

Legality as Such: Further Thoughts on David Dyzenhaus, *The Long Arc of Legality*

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Abstract

The subtitle of David Dyzenhaus's book, *The Long Arc of Legality*, is: *Hobbes, Kelsen, Hart*. And Dyzenhaus's ultimate objective in the book is seemingly a natural law or anti-positivist position. In particular, the text puts forward a distinctive view of the moral content of law and "legality". Attempting to get to that destination via three figures (Hobbes, Kelsen, and Hart) associated with both amoral and legal positivist positions seems like a strange strategy, or perhaps just a difficult self-imposed challenge, and thus an opportunity to show mastery. Despite, or perhaps *because of*, that difficulty, the book is a very impressive achievement, raising fundamental questions about the way we think about adjudication in particular and law in general.

Keywords: David Dyzenhaus. H.L.A. Hart. Thomas Hobbes. Hans Kelsen. Legality.

It is said of the great American judge and legal commentator, Oliver Wendell Holmes, that when he sat on the United States Supreme Court (which he did for 30 years, from 1902 to 1932), he «like[d] to needle his fellow justices in conference by saying, "I will admit any general proposition you like and decide the case either way"»¹. In part, this reflected Holmes' famous (American legal realist-style) view, expressed in a well-known dissenting opinion, that «[g]eneral principles do not decide concrete cases»². But another part of that quotation (whether real or apocryphal), reflects the superiority of Holmes's mind to that of most of his fellow Justices (at least until Louis Brandeis joined Holmes on the Court in 1916; Brandeis would serve until 1939). One can also imagine this sort of intellectual game and challenge at "The Metaphysical Club" (where Holmes attended with other luminaries of New England intellectual life, though, it appears that Holmes

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¹ Budiansky 2019b: p. 243; see also Budiansky 2019a.

² *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).

may only have appeared for a brief period³) or some other comparable venue.

The thought of intellectual challenges taken up by the vastly learned, attached to a particular and important theoretical point to be made, comes to mind when revisiting David Dyzenhaus's monumental work, *The Long Arc of Legality*⁴. I focus especially on the subtitle of the text: *Hobbes, Kelsen, Hart*. Dyzenhaus's ultimate destination is what, at least at first glance, appears to be a natural law or anti-positivist position: «[T]o be legal, to count as valid law, law must be interpretable in a way which respects ... fundamental principles» (3). So, attempting to get to that destination via three figures associated with both amoral and legal positivist positions seems like a strange strategy, or perhaps just a difficult self-imposed challenge, and thus an opportunity to show mastery.

Consider the three theorists chosen. Thomas Hobbes is associated with the extreme view that subjects have an obligation to obey the State (*Leviathan*) in almost all circumstances, even when the rules and actions of the State are deeply immoral. This is because, in Hobbes' view, any other attitude would lead to the chaos of a stateless society, "the war of all against all"⁵. The only restrictions Hobbes offers on such obedience is that no one need assent to orders for their own death; no one would rationally give up the right of self-defense, to defend one's own life, as part of a social contract⁶. Also, connected with that contract, if the Sovereign breaks the terms of the agreement, by not securing basic order, then subjects are also no longer bound⁷.

For Hans Kelsen, it appears to be central to his "Pure Theory of Law", that, as he wrote, «[a]ny content whatever can be law; there is no human behaviour that would be excluded simply by virtue of its substance from becoming the content of a legal norm»⁸. Kelsen's analysis of the nature of law is general and abstract, about general form rather than particulars of substance. And H. L. A. Hart had also written in abstract terms about the general nature of law. He sharply criticized the German theorist Gustav Radbruch for believing that rules could lose their status as "law" when they were deeply immoral⁹.

As stated, Dyzenhaus appears, like Holmes, to give himself a seemingly impossible task, to start from theorists conventionally believed to be hostile to the idea that

³ Menand 2001: 201, 216.

⁴ Dyzenhaus 2022. References to that book will appear in the text as page numbers within parentheses.

⁵ Hobbes 1909: Part I, ch. 13, at 98 («this warre of every man against every man»); see also Kavka 1983.

⁶ Hobbes 1909: Part I, ch. 14, at 101-102 («And therefore there be some Rights, which no man can be understood by any words, or other signes, to have abandoned, or transferred. As first a man cannot lay down the right of resisting them, that assault him by force, to take away his life»). Hobbes seems also to ascribe to subjects a right of disobedience when the subjects' families or honor are at stake. Lloyd and Sreedhar 2022: § 9

⁷ See, e.g., Barker 1951: p. 92 n. 1; Lloyd and Sreedhar 2022: § 9.

⁸ Kelsen 1992: § 28, at 56.

⁹ Hart 1958: 616-621. On Radbruch, see, e.g., Radbruch 2006a, 2006b.

there are substantive restrictions on (what can count as) law, and, starting from the works of such theorists, still come up with an argument for just such restrictions. Obviously, the task would have been far different – and much more straightforward – had Dyzenhaus grounded his work on the ideas of well-known natural law theorists or anti-positivists, like John Finnis¹⁰, Lon Fuller, Ronald Dworkin, Nigel Simmonds, Mark Murphy, or Robert Alexy (many of these theorists get some mention in *The Long Arc of Legality*, but none are subject to the detailed focus given to the amoral or legal positivist theorists mentioned in the subtitle).

As I wrote in my earlier review of this work in the journal *Ethics*¹¹, Dyzenhaus's ability to weave what appear to be stray threads of arguments, often from more obscure sources¹², into an unconventional but tenable view, is impressive, but, as I also noted, these contrarian readings of the amoral and legal positivist theorists will not convince everyone. But it is important to remember that Dyzenhaus's primary objective here is *not* exegetical. It is *not* essentially about fighting it out, reference by reference, to determine what Kelsen *really* advocated¹³, or what Hobbes *really* meant (which is not to say that I think that Dyzenhaus is just making things up; he has genuinely found these contrary themes and ideas hidden in the corners of these theorists' works, and his *is* an important challenge to conventional readings of these theorists). The ultimate objective of *The Long Arc of Legality* is to support an argument about the nature of law, the nature of legality, and the implications it has for how judges, legislators, and legal subjects should respond to unjust law: all of this may hold up regardless of what we might conclude regarding the historically-most-accurate understanding of any particular theorist.

It is crucial to note that, when we leave the details of interpreting particular texts and look at matters in a more general (and more abstract) way, the basic argument seems strong. The underlying question is whether it is in fact true that law can have *any content* – here, again, we are properly indifferent as to whether this near-quotation from Kelsen (that law *can* have *any content*) represented Kelsen's most settled view on the question or not. Dyzenhaus's basic assertion is that law, *qua* law, involves certain principles, certain constraints, certain promises, that there is a

¹⁰ The book includes an Appendix, which offers to explain the absence of Finnis from the text (435-443). Though the disagreement is described as one about different approaches to law and legal theory, much of the Appendix details policy positions Finnis has advocated, positions with which Dyzenhaus (understandably) takes strong exception.

¹¹ Bix 2023.

¹² For example, a key piece of Dyzenhaus's argument about Kelsen comes from a quotation from a (previously untranslated) 1924 article, where Kelsen states that the basic norm «corresponds to a certain degree with ... [the] social contract ...». (161, quoting Hans Kelsen, "Die Lehre von den drei Gewalten oder Functionen des Staates" (1924), reprinted in Klecatsky, Marcic and Schambeck 1968: 1625, 1652 (Dyzenhaus' translation)).

¹³ At one point, Dyzenhaus comments: «I must acknowledge that my interpretation of Kelsen is unorthodox» (163).

the sort of mutual restraint, «a relationship of reciprocity between ruler and ruled» (17), as indicated both by the social contract tradition and, more recently, by Lon Fuller’s “principles of legality” (“inner morality of law”)¹⁴. The view is that if “legality” means something, if it has substantive content (I leave the Fullerian question of required procedural or process-based standards¹⁵ aside for now), then Dyzenhaus is correct that legal officials – and, particularly, judges – should re-interpret or refuse to enforce certain norms, “in the name of law”.

Recall Hart’s famous phrasing, that law must be understood as being something more than the «gunman situation writ large»¹⁶. This was part of a hermeneutic-style argument against John Austin’s command theory, a criticism that the latter theory was not able to account for the way in which some subjects took an internal point of view to law, viewing the law as giving them reasons for action. Although, notice that this argument from Hart operates at one step removed: that the theorist should take into account the fact that (*some*) subjects *accept the law, treat the law* as giving them reasons for action. Why should we care about the attitude of individuals, especially if such attitudes might be mistaken?

Hart’s hermeneutical point – that theorists should take into account the attitude of actors – makes obvious sense when speaking about simple purposive activities, like games. One only starts to understand a game one is watching when one knows basic information about purposes: Are the players trying to win? What is needed for a win? What counts as a score?, etc. While law is clearly a purposive social activity, it is not purposive in the simple or straightforward sense that (say) chess or football is.

John Finnis’s critique of Hart was along these lines: that a theorist should not just focus on, or incorporate *any subject’s view* that happened to accept the law or consider it as giving reasons for action, but should instead focus on those instances where the acceptance was *justified* as a matter of morality, as a matter of practical reason¹⁷. When Hart says that law is more than the gunman situation writ large, he might be taken as making the same sort of sociological or psychological point about people’s attitude towards law¹⁸. As Dyzenhaus points out, at various points Hart seems to view law not merely as something that others *treat* in a particular way, but as something that regularly *deserves* such treatment. In Dyzenhaus’s characterization of the view, law (the State) «wields authority rather than sheer coercive power» (357).

The stark alternative to Dyzenhaus’s position, an alternative which I think the book might have given more attention to, is the argument that law has *no* necessary or implied content, that it involves, on its own, *no* express or implied promise to sub-

¹⁴ Fuller 1969.

¹⁵ See Fuller 1969; see also Gardner 2012: 195-220 (on Fuller).

¹⁶ Hart 1958: 603.

¹⁷ Finnis 2011: 3-18.

¹⁸ Cf. Tyler 2006; see also Schauer 2015 (arguing that most obedience is based on coercive sanctions for disobedience).

jects, and that it can contain the most egregious immorality (or procedural irregularity) and still be “law”, “legal”, or “a legal norm”. Dyzenhaus does mention the way that Hart at times seems to treat law as «morally inert» (74-75). Lon Fuller, back in 1958, clearly senses the way in which Hart (and other legal positivists) seem to want to have it both ways on the moral status of law. Here is Fuller on Hart’s view:

On the one hand, we have an amoral datum called law, which has the peculiar quality of creating a moral duty to obey it. On the other hand, we have a moral duty to do what we think is right and decent. When we are confronted by a statute we believe to be thoroughly evil, we have to choose between those two duties. [¶] If this is the positivist position, then I have no hesitancy in rejecting it. The “dilemma” it states has the verbal formulation of a problem, but the problem it states makes no sense. It is like saying I have to choose between giving food to a starving man and being mimsy with the borogoves¹⁹.

Hart *does* seem to want to have it both ways. Or, perhaps, he seems to want to have it one way at one phase of his argument, and a different way during a different phase of his argument.

Again, though, the proper focus is *not* the exegetical one of trying to determine Hart’s most authentic or most settled views, but one of trying to find the position that is most defensible. For many people, the picture of law as «morally inert» (whether attributed to Hart or not) is too deeply unattractive – and this is, in part, because the label of “legality” seems to carry at least a residual, and positive, moral content²⁰. However, a more substantive argument is needed to transform intuitive revulsion, or simple intuition, into a persuasive philosophical analysis.

Dyzenhaus does have some responses to the law as morally inert option. The book suggests that while such a position *might* be tenable to citizens facing a legal system they consider to be oppressive and unjust, it is not tenable for an official within a system. As regards a citizen viewing the law as morally inert, there is here an analogy with Hans Kelsen’s suggestion that an anarchist would not presuppose the Basic Norm, and (thus) would not see the actions of legal officials in a normative way²¹. As regards an official in a legal system, whose task it is to apply the system’s laws to its subjects, the matter is different. Consider this argument from Joseph Raz:

I have contrasted accepting a rule concerning the behaviour of the agent (“I ought not to buy sweets”) and accepting a rule concerning the behaviour of another (“He ought not to buy sweets”). I can believe in the validity of the first for reasons

¹⁹ Fuller 1958: 656.

²⁰ For apparent empirical support, see Flanagan and Hannikainen 2022, critiqued by Himma 2023: 359-363.

²¹ Kelsen 1992: § 16, at 34.

of self-interest or convenience. But I cannot justify a belief in the validity of the second by such reasons²².

That is, when one tells *someone else* what to do, one must be (implicitly) claiming that there is a moral reason for that prescription. Dyzenhaus offers a similar comment: «[F]rom the internal point of view of a legal official charged with interpreting the law, the answer to a question about what the law requires must be the judge's good faith and best shot of showing... that the answer is based on principles which justify it to those whom it affects» (212, footnote omitted).

Yet, it is important to note that not everyone accepts the simple move from official actions to (believed or assumed) moral reasons for action. Matthew Kramer famously wrote of a hypothetical country, «Despotia», where «the norms which establish legal requirements are imperatives rather than prescriptions» and «the pronouncements that affirm legal duties ... do not necessarily advert or profess to advert to any more reasons-for-action»²³.

Officials might in fact view law, qua law, as morally inert. This is not, by the way, applicable only to dictatorships or amoral officials. The officials may have entirely mundane and good-faith views: e.g., that law is to be evaluated by its compliance or non-compliance with (external) morality, and that where the two conflict, officials will face a moral dilemma, having to choose between the injustice of the law on the one hand, and, on the other hand, some combination of the officials' oath to enforce the law and whatever good consequences follow (in a Hobbesian way, or otherwise) from the robust presence of this, or perhaps any, legal system.

There is also the probing question about legal status raised in Javier Gallego's review of this book²⁴ – a question not only for Dyzenhaus, but indeed for a wide range of theorists, from the American legal realists to Gustav Radbruch to Ronald Dworkin to Mark Greenberg: when or in what form does law (begin to) “exist”: when enacted and/or promulgated, when the judge announces it, when the norm in question passes some “legality” test, or when it passes some moral test (in Dyzenhaus's terminology) “external” to the law? Gallego argues that the disagreements among theorists here may be ultimately metaphysical²⁵. However, as Brian Leiter has pointed out, such fading into metaphysics may indicate a badly wrong turn somewhere in our analysis, and we are well advised to return to the sort of practice-focused analysis advocated by H. L. A. Hart and others.²⁶ But Gallego's point – against theorists generally, not just against Dyzenhaus – is that jurisprudential views about the enforcement of law often hide in their premises about law aspects of their

²² Raz 1984: 130.

²³ Kramer 1999: 89.

²⁴ Gallego 2023: 471-473.

²⁵ See Gallego 2023: 472-473.

²⁶ Leiter 2020.

conclusions regarding what judges should be enforcing.

Dyzenhaus, in *The Long Arc of Legality*, does inject substantive moral or moral-like content into the idea of “legality”, even if it involves a «pragmatist account of morality» (357) (as Dyzenhaus himself hints, a topic worthy of a large book of its own, and certainly beyond the matters I can give due consideration to in the present short article). However, it is useful to remember that “legality” is a quirky (as well as somewhat amorphous) attribute. As Leslie Green and Thomas Adams write: «A [musical] fugue may be at its best when it has all the virtues of fugacity; but law is not best when it excels in legality; law must also be just. A society may therefore suffer not only from too little of the rule of law, but also from too much of it»²⁷. And consider also the famous words of Grant Gilmore:

Law reflects but in no sense determines the moral worth of a society. The values of a reasonably just society will reflect themselves in a reasonably just law. The better the society, the less law there will be. In Heaven there will be no law, and the lion will lie down with the lamb. The values of an unjust society will reflect themselves in an unjust law. The worse the society, the more law there will be. In Hell there will be nothing but law, and due process will be meticulously observed²⁸.

Green and Adams and Gilmore may be indicating something distinctive about law and legality. Perhaps that quality, that essence, is neither morally inert, on the one hand, nor, on the other hand, sufficiently morally positive to create obligations to obey for the law’s subjects or significant constraints on the actions of judges.

Throughout *The Long Arc of Legality*, the text returns persistently to the question it puts in the mouths of demanding legal subjects (and in the imagination of self-conscious judges, worrying in good faith about the perception of legal subjects): «“But, how can that be law for me?”» (e.g., 121). The question to be considered is how much emphasis, and what sort of intonation, to be given to “law” in that query. Consider, in rough analogy, United States Chief Justice Marshall’s famous comment in an important early U.S. Supreme Court case, that «we must never forget that it is *a constitution* we are expounding»²⁹. Chief Justice Marshall’s quotation regarding constitutional interpretation has been endlessly repeated, but with those quoting it drawing quite different lessons from the fact that what is being interpreted is «*a constitution*». The question of how «that can that be *law* for me» might warrant only a reference to the regulation being of a certain kind or having followed a certain procedure, or a particular approach to regulating behavior, or meeting a particular moral standard, depending on whom one asks.

²⁷ Green and Adams (2019): § 4.2.

²⁸ Gilmore 1977: 110-111. For some additional cautionary notes about (the rule of) law, see Horwitz 1977.

²⁹ *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819).

Conclusion

As this article indicates, *The Long Arc of Legality* offers a complex set of arguments on a series of issues central to our understanding of law and of state legitimacy. It will warrant intellectual exchanges like the ones in the present journal for a long time to come. As I wrote in my earlier review: «the edifice *The Long Arc of Legality* constructs is undoubtedly impressive, and those of us working in legal philosophy cannot ignore the challenges that the work raises».³⁰

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³⁰ Bix 2023: 310.

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