NEGATIVE AND POSITIVE POSITIVISM
Jules L. Coleman

Introduction, Polycarp Ikuenobe

THE CONTEMPORARY AMERICAN LEGAL theorist and philosopher Jules Coleman defends H. L. A. Hart’s legal positivism against Ronald Dworkin’s criticism by examining the nature of a rule of recognition. He argues that legal positivism is a true account of the nature of law in terms of specifying the importance of a rule of recognition. Such importance implies that we cannot conceive of a legal system that does not satisfy the minimum requirement of having a rule of recognition—the criterion for clearly identifying the laws of a society. This idea, which distinguishes legal positivism from other theories, involves two constraints on the authority of a rule of recognition. First, it determines legality according to a pedigree that derives its authority from its acceptance by officials and not its truth as a normative principle. Second, judicial obligation that derives from a rule of obligation is a matter of legal practice and not critical morality. Dworkin sees the second constraint as saying that a rule of recognition is a social rule that has authority based on conventions, as opposed to a normative rule that imposes obligation because it is morally right. Coleman examines the issue of whether legal positivism is committed to either or both of these constraints. He argues that legal positivism is committed to the separability thesis that there is no necessary relationship between law and morality. So, the legal positivist constraint on a rule of recognition must be committed to this thesis.

Coleman argues that the rule of recognition has two plausible senses, epistemic and semantic. The semantic sense implies that it is the standard for identifying and validating the laws of a society—the standard that must be satisfied in order for a precept to be a law. The separability thesis of legal positivism claims that we can conceive of a rule of recognition that does not specify being a true moral principle as a condition for the validity of law. This view is to be distinguished from its interpretation by Dworkin, which is that the morality and law of a society are distinct. Coleman argues that this interpretation of legal positivism is either factually wrong as an epistemic claim about legal knowledge or is reducible to the separability thesis. This stance, which Coleman calls negative positivism, is a negative thesis. He
examines Dworkin’s view that moral principles have a force of law not because they are enacted but because they are a socially accepted means of resolving disputes. Dworkin argues that legal positivism is inadequate because judges exercise discretion by relying on moral principles to resolve controversial disputes; therefore, it is not true that all valid laws can be identified and applied without controversy. Coleman argues that Dworkin’s argument does not affect the adequacy of the separability thesis of negative positivism as a negative thesis.

Coleman argues that legal positivism is sometimes construed as saying that morality and law are distinct, and that this view derives from the idea that law needs to be uncontroversial and concrete. Moral principles are controversial: they do not clearly specify the nature of obligation. For legal positivists, when disputes arise as to whether a precept is law, there is a way to verify and ascertain this, and people are clearly aware of the nature of their legal obligations. In which case, law consists of knowable and uncontroversial hard facts. This view attributes an epistemic position to legal positivism by giving an epistemic construal to the rule of recognition, that in order for a precept to be a law, there must be a test or method for verifying it. He argues that if this epistemic construal which says that laws are hard facts—the view he calls positive positivism—is a true construal of legal positivism, then Dworkin’s position about adjudication will be plausible. That is, adjudication involves hard and easy cases: in easy cases, the law is clear, but in hard cases, the law is not clear; as such, discretion is required by the judge. If legal positivism is motivated by the idea that law consists of hard facts, then it must be abandoned, given Dworkin’s argument. There are indications that some of Hart’s views reflect this position. Because Dworkin’s argument is directed at Hart’s legal positivism, one may question whether Hart’s views represent essential elements of legal positivism. The separability thesis can stand on its own without this motivation. Verificationism may be wrong while the separability thesis may be right, and legal positivism does not necessarily involve the verificationism of logical positivism.

Coleman offers an alternative view of positive positivism, which says that laws are not uncontroversial but conventional; their authority derives from accepted criterion by officials. To meet Dworkin’s objection, Coleman argues that it is possible to have a semantic view of a rule of recognition that can identify moral principles as legal standards. This may explain Dworkin’s view about adjudication of hard cases and discretion. But Dworkin may object that such a rule of recognition will not be acceptable to legal posi-
tivism because it will be controversial and cannot be an adequate means of identification. Coleman argues that Dworkin’s arguments against the legal positivist view of law as convention can be characterized into four: the social rule argument, the pedigree argument, the controversy argument, and the moral argument. Dworkin argues that it is not clear whether a rule of recognition is a social rule that is simply accepted or a normative rule justified by a moral theory. In other words, the nature of judicial duty is not clear—whether it is legal or moral, and if it is moral whether it can be identified by a pedigree. Legal positivism insists that a pedigree can only clarify legal obligation. However, if one sees a rule of recognition as imposing a moral duty on judges in hard cases that are controversial and requiring the application of moral principles, then the rule of recognition must involve principles of critical morality. Coleman argues that this argument is not damaging, and that it is plausible to construe social rules as positive rules. This may explain a judge’s obligation in hard cases in terms of the accepted legal practice. But such practice is not a necessary feature of the concept of law.

As you read Coleman, consider and reflect on the following questions: What are negative and positive positivism? Why does Dworkin reject legal positivism? Why is Dworkin’s argument not effective with respect to negative positivism? How is Dworkin’s argument effective with respect to positive positivism? What are the features of positivism that Coleman thinks can withstand Dworkin’s criticism?

Every theory about the nature or essence of law purports to provide a standard, usually in the form of a statement of necessary and sufficient conditions, for determining which of a community’s norms constitute its law. For example, the naive version of legal realism maintains that the law of a community is constituted by the official pronouncements of judges. For the early positivists like Austin, law consists in the commands of a sovereign, properly so-called. For substantive natural law theory, in every conceivable legal system, being a true principle of morality is a necessary condition of legality for at least some norms. Legal positivism of the sort associated with H. L. A. Hart maintains that, in every community where law exists, there exists a standard that determines which of the community’s norms are legal.

ones. Following Hart, this standard is usually referred to as a rule of recognition. If all that positivism meant by a rule of recognition were “the standard in every community by which a community’s legal norms were made determinate,” every theory of law would be reducible to one or another version of positivism. Which form of positivism each would take would depend on the particular substantive conditions of legality that each theory set out. Legal positivism would be true analytically, since it would be impossible to conceive of a theory of law that did not satisfy the minimal conditions for a rule of recognition. Unfortunately, the sort of truth legal positivism would then reveal would be an uninteresting one.

In order to distinguish a rule of recognition in the positivist sense from other statements of the conditions of legality, and therefore to distinguish positivism from alternative jurisprudential theses, additional constraints must be placed on the rule of recognition. Candidates for these constraints fall into two categories: restrictions on the conditions of legality set out in a rule of recognition; and constraints on the possible sources of authority (or normativity) of the rule of recognition.

An example of the first sort of constraint is expressed by the requirement that in every community the conditions of legality must be ones of pedigree or form, not substance or content. Accordingly, for a rule specifying the conditions of legality in any society to constitute a rule of recognition in the positivist sense, legal normativity under it must be determined, for example, by a norm’s being enacted in the requisite fashion by a proper authority.

The claim that the authority of the rule of recognition is a matter of its acceptance by officials, rather than its truth as a normative principle, and the related claim that judicial duty under a rule of recognition is one of conventional practice rather than critical morality, express constraints of the second sort.

Ronald Dworkin expresses this second constraint as the claim that a rule of recognition in the positivist sense must be a social, rather than a normative, rule. A social rule is one whose authority is a matter of convention; the nature and scope of the duty it imposes is specified or constituted by an existing, convergent social practice. In contrast, a normative rule may impose an obligation or confer a right in the absence of the relevant practice or in the face of a contrary one. If a normative rule imposes an obligation, it does so because it is a correct principle of morality, not, *ex hypothesi*, because it corresponds to an accepted practice.
Dworkin, for one, conceives of the rule of recognition as subject to constraints of both sorts. His view is that only pedigree standards of legality can constitute rules of recognition, and that a rule of recognition must be a social rule. Is legal positivism committed to either or both of these constraints on the rule of recognition?

I. NEGATIVE POSITIVISM

Candidates for constraints on the rule of recognition are motivated by the need to distinguish legal positivism from other jurisprudential theses: in particular, natural law theory. Positivism denies what natural law theory asserts: namely, a necessary connection between law and morality. I refer to the denial of a necessary or constitutive relationship between law and morality as the separability thesis. One way of asking whether positivism is committed to any particular kind of constraint on the rule of recognition is simply to ask whether any constraints on the rule are required by commitment to the separability thesis.

To answer this question we have to make some preliminary remarks concerning how we are to understand both the rule of recognition and the separability thesis. The notion of a rule of recognition is ambiguous; it has both an epistemic and a semantic sense. In one sense, the rule of recognition is a standard which one can use to identify, validate, or discover a community’s law. In another sense, the rule of recognition specifies the conditions a norm must satisfy to constitute part of a community’s law. The same rule may or may not be a rule of recognition in both senses, since the rule one employs to determine the law need not be the same rule as the one that makes law determinate. This ambiguity between the epistemic and semantic interpretations of the rule of recognition pervades the literature and is responsible for a good deal of confusion about the essential claims of legal positivism. In my view, legal positivism is committed to the rule of recognition in the semantic sense at least; whether it is committed to the rule of recognition as a standard for identifying law (epistemic sense) is a question to which we shall return later.

The separability thesis is the claim that there exists at least one conceivable rule of recognition (and therefore one possible legal system) that does not specify truth as a moral principle among the truth conditions for any proposition of law. Consequently, a particular rule of recognition may specify truth as a moral principle as a truth condition for some or all propositions of law without violating the separability thesis, since it does not follow from
the fact that, in one community in order to be law a norm must be a principle of morality, being a true principle of morality is a necessary condition of legality in all possible legal systems.

It is tempting to confuse the separability thesis with the very different claim that the law of a community is one thing and its morality another. This last claim is seriously ambiguous. In one sense, the claim that the law of a community is one thing and its morality another may amount to the very strong assertion that there exists no convergence between the norms that constitute a community’s law and those that constitute its morality. Put this way, the thesis is an empirical one whose inadequacies are demonstrated by the shared legal and moral prohibitions against murder, theft, battery, and the like.

Instead, the claim may be that one can identify or discover a community’s law without having recourse to discovering its morality. This is an epistemic claim about how, in a particular community, one might go about learning the law. It may well be that in some communities—even those in which every legal norm is a moral principle as well—one can learn which norms are law without regard to their status as principles of morality. Whether in every community this is the case depends on the available sources of legal knowledge, not on the existence of a conceptual relationship, if any, between law and morality.

A third interpretation of the thesis that a community’s law is one thing and its morality another, the one Dworkin is anxious to ascribe to positivism, is that being a moral principle is not a truth condition for any proposition of law (in any community). Put this way the claim would be false, just in case “it is the law in $C$ that $P$” (for any community, $C$, and any proposition of law, $P$) were true only if $P$ stated a (true) principle of morality. Were the separability thesis understood this way, it would require particular substantive constraints on each rule of recognition, that is, no rule of recognition could specify truth as a moral principle among its conditions of legality. Were legal positivism committed to both the rule of recognition and to this interpretation of the claim that the law and morality of a community are distinct, Dworkin’s argument in Model of Rules 1 (MOR-I) would suffice to put it to rest.

However, were the claim that the law of a community is one thing and its morality another understood, not as the claim that in every community law and morality are distinct, but as the assertion that they are conceptually distinguishable, it would be reducible to the separability thesis, for it would assert no more than the denial of a constitutive relationship between law and morality.
In sum, “the law of a community is one thing and its morality another,” makes either a false factual claim, an epistemic claim about the sources of legal knowledge, or else it is reducible to the separability thesis. In no case does it warrant substantive constraints on particular rules of recognition.

Properly understood and adequately distinguished from the claim that the law and morality of a community are distinct, the separability thesis does not warrant substantive constraints on any particular rule of recognition. It does not follow, however, that the separability thesis imposes no constraints at all on any rule of recognition. The separability thesis commits positivism to the proposition that there exists at least one conceivable legal system in which the rule of recognition does not specify being a principle of morality among the truth conditions for any proposition of law. Positivism is true, then, just in case we can imagine a legal system in which being a principle of morality is not a condition of legality for any norm: that is, just as long as the idea of a legal system in which moral truth is not a necessary condition of legal validity is not self-contradictory.

The form of positivism generated by commitment to the rule of recognition as constrained by the separability thesis I call negative positivism to draw attention both to the character and the weakness of the claim it makes. Because negative positivism is essentially a negative thesis, it cannot be undermined by counterexamples, any one of which will show only that, in some community or other, morality is a condition of legality at least for some norms.

II. Positive Positivism: Law As Hard Facts

In MOR-I, Dworkin persuasively argues that in some communities moral principles have the force of law, though what makes them law is their truth or their acceptance as appropriate to the resolution of controversial disputes rather than their having been enacted in the appropriate way by the relevant authorities. These arguments would suffice to undermine positivism were it committed to the claim that truth as a moral principle could never constitute a truth condition for a proposition of law under any rule of recognition. The arguments are inadequate to undermine the separability thesis, which makes no claim about the truth conditions of any particular proposition of law in any particular community. The arguments in MOR-I, therefore, are inadequate to undermine negative positivism.

However, Dworkin’s target in MOR-I is not really negative positivism; it is that version of positivism one would get by conjoining the rule of recog-
nition with the requirement that the truth conditions for any proposition of
law could not include reference to the morality of a norm. Moreover, in fair-
ness to Dworkin, one has to evaluate his arguments in a broader context. In
MOR-I Dworkin is anxious to demonstrate, not only in inadequacy of the
separability thesis, but that of other essential tenets of positivism—or at least
what Dworkin takes to be essential features of positivism—as well.

The fact that moral principles have the force of law, because they are
appropriate, true, or accepted even though they are not formally enacted,
establishes for Dworkin that: (1) the positivist’s conception of law as rules
must be abandoned; as must (2) the claim that judges exercise discretion—the
authority to extend beyond the law to appeal to moral principles—to resolve
controversial cases; and (3) the view that the law of every community can be
identified by use of a noncontroversial or pedigree test of legality.

The first claim of positivism must be abandoned because principles, as
well as rules, constitute legal norms; the second because, while positivists
conceive of judges as exercising discretion by appealing to moral principles,
Dworkin rightly characterizes them as appealing to moral principles, which,
though they are not rules, nevertheless may be binding legal standards. The
third tenet of positivism must be abandoned because the rule of recognition
in Dworkin’s view must be one of pedigree, that is, it cannot make reference
to the content or truth of a norm as a condition of its legality; and any legal
system that includes moral principles among its legal standards cannot have
as its standard of authority a pedigree criterion.5

The question, of course, is whether positivism is committed to either
judicial discretion, the model of rules, or to a pedigree or uncontroversial
standard of legality. We know at least that it is committed to the separability
thesis from which only negative positivism appears to follow. Negative posi-
tivism is committed to none of these claims. Is there another form of posi-
tivism that is so committed?

Much of the debate between the positivists and Dworkin appears rather
foolish, unless there is a version of positivism that makes Dworkin’s criti-
cisms, if not compelling, at least relevant. That version of positivism, whatever
it is, cannot be motivated by the separability thesis alone. The question
then is whether anything other than its denial of the central tenet of natural
law theory motivates positivism?

One easy, but ultimately unsatisfying, response is to maintain that
Dworkin’s objections are to Hart’s version of positivism. While this is no
doubt true, such a remark gives no indication of what it is in Hart’s version
of positivism that is essential to positivism generally. Dworkin, after all, takes his criticisms of Hart to be criticisms of positivism generally, and the question remains whether positivism is committed to the essentials of Hart’s version of it.

A more promising line of argument is the following. No doubt positivism is committed to the separability thesis. Still, one can ask whether commitment to the separability thesis is basic or derivative from some other, perhaps programmatic, commitments of legal positivism. That is, one can look at the separability thesis in isolation or as a component, perhaps even a derivative element, of a network of commitments of legal positivism. We are led to negative positivism when we pursue the former route. Perhaps there is a more interesting form of positivism in the cards if we pursue the latter.

Certainly one reason some positivists have insisted upon the distinction between law and morality is the following: While both law and morality provide standards by which the affairs of people are to be regulated, morality is inherently controversial. People disagree about what morality prescribes, and uncertainty exists concerning the limits of permissible conduct and the nature and scope of one’s moral obligations to others. In contrast, for these positivists at least, law is apparently concrete and uncontroversial. Moreover, when a dispute arises over whether or not something is law, there exists a decision procedure that, in the bulk of cases, settles the issue. Law is knowable and ascertainable; so that, while a person may not know the range of his moral obligations, he is aware of (or can find out) what the law expects of him. Commitment to the traditional legal values associated with the rule of law requires that law consist in knowable, largely uncontroversial fact; and it is this feature of law that positivism draws attention to and which underlies it.

One can reach the same characterization of law as consisting in uncontroversial, hard facts by ascribing to legal positivism the epistemological and semantic constraints of logical positivism on legal facts. For the logical positivists, moral judgments were meaningless because they could not be verified by a reliable and essentially uncontroversial test. In order for statements of law to be meaningful, they must be verifiable by such a test (the epistemic conception of the rule of recognition). To be meaningful, therefore, law cannot be essentially controversial.

Once positivism is characterized as the view of law as consisting in hard facts, Dworkin’s ascription of certain basic tenets to it is plausible, and his
objections to them are compelling. First, law for positivism consists in rules rather than principles, because the legality of a rule depends on its formal characteristics—the manner and form of its enactment—whereas the legality of a moral principle will depend on its content. The legality of rules, therefore, will be essentially uncontroversial; the legal normativity of principles will be essentially controversial. Second, adjudication takes place in both hard and simple cases. Paradigm or simple cases are uncontroversial. The answer to them as a matter of law is clear, and the judge is obligated to provide it. Cases falling within the penumbra of a general rule, however, are uncertain. There is no uncontroversial answer as a matter of law to them, and judges must go beyond the law to exercise their discretion in order to resolve them. Controversy implies the absence of legal duty and, to the extent to which legal rules have controversial instances, positivism is committed to a theory of discretion in the resolution of disputes involving them. Third, positivism must be committed to a rule of recognition in both the epistemic and the semantic senses, for the rule of recognition not only sets out the conditions of legality, it provides the mechanism by which one settles disputes about what, on a particular matter, the law is. The rule of recognition for the positivist is the principle by which particular propositions of law are verified. Relatedly, the conditions of legality set forth in the rule of recognition must be ones of pedigree or form, otherwise the norm will fail to provide a reliable principle for verifying and adjudicating competing claims about the law. Finally, law and morality are distinct (the separability thesis) because law consists in hard facts, while morality does not.

Unfortunately for positivism, if the distinction between law and morality is motivated by commitment to law as uncontroversial, hard facts, it must be abandoned because, as Dworkin rightly argues, law is controversial, and even where it is, law may involve matters of obligation and right rather than discretion.

There is no more plausible way of understanding Dworkin’s conception of positivism and of rendering his arguments against it (at least those in MOR-I) persuasive. The result is a form of positive positivism that makes an interesting claim about the essence of law—that by and large law consists in hard, concrete facts—a claim that Dworkin neatly shows is mistaken. The entire line of argument rests, however, on ascribing to legal positivism either a programmatic or metaphysical thesis about law. It is the thesis of law as hard facts—whether motivated by semantic, epistemic, or normative arguments—that explains not only positivism’s commitment to the separability
thesis, but its adherence to other claims about law, that is, discretion, the model of rules, and the noncontentful standard of legality.

The argument for law as hard facts that relies on the positivist program of knowable, ascertainable law is straightforwardly problematic. Legal positivism makes a conceptual or analytic claim about law, and that claim should not be confused with programmatic or normative interests certain positivists, especially Bentham, might have had. Ironically, to hold otherwise is to build into the conceptual account of law a particular normative theory of law; it is to infuse morality, or the way law ought to be, into the concept of law (or the account of the way law is). In other words, the argument for ascribing certain tenets to positivism in virtue of the positivist’s normative ideal of law is to commit the very mistake positivism is so intent on drawing attention to and rectifying.

The argument for law as hard facts that relies, not on the programmatic interests of some positivists, but on the semantic and epistemology of logical positivism is both more plausible and interesting. Hart’s characterization of his inquiry as an analysis both of the concept of law and of how one determines if a norm constitutes valid law as if these were one and the same thing suggests a conflation of semantic and epistemic inquiries of the sort one associates with logical positivism. Recall, in this regard, Hart’s discussion of the move from the “prelegal” to the “legal.” The move from the prelegal to the legal is accomplished by the addition of secondary rules to the set of primary social rules of obligation: in particular, by the addition of a rule of recognition that solves the problem of uncertainty, that is, the epistemic problem of determining which norms are law. Moreover Hart’s discussion of judicial discretion—that is, the absence of legal duty—as arising whenever the application of a general term in a rule of law is controversial further suggests the identification, for Hart at least, of law with fact ascertainable by the use of a reliable method of verification. Still, in order to justify the ascription to positivism of the view that law consists in hard facts, we need an argument to the effect that part of what it means to be a legal positivist is to be committed to some form of verificationism.

The problem with any such argument is that the separability thesis can stand on its own as a fundamental tenet of positivism without further motivation. After all, verificationism may be wrong and the separability thesis right; without fear of contradiction one can assert both a (metaphysical) realist position about legal facts and the separability thesis. (As an aside, this fact alone should suffice to warrant caution in ascribing logical positivism to
legal positivism on the grounds that they are both forms of positivism; otherwise one might be tempted to ascribe metaphysical or scientific realism to legal realism on similar grounds, which, to say the least, would be preposterous.) In short, one alleging to be a positivist can abandon the metaphysics of verificationism, hang on to the separability thesis, and advance the rather plausible position that the motive for the separability thesis—if indeed there is one—is simply that the distinction it insists on between law and morality is a valid one; and, just in case that is not enough, the positivist can point out that there is a school of jurisprudence that denies the existence of the distinction. In effect, the positivist can retreat to negative positivism and justify his doing so by pointing out that the separability thesis needs no further motivation, certainly none that winds up committing the advocate of a sound jurisprudential thesis to a series of dubious metaphysical ones.

While I am sympathetic to this response, it is not going to satisfy Dworkin. There is something unsatisfactory about a theory of law that does not make an affirmative claim about law. Indeed, one might propose as an adequacy condition that any theory of law must have a point about law. Negative positivism fails to satisfy this adequacy condition. Natural law theory satisfies this adequacy condition by asserting that in every conceivable legal system moral truth is a necessary condition of legality—at least for some norms. Since it consists in the denial of this claim, negative positivism makes no assertion about what is true of law in every conceivable legal system. The view Dworkin rightly ascribes to Hart, but wrongly to positivism generally, that the point of positivism is that law consists in hard facts, meets the adequacy condition and makes the kind of claim, mistaken though it may be, that one can sink one’s teeth into.

I want to offer an alternative version of positivism, which, like the “law-as-hard-facts” conception, is a form of positive positivism. The form of positive positivism I want to characterize and defend has, as its point, not that law is largely uncontroversial—it need not be—but that law is ultimately conventional: That the authority of law is a matter of its acceptance by officials.

III. Positive Positivism: Law As Social Convention

It is well known that one can meet the objections to positivism Dworkin advances in MOR-I by constructing a rule of recognition (in the semantic sense) that permits moral principles as well as rules to be binding legal standards. Briefly the argument is this: Even if some moral principles are legally binding, not every moral principle is a legal one. Therefore, a test
must exist for distinguishing moral principles that are legally binding from those that are not. The characteristic of legally binding moral principles that distinguishes them from nonbinding moral principles can be captured in a clause in the relevant rule of recognition. In other words, a rule is a legal rule if it possesses characteristic $C$; and a moral principle is a legal principle if it possesses characteristic $C_I$. The rule of recognition then states that a norm is a legal one if and only if it possesses either $C$ or $C_I$. Once this rule of recognition is formulated, everything Dworkin ascribes to positivism, other than the model of rules, survives. The (semantic) rule of recognition survives, since whether a norm is a legal one does not depend on whether it is a rule or a principle, but on whether it satisfies the conditions of legality set forth in a rule of recognition. The separability thesis survives just so long as not every conceivable legal system has in its rule of recognition a $C_I$ clause; that is, a clause that sets out conditions of legality for some moral principles, or if it has such a clause, there exists at least one conceivable legal system in which no principle satisfies that clause. Finally, one argument for judicial discretion—the one that relies not on controversy but on the exhaustibility of legal standards—survives. That is, only a determinate number of standards possess either $C$ or $C_I$, so that a case may arise in which no legal standard under the rule of recognition is suitable or adequate to its resolution. In such cases, judges must appeal to nonlegal standards to resolve disputes.9

Given Dworkin’s view of positivism as law consisting in hard facts, he might simply object to this line of defense by noting that the “rule of recognition” formed by the conjunction of the conditions of legality for both principles and rules could not be a rule of recognition in the positivist’s sense because its reference to morality would make it inherently controversial. Put another way, a controversial rule of recognition could not be a rule of recognition in the epistemic sense; it could not provide a reliable verification principle. For that reason, it could not be a rule of recognition in the positivist sense. Interestingly, that is not quite the argument Dworkin advances. To be sure, he argues that a rule of recognition of this sort could not constitute a rule of recognition in the positivist’s sense. Moreover, he argues that such a rule would be inherently controversial. But the argument does not end with the allegation that such a rule would be controversial. The controversial character of the rule is important for Dworkin, not because it is incompatible with law as hard fact or because a controversial rule cannot be a reliable verification principle, but because a controversial rule of recognition cannot be
a social rule. A controversial rule of recognition cannot be a conventional one, or one whose authority depends on its acceptance.

Against the law-as-convention version of positivism, Dworkin actually advances four related arguments, none of which, I want to argue, is ultimately convincing. These are what I will refer to as: (1) the social rule argument; (2) the pedigree argument; (3) the controversy argument; and (4) the moral argument.10

Dworkin’s first argument in MOR-II against law-as-convention positivism is that the social rule theory provides an inadequate general theory of duty. The argument is this: According to the social rule theory an individual has an obligation to act in a particular way only if (1) there is a general practice of acting in that way; and (2) the rule that is constructed or built up from the practice is accepted from an internal point of view. To accept a rule from an internal point of view is to use it normatively as providing reasons both for acting in accordance with it and for criticizing departures from it. But, as Dworkin rightly notes, there may be duties even where no social practice exists, or where a contrary practice prevails. This is just another way of saying that not every duty is one of conventional morality.

If the positivist’s thesis is that the social rule theory provides an adequate account of the source of all noninstitutional duties or of the meaning of all claims about such duties, it is surely mistaken. Not all duties imposed by rules are imposed by conventional rules. Fortunately, the law-as-convention version of positivism makes no such claim. The question is not whether the social rule theory is adequate to account for duties generally; it is whether the theory accounts for the duty of judges under a rule of recognition. An inadequate general theory of obligation may be an adequate theory of judicial duty. Were one to take the social rule argument seriously, it would amount to the odd claim that the rule of recognition cannot be a social rule and, therefore, that obligations under it could not be ones of conventional morality, simply because not every duty-imposing rule is a social rule.

Dworkin has three distinct, powerful arguments against law-as-convention positivism. Each argument has a slightly different character and force. The point of the pedigree argument is that a rule of recognition that makes reference to the content of moral principles as a condition of their legality
will spur controversy and, because it will, it cannot be a social rule, or, therefore, a rule of recognition in the positivist’s sense. The argument is weak in the sense that, even if sound, it would be inadequate to establish the normative account of the rule of recognition. Only controversial rules of recognition fail to be social rules; for all the argument shows, uncontroversial rules of recognition may be social rules.

The more general argument from controversy appears to fill the gap left by the pedigree argument. Here the argument is not that every rule of recognition will be systematically controversial. Instead, the argument relies on the plain fact that even basically uncontroversial rules of recognition will have controversial instances. The social rule theory cannot account for judicial obligation in the face of controversy. If the rule of recognition imposes an obligation on judges in controversial cases, as Dworkin presumes it does, the obligation can be accounted for only if the rule is a normative one whose capacity to impose a duty does not depend on widespread convergence of conduct or opinion. The point of the argument can be put in weaker or stronger terms. One can say simply that obligations in controversial cases exist and positivism cannot account for them; or one can put the point in terms of natural law theory as the claim that the duties that exist are ones of critical morality, rather than conventional practice.

The point of the moral argument is that, in resolving hard cases, judges appear to rely on principles of political morality rather than on convergent social practice. Judges apparently believe that they are bound to resolve these controversies and, more important, that their duty to resolve them in one way rather than another depends on the principles of morality to which they appeal.

IV. Convention And Controversy

Each of the objections to the social rule theory can be met. Consider the pedigree argument first, that is, the claim that a rule of recognition which refers to morality—which is a \( C_i \) clause satisfied by some norm—will be controversial and, therefore, cannot be a social rule of recognition. Suppose the clause in the rule of recognition states: The law is whatever is morally correct. The controversy among judges does not arise over the content of the rule of recognition itself. It arises over which norms satisfy the standards set forth in it. The divergence in behavior among officials as exemplified in their identifying different standards as legal ones does not establish their failure to accept the same rule of recognition. On the contrary, judges accept
the same truth conditions for propositions of law, that is, that law consists in 
moral truth. They disagree about which propositions satisfy those condi-
tions. While there may be no agreement whatsoever regarding which stan-
dards are legal ones—since there is no agreed upon standard for determining 
the truth of a moral principle—there is complete agreement among judges 
concerning the standard of legality. That judges reach different conclusions 
regarding the law of a community does not mean that they are employing 
different standards of legality. Since disagreement concerning which prin-
ciples satisfy the rule of recognition presupposes that judges accept the same 
rule of recognition, the sort of controversy envisaged by the pedigree argu-
ment is compatible with the conventionalist account of the authority of the 
rule of recognition.

Notice, however, that were we to understand the rule of recognition 
epistemically, as providing a reliable test for identifying law, rather than as 
specifying truth conditions for statements of law, the sort of controversy gen-
erated by a rule of recognition like the law is whatever is morally right 
would be problematic, since the proposed rule of recognition would be inca-
 pable of providing a reliable test for identifying legal norms. This just draws 
our attention once again both to the importance of distinguishing between 
the epistemic and semantic interpretations of the rule of recognition, and to 
the necessity of insisting upon the semantic interpretation of it.

Schematically, Dworkin’s argument is as follows.

1. Every rule of recognition will be controversial with respect to its 
scope and, therefore, with respect to the nature and scope of the obli-
gations it imposes.

2. Nevertheless, in resolving disputes involving controversial aspects of 
the rule, judges are under an obligation, as they are in the uncontro-
versial cases, to give the right answer.

3. The social rule theory which requires convergence of behavior as a 
condition of an obligation cannot account for the obligation of judges 
in 2.

4. Therefore, positivism cannot account for judicial obligation in 2.

5. Therefore, only a normative theory of law in which the duty of judges 
depends on moral argument rather than convergent practice can 
account for judicial duty in 2.
As I suggested earlier, a positivist might respond by denying the truth of 2, that is, that judges are obligated in controversial cases in which behavior and opinion diverge. Hart, for one, denies 2, and he appears to do so because he accepts 3. That he denies 2 is made evident by his characterizing these kinds of cases as involving “uncertainty in the rule of recognition” in which “all that succeeds is success.” If a positivist were to deny 2 to meet Dworkin’s objections on the grounds that he (the positivist) accepts 3, it would be fair to accuse him of begging the question. He would be denying the existence of judicial obligation simply because his theory cannot account for it. Moreover, from a strategic point of view, it would be better to leave open the question of whether such duties exist, rather than to preclude the very possibility of their existence as a consequence of the theory; otherwise any argument that made the existence of such duties conceivable would have the effect of completely undermining the theory. Notice, however, that Dworkin is led to an analogous position, since his argument for the normative theory of law (i.e., 5) requires that judges are under obligations in every conceivable controversial case (i.e., 2). The social rule theory logically precludes judicial obligation in such cases; the normative theory requires it. Both theories of law will fail, just in case the existence of judicial duty in controversial cases involving the rule of recognition is a contingent feature of law. In other words, if it turns out that in some legal systems judges have an obligation to provide a particular formulation of the rule of recognition when controversy arises over its proper formulation, whereas in other legal systems no such duty exists and judges are free to exercise discretion—at least until one or another judicial duties in all controversial cases, and that which logically entails such duties, will fail.

For the traditional positivist, we would have a case in which no obligation existed, where all the succeeded was success: A case in which the judges’ recourse to the principles of political morality necessarily involved an exercise of discretion.

What, in Dworkin’s view, is evidence for the normative theory of the rule of recognition—that is, general and widespread appeal to moral principle to resolve controversies in it—is, in my view, evidence of the existence of a social practice among judges of resolving such disputes in a particular
way; a practice that specifies part of the social rule regarding judicial behavior. The appeal to substantive moral argument is, then, perfectly compatible with the conventionalist account of law.

To argue that the appeal to moral argument is compatible with the conventionalist account is not to establish that account, since the appeal to moral argument as a vehicle of dispute resolution is also consistent with the normative theory of law. One could argue that, at most, my argument shows only that Dworkin’s arguments, which rely on both the controversial nature of law and the appeal to moral principles to resolve controversy, are inadequate to undermine positivism. We need some further reason to choose between the normative and conventional theories of law.

For the normative theory of law to be correct, judges must be under a legal obligation to resolve controversies arising in every conceivable rule of recognition by reliance on substantive moral argument. That is because Dworkin’s version of the normative theory entails the existence of judicial duty in all cases, and because the resolution of the dispute must involve moral argument. After all, if the rule of recognition is, as Dworkin claims, a normative rule, then its authority rests on sound moral argument and the resolution of disputes concerning its scope must call for moral argument. Were judges to rely on anything else, the authority of the rule of recognition will not be a matter of its moral merits; or if they appeal to nothing at all, then in such jurisdictions we would have reason to believe that judges are under no particular obligation to resolve a controversy in the rule of recognition.

Unlike traditional positivism, which has trouble explaining judicial behavior in mature legal systems, and the normative theory of law, which has difficulty explaining developing and immature legal systems (for the reasons that the first precludes obligations in controversial cases, while the second requires them), law-as-convention positivism understands such duties to be a contingent feature of law that can be explained as arising from the critical acceptance of a practice of dispute resolution, rather than from the principles of morality which judges under one kind of practice might cite.
V. CONCLUSION

Dworkin makes three correct observations about the controversial nature of some legal standards.

1. A legal system can (and does in the United States and Britain) recognize certain standards as part of the law even though they are “essentially controversial” in the sense that there may be disagreements among judges as to which these are, and there is no decision procedure which, even in principle, can demonstrate what they are, and so settle disagreements.

2. Among such essentially controversial legal standards are moral principles owing their status as law to their being “true” moral principles, though their “truth” cannot be demonstrated by any agreed upon test.

3. The availability of such controversial principles fills the “gaps” left by ordinary sources of law, which may be partially indeterminate, vague, or conflicting. So that, at least with respect to the resolution of disputes involving standards subordinate to the rule of recognition, a judge never has to exercise lawmaking power or “discretion” to fill the gaps or remove the indeterminacy if such moral principles are a part of the law.

In this essay, I have drawn distinctions among three versions of positivism and have discussed their relationship to Dworkin’s claims: (1) “Negative positivism,” the view that the legal system need not recognize as law “controversial” moral standards; (2) “positive, hard-facts positivism,” the view that controversial standards cannot be regarded as law and, hence, rejects Dworkin’s three points; (3) “positive, social rule positivism,” which insists only on the conventional status of the rule of recognition but accepts Dworkin’s three points.

Since the inclusion of controversial moral principles is not a necessary feature of the concept of law, Dworkin’s arguments to the effect that such principles figure in judicial practice in the United States and in Britain, are inadequate to undermine the very weak claim of negative positivism. On the other hand, if Dworkin is right—and I am inclined to think that he is—in thinking that controversial moral principles sometimes figure in legal argument, then any form of positivism that is committed to the essentially non-controversial nature of law is mistaken. Finally, what I have tried to do is to develop a form of positivism which accepts the controversial nature of some
legal reasoning, while denying that this is incompatible with the essential, affirmative claim of the theory that law is everywhere conventional in nature. If I am correct, there is a form of positivism which can do justice to Dworkin’s insights while rendering his objections harmless.

**Endnotes**

1 Dworkin’s claim that positivism is committed to a pedigree standard of legality is too narrow. What he means to argue, I believe, is that positivism is committed to some form of “noncontentful” criterion of legality, of which a pedigree standard would be one. For ease of exposition, I will use “pedigree test” broadly to mean any sort of noncontentful criterion of legality.

2 See pp. 145–148 *infra*.

3 The phrase “truth as a moral principle as a condition of legality” does seem a bit awkward. However, any other phrase, such as “morality as a condition of legality,” or “moral content as a condition of legality” would be ambiguous, since it would be unclear whether the separability thesis were a claim about the relationship between law and critical morality or between law and conventional morality. My understanding of the separability thesis is as a denial of a constitutive relationship between law and critical morality. For another interpretation of the separability thesis see p. 152 *infra*.

4 This seems to be in the form of positivism David Lyons advances to meet Dworkin’s objections to positivism. Cf. David Lyons, Review: Principles, Positivism, and Legal Theory, 87 Yale L. J. 415 (1977).

5 But see Rolf Sartorius, Social Policy and Judicial Legislation, 8 Am. Philosophical Q. 151 (1971); Jules Coleman, Review, Taking Rights Seriously, 66 Calif. L. Rev. 885 (1978); and pp. 149–150 *infra*.

6 The following characterization of positivism in virtue of motivations for the separability thesis was developed after numerous discussions with Professor Dworkin. I am particularly grateful to him for remarks, but it is likely that I have not put the characterization as well as he would have.

7 That is because legal realism is skeptical about the existence of legal facts. Legal facts are “created” by official action; they are not “out there” to be discovered by judges. Scientific or metaphysical realism maintains exactly the opposite view of facts.

8 See note 5 supra.

9 Often overlooked is the fact that there are two distinct arguments for discretion: One relies on the controversial nature of penumbra cases involving general terms; the other relies on the finiteness of legal standards. The first argument is actually rooted in a theory of language; the second, which would survive a rejection of that theory, relies on gaps in the law. See Coleman, *supra* note 5.
Dworkin does not explicitly distinguish among these various arguments, nor does he label any of them. The labels and distinctions are mine.

There are two ways in which we might understand the notion of a social rule. Under one interpretation, not every rule of recognition would be a social rule; under the other, each would be. As both Hart and Dworkin use the term, a social rule is specified by behavior. It cannot be formulated in the absence of a practice, and the nature of the practice determines the scope of the rule and the extent of the duties it imposes. The rule that men must doff their hats upon entering church is a social rule in this sense. Not every rule of recognition, however, is a social rule in this sense for two reasons. First, at least in some jurisdictions, the content of the rule may be specified prior to the existence of an appropriate practice. For example, the formulation of the Constitution of the United States did not require the existence of the relevant judicial practice; it preceded the practice. No doubt ambiguities and other uncertainties in the rule are resolved through judicial practice; nevertheless, the general form and nature of the rule had been specified without regard to practice. Second, whereas Dworkin’s contrast between social rule and normative rule theories of law turns on the manner in which legal rules give rise to duties, the rule of recognition is not itself a duty-imposing rule. We might construct a broader notion of a social rule. In this sense a rule will be a social rule if its existence or authority depends, in part, on the existence of a social practice. Here the requirement is not that the rule’s proper formulation be specified by practice. Instead, the claim is that the authority of the rule depends on the existence of a practice. The rule itself may be specifiable, at least in general terms and at some points in time, without regard to the practice. However, in the absence of the practice, the rule is empty in that it is incapable of providing justifications for action. In short, its normativity depends on the practice, though its content need not be specified by it. Every rule of recognition for the positivist is a social rule in this sense.