Legal philosophy since the 1960s has been gradually moving away from discussion of the foundations of doctrinal areas and in the direction of general philosophy. This volume epitomizes this trend. It focuses a traditional metaphysical problem: for any given domain, are claims within it objective? For any such domain, furthermore, what is the test of objectivity? This volume addresses these questions in two domains, law and morality. That these two domains should have been chosen is explicable on two grounds. First, if, as some philosophers believe, the content of the law is dependent on morality, then legal judgment cannot be deemed objective unless it can be shown that the morality in which law is grounded is objective. Secondly, law and morals must confront the same kind of sceptic: that is, the sceptical arguments that trade on the claim that morality depends on human responses or practices can be adapted to apply also to law. If such dependence makes morality ineligible for objectivity, then law must likewise be ineligible.

The contributions to this collection are diverse and of high quality. David Brink grants that the law is composed of materials that express decisions such as statutes and cases; he then asks whether the interpretation of such materials can be objective. Brian Leiter discusses the question of naturalism about morality: can we defend morality’s objectivity simply by appealing to the fact that moral claims are susceptible to reasons, or must we also find for them a foundation in the natural world, such as that provided by science? Gerry Postema argues that judgments in an objective domain must possess, among other things, the possibility of invariance across subjects, and claims that a public procedure of justification capable of leading to consensus is among the marks of objectivity. Sigrun Svavarsdottir critically discusses Thomas Nagel’s defence of the objectivity of value, which, she says, postulates that the issue is not whether values are part of the fabric of the world, but rather whether values are visible from a standpoint that is sufficiently detached from the personal perspective. Joseph Raz develops and defends the objectivity of practical reason against a number of difficulties, including the observation that some concepts that figure in practical reasoning are ‘parochial’, i.e. their content depends on social facts. Philip Pettit’s essay develops a defence of objectivity of value which concedes that evaluative properties are dependent on human responses, just as are secondary qualities such as colour. David Sosa, by contrast, argues that objectivity is sensible only for primary, non-response dependent properties. The essays are all important to specialists, and several may prove valuable for graduates and advanced undergraduates. Here I focus on only two of them—Brink’s and Leiter’s. Each of these address important issues discussed in recent literature in legal philosophy.

Brink begins by saying that the law is objective where it determines a uniquely correct outcome for a hypothetical or real case. In fact, his discussion of objectivity proceeds in terms of fallibility (ie, scope for error), which is perhaps a more helpful conception of objectivity, since it allows us to connect objectivity in law with objectivity in other domains. Consider, for example, physics as an objective domain: what makes it objective, on the error-based conception, is that there is conceptual space between what we take to be the case about the physical world, and what the case is. This space—between judgment and what is—is the space for error. The fact that our judgments may be fallible makes the domain objective.

Brink focuses on fallibility of judicial judgment. Those who think that the law is what judges say it is—the American Legal Realists typify this position—in effect hold judges infallible. In doing so they regard the law as thoroughly indeterminate. We can try to predict what the judge will do, but for the judge there is no fact of the matter about
what the law is and so whichever way he decides is perfectly legal. Those who think that judges are at least some of the time fallible think that the law is at least partially determinate. Hart fits into this niche, since he famously thought that in ‘easy’ cases there is a standard that governs judicial behaviour, by reference to which decisions, even if final, can be distinguished as correct or incorrect. That is a specifically legal standard that determines judicial duties, not just any old standard such as moral, prudential or stylistic. By contrast, Hart thought that in ‘hard’ cases there is no fact of the matter as to what the law is, which is to say that there is no such standard governing judicial behaviour; and so for a judge there is no legal mistake to make, whichever way he decides. Finally, those who think that there is always a fact of the matter as to what the law is believe that judges can always get the law wrong: a court might fail to discern the right answer, for example, in producing its decision. This last position is one which we might associate with Ronald Dworkin, and Brink is tempted in that direction—although he wants to rely not on Dworkin, but on arguments from the philosophy of language instead.

Hart believed that when lawyers disagree about the applicability of a general term in the canonical formulation of a legal rule—in his famous example, when lawyers cannot agree as to whether something is a vehicle—there is no fact of the matter about what the law is. Dworkin’s critique of that view is, according to Brink, this: the law includes not only rules but also principles, and so in hard cases, where the rules may well be silent or lead to an absurd outcome, principles come into play and fill in the gaps. For Brink, however, this critique will not do, since principles are more grist for Hart’s mill: that is, principles are expressed in language, including open-textured general terms. If the application of rules is partially indeterminate as a result of the open texture of the terms in which they are expressed, the application of principles will be just as indeterminate, except if we suppose, implausibly, that every case that is hard in respect of the relevant rules is an easy one in respect of the relevant principles.

To resist Hart’s thesis, Brink claims, we must engage with his semantic argument for indeterminacy. This argument involves two assumptions: first, that the meaning of an expression consists in the identifying descriptions which users associate with it; secondly, that meaning determines reference, in the sense that the expression correctly applies to something just in case it satisfies the descriptions. Brink argues, plausibly, that we should not accept either assumption. Taking his cue from Donellan, Kripke and Putnam, he argues that any semantics must disengage the meaning and/or reference of expressions from beliefs of users about the range of application of those expressions, and must accept that identifying the reference of an expression typically involves theoretical considerations that go beyond what ordinary users know. Brink was among the first to see the relevance of the arguments made by Kripke et al. to debates in legal philosophy. If we accept Brink’s arguments, as I think we should, we must reject Hart’s semantic argument concerning indeterminacy. But is this all we need to say? Is it true, in other words, that the question of objectivity in law is identical to the question how canonically formulated rules apply to cases?

Brink says that such semantic issues do not exhaust legal interpretation. Whichever way we answer the question concerning what counts as a vehicle, hard cases persist. Police cars are vehicles, but this does not settle the question whether a police car that enters the park in an emergency has violated the relevant prohibition. Legal rules are human artifacts, says Brink, and as such are essentially tied to their rationales. Legal interpretation has to resolve not only the problem of applying the constituent expressions of a rule’s formulation, but also the problem of applying the rule in line with its rationale. To address the problem Brink develops a view that is, as he points out, Dworkinian in spirit, if not in detail: interpreters must assign a rationale that best justifies the rule, and it is in light of the rationale that the rule must be applied.
Since Brink ends up pretty much where Dworkin does, it seems pertinent to ask whether he was right to reject Dworkin's argument from principles. Evidently Brink thinks that Dworkin's argument from principles is meant to refute Hart's indeterminacy thesis, granted that the law is a matter of what words mean in a set of canonically formulated norms. And if that were Dworkin's point about principles, it would have the weaknesses Brink attributes to it: the argument from the philosophy of language would supplant, not reinforce or work in tandem with that from principles. Indeed, that is the reading of the argument from principles that positivists favour. For the legal positivist, we first of all have legal norms and then consider what they have to say for the dispute in hand. That is a state of affairs which minimizes the significance of principles since, even once we have agreed that some principles figure among our legal norms—once we have settled the positivist's question of validity—we must still resolve problems about how the terms in which those norms are expressed are to be applied (much like Hart's rule about vehicles in the park) and about how to balance principles that pull in opposite directions—we must further settle the question of the norms' impact on our rights and duties.

Of course, principles are not norms that are formulated in a canonical way and cleverly hidden in the library's philosophy shelves where lawyers rarely look. Rather, to evoke Dworkinian imagery, they figure in a story that justifies settled law. A principle that justifies resolving a case in a certain way is a legal principle just in case it justifies resolving other cases in the way in which they have been resolved: what makes a principle legal is its justificatory power in other cases, the fact that it figures in the rationale of settled law. What makes it relevant to the case in hand is the fact that it decides the case in a particular way, not that it is within the ballpark of decisive factors. And so the notional further problem of application evaporates. Dworkin's principles are, then, the very same thing that Brink urges us to look for in order to decide hard cases: rationales or 'points' or 'purposes'. Brink's misinterpretation of Dworkin's argument would be inconsequential if it were merely a matter of how to interpret Dworkin. But in fact it is evidence of some deeper flaw. Brink accepts, in effect, the positivists' claim that the law consists of a set of norms, whose identity is fixed in some way or other, and which we must apply to the facts of cases in order to resolve disputes. This is the reason, I suspect, why he thinks that Dworkin's point about principles must be understood as a point about how many legal norms there are, norms whose legality is a distinct matter from their specific bearing on cases. And that is also the reason, I believe, why he thinks that his new semantics, supplemented by attribution of rationales, is helpful in the context of legal interpretation alone, not in order to work out, more fundamentally, what the law is in the metaphysical sense (ie, what its nature is).

Extending interpretivism to the question of the nature of law would take us to a different conclusion about the state of play in jurisprudence. Brink's conclusion focuses on what he takes to be the strongest case for positivism: that a law can be part of the system even if it is bad. Brink concludes that, since working out what the law says is an interpretive matter, values play a role in identifying the least bad interpretation of bad laws, and so positivism does not win outright. By contrast, the line of argument that takes up the question of the nature of law itself ends up at a different place. According to this line, the right view about the nature of law is the one that best justifies legal practice as a whole, ie which assigns to law a rationale such that its various attributes are shown to be justified in the best possible way. It follows that, not only must we use constructive interpretation in order to identify the content of statutes, and so must justify them so far as possible, but we must also use constructive interpretation to determine the legality of statutes. Bad statutes might turn out to be part of the law because it is good that they should be, in which case positivism loses.
Leiter takes on Dworkin’s anti-Archimedean arguments, and finds them deeply flawed. According to Dworkin, what the law requires follows from the best justification of political history. But this makes the law’s standing hostage to evaluation’s standing. To justify the history, after all, we must rely on certain values, and if the latter are a matter of projection or are otherwise not objective, what the law requires cannot be an objective matter.

It seems, then, that Dworkin needs to defend his conception of law at some meta-evaluative level. But Dworkin famously argues that there is no such level: all the defence we can offer, and all that is necessary for our evaluative claims, is, according to Dworkin, internal to the evaluative domain. To defend the claim that slavery is wrong is to point out all the values that it violates, not to offer some kind of special, metaphysical defence that is austere (relies on no value) and neutral (has no implications at the first-order evaluative level). And, since we have plenty of such first-order defences for the proposition that slavery is wrong, we need not worry at all; our evaluative claims are secure.

Leiter is not convinced. He thinks that there exists an external standpoint from which to mount scepticism, and therefore that there exists a distinct, external defensive task for friends of the objectivity of value. Not external to everything of course: there is no timeless Archimedean point external to all that we believe in and from which to inspect and remedy all our problems at once. He does think, however, that there exists some point which is sufficiently Archimedean for evaluation and other suspect practices: that is the point occupied by the sciences, a point which is external to, and so permits global, wholesale attacks on many domains, and in fact is as external to evaluation as it is to superstition, witchcraft, or astrology.

Leiter’s paper raises many issues, and I will only discuss one: can there be external scepticism? Leiter claims that the argument to the effect that there cannot is either trivial or incoherent.

The crucial argument is really an argument about the logic of criticism: the sceptic must suppose that his claims engage and compete with the claims made in the domain that is the target of his criticism. What makes it the case that a claim is competing with another is a substantive matter, and it is typically part of the sceptic’s task to show that his target’s claims are indeed competing with his own, and that his own claims are stronger. The argument from internality summarizes a common feature of all sceptical attacks: namely that they include or entail a claim about competition. The point goes back to the structure of agreement, disagreement and error. It has been pointed out, time and again, that you cannot disagree with someone unless there is something you disagree about. Since something or other must serve as the locus of the disagreement, the sceptic and his target must, inevitably, share something—a subject matter. What one says is internal to what the other says.

Leiter misconceives the reason the internality argument is consistent with science’s license to attack, say, astrology: he thinks that such cases are a special exception, a concession to the effect that, where causal claims are involved, the internality argument does not apply. The truth is precisely the other way around: the fact that astrology receives no immunity illustrates the general operation of the internality argument, rather than restrict it to non-causal domains.

If the internality argument does not aim to confer immunity to particular domains, how can it help defend morality? It does so in at least two ways. First, it does so by helping show that the scientist and the moralist are not in fact competing with each other and that we need not think of science as a source of moral scepticism. Secondly, it helps defend morality against those who are not convinced and think that science is in fact competing with morality: for example those who think that there exists a causal
account which fully explains morality, whatever that means, and so, as it turns out, competes with it. Given that scepticism is always internal, so the defence goes, it follows that the challenge, if successful, should displace its target. That is what happens in the case of astrology. To be convinced by the sceptic is to give up the belief that one should avoid momentous decisions when the stars are out of line. The tricky point with most versions of moral scepticism is that the sceptic will not do that, and this is why such scepticism is very different from the kind which Leiter champions. The typical moral sceptic wants to tell us both that something is very wrong with morality and that we should not torture babies for fun, even when no one is looking. He is like someone who says that, though it is not really objectively true, influenza is indeed the influence of bad spirits. The internality argument then poses a dilemma for him. If he is right about the first part, he must be wrong about the second. Or vice versa. And of course he likes neither of these options. Now, for an argument as small as the internality argument, that is a pretty neat trick. So, *pace* Leiter, the argument seems coherent and important. Perhaps there is something wrong with it, but Leiter has not put his finger on it.

Although I have focused on only two of the essays in this collection, I should reiterate that all of the contributions discuss topics that are important and difficult, and do so at a very high level of clarity and sophistication. I would strongly recommend *Objectivity in Law and Morals* to anyone who is working in legal and moral philosophy.

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