing practice. So it is the practice of the community of language users with which each language user is adequately familiar that constrains usage.¹¹²

For the foregoing reasons, we reject the application of semantic realism to legal discourse. As we noted earlier, it is (logically) possible to accept metaphysical realism but reject semantic realism. However, we also noted that if one took this tack, one would be committed to the odd view that the discourse in question could not describe the world as the metaphysical realist conceives it. Thus, semantic and metaphysical realism typically go hand in hand. The considerations that invite us to abandon semantic realism in a domain of discourse appear to suggest that we abandon metaphysical realism in that domain as well. And if we give up both semantic and metaphysical realism, does not that imply that we have

¹¹⁰ That is, we cannot *correctly* use the sentence "the cat is on the mat" to refer to a pig on my bed under normal circumstances, i.e., where I am trying to assert a true proposition.

¹¹¹ Or, as Nietzsche put the same point regarding Kant's attempt to give a metaphysical foundation to morality: "[H]ow could something unknown obligate us?" FRIEDRICH NIETZSCHE, *Twilight of the Idols*, in THE PORTABLE NIETZSCHE 463, 485 (Walter Kaufmann trans., 1954) (1888).

¹¹² A further question, beyond the scope of the present inquiry, is how conventions or practices constrain. How does the mere convergence of behavior (as in a convention) impose normative constraints?

abandoned all hope of providing an objective conception of the relevant discourse or of the objects referred to by the discourse as objective?

Realism entails objectivity, but objectivity does not entail realism. Antirealism, in other words, does not entail subjectivity. We intend to defend a form of antirealist objectivity. But how can a position that denies that the world is independent of the ways in which we happen to construe it be compatible with objectivity? Our task is to show how a discourse and the objects referred to in the discourse can be objective even if the domain of discourse does not invite a realist interpretation. That is the task to which we now turn.

3. Objectivity and Subjectivity

We begin by attending more carefully to what it means to talk about "objectivity" and "subjectivity." Consider, in this regard, the distinction between what "seems right" (with respect to the truth of some judgment) and what "is right" (i.e., what really is the case).¹¹³ *Subjectivism* is the view that denies the distinction. To say that something is right under subjectivism is to say that it seems right to me, no more, no less. We might call this doctrine Pure Protagoreanism,¹¹⁴ since it literally suggests that *each* individual is the measure of all things.¹¹⁵

At the other end of the continuum from subjectivism is the doctrine we will call "strong objectivism." According to this view, what "seems right" never determines what "is right." According to the strong *metaphysical* objectivist, what is the case about the world never depends on what humans take there to be (even under ideal epistemic conditions). According to the strong *semantic* objectivist, the meaning of a sentence never depends on what any speaker or community of speakers takes it to mean. We will call strong

¹¹³ For a more complete development of these distinctions, see Brian Leiter, *Objectivity and the Problems of Jurisprudence*, 72 TEX. L. REV. 187, 192-96 (1993) (book review). We also ignore here certain philosophical details and difficulties that are taken up in Leiter's article.

¹¹⁴ This doctrine is an allusion to Plato's *Theaetetus*. See PLATO, *THEAETETUS* *152a, *166a-b.

¹¹⁵ What, someone might wonder, is the meaning or content of the thought, "It seems right to me that X means Y"? If subjectivism is true, then it must only be: "It seems right to me that it seems right to me that X mean Y." But what, then, is the content of *that* thought? Clearly, an infinite regress is in the offing. This might be one reason—one among several, no doubt—for rejecting subjectivism about meaning.

objectivism the "Platonic" position.¹¹⁶ Thus, at one end of the subjectivism/objectivism divide we have Protagorean subjectivism; at the other end we have Platonic objectivism.

"Minimal objectivity"¹¹⁷ occupies some of the space between these two extremes. According to minimal objectivity, what seems right to the majority of the community determines what is right. As regards the theory of meaning, this is simply a form of "linguistic communitarianism": how most speakers are disposed to use a word fixes its meaning. Minimal objectivity preserves the essential anthropocentrism of the Protagorean doctrine in that neither the meaning of sentences in the discourse nor the metaphysical status of the objects referred to by those sentences are independent of human practices with regard to them. But it introduces an element of objectivity that consists in taking from the individual the measure of all things and placing that power in the community as a whole. According to minimal objectivity, individuals are not the measure of all things, but their collective or convergent practices are. Because it denies the epistemic transcendence of meaning and ontology, minimal objectivity is essentially antirealist; because it denies that the world is just how any particular person takes it to be, it is essentially objectivist. Whether it is a powerful enough conception of objectivity to allay our fears about the subjectivity of adjudication remains to be seen.

We now have two conceptions of objectivity that may be applicable to the legal domain: strong and minimal objectivity. Both conceptions of objectivity play a role in various of our non-legal practices. Strong objectivity, for example, figures in our conception of scientific inquiry. We view scientists as trying to uncover the way the world really is; and the way the world is is independent of anyone's beliefs or theories about it, all of which could turn out to be false.¹¹⁸

On the other hand, there are several predicates that are naturally interpreted as being minimally objective. Being fashionable is an obvious example.¹¹⁹ Something is (objectively) fashion-

¹¹⁶ See PLATO, PHAEDO *74a-75b; PLATO, REPUBLIC *475-80, *508d-e; PLATO, SYMPOSIUM *211a-b.

¹¹⁷ See Leiter, *supra* note 113, at 192-93.

¹¹⁸ This may even be the way in which scientists see their practice, but interestingly, it is not the only way philosophers of science see scientific practice and its metaphysical commitments. In this regard, see LARRY LAUDAN, SCIENCE AND RELATIVISM xii (1990).

¹¹⁹ See Leiter, *supra* note 113, at 195.

able provided the majority of the community treats it as such, not otherwise. It is impossible to conceive of the property of being fashionable in any other way. It makes no sense, for example, to say that a style of dress is fashionable and mean by that nothing more than that I alone regard it as such. At the same time, it makes no sense to say that whether a style of dress is fashionable is altogether independent of how people regard it. So being fashionable is neither purely subjective nor strongly objective; it is minimally objective.

Just to complete the picture, it is also obvious that some predicates naturally admit of a subjective interpretation. A good example is tastiness.¹²⁰ When we try to make sense of someone's claim that a certain ice cream flavor tastes good, it is natural to understand her to be claiming that it tastes good to her. It makes no sense to understand her to be asserting that it tastes good independently of how anyone regards it as tasting; and it makes only slightly more sense to understand her to be claiming that it tastes good because most people would so regard it.

These various conceptions of objectivity and subjectivity all play a role in our accounts and understandings of different features of our experience. It is simply false, and not merely unhelpful, to claim that "everything is subjective." If our theories are supposed to illuminate our practices, then it is worth noting that much of our discourse employs predicates that invite objectivist interpretations. The only meaningful or worthwhile endeavor is to try to determine which domains of discourse admit of objective and subjective accounts. Which conception of objectivity or subjectivity applies to a particular domain? Which applies to the legal domain?

As important as it is not to conflate concerns about objectivity with concerns about determinacy, it is equally important not to conflate theories of *metaphysical* objectivity with general semantic claims. The former are concerned with the degree of mind- and evidence-independence of facts of various kinds;¹²¹ the latter give an account of meaning in some or all regions of discourse. For example, minimal objectivism about *moral facts* (the view that the

¹²⁰ See *id.* at 194.

¹²¹ We can think of theories of semantic objectivity—theories about the objectivity of meaning—as a subset of theories of metaphysical objectivity. Instead of being concerned with mind- and evidence-independence of facts in general, theories of semantic objectivity are concerned with the degree of mind- and evidence-independence of semantic facts (or facts about meaning).

community determines what is morally right and wrong) is a *metaphysical* view—a view about the status of moral facts. Though it may be a plausible metaphysical view, it is obviously not a very plausible account of the semantics of moral discourse. In moral discourse—in our discussions and debates about moral issues—we do not justify our judgments about the morality and immorality of various acts by averting to the fact that “most people around here believe it to be so.” The surface of our moral discourse seems to aspire to higher forms of objectivity. What this means is that even if minimal objectivity provides the best interpretation of the way in which moral facts are regarded, it does not provide a particularly plausible semantics of moral discourse. Even if moral facts are fixed by community practices, the discourse of moral argument invites a somewhat different interpretation. It is no part of the practice of making and defending moral judgments that those who do so are satisfied to show that the bulk of the members of a community regard conduct as good, bad, right, wrong, and so on.

Consequently, a philosopher who thinks that moral facts are subjective or minimally objective (as a metaphysical matter)¹²² still owes some account of the semantics of our moral discourse: what do we *mean* when we purport to defend moral claims without averting to what the speaker or the community of speakers takes to be true. Recent philosophical work has shown that there can be an account of the semantics of moral discourse and its purported claims to strong forms of objectivity (“what the Serbs are doing in Bosnia is really wrong, whether or not they know it”) that is compatible with denying comparably strong forms of (metaphysical) objectivity.¹²³ There may be no moral facts, but we can still have an account of the meaning of ethical discourse which proceeds as though there were.

Unsurprisingly, there are cases where the same theory of objectivity will suffice for both the metaphysics and the semantics. What is fashionable is determined by what the bulk of the community regards as fashionable. Moreover, in discussions about what is fashionable, we can properly avert to majority opinion as a gauge

¹²² Our locution here may not be standard: a philosopher who thought moral facts were metaphysically subjective in the sense defined above might prefer to say that there are no moral facts at all, suggesting that the very concept of a moral fact presupposes some form of objectivity.

¹²³ See ALLAN GIBBARD, *WISE CHOICES, APT FEELINGS: A THEORY OF NORMATIVE JUDGMENT* 153-250 (1990) (providing a seminal treatment of this issue).

for the correctness or incorrectness of particular judgments of fashionability. As we suggested above, however, even if moral facts are—metaphysically—subjective or minimally objective, it is not part of meaningful moral discourse to establish the immorality of torture by averting to the speaker's or the community's dislike of it.

As with moral discourse, there may be reasons to think that skeptical positions regarding the metaphysics of legal facts (e.g., subjectivism or minimal objectivism) may have to be conjoined with different views of legal semantics. Judges, after all, do offer reasons for their decisions, and in the course of doing so seem to aspire to certain forms of objectivity that are stronger than subjectivism and minimal objectivism—a point exploited to good effect by Ronald Dworkin over the past twenty-five years.¹²⁴

Averting to the semantics of legal discourse as a way of establishing metaphysical claims has been a large part of Dworkin's arsenal of weapons used against his enemy, the legal positivist. Here are two examples. First, in arguing that principles and policies other than legal rules are binding legal standards, Dworkin claims that judges do not appear to write or speak as if they treated such standards as extralegal. Then, in defending the claim that there are right answers to legal disputes, Dworkin argues that judges argue as if there were right answers even if they do not agree about what those answers are. In both cases, Dworkin employs features of the discourses as a way of suggesting or establishing claims about the status of the objects referred to in the discourse.¹²⁵

¹²⁴ See, e.g., Dworkin, *Model of Rules*, *supra* note 27, at 14, reprinted in DWORKIN, *supra* note 3, at 14.

¹²⁵ Coleman, for one, is a positivist who has never found this line of argument persuasive, since it rests on a philosophically dubious form of argument, employing features of the semantics of legal discourse to establish a metaphysical claim about the objects referred to by the discourse.

The analogy with the case of ethics is again apt and likely to be illuminating. Many writers who agree on the metaphysical question (about the status of moral facts) disagree on the semantics. Ayer, Gibbard, Mackie, and Stevenson are all metaphysical antiobjectivists about morality (i.e., ours is a world without moral facts), and they all disagree, in some cases dramatically, on the best account of the meaning of moral language and moral discourse. See A.J. AYER, *LANGUAGE, TRUTH AND LOGIC* (1952); GIBBARD, *supra* note 123; MACKIE, *supra* note 93; CHARLES STEVENSON, *ETHICS AND LANGUAGE* (1944). We think it more fruitful to begin with the metaphysical question—what there is—and deal with the semantics afterward. Semantics always has the option of revisionism (i.e., maybe the pretensions of language cannot be realized, and so must be revised), but revisionism in metaphysics, as a picture of what there is and its status, seems less promising.

The concepts of minimal and strong objectivity are far from unfamiliar in jurisprudence, even if they have not been discussed previously in these terms. Minimal objectivity is very close to conventionalism, and most contemporary legal positivists (Coleman is an exception) have favored some or other version of it. Strong objectivity is associated with the natural law tradition and most recently with the works of Michael Moore and David Brink.¹²⁶ Both minimal and strong objectivity are subject to important criticisms, especially when construed as semantic theories. Some of these criticisms are quite general; others are more limited to one or the other as a conception of objectivity in law. In taking up these objections, we want not only to raise doubts about the applicability of either to law; we want as well to motivate consideration of yet another conception of objectivity that is largely unfamiliar to legal scholarship, modest objectivity.

B. *Setting the Stage for Modest Objectivity*

1. Problems with Strong Objectivity

Following Crispin Wright, we have characterized metaphysical realism as the conjunction of two premises: one affirming the independence of facts from our epistemic access to them (their independence from human evidence and belief); the second affirming the possibility of securing knowledge of such facts.¹²⁷ The most pressing problem with metaphysical realism about legal facts has to do with the tension between these two claims. If the existence and nature of legal facts are independent of what all lawyers and judges believe (or might have reason to believe), then how do judges gain access to them? Put differently, what reason is there for thinking that conventional adjudicatory practices involve reliable mechanisms for identifying legal facts?

The realist about legal facts might simply deny that there is a problem here. She might offer two responses. First, she might say that it does not matter whether judges have access to the legal facts of the matter. Legitimate authority depends only on there being correct answers to legal disputes, not on any judge's ability to access

¹²⁶ See generally David O. Brink, *Legal Theory, Legal Interpretation, and Judicial Review*, 17 PHIL. & PUB. AFF. 105 (1988); Michael M. Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 279 (1985).

¹²⁷ See WRIGHT, *supra* note 100, at 1-2.

them. But this ought to be unconvincing. The fact that there are right answers would count for very little if judges were invariably to come to the wrong conclusions about them. Why would anyone have a reason to comply with the law's demands if there were no reason to believe that the decisions judges arrive at were generally correct? In order for coercion to be justified, it must be employed to enforce answers that are generally correct, not just ones judges happen to reach. So there is no escaping the problem of access.

Metaphysical realists about legal facts, like Michael Moore,¹²⁸ are well aware that this answer will not do. Instead, they offer a second kind of response: judges can have access to the correct answers to legal disputes in the same way that ordinary citizens can have access to ordinary facts of the matter. The problem is somewhat different in the case of judging, however. The evidence on which a judge bases his beliefs about what is the correct answer to a dispute is presented in a special way through an adjudicatory process. Our question, therefore, becomes what reason do we have for thinking that the adjudicatory practices we have developed will yield judgments or beliefs that accurately track what the law in fact (objectively) requires?

If we think of an adjudicatory process as the mechanism through which a judge forms *justified beliefs* about what the law requires, then the question becomes what conception of the adjudicatory process will ensure that those justified beliefs are also true, that they coincide with what the law actually requires. Philosophically, we would put the question this way: what *epistemology* of judging is appropriate to a metaphysical realist conception of legal facts?

The leading metaphysical realist about legal facts, Michael Moore, is a *coherentist* about justification. Justified beliefs about what the law requires of officials are those that cohere in an appropriate way with the set of beliefs about the law that the judge already has. Beliefs cohere to the extent that they are, for example, consistent and display a maximum of inferential support for each other.¹²⁹ The adjudicatory process, then, is best seen as the vehicle through which judges try to provide an account of the law

¹²⁸ Although we say, "like Michael Moore," Moore and David Brink (as well as some natural lawyers) are probably the only adherents of the view that legal facts are strongly objective. See *supra* note 126 and accompanying text; cf. Leiter, *supra* note 113, at 201-02.

¹²⁹ See LAURENCE BONJOUR, *THE STRUCTURE OF EMPIRICAL KNOWLEDGE* 93-101 (1985).

that makes the law's demands cohere in the relevant way. The outcome a judge should give in a particular case is the one that maximally coheres, and, provided the judge has gone about things in the right way, she is justified in believing that the outcome she reaches is what the law *really* requires. Coherence in our beliefs is supposed to track the strongly objective requirements of the law.¹³⁰

The problem is that coherence as an account of justified belief (i.e., as an epistemology of judging) is a poor match for metaphysical realism regarding the content of legal judgments and the status of legal facts. Why should the fact that a set of beliefs cohere for a judge (or for us) be a reason for thinking that those beliefs track the way the world really is? This is just the familiar philosophical worry that in the absence of a mechanism through which a coherent set of beliefs comes to be connected to facts about the world that are independent of those beliefs, there are no grounds for believing that justified beliefs, so conceived, track the way the world is. The problem is not eliminated even on the assumption that the world is itself coherent or consistent. For why should the kind of coherence among our beliefs (which is justificatory or inferential) correspond to the consistency or coherence of things in the world? Coherence among beliefs has nothing to do with the kind of coherence that objects in the world are thought to exhibit.¹³¹

¹³⁰ There are numerous formulations of the requirements of coherence, and the interested reader would do best by consulting the epistemology literature rather than the legal literature. *But see* Joseph Raz, *The Relevance of Coherence*, 72 B.U. L. REV. 273 (1992) (providing an illuminating treatment of the topic). There are well-known problems with coherentist accounts of justified belief, but our concern here is with the narrower problem of mixing a coherentist account of justified belief with a metaphysical realist picture of legal facts.

¹³¹ Suppose the required coherence *includes* coherence among our predictive beliefs (e.g., water will boil at 100 degrees centigrade) and our beliefs based on subsequent experience (e.g., water did in fact boil at 100 degrees centigrade). Will not this sort of coherence warrant the inference that our predictive beliefs described the world as it really is? Although this strategy might seem completely inapposite in the legal case, it may seem to harmonize coherentism and metaphysical realism in other domains. We do not take up this strategy of argument here, except to note that it is parasitic on what is known as the explanatory argument for realism. For powerful criticisms of this underlying explanatory argument, see Arthur Fine, *The Natural Ontological Attitude*, in SCIENTIFIC REALISM 83, 84-91 (Jarrett Leplin ed., 1984) (discussing inherent flaws to various methodological defenses of realism); Peter Railton, *Explanation and Metaphysical Controversy*, in SCIENTIFIC EXPLANATION 220, 224-30 (Philip Kitcher & Wesley C. Salmon eds., 1989); BAS C. VAN FRAASSEN, LAWS AND SYMMETRY 142-49 (1989).

Our objection here is not to strong objectivity about legal facts per se. Rather, it is an objection to mating strong objectivity with coherence theories of justified belief as a satisfactory account of how judges can have access to strongly objective legal facts (which, on the view under consideration, is a precondition for legal authority). In areas outside of law, the vast majority of contemporary metaphysical realists are "externalists" in epistemology.¹³² Externalism holds that beliefs are justified provided they result from a reliable causal mechanism; that is, if the fact of which one claims to have knowledge causes one to have the beliefs one has in a suitable way, then one's beliefs are justified. Coherence has nothing to do with the justification of beliefs on an externalist account; the right kind of causal relationship between fact and belief is all that is required for a belief to be justified. Externalism is not subject to the same criticisms we have levelled against coherence accounts because externalism requires a mechanism (causation) through which the way the world is connected to justified beliefs so that the set of those beliefs tracks this world. Justified beliefs are caused (in an appropriate and reliable way) by those facts.

If externalism solves the mechanism problem that haunts coherentism, why would a metaphysical realist about legal facts not simply abandon coherentist accounts of justified belief about legal facts in favor of some form of externalism? Fortunately, we can answer this question without getting into the details of various forms of externalism. In fact, pursuing the externalist approach may well prove fruitful in a variety of domains,¹³³ but there is good reason for being troubled by its application to legal knowledge. The problem is that externalism rejects the *doxastic* requirement of justified belief.¹³⁴ One's beliefs are justified *externally*, that is, independent of one's own experience or awareness of them as being justified. And such an account, even if plausible in other areas of knowledge, seems especially inappropriate to the adjudica-

¹³² See, e.g., Richard Boyd, *How to Be a Moral Realist*, in *ESSAYS ON MORAL REALISM* 181, 181-228 (G. Sayre-McCord ed., 1988) (exploring how realist philosophy of science can be employed in the articulation and defense of moral realism); Peter Railton, *Moral Realism*, 95 *PHIL. REV.* 163, 166-71 (1986) (arguing that a naturalistic realist view of epistemology requires the adoption of external criteria). Perhaps the leading contemporary externalist is Alvin Goldman. For his original articulation of the view, see Alvin I. Goldman, *A Causal Theory of Knowing*, 64 *J. PHIL.* 357 (1967).

¹³³ For some general doubts about externalism, however, see *BONJOUR*, *supra* note 129, at 41-45.

¹³⁴ For a discussion of the doxastic requirement, see *id.* at 101-06.

tory process. A judge sees herself as being justified in defending a particular outcome as required by law by considering the grounds for her judgment. It is an entirely self-conscious activity. Externalism requires only a suitable causal mechanism, of which the agent need not be aware. And this seems terribly out of place in the context of adjudication in which the justification of belief has everything to do with the judge's self-conscious reasoning.

The realist is on to something in claiming that the ordinary conception of adjudication seems committed to the idea that judges try to determine what the law requires—that, in effect, judges find the law, rather than make it in the sense subjectivism claims they must. The problem is that if the law judges find is epistemically transcendent—if its existence and character are independent of how judges and others regard it—then how can judges come to hold true beliefs about its requirements? Coherence among a set of beliefs about what the law requires simply will not do the trick.

2. Problems with Minimal Objectivity

With this discussion in mind, it is easy to understand the attraction of minimal objectivity. According to minimal objectivity, legal facts are fixed by what the majority of judges take them to be. Thus, there is no problem of epistemic access. Indeed, the very concept of minimal objectivity is defined in epistemic terms, in terms of how the relevant community takes things to be. Though legal discourse may appear to implicate strongly objective legal facts, the objects of that discourse, legal facts, are only minimally objective.

Minimal objectivity is not unproblematic, however. There are at least three different kinds of objections that have been offered to minimal objectivity both as a semantic and metaphysical theory. The first concerns its difficulty in explaining the possibility of global or large-scale error; the second concerns its inability to explain rational disagreement that is not settled by convention; the third concerns what we will call the problem of the dominant ideology. We begin with the last, not because it is the most telling or troublesome, but because versions of it are so fashionable.

Recall that liberalism's critics mistakenly argue that Kripkenstein-like considerations establish a radical indeterminacy of meaning when in fact that meaning is fixed by conventional human

practices.¹³⁵ The human practices that fix meaning, one might worry, are, like other human practices, reflections of the dominant hierarchies and power relationships within the community. And this invites the objection that ultimately the meaning of the various rules and principles that comprise the law will reflect the dominant culture in ways that threaten the law's legitimacy as an arbiter among conflicting interests and conceptions of the good. The law is really no more than an enforcer of the dominant ideology and culture hiding behind a mask of objectivity. This is the semantic version of the dominant ideology objection.

The metaphysical version has an even greater initial force. If legal facts are fixed by the practices of judges, then legal facts will reflect how judges regard them. Judges are generally well-to-do, white males. Thus, what we regard as objective legal facts turn out to be nothing more than expressions of the biases of wealthy, white men.

These objections are of differing merit. The semantic version of the objection, to start, is simply confused and implausible. That communal practices fix the meaning of *particular* words and sentences can hardly preclude those meaningful words and sentences from being employed in new ways to express new semantic content. The sentences "workers are exploited under capitalism" and "in patriarchal societies, men on average enjoy benefits and privileges not enjoyed on average by women" are perfectly intelligible, even if semantic conventionalism is true.¹³⁶ The writings of Marxists, Critics, or Feminists seem perfectly intelligible, Kripkenstein notwithstanding.

The objection to metaphysical conventionalism is slightly more worrisome. There are good grounds for expecting some correlations between race, gender, and class and ideology or system of belief.¹³⁷ But the correlation is neither obvious nor uniform; and in the legal case, it surely requires some detailed explication to

¹³⁵ See *supra* part I.A.3. Meaning so determined can still be quite determinate.

¹³⁶ See *infra* text accompanying note 139 (discussing a more serious worry about conventionalism as a theory of legal semantics).

¹³⁷ Of race, gender, and class, class affiliations seem the most powerful predictors and determinants of ideology, though race and gender have been more popular topics for bourgeois academics in American law schools and elsewhere. Greater subtlety in the application of these categories would be welcome in all cases. Most great radical theorists, after all, came from the bourgeois classes; and need we remark upon the pertinent racial differences between William Brennan, a jurist possessed of exceptional powers of empathy and imagination, and Clarence Thomas, a jurist of equally exceptional callousness and narrowness of vision?

demonstrate that there is a real determination relation between judicial race, gender, and class and the metaphysical universe of legal facts. Surely, too, it is worth remembering in this context the lesson of the "sociological" wing of Legal Realism (the Karl Llewellyn/Underhill Moore wing):¹⁵⁸ of the psychosocial facts about judges that explain and determine what they do, significant weight must be assigned to the fact that they are socialized as *judges*, rather than as journalists, pundits, revolutionaries, or psychotherapists. The sociological fact that judges are, quite strikingly, people possessed of a self-conscious sense of themselves as judges, as persons occupying roles with defined expectations and norms, means that any simple-minded correlation between race, gender, class, and legal decision may be the exception rather than the norm.

That being said, we think the worry about minimal objectivity as an account of the metaphysical status of legal facts is a genuine one. An "on-average," but not uniform, correlation between race, gender, and class and legal decisions would be significant enough to raise doubts about whether minimal objectivity could suffice as the kind of objectivity of legal facts that would be consistent with legal authority. Indeed, this objection provides part of the impetus for exploring a conception of the law as *modestly* objective, a topic to which we turn shortly.

Conventionalism (or minimal objectivity) as a semantic theory confronts another problem: if conventional practice fixes the meaning of a word, then participants in the practice cannot be wrong in using the word as they do. This problem leads to quite general philosophical problems, especially for concepts about which our knowledge grows. If everyone agrees, for example, about the meaning of "gold" or "death," then the conventional understanding fixes the reference of gold or death. Suppose, however, that as a result of developments in chemistry and biology, metal that was formerly referred to as gold and states of being that were formerly referred to as death are no longer plausibly viewed that way. Suppose that, as a consequence, the relevant linguistic practices change to reflect this change in the state of scientific knowledge. Conventionalism or minimal objectivity provides a rather odd characterization of what has transpired. Rather than saying that previous speakers of the language were wrong, it must say instead

¹⁵⁸ See Leiter, *supra* note 60.

that the meaning of the terms have changed because the properties conventionally associated with the terms have changed.

A more plausible account, it seems, would claim that chemists and biologists have learned more about the way things really are. It makes more sense to say that scientific discovery warrants the conclusion that previous speakers of the language were simply wrong about the way things really are, not that things were one way once, but are no longer. It makes even less sense to say that things have changed just because the conventions adopted by language speakers have changed. And it has seemed to those who are persuaded by such objections that the only plausible alternative is to reject conventionalism (or, in the language used so far, the thesis that semantic facts are "minimally objective") in favor of some form of semantic realism (i.e., the view that meaning is fixed by reference, and not the other way around).¹⁸⁹

There is one final problem for minimal objectivity: the problem of rational disagreement. Suppose there is a general practice among members of a community that has a certain reasonably well-defined boundary. Everyone, say, stops at red lights. Now suppose someone comes onto the scene, does not know the people very well, but wants to make the right kind of impression. She wants to do what everyone else does. Such a person might ask herself the following question: what must I do in order to conform my behavior to what others do as a rule? This is just another way of asking the question: what rule are the others following?

The conventionalist or minimal objectivist holds the view that the normative dimension of the rule is fixed by convergent behavior. If an agent wants to know what she must do in order to follow the rule, then she should do what others do, or what is conventionally understood to be what the rule requires. This means that to the extent to which there is disagreement about what the rule requires, there is no action the rule requires of her; and that is because what the rule requires is fixed by convergent behavior. In a nutshell, the problem is this: according to minimal objectivity or conventionalism, the scope of the duty imposed by rules is set by convergent behavior. In the absence of convergence, there is no duty. This means, in the case of the red light, that everybody has a duty to stop at the red light, but if people disagree about whether one should stop in an emergency, then there is no duty to stop.

¹⁸⁹ See Moore, *supra* note 126, at 323-28.

This is just another way of raising a doubt about the ability of minimal objectivity to provide a plausible account of rational disagreement. One reason individuals may not converge on a practice with respect to emergencies is that they disagree about what the rule regarding stopping at red lights means. Their convergent behavior underdetermines which rule they are following.¹⁴⁰ They may disagree about what the rule requires, yet all believe that the rule actually requires something. In other words, none of them really believes that the rule requires nothing simply because they disagree about what it requires. This is a problem for minimal objectivity because it is understood as the claim that what a rule requires is fixed by convergent practice. Presumably, part of the commitment to objectivity in law is the idea that there are objective answers to legal disputes, answers that may be connected to judicial practices, but not absolutely fixed by them, answers that are correct in spite of even widespread disagreement about what they are.¹⁴¹

3. Modest Objectivity

We have now surveyed some of the more troubling and more or less familiar problems facing strong and minimal objectivity respectively. Minimal and strong objectivity are not, however, the only candidates for the kind of objectivity involved in adjudication; there is an additional conception of objectivity we want to develop which we call "modest objectivity." According to modest objectivity, what seems right under "ideal epistemic conditions" determines what is right.¹⁴² In pure Protagorean subjectivism, the individual is the measure of all things in the very straightforward sense that if something seems right to her, then it is right.¹⁴³ Minimal objectivity takes the judgment out of the hands of each person, so that it is possible that a person could be wrong in asserting that something

¹⁴⁰ X "underdetermines" Y when X does not justify *only* Y.

¹⁴¹ We do not mean to suggest that conventionalists have nothing to say in response to these objections. Andrei Marmor, for one, persuasively responds to at least one version of the problem of mistakes. See ANDREI MARMOR, INTERPRETATION AND LEGAL THEORY 124-54 (1992). Additionally, when Coleman was a committed conventionalist, he did not find the Dworkinian line of argument compelling. See Coleman, *supra* note 80, at 139, 150.

¹⁴² We develop the content of "ideal epistemic conditions" *infra* part II.C.2, but for now let us say that such conditions are those that are the best for gaining reliable knowledge of something.

¹⁴³ See *supra* notes 114-15 and accompanying text.

is right on the grounds that it seems right to her. Minimal objectivity introduces the possibility of an agent's being wrong about whether something is right without her being wrong depending in any way on any form of realism.

Modest objectivity allows the possibility that everybody could be wrong about what a rule requires; what seems right even to everyone about what a rule requires may not be right. Only what seems right to individuals placed in an epistemically ideal position determines what is right. At the same time, modest objectivity provides a sense in which sentences can be objective that does not depend on their truth-conditions being fully independent of our epistemic resources and access to them. As a metaphysical theory, it makes the existence and character of facts of various kinds dependent on us, but not on our actual or existing beliefs and evidence.

4. Modest Objectivity, Access, and Error

We have not yet said much about the concept of modest objectivity other than to point out that it shares with minimal objectivity an antirealist metaphysical stance, and that it shares with strong objectivity the idea that the world is not necessarily just how the majority regards it. Why prefer modest objectivity as an account of adjudication and law? It would not make much sense to try to develop the concept of modest objectivity with much care unless there was some reason to believe that it would improve our understanding of legal practice. One way to do that is to show how modest objectivity avoids some of the problems that beset strong and minimal objectivity.

Modest objectivity is not committed to a realist or strongly objective metaphysics. According to modest objectivity, legal facts are not evidence-transcendent. Legal facts are fixed by judgments under epistemically ideal conditions. Therefore, modest objectivity does not face the *same* problem that realism does in explaining how a judge could gain access to strongly objective facts.¹⁴⁴

If meanings are minimally objective, then the extant convergent practice fixes the meaning. This is what generates the problem of mistakes, because where the practice changes (e.g., because of new scientific discoveries about the chemical composition of gold), so

¹⁴⁴ It faces another problem, however, of showing how adjudication approximates or exemplifies ideal epistemic conditions. See *infra* part II.C.5.

does meaning. But this radical discontinuity—in which our understanding of gold does not *increase*, but rather the subject simply changes when we learn more about it—is avoided if we think of meaning as being modestly objective. That is, what gold means depends on what speakers of the language would take it to mean under *epistemically ideal conditions*. For natural terms like “gold,” the ideal epistemic conditions must, of course, include relevant scientific knowledge about gold. Thus, the meaning of the term is fixed *not* by extant convergent practice, but by the convergence that would occur under conditions of maximum scientific information.

Roughly the same considerations apply in the case of determining the prescriptive dimension of (legal) rules. A judge intent on doing what the rule requires would not look to do what judges as a rule do; there may be no convergence of behavior. Instead, a judge should try to uncover what a judge or panel of judges would do under ideal epistemic conditions. That is, according to modest objectivity, the scope of the duty under a rule is not fixed by existing convergent practices, nor is it settled by what the law is independent of anyone’s beliefs about it; rather, the scope of duty is given by the sort of convergence that would occur under ideal conditions. Thus, a judge who wants to know what the scope of that (modestly objective) duty is wants to know what judges would do under the relevant conditions. Disputes about the requirements of a rule, then, are really best understood as disputes about what practice judges would converge upon under ideal conditions (conditions which presumably will include, for example, full information and maximum rational and legal capabilities).

In short, we have reason to pursue the concept of modest objectivity further. In doing so, we will have to say a good bit more about its central idea, “ideal epistemic conditions,” a concept that we have relied upon above, but that we have so far left perhaps maddeningly vague. We turn now to begin, but only begin, the difficult task of remedying this situation.

C. *The Content of Modest Objectivity*

1. Objectivity as the Absence of Subjectivity

Note, first, that someone defending modest objectivity does not have to defend it as a general metaphysics applicable to all domains. In other words, it is possible to think strong objectivity applicable to midsize physical objects like tables and chairs, while thinking

modest objectivity appropriate to our concepts of the moral, social, or legal domain.¹⁴⁵ Or one can defend modest objectivity with respect to midsize physical objects and subjectivism or minimal objectivity about the moral and social domains.

Second, whatever account of ideal epistemic conditions we settle on may vary from one domain to another. What might constitute ideal conditions for fixing the existence of scientific facts (should these be modestly objective) may bear no relation to what counts as ideal conditions for fixing the existence of legal or moral facts.

Third, there is at least one general theme that underlies our conception of things as modestly objective (and that also underlies, consequently, the specification of the relevant ideal conditions). All the conceptions of objectivity—strong, modest, minimal—involve severing the dependence of some entity or property from elements of our “subjectivity,” such as our beliefs, prejudices, ideologies, and personal characteristics. Where strong objectivity seems untenable (for whatever reason), we are drawn to modest objectivity where it still seems important to sever at least some of the ties between the existence and character of some object or property and our immediate subjectivity; our existing subjective condition is more likely to distort the object rather than to present it in its “true” light. An attempt to specify idealized conditions so that what “seems right” would determine what “is right” is just the attempt to abstract away from some of these elements of our subjectivity.

Thus, modest objectivity is not objectivity in the sense of a world whose character is independent of our epistemic tools for gaining access to it; rather, it is objectivity that involves the substantial (but not total) absence of subjectivity. It is an attempt to abstract away from the kinds of subjectivity that might intercede between us and items in the world that we conceive of as possessing some measure of independence from our existing subjective propensities. It is not (as we shall see shortly) a kind of objectivity that requires abstraction from all aspects of subjective human experience, however.

2. Understanding Epistemically Ideal Conditions

Take the case of color properties. Suppose, as seems likely, that we conceive of colors as modestly objective; something is red just in case it seems red to observers under ideal conditions. What are those conditions? Well, observations would have to be made in

¹⁴⁵ See Leiter, *supra* note 113, at 194-95, 201-02.

the light, not in darkness; the light would have to be reasonably bright; it would have to be white light (Day-Glo would not do); observers would require normal vision, and they would have to be able to distinguish between colors (everything cannot appear blue to them). But these *ideal* conditions are not necessarily our normal or presently existing conditions. We do not want to say that the color of an object is determined by however we presently take it to be, regardless of our existing subjective condition. Hence, a need for idealization exists.

But how do we know what the ideal conditions are? We have no resource at this point other than our *existing concept* of the property at issue; we simply “unpack” our concept of color, of how color properties figure in our practices. If the specification of the idealized conditions is accurate, then the claim must be that anyone who uses color concepts otherwise (e.g., someone who claims that something is red if it appears to be red under Day-Glo) would simply not understand our concept of color.

Note, then, that a property can only be modestly objective when there exists a sufficiently clear concept to “unpack.” Most of us are inclined to say, for example, that the tastiness of ice cream flavors is not objective, precisely because we have no conception of what the appropriate or ideal conditions are for rendering judgments about tastiness. If chocolate seems tasty to Coleman, and vanilla seems tasty to Leiter, there is really nothing more to be said; there is no objective fact about which flavor is really tasty (i.e., no conditions we could specify for *fixing* the tastiness of ice cream flavors).

Moral judgments present a special, and more problematic case. If morality is modestly objective, then we might want to say that *X* is morally right only if judges under appropriate conditions would so judge it. But what are the appropriate conditions? Will they not be contestable in important ways that cannot be resolved other than by substantive moral argument, if they are resolvable at all? Yet surely everyone would agree, would they not, that moral judges should have accurate and complete factual information, should be impartial and free of bias, should weigh all affected interests equally, and so on? Are not these conditions part of the concept of morality that figures in our practices? Would not a person who was unwilling to count these as appropriate or ideal conditions of moral judgment be revealing herself to be someone who did not understand the concept of morality? Would she not be just like the

person who thought that color properties should be fixed by observation under Day-Glo?

It may be plausible to claim that these conditions of judgment are part of our concept of morality in the same way that the conditions of observation are part of our concept of color. But it can only be plausible if we possess a sufficiently coherent and well-defined concept of morality (of what it means for something to be morally right), so that there is something in the concept to unpack. The question of whether morality is sufficiently coherent and well-defined is just one of the issues that separate moral realists from moral antirealists. If the realist is right, then our concept of morality hangs together sufficiently well that we can specify the conditions under which persons would properly detect what it is we are talking about when we are talking about the morality of an act. When we say an act is morally incorrect we are, perhaps, just saying something like, "It has a negative effect on aggregate well-being." In that case, the appropriate conditions under which judgments will fix the morality of an act will include full information about effects upon well-being, the capacity to weigh affected interests, and impartiality as between the well-being of different parties.

The antirealist denies all this. According to the antirealist, sometimes when we say an act is "morally incorrect" we mean what the utilitarian thinks it means; but other times, we mean that it "fails to respect the dignity of persons" (or some other appropriate Kantian surrogate). Still other times, we use the language of morality to express other judgments in other circumstances. For the antirealist, in short, our concept of morality does not cohere around a group of descriptive or empirical properties (like facts about well-being); talk about the morality of an act has an entirely different role—not to pick out some cluster of facts, but perhaps to express approval or to recommend or endorse an action.¹⁴⁶

3. Objectivity in Law and Morals

Properties can be modestly objective only if they are sufficiently coherent to enable us to identify what would count as the conditions under which judgments about such properties would fix their existence and character. We have suggested that our concept of color is sufficiently coherent to admit of an account of it as modestly objective. It is less clear whether the same could be said

¹⁴⁶ See GIBBARD, *supra* note 123, at 6-22.

of moral properties. So, for example, is impartiality really a condition of adequate *moral* judgment? Can not a refined moral sensibility include *partiality* to family and close friends? Is morality really about aggregate well-being, the dignity and autonomy of persons, or something else altogether?

If law and morality are connected in the strong sense that the truth of legal propositions often depends on the truth of moral judgments, then this dispute between moral realists and antirealists can be extremely relevant to certain forms of legal theory. Some legal theories, including all forms of substantive natural law theory, make the truth of some moral claims part of the truth-conditions of various legal claims. Michael Moore has dubbed this view "relationalism."¹⁴⁷ For such theories, the objectivity of morality is, then, a necessary condition of the objectivity of law. If the authority of law depends on its objectivity, then legal authority turns on the very possibility of the objectivity of morality. Morality must be objective in some sense if law is. Moore, himself, defends a form of moral realism.¹⁴⁸ For him, both law and morality are strongly objective.

The interesting case is Dworkin. Positivism can be understood as the claim that the truth conditions of legal sentences typically do not implicate the truth of moral judgments.¹⁴⁹ Positivists reject relationalism. As one of positivism's earliest and most powerful critics, Dworkin accepts some version of the relational thesis.¹⁵⁰ On the other hand, unlike Moore, Dworkin (as we read him) rejects moral realism and the strong objectivity of legal facts. For him, legal facts are not part of the "fabric" of the universe.¹⁵¹ Both law and morality must be objective for Dworkin, but not strongly objective. We will argue momentarily that Dworkin is committed to the modest objectivity of both law and morality.¹⁵²

The debate between moral realists and antirealists has less of a bearing on the jurisprudential views that we hold. We are both positivists, which means that we reject a strong interpretation of the

¹⁴⁷ See Moore, *supra* note 92, at 2425.

¹⁴⁸ See *id.* at 2491-533.

¹⁴⁹ This is not quite the conception of positivism Coleman defends. See generally Coleman, *supra* note 80.

¹⁵⁰ See DWORKIN, *supra* note 3, at 22-45.

¹⁵¹ DWORKIN, *supra* note 23, at 80. Dworkin's use of this kind of rhetoric seems to betray various confusions about the metaphysical issues. Nonetheless, it seems correct to say that Dworkin holds a weaker view of the objectivity of morality than, say, Moore does.

¹⁵² See *infra* part II.C.7.

relational thesis, that is, the view that the truth of legal claims is invariably or often related to the truth of certain moral claims. The objectivity of law is, in our view, independent of the objectivity of morality in part because the truth conditions of legal propositions do not entail the truth of moral claims. We are free to adopt an antirealist view about morality, which, in fact, both of us are inclined to do, while maintaining the view that legal facts can still be minimally (Leiter) or modestly (Coleman) objective.¹⁵³ Because we are positivists, there is no real need here to pursue the question of how morality, which seems so unlike color, could be modestly objective; it is enough if law is.

4. Is Modest Objectivity Conventional?

We come now to a series of philosophically demanding and important points. The objectivity of a concept (for example color, morality, or law) presupposes a coherent practice regarding the use of that concept. Only such practices can admit of ideal conditions of observation or judgment. When properties can be modestly objective, their being so depends on the existence of epistemically ideal conditions for judgment. In the case of color properties, it is fairly obvious what those conditions are. This will not always be the case. Suppose there is disagreement as to what is to count as

¹⁵³ It may be worth emphasizing our differences with both Moore and Dworkin. Each of us are committed to the objectivity of law as a conceptual or normative matter. (Being a skeptic and a Legal Realist of sorts, Leiter is somewhat less certain about actual legal practice.) Unlike Dworkin and us, Moore is committed to law being strongly objective. Both Dworkin and Moore accept the relational thesis, namely, the claim that the truth conditions for legal propositions implicate the truth of moral claims. We reject this thesis. Moore adopts strong objectivity about both law and morals. Dworkin accepts the objectivity of law, and because he adopts the relational thesis, he is committed to the objectivity of morality. But he rejects the strong objectivity of both. In our view, he is committed to the modest objectivity of both.

Because we reject the relational thesis, our views about the objectivity of law and of morals are not linked in the way they are for both Moore and Dworkin. Coleman shares with Dworkin the conception of law as modestly, not strongly, objective. And we both disagree with Moore and Dworkin about morality. Moore is committed to morality being strongly objective; Dworkin is, we think, committed to law being modestly objective; we doubt that morality is objective in either sense.

We are committed to what might be called "legal cognitivism." We are committed to the claim that statements of the form, "it is the law in our community that *P*" can be either true or false; statements about what the law requires are apt for truth predicates. We are not committed to the idea that there are right answers to all legal disputes. However, because we are committed to law's objectivity, we are committed to the objectivity of the claims that there are right answers to legal disputes.

epistemically ideal positions. How is that disagreement to be resolved? Is there a fact of the matter regarding what counts as suitable constraints on observation and judgment? If so, what is its source? The answer seems to be (as we hinted above) that what counts as appropriate constraints on observation is given by accepted practices within a domain of discourse. Scientists agree that observations made only under white light are appropriate to forming judgments about color properties, and so on; common sense follows science in this regard. But if it is this kind of scientific and common sense agreement that renders observation conditions legitimate or appropriate, why, then, does not modest objectivity merely collapse into conventionalism?

There is a difference, however, between saying that the nature of *X* is determined by what the community believes about *X* (conventionalism or minimal objectivity) and saying that the nature of *X* is determined by what people under *appropriate or ideal* conditions would believe about *X*. Even where what counts as an idealization depends on our "conventional" practice (as in the case of color concepts), the account of objectivity still obviously differs. All the objection shows is that modest objectivity still honors the Protagorean doctrine that "man is the measure of all things," by relying, in this case, on our practices involving the concept to generate the idealization. But this hardly shows that there is no difference between minimal objectivity about color and modest objectivity.

Two other points need to be emphasized. First, in cases like this we have no other way of proceeding than by trying to unpack the concepts that figure in our practices. The fact that these concepts figure in our practices does not make the task of unpacking them a version of conventionalism. The practices may be conventional, but conventional practices may be committed to practice-transcendent or nonconventional concepts.

Second, it is highly misleading to claim that in explicating concepts that are modestly objective, like color properties, the epistemically ideal conditions are *set* or *fixed* by conventions. Those conditions are not set or fixed at all. Instead of pointing out that the conditions of observation appropriate to color properties are set by convention, we should be read as trying to uncover the conditions of observation that are presupposed by the concept of color properties. These are conditions that are part of the concept; they are not independently set or determined. The whole question of how epistemically ideal conditions are set or fixed misunderstands

the inquiry. In every case of a property or fact that is potentially modestly objective, we are looking to see if we can identify the conditions of observation or judgment that the practices involving that concept presuppose. When we are unable to identify a set of such conditions, we do not fix a set arbitrarily. Rather, the failure to uncover a set of such conditions gives us reason to doubt that the concept in question is or can be modestly objective. So the thought that modest objectivity collapses into conventionalism because the conditions of judgment are fixed by convention simply misses the point.

5. The Content of Modest Objectivity and the Problem of Access

Legal facts are modestly objective when what is a legal fact is what judges under ideal epistemic conditions would take that fact to be. For example, Coleman is *in fact* liable for his negligence when judges under ideal epistemic conditions would find him liable for his negligence. In suggesting that this concept of objectivity is implicit in our legal practice we are claiming that, among other things, it may provide the best explanation for various features of that practice.¹⁵⁴ For example, we willingly allow the possibility that individual judges can be mistaken about legal facts, that an entire legal community during a particular historical period can be mistaken about what the law is (e.g., the Court in the era of *Plessy v. Ferguson*¹⁵⁵), but that what the law is does depend, at some level, upon the judgment of lawyers. An in-principle undetectable legal fact—of the sort whose existence is possible under strong objectivity—is, we suggest, not part of the conceptual apparatus of our legal practice.

But now let us try to be more precise and flesh out this notion of objectivity with some details. There is a legal fact about whether Coleman is liable for his negligence just in case judges under ideal conditions would find him liable. What are these conditions? Does the concept of “law,” or the “legal,” cohere sufficiently well to admit of characterization as modestly objective? Is law going to be more like the case of “color” (in which ideal conditions seem easy to specify) or “morality” (in which it may be impossible to specify such conditions)?

¹⁵⁴ We tackle this very question at length in Jules Coleman & Brian Leiter, *Legal Objectivity: Minimal or Modest?* (in progress) (manuscript on file with authors).

¹⁵⁵ 163 U.S. 537 (1896).

We want to suggest that law is more like color than morality in this respect.¹⁵⁶ At least some of the ideal conditions for rendering (objective) legal—as opposed to moral—judgment seem easy to specify. The ideal judge must be:

- (1) fully informed both about
 - (a) all relevant factual information; and
 - (b) all authoritative legal sources (statues, prior court decisions);
- (2) fully rational, e.g., observant of the rules of logic;
- (3) free of personal bias for or against either party;
- (4) maximally empathetic and imaginative, where cases require, for example, the weighing of affected interests; and
- (5) conversant with and sensitive to informal cultural and social knowledge of the sort essential to analogical reasoning, in which differences and distinctions must be marked as “relevant” or “irrelevant.”

Our claim, then, is that a legal judgment rendered under conditions like these would fix what the law is on that point.¹⁵⁷ The idea that a legal judgment rendered under these conditions would not fix the law on that point is, if modest objectivity is correct as an account of the metaphysics of legal facts, foreign to our legal practice. Conversely, the idea that a legal judgment rendered under ordinary conditions (of incomplete information, bias, irrationality, etc.) fixes the legal fact in the case at hand is, if modest objectivity is correct, also foreign to legal practice. What judges believe matters, even though all judges can at present be wrong about the law. But judges under ideal conditions of the sort just specified cannot be wrong.

But now comes the “natural” objection: surely, judges in the real world are not, in fact, rendering judgments under ideal conditions! So framed, however, this is no objection to the position just described because our claim here is only that the appropriate concept of objectivity in law is that of modest objectivity. The claim is not that actual adjudication is necessarily objective in the metaphysical sense of reliably reporting objective legal facts. Modest objectivity is a normative conception of objectivity in the

¹⁵⁶ Though it should go without saying, the ideal conditions for rendering color judgments are nothing like the ideal conditions for rendering legal judgments.

¹⁵⁷ We are definitely not claiming that judgment under these conditions would always identify one legal fact; since we accept that law can be indeterminate, legal judgment under ideal conditions will sometimes identify no legal fact of the matter.

sense that it provides a criterion for assessing whether adjudication is legitimate or justifiable. The critic of liberalism who faults adjudication for not being objective is precisely in need of an account of the concept of objectivity appropriate in law to which actual adjudication falls short. Modest objectivity provides criteria by which to *criticize* actual adjudicatory practice as falling short of objectivity, e.g., for its lack of impartiality, complete information, imaginative empathy, logic, etc.

Having said this, the natural objection just rehearsed points to a far more important philosophical difficulty with the theory of modest objectivity. Recall that modest objectivity was presented earlier as an objection to strong objectivity in that it rendered legal facts in-principle inaccessible to judges at the very same time accessibility was thought to be a condition of legal authority. And if real judges are not ideal judges, and if law is modestly objective in the sense just described, then will it not turn out that legal facts are equally inaccessible to actual judges rendering decisions for actual litigants?¹⁵⁸ If that is so, will not a conception of law as modestly objective run afoul of the very same objection we levelled against strong objectivity, and in so doing undermine the conditions for legal authority?

Once again, we have to be careful not to conflate two distinct notions; let us call them “de jure inaccessibility” and “de facto inaccessibility.” According to strong objectivity, legal facts are de jure inaccessible because, given the terms of the theory, it must be the case that what we are capable of determining does not determine what is the case.¹⁵⁹ By contrast, modestly objective legal facts will only be de jure inaccessible if the ideal conditions specified by the theory are themselves de jure (that is, in principle or by the terms of the theory) unattainable by humans. The ideal conditions for rendering legal judgment, however, do not seem to be beyond human reach; indeed, it seems that judges sometimes approximate them well enough to succeed in reporting legal facts (as in any standard “easy case”). As framed, the objection shows only that legal facts are sometimes de facto inaccessible, that is, unknown (or undetected), because of the failure of judges to be objective in precisely the sense specified by the criteria for the ideal

¹⁵⁸ Compare the “Normativity Argument” in Leiter, *supra* note 113, at 207-08.

¹⁵⁹ This does *not* entail the view that de jure inaccessible legal facts are unknowable to humans, however, only that their being legal facts does not depend on their being knowable.

conditions. Modestly objective legal facts—unlike strongly objective ones—are *de jure*, or in-principle accessible, and thus can survive the earlier objection that the conditions of objectivity ultimately undermine rather than support the liberal conception of legal authority.

6. Modest Objectivity and Contemporary Jurisprudence

As it is normally conceived, the debate about objectivity in law is a debate between conventionalists and realists. We have tried to show that there is an alternative conception of objectivity, modest objectivity, that explains the possibility of general mistake and provides a sense of objective legal duty that extends beyond convergent behavior, and does so without commitment to full blown realism about legal facts. It is our view not only that this is a coherent conception of objectivity, but also that it is the conception of objectivity at work in much of the current jurisprudential debate. It is, we suggest, the conception of objectivity to which Dworkin is committed, and to which Critical Race Theorists (and also Feminists) ought to be committed. In the closing Sections of this Article, we seek to make good on these claims. Our remarks are tentative in part because Dworkin, and Critical Race Theorists, can be understood as explicitly rejecting the notion of objectivity in law.¹⁶⁰ But we cannot allow their explicit rejection of objectivity to divert us from showing that there is a viable form of objectivity in the legal domain to which they could and should be committed.

¹⁶⁰ Anyone who believes that there are right answers to legal disputes is unavoidably committed to the idea of objectivity. Thus, despite his protestations to the contrary, Dworkin is certainly committed to metaphysically objective legal facts. Similar remarks apply to many of his most ardent critics. See *supra* note 2. Much writing by Feminists and Critical Race Theorists, on the other hand, seems to have fallen under the influence of a lot of bad philosophy, with the result that such writers often seem to believe that there are no objective facts about the world. Rather than providing new perspectives (female, minority) that enrich our understanding of an objective world or offering new discursive modes (e.g., narrative) for accessing heretofore ignored facts about this objective world, these critical writers often seem to view themselves as offering simple alternatives to the “white male” perspective (if there is such a thing), alternatives that may have ethical and aesthetic merits, but certainly no epistemic merits (like being true). We urge that these writers should not be so quick to abandon claims to objectivity. It seems a distinct advantage to be able to reject sexist and racist views not simply because they are ethically or aesthetically unappealing to our “perspective” but because they are objectively false, i.e., predicated on false claims about gender, race, social structure, and social causation. We suggest in the text an account of objectivity that is compatible with the spirit of such critical work.

7. Dworkin and Modest Objectivity

It is plain that Dworkin means to reject conventionalism and plausible (if less plain) that he wants to resist the strong objectivity of realism. He wants to give an account of the way in which legal propositions can be true without their truth-conditions being set either by convention or by correspondence to facts that are part of "the 'fabric' of the universe."¹⁶¹ Although he does not explicitly embrace a legal metaphysics, we want to suggest that the metaphysics to which he is committed is what we have called modest objectivity, at least with regard to the status of "right answers."¹⁶²

There is a difference between Dworkin's right answer thesis as presented in his discussion of "Hard Cases,"¹⁶³ and the argument Dworkin settles on in *Law's Empire*.¹⁶⁴ In his earliest essays, e.g., "Judicial Discretion"¹⁶⁵ and "Model of Rules,"¹⁶⁶ Dworkin's target was legal positivism's commitment to judicial discretion in hard cases. At first, it looked like Dworkin's main point was that positivism had too impoverished a conception of binding legal standards. Increase the set of binding legal standards, and the scope or extent of judicial discretion will diminish accordingly. By the time one reaches his chapter on "Hard Cases," Dworkin should be read as developing a general theory of adjudication, applicable to all cases, and not just to hard ones. In the account developed there, right answers to legal disputes were defined as those to which Dworkin's idealized judge, Hercules, would come.¹⁶⁷ Hercules's judgment fixes what counts as a right answer to a legal dispute. Thus, the kind of objectivity involved in the right answer thesis is not independent of epistemic access to legal facts. Indeed, Hercules is nothing other than a judge perched precisely in an ideal epistemic condition. He has the entirety of the law before him. He is fully

¹⁶¹ DWORKIN, *supra* note 23, at 80.

¹⁶² This may also be Kent Greenawalt's view. See KENT GREENAWALT, *LAW AND OBJECTIVITY* 210 (1992); cf. Leiter, *supra* note 113, at 198-200.

¹⁶³ DWORKIN, *supra* note 3, at 81-130.

¹⁶⁴ See DWORKIN, *supra* note 23.

¹⁶⁵ See Dworkin, *Judicial Discretion*, *supra* note 27, at 624 (arguing that the view of discretion that is "grounded on the realization that some of the reasons courts give for decisions do not operate like rules is inaccurate and misleading").

¹⁶⁶ *Id.* at 31 (critically assessing the positivist acceptance of judicial discretion in hard cases when other principles exist to guide and bind judges).

¹⁶⁷ See DWORKIN, *supra* note 3, at 105-30 (outlining Hercules's decision-making process).

rational and informed. He has maximum capacities for philosophical and moral reflection. The kind of objectivity exhibited by legal facts on this account is modest.

Under the theory of "Hard Cases," judges have a duty to aspire to decide cases as would Hercules so that they might develop a practice that enables them to find the right answers to legal disputes.

By the time we get to *Law's Empire*, Dworkin's argument has changed significantly, even if his basic philosophical (especially metaphysical) commitments have not. He is still committed to the existence of right answers that are, in our terms, modestly objective, and this is because answers are correct if they are the decisions reached by Hercules. The argument for judges aspiring to decide cases as would Hercules has altered significantly, however. The relevant components of the theory of adjudication are not defended because they are essential to fixing or finding correct answers to legal disputes. Rather, they are defended on different grounds of political morality. The relevant theory of adjudication is defended on the grounds that it embodies the political virtues of integrity, justice, and due process.¹⁶⁸ Hercules's decision-making process embodies these ideals, and judges should aspire to Herculean heights, not because doing so is necessary to secure right answers, but because doing so is required by these political ideals.¹⁶⁹ These political ideals are themselves defended in terms of a theory of political community, which is itself defended by its relationship to the value of fraternity.¹⁷⁰ Whereas the argument for the right answer thesis of "Hard Cases" derives ultimately from a liberal political theory that takes individual rights as fundamental, the argument of *Law's Empire* is grounded in the ideal of liberal community.

Whatever the differences may be between the underlying political morality of *Taking Rights Seriously* and *Law's Empire*, and they are substantial, Dworkin remains committed to a conception of right answers to legal disputes: answers that can be right whatever the prevailing conventions among lawyers may be, answers that can be right without their correctness requiring strong objectivity, and answers that are right and modestly objective.

¹⁶⁸ See DWORKIN, *supra* note 23, at 225.

¹⁶⁹ See *id.* at 176-216.

¹⁷⁰ See *id.* at 187.

8. Critical Race Theory and Modest Objectivity

We conclude with a few brief remarks about the relationship between critical race theories and modest objectivity. We begin by revisiting a remark made earlier about the sense in which modest objectivity seeks to abstract from those aspects of subjective human experience that might infect judgment.

While it is true that objectivity suggests the rejection of subjectivity, it is not true that the epistemically preferred position will always abstract from aspects of subjective experience. Quite generally, insofar as there are objective facts about subjective experience, ideal conditions for rendering judgments about these facts will necessarily incorporate aspects of subjective experience. More particularly, insofar as the application of some legal categories requires the weighing of the affected interests of individuals, then the ideal conditions for rendering judgments about such matters will require information about subjective experience.

In this light, the familiar emphasis in Critical Race Theory on “narrative” can be understood not as a rejection of objectivity—“it’s narrative all the way down”—but rather as a specification of the conditions for detecting objective legal facts in certain types of cases.¹⁷¹ Narratives, after all, are supposed to recount subjective experience, typically of oppression by law or by other means. They are best understood as providing access to real facts about oppression that would be inaccessible to ordinary discursive modes of legal reasoning. In cases, then, where minority interests are at stake (are to be “weighed,” “balanced,” etc.), the claim that the legal facts are modestly objective amounts to the claim that the ideal conditions for rendering judgment include access to narrative depictions of the affected parties.

It probably goes without saying, but it might bear repeating nonetheless, that subjectivism is not the friend of those who view themselves as alienated and disempowered. The claim that everything comes down to power cannot help those who view themselves as outside the corridors of power. The kind of account of legal facts that is compatible both with the possibility of their objectivity as well as the centrality of narrative is, we suggest, modest objectivity.

¹⁷¹ See *supra* note 2.

CONCLUSION

Philosophical theses are offered to help us understand and, on occasion, to defend our practices. Liberalism is offered as an account of a defensible political and legal practice. Its critics have raised a variety of objections to liberalism both as an account of our existing practices and as an ideal to which social and political arrangements ought to aspire. Our ambition has not been to defend liberalism against all of the criticisms levelled against it. Instead, we have focused on two different, but related objections to liberalism as a family of jurisprudential theses: the claims that law is both indeterminate and subjective.

Our argument has been that liberalism is not in fact committed to legal determinacy. Instead, it is committed to a variety of political ideals, including the claims that political coercion must be justified, individuals must have an opportunity to conform their behavior to the law's demands, institutions must enhance autonomy and well-being, and democratic rule must be possible. None of these entail a commitment to determinacy in the sense of uniquely warranted outcomes. Determinacy is not part of the liberal conception of law. Objectivity is.

For some, objectivity is not metaphysical, but procedural or (broadly speaking) epistemic; it is motivated by commitment to certain values that themselves do not depend on the truth of any metaphysical claims. For reasons similar to the ones Joseph Raz has raised against political liberalism without metaphysics,¹⁷² we have chosen not to pursue this approach to the concept of objectivity implicated by law. Instead, we have pursued a metaphysical conception of objectivity. In so doing, we have distinguished among a variety of conceptions of objectivity and have tried to set out a new conception of objectivity for the field of jurisprudence, modest objectivity.¹⁷³

¹⁷² See Joseph Raz, *Facing Diversity: The Case of Epistemic Abstinence*, 19 PHIL. & PUB. AFF. 3, 4 (1990) (challenging the cogency of the reasons offered by John Rawls and Thomas Nagel for epistemic abstinence).

¹⁷³ When we say "new," we do not mean to say that this conception of objectivity is original to us—although we believe its application to the legal domain is lacking in philosophical pedigree. For a general metaphysical picture of modest objectivity, see HILARY PUTNAM, REASON, TRUTH AND HISTORY 49-74 (1981). For an account of value as modestly objective, see Bruce Brower, *Dispositional Ethical Realism*, 103 ETHICS 221, 222 (1993) and Mark Johnston, *Dispositional Theories of Value*, 63 PROC. ARISTOTELIAN SOC'Y 134, 145 (1989).

In setting out the concept of modest objectivity, we have tried to put some flesh on its bones, establish its coherence, and explore its relationship to both minimal and strong objectivity. We have outlined some of the ways in which modest objectivity answers important objections raised against both minimal and strong objectivity. We have also argued that the notion of "ideal epistemic conditions" is central to much of the current jurisprudential debate, figuring prominently in both Dworkin's and his strongest critics' most important arguments. To that extent, we have suggested that (implicitly at least) the thought that law is modestly objective is part of the working conception of legal practice among many different jurisprudential theses.

Much work remains. We have not completely fleshed out the idea of "ideal epistemic conditions" as applied to law. We have not yet shown that our working conception of law is sufficiently coherent to admit of (metaphysical) objectivity of any sort. In short, it remains for us to show that modest objectivity figures not only in the various jurisprudential accounts of legal practice, but also in our legal practices themselves. That is a formidable task, one on which we differ, and which we hope to explore shortly. For now, we have to be satisfied with putting the concept of modest objectivity on the table.¹⁷⁴

¹⁷⁴ Earlier versions of this Article were presented at the Tel Aviv Conference on "Interpretation" where it benefitted from excellent comments by Andrei Marmor, Joseph Raz, Jeremy Waldron, and Michael Moore and at Oxford University where it benefitted from more comments by Raz and Waldron, a splendid commentary by Howard Chang, and thoughtful criticisms by Ruth Chang, Will Woluchow, John Finnis, John Gardner, Carl Wellman, and Liam Murphy. The Article also improved as a result of conversations with Peter Railton, Larry Alexander, Chris Kutz, Scott Shapiro, and Jack Balkin.

This Article is part of a series of papers on objectivity in law by the authors. Some in the series will be coauthored, others will not. The reader is directed to Leiter, *supra* notes 20, 60, 113, and to Jules Coleman's book-length manuscript, *Reason, Objectivity and Authority* (in progress) (manuscript on file with author), for related discussions of the materials in this Article. In the next, jointly authored piece, we plan to take up the question of whether legal facts are minimally or modestly objective. See Coleman & Leiter, *supra* note 154.

