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Conventions, Disagreements, and (Hart's) Inclusive Legal Positivism

By Boyong Zhou

Introduction

In H.L.A. Hart's legal positivism, the rule of recognition is a rule that serves as an institutional check to identify the various sources of law and to ensure that laws are legally valid and binding. This rule provides us with a substantive understanding of two general theses that legal positivism commits to: the Social Fact Thesis and the Conventionality Thesis. The former claims that law originates from and is essentially a social fact. The latter states that the criteria for the legal validity of a legal system are settled by conventions held by legal officials, understood as the convergence of their beliefs and behaviours. According to Hart, the rule of recognition is both the basic social fact that makes certain rules part of the law and the very convention adopted by officials. One of the most prestigious critics of Hart (and thus of legal positivism), Ronald Dworkin, however, argues that the rule of recognition (hereinafter RoR) must be rejected because there are valid legal principles that it fails to recognize as part of the law. Furthermore, he argues that there are theoretical disagreements over 'grounds of law', which would undermine the social convention that officials are subject to and thus destroy RoR itself.

In response, in the postscript of his *The Concept of Law*, Hart describes his positivism as 'soft positivism' (i.e., inclusive positivism), according to which, in every conceptually possible legal system, there could be norms that are ascribed legal validity solely because of their moral content, rather than through the institutional check sustained by RoR. Specifically, legal principles can be incorporated into the rule of recognition and thus become part of the law without compromising its social nature. This statement is deemed the Incorporation Thesis, and inclusive positivism is the view that adopts this thesis. To what extent Hart's inclusive positivism successfully responds to Dworkin's criticism remains a question often disputed within the philosophy of law.

In this article, I will defend Hart against Dworkin's objections and answer this question by proposing a specific reading of the Incorporation Thesis, namely that the incorporation of moral norms is a necessary but not sufficient condition for legal validity. I will argue for the following two claims:

(A) Incorporating legal principles into legal validity criteria does not harm the Social Fact Thesis.

Therefore,

(B) Such incorporation is perfectly compatible with RoR as a social convention.

Then, I will respond to a potential objection from Andrei Marmor that can support Dworkin's criticism. This objection claims that inclusive positivism is false because the notion of convention it holds is conceptually wrong: inclusive positivists mistakenly think that within convention there is a gap between a rule and its application, which can be filled by moral or political content. However, there is no such gap, because a convention is nothing other than *a certain set of rules and their application*. Hence, whenever there are legal interpretation

disputes among judges, the contents of their dispute lie outside the scope of the convention. And if the convention could not address legal disputes among judges because they lie outside its scope, the Incorporation Thesis is wrong. This is because what validates laws in legal interpretation disputes is not the convention, as it does not exist there. This objection, therefore, yields the same result as Dworkin's idea of theoretical disagreement over grounds of law, which is that the social convention that positivists insist on is undermined.

By replying to this objection, I propose a new distinction that can be made in uncertain cases of legal interpretation. This distinction is one between what RoR (i.e., the convention) is and what it should be taken to be. I will argue that this new distinction would avoid Dworkin's criticism as well as Marmor's attack on the conceptual mistake of clarifying the convention and would lead to my qualified reading of the Incorporation Thesis stated above. For any norm N to be part of the law, it is necessary but not sufficient for N to meet certain moral requirements. Finally, my paper argues that, given my reading of the Incorporation Thesis, the social nature of the convention could be secured even if legal principles were validated as laws in virtue of their content alone.

1. The Foundation

1.1 The rule of recognition

I begin with a brief illustration of the concepts covered in this essay. All kinds of legal positivism hold two fundamental theses: the Social Fact Thesis and the Conventionality Thesis. According to the Social Fact Thesis, law is essentially a social fact in the sense that anything called 'the law' has properties that refer solely to a social fact, which, in turn, explain the criteria of legal validity, the existence of legal rules, and finally a legal system. Now, what is the basic social fact that is essential to explain all these? According to Hart, it is RoR, which is a higher-order law of 'the law'. It provides law identification criteria through which specific social rules are recognised as laws. As he puts it, RoR

"specif[ies] some feature or features possession of which by a suggested rule is taken as a conclusive affirmative indication that it is a rule of the group."¹

In his view, RoR identifies sources of the law and establishes criteria for legal validity. For a system to be appropriately called a legal system, it must contain RoR to identify the specific social norms that constitute its rules, thereby determining its relevant criteria of legal validity.² In other words, only when RoR establishes the criteria for identifying the law can a legal system apply its norms and validity.

The fact that RoR makes social rules legally valid, in turn, leads us to the above Conventionality Thesis, which holds that the criteria for legal validity are established by social convention among legal officials. This can be explained as follows: Hart distinguishes 'the internal aspects of rules' from 'the external aspects of rules'.³ The

¹ H.L.A. Hart, "Law as the Union of Primary and Secondary Rules," in *Classic Readings and Cases in the Philosophy of Law*, edited by Susan Dimock (New York: Routledge, 2007), 59.

² H.L.A. Hart, *The Concept of Law*. 3rd ed. (Oxford: Oxford University Press, 2012), 92.

³ *Ibid.*, 88-89.

latter is made by an external observer of a legal system who does not consider herself to have reason to regard its rules as a common standard regulating her behaviour. Instead, she would only make judgments that

“record the regularities of observable behaviour in which conformity with the rules [of a legal system] partly consists, and those further regularities, in the form of the hostile reaction, reproofs, or punishments, with which deviations from the rules are met.”⁴

In short, judgments about a legal system made by such an observer are descriptive and inform that (i) a group of people obey sets of rules; (ii) these rules are consistently enforced and efficacious; and (iii) the consequences of deviant behaviour are predictable. On the other hand, the former, i.e., the internal aspect of rules, is not derived from any descriptive perspective, such as that of an observer. Instead, this aspect is claimed by a participant who views the rules of a legal system as reason-giving, used to justify, evaluate, and criticize deviant behaviours against the common standard of behaviour regulated by those rules. Therefore, the judgments such a participant would make are not merely those concerning the efficacy of laws, obedience to laws, and the predictability of disobedience as the above external observer would claim. They are rather concerned with the validity of laws and are non-descriptive, providing people with reasons to accept rules as binding and to criticize those who disobey them.⁵

On Hart’s view, the internal aspect of rules is necessary for the existence of RoR and for a social convention. There would be no convention on X if X-ing were merely a behavioural convergence. X-ing constitutes a convention only if (A) X-ing is accepted as a reason to regulate behaviour, (B) X-ing is regarded as a common standard of action, and (C) non-X-ing is evaluated critically and would result in punishment. For example, a group of people prefers drinking a Coke while eating a hamburger. This is a common behavioural convergence. However, from the internal perspective we have introduced now, drinking a Coke while eating a hamburger will become a convention only if people view not doing so as grounds for criticism. This is enough to make it a convention that people drink Coke while eating a hamburger.

Now, for Hart, the convention that constitutes the legal validity criteria and thus the legal system is one of judicial consensus: a convention among judges to specify certain social norms as binding. This convention must be held by its participants from the internal aspect of rules. Thus understood, RoR is a conventional rule based on the social fact that a group of people, particularly legal officials, adheres to the criteria it sets out and shares a mutual belief in social norms and rules, which are validated as law by it, in such a way that non-compliance with these norms is subject to criticism. RoR, in other words, is the very social convention concerning officials’ beliefs

⁴ *Ibid.*, 89.

⁵ It should not be assumed that judgments made from the internal aspect of the rules are evaluative in a *moral* sense because they are non-descriptive. Hart makes the general point that when judgments of a behaviour B from the internal aspect of rules give reasons to accept B as a common standard of behaviour and to criticize non-B, their ‘normativity’ lies in imposing *institutional*, rather than moral, obligations upon those who make them. It is, therefore, wrong to assume that judgments from the internal aspect of rules are made to build up a social convention in virtue of some moral reasons, since these judgments are non-descriptive. Hart’s general point here leads to, according to some scholars, the so-called ‘Strong Conventionality Thesis’, according to which, ‘the conventional rule of recognition is a duty-imposing rule’. The duty imposed here is the institutional obligations upon judges. See Kenneth E. Himma, “Inclusive Legal Positivism,” in *The Oxford Handbook of Jurisprudence and Philosophy of Law*, ed. Jules L. Coleman, Kenneth E. Himma, and Scott J. Shapiro (Oxford University Press, 2004): 133; Andrei Marmor, “Legal Conventionalism,” *Legal Theory* 4, no. 4 (1998): 530.

and their convergence on its legal validity criteria in behaviour.

To summarise, firstly, RoR explains how any legal rules can become law and, therefore, their legal validity. Secondly, and more fundamentally, RoR exists as a social convention formed by legal officials' convergence of beliefs and their behaviour according to the validity criteria it specifies.

1.2 Legal Principles

So far, I have outlined the nature of RoR as the fundamentals of Hart's positivism. Dworkin, on the other hand, claims that, in a settled legal system, apart from legal rules, there are also legal principles that are not identical to legal rules. Unlike legal rules, whose validation is in an all-or-nothing manner, legal principles carry a moral weight dimension reflecting the 'requirement of justice or fairness' or other values they imply.⁶

Because of the moral weight they carry, principles are not decisive in validating a judge's decisions, as statutes are in their mandatory nature. Instead, principles merely guide a court's legal reasoning based on the moral content they embody. Because of this, principles can never be logically invalidated; they can only be outweighed or shown to be inappropriate for specific cases.

To illustrate how principles guide the court in its judgments, Dworkin cites famous cases in which principles were applied to reach the appropriate legal answer. These cases are hard cases. A hard case is one in which there are no apparent legally binding standards that could be applied in terms of the settled law.⁷ For example, Dworkin cites *Riggs v. Palmer*.⁸ An appointed heir murdered his grandfather, who had bestowed his heritage upon him. The court applied the principle 'No one shall be permitted to profit by his wrongdoing' to the contract law concerning the devolution of property, thereby nullifying the heir's legal right to inherit.

Dworkin believes that principles and their application in cases like *Riggs v. Palmer* undermine what he called the 'pedigree' of RoR. According to Dworkin, positivists like Hart commit to the 'Pedigree Thesis', which claims that

*"RoR provides a method for accounting for how the law is identified, developed, and adopted."*⁹

Any elements of law and specific terms of the legal validity criteria are supported by, and traceable to, the basic convention that underpins the legal system. This kind of validation chain is what Hart's pedigree is, from Dworkin's perspective. However, as he claims, there are legal principles that are not identifiable within the validation chain Hart commits to because of their indeterminate nature, and that are as legally binding as rules.

Prima facie, a positivist would deny that principles are legally binding as rules of law are. Principles cannot be subjected to the criteria of the law because of the relative nature of their content. Hence, they fail to be subsumed under RoR's pedigree. The 'wrongdoing-ness' in 'no one shall be permitted to profit by his wrongdoing' leaves an open context subject to debate. This would lead to interpretive uncertainty regarding the legal validity

⁶ Ronald Dworkin, *Taking Rights Seriously*. (London: Duckworth 1997), 22.

⁷ *Ibid.*, 23.

⁸ *Ibid.*, 23.

⁹ *Ibid.*, 24.

of this principle itself. Principles are thus seen by positivists as extra-legal but legally relevant standards. Dworkin agrees that the nature of principles carries moral content and plays a non-determinative role in administering the law. However, he does not see it as a flaw that reduces principles to merely extra-legal standards. For Dworkin, principles are as legally binding as the rules of law. If this is the case, the nature of principles serves as an argument against the pedigree of RoR. RoR cannot identify them as part of the law because they are validated by the moral content they reflect, which has nothing to do with the convention required to make the law what it is.

2. The Principle Objection

Let us turn to the first step in Dworkin's argument. He starts by denying that a judge has a 'strong sense' of judicial discretion that would allow him or her to either apply or not apply principles to hard cases. And since the judge has no such discretionary power, the principles are no longer extra-legal standards. Positivists claim that the judge has a 'strong sense' of discretion if, in hard cases, he is 'not bound by standards set by the authority in question [that of legal validity]'.¹⁰ Therefore, the judge needs to look toward extra-legal standards, because there are no settled standards of legal validity for them to make the decision. However, for Dworkin, the judge does not have such strong discretion for two reasons.

Firstly, it is the principle that directly provides the court with a legal reason to extend and change the settled law. It is the intrinsic moral property of the heir's murder that overturns the contract law. This would suggest that the amendment of rules is supported affirmatively by principles that the judge has no liberty *not* to pick up.¹¹ There are no extra standards that the judge could fall back on to come up with an answer to the complex, hard case. Instead, there is one legally appropriate answer for the hard case that the judge ought to specify: in *Riggs v. Palmer*, the wrongness of murder. Thus, the judge has no strong discretion in the case.

Secondly, whenever the judge might be credited with possessing the supposed 'strong discretion' and thus the power to change the settled law, he ought to consider conservative principles against granting new judicial discretion to new judges. Dworkin cites two prominent principles of this kind: legislative supremacy and precedent.¹² Judges typically align their decisions with these two principles to maintain coherence within the legal system. They cannot simply dismiss them. Instead, they need to uphold the legally binding norms. Neither the first nor the second reason implies that the judge possesses a strong sense of discretion. On the contrary, in both cases, principles are as binding as the rules of law, serving to limit judges' actions.

The denial of strong discretion leads to the bindingness of principles. Consequently, if legal principles are legally binding as well, this undermines the pedigree thesis. This is the second step of Dworkin's argument. If the pedigree cannot cover legal principles because they are identified in terms of their intrinsic moral content, but not in terms of RoR, it is simply not true that it is the positivist's pedigree that provides the law identification criteria. Hart distinguishes the acceptance of RoR from the validity of rules necessitated by it. The latter receive their legal normativity under criteria provided by the former. But principles are not identified in the same way. They are

¹⁰ *Ibid.*, 32.

¹¹ *Ibid.*, 37.

¹² *Ibid.*, 38.

validated by referring to other principles, which broadly include the institution's legal practice and moral authority. Unlike legal rules derived from RoR alone, the validity of principles relies on an understanding of the interaction between the 'institutional authority of common law courts, their relations to legislatures, and to ordinary moral practices' and so forth.¹³ Dworkin therefore concludes that principles are proven to be as binding as laws, whereas they are not validated by RoR. Therefore, the pedigree thesis, which advocates an exclusive way of law identification through RoR, is undermined by the existence of principles.

3. Incorporation Thesis

How can we respond to Dworkin's objection? Hart and other positivists adopt what is known as 'inclusive legal positivism', the core of which is the Incorporation Thesis, which asserts that legal principles (and thus moral norms) can be included within RoR's legal validity criteria. Before presenting my claim (A): Incorporating legal principles into legal validity criteria does not harm the Social Fact Thesis, I will analyze Hart's own reply to Dworkin in the postscript to *The Concept of Law* and argue that Hart's reply is, nevertheless, insufficient.

3.1 The Postscript

Hart argues that Dworkin's preoccupation with constructive interpretation leads him to 'double error'.¹⁴ Firstly, 'legal principles cannot be identified by their pedigree', and secondly, 'a rule of recognition can only provide pedigree criteria'.¹⁵ For Hart, both of these two points are mistaken. He thinks that nothing in the characteristics or features of legal principles precludes their validation as part of the law by RoR, given their moral content and non-conclusive nature. The force of Dworkin's challenge would be reduced if legal validity criteria offered by the convention contained a moral-content-based test for law rather than merely a social-fact-source-based test. As Hart says,

*"for plainly, a provision in a written constitution or a constitutional amendment or a statute may be taken as intended to operate in the non-conclusive way characteristic of principles, as providing reasons for decision, which may be outweighed in cases where some other rule or principle presents stronger reasons for an alternative decision..."*¹⁶

Then, he claims,

"[a]lso, some legal principles, including some basic principles of the Common Law, such as that no man may profit from his own wrongdoing, are identified as law by the 'pedigree' test in that they have been

¹³ S.J. Shapiro, 'The "Hart–Dworkin" debate: A short guide for the perplexed', in *Ronald Dworkin*, A. Ripstein (ed.) (Cambridge University Press, 2007): 28; see also: Dworkin, *Taking Rights Seriously*, 41.

¹⁴ The 'constructive interpretation' is the alternative set of law identification and validation criteria Dworkin conceives of, in contrast to Hart's RoR. Covering both legal principles and rules, it is one that 'best fits and justifies both the whole institutional history of the settled law and the individual's political right.' Hart, *The Concept of Law*, 263-4; See also: Dworkin, *R. Law's Empire*. (Fontana Press, 1986).

¹⁵ H.L.A. Hart, *The Concept of Law*. 3rd ed. (Oxford University Press, 2012), 263.

¹⁶ *Ibid.*, 264.

*consistently invoked by courts in ranges of different cases as providing reasons for decision, which must be taken into account, though liable to be overridden in some cases by reasons pointing the other way.*¹⁷

Moreover, Hart thinks that the existence of RoR is a necessary condition for legal principles to be identified as part of the law, even by the criterion of ‘constructive interpretation’. The reason for this claim is that:

*“The starting point for the identification of any legal principle to be brought to light by Dworkin’s interpretive test is some specific area of the settled law that the principle fits and helps to justify. The use of that criterion [the interpretive test], therefore, presupposes the identification of the settled law, and for that to be possible, a rule of recognition specifying the sources of law and the relationships of superiority and subordination holding between them is necessary.”*¹⁸

As a result, we can summarise Hart’s reply to Dworkin into two claims:

One: RoR does not operate in an exclusive way that validates norms as part of the law by relying solely on social facts.

Two: RoR is necessary if legal principles are to be validated.

Hart’s response has been welcomed by several scholars. For example, Wil Waluchow cites empirical evidence showing that some legal systems indeed contain content-based tests of validity criteria.¹⁹ Specifically, Waluchow cites section 7 of the Canadian Charter (which states some fundamental human rights and their infrangibility) and some amendments to the U.S. Constitution that provide the right to vote, free speech, and religious freedom.²⁰

3.2 My Claim (A)

Now, we have to ask: Is Hart’s reply to Dworkin sufficient? The answer, I shall argue, is that it is not. Both One and Two presuppose, *as a given fact*, that there is a social convention that operates non-exclusively to validate and identify norms as the law, either through the strict institutional checks it contains or through the content of the norms themselves. However, this presumption is wrong because we must not overlook the *conceptual* force of Dworkin’s objections, which expose issues with positivism. This force arises from a profound tension Dworkin highlights within positivism: a tension between the pedigree that includes content-based constraints and its structural certainty. The structural certainty required by the pedigree can be clarified as follows. According to the Conventionality Thesis discussed above, RoR is understood as a socially conventional rule requiring the mutual convergence of officials’ behaviour, motivated by their commitments to specific social rules, to accept those rules

¹⁷ *Ibid.*, 265.

¹⁸ *Ibid.*, 266.

¹⁹ W.J. Waluchow. *Inclusive legal positivism*. (Oxford University Press, 1994): 177-8.

²⁰ *Ibid.*, 178.

as valid and binding. But it would be meaningless to speak of such convergence or acceptance if it were not certain which sets of social rules are identified by it as valid laws. Moreover, the validity criteria RoR sets out would not be effectively binding if it were not certain what criteria are those established by RoR. Hence, the pedigree of 'RoR' must be certain. However, the moral norms reflected and embodied in the principles would provoke interpretative uncertainty among legal officials, as judges would dispute one another over their critical content, thereby potentially leading to divergence in judges' behaviour and decisions.

On the other hand, Hart's reply above assumes that Dworkin is asking the following question, which Dworkin would consider a misunderstanding on his part: Given the convention that makes up the legal validity criteria, how could legal principles be captured by it? But as we have pointed out, Dworkin focuses on the conceptual tension between the convention that incorporates legal principles and its own structural certainty. So, instead, he asks: Given the existence of legal principles, how could there ever be a convention that attempts to include them within it if their nature is incompatible with what it requires?

In other words, how can interpretative uncertainty be conceptually compatible with the conventional nature of RoR, which requires acceptance and people's convergent behaviour? Dworkin thinks this is incompatible: the moral content of legal principles automatically threatens judges' mutual acceptance and their behavioural convergence, which constitute the convention that makes up the legal validity criteria. Therefore, from a conceptual perspective, there should be no 'content-based' validity criteria offered by RoR. Dworkin's objection from principles does not assume that the pedigree as a way of identifying legal validity is useless for a legal system. He does not deny the *existence* of any pedigree. Nor does he deny that there are many instances of an inclusive convention existing within legal systems, as Hart and Waluchow point out.

Yet he argues that given the nature of principles, pedigree fails to account for them. This is why the nature of principles in itself falsifies the positivist's pedigree thesis. Hence, a successful reply to Dworkin cannot just claim that *we can incorporate principles under RoR*, because the very incompatibility between principles and the positivists' notion of pedigree is already considered to be an argument for Dworkin.

So, how should we proceed? This is where my claim (A) comes into play. Incorporating legal principles into legal validity criteria does not harm legal positivism's Social Fact Thesis. Dworkin arguably exaggerates the implications of the Social Fact Thesis. In essence, his objection assumes: *It must be a social fact that the validity of first-order law (i.e., laws validated by RoR) is explained by RoR alone.* Or in a simpler form: *Relevant social facts must come to explain the validity of first-order law.*

However, we can reject this reading of the Social Fact Thesis. Instead, we can argue that relevant social facts only explain the acceptance and the authority of *higher-order law*, namely, RoR itself. In other words, insofar as the existence of RoR is itself a social fact, subsequent legal rules identified by it do not need to have a social source. Jules Coleman's distinction between the content of RoR and its application supports my interpretation of the Social Fact Thesis here.²¹ According to Coleman, when judges disagree with each other in a hard case, their disagreement should be construed as disagreeing over which set of propositions of the law satisfies the validity criteria that consist in RoR. This debate concerns how RoR is applied to validate moral principles. For example,

²¹ Jules Coleman, "Negative and positive positivism", *The Journal of Legal Studies*, 11(1), 1982: 139-64.
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judges might disagree on which moral principles should be validated as law. However, their disagreement should not be seen as a disagreement about the standards that constitute RoR. The convention that ‘moral principles are accessible in adjudication in a hard case’ is mutually agreed upon and *is itself a social fact*. Essentially, Coleman’s distinction expresses the same idea as my argument: Only RoR itself must be explained as a social fact.

If my defence succeeds, it sheds light on a proper understanding of the Incorporation Thesis. The incorporation of moral standards can be regarded as a condition for legal validity without undermining the entire social pedigree of the law as the foundation of a legal system. This is how we should interpret Hart when he states that RoR has an ‘open texture’ in hard cases where the court must validate principles to decide.²² The defence of ‘inclusive positivism’ needs to be linked to the deeper claim about the social essence of the pedigree. Consequently, Dworkin’s objection based on principles fails.

4. Theoretical Disagreements

Dworkin further develops his objections to Hart’s positivism in his *Law’s Empire*, asserting that positivism cannot explain theoretical disagreements over grounds of law that are common among officials.²³ By ‘grounds of law’, he refers to the basis on which a legal rule is considered true.²⁴ The legislation of the California legislature or the Fife Council constitutes such a ground for specific laws enacted within their jurisdiction.

Subsequently, theoretical disagreements among officials are about what such grounds are. And if theoretical disagreement is widespread, how can positivists explain its existence while maintaining that binding legal facts are determined by RoR that, *ex hypothesi*, relies on agreement about their content?²⁵

Consider the following case of *Tennessee Valley Authority (TVA) v. Hill*.²⁶ Conservationist plaintiffs sued TVA’s 100-million-dollar dam project because its construction threatened a fish called the snail darter, thereby violating the Endangered Species Act of 1973. TVA argued that the project was funded and scheduled before the enactment of this wildlife-protection law.

Judges like Warren E. Burger argued that, although suspending dam construction is wasteful and could lead to absurd public policy outcomes, the statute prohibits threatening wildlife. Judges like Lewis F. Powell disagreed with Burger, maintaining instead that this law should not be interpreted as implying absurd outcomes, unless indicated by the legislature. Since Congress gave no affirmative indication to regard the case in question as an exception to this law, judges were obligated to decide based on common sense and the public weal.²⁷ According to Dworkin, here, the disagreements between Burger and Powell are theoretical. They both regarded the Endangered Species Act of 1973 as a valid law, as identified by RoR. They debated how its meaning should be interpreted, given that the legislature showed no strong conviction either in rejecting the outcomes of the dam suspension or in enacting the law. Therefore, it seems that positivists cannot account for these kinds of cases

²² Hart, *The Concept of Law*, 252.

²³ It should be clarified that the time at which Hart wrote his postscript was after 1986, when Dworkin published his *Law’s Empire*. So, Hart’s reply above would cover, according to Hart’s own idea, objections from Dworkin that I am going to discuss in section 4, even though we have seen that Hart’s reply is flawed.

²⁴ Dworkin, *Law’s Empire*, 5.

²⁵ *Ibid.*, 6; see also: S.J. Shapiro, *The “Hart–Dworkin” debate*, 41.

²⁶ *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 173 (1978).

²⁷ S.J. Shapiro. *The “Hart–Dworkin” debate*, 38.

because there is no convention concerning whether judges should prioritise statute law over patently absurd outcomes. There are, in fact, theoretical disagreements about whether the principle of ‘the priority of statute law’ is incorporated by RoR, even though RoR validates this law.

Positivists have several ways to respond to the theoretical disagreement at issue. Plainly, they can deny that such a theoretical disagreement is genuine within their framework; i.e., it is impossible given RoR. Scholars like Coleman would deny that the theoretical disagreement exists, as we learned from Coleman’s distinction above. Insofar as Congress’s legislative function is indisputable, there are conventions. The only possible disagreement among judges is whether to apply RoR to identify certain legal principles. Judges are disputing matters of statutory law interpretation, but such debates of interpretation do not imply a lack of convention.

Yet this reply might not be satisfactory. It errs just as Hart’s own reply to Dworkin. Again, it assumes the existence of the convention as a given fact. Let me analyse how it works step-by-step. If the convention is just there, then surely, we can find a way to make it compatible with theoretical disagreements among judges, such that they do not imply the absence of the convention. The way we find such compatibility might well be explained in terms of Coleman’s distinction between judges applying RoR to validate a debatable norm and judges debating RoR itself.

However, there is no reason why we should first assume the existence of any sort of convention in terms of judges’ behavioural and belief convergence, if there is something that makes convention impossible in the first place. As a result, if we get rid of the assumption that *there is a convention as such*, then the phenomenon of theoretical disagreement is really disturbing, as it is incompatible with the goal of setting up a convention.

With the clarification that the theoretical disagreement makes it impossible for the convention to come into existence, the true force of Dworkin’s developed objection based on that disagreement is now revealed. It can be stated as follows.

In Section 1, we saw that judgments from the internal aspect of rules give people reasons to accept rules within a legal system as legally binding and to view deviant behaviour as objectionable. To recall, these judgments are necessary for the existence of the convention. Hence, if there were a convention, namely judges’ beliefs and behavioural convergence, in a legal system, they would have to make judgments from the internal aspect of rules, which are necessary for the convention as such here. However, if there were theoretical disagreements, it would mean that judges do not agree with one another in their judgments based on the internal aspects of rules. Critical, controversial, and even vague moral reasons affect judges’ and legal officials’ decision-making processes in producing significant judgments from the internal aspects of rules, thereby leading to no certain agreement among them. And if this is so, the following convention, defined as judges’ beliefs and behavioural convergence, would be nowhere. This, I speculate, is what Dworkin should have meant when he speaks of theoretical disagreement over the grounds of law. The level of such disagreement lies in making judgments based on the internal aspect of rules, which justify the institutional obligations that judges abide by.

4.1 My Claim (B)

Despite the force of Dworkin's objection, grounded in theoretical disagreement, I shall argue that there is a possible reply that could be offered to defend Hart's positivism. One crucial premise in this objection is that moral reasons, in virtue of their critical and open-to-dispute nature, make it very difficult for judges to make judgments from the internal aspect of rules necessary for the convention. The idea supporting this premise is, from my perspective, an assumption that it must be epistemically certain for judges which judgments constitute the convention. By following this assumption, it is natural to infer that legal interpretation debates vindicate that the proposed epistemic certainty is not the case because judges were motivated by different moral or political reasons to view the same statutory law.

However, it is a mistake that judges must, epistemically, share norms and beliefs to reach their agreements and behave convergently, simply because the convention requires their mutual acceptance of identifying specific social rules as legally valid and their behavioural convergence. It is a misunderstanding of the function of the convention (namely that of RoR) to think that it is formed out of an epistemic reason for certainty about law. Granted, much of the potential debate rooted in legal interpretation reflects moral or political reasons that are controversial but still determinative. Yet these reasons can be shown to be acted upon or obeyed without reference to a specific convention. Therefore, from a conceptual perspective, the function of convention does not depend on ascribing certainty to these reasons, although conventions shape and influence them. Instead, conventions establish a social sphere of practice that a group of people values. This does not mean that everything involved in establishing a convention concerns epistemic certainty about the interpretation of moral or political reasons.

Reconsider the case in which drinking Coke while eating a hamburger is a convention. Let us suppose that there are, if any, moral reasons not to eat any hamburger (suppose we are in a possible world in which any hamburger necessarily contains meat). Hence, these presumed moral reasons prevent people from agreeing on the judgments necessary to view and justify behaviours such as drinking Coke while eating a hamburger as a convention. Nevertheless, the convention of drinking Coke while eating a hamburger would not cease to be what it is, simply because there are moral reasons against it. Insofar as the function of such a convention is independent of whether there are moral reasons for or against it, the epistemic certainty that requires judges' beliefs and behavioural convergence *is not in itself* an argument against the convention that Hart's positivism relies on. This claim should remain true, even if the degree of such a certainty existing among judges is nearly zero because of some profound theoretical disagreements. In this extreme case, positivists like Hart would simply admit that this case is one of 'general disregard of the rules of the system', such that

“the normal context or background for making any internal statement [judgments made from the internal aspect of rules] in terms of the rules of the system is absent.”²⁸

The point here is that it would be pointless for Hart to take this extreme case as a valuable example for identifying any social convention that serves as a condition for legal validity. As he claims:

²⁸ Hart, *The Concept of Law*, 103-4.
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“To insist on applying a system of rules which had either never actually been effective or had been discarded would, except in special circumstances mentioned below, be as futile as to assess the progress of a game by reference to a scoring rule which had never been accepted or had been discarded.”²⁹

Consequently, extreme cases in which theoretical disagreements are so profound and widespread that the convention is either inefficacious or impossible are not a counterexample to Hart’s inclusive positivism. In such extreme cases, a positivist analysis of law would no longer be applicable.

So far, I have argued that (1) only the convention itself (namely, RoR) must be explained as a social fact and (2) the function of convention is not about ascribing certainty to moral or political norms. These two statements offer positivist explanations for debates over statutory interpretation without accepting Dworkin’s objections, and clarify the degree of ‘certainty’ that RoR requires. Neither legal principles nor theoretical disagreements would threaten the pedigree of RoR. As a result, I think the Incorporation Thesis is compatible with both the Social Fact Thesis and the Conventionality Thesis.

5. A proper reading of the Incorporation Thesis

One final objection to inclusive positivism deserves attention.³⁰ In this section, I examine this objection and then propose my own reading of the Incorporation Thesis, grounded in a new distinction between what RoR is and what it should be.

Recall Coleman’s distinction between the application of RoR and its content. Following my arguments against Dworkin’s two objections—the objection from legal principles and the one from theoretical disagreements—it seems that we can safely use Coleman’s distinction when we encounter hard cases in which RoR needs to validate moral principles to be part of the law. When making legal decisions in hard cases, the judge applies RoR rather than disputing its content. However, Andrei Marmor argues that the distinction between the application of RoR and its content is conceptually flawed.

As Marmor argues, inclusive positivists assume that ‘there is a potential gap between the convention, which is *a rule and its application*, a gap that can be bridged by moral or political arguments.’³¹ Yet the problem is that there is no such gap. The convention, *by definition*, is just a practice of applying its rule to certain cases. The application of rules prescribed by a convention is just *that* convention.

Marmor provides an example to explain this objection. The English word ‘morning’, by convention, is appropriate when referring to 9 a.m. It is, however, unclear, by the convention of using this word, whether 11:30

²⁹ *Ibid.*, 104.

³⁰ As I indicated, this objection is not invited by Dworkin. Instead, it is invited by an exclusive positivist, Andrei Marmor. The reason I examine it in this paper is that, though not obvious, it shares a logical commonality with Dworkin’s criticisms of the Incorporation Thesis. This commonality is that they all directly focus on the tension between convention and its incorporation into moral norms. A successful defense of Inclusive Positivism requires clarifying exactly how the convention incorporates moral norms. Hence, it is not a digression to examine Marmor’s objection in a paper on the Hart-Dworkin debate.

³¹ Marmor, ‘Exclusive legal positivism’, in *The Oxford Handbook of Jurisprudence and Philosophy of Law*. J.L. Coleman, K.E. Himma and S.J. Shapiro (eds) (Oxford University Press, 2004): 112.

a.m. should be called ‘morning’ or ‘noon.’³² This example demonstrates that there is no convention to call 11:30 a.m. ‘morning’. Therefore, the absence of a convention for ‘morning’ at 11:30 a.m. means that it is meaningless to ask what the ‘morning’ convention is (or requires to be) when it refers to 11:30 a.m. The impact of this objection is significant for inclusive positivists. They argue that RoR incorporates a content-based test for legal validity criteria. But now, in a hard case, there might be no convention. And if there were no convention in a hard case, then it would be wrong that it is through applying RoR to validate moral norms as part of the law. The Incorporation Thesis is thus wrong.

I reply to Marmor’s objection by distinguishing two readings of the Incorporation Thesis: *the sufficiency reading* versus *the necessity reading*. It seems to me that Marmor’s objection assumes that, according to the Incorporation Thesis, in a hard case:

1. Because it should be that Y, it is a convention that Y.³³

In other words, this objection assumes what I refer to as the sufficiency reading of the Incorporation Thesis:

2. ‘If it is morally important that Y, then it is part of the convention C that Y.’

These two equivalent statements, 1 and 2, read the Incorporation Thesis in a way that the moral content of a legal principle is a *sufficient* condition to make it legally valid.³⁴ However, such a reading is a mistake. A case helps to illustrate why this is.

Night: Suppose a country has an ambiguous law against involuntary labour: ‘No involuntary labour is permitted at night’. Tom runs a company, and Mary, a single mother, is his employee. Tom has an unusual understanding of the notional convention “night”, referring to it as ‘when the sun sets’. Mary refers to it as ‘after 8:00 p.m.’, as this is commonly held to be the time “night” refers to. Suppose one day Tom asks Mary to work until 10:30 p.m. because he expects the sun to set at that time (this is not uncommon in the summer in Europe). Mary is unwilling to stay but has no choice. However, because Mary works until 10:30 p.m., nobody cooks for her child before this time (as usual, Mary cooks at 8 p.m.). As a result, her baby becomes seriously ill. Mary sues Tom for breaching the law that ‘No involuntary labour is permitted at night’.

The court might rule that Mary wins the lawsuit based on the following argument: Neither Tom nor Mary is entitled to claim that his or her view of the conventional meaning of “night” is correct (after all, why would “night” not refer to ‘7:30 p.m.’, ‘7:00 p.m.’, or ‘6:45 p.m.’?). However, it is necessary for any law to be legally valid

³² *Ibid.*, 114

³³ *Ibid.*, 155.

³⁴ Compare my formulation to Himma’s similar one: ‘There are conceptually possible legal systems in which it’s a sufficient condition for a norm to be legally valid that it reproduces the content of some moral principles’. I should note that although Himma brings out this version of the Incorporation Thesis, he does not relate it to Marmor’s objection and the defense of Inclusive Positivism, as I am attempting to do. See: Kenneth E. Himma, *Inclusive Legal Positivism*: 137.

that its content is consistent with certain moral requirements. The convention of “night” should be one that is consistent with the moral duty to care for one’s child. Tom, therefore, breaches the law ‘No involuntary labour is permitted at night’ because Mary must work at the expense of her duty to care for her child.

According to Marmor’s objection, in *Night*, the court should assume that if people ought to take care of their children on a given night, it is part of the law that no involuntary labour is permitted at night. This is incorrect. Moral norms cannot suffice to be legally valid. The court’s reasoning above, as I have speculated, does not commit to the sufficiency of moral norms being legally valid by their content. Instead, the court only states that promulgated legal rules must be constrained by moral norms. In other words, moral norms are necessary but not sufficient conditions for legal validity.

If the Incorporation Thesis is understood solely as claiming that it is a necessary but not sufficient condition for L to be legally valid that L is consistent with morality, then the fact that there is no gap in the content/application of a convention does not pose any objection to the Incorporation Thesis. This is because this thesis does not have to rely on this distinction. Instead, we can assert that in a hard case, officials are disputing the scope of the convention, disputing what should be confirmed as RoR, not what it *is*. The Incorporation Thesis rests on a new distinction between what RoR is and should be, rather than on the old distinction between the content of RoR and its application.

It might be objected that I am not really posing a new distinction. Yet this is wrong. We should be careful here that these two distinctions are conceptually separate, because it is possible to conceive of Q and how to apply Q without thinking clearly about what Q really should be confirmed. In *Night*, even if there were no clear convention applicable to discern when it is night, judges are nonetheless entitled to make the convention in conformity with the moral duty of care. Such judicial discretion, in *Night*, does not expand the content of the convention that makes RoR include something that was not previously part of it. This can be explained by asking two different questions.

In *Night*, we can ask:

(i): What is the rule of recognition that validates the law that no involuntary labour is permitted at night?

Or,

(ii): What should the rule of recognition be so that the law that no involuntary labour is permitted at night is validated?

It is question (ii) rather than (i) that inclusive positivists ask, because (i) is not compatible with the Conventionality Thesis. This is because the answer to (i) is Mary’s moral duty of care. When moral norms are sufficient to play the role of the rule of recognition, thereby making the law valid, the social convention would be pointless, for it would lose its function. The Conventionality thesis would, therefore, be denied since the legal validity criteria are now

explained by morality. So, the proper question that the inclusive positivists ask for their Incorporation Thesis is (ii). And the answer is: the rule of recognition should be in conformity with the moral duty of care, so that the *Night* case is one where the law that no involuntary labour is permitted at night can be applied. This answer, as far as I can tell, is perfectly compatible with the Conventionality Thesis, and thus, with the Social Fact Thesis. Hence, I conclude that the Incorporation Thesis should be read as holding that morality is necessary for any norm L to be legally valid, and that in cases of legal interpretation disputes and theoretical disagreements, judges are not disputing what RoR is, but what it should be morally taken as (in order to legalize a possible norm).

Conclusion

In this paper, I have aimed to defend Hart's inclusive positivism against Dworkin's objections, arguing that the Incorporation Thesis is compatible with both positivism's Social Fact Thesis and the Conventionality Thesis. Specifically, neither the existence of legal principles nor supposed theoretical disagreements among legal officials can successfully undermine the Incorporation Thesis. The pedigree of the rule of recognition remains secure. Finally, I propose a particular interpretation of the Incorporation Thesis that is immune to Marmor's objection against Coleman's distinction between the content and application of the rule of recognition. The Incorporation Thesis is safe when it depends on the new distinction between what should be confirmed as the convention and what the convention is, claiming only that morality is necessary for any norm L to meet for it to be legally valid.

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