LEGAL OBJECTIVITY: A DEFENCE OF RIGHT ANSWERS IN THE LAW

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A dissertation submitted in the partial fulfilment of the degree of Bachelor of Laws (Honours) at the University of Otago – Te Whare Wananga o Otago.

October 2008

Acknowledgements

Over the last year my debt of gratitude to Stephen Guest has grown from large to enormous. From agreeing to supervise someone he hardly knew half-way across the world, to his endless patience reading and re-reading drafts, his insights, supervision and support has been of immeasurable help.

I also express my thanks to Ronen Lazarovitch for his helpful comments, and to Mark Heneghan for making bureaucratic red-tape a non-issue in my undertaking of this project.

This project is dedicated to Leuaina Andrews - a small thank you in recognition of her love, support and friendship over the last five years.

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Upon birth - even before birth - we enter law's domain.[1] The answers to legal questions affect our lives up until, and beyond, our deaths.[2] This project addresses a fundamental issue: are there right answers to controversial legal questions?

The ultimate justification or nature of right legal answers is important. We put enormous faith in the idea of right answers in the law. State coercion is justified by democratic principles only to the extent that there can be right answers in the law; answers laid down by an elected legislature and clarified - not distorted - by the judiciary. Our legal institutions and practices presuppose the existence of right answers; what are our appeal courts for if not correcting wrong decisions?

Mainstream legal discourse takes the position that a right answer in law must be more than the freewheeling subjective discretion of judges. We do not think that cases are decided on a whim, on the basis of nothing more substantial than what a judge ate for breakfast.[3] Unrestricted discretion to decide cases is like the Platonic 'might is right', the only difference is that wooden club of Thrasymachus has transmogrified into a small hammer wielded by an old man wearing a robe.[4] If arbitrary might was all a controversial case boiled down to then we would be engaged in a collective lie, and an unjust lie at that.[5] This possibility warrants attention. A discussion as to whether right answers beyond subjective discretion exist cannot be brushed aside as peripheral. If we are going to

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[1] Even the path from conception to birth lies in the shadow of the law; the Contraception, Sterilisation and Abortion Act 1977 affects those not yet born. Upon birth, a person's contact with the law becomes more marked, for example the Citizenship Act 1977 grants legal rights of citizenship.

[2] During life we are free to exercise legal rights and we are restricted by legal obligations. Upon deaths, our continued legacy on earth is governed to some extent by law - consider, for example, the Wills Act 2007 which affects how our property is to be posthumously distributed.

[3] For a sample of realist thought see K Llewellyn, *Jurisprudence: Realism in Theory and Practice* (University of Chicago Press, 1962). For more recent writing in this vein see J Hasnas, The Myth of the Rule of Law (1995) 199 *Wisconsin Law Review* 955.

[4] Plato, *Republic* in *The Republic of Plato* translated with introduction and notes by F MacDonald Cornford (Clarendon Press, 1941). The reference is to the character Thrasymachus who declares that 'justice is the advantage of the stronger' at 338c of the original text.

[5] And this is the position of many thinkers. The critical jurisprudence project seeks to show that law and legal liberalism routinely fails to deliver upon its promises of impartial governance.

expend time and energy into finding right answers then our very first concern should be as to whether right answers are even possible in the law.[6]

This project will argue that there are objectively right answers to legal questions. Despite the grand sounding nature of this claim this essay's thesis is modest. A discussion of right answers in law is all too often burdened by heavy philosophical baggage, when the truth about legal objectivity is straightforward. This paper seeks to jettison unhelpful theories of 'moral properties' and demands for 'certain proof', arguing instead that right answers in the law are those with the best reasons in their favour. An objectively right answer is the answer best supported by reasons, and any right answer can be falsified if better reasons can be given for a contrary position.

This thesis therefore rejects the notion that a right answer to every legal question exists in advance, needing only to be found and declared like a fact of the natural world. There is no 'Aladdin's cave' with 'the common law in all its splendour' hidden inside of it.[7] Law is a domain of evaluative, controversial truths and there is no final factual determinate of legal truth above or outside or beyond reasoned argument. Objectivity is a domain specific concept and that the conception of objectivity appropriate in the law is different to the conception of objectivity that is appropriate in the sciences. The ultimate aim of this project is to show that evaluative, reasoned truths in law are sensible, plausible and all that is possible.

This project is divided into two stages. The first stage advances a theory of right answers as best reasons. The second stage defends this theory of against various objections. Chapter 1 argues that the law is best understood as an argumentative enterprise. This chapter explains the worth of argument and introduces an evaluative paradigm of law.

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[6] We can be more nuanced and realize that two questions arise; first, whether right answers exist in the law, and second the nature of such right answers. However, because discussion about the *nature* of right answers informs the scope of what will be considered a *right* answer these questions can be dealt with as one for the purposes of this project. To illustrate this point with an example, if correct legal answers were thought to require certain metaphysical proof, then most would conclude that right answers do not exist in law simply because such proof is lacking. At the other extreme, if one thought that right answers were whatever a judge decided, then the mere existence of legal decisions would entail the existence of right answers. Thus, conclusions about the nature of right legal answers largely settle further questions as to whether right answers exist - this is why the two questions of 'nature' and 'existence' can be treated as one.

[7] Lord Reid, The Judge as Lawmaker, (1972) 12 *The Journal of Public Teachers of Law* 22.

This theory, built around the idea of best reasons, or best justifications, will be illustrated by showing the ways in which it is a more powerful and persuasive theory of law than its immediate predecessor, legal positivism. Chapter 2 will examine the idea of best reasons in more detail, arguing that best reasons in any evaluative argument consist of a context sensitive matrix of concepts. Chapter 3 is the transition chapter between the first and second stages of this project. This chapter will distinguish between two types of scepticism and make a preliminary argument that regardless of sceptical challenges, we cannot escape our day to day reliance on reasoned conclusions. Chapter 4 examines the two key limbs or central pillars of scepticism against legal objectivity arguing that each limb either collapses, or is pointlessly sceptical of a theory that is not advanced by this project. Chapter 5 completes this essay's defence of legal objectivity, considering and rejecting a contemporary sceptical challenge to the idea that moral truth and legal truth can consist of reasoned conclusions.

Chapter 1 – An interpretive account of law

a. Evaluative argument

Many things only make sense if we take their point or reason for being into account. The point of a particular thing is a social construct which must be 'made sense of'; it cannot be described like a plain fact because it is not a plain fact. An argumentative attitude is therefore the fastest and most direct way of understanding some things.[8] For example, describing the details of a particular taxation system (those earning under $14 000 pay 12.5% of their gross income to the IRD etc) would not actually explain what tax was. An adequate elucidation of tax in modern society would have to describe the point of taxation, explaining that it pays for public amenities and so forth. In contrast, to understand how a clock works, we would not need to know the point of clocks; we would just need to describe the mechanisms that turn the dials. (Of course, understanding the *concept* of clocks more generally might require looking to the point of time keeping.)[9]

Evaluative argument is so pervasive in our daily lives that we sometimes overlooked it by virtue of the fact that it is all around us. Denying the importance of evaluative argument in the law, however, is a bit like standing in Trafalgar Square and denying that you could see England.[10] Arguments about the point of the law are clearly crucial. The most devastating thing a judge can say to a courtroom argument is that it has missed the point and law students do not pass exams unless they focus on the issues in point, regardless of how many cases they rote-learn.

It is helpful to think of evaluative argument as having a number of layers. There is a layer of argument about whether a particular thing should be understood by its point, further argument about what this point is, and final layer of argument about how to best realise or advance or give effect to this point. By elucidating the form or shape of evaluative

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[8] Dworkin's final conclusion is that the law is best characterised as and argumentative attitude. *Laws Empire*, pp 49, 413. (*Laws Empire*)
[9] N MacCormick uses a similar example in the Addendum of his book *Legal Rights and Legal Theory* (Clarendon Press, 1978)
[10] The point here is that if you can't see it, it is only because you are *in* it.

argument we can see how such argument makes the best sense of the law generally and right answers within the law specifically.

b. The process of evaluative argument: an interpretive account of law

Persuasive interpretive arguments are process based, and work from general concepts to specific points, honing in on the best answer in a given situation. Three distinct stages or analytical attitudes can be identified: pre-interpretation, interpretation and post-interpretation.[11] Argument at the pre-interpretive phase aims to establish a preliminary platform of agreement upon which further arguments can be developed. This 'platform' of agreement is important because people can only engage in sensible argument when they share some assumptions and practices.[12]

Thus, in the law there is a level of pre-interpretive argument about the things that can be called 'in some relatively uncontroversial way, "law".'[13] Hart, for example, argues that certain rules and customs comprise the law, while Dworkin argues that the law makes more sense as a body of rules, customs *and principles*. Pre-interpretive argument is relevant not only in regards to the general substantive nature of law, but also in regards to the interpretive method that interpreters will use to make the best sense of the of the law.[14] For example, in adjudication, two opposing advocates would need a degree of pre-interpretive agreement about the general area of law in question (the subject matter) *and* the general methodology that will produce a correct answer. They cannot have a sensible argument if one advocate's methodology is legal reasoning from precedent while the other advocate is planning to read the entrails of a sacrificial animal for the answer. In many instances pre-interpretation will not require explicit argument, indeed, this stage of the interpretive process is often assumed.[15] Two lawyers, for example, will probably agree on the subject matter at issue (typically the statutes and cases governing the issue) and the types of argument that can be used to analyze the subject matter (usually reasoning from precedent).

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[11] *Laws Empire,* 49.
[12] R Dworkin, *Justice in Robes* (Harvard University Press, 2006) 9. (*Justice in Robes)*
[13] S Guest, *Ronald Dworkin* (Edinburgh University Press, 1992) 23. (*Guest*)
[14] *Justice in Robes,* 10.
[15] *Ibid*, 12.

We can make our understanding of pre-interpretative argument more concrete by comparing Dworkin's pre-interpretive conclusions about the law to those of his jurisprudential predecessor, H.L.A. Hart. Hart's idea was that the law was centrally concerned with rule following; regular behaviour conformed to by reference to a stipulated standard accepted by at least some members of a group.[16] For Hart, understanding the union of primary and secondary rules was 'the key to the science of Jurisprudence'.[17] Primary rules concern the direct regulation of human conduct, requiring people to do or abstain from certain actions, while secondary rules exist parasitically upon primary rules stipulating how they can be introduced, identified, extinguished or modified.[18] This theory separates moral questions from legal questions.[19] The validity of any legal rule, including laws that overlap with morality such as the prohibition of murder, stems from the source or 'pedigree' of the rule as opposed its content or 'intrinsic value'.[20]

This pre-interpretive conception of law as a body of primary and secondary rules is plausible. It made better sense of the law that than previous theories, such as the command theory[21], or theories of natural law.[22] The problem was that Hart's theory did not make much sense of 'hard cases' where rules alone are incapable of dictating any one particular outcome.[23] Hart's idea was that in a hard case judges exercise 'strong'

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[16] HLA Hart, *The Concept of Law* (Clarendon Press 1961) 77-81. (*Concept of Law*)

[17] Ibid, 79.

[18] Ibid. Thus, secondary rules would include rules of recognition for identifying what rules were law, rules of adjudication to mediate between conflicting rules as well as rules of change and empowering rules to cure the static and potentially inefficient nature of primary rules

[19] As famously put by Hart, 'it is in no sense a necessary truth that laws reproduce or satisfy certain demands of morality, though in fact they have often done so'. *Concept of Law*, 181.

[20] N Lacey, *A Life of H.L.A. Hart: The Nightmare and the Noble Dream* (Oxford University Press, 2004), 225. (*Lacey*). The term 'pedigree' coined by Dworkin in *Taking Rights Seriously*, 17.

[21] The command theory of law was most famously set out by J L Austin in *The province of Jurisprudence Determined* (J. Murray, 1832). The major defect with Austin's theory was that his idea of law required constant threat of force for it to be law. When this coercive threat is lacking - for example, where a burglar commits a theft in a remote area with almost no chance of being apprehended, the command theory would say that no law existed. This poorly describes our everyday understanding of the law. See *Taking Rights Seriously*, 19.

[22] Natural law is the idea that valid principles of human conduct exists before their discovery, just like 'laws' of science or math (*Concept of Law,* 182.) However, modern thinkers have thought natural law reducible to 'a very simple fallacy: a failure to perceive the very different senses which law-impregnated words can bear.' *Concept of Law,* 183.

[23] This might be because the rules are inadequate, unclear or contradictory.

discretion and decide cases untrammelled by any *legal* restraint.[24] Judges, however, do not act as if they are unrestrained in hard cases. By recognising the existence and restraining effect of legal principles, Dworkin made better sense of hard cases and hence the law as a whole.

A picture of the law that extends to legal principles is supported by the discourse of the legal institution; principles are mentioned in most cases and are the staple of legal reasoning in hard cases. Some well known legal principles include the maxim that 'no one shall profit from their own wrong'[25], the 'neighbourhood principle' stated by Lord Atkin upon which the law of negligence is founded[26] and the widely invoked 'principle of legal certainty'[27]. Legal principles can be seen as distinct from legal rules in two ways.[28] First, principles are not identified in terms of their 'pedigree' or source, but by their content.[29] Principles are content based standards that evolve into and out of existence. In contrast, rules are the product of instantaneous conception that can be taken into or out of existence through an overriding rule. This raises the second way in which principles are distinct from rules: they are not applied in an 'all or nothing' fashion.[30] Principles have a 'dimension of weight or force' that requires judges to balance competing principles against one another in a complex case.[31] This means that competing or contradictory principles can simultaneously exist in the law, whereas contradictory rules are logically impossible; one rule must cease to be a rule where two prima facie rules come into conflict.[32]

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[24] *Concept of Law*, 120-151. Note that Legal restraint on judicial discretion - rules that would guide a judge to decide a case in favour of one party or other - would have to come from legal rules that, by definition, do not exist in a hard case. *Concept of Law*, 132.

[25] Ibid, 23.

[26] *Donoghue v Stevenson* [1932] AC 562 at 580 (HL).

[27] Consider, for example, the famous statement of Sir George Jessel MR that 'contracts when entered into freely shall be held sacred and shall be enforced by Courts of Justice'. *Printing and Numerical Registering Co v Sampson* (1875) LR 19 462 at 465. For a more recent elucidation of this principle see *Wellington City Council v Body Corporate 51702 (Wellington)* [2002] 3 NZLR 486 (CA) at 495.

[28] *Taking Rights Seriously*, 24 and *Lacey*, 331.

[29] *Taking Rights Seriously*, 40.

[30] Ibid.

[31] *Lacey*, 331.

[32] This is recognised in legal doctrines such as the implied repeal of a statute that is inconsistent with a later statute. See generally; *Vauxhall Estates Ltd v Liverpool Corporation* [1932] 1 KB 733 and *Ellen Street Estates Ltd V Minister of Health* [1934] 1 KB 593.

To illustrate the 'weighted' nature of principles, imagine that a judge must decide whether to a grant bail to a man convicted of serious spousal abuse.[33] Here the principle that an accused person is innocent until proven guilty must be balanced against the competing principle that an innocent person has the right to be protected from the unnecessary risk of harm.[34] Also relevant is the principle of 'integrity'.[35] This principle seeks to ensure that all are treated as equals under the law and requires that the law speaks with one voice.[36] This principle is popularly manifested in the maxim that like cases are to be treated alike.[37] Reaching a fully justified legal decision in this case (or any case), requires consideration of all relevant principles to reach a decision that makes the best sense of the law as a whole. Consequently, if previous decisions have denied bail to violent offenders, this must be taken into account by our hypothetical judge.[38] If our judge denied bail on the basis of a factual analogy with decided cases, this would not 'overthrow' the competing principle of treating people as innocent until proven guilty. Whilst denying bail, the judge would simultaneously treat the accused as innocent in many ways- by putting the Crown to a 'beyond reasonable doubt' burden of proof, for example. This balanced application of law where contradictory directives are simultaneously put into effect does not fit with a 'rules only' conceptualisation of law, yet it seems to best accord with what actually happens in the law. A pre-interpretive account of law that embraces legal principles seems to make better sense of the law than an account that only recognises legal rules.

Dworkin's understanding of law is more interpretive than Hart's.[39] Although Legal positivism is an interpretation of law, the actual theory of primary and secondary rules is fundamentally descriptive, not interpretive. Under positivism the ultimate

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[33] Section 8(5) of the Bail Act 2000 applies. The granting or refusal of bail is essentially a balancing exercise: *R v Chapman* [1992] 2 NZLR 380. Section 8(5) provides that the need to protect the victim of the alleged offence is of paramount consideration, but the court must also weigh up the rights of the accused, who until conviction is entered, has the presumption of innocence in their favour.

[34] Per n 33 above. For application of these principles see *Bishop v Police* (HC, Hamilton AP 06/01, 16 Feb 2001, Hammond J) [2001] BCL 278 and *Searancke v Police* (HC Hamilton CRI 2007-419-000135, 23 November 2007, Venning J)

[35] *Laws Empire,* Chapters 6-7.

[36] *Laws Empire,* 225.

[37] Note that integrity is more sophisticated than this. For the ways in which integrity differs from the maxim that like cases are treated alike see *Laws Empire,* 219-221.

[38] The judge would consequently have to have regard to cases like those mentioned above in n 33 and n 34 above.

[39] *Laws Empire,* 226.

determinate of any particular law must be a 'plain fact', or secondary rule. In contrast, Dworkin's theory of the law is itself a program of interpretation. It does not give an ultimate justification of the law by turning to a rule or plain fact. Rather, the law is ascertained through further interpretive study of legal doctrine.[40]

After argument about the general concept of law, the best conception of law can be discussed.[41] This next layer of evaluative argument is more specific; having made the best sense of the general idea in question (pre-interpretation), what are the best answers within this idea (interpretation)? Again we can concretise this stage of the interpretive process by seeing how it applies to law. If we accept Dworkin's pre-interpretive theory of law, what answers will make the most sense within this theory? It can be strongly argued that the best legal answers – the answers that best explain and justify Dworkin's pre-interpretive account of law – will have both legal 'fit' and moral worth.[42]

'Fit' is the idea that a legal interpretation must be consistent with precedent and coherent within its surrounding legal context.[43] Thinking about the law as a sort of chain novel with multiple authors is helpful.[44] While each subsequent author has some freedom to develop the novel, they are constrained by what has already been written. Each author needs to have regard to things like the previous plot developments and the character's names if the novel is to make sense.[45] Likewise, in the law, developments that make sense fit with the past. Legal interpretations must coherently fit within their relevant legal context; the surrounding body of statutes and precedents and principles.

In addition to legal fit it can be argued that any fully justified legal answer must have moral worth. If we accept that legal principles underpin the law then the requirement that

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[40] Ibid.

[41] For a discussion about the distinction between concepts and conceptions, see generally: J Rawls, *A Theory of Justice* (Harvard University Press, 1971), esp. Chapter 5 and *Guest* at 34-37. The essential idea is that concepts are the general basic idea, while conceptions are the specific developments, or extensions of this idea - there will be several potential conceptions for each concept.

[42] *Justice in Robes*, 14-15.

[43] *Guest*, 49.

[44] *Ibid.*

[45] *Ibid,* 50.

all legal interpretations have moral worth follows. The principle of legal fit, for example, is simply a particularly prominent aspect of what moral worth usually requires; treating like cases alike is a manifestation of the ultimately moral principle that individuals should be treated with equal respect and concern under the law.[46] This insistence on moral worth makes the best sense of the law given Dworkin's pre-interpretive conclusions; if there are legal principles then the law has a moral element. As noted earlier, principles exist because of their substance (not their 'pedigree') and recognising the existence of principles makes the best sense of legal arguments, practices and judgments.[47] Admittedly, the operation of legal principles is not always obvious. However, just as the scarcity of oxygen at altitude brings about a conscious awareness of breathing, the breakdown of legal rules in hard cases brings the background operation of legal principles into our immediate contemplation. The foundational operation of legal principles means that all legal argument ultimately collapses into moral argument about 'why and under what conditions the enforcement of legal standards is justified'.[48]

The need for moral judgments in the law is not particularly problematic. We can briefly glance ahead at this point to the idea that will be defended by this paper. Just as right answers in the legal realm are the product of everyday argumentation, it will be argued that right moral answers are the product of ordinary argument. Reasons are given, and the moral position that can be best justified should be accepted. Seeking certain proof for a moral position is unhelpful and misleading. No such certain proof exists, only contestable reasons. Moral truth is evaluative, not descriptive; a social phenomenon, not a natural one.

The third interpretive phase - post interpretation - recognises that interpretive conclusions can alter initial pre-interpretive and interpretive perceptions.[49] The idea is that the best justifications of a particular practice or specific rule may require that rule or practice to

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[46] *Laws Empire, 219.* Also, note the term 'usually'. In some instances, where an entire body of precedent is morally repugnant, Dworkin would argue that precedent should be disregarded in favour of a more moral outcome. This reasoning is consistent with our wider understandings of law if 'fit with precedent' is seen as stemming from deeper moral principles.

[47] *Taking Rights Seriously,* 45.

[48] *Lacey* at 354, quoting a written interview of HLA Hart published in the Spanish Journal *Doxa* in 1988: *Doxa* 5 (1988) 339.

[49] *Laws Empire*, 66. *Guest*, 31.

be modified to better accord with its own 'point' or justification. Consider a law about the safety features required on industrial machines.[50] The best interpretation of this law might be that it concerns the protection of industrial workers. This interpretation would give the section a pro-worker reading but might also conclude post-interpretively that Parliament should re-express this section in clearer language as this would better advance the (interpretively assessed) purpose of the law, namely protecting workers rights.

We can pause at this point and take stock. Over the course of his academic career, Dworkin has argued that the above conclusions make the best sense of the law. Whether or not these substantive conclusions are accepted, we can crucially note how his conclusions have been reached and how they might be countered. The best interpretations of the law are those that make the best sense of the law. Dworkin's conclusions could be challenged by showing that other conclusions make better sense of the law. We would ultimately accept the theory that was best justified, the answer best supported by reasons.

We can further note that elucidating the interpretive process helped identify where and how the thesis of this paper comes into play. If the law is underpinned by moral standards then questions of moral objectivity are implicated in questions of legal objectivity. Dworkin's theory was seen as better than Hart's because it explained (through legal principles) how judges might be legally restrained in hard cases. However, Dworkin's solution might also be his stumbling block. Legal principles supposedly solve hard cases because they limit judicial discretion. Yet, if judgments about what is morally best are subjective then there is no limitation- there would only be different answers in hard cases, not right answers.[51] Judges would not be bound by legal principles in any

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[50] Section 6 of the Health and Safety in Employment Act 1992 would generally apply. Section 6 provides that 'Every employer shall take all practicable steps to ensure the safety of employees while at work.' It is worth noting that this section has, in fact, been interpreted in a way that is slanted towards employees. For example, in *Dept of Labour v de Spa & Co Ltd* (8/10/93, DC Christchurch CRN30090213/93, Holderness, J) the Court held that there will be a breach of s6 where an employee is encouraged to act recklessly because of the employer's failure to minimize opportunities where an employee might unthinkingly place his or her safety in jeopardy.

[51] This concern has been expressed by many thinkers. It is artfully put by J L Mackie: '[W]hat the law is, on Professor Dworkin's view, may crucially depend on what is morally best. Now I would argue…that moral judgements of this kind have an irreducibly subjective element. If so, then Professor Dworkin's theory automatically injects a corresponding subjectivity into statements about what the law is.' J L Mackie, 'The Third Theory of Law', reprinted in M Cohen (ed.), *Ronald Dworkin and Contemporary Jurisprudence* (Duckworth, 1983), 165.

meaningful way; they would have strong, not weak, discretion and Dworkin's theory would be no different to positivism. This papers contention that there can be objectively right moral answers is therefore a response to the sceptical strategy of trying to unravel legal objectivity by picking away at moral objectivity.

Before defending the idea that right moral answers can consist of 'best reasons' a final explanatory section is needed. What exactly is meant by 'best' reasons, what is a best justified or best reasoned answer? Clearly much is contained in the concept of 'best'. The proceeding chapter aims to unpack this concept.

Chapter 2 – The crux of interpretive argument: the concept of 'best'

The idea of this paper is that the term 'best' is not a label for a single concept. Rather, 'best' refers to a matrix or bundle of concepts. Some of the concepts in this matrix almost universally feature in a best answer, while other concepts feature in best answers in a more context sensitive manner. This idea can be explained through an analogy. Consider the skills or attributes that make a politician an effective public speaker. There will be some fundamental skills like speaking audibly, enunciation and the use of varied tone and tempo. These attributes of effective speaking remain relatively constant no matter the audience or the content of the speech. Beyond these constants, an effective political speaker will have a repertoire of skills that will be invoked in a more context sensitive manner. For example, in a campaign stump speech, the effective politician will take a populist tone, favoring applause-line slogans over cerebral policy discussion. The savvy politician may also modify their clothing and vernacular for the occasion - a beer hall crowd is unlikely to be excited by a charcoal pin-stripe and polysyllabic words. In another contexts however, the effective political speaker will treat formal clothing and language as essentials. For example, in a speech honoring national war dead, the effective political speaker will be solemn, formal and dignified. Note that the fundamentals of good public speaking (audibility, enunciation etc) remain constant from the boisterous beer hall address to the sepulchral memorial speech.

We can translate this speech example back into the 'matrix theory' of best answers. The complete bundle of speaking skills displayed in a given situation is equivalent to the complete content of a best answer. The skills or concepts in this bundle involve a relatively unchanging core, while context determines the skills or concepts important to a best answer in a given situation. In other words, a best answer in a particular context, just like a best speech in a particular context, will be tailored to that context. Hence, we can unpack the concept of 'best' both across and within all conceivable domains, continually refining the answer that will be best dependant upon the nature of the question that is asked.

What then, is the relatively unchanging 'core' of a best answer, the equivalent of an audible voice and enunciation in our speech analogy? The suggestion of this paper is that the core of a best answer will involve some minimal form of reason; it is hard to think of any sort of inquiry that could completely jettison all beliefs about truth and reason. Even a wholesale attack on truth, for instance, must retain some minimal beliefs about good reasoning or else it will render its own attack incoherent.[52] We cannot climb outside of reason and test it from above as doing so would deprive us of the rational machinery needed to proceed.[53] We can explain this epistemic situation through Otto Nuerath's analogy of sailors rebuilding a ship while at sea.[54] Since they cannot 'climb out of' the boat, they 'must choose to stand firm on certain planks of the ship while reconstructing others.'[55] Our epistemic situation is similar because when criticising truth and reason we must retain some planks of truth and reason to stand on while making our judgments - even if we will go back later and critically assess these planks (standing on other recently repaired planks of knowledge).

This idea that a best answer must always encompass some form of reason can be likened to the idea that intelligible legal arguments must flow from pre-interpretive conclusions. The similarity is that in each instance a best answer (whatever that is) must begin from sensible foundations; foundations that other people can understand and make sense of. In the law, this requires a foundation of conclusions about what can be considered 'law'. More generally, any answer purporting to be true or best or reasonable must flow from some minimal conclusions or assumptions about truth and reason.

Outside a core of reason, what comprises a best answer in a given situation? The suggestion of this paper is that a best answer is tailored to context and will differ both across and within all conceivable domains. The most effective political speech will be tailored to general context (change across domains) and then tailored further still to the audience on the day (change within a domain).

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[52] Dworkin, Objectivity and Truth: You'd Better Believe it" *Philosophy and Public Affairs* 25 (1996) 87 at 94 (*Objectivity and Truth*)

[53] *Objectivity and Truth*, 127.

[54] Ibid.

[55] B Leiter, 'Objectivity, Morality and Adjudication' (*Leiter*) at p 70 in B Leiter (ed), *Objectivity in Law and Morals* (Cambridge University Press, 2001)

Consider the shift or change in a best answer across the respective domains of science and law. A best answer in the sciences might have regard to empirical substantiation, logic, predictive value and controlled experimentation. Compare this to the law, where a best answer will have legal fit and moral worth. The differing criteria of a best answer can be explained interpretively. In science, the overall point of the enterprise is the accurate observation and description of the natural world. In law, description might feature in a best answer too. However, the point of law (roughly put) is achieving justice. So, in law, accurate description of legal rules is not the ultimate point or final goal. Accurate observation and description in the law is valued only to the extent that it advances principles of justice. For example, the principle of equal treatment under the law treats like cases alike, and this requires the accurate observation and description of existing rules and precedents (so that a new case can be decided like the old ones.) Thus, accurate observation in law is *a means to the end* of achieving justice, not an end in itself (like observation is in the sciences.)

A best legal answer will change depending on the nature of the legal question asked. There will be a difference between the reasons given in a hard case and the reasons given in an easy case. In an ordinary or easy case, a best answer will accurately describe and apply the relevant statute and case law. Of course, legal principles will underpin this rule application. However, an easy case is easy precisely because the existing rules fit smoothly or align with the underlying legal principles. This fit or alignment means that explicit discussion of legal principles is not necessary to make the best sense of the law. Further, because most cases are easy, 'best' legal answers will usually require only clear description and application of statutes and precedents - although it will always be possible to explore the underlying supporting principles. Take a paradigmatic easy case; a traffic officer writing a parking fine for someone parked in a no-parking zone. The case is easy because the rules clearly apply to the facts, *and* because the rules fit with the underlying principles of the law. If pressed, the traffic officer can justify the 'no parking' rule as passed by an elected legislature. If pressed further still, the officer can provide moral justification for governance by constitutional democracy. This principled analysis, while possible, is unnecessary. The literal 'no parking' rule gives us no reason to seek any further justification because it fits with and is

justified by, the legal principles underpinning the law. In hard cases however, the focus of a best answer shifts. Explicit analysis of legal principles is necessary to make sense of legal rules (or the lack of them). This shift in the criteria of a best answer explains why non-literal interpretations are sometimes appropriate in law. Non-literal interpretations make the best sense of hard cases where the requirements of legal principle differ from the literal requirements of the stipulated rules.

We can recognize that best legal answers are different not just between hard and easy cases, but also between different areas of law. A best answer in a negligence law case differs from a best answer in a public law case concerning the Bill of Rights.[56] The concepts comprising a best answer in the negligence case will include fidelity to precedent[57], an awareness of other areas of private law to ensure that other tortious doctrines are not inadvertently subsumed by negligence law, and deeper principles about the nature and purpose of private law. [58] In the public law case, the matrix of a best answer will cohere with accepted interpretations of the Bill of Rights Act and the deeper principles about the point and content of individual rights against the state.

The above three paragraphs have traced a best answer both across domains - showing how best legal answers differ from best scientific answers - and within domains - showing how best legal answers will be tailored to address the issue in point. Hence, the concepts comprising best answers are context-sensitive 'all the way down'; we can continually refine the answer that will be best in a given situation.

The concepts comprising the best answer will be interconnected, which is why the term 'matrix' is used to describe their collective operation. This is significant because the answer that is best in a given situation will be more complex and sophisticated than the mere sum of its parts. Turning back to our memorial speech example, imagine subtracting

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[56] New Zealand Bill of Rights Act 1990.

[57] See *Rolls-Royce New Zealand Ltd v Carter Holt Harvey Ltd* [2005] 1 NZLR 324 at para 59, where Glazebrook J emphasises that the expansion of negligence law must only expand incrementally from decided cases.

[58] Some such principles come to the fore in *Rolls Royce* (citation above n 68). At para 60 Glazebrook J states that 'the proximity inquiry can be seen as reflecting a balancing of the plaintiff's moral claim to compensation for avoidable harm and the defendant's moral claim to be protected from undue restrictions on its freedom of action and from an undue burden of legal responsibility.' See generally; E Weinrib, *The Idea of Private Law* (Harvard University Press, 1995).

one of the key parts. Instead of formal language plus formal attire, imagine formal language plus a clown-suit. This would not equal a memorial speech that was only half as effective (as a sum of the parts analysis would dictate); it would be ruinous. The formal suit lent credibility to the formal words and vice versa, giving the speech an overall coherence and plausibility. This idea of interconnectivity applies to best answers more generally.

Consider a best answer in the domain of the natural sciences. A significant criterion of a best scientific answer might be empirical observation. Yet, if a rock flew out of my hands skywards tomorrow, few scientists would conclude that rocks fly. The best answer would be along the lines that I was hallucinating, or that the thing I was holding was not actually a rock. This conclusion, which seems sensible enough, shows that there is more than one concept relevant to a best scientific answer. If we would not second guess the law of gravity because of a single observation, this must mean that we mediate bald observations through a number of other concepts - concepts like predictive value, variable controls and existing bodies of knowledge. Further, these concepts link to, cohere with and mutually reinforce one another. Each concept connects to the others and we trust the answer that makes the best sense of all these concepts in their totality. Hence, bald observation is checked or mediated by experimental controls and existing bodies of knowledge, while these concepts are themselves checked by empirical observations. Where a single person reports a flying rock it makes more sense to doubt their observation than to rethink the law of gravity. However, if a thousand heavy objects were observed flying into space at different times by different people in different locations then observation - even unprecedented and untested observation - could not be likewise be discounted. Discounting mass observation would poorly explain the totality of concepts relevant to a best scientific answer. To make sense of existing bodies of knowledge, for example, we must begin with the premise that humans can observe things relatively accurately with their eyes. If we grant this, then we must also grant that existing knowledge are susceptible to modification if new things are observed. Thus, when observations become overwhelming, the answer that is most coherent or consistent with our scientific beliefs will involve a rethinking of existing knowledge and the making of new predictions.

Best answers then, are often complex. The strands of a best answer connect with one another, and untangling these strands to understand them can take time. This essay's thesis that best answers are straightforward therefore needs some clarification. Best answers are straightforward philosophically; there is nothing metaphysical or mystical about objective rightness. However, in a given instance, it may be a lot of work to give the best reasons. There is no shortcut to a best answer, no golden tablet sent down from the gods spelling out the universal truths of mankind. Instead, the best answer will consist of an interconnected matrix of concepts. Some of these concepts, like bare requirements of logic, almost universally feature a best answer. Other concepts only come into play in specific contexts. Fully understanding a best answer in a given situation requires interpretation 'all the way down'. Reasoned thought is all there is; the careful analysis of what makes the best sense in a given situation. With this understanding of best answers, we can move on to the second and major part of this project. Can answers consisting of no more than the 'best reasons' be defended as objectively right in the law and morality?

Chapter 3 – Scepticism of objectivity

a. Internal and external scepticism

There are two ways a purported right answer can be challenged. One is to show that a purported right answer is poorly supported by reasons, and that another answer makes more sense. We can think back to our parking officer example to clarify how this sort of argument works. Imagine a hypothetical section - call it Section 4 of the Parking Act 2008, which gives parking officers the power to write fines:

S.4. Tickets may be issued to cars parked in no parking zones.

Picture this scenario: a person pulls over into a no-parking zone on the side of a busy road to let out a passenger. In the few seconds the car is stationary a particularly vigilant officer issues a ticket. The driver thinks the officer has incorrectly understood S.4. and the case proceeds to court. The officer contends that the correct or right reading of the law is that 'parked' means 'stationary'. The driver counters that the word 'parked' cannot sensibly extend to a running vehicle, even one that is temporarily stationary. Each side invokes techniques of statutory interpretation, past precedents and the legal principles to argue that their interpretation is the best. This sort of argument about right answers is internal. The answer that is best justified will be justified by reasons internal to the law. The driver's disagreement with the parking officer's reading of the law relies on substantive, controversial arguments about what the (right answer in) law actually is.

There is another way of criticising the traffic officer's argument. It could be argued that the traffic officer cannot claim that his reading of the law is correct because *no* legal conclusion is 'really' or 'truly' or 'objectively' right. Instead of arguing about how many angels can fit on the head of a pin, the move here is simply to say that there are no angels. This sort of scepticism is external. It is not sceptical of moral conclusion because it disagrees with them, but because it doubts whether any moral position can really be right.

External scepticism is therefore neutral in that it 'takes no sides in moral controversies'.[59] It purports to rely on non-moral arguments to defeat ordinary or internal moral arguments.[60] This sort of scepticism sees itself as 'a metaphysical theory, not an interpretive or moral position'.[61]

This paper seeks to defend legal and moral objectivity against external scepticism for two main reasons. First, this essay's thesis that right answers can consist of best reasons is relatively immune from internal attack. Internal arguments, themselves reliant on best reasons to be successful, would struggle to gain traction against the thesis that correct conclusions can consist of best reasons. The second reason is that a defence of legal objectivity must be in response to attacks, and most frequent and prominent attacks on moral and legal objectivity are external.[62]

b. A preliminary riposte to external scepticism

This argument considers whether;

> … external scepticism, if it is sound, *would in any way condemn the belief that interpreters commonly have*: that one interpretation of some text or social practise can on balance be better than others, that there can be a 'right answer' to the question which is best even if it is controversial what the right answer is.[63]

External sceptics argue that the only sensible or 'real' kind of objective moral truth is that where right answers are certain and demonstrable.[64] However, notwithstanding this philosophical position, external sceptics - indeed, almost everybody - acts as if certain

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[59] Ibid.

[60] *Objectivity and Truth,* 92.

[61] *Laws Empire*, 79.

[62] For example, in the recent book *Objectivity in Law and Morals* B Leiter (ed), (Cambridge University Press, 2001) no less than four essays (of seven) pursue external arguments against the idea of legal objectivity.

[63] *Laws Empire,* 78 (Authors Italics).

[64] Take, for example, the position of David Brink who argues that morality is not a domain specific concept in his article 'Moral Realism and the foundations of Ethics' in B Leiter (ed), *Objectivity in Law and Morals* (Cambridge University Press, 2001). Brink argues that 'ethics is or can be objective in much the same way that the sciences are objective' p 6.

things are right and others are wrong on a day-to-day basis. Children are taught that slavery is wrong, and that empathy is a virtue. The external sceptic 'does not wish to be understood as holding the same view as the fascist that there is nothing wrong with slavery.'[65] Their argument is detached from moral controversies, and claims only to make the philosophical point that there are no grounds for saying that slavery is 'really' or 'objectively' wrong. Stripped of the mantle of objectivity moral positions boil down to mere tastes or opinions about what is right and wrong, according to the external sceptic. We could still term such opinions right, but this would only mean that rightness was subjective, with no one opinion being in any way superior to another.[66]

The problem is that external scepticism of morality misses a crucial point; moral arguments are distinct from tastes, or whims. We do not treat moral arguments as playthings, as non-consequential choices that are only 'right for each person'. The unique character of moral positions is evidenced in that thoughtful people, including sceptics, go on 'making, advising and rejecting arguments in the normal way, consulting revising [and] deploying convictions'.[67] Equating such moral convictions or opinions with subjective tastes or emotional reactions is 'just bad reporting' that does not adequately describe the process of making and responding to arguments.[68] Amenability to reason is what distinguishes moral opinions from subjective 'tastes' such as deciding whether to order a lager or a draft with a restaurant meal.

The idea that evaluative reasons can produce a right answer is not a strange idea. Numerous moral thinkers either implicitly or explicitly premise their thought on the notion that everyday argument can produce right or wrong answers. Three common techniques of moral argument include exposing the inconsistencies, inadequacies or unintended consequences of a person's moral views.[69] These techniques are used by

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[65] R Dworkin, *A Matter of Principle*, (Harvard University Press, 1985) 172. (*Matter of Principle*)
[66] B Williams, *Ethics and the Limits of Philosophy* (Collins/Fontana Press, 1985) at pp 156-173. *(Williams)*
[67] *Laws Empire*, 86.
[68] *Matter of Principle*, 173.
[69] J Glover, *Causing Death and Saving Lives* (Penguin, 1977) 25. (*Glover*)

Jonathan Glover extensively in his book *Causing Death and Saving Lives*.[70] To illustrate how these techniques work, consider the following example:

> If you disapprove of all abortions, I may ask you to give a reason. If you reply that to take human life is always wrong I will ask you if you are a complete pacifist. If you hold some non-pacifist views about war, you must either abandon or modify your principle that taking life is always wrong or else change your mind about pacifism.[71]

Humane ideals have been extensively defended through the union of the social sciences and reason; what Jim Flynn calls 'substitutes for objectivity'.[72]

We can give further support to the idea that reasons alone can provide right answers. Even those who think that the only sensible conception of truth involves demonstrable, certain truth cannot eschew the worth of evaluative conclusions. Such people compare evaluative truths with the describable facts of the world, arguing that the former are not really truths at all. Yet, to have a clear-cut picture of the world based entirely upon how things are first perceived is a privilege reserved only for 'fools and fanatics'.[73] For the readers of this essay critical thought and reflection is needed before a conclusion can be accepted as true - whether in science or morality or law. Even facts of the natural world are perceived through an evaluative filter which is why an 'at first instance' perception of a rock flying skywards might be put down to hallucination. Evaluative argument clarifies and bolsters 'certain' descriptive truths, testing and 'making the best sense of' purported observations. Therefore the sceptical strategy of comparing evaluative truths with descriptive truths to discount the latter comes at a heavy cost. Denying the ability of evaluative argument to reach any 'real truth' simultaneously undermines any critical notion of 'scientific' or descriptive truth: even descriptive truths are vetted through an evaluative process.

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[70] Ibid.
[71] Ibid, 25.
[72] J Flynn, *How to defend humane ideals: substitutes for objectivity* (University of Nebraska Press, 2000)
[73] Paraphrasing Dworkin in *Objectivity and Proof*: 'absolute clarity is the privilege of fools and fanatics' at p 135.

The above arguments show that people - even external sceptics - *do* make and accept evaluative arguments about moral issues, even if they term their conclusions 'opinions'. Further, it makes day to day sense to term such opinions 'right' or 'wrong'; we talk about 'right' and 'wrong' answers to evaluative arguments. The best external scepticism can do is, 'in a calm philosophical moment' firmly reclassify all interpretive or evaluative conclusions as opinions not eternal truths but this would change nothing in the domain of morality.[74] Moral positions would still be right or wrong. Evaluative moral opinions were right or wrong because of substantive reasons, not because of their status. Thus, even if external scepticism was successful, we would have no reason to abandon an evaluative theory of 'right' or 'wrong' moral conclusions. External scepticism, if true, would allow somebody to respond to a moral argument by saying 'that is only your opinion', but the issue would still remain as to which opinion was best justified.[75]

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[74] *Laws Empire,* 85.
[75] Ibid.

Chapter 4 – The failure of external scepticism

So far it has been shown that even if external scepticism was successful there would still be evaluative right answers within the domain of morality. Now the question is whether the assumed success of external scepticism was warranted.

The twin pillars of a successful external attack are 'neutrality' and 'austerity'. Austerity is the idea that scepticism of morality needs to be non-moral; it must stand back from the domain of morality in order to deliver detached conclusions about the truth of moral judgments. [76] If the external sceptic wishes to claim that no moral judgment is capable of being true, then the austerity of his or her own argument is philosophically important. If a sceptical argument against morality is in some way constructed from, or contingent upon moral judgments, then it will fail under its own standard of truth.[77]

Neutrality gives external scepticism a popular as opposed to a philosophical advantage over internal moral conclusions. The idea that reasons can show some moral positions better justified than others is commonsensical - people unproblematically teach their children to share and condemn genocide, thinking and acting as if there are moral rights and wrongs. It is the insistence on terming evaluative answers 'really' universally, objectively right is met with indignation. Insistence on universally right moral answers seems arrogant 'in the face of great cultural diversity'.[78] The neutrality of external scepticism offers a way out of this catch-22. It allows people to sincerely, fervently believe in 'their own' moral positions without being culturally arrogant. Furthermore, the purported neutrality of external scepticism helps to insulate partisan moral positions from reason. An external sceptic who holds moral beliefs does not make any claim to the ultimate truth of their moral opinions. If there are no 'real' moral truths, but only feelings 'in our own breasts', then critical analysis of beliefs becomes otiose.[79] All the reasons in the world would not, and could not provide any real or ultimate truth and therefore

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[76] Ibid

[77] Ibid, 94.

[78] Ibid, 93.

[79] Ibid, 92.

critical thought is pointless - or so the argument runs. Because external scepticism insulates moral opinions from critical reason, people or groups who hold beliefs that are not rationally justifiable have a special incentive to embrace it. External scepticism endows their beliefs with the same negative respectability of other beliefs, including beliefs that can be rationally justified; all are only opinions. The neutrality of external scepticism has a popular appeal because it does not call for people to modify any of their partisan views; it requires people to only alter the status, not the substance, of their beliefs.[80]

If external can only be sensibly construed as *non*-neutral propositions, then the popular appeal of external scepticism evaporates. Two questions arise. First, can we plausibly translate purported statements of neutral external scepticism into substantive, non-neutral internal statements?[81] Second, is it possible to understand external statements as neutral and philosophically distinct from substantive internal statements?[82] If the first question can be answered yes, and the second, no, then external scepticism is not a neutral position, but a partisan one.[83]

It is 'easy enough' to interpret external statements as substantive internal statements.[84] I say that abortion is wrong. This is an internal, non-neutral statement. Then, I qualify this statement and say that abortion is 'really', 'objectively', 'truly' wrong. These statements are supposedly external statements about the metaphysical status of my views. Yet how often do people actually mean something metaphysical by further statements of this nature? Consider statements of this 'really, truly' nature that you have heard in moral argument. Were such statements really making a metaphysical claim? Or, were they *re-emphasising* the original claim made - that abortion is wrong, or that genocide is wicked or whatever - to make clear that such a position is held for serious reasons. This latter explanation is at least a plausible explanation of 'really, truly' statements. Thus, in response to the first question, we *can* interpret supposedly external statements as non-

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[80] Ibid, 93.
[81] Ibid, 97.
[82] Ibid.
[83] Ibid.
[84] Ibid.

neutral internal ones re-qualifying or re-emphasing the original substantive position put forwards.

Now, the second question: can the external sceptic explain their claims in a neutral manner, distinct from internal statements? The external sceptic might try and make use of the philosophical distinction between primary and secondary properties. Primary qualities are the real properties of things, whereas secondary qualities exist only in the mind of perceivers. Traditionally, things like shape, size an motion were understood as primary properties, while things like taste, color, smell and sound were conceived of as secondary properties. Perhaps an external sceptic could talk about moral truth in a neutral way through this distinction. The claim would be that moral properties are secondary properties, and therefore genocide is only wrong in the sense that it is perceived by people as wrong. At a cursory glance, this strategy looks promising. Upon reflection though, we can see that classifying moral rights and wrongs as primary or secondary properties takes a substantive, non-neutral position. If most people think that genocide is wrong and the external sceptic terms this a secondary property, then the external sceptic has taken a substantive position, namely that genocide is wrong. This substantive judgment is clothed in metaphysical language - it labels rightness a 'secondary quality'. However, a claim is still made: that the only wrongness of genocide consists in people's reactions to it. This is a non-neutral, substantive position about the morality of genocide. Further, it is not a particularly strong argument as to why genocide is wrong. It could be countered that genocide is wicked not because of how people perceive it, but because it dehumanises the victims, the killers and humanity as a whole. (This dehumanisation point is masterfully expressed by Martian Amis: 'When I read about the Holocaust I experience something: a sense of physical infestation. This is species shame.')[85]

Most 'neutral' scepticism of moral objectivity fails for a more general, preemptory reason. Sceptics can only formulate criticisms of morality that are neutral (or at least

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[85] M Amis, *Koba the Dread: laughter and the twenty million*, (Jonathan Cape, 2002) 92.

plausibly neutral)[86] if they attack a ridiculous theory of moral truth that is not advanced by this paper. Imagine that moral truth consisted of, and resulted from, unique moral facts or particles that made up the 'fabric of the universe'.[87] Such particles – 'morons' as Dworkin calls them - both constitute morality and interact with humans to make people aware of moral truths independently of any substantive moral reasons.[88] This 'moral field' thesis might make external scepticism plausible.[89] The external sceptic could attack the idea of morons and their purported effect on people through non-moral philosophical arguments. Moral conclusions based on the existence of morons could be doubted because they are, well, moronical.[90] The problem for the external sceptic is that no-one is advancing the moral field thesis as a sensible theory of moral truth; the idea of this paper is that morality consists of the best substantive reasons for any position. So, external scepticism (if it is to remain neutral) must neuter itself and attack only an irrelevant phantom; the moronical theory of 'morons'.

In response to our two questions, we *can* read supposedly external statements as non-neutral internal ones, but we *cannot* construe such statements as neutral in any meaningful way. Consequently, the purported neutrality of external scepticism 'is an illusion'.[91]

The failure of neutral external scepticism does not entail the complete collapse of external scepticism - it just dampens external scepticim's popular appeal. With neutral external scepticism discounted, two options remain.[92] Either one can argue, like this essay has, that 'best' internal reasons constitute a real objective morality. Or, like John Mackie, one can reject morality wholesale.[93] Such wholesale scepticism of morality must be austere; it must be constructed entirely of non-moral arguments. This is a

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[86] In *Objectivity and Truth*, Dworkin meticulously addresses each purported attempt at neutrality to show that none of them actually are neutral (pp 98-112). However, a faster way to the main point is to show that external statements that look prima facie neutral only have this appearance by virtue of attacking an irrelevant philosophical target.
[87] Phrases like these about the 'fabric of the universe' appear 'hundreds of times' in the writings of external sceptics; *Objectivity and Truth,* 97.
[88] Ibid, 94.
[89] ,Ibid.
[90] Ibid, 105.
[91] Ibid, 97.
[92] Ibid, 113.
[93] This the conclusion J Mackie reaches in *Ethics: Inventing Right and Wrong* (Penguin, 1977). (*Mackie*)

philosophical requirement. If an argument wishes to doubt all morality it cannot support itself with moral claims - arguing against all morality from moral arguments would be akin to believing in Atheism because of Divine Revelation; the reasons condemn the truth of the conclusion.

Two arguments 'are now the staples of austere scepticism.'[94] First is the argument from moral diversity. This argument insists that because people disagree so much about morality, no moral claim can be true.[95] Why should I be confident my answer is really right, when intelligent and reflective people disagree with me?[96]

Three things can be said against the sceptical conclusion that no moral claim is true because of diversity. A minor point is that the diversity of moral scepticism is often exaggerated. Throughout history and across cultures the similarity of moral views is at least as striking as their dissonance.[97] Another minor point is that it is not clear how the acceptance or non-acceptance of moral viewpoints is relevant to their truth. We would not count the popularity of our moral opinions as evidence of their correctness, so why should disagreement or controversy be counted as evidence against them?[98] Expanding upon this point, we reach the key argument as to why moral diversity does not entail moral scepticism. The diversity of moral opinions should only impeach morality if we can explain why it should. In regards to facts of the world, for example, we can give an explanation of why differing opinions should cause us to discount purported truths. Dworkin gives the example of claimed unicorn sightings.[99] If claimed sightings of unicorns wildly diverged in descriptions of the beast, we would be sceptical of them; people would report seeing more or less the same thing if unicorns actually existed. So, if the truth is question is a describable fact, then a diversity of claims suggests that no such fact exists. However, if the truth in question does not concern a fact, then the connection between diversity and scepticism loses any reasoned justification. A diversity of moral opinions might lead us to the conclusion that moral truths are controversial - but this is

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[94] *Objectivity and Truth*, 113.
[95] Ibid.
[96] Ibid.
[97] Consider, for example, the almost universal human taboo of random murder, see *Glover* at pp 39-60.
[98] *Objectivity and Truth*, 113.
[99] Ibid.

consistent with 'moral truth as best reasons'. A diversity of moral opinions might also make us uncertain as to which purported moral truth is correct – but this essay has made no claims that moral truth will be certain; the argument has been that our only guide to moral truth is reasoned argument; the answer that can be best justified is the right one.

A diversity of moral opinions does not, however, give us any reason to think that *no* moral conclusion is capable of being correct. If moral truths were facts of this world, then varied reportage of these facts, like varied reportage of unicorns, would give us a *reason* for thinking no such facts exist. If, on the other hand, moral truths are the controversial product of evaluative argument, then the connection between diversity and scepticism loses any rational justification.

We have seen that the external sceptic's challenge to moral objectivity on the grounds of diversity can only gain traction if it attacks a theory of 'moral facts' that is not advanced by this paper's theory of moral truth. The second staple argument of austere scepticism relies on a similar misguided strategy. The argument, put most forcefully by J L Mackie, is that moral truth should be doubted because of the 'queerness' of the idea that moral properties are 'inherently motivating'.[100] Of course, this essay's thesis of morality as best reasons makes no such claim to 'inherent motivation'. We can make a pre-emptive argument to dismiss scepticism against morality on the basis of 'queerness'; if moral truths do not necessarily 'inherently motivate' action, then the claim of queerness loses its starting foothold.

We can explain moral truth without queer properties of inherent motivation by making a distinction between two questions. First, the question of moral truth, and second the question of the action to be taken as the result of a particular moral truth. To illustrate: I conclude that torture is wrong, really truly wrong. Next, I need to decide what to do as a result of this belief. Some things are obvious. I would easily conclude that I should not torture people. If I was in the process of torturing someone I would abruptly stop. These judgments follow so obviously from the belief that torture is wrong that questions of action and truth seem identical. It seems like the moral truth of tortures wrongness 'inherently motivates' the action, which is 'queer'. However, the difference between

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[100] Ibid, 114.

questions of moral truth and questions of consequent actions becomes clear when trying to decide precisely what actions a particular moral truth requires. Having decided torture is wrong, should I donate to anti-torture campaigns? If so, how much? Should I spend my weekends writing protest letters to the embassies of countries that condone torture? Should I quit my job and dedicate the remainder of my life to stopping torture? These further judgments are made on the same conceptual level as my decision to not torture people, yet they are clearly separate from the question of torture's wrongness. By recognising the existence of two questions the connection between morality and action can be explained without any 'queer properties' of 'inherent motivation'.

The tendency of sceptical theories to attack a (non-existent) theory of moral facts implicitly brings another issue to the fore. The ultimate issue is not about the existence of moral facts, but the consequences of their non-existence. Pulling back then, we can consider the two competing positions. One position - the position that has been taken by this essay - is that moral truth can be constructed from no more than best reasons. The other position - taken by a sceptic - would insist that no moral truth is possible at all. Which claim is more plausible? On the side of evaluative moral truths, we have this paper's arguments that we constantly depend on evaluative conclusions and unproblematically treat such conclusions as right or wrong. On the side of absolute moral scepticism, what is left once we discount the pyrrhic victory of external scepticism against the phantom of 'moral fact' theories? All that remains appears to be an uncomfortable feeling that moral truth is not anything apart from our own reasoned convictions. Note that becoming an absolute sceptic from this uncomfortable feeling requires a (further) step of anti-reason. Assuming such feelings stem from a concern about the collapse of morality (and why else would they be uncomfortable?), embracing evaluative moral truths is the most rational response to them. Evaluative moral truths are not subjective tastes. They are reasoned truths that are right to the exclusion of all others. Absolute scepticism, by contrast, is like moral relativism but more extreme. According to absolute scepticism, there is nothing to even be relative about.

Chapter 5 – A contemporary challenge to 'morality as best reasons'

    a. Leiter's project

In his essay 'Objectivity, Morality and Adjudication'[101] Brian Leiter argues that 'susceptibility to reasons' is not an adequate account of objectivity.[102] Leiter is a paradigmatic external sceptic (whether he realises it or not).[103] His view is that issues of objectivity in ethics present a 'predicament' to which there is 'no solution' and that, in consequence, morality and law are 'indeterminate'.[104] Leiter's project is familiar. He argues that the only sensible conception of objectivity is 'scientific' objectivity.[105] Then, on the basis that no moral 'facts' exist, he says that morality is subjective only.

It is important to place 'Objectivity, Morality and Adjudication' within Leiter's overall project. Leiter does not want to engage sceptically with internal evaluative conclusions through internal evaluative arguments. He would prefer to be detached, standing on the 'firm' ground of philosophy to condemn morality with non-moral arguments. His strategy against evaluative moral truths is pre-emptive. Rather than engage with Dworkin's theory of argument-derived moral truths, Leiter seeks to show that 'objective' evaluative answers are a ridiculous notion from the start, undeserving of attention in a serious discussion of moral truth. This move allows Leiter to focus his ultimate scepticism of all morality on the more solid (and less defensible) target of moral facts. 'Objectivity, Morality and Adjudication' is essentially an essay justifying this pre-emptive disregard of evaluative moral truths; Leiter argues that the only sensible conception of morality involves 'a metaphysical thesis: to wit, that there exists a … [mind independent]…

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[101] B Leiter, 'Objectivity, Morality and Adjudication' (*Leiter*) in B Leiter (ed), *Objectivity in Law and Morals* (Cambridge University Press, 2001)

[102] *Leiter*, 6.

[103] In places, Leiter argues that scepticism of morality need not be metaphysical (pp 70, 71). However, in other places he seems to claim that morality must be a metaphysical thesis (p 69). Either way Leiter seeks to assess morality from a position outside morality (p 72).

[104] Ibid.

[105] Ibid, 6. 'My own conclusion… [rejects]…the domain specificity of objectivity'.

property of moral wrongness'.[106] His ultimate scepticism of all morality is a matter for another day.[107]

For Leiter, the 'crucial move' in Dworkin's argument is the repudiation of the demand that moral truth conform to the standards of scientific epistemology.[108] According to Leiter, distinguishing between different standards of objective truth is a mistake. There are several stages to Leiter's argument, but the crux of his position is that 'the type of objectivity found in the natural sciences is the relevant type of objectivity to aspire to in all domains.'[109] More specifically, his position is that '(a) only that which makes a causal difference to experience can be known, and (b) only that which makes a causal difference to experience is real.'[110] Thus, if morality is to be objectively true it must be, in Leiter's words, '"mind independent" and causally efficacious'.[111] Leiter acknowledges that this understanding of moral truth commits him to the moral field thesis where moral facts ('morons') are *all that will suffice* as moral truth. He further acknowledges that this thesis 'is, indeed, quite absurd'.[112] However, for Leiter, this absurdity is a strike against morality, not a strike against his insistence that only scientific truths are real. As he puts it

> If the demand that moral properties find a place within scientific epistemology leads to an "absurd" moral field thesis … [this] … shows not that the external sceptic is misguided, but that he is right, that there is no intelligible sense in which the world could contain moral facts.[113]

At the heart of his theory is the claim that scientific facts are the be all and end all of truth. Leiter spends little time justifying this claim, which is somewhat surprising given his entire theory is contingent upon it. The short justification he gives is that a scientific standard of truth for moral questions is appropriate because 'science has "delivered the

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[106] Ibid, 69.
[107] Ibid, 68. 'It is my view that the predicament has no solution and that the law is, in fact, indeterminate. These latter issues are, however, beyond the scope of this paper.'
[108] Ibid, 77.
[109] Ibid, 67.
[110] Ibid, 75.
[111] Ibid, 67.
[112] Ibid, 75.
[113] Ibid

goods"[114].... [s]cience has earned its claim to be a guide to the real and unreal by depopulating our world of gods and witches and ethers and substituting a picture of the world and how it works of immense practical value.'[115] This is essentially an argument by analogy. Because a scientific standard of truth has served us well in the sciences, Leiter argues that it should be embraced as the only sensible standard of truth. Leiter's conclusion takes the offensive

> … [W]hat we have yet to find in Dworkin is any argument for insulating the domain of morality from the demands of scientific epistemology. [116]

This paper will respond to this specific challenge, showing that Leiter's arguments are flawed and his conclusion mistaken.

b. Why morality can be insulated from the demands of scientific epistemology

A central idea in Dworkin's writing and a central idea advanced by this paper is that morality can be insulated from the demands of scientific proof because morality is not like science. Leiter's position is akin to being suspicious of a book review because all it offers for its conclusions are reasons. We can be more structured in our response to Leiter; there are two points to be made. First, that evaluative truth is sensible in some contexts and second that the domain of morality is one such context.

This essay has already advanced a number of arguments to show that evaluative conclusions are sensible. Political debate, a general concern with truth in the public realm[117], our adversarial legal system and our day to day decision making all treat

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[114] Ibid, 77.
[115] Ibid.
[116] Ibid, 78.
[117] Truth in the public realm is seen by J S Mill as advanced by a principle of free speech (see chapter 2 of his *On Liberty* (Routledge, 1991). The idea is that if all viewpoints are aired in a competitive "marketplace of ideas" then the truth will eventually emerge in the form of the best justified idea. This conception of free speech has been challenged by Fish (among others), but not in a way that fundamentally undercuts the point being made here; that argument delivers us conclusions that we rely upon. (Fish, for example, argues that the principle of free speech does not, and should not, justify all speech. He seeks to show that hate

evaluative argument as the primary mechanism for reaching correct conclusions. And it is not sufficiently appreciated that even in so-called 'non-evaluative' domains like science evaluative conclusions are relied upon to an extent. The best answers in science are those that make the most sense of a number of concepts; existing bodies of knowledge, predictive value, experimental controls and empirical observations. This paper has suggested that the best scientific answers give the most weight to empirical observation, but still seek consistency with the other mentioned concepts as far as is possible. Thus, a best scientific answer is *ultimately* the product of a reasoned balancing process, as opposed to bald observation. This is why a single reported instance of a flying rock would not be explained by a freak gravitational change; 'hallucination' or 'lying' makes more sense of the totality of concepts relevant to science. Thus, while an observation is important to science it is not a 'trump-all' determinate of truth. Even in science, observations are critically assessed through an evaluative process in order to arrive at the 'truth'.

There is another way to the general point made above that can be seen by asking a question. What is it that makes empirical substantiation a worthwhile criterion of truth? The worth of empiricism – a judgment of value - cannot, for example, be justified by an empirical fact.[118] The assertion that only demonstrable or certain truths are true is false by its own standard because it cannot be shown demonstrably or certainly true. If empirical substantiation cannot be justified as a criterion of truth through an empirical fact, how might it be justified? Perhaps we can work with Leiter's justification; empiricism has worth as a criterion of truth because it has 'delivered the goods'.[119] We must then ask what this phrase means. The argument seems to be that something can be considered a criterion of truth if it has explanatory power, if it can make sense of our world or whatever we are seeking to make sense of. So far, Leiter's (presumed) argument seems sensible. The next question is what criterion or criteria make the best sense of our world?

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speech should be treated differently to other speech. His general point is that the disadvantages of allowing hate speech clearly outweigh the advantages of allowing it. See; S Fish, *There's no such thing as free speech and it's a good thing too* (Oxford University Press, 1994).

[118] Williams makes this point that there is no empirical evidence to substantiate the claim that we should care about science. *Williams* at pp 132-155.

[119] *Leiter*, 77.

We might, like Leiter, try to identify a single criterion that makes the most sense of all things – he would claim, perhaps correctly, that the *single* thing that makes the most sense of all things is scientific observation. However, upon reflection, we can see that all things are not best explained with a single criterion of truth. Different and disparate things can be best explained if we treat more than one factor as relevant to explaining them. Here the discussion turns to which concepts or inquires provide the best answer in a given situation. This is an interpretive question, and this essay has advanced an abstract theory of best answers, arguing that in a given situation a best answer is comprised of a matrix of factors or concepts, some of which are near universal, others of which are context specific.

When Leiter argues that scientific epistemology should be considered a worthwhile criterion of truth because it has explanatory power he fails to see the consequences of his own argument. If the criteria of truth are put in place by virtue of their explanatory power, then the factors relevant to the truth of a particular thing will be whatever makes the 'best sense' of that thing. Leiter's argument is back in the realm of the evaluative. The backstop test for all truth ('delivering the goods') is not something that can be observed, but is something that must be argued.

These arguments show that, in the final analysis, our understanding of the world is underpinned by evaluative conclusions. The domain of morality is particularly reliant on evaluative conclusions; reasoned argument is the *primary* mechanism through which moral conclusions are derived. This essay has made two general arguments to this effect. First, in Chapter 4 it was argued that we do reach day to day evaluative conclusions regarding moral questions. There is no person who thinks that morality is not important when it comes to real life; even the external sceptic teaches their child not to inflict pain on others for pleasure (before promptly asserting that this reasoned viewpoint is a mere taste). Second, Chapter 5 contended that evaluative argument is the primary source of moral truth because nothing else is possible. We have no reason to think mind-independent properties of moral wrongness exist.

These arguments explain why morality can be justifiably insulated from the demands of scientific epistemology. Argument, not description, makes the best sense of morality.

Two further responses to Leiter's paper are pertinent. First, Leiter's reliance on the Quinean conception of knowledge as an alternative to evaluative moral truths is misplaced. Second, Leiter attacks evaluative moral truths through the unjustified move of failing to treat questions of objectivity and morality as interpretive. Without producing an argument, Leiter acts as if the mere existence of contrary positions rebuts Dworkin, yet he does not show why his contrary positions are persuasive or even sensible. These two criticisms will be developed in turn.

c. The consequences of a Quinean worldview

Leiter's conceptualisation of the world claims to be broadly Quinean.[120] He compares the flimsy evaluative right answers offered by Dworkin to Quine's 'real' empirically substantiated truths. The problem for Leiter is that a Quinean picture of the world does not clearly exclude the possibility of evaluative moral truths. It will be suggested that Quines theory of knowledge is consistent with evaluative truths in some contexts and Quines theory will be briefly explained to show how this conclusion can be reached.

Quines acknowledged philosophical achievement was the development of a theory of knowledge that is attractive because it seems more sophisticated, nuanced and plausible than its predecessors. Prior to Quine, knowledge was primarily understood through the 'two dogmas' of analytic and synthetic truth.[121] Analytic propositions were those that could be shown to be true or self-contradictory by virtue of the meaning of words. The statement that 'all bachelors are unmarried men' is the classic example of an analytic truth. Synthetic propositions, by contrast, are either verifiable or falsifiable by observation. The proposition that 'at least one black swan exists' is an example of synthetic statement that can be empirically verified (by sighting a black swan). Quine rejected this strict dichotomy of all knowledge being either analytic or synthetic,

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[120] *Leiter*, 71. 'In the Quinean picture (to which I am basically sympathetic)…'
[121] Quines term in his major work which attacked this theory of truth; W V Quine, Two dogmas of empiricism (1951) *Philosophical Review* 60. (*Two Dogmas*)

doubting that there was a clear cleft between the two.[122] Heir to the empiricist tradition, Quine did think that a meaningful statement needed to be evidenced in some way. However, Quine thought that individual statements rarely had any direct connection with the evidence that would either prove or disprove them.[123] Instead, his suggestion was that statements face the tribunal of truth 'not individually, but only as a corporate body.'[124] Consequently, to understand what would count as evidence for or against a particular statement required an understanding of not just the statement itself, but also the statements and concepts surrounding it. In short, Quine thought that there was a fundamental interconnectivity between propositions and that therefore individual propositions could not be partitioned off for verification as either analytic or synthetic.[125]

This rejection of a rigid understanding of the analytic/synthetic distinction called for a new way of thinking about knowledge. Quine articulated his interconnected theory of knowledge through his famous metaphor of a web.[126] The edges of this knowledge web have contact with extra-mental facts. Correspondingly, statements about sense-experience are located on the periphery of the web whereas the center of the web contains more abstract truths – logic, maths and tautologies.[127] There is no conceptual cleft between empirical and abstract knowledge; the difference between knowledge in different areas of the web is of degree, not kind.[128] Take, for example, a proposition from the center of the web - the tautology that 'all bachelors are unmarried men'. At first sight this statement appears to have no connection with empirical truths; the words 'bachelor' and 'unmarried man' provide this statement its meaning. Imagine, however, a scenario where society gradually legalised and accepted marriages between same-sex couples. This would not immediately affect the linguistic truism that 'all bachelors are unmarried men.' However, after a few decades of same-sex marriage, it might be the case that reference to gender in

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[122] W V Quine 'Truth by Convention' (reprint) in H Fiegl and W Sellars (eds) *Readings in Philosophical Analysis* (Appleton, 1949).
[123] *Two Dogmas*, esp section C.
[124] Ibid.
[125] Ibid, 40-41.
[126] Ibid.
[127] Ibid. 42 and S Soames, *Philosophical Analysis in the Twentieth Century*, *Vol. 1* (Princeton University Press, 2003)*,* 338. (*Soames*)
[128] Soames, 338.

regards to marriage is archaic and irrelevant to the point of being wrong. In such a situation, the word bachelor might drop out of existence and the phrase 'all bachelors are unmarried men' would consequently become meaningless. Thus, the truth provided by the statement 'all bachelors are unmarried men' is not *purely* analytic.

It follows from Quine's theory that the location of a statement on the web informs us of the type of evidence that will be most important to ascertaining its truth or falsity. For example, if a statement is about sense experience, then observations and sense-experience will be relevant to whether it is true or false. Conversely, if a statement is located closer to the web's center, sense experience and empirical observation will be less important. Consider, for example, the evidence relevant to the truth of a tautology. Most important are the practical reasons behind the stipulation of meanings, less important is the customary usage of words, and even less important still are facts of the world. Therefore, on Quine's theory the evidence relevant to the truth of a particular statement is context sensitive.

This Quinean picture of knowledge can be easily translated into the language of domain-specific best answers. The web conception of knowledge fits with the context sensitive 'matrix idea' of best answers that this essay has advanced. In a given situation or context, best answers will consist of reasons relevant to that context. The concepts or factors relevant in a given situation, and the weight given to such factors are a matter of interpretive argument. In the context of science for example, it can be strongly argued that the fundamental determinate of correctness is coherence with mind independent reality.

How then, should morality be conceived of on a Quinean picture of the world?
This paper has contended that we have no reason for thinking that moral truth consists of anything but everyday reasons. This argument was not that mind independent facts are irrelevant to a moral judgment. A good answer to the question of whether abortion is wrong will be logically consistent, and may also rely on facts, like the fact of whether a fetus can feel pain or not. This fact is not a 'moral' fact of rightness or wrongness.

Rather, it is an empirical fact, from which conclusions of rightness or wrongness can be drawn. If a fetus can feel pain, this might give us a reason to think abortion is wrong, not because pain is synonymous with wrong, but because we can empathise with a creature feeling pain, and this empathy gives us reason for making a separate judgment against abortion. Ultimately, there is no more to moral judgments than reasoned arguments of this nature, and every moral judgment is potentially susceptible to contrary reasons. (Although we have no reason to alter our moral judgments until better contrary reasons are given. Best or correct answers are those that are justified by the best reasons at any point in time.) This view places moral propositions somewhere between abstract truths and empirical truths on the Quinean web of knowledge. Both logic and facts of the world are relevant to moral argument. However, there is no final or ultimate factual determinate of a right moral answer, just as there is no final factual determinate of an algebraic equation. It has been argued that this is a possible, sensible and plausible theory of moral truth. Further this theory of moral truth flows comfortably from a Quinean picture of the world - a picture that Leiter is 'broadly sympathetic' to. In response to Leiter, we can note that the real question is not why moral answers can be insulated from the demands of scientific proof. The more vexing question is why someone with a Quinean view of knowledge so fervently insists that the only sensible type of knowledge is 'scientific' knowledge of mind independent facts.

d. Unjustified domain shifts

A further and more fundamental criticism can be made of Leiter's paper. Much of Leiter's argument against the domains specificity of objectivity seems to be a *reductio ad absurdum*. Leiter looks at what answers would be considered objectively right under Dworkin's theory, and contrasts such answers with *real* objectively right answers to argue that the domain specificity of objectivity is absurd. Leiter makes this move throughout his paper, but perhaps most prominently when he gives the example of 'the adherents of the church of scientology who embrace the bizarre Hubbardian cosmology.'[129] Their account of the cosmos, Leiter argues, cannot be sensibly construed

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[129] *Leiter*, 83.

as objectively right. Their cosmology defies the reasoned accounts of 'physics, astrology and evolutionary biology'.[130] Yet, Leiter contends that on a domain specific account of objectivity, we would have to classify a Scientologist's cosmological views as objectively right because internal to the domain of scientology 'there are probably no reasons…that would lead its adherents to abandon … [their cosmological views]'.[131] From this example Leiter concludes that domain specific objectivity delivers 'objectively right answers' that are clearly not objectively right. Leiter's analysis is misleading because it does not justify or direct interpretive argument towards the appropriate scope of the domain that it is discussing. This general problem can be explained through an example.

Imagine Leiter asked us to consider a discourse about 'great leaders' internal to a group of Neo-Nazis. For this group, the qualities of great leadership would likely include anti-Semitism, ruthlessness and militarism. Within this domain it could be strongly argued that Hitler was the greatest leader the world has ever seen, followed closely by Stalin (giving credit to his lifelong latent anti-Semitism). Leiter would argue that the greatness of Hitler's leadership would be an objective truth within this domain. Yet no one but a Nazi would call Hitler the world's greatest leader. Thus, this domain specific objective truth, like Leiter's scientology example, points to the absurdity of domain specific objectivity.

The problem with the above challenge is that there has not been any argument as to whether the domain of 'great leadership' can be sensibly construed as requiring coherence with Nazi ideals. Indeed, half a second's thought shows that Nazi ideals cannot justifiably exhaust (or arguably even feature) in the criteria of what it is to be a great leader. Rather, plausible arguments can be made to show that hallmarks of great leadership include crisis aversion as opposed to creation, and listening skills as opposed to un-checkable megalomania. The point is that interpretive questions about great leadership (or anything else) are interpretive 'all the way down'. Arguments directed at the concept of great leadership are important, as are arguments regarding the factors or

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[130] Ibid.
[131] Ibid.

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criteria that would, if fulfilled, point to great leadership. Considering what actual leader is best is a final stage of the overall interpretive process, not the only stage.

When the concept and criteria of 'great leadership' is carefully argued, as opposed to arbitrarily asserted, the Neo-Nazi argument that Hitler was a great leader flounders. This is because the Neo-Nazi relies on an unjustified pre-supposition that great leadership, best understood, involves tyrannical qualities. Of course, the Neo-Nazi might be able to make a fully justified interpretive argument that Hitler was the greatest *dictator* that the world has ever seen. At first blush, there is a strong argument that the concept or idea of dictatorship is best understood as a concept that describes undemocratic leaders. Further, there is a strong argument that cruelty, megalomania and ruthlessness are relevant factors in a judgment about best dictators. Finally, with these factors in mind, the Neo-Nazi could make a strong argument that Hitler was the best dictator. Concluding that Hitler was 'really, truly' the world's greatest dictator is not as patently absurd as claiming that Hitler was the world's greatest leader. The domain of dictatorship can be argued to sensibly include people like Hitler, while the domain of great leadership cannot.

The problems with domain specific objectivity raised by Leiter therefore evaporate once the scope of a particular domain is interpretively justified. Take Leiter's example of objectively right answers internal to the domain of scientology. If the claim was that *according to some proclaimers of scientology* the best explanation of the universe fits with Hubbardian cosmology, then there would be no problem. We could comfortably term this answer 'objectively' right without compromising the established conclusions of science. The astrological claims internal to the domain of scientology do not affect science unless a separate argument can be made that scientological claims *should* affect the conclusions of science. Putting this point another way, if the Scientologist wishes to claim that modern science should have regard to the conclusions of Hubbardian cosmology he must make an argument to this effect; that the best understanding of modern science takes into account the claims of scientology. It is unlikely the Scientologist could give good reasons to this end. (Ferventness of belief is a reason, but not a particularly strong one.) Best understood, the domain of modern science is arguable as the domain of empirically substantiated propositions that accurately predict natural

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phenomena. A domain specific conception of objectivity would not treat scientological claims as on par with established claims of 'physics, astronomy and evolutionary biology' as Leiter fears. Science would not have any reason to take into account claims lacking empirical substantiation or predictive value. Thus, provided argument is directed as to the best conception of the domain of science, the Scientologist's claim of objective scientific truth cannot even get off the ground. (Provided that scientological claims are actually as bizarre and baseless as Leiter says they are.) Domain specific objectivity only delivers absurd answers if domains are absurdly defined.

Conclusion

The issue of legal objectivity presents us with either a nightmare or a noble dream.[132] The nightmare is that the legal enterprise is founded upon a great lie - the lie of right answers. Our constitutional structure, our appeal courts and our discourse might all be victims of the collective illusion that there is more to law than the subjective discretion of judges. The noble dream is that right answers are possible, and that judges can be meaningfully restrained. At the most noble, perhaps the dream would be that a right answer to every legal question exists in advance needing only to be found and declared.

This paper has rejected the nightmare and embraced a modest version of the noble dream, a version that pulls us out of subjectivity, but not out of controversy. Right answers are possible, but they are not certain. Objectively right answers are the answers that are best supported by reasons. For some, this account of legal objectivity will resemble more the nightmare than the noble dream. After all, there is no final arbiter of legal truth outside our own intellectual convictions; we have rejected the notion that there can be a higher determinate or judge of truth above or outside or beyond reasoned argument. This does not make all conclusions equal, some conclusions will be supported by better reasons than others, and the conclusions that can be best justified are objectively right.

The first and second chapters of this essay introduced the idea of interpretive argument and evaluative conclusions. This section - the theory - sought to show that ordinary argument can produce 'right' answers; conclusions best justified to the exclusion of all others. Chapter 1 explained that some things are best understood through argument about their point or purpose, and that the law is one such thing. The form or shape of interpretive inquiry was described as ever-narrowing argument to the best conclusions. This account of interpretation, oriented by best reasons or best justifications, necessitated a discussion about the meaning of 'best' in Chapter 2. This discussion of 'best' answers

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[132] This phrase and to some extent the metaphor is borrowed from HLA Hart's famous lecture of the same name. HLA Hart, American Jurisprudence Through English Eyes: The Nightmare and the Noble Dream (1977) 11 *Georgia Law Review* 969

did not remove us from the battleground of controversial, substantive arguments: it had the opposite effect, further entrenching us into an interpretive understanding of the world. This chapter traced the interpretive inquiry 'all the way down' arguing that evaluative conclusions are always possible, even though they might require sophisticated and time-consuming argument. This paper changed gears from theory to defence in Chapter 3. It was explained that most challenges to legal objectivity doubt whether any reasoned answer can 'really' be true. In addition to explaining this as 'external' scepticism, Chapter 3 made the preliminary argument that *even if* external scepticism was philosophically successful, it would not in any way affect our day to day reliance on reasoned conclusions. Chapter 4 considered in more detail the two pillars of external scepticism; 'neutrality' and 'austerity'. It was shown that the supposed neutrality of external scepticism either collapsed into non-neutral substantial claims or survived as an irrelevant attack on 'moral facts', leaving this paper's thesis of 'morality as best reasons' untouched. External attempts to attack morality with non-moral 'austere' arguments likewise failed. A diversity of evaluative conclusions, unlike a diversity of factual descriptions, cannot connect to scepticism in any justifiable way, and the sceptical argument from 'queerness' did not even get off the ground - by distinguishing between questions of moral truth and consequent actions morality was explained without any 'queer properties' of 'inherent motivation'. Chapter 5 attempted tie the theory and arguments of this paper together in a response to Brian Leiter's contemporary sceptical challenge. Leiter criticised the notion of domain specific objectivity, arguing against evaluative conclusions in favor of 'scientific' objectivity. However, his own criterion for objective truth ('delivering the goods') was reliant upon evaluative conclusions. Further, the idea that moral truth is different to scientific truth comfortably flows from the Quinean picture of knowledge that Leiter claims to embrace. Most importantly, Leiter's arguments against domain specific objectivity were shown to rely on unjustified domain shifts. It was only by arbitrarily defining domains that Leiter could make domain specific objectivity look absurd.

Where then, does this theory of legal objectivity as 'best reasons' leave us? I would suggest that we are left with a new vision of the law, a vision that will be noble to some,

but unsettling to others. On our new vision, right answers in the law are a journey, not a destination. Controversies will exist, but we must engage with them. If right answers are the best reasons, then we must argue. Our ticket to throw up our hands and walk away from hard problems in the name of scepticism has been revoked.

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