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# The Politics of Legal Positivism: A Reply to David Dyzenhaus

Adam Tucker<sup>†</sup>

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## Abstract

David Dyzenhaus is the standard bearer of a school of thought that associates the philosophy of legal positivism with undesirable consequences in real life politics. This article examines and rejects the jurisprudential underpinnings of that enterprise. It focuses, by way of a case study, on just one subset of Dyzenhaus' arguments, namely that part of his anti-positivist position that insists on a connection between legal positivism and legislative supremacy. Part I introduces Dyzenhaus' position. Part II explores three arguments that Dyzenhaus develops which connect legal positivism to legislative supremacy, the arguments from authoritarianism, irrelevance and vacuity. Part III criticises two aspects of the methodology which underlies those arguments, its projection of prescriptive commitments onto descriptive works and the austerity of its conception of what counts as a properly prescriptive argument.

## I. Introduction

David Dyzenhaus is the standard bearer of a school of thought that associates the philosophy of legal positivism with undesirable consequences in real life politics. The range, depth and influence of his work is remarkable; he has said important things about (*inter alia*) various doctrines of contemporary administrative law<sup>1</sup>, the expansion of executive power in the 'war on terror'<sup>2</sup>, the judicial politics of Apartheid South

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<sup>†</sup> 50<sup>th</sup> Anniversary Research Lecturer in Law, University of York. I would like to thank Simon Halliday, William Lucy, Michael Stokes and two anonymous referees for prompting me, in various ways, to improve this article.

<sup>1</sup> See, eg, David Dyzenhaus, 'Form and Substance in the Rule of Law' in Christopher Forsyth (ed), *Judicial Review & The Constitution* (Hart Publishing, 2000) and David Dyzenhaus, 'An Unfortunate Outburst of Anglo-Saxon Parochialism' (2005) 68 *Modern Law Review* 673.

<sup>2</sup> David Dyzenhaus, 'Humpty Dumpty Rules or the Rule of Law: Legal Theory and the Adjudication of National Security' (2003) 28 *Australian Journal of Legal Philosophy* 1; David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (Cambridge University Press, 2006). See also Tom Campbell, 'Blaming Legal Positivism' (2003) 28 *Australian Journal of Legal Philosophy* 31.

Africa<sup>3</sup>, the political legitimacy of Weimar Germany<sup>4</sup> and the legality of the Chinese Canadian Head Tax<sup>5</sup>. In each of these fields (and more) Dyzenhaus often adopts the distinctive approach of using a critique of and hostility to the claims of legal positivism as the foundation for practical political and legal argument. This article examines and rejects the jurisprudential underpinnings of that enterprise.<sup>6</sup>

Dyzenhaus' objections to legal positivism are manifold. He has argued that it is 'destructive of healthy legal practice',<sup>7</sup> results in 'an unwitting collaboration in an authoritarian political project',<sup>8</sup> and is a 'stagnant research programme ... which ... no longer accounts appropriately for the data of legal practice'.<sup>9</sup> Contemporary positivism, he alleges, 'declare[s] itself irrelevant to the practice of law'.<sup>10</sup> As a result of its supposedly 'empty, almost paradoxical understanding of legality and law's authority in which law becomes an instrument of the powerful', he ventured to predict 'the demise of legal positivism'.<sup>11</sup> This article focuses, by way of a case study, on just one subset of these arguments, namely that part of Dyzenhaus' anti-positivist position that insists on a connection between legal positivism and legislative supremacy. 'Positivism', according to Dyzenhaus, 'says that judges should apply only those values and norms that have been explicitly incorporated into the law by statute'.<sup>12</sup> Or, in an alternative formulation, 'positivism cannot supply a foundation for judicial review since it is politically committed to minimising the role of judges in legal order'.<sup>13</sup> Or yet another: 'the positivist model of the rule of law ... regards statutes as the primary, even the only, legitimate source of legal values'.<sup>14</sup>

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<sup>3</sup> David Dyzenhaus, *Hard Cases in Wicked Legal Systems: South African Law in the Perspective of Legal Philosophy* (Clarendon Press, 1991).

<sup>4</sup> David Dyzenhaus, *Legality and Legitimacy: Carl Schmitt, Hans Kelsen, and Hermann Heller in Weimar* (Clarendon Press, 1997).

<sup>5</sup> David Dyzenhaus, 'The Juristic Force of Injustice' in David Dyzenhaus and Mayo Moran (eds) *Calling Power to Account: Law, Reparations and the Chinese Canadian Head Tax Case* (University of Toronto Press, 2005).

<sup>6</sup> But not, I should stress, all of the substantive political positions that this approach leads Dyzenhaus to adopt. Indeed, they are often attractive. My aim here is to highlight that the defence of those political positions needs disentangling from questions about the nature of law.

<sup>7</sup> Dyzenhaus, above n 3, ix.

<sup>8</sup> David Dyzenhaus, 'Why Positivism is Authoritarian' (1992) 37 *American Journal of Jurisprudence* 83, 112.

<sup>9</sup> David Dyzenhaus, 'Positivism's Stagnant Research Programme' (2000) 20 *Oxford Journal of Legal Studies* 703, 704.

<sup>10</sup> David Dyzenhaus, 'The Genealogy of Legal Positivism' (2004) 24 *Oxford Journal of Legal Studies* 39, 67.

<sup>11</sup> David Dyzenhaus, 'The Demise of Legal Positivism' (2006) 119 *Harvard Law Review Forum* 112, 120, 121.

<sup>12</sup> Dyzenhaus, above n 5, 261.

<sup>13</sup> Dyzenhaus, 'Form and Substance', above n 1, 159.

<sup>14</sup> Dyzenhaus, above n 5, 261.

Similar ideas appear with some regularity in the academic literature. For example, in his review of Nicola Lacey's biography of H L A Hart, John Mikhail comments that 'the human rights revolution in constitutional ... law ... would appear to have significant implications for the tradition of ... jurisprudence with which Hart was associated'.<sup>15</sup> Similarly, when senior judges contemplated the existence of limits on Parliament's legislative power in *Jackson v Attorney General*,<sup>16</sup> Tom Mullen suggested that it was 'not clear that any of the opinions which suggest limitations on the sovereignty of parliament make sense' from the perspective of Hartian legal theory.<sup>17</sup> In a similar vein, Jeffrey Goldsworthy's (otherwise unrelated) critique of scepticism about legislative intention is explicitly tangled with legal positivism through an introductory assertion that his argument about legislative intention 'should disturb legal positivists who accept the doctrine [of parliamentary sovereignty]' and his conclusion that 'legal positivists-and for that matter anyone else-who would prefer to steer clear of judicial supremacy over statutory law, should try to steer clear of skepticism about the existence and utility of legislative intentions and purposes.'<sup>18</sup> Usually — like these examples — the suggestion is not accompanied by any justificatory argument. It just seems to be taken as a self-evident truth across much of the legal academy that there is some kind of obvious affinity between legal positivism and legislative supremacy. This association is presumably reinforced by the fact that the leading defence of parliamentary sovereignty (Jeffrey Goldsworthy's) is self-consciously positivist and the leading critique of the doctrine (Trevor Allan's) is explicitly anti-positivist. Dyzenhaus is distinctive in developing a carefully articulated defence of this position. The arguments he deploys are ultimately methodological; his reading of work in the positivist tradition imposes on it a distinctive and demanding methodology in order to bundle legal positivism with a substantive political commitment to majoritarianism. This article argues that those methodological demands are unsustainable.

Presenting this argument will require me to overcome a distinctive difficulty with engaging with Dyzenhaus. Reading his work can be a disorienting experience as many of its claims are, on the face of it, surprising. It sometimes feels like the 'legal positivism' he is attacking is somehow different to the 'legal positivism' espoused by writers who understand themselves to be working within that tradition.<sup>19</sup> The idea that legal positivism has an intimate connection with a commitment to an unlimited legislature is among these surprising claims. It is surprising because contemporary positivism is not characterised by any endorsement of this position. Hart, for example,

<sup>15</sup> John Mikhail, "'Plucking the Mask of Mystery from Its Face": Jurisprudence and H L A Hart' (2007) 95 *Georgetown Law Journal* 733, 750.

<sup>16</sup> *R (Jackson) v Attorney General* [2006] 1 AC 262.

<sup>17</sup> Tom Mullen, 'Reflections on *Jackson v Attorney General*' (2006) 26 *Legal Studies* 1, 25.

<sup>18</sup> Jeffrey Goldsworthy, 'Legislative Intentions, Legislative Supremacy, and Legal Positivism' (2005) 42 *San Diego Law Review* 493, 493, 518.

<sup>19</sup> The most extreme example I am aware of is this: 'Dworkin is a positivist' (in Dyzenhaus, 'Form and Substance', above n 1, 165 n 74).

had nothing to say about the desirability of constitutional rights and Raz has even argued, albeit tentatively, that ‘it is fitting that they should be removed from the ordinary democratic process.’<sup>20</sup> The problems that these idiosyncrasies in Dyzenhaus’ thought can cause were most obvious in his exchange with Matthew Kramer.<sup>21</sup> But, as we will see below, this obstacle can be overcome if we are clear from the outset about the structure of Dyzenhaus’ position. In what follows, I propose the following outline understanding of the commitments which interact to generate Dyzenhaus’ anti-positivism. Keeping them in mind as we assess his more concrete claims will help to avoid the misunderstandings that his unusual account of positivism is prone to provoking. In outline, then, Dyzenhaus’ position is shaped like this:

1. Legal philosophy is necessarily a branch of political philosophy making substantive political claims that must be justified by reference to substantive political arguments.
2. A properly substantive political argument has two features. First, it must be based in political morality. Secondly, it must be designed to influence legal practice.
3. The substantive politics of legal positivism are majoritarian because, either
  - a. The effect of legal positivism is to provide succour to the decision making of judges who show fidelity to the legislation of authoritarian regimes; or
  - b. Legal positivism is theoretically irrelevant if it is detached from a political commitment to minimising the law making role of the judiciary; or
  - c. When legal positivism parades as politically neutral, its claims are vacuous. In any event, they cannot be defended without resort to political argument.

So the connection between legal positivism and legislative supremacy emerges under the aegis of claim (3). But as the next section demonstrates, none of claims (3a) (3b) or (3c) can be appraised without collapsing into an assessment of claims (1) and

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<sup>20</sup> Joseph Raz, *Ethics in the Public Domain* (Clarendon Press, revised ed, 2001) 57.

<sup>21</sup> Dyzenhaus, above n 9, then Matthew Kramer, ‘Dogmas and Distortions: Legal Positivism Defended’ (2001) 21 *Oxford Journal of Legal Studies* 673, then David Dyzenhaus, ‘Caveat Reviewer’ (2001) 21 *Oxford Journal of Legal Studies* 703. See James Allan, ‘A Modest Proposal’ (2003) 23 *Oxford Journal of Legal Studies* 97 for an evaluation of the exchange. The final section of this article proposes a reading of Dyzenhaus that Kramer did not consider.

(2). They presuppose these underlying methodological arguments and so depend upon them for their soundness. This is why the argument must move into issues in the methodology of jurisprudence. But as Dyzenhaus' methodological claims are unsustainable, his substantive claims must also fall.

## II. The collapse of Dyzenhaus' third stage arguments

This section explores Dyzenhaus' three arguments purporting to connect legal positivism to legislative supremacy. That exploration is inconclusive, because in all three cases we are ultimately confronted by the need to move the argument away from the substance of each argument and consider instead the methodological claims on which they depend.

### A. THE ARGUMENT FROM AUTHORITARIANISM

In 'Why Positivism is Authoritarian'<sup>22</sup> Dyzenhaus explores the following, essentially consequentialist, argument against legal positivism:

While contemporary positivists want judges and citizens not to be authoritarian, they offer a conception of law which as a matter of practice will be implemented by the judges of a wicked legal system in an authoritarian way.<sup>23</sup>

This argument is developed from the Hobbesian idea that judges are obliged to enforce the law as it exists — 'the will of the sovereign as he intended it to be executed'.<sup>24</sup> So the argument from authoritarianism is simply a more specific version of the claim that legal positivism endorses legislative supremacy. Dyzenhaus harnesses the particular example of authoritarianism in a wicked legal system because this is the scenario that best captures the possibly deleterious consequences of encouraging the judiciary to simply apply the law, whatever it may be.

Although it looks simple, the argument from authoritarianism is double edged. In its first guise, it is a straightforwardly consequentialist argument against legal positivism. In its second guise, considered below, it is a more subtle argument about the methodology of jurisprudence.

The first, straightforward, version of this argument situates Dyzenhaus in an ongoing debate about whether the endorsement of legal positivism leads to repugnant or beneficial moral consequences. Dyzenhaus' position contrasts, for example, with Hart's claim that adopting a positivist conception of law has beneficial moral consequences, notably in alerting citizens to the possibility of unjust law and so

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<sup>22</sup> Dyzenhaus, above n 8.

<sup>23</sup> Ibid 111.

<sup>24</sup> Ibid 88.

priming them to resist where necessary.<sup>25</sup> The arguments Dyzenhaus marshals in favour of his position, by developing a detailed case study of judicial reasoning in the context of the prevailing legal-philosophical climate in the South African legal system during apartheid, are impressively and comprehensively elaborated.<sup>26</sup> But it is important to note that the whole enterprise presupposes that the consequential approach is an appropriate way to evaluate jurisprudential claims. From the very first paragraph of *Hard Cases in Wicked Legal Systems* (which reappears, reworked, as the opening of *Why Positivism is Authoritarian*), it is clear from the way that Dyzenhaus frames the issues he will tackle that he endorses this approach to legal philosophy:

Like Dr Jekyll and Mr Hyde legal positivism seems to lead two distinct lives, one virtuous and one wicked. As Jekyll, and as its proponents claim, legal positivism is a doctrine about the nature of law that, correctly understood, can only help to inculcate morally desirable attitudes towards the law in both judges and citizens. As Hyde, and as its critics claim, positivism's slogan ... is the legal ideology of authoritarianism.<sup>27</sup>

So the argument from authoritarianism presupposes that it is appropriate to appraise legal philosophies in terms of their consequences rather than their inherent soundness. In this respect, Dyzenhaus endorses a position that Julie Dickson calls the *beneficial moral consequences thesis*:

value judgments concerning the beneficial moral consequences of espousing a certain theory of law may legitimately feature in the criteria of success of legal theories.<sup>28</sup>

But Dickson rejects the beneficial moral consequences thesis, as 'an argument that runs in the wrong direction'. Even if a theory of law results in beneficial moral consequences, she argues, we should only accept it if it is the '*correct way to go about understanding ... law*'.<sup>29</sup> This is driven by her conception of legal theory as an essentially descriptive enterprise:

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<sup>25</sup> H L A Hart, *The Concept of Law* (Oxford University Press, 2<sup>nd</sup> ed, 1994) 210.

<sup>26</sup> See Dyzenhaus, above n 3. This approach to legal theory is perhaps vulnerable to criticism on grounds which I do not develop here. The remarkable case study is intended to supply the requisite robust and generalisable empirical evidence establishing the existence of the alleged connection between theory and practice. Dyzenhaus is less clear about the intensity of the connection between theory and practice that must hold for it to be conceptually significant. For discussion about these, and related, issues, see, eg, Dennis Davis, 'Review of David Dyzenhaus, *Hard Cases in Wicked Legal Systems*' (1992) 109 *South African Law Journal* 157 and Leslie Green, 'The Nature of Law Today' (1994) 88 *The American Political Science Review* 206–10.

<sup>27</sup> Dyzenhaus, above n 3, 1; Dyzenhaus, above n 8, 83.

<sup>28</sup> Julie Dickson, *Evaluation and Legal Theory* (Hart Publishing, 2001) 9.

<sup>29</sup> *Ibid* 88.

the task of analytical jurisprudence [is] that of attempting to identify and explain the nature of law. It is the character of an actually existing social institution which we are after, and it is a basic assumption of this approach that the social institution of law has a particular character which legal theory is attempting to identify and explain.<sup>30</sup>

This ‘basic assumption’ is at the crux of the conflict between Dyzenhaus and descriptive legal positivism. Descriptive theorists are unconcerned whether their philosophy is Dr Jekyll or Mr Hyde. Rather, they understand their task to be uncovering descriptive truths about the nature of the social institution of law. So the argument from authoritarianism will not impress a descriptive theorist because consequentialist considerations do not feature in his criteria for the success of a theory of law. From his perspective, the claims he supports are to be evaluated not by the consequences of expressing them, but on the basis of their truth or falsity. And Dyzenhaus’ argument does not operate on this plane. Consider, for example, the characteristically positivist claim that dominates Dyzenhaus’ critique of positivism — that there will arise cases in which the result is not determined by law, and so judges exercise a discretionary law making power in order to decide one way or the other<sup>31</sup>. Consequentialist arguments will make no sense to a theorist who offers this claim descriptively because from his perspective, it is true regardless of the consequences that flow from its truth.<sup>32</sup> So, faced with the argument from authoritarianism, our descriptive theorist must choose between two possible responses.

First, suppose the judges have (to borrow Dyzenhaus’ terminology) ‘correctly understood’ the claim that they exercise a law making power in the event of indeterminacy. The argument from authoritarianism tells us that this will encourage them to change their behaviour for the worse because this makes ‘the only sense of legal positivism which it is possible for judges to make’.<sup>33</sup>

Even if we grant Dyzenhaus’ argument and allow that this change in behaviour occurs, then from the descriptivist perspective it is still not clear how legal positivism is to blame. The change is grounded in the judges’ political views on the appropriate exercise of what they have now found out amounts to a law-making power. If those views lead them to behave in an authoritarian fashion, or display an excess of deference to the legislature, then that is because they hold sceptical views as to the legitimacy of judicial law making. Dyzenhaus is alert to this objection and responds with an argument based on the capacity of rival understandings of legal positivism to

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<sup>30</sup> Ibid 89.

<sup>31</sup> See Hart, above n 25, ch 7.

<sup>32</sup> Cf Dworkin’s ‘two objections to judicial originality’, namely that it is undemocratic and violates the rule of law — both consequentialist objections to a descriptive claim. Ronald Dworkin, *Taking Rights Seriously* (Duckworth, 1977) 84.

<sup>33</sup> Dyzenhaus, above n 8, 85.



‘inform judicial activity’.<sup>34</sup> But this simply reopens the methodological problem, because it presupposes that it is appropriate to evaluate legal positivism in terms of its ability to inform judicial behaviour. The descriptivist, who aims only to explain that behaviour as best he can, will not recognise the force of Dyzenhaus’ position. The only ‘solution’ that will present itself to the descriptive theorist if exposing their truth has repugnant consequences is to keep that truth secret. But this is hardly an appealing position to adopt, and it clearly is not endorsed by Dyzenhaus who has gone to great lengths to expose, persistently, what he views to be an objectionable argument.

Alternatively, suppose the change in behaviour that Dyzenhaus detects in judges exposed to legal positivism arises because they have ‘incorrectly understood’ its claims. Surely the mistaken judge, or whoever happened to mislead them, is to blame. Here, Dyzenhaus’ argument that legal philosophies only make sense to judges in terms of the way in which they ‘inform judicial activity’<sup>35</sup> becomes especially relevant. The descriptive theorist does not intend his claims to inform judicial behaviour beyond perhaps giving them a greater understanding of the task they are already undertaking. But by persistently arguing that their claims only make sense when read prescriptively, and by insisting that ‘complete theories of law’ provide a ‘way of resolving hard cases’, Dyzenhaus’ jurisprudence is, ironically, a clear contender as a misleading influence that might lead judges to ‘incorrectly understand’ the claims of the descriptive theorist in the first place.

Now, none of this is supposed to hit the substance of the argument from authoritarianism. But it should be clear by now that this argument only has any purchase if it is appropriate to assess the claims of legal positivism consequentially, or if legal philosophies are to be understood as attempts to inform judicial behaviour in hard cases. And as Dyzenhaus and the descriptive theorist differ on this fundamental underlying point the argument from authoritarianism, understood as a straightforward argument against legal positivism, cannot be assessed without first considering the underlying conception of legal philosophy as a prescriptive enterprise that it presupposes.

In its second guise, the argument from authoritarianism is presented as if it contributes to this very issue. In this, more subtle, guise Dyzenhaus deploys the argument from authoritarianism as a contribution to this deeper, methodological debate. It is, he claims, itself evidence that the descriptive theorist is mistaken, and should move onto prescriptive ground:

It is part of Dworkin’s ... accomplishment to have attempted to restore legal philosophy to an examination of its proper, pragmatic roots by reuniting the central questions of legal and political philosophy ... [T]he cost for contemporary positivists of resisting this attempt is an unwitting collaboration in an

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<sup>34</sup> Ibid 85–6 citing — somewhat tangentially — H L A Hart, *Essays in Jurisprudence and Philosophy* (Clarendon Press, 1983) 67–8 as a proponent of the objection.

<sup>35</sup> Dyzenhaus, above n 8, 85–6.

authoritarian political project of which they should want no part.<sup>36</sup>

Unfortunately, however, this attempt to harness the argument from authoritarianism in the methodological debate between prescriptive and descriptive theory must fail. In its first guise, it is potentially compelling, just in case it is appropriate to assess legal philosophies in terms of their consequences. But in this second guise, it argues that contemporary positivists should adopt a prescriptive methodology in order to avoid the bad consequences of their descriptive methodology. But this presupposes that worrying about consequences is the appropriate way to choose between legal philosophies in order to argue that this is in fact the appropriate way to choose. In short, it is question begging. The only form in which the argument from authoritarianism can succeed is in its first form. And in that form, appraisal of its success ultimately collapses into an underlying methodological argument about the nature of jurisprudence. We will return to that debate, and Dyzenhaus' position within it after considering two further arguments that he levels at legal positivism.

## B. THE ARGUMENT(S) FROM IRRELEVANCE

In 'Positivism's Stagnant Research Programme',<sup>37</sup> Dyzenhaus develops two arguments against legal positivism that turn on an allegation of 'irrelevance'. They are not neatly delineated by Dyzenhaus so they need disentangling from one another before the importance of the second argument from irrelevance can become clear. Both focus on the positivist claim that judges in hard cases exercise a discretion to make new law rather than determine pre-existing legal rights and duties. Before we consider the detail of Dyzenhaus' argument, its connection with legislative supremacy can be anticipated from the outset: a 'relevant' form of legal positivism would reconnect with its Hobbesian roots and advocate reform to minimise judicial law-making in favour of the will of the legislature.

The first argument from irrelevance takes Hart as its focus. Dyzenhaus sees the value-laden nature of the practice of adjudication as an 'anomaly' for legal positivism and interprets Hart's work on indeterminacy as his response to that anomaly. But Hart's solution does not satisfy Dyzenhaus. For him, 'the way in which Hart's legal positivism deals with the apparent anomaly ... is to suggest the irrelevance of that practice to its thesis.'<sup>38</sup> If true, this would be a serious problem for legal positivism; a theory of law that reacted to an 'apparent anomaly' by branding the practice of adjudication as irrelevant to the nature of law would indeed be deficient. Furthermore, in contrast to the argument from authoritarianism, it looks like an argument with which the descriptive theorist can engage. It is a straightforward claim that positivism — even in descriptive mode — cannot accommodate a central feature (adjudication) of the phenomenon it purports to explain (law).

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<sup>36</sup> Ibid 112.

<sup>37</sup> Dyzenhaus, above n 9.

<sup>38</sup> Ibid 708.

But this argument fails because Hart's discretion thesis is neither a failure to deal with the practice of adjudication nor an attempt to exclude it from the domain of legal theory. On the contrary, it is a substantive attempt to deal with the practice by suggesting that it is in the nature of law that judges sometimes act as lawmakers. And Hart defended it at length in *The Concept of Law*, hardly an indication that he believes the explanation of judicial discretion to be outside the purview of legal theory.<sup>39</sup> That judges act as lawmakers in no way entails that adjudication is irrelevant to legal positivism. Dyzenhaus' argument does of course make sense if it is presupposed that the task of legal theory is to explain why judges' pronouncements are authoritative statements of pre-existing rights and duties. But Hart is interested in the prior question of *whether* judges' pronouncements have this character and it is by failing to answer it in the affirmative that he comes into conflict with Dyzenhaus. So the conception of legal theory implicit in Dyzenhaus' argument bypasses the very question that Hart's work on judicial discretion is supposed to answer — whether or not judicial decisions in hard cases are best understood as the determination of pre-existing rights and duties, or the creation of new ones. Dyzenhaus is, of course, at liberty to disagree with Hart on this point. But the only way to establish that disagreement is to argue that Hart is wrong.<sup>40</sup> Instead, he argues by simple stipulation, that Hart's argument is afflicted with a kind of theoretical illegitimacy.

The second argument from irrelevance takes what Dyzenhaus describes as 'Raz's sense that judges are fully constrained by legal authority only when their judgments about the law are not evaluative'<sup>41</sup> as its focus. This, Dyzenhaus argues, leads Raz to the conclusion that 'much of the practice of law is done outside the scope of authority', a conclusion that Dyzenhaus finds 'peculiar'. The impact of this argument is hard to pin down, as its characterisation of Raz's position seems to use the language of authority in a way that Raz would not. But I take it that by 'outside the scope of authority', Dyzenhaus means (something like) 'unconstrained by legal authority'.<sup>42</sup> At first glance, this argument seems to suffer the same problem as that considered above. It is tempting to respond that Raz's conclusion is only 'peculiar' in the light of an initial assumption that all judicial behaviour will operate within 'the scope of authority'. And this assumption would beg the very question that Raz — like Hart before him — was tackling. But Dyzenhaus' explanation of the alleged peculiarity reveals that this second argument from irrelevance is richer than the first.

<sup>39</sup> Hart, above n 25, ch 7.

<sup>40</sup> On this point, Dyzenhaus' approach shadows that of Ronald Dworkin. Dworkin's clearest elaboration of this vision of legal theory is in the opening to his seminal 'The Model of Rules I', where he introduces the task of legal theory as explaining *how* the law justifies the claims it makes, bypassing the prior question of *whether* it does so at all, Ronald Dworkin, above n 32, 14. Note that Dworkin subsequently provided theoretical underpinnings for this apparently surprising presupposition. See below n 75 and accompanying text.

<sup>41</sup> Dyzenhaus, above n 9, 714.

<sup>42</sup> The argument seems to be derived directly from Raz's sources thesis: if the law cannot be identified through evaluating, then a judge who evaluates is not thereby identifying the law. His actions are 'outside the scope of legal authority'.

He finds Raz's claim about discretion peculiar because 'the substance in the ... theory condemns it to practical irrelevance.' Although he does not emphasise the distinction, notice that the notion of irrelevance is playing a fundamentally different argumentative role here to that which it played in the first argument from irrelevance, above, because its place in the argument has been reversed: the first argument was about the relevance of practice to theory whereas this second argument is about the relevance of theory to practice. But the measure of 'relevance to practice' upon which Dyzenhaus relies is surprisingly demanding. He unpacks it, during the course of the article, by constructing a fictional controversy against which the success of legal positivism can be assessed:

Suppose that the ... positivist finds that judges in a particular legal order divide between those who adopt a positivistic account of legal authority, in which valid law is the law established in accordance with the Identification Thesis, and those who adopt a Dworkinian account, in which authority accrues only to those statements of the law which are supported by a moral theory which justifies them.<sup>43</sup>

At this first stage, Dyzenhaus implies that the positivist is 'reduced to reporting that ... there is controversy about the nature of legal authority'. Note that already, this is a puzzling misrepresentation of the positivist position. In the conditions Dyzenhaus stipulates, the positivist does not merely report the controversy; he quite obviously also takes a stance on which set of judges has the soundest understanding of the nature of law. More precisely, he disagrees with Dyzenhaus' fictional 'Dworkinian' judge about the nature of law. So, in addition to reporting the controversy, he maintains that one side is mistaken.

Next, Dyzenhaus expands the position adopted by his fictional 'positivist' judges by revisiting the position staked out in the argument from authoritarianism: he says they endorse a moral duty to obey the law, whatever its content, direct their decisions accordingly and 'adopt a very conservative view of their role'.<sup>44</sup> This development is designed to compound the positivist's disagreement with our protagonists. Now, the positivist will also disagree with the 'positivist' judge because of his newly conjured authoritarian leaning. And so, with nothing critical to say to either judge, Dyzenhaus argues, positivism 'leaves the terrain of adjudication to be contested between both kinds of judges' to whom it has nothing critical to say'.<sup>45</sup> Immediately, it seems odd that Dyzenhaus designs a story in which the positivist disagrees with all the judges in order to claim that he has nothing critical to say to any of them. It would certainly seem more likely that the positivist has something critical to say to all as opposed to none of Dyzenhaus' judges. This point is developed by Kramer:

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<sup>43</sup> Dyzenhaus, above n 9, 712.

<sup>44</sup> Ibid 716.

<sup>45</sup> Ibid 717.

If I say to those judges that their reasons for adopting their adjudicative posture are grounded in a fallacy, am I not saying something critical to them?<sup>46</sup>

Furthermore, Kramer is trenchantly critical of the Dyzenhaus' 'positivist' judges. He describes them as 'dismayingly wooden', 'benighted',<sup>47</sup> 'ridiculous' and 'potentially dangerous'.<sup>48</sup> And this criticism is hardly surprising as it is exactly what Dyzenhaus scenario was designed to provoke. What, then, is this argument supposed to achieve? The answer lies in Dyzenhaus' distinctive demands about the kind of things a theorist should say to a judge. He expects positivism not only to disagree with them about abstract questions about the nature of law, but also about the way in which they decide cases:

Positivism presents a theory of law, not a theory of adjudication, though its theory of law has consequences for any theory of adjudication — it is about how judges should exercise their discretion.<sup>49</sup>

Now the shape of the 'practical irrelevance' for which Dyzenhaus attacks positivism comes into view. Dyzenhaus requires that the positivist disagreement with his judges be capable of expression in the form of a dispute with the judges about what decisions they should actually come to in concrete cases. But this requirement has no purchase from a descriptive perspective. The descriptive theorist claims simply that judges exercise a law making power. Of course he is free to move on and issue recommendations as to how this power should be exercised, recommendations that will be external to his legal positivism. But for Dyzenhaus this does not suffice. For him, these recommendations should be internal to and informed by the positivist aspect of the theorist's approach. They should be made as claims about the nature of law, rather than as claims made as a consequence of a logically prior insight about the nature of law. Yet this is the very type of claim that the descriptive positivist resists. Nowhere is this clearer than when Dyzenhaus berates Raz's insistence that judges do more than find pre-existing law:

The triumph of methodology over substance is signalled when in place of advocating reform to bring participants' activity within the scope of authority, one simply designates their activity as outside that scope.<sup>50</sup>

To a descriptive theorist, this argument is incoherent. Even if he were so inclined, it would be impossible for Raz to advocate reform to curtail judges' law-making activities without first designating them as such. Without the prior 'designation', or identification of a possible problem, there would be nothing for

<sup>46</sup> Kramer, above n 21, 685.

<sup>47</sup> Ibid.

<sup>48</sup> Ibid 686.

<sup>49</sup> Dyzenhaus, above n 9, 716.

<sup>50</sup> Ibid 713.

reform to target. A measure of relevance that demands recommendations for reform to be bundled with the description of the phenomenon in need of reform can have no purchase with such a descriptive theorist. And, as this is the very measure of relevance in play in Dyzenhaus' second argument from irrelevance, that argument is effectively meaningless for the very theorists to whom it is addressed. The argument from irrelevance depends on the conception of jurisprudence it presupposes. So, again, our appraisal of its success ultimately collapses into the underlying methodological argument about the nature of jurisprudence.

### C. THE ARGUMENT(S) FROM VACUITY

In *The Genealogy of Legal Positivism*, Dyzenhaus argues that 'positivism is best understood as politically prescriptive' on the grounds that 'any of the marks of positivism as a distinct theory ... of law are marks inherited from a political tradition and which can be detached from that tradition only on pain of vacuity'.<sup>51</sup>

His argument for this position has a complex structure. It consists in a 'genealogical reconstruction of the tradition' which runs from Hobbes to the present day and identifies and culminates in an attack on a shift from positivism's prescriptive origins to the descriptivism of (much) contemporary positivism. This shift, Dyzenhaus argues, can be traced to Austin, who 'does not seem to understand the methodology of legal theory as political'<sup>52</sup> and, more significantly, Hart, for whom 'positivism is committed to providing a general theory of law ... on value neutral, descriptive ground' whilst remaining 'morally and politically agnostic'.<sup>53</sup> Importantly, the prescriptive commitment that contemporary positivists are said to have dropped equates to a commitment to legislative supremacy. Hobbes' and Bentham's theories, he notes, 'require that there be but one source of law — sovereign will — and that that source manifest its judgments in the form best suited to transmitting determinate judgments about the public good from ruler to subject — statutes'.<sup>54</sup> And, for them, '[p]ositive law, properly so called, is ... law whose content is determinable by ... tests which appeal only to facts about legislative intention'.<sup>55</sup> Whilst (many) contemporary positivists have apparently abandoned this political commitment, Dyzenhaus again evokes the possibility of (fictional) 'positivist judges' who remain faithful to it: 'Positivist judges ... will accept one or other ... political arguments for the legitimacy of the constitutional arrangement whereby parliament has a monopoly on law-making power'.<sup>56</sup>

In summary, then, the argument claims that positivism is vacuous when detached from a political commitment to legislative supremacy. But what does it mean

<sup>51</sup> Dyzenhaus, above n 10, 60.

<sup>52</sup> *Ibid* 47.

<sup>53</sup> *Ibid* 51–2.

<sup>54</sup> *Ibid* 42.

<sup>55</sup> *Ibid* 45.

<sup>56</sup> *Ibid* 50–1.

to accuse a legal theory of vacuity? The relationship between them is not entirely clear, but it seems that there are three senses of vacuity at stake.<sup>57</sup> So there are actually three arguments from vacuity to consider.

The first argument is aimed at ‘inclusive’ legal positivism. In response to Dworkin’s critique of Hart, inclusive legal positivists concede that moral standards can feature in the criteria of legal validity.<sup>58</sup> It is common to encounter the concern that this concession deprives inclusive legal positivism of its distinctiveness.<sup>59</sup> The first argument from vacuity is Dyzenhaus’ version of this concern:

All that binds [inclusive positivists to their] tradition is a preamble to their theory that all legal values have their source in social practices and that social practices give rise to morally repugnant values, so that the presence of morality is a matter of historical and political contingency. That preamble is vacuous because no-one could deny it.<sup>60</sup>

Here, then, vacuous means undeniable. At first glance this is extremely surprising, as it looks like a concession that the claims of the inclusive legal positivists are true! In any event, the position he describes is not vacuous in the sense he claims. It is, for example, antithetical to the legal theory of Ronald Dworkin, who denies both limbs of the purportedly undeniable preamble. For him, legal values do not ‘have their source in social practices’. Rather, law (as an interpretive practice) serves some logically prior value ‘that can be stated independently of just describing the rules that make up the practice’.<sup>61</sup> Furthermore, the ‘presence of morality’ in law is no mere matter of historical and political contingency for Dworkin. Whatever the independent prior value turns out to be, ‘the law of a community ... is the scheme of rights and communities that meet that ... standard’.<sup>62</sup> On this account, morality is intertwined with law in a way that is incompatible with Dyzenhaus’ summary of the inclusive positivist position. The second half of that summary gestures towards the distinctively positivist kernel of inclusive legal positivism — a commitment to the claim that it is entirely contingent whether a legal system incorporates morally attractive or morally repugnant norms. And this too is far from undeniable. Gustav Radbruch, for example,

<sup>57</sup> Although Dyzenhaus summarises that the vacuity in question ‘takes two forms’: *ibid* 60–1.

<sup>58</sup> See, eg, W J Waluchow, *Inclusive Legal Positivism* (Oxford University Press, 1994); Jules Coleman, ‘Negative and Positive Positivism’ (1982) 11 *Journal of Legal Studies* 139; and Hart, above n 25, 250–54.

<sup>59</sup> Dworkin, for example, claimed that he found it ‘hard to see any genuine difference’ between (Coleman’s version of) inclusive legal positivism and his own legal theory: Ronald Dworkin, ‘Thirty Years On’ (2002) 115 *Harvard Law Review* 1655, 1656. For a discussion of some ‘questions about its ... distinctiveness’ see also Brian Bix, ‘Patrolling the Boundaries: Inclusive Legal Positivism and the Nature of Jurisprudential Debate’ (1999) 12 *Canadian Journal of Law and Jurisprudence* 17.

<sup>60</sup> Dyzenhaus, above n 10, 55.

<sup>61</sup> Ronald Dworkin, *Law’s Empire* (Hart Publishing, 1986) 47.

<sup>62</sup> *Ibid* 93.

argues that ‘where equality ... is consciously denied in the creation of positive law, then the law ... entirely loses its character as law’.<sup>63</sup> His formula has recently been endorsed by Julian Rivers and defended by Robert Alexy.<sup>64</sup> In any event it would be surprising if this were the sense in which Dyzenhaus meant to establish the vacuity of contemporary legal positivism without a commitment to legislative supremacy. To argue that legal positivism without that commitment was undeniable would be a truly remarkable position for a critic to adopt. And, unsurprisingly, the other two senses of vacuity he deploys are more meaningful.

In the second argument from vacuity, Dyzenhaus turns his attention to exclusive legal positivism. In contrast to inclusive legal positivists, exclusive legal positivists maintain that moral standards cannot feature in the criteria of legal validity. Dyzenhaus objects that this is:

of little assistance to judges in a common law legal order ... All the exclusive legal positivist can say to ... judges [in jurisdictions with a bill of rights] is that they have discretion and that they should describe most of what they do in Austinian, quasi-legislative language. Here the kind of vacuity in issue is the virtual irrelevance of theory to practice.<sup>65</sup>

In a footnote to the above passage, Dyzenhaus confirms that the specific feature of exclusive positivism that he is targeting is what John Gardner calls its ‘normative inertness’ — the fact that it doesn’t tell people what they ought to do in any given situation.<sup>66</sup> Note that this is a return to the argument from irrelevance.

Of the three senses of vacuity in Dyzenhaus’ argument, then, it is the third that represents the most interesting and novel claim. It consists in the complaint that:

Both kinds of descriptive positivists find themselves retreating to some high ground about the very nature of law, unanswerable to experience and practice because of their political purity.<sup>67</sup>

Whilst, at first glance, this also looks like a return to the argument from irrelevance, it is actually subtly different. Dyzenhaus’ concern is with jurisprudential conclusions that differ from the beliefs of participants in legal practice; his main example of this kind of situation is the apparent clash between the positivists’ claim

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<sup>63</sup> The translation here is taken from the text of Julian Rivers, ‘Gross Statutory Injustice and the Head Tax Case’ in Dyzenhaus and Moran (eds), above n 5, 237.

<sup>64</sup> For Rivers’ endorsement, see Rivers, above n 63. For Alexy’s defence, see Robert Alexy, ‘A Defence of Radbruch’s Formula’ in David Dyzenhaus (ed), *Recrafting the Rule of Law* (Hart Publishing, 1999).

<sup>65</sup> Dyzenhaus, above n 10, 60–1.

<sup>66</sup> See *ibid* n 61, where Dyzenhaus makes explicit the claim that ‘inertness is really vacuity’. Gardner’s discussion of normative inertness is in John Gardner, ‘Legal Positivism: 5 ½ Myths’ (2001) 46 *American Journal of Jurisprudence* 199, 202–3.

<sup>67</sup> Dyzenhaus, above n 10, 61.



that judges exercise a law-making power in hard cases and the understanding of some judges, especially in common-law jurisdictions, who themselves believe that their role consists in finding pre-existing law rather than making new law.<sup>68</sup> The third argument from vacuity is the allegation that in these circumstances positivists cannot properly persuade the practitioner of their mistake; rather they are reduced to vacuous assertions that they are right and the participants are wrong, because they are unable to justify their insistence that these participants' beliefs should be rejected:

such insistence requires an explanation, which is not forthcoming from such legal positivists because its only source is the kind of genealogical argument which they need to resist.<sup>69</sup>

The two parts of his claim break down as follows. First, legal positivists do not offer an explanation why the opinion of a judge who believes he finds, rather than makes law, should be rejected. Secondly, the reason that they fail to explain is that the only possible kind of explanation is political, and legal positivists deny themselves recourse to such arguments.<sup>70</sup>

The flaw with this argument lies in the first part, which is straightforwardly false. Contemporary legal positivists are united around and vocal in expressing their reason for rejecting the position of anyone — including judges — who claims that judges find rather than make the answer in hard cases. Indeed, whilst they might not have actually addressed their arguments at judges (real or imaginary) who hold this position, a significant amount of positivist theorising from the past fifty years makes some kind of contribution to this issue. The reasons around which they are united are, firstly, that there is a fact of the matter on this question and, secondly, that those who hold that position (whether philosopher, practitioner, judge or layman) are quite simply wrong about this feature of the nature of law. Different writers may offer different reasons. Their reasons may not even be mutually compatible. But the suggestion that they have no explanation at all is quite simply unsustainable. This should mean that the second part of the argument — Dyzenhaus' proposed reason why positivists have failed to explain themselves — is otiose, which in a sense it is. But it is also telling, as the next stage in his discussion highlights.

Dyzenhaus proceeds — immediately — to consider the following example:

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<sup>68</sup> Note that he stipulates the existence of these judges.

<sup>69</sup> Dyzenhaus, above n 10, 55.

<sup>70</sup> My expansion of the second limb of the argument glosses the original 'genealogical' as 'political'. Strictly speaking, Dyzenhaus' original formulation appears to impose onerous restrictions on the range of political commitments that could ground legal positivism, restricting them to those held by earlier positivists, which would exclude the possibility that alternative or rival political commitments also lead to legal positivism. This strikes me as a separate, and mistaken, point. It does not, however, seem to be a simple slip, as Dyzenhaus repeats the same formulation in his subsequent discussion of theories of authority. See below n 74.

Joseph Raz ... denies that judges who operate within the conceptual space of the common law style have a correct understanding of their practice. That denial seems premised on an argument about the very nature of authority: it is in the very nature of authority that the content of an authoritative directive can be determined in accordance with the Sources Thesis. But that argument looks suspiciously circular, especially given the political origins of the Identification Thesis from which the Sources Thesis descends, and the fact that the account of authority in which the argument is nested is one of the bones of contention within both legal theory and legal practice.<sup>71</sup>

By ‘judges who operate within the conceptual space of the common law style’, Dyzenhaus means judges who believe that in hard cases they discover ‘what the law both morally and legally requires ... [by] bringing to the surface the fundamental principles already immanent in the law’, and that such decisions are ‘fully determined by the law’.<sup>72</sup> And, as Dyzenhaus notes, Raz argues that such judges would be mistaken on the grounds (*inter alia*) that their stance is incompatible with the concept of authority. We can put the detail of that argument to one side.<sup>73</sup> The important point is to note the two grounds on which Dyzenhaus relies to impugn it. First, he appeals to the ‘political origins’ of legal positivism. Secondly, he effectively aims the argument that has thus far been aimed at positivist accounts of the *nature of law* at Raz’s account of *authority*: He notes that that account is controversial (a ‘bone of contention’), and then asserts that the solution to the controversy does not lie in conceptual analysis because ‘politically partisan accounts of the authority of law have to be reconstructed genealogically’.<sup>74</sup> All of this betrays a refusal to take descriptive claims at face value. Raz’s argument is explicitly descriptive, so Dyzenhaus points towards the prescriptivism of Hobbes and Bentham as if it infects all other positivistic theory. Raz refers to an account of authority, which is also explicitly descriptive, so Dyzenhaus moves from the fact that this is controversial to an assertion that it too can really only be defended on political terrain. The second limb of the argument from vacuity may well be otiose, but it also reveals what is really at stake. When the supportive argument is unpacked, it becomes clear that Dyzenhaus’ objection is not that the positivists have

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<sup>71</sup> Dyzenhaus, above n 10, 55–6.

<sup>72</sup> *Ibid* 46.

<sup>73</sup> It is summarised in Raz, above n 20, 210–37.

<sup>74</sup> Dyzenhaus, above n 10, 56. Again, note that in choosing the adjective ‘genealogically’ Dyzenhaus appears to be claiming that any given account of authority is tied to the political commitments of those responsible for earlier articulations of that account. My discussion treats his argument as if he meant ‘politically’ in a wider sense. See also above n 70. Furthermore, in the text I ignore the move from accounts of authority *tout court* to accounts of the authority *of law*. If this slip is acknowledged, it becomes clear that Dyzenhaus’ argument misses Raz entirely, because the Razian stance is derived from the former, and Dyzenhaus’ argument shifts focus to the latter.

not explained themselves. It is that the explanations they have offered are not politically prescriptive.

So it seems that the ‘suspiciously circular’ argument in play is Dyzenhaus’ own rather than Raz’s: remember that his overarching argument is that detachment from political commitments renders descriptive positivism vacuous. But when we come to unpack what he means by ‘vacuous’ we find that it means ‘detached from political commitments’. So once again, Dyzenhaus’ position presupposes rather than establishes the conclusion it is supposed to support. Properly unpacked, the argument from vacuity is the claim that legal positivism is vacuous because of its commitment to political neutrality. But it only carries any weight if the reader is already committed to the proposition that politically neutral analysis is vacuous. This cannot be established by pointing to that neutrality; it depends on the underlying methodological debate about the nature of jurisprudence.

The extent to which Dyzenhaus is relying on — rather than defending — an underlying account of the methodology of jurisprudence is betrayed by a curious feature of his argumentative strategy. Notice that he recognises the possibility that participants — in this case, different judges — are split over what constitutes the best account of the nature of law. So the role of the anti-positivist judge in the story is not to disprove legal positivism; it is simply to establish some disagreement — with the positivist judge — which Dyzenhaus then claims can only be settled by political argument. Similarly, he doesn’t actually disagree with Raz’s account of authority. He simply notes that it is controversial in order to introduce the claim that the way to solve the controversy is by recourse to normative political argument.

Certainly, some arguments can be settled only by normative political argument. But not all arguments are like this. Dyzenhaus insists that the controversies he identifies are the kind that can only be settled by normative argument, but he never actually tells us why. Ultimately the success of his arguments depends on this underlying problem. And, as we have seen, each of the three arguments considered in this section collapse in the same way. So we must now turn to the question of the extent to which explaining the nature of law is a politically prescriptive enterprise.

### **III. Dyzenhaus’ isolated methodology**

So each of Dyzenhaus’ three arguments linking legal positivism to legislative supremacy ultimately collapses into some aspect of the underlying methodological debate about the nature of jurisprudence. The three arguments are united by the assumption that jurisprudence is properly understood as a prescriptive, rather than purely descriptive, enterprise. However, different points emerge from each. The argument from authoritarianism tells us that Dyzenhaus presupposes that jurisprudence is prescriptive. The argument from irrelevance tells us that Dyzenhaus considers prescriptive theory to be aimed at judges and intended to influence the decisions they come to in hard cases. The argument from vacuity tells us that Dyzenhaus supposes

that the only kinds of arguments that these prescriptions can embody are normative political arguments. Taken together, these are the foundation for a very distinctive position as regards the nature of jurisprudence and it is unfortunate that it is not explicitly defended in Dyzenhaus' arguments. This position has two important features. First, Dyzenhaus projects his brand of prescriptivism onto (clearly) descriptive works, reading them *as if* they conformed to his preferred methodology and interpreting their claims in that light. Secondly, that brand of prescriptivism is remarkably austere both in terms of the kind of arguments that it permits, and the kind of beneficial moral consequences that it targets. This section explores these two features of Dyzenhaus' position and outlines where they situate his work with respect to theorists that have defended related positions in this debate. No-one has defended a position as doubly extreme as the one that lies behind this critique of legal positivism. I will suggest that it is untenable.

### A. PROJECTED PRESCRIPTIVISM

We saw in our discussion of the argument from authoritarianism the conflict between the prescriptivism of Dyzenhaus, who appraised legal positivism in terms of the moral consequences of espousing it as a theory of law, and the descriptivism of Dickson, for whom the success of a theory of law depends on its truth or conceptual soundness. A key feature of Dyzenhaus' argument is that it treats arguments developed by descriptive theorists as if they were prescriptive. How could this be justified?

Dyzenhaus' rejection of the descriptivist position implies a rejection of its central assumption that there is some truth to be uncovered about the nature of law. So the first step to understanding his position requires us to inquire how there could be multiple competing truths about the nature of law. As we saw, above, the conclusion of the argument from authoritarianism welcomed Dworkin's 'accomplishment' in 'attempting to restore legal philosophy to an examination of its proper, pragmatic roots'.<sup>75</sup> For him, then, all conceptual inquiry about law is prescriptive. This presupposes that there is no 'fact of the matter' and that the concept of law is fluid such that legal theorists have a choice between competing conceptions of law that are all faithful descriptions of the institution itself. Taken at face value, this is a position that risks collapse into a species of unsustainable scepticism, because if all we can say about law is prescriptive then it is impossible for us to agree, descriptively, on what we are arguing about in the first place. With this in mind it is a shame that Dyzenhaus does not provide an account of what it is about law that makes legal theory uniformly prescriptive. In order to remedy this defect, he would have to defend at least one descriptive claim — his description of whatever feature of the institution of law makes it amenable only to prescriptive (and not descriptive) analysis. Dworkin, on whom Dyzenhaus superficially relies, does of course have such an argument for his stance that legal theory is prescriptive, which rests on at least *one* prior descriptive claim: that law is a member of a special category of social practices, interpretive practices, that

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<sup>75</sup> See Dyzenhaus, above n 8, 112.

can only bear prescriptive theorising.<sup>76</sup> But Dyzenhaus distances himself from this wider commitment of Dworkin's and as a result the foundations of his claim that legal theory is exclusively prescriptive are unclear.<sup>77</sup>

One possibility is developed by Frederick Schauer. Law, he notes, is a socially constructed concept and, as such, 'it would be open for the people whose collective beliefs and actions construct [the concept of law] to construct [it] in one way rather than another'.<sup>78</sup> Furthermore, the socially constructed concept of law is not static. Rather, it 'changes over time and is best understood as emerging through a process of continuous construction and reconstruction'.<sup>79</sup> Accordingly, 'it would be a mistake to assume that the concept of law must always be what it now is'.<sup>80</sup> This framework makes space for both descriptive and prescriptive theorising about the nature of law. Schauer characterises descriptive jurisprudence as adopting 'a snapshot approach to freezing an image of a continuously moving entity' and contrasts it with prescriptive jurisprudence intended to 'offer reasons and arguments why a culture should steer and shape ... its concept of law in this direction rather than that'.<sup>81</sup> This framework creates the logical space for two types of legal theories that are apt to be judged according to consequentialist and descriptive criteria respectively. But this model cannot explain Dyzenhaus' approach because the division that it envisages depends on what Schauer calls the 'voice' adopted by different legal theories: some are descriptive, some are prescriptive, and the choice is determined by the enterprise on which the author understands themselves to be embarking.<sup>82</sup> The positivism which Dyzenhaus targets speaks in the voice of descriptive jurisprudence, 'that of describing and explaining the concept of law'.<sup>83</sup> So even though Schauer acknowledges both the possibility and importance of prescriptive jurisprudence, he does not do so in a way that explains

<sup>76</sup> Dworkin, above n 10, 45–87 and Ronald Dworkin, *Justice in Robes* (Harvard University Press, 2006) 10–12. For a focused exposition of the notion of an interpretive practice, see also Nicos Stavropoulos, *Interpretivist Theories of Law* (21 September 2008) The Stanford Encyclopedia of Philosophy <<http://plato.stanford.edu/archives/fall2008/entries/law-interpretivist/>>.

<sup>77</sup> The detachment is explicit in 'The Genealogy of Legal Positivism', Dyzenhaus above n 10, where he criticises the 'appearance of randomness' in Dworkin's position: *ibid* n 3. The detachment is implicit in Dyzenhaus' whole oeuvre, because Dworkin's interpretivism brings with it a distinctive and unavoidable baggage of specialist terminology, none of which features in Dyzenhaus' work.

<sup>78</sup> Frederick Schauer, 'The Social Construction of Law: A Reply to Julie Dickson' (2005) 25 *Oxford Journal of Legal Studies* 493, 496.

<sup>79</sup> *Ibid* 498.

<sup>80</sup> *Ibid* 498. Further, as Raz discusses, (in an argument endorsed by Schauer) the variety is more than merely temporal: 'Different cultures have different concepts of law. There is no one concept of law, and when we refer to the concept of law we just mean our concept.' Joseph Raz, *The Authority of Law* (Oxford University Press, 2009) 32.

<sup>81</sup> *Ibid* 498.

<sup>82</sup> *Ibid* 500–1.

<sup>83</sup> *Ibid* 501.

Dyzenhaus' brand of prescriptivism. That requires a framework that would licence treating self-consciously descriptive theory as if it were really prescriptive.

A recurrent theme in Dyzenhaus' work might point towards such a framework. That theme is disagreement. Dyzenhaus persistently treats the existence of judges who disagree with the legal positivist analysis of hard cases as a phenomenon that poses a challenge to legal positivism as a whole. Indeed, these judges are something of a *leitmotif* in his work.<sup>84</sup> Although Dyzenhaus never articulates the connection between these judges and the prescriptive nature of legal theory, Liam Murphy, who shares his commitment to prescriptive theory, has developed an argument that could fill the gap. He outlines a disagreement-based conception of politically prescriptive jurisprudence in his article *The Political Question of the Concept of Law*.<sup>85</sup>

As Murphy points out, it is clear that lawyers often argue and judges often decide cases on moral or political grounds. The conceptual question, then, on which legal philosophers disagree, is whether this kind of 'appeal to political considerations by lawyers and judges is *properly understood* as part of an argument about what the law (already) is'.<sup>86</sup> For Murphy, this disagreement is the foundation of an argument in favour of prescriptive theorising. He argues that it will 'survive ... abstract reflection about the very idea of law', by which he means that the disagreement will not be settled one way or the other by a philosophical investigation into 'what we already share by way of a concept of law'.<sup>87</sup> The disagreement will persist and another way to settle it must be found. Murphy's proposed solution is to move the debate onto political terrain. The reason the disagreement about our equivocal concept matters, he argues, is the extent to which acceptance of one conception of law or another affects political practice. Accordingly, '[t]he way to resolve the ... disagreement ... must therefore be to evaluate the practical and political reasons that they offer for their respective positions'.<sup>88</sup> Here, then, we have excavated some plausible foundations for Dyzenhaus' projected prescriptivism. Where Dyzenhaus never justifies the leap to prescriptive debate, Murphy provides a justification which is compatible with Dyzenhaus' approach, animated as it is by the theme of disagreement. And, Murphy's account of the boundary between descriptive and prescriptive theory has the potential to licence departure from the self-understanding of his targets. Schauer's framework was tied to the voice adopted by the theorist, and so demands fidelity to their intentions. But Murphy's is tied to the question being tackled, and so appears to permit

<sup>84</sup> Note how these judges are central to the arguments from irrelevance and vacuity. Cf Dworkin, who makes what he calls theoretical disagreement, and an allegation that legal positivists cannot explain it, the focus of his theory of law in *Law's Empire*, above n 62.

<sup>85</sup> Liam Murphy, 'The Political Question of the Concept of Law' in Jules Coleman (ed), *Hart's Postscript: Essays on the Postscript to the Concept of Law* (Oxford University Press, 2001).

<sup>86</sup> *Ibid* 372 (emphasis in original).

<sup>87</sup> *Ibid*.

<sup>88</sup> *Ibid*.

imposing a prescriptive reading on arguments about any question which turn out to need tackling prescriptively.

This account licences Dyzenhaus' move to prescriptive argument as the disagreement over how best to account for what happens in hard cases has survived abstract reflection. But Murphy's account of the borderline between descriptive and prescriptive theory is (like Schauer's) not an account of what methodology to read into previously developed arguments. It is an argument about how we ought to develop those arguments in the first place. So it does not on its face provide a licence for the enterprise of projecting prescriptive methodology onto descriptive arguments. If Murphy's conclusion that argument about the nature of law is necessarily prescriptive is sound, then it obviously has ramifications for descriptive theory. But the automatic imputation of any particular prescriptive commitments to the authors of descriptive theories is not among those ramifications. As Waldron notes in his appeal for more prescriptive positivist theorising, legal positivists are interested in a cluster of different versions of positivity and can plausibly be understood to be motivated by a variety of values.<sup>89</sup> But, he also notes:

Those who resist the general jurisprudential methodology associated with normative positivism may do so because they fear that a particular one of [several possible] interests ... is being foisted on legal positivists — as though they must all have the programmatic interests that, say, Bentham or Hobbes had, or not count as real positivists at all.<sup>90</sup>

This, I think, is what Dyzenhaus does. A substantial proportion of the enterprise of contemporary jurisprudence proceeds as if there is a fact of the matter about the nature of law. It is possible that this foundation is mistaken. It would be one thing for Dyzenhaus to challenge this orthodoxy with a concrete argument that the concept of law is, in fact, indeterminate on this point. It is quite another for him to both presuppose this radical position without offering a single argument in its favour and project that position onto arguments which do not share its methodological assumptions. Suppose, however, that he is correct. In the next section we will see that the arguments from irrelevance and vacuity highlight how his position becomes yet more distinctive because he adopts an extremely narrow view of what constitutes prescriptive jurisprudence.

## B. THE AUSTERITY OF DYZENHAUS' PRESCRIPTIVISM

In his exchange with Kramer, Dyzenhaus explains 'the double sense ... required for a position to be properly substantive': It must be 'based in political morality' and

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<sup>89</sup> Jeremy Waldron, 'Normative (or Ethical) Positivism' in Coleman, above n 85, 432.

<sup>90</sup> Ibid 433.

‘designed to have an effect on practice.’<sup>91</sup> We will first consider the two requirements in turn.

Whilst Dyzenhaus’ formulation of his methodology seems very general, his arguments actually envisage only one kind of ‘effect on practice’ that the theorist need consider. His critique of legal positivism is founded on argument about the effect that theories have on the way in which judges decide hard cases. This has important ramifications for the way in which the argument from authoritarianism sits in the wider debate about the possible consequences of legal positivism.

Some defences of legal positivism seem to engage directly with the argument from authoritarianism by pointing to the morally beneficial consequences of adopting the positivist perspective on law. The most famous of these arguments was developed by Hart in his debate with Fuller, and echoes of it remain in *The Concept of Law*, despite his shift to a primarily descriptive approach. In summary, Hart argued that legal positivism is the approach most likely to ‘lead to a stiffening resistance to evil’ by ‘making man clear-sighted in confronting the official abuse of power.’<sup>92</sup> This argument has been adopted or endorsed by several contemporary theorists.<sup>93</sup> But although this argument relies on the beneficial moral consequences of positivism, and so seems to engage with Dyzenhaus, it is not about how judges should decide cases. It is about the attitudes that legal positivism engenders in the citizenry in general. This explains the strange turn that Dyzenhaus seems to take at the culmination of his article ‘The Genealogy of Legal Positivism’ where he welcomes what he calls the ‘neo-Benthamite revival’ in legal positivism.<sup>94</sup> Here, Dyzenhaus is referring to an important trend in contemporary legal positivism which is politically prescriptive, which is grounded in the value of legislative supremacy and which advocates for the marginalisation of the role of judges.<sup>95</sup> He celebrates this ‘revival’ because it brings with it the possibility of ‘constructive’ or ‘productive engagement’ with his own brand of anti-majoritarian anti-positivism.<sup>96</sup> Note, however, that it is not simply prescriptive positivism which is revived in this trend. The persistence of the Hartian prescriptive argument through the work of authors like MacCormick, Schauer and Murphy means that no such ‘revival’ is needed. But Dyzenhaus overlooks this tradition. Rather what he welcomes is the revival of the specific form of prescriptive theory that corresponds to his criteria for ‘properly substantive’ — that is, theory based in political morality and aimed at

<sup>91</sup> Dyzenhaus, above n 9, 717. Note that Dyzenhaus presents the two requirements in the opposite order; I have reversed them for ease of exposition and discussion.

<sup>92</sup> Hart, above n 25, 210.

<sup>93</sup> Eg, Murphy, above n 85; Neil MacCormick, ‘A Moralistic Case for A-Moralistic Law?’ (1985) 20 *Valparaiso University Law Review* 1; Frederick Schauer, ‘Positivism as Pariah’ in Robert P George (ed), *The Autonomy of Law: Essays on Legal Positivism* (Oxford University Press, 1996).

<sup>94</sup> Dyzenhaus, above n 10, 61.

<sup>95</sup> See especially, Tom Campbell, *The Legal Theory of Ethical Positivism* (Dartmouth, 1996).

<sup>96</sup> Dyzenhaus, above n 10, section 4.



influencing how judges decide cases. Dyzenhaus is of course aware of the Hartian strand of prescriptivism.<sup>97</sup> But his arguments do not engage with it, as it doesn't conform to his extremely narrow conception of substantive legal theory. And Dyzenhaus doesn't articulate his vision of this restriction on what counts as properly substantive theory. Schauer, on the other hand, explicitly discusses the issue:

The choice between positivism and its opposition ... assuming the choice to be instrumental ... may depend on the situation of the chooser and the uses to which the choice must be put. Fuller's attack on positivism comes from a perspective that presupposes a chooser trapped inside the legal system ... Much of traditional positivism, however ... does not share Fuller's presupposition.<sup>98</sup>

The case for restricting our choice to the perspective of the participant, like Dyzenhaus (and, according to Schauer, Fuller) seems impossible to make. If we are dealing with the beneficial moral consequences of endorsing one or other theory of law, then surely all the moral consequences must be counted. So suppose that Dyzenhaus is correct that positivism encourages authoritarian judging, and Hart, Schauer, MacCormick and Murphy are correct that positivism encourages citizens to subject the law to critical moral scrutiny. Dyzenhaus' anti-positivism does not prevail by default. He must justify why his beneficial moral consequences outweigh theirs, and this cannot be achieved by simply stipulating a very austere account of properly prescriptive theorising.

We can now turn to the final aspect of Dyzenhaus' distinctive approach to legal theory. He presupposes that when theorists come to choose between competing conceptions of law, then the only kind of arguments that can come into play are those based in political morality. This was most clear in the argument from vacuity, where vacuity was a label applied to jurisprudential argument supported by arguments from outside political morality. But recall Murphy's argument in favour of prescriptive theory, which was the closest we could find to an explanation for Dyzenhaus' insistence on prescriptivism. Faced with persistent disagreement, Murphy does not argue that the way to decide is by exclusively political argument. Rather, he specifies that we should decide by evaluating 'the *practical* and political reasons'<sup>99</sup> in favour of the respective positions in the debate. In dropping the possibility that non-political reasons might contribute to our choice between competing legal theories, Dyzenhaus imposes yet another significant but unexplained restriction on the way in which jurisprudence should proceed. There are many practical reasons that might legitimately feature in our choice. Consider, for example Brian Leiter's recent summary of theoretical desiderata:

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<sup>97</sup> See, eg, the discussion in David Dyzenhaus, 'Fuller's Novelty' in Willem J Witteveen and Wibrem van der Burg (eds), *Rediscovering Fuller* (Amsterdam University Press, 1999).

<sup>98</sup> Schauer, above n 93, 47.

<sup>99</sup> Murphy above n 85 and accompanying text (emphasis added).

Here are three familiar theoretical desiderata often thought relevant:

*Simplicity.* We prefer simpler explanations to more complex ones, *all else being equal* (that is, without cost to *other* theoretical desiderata).

*Consilience.* We prefer more *comprehensive* explanations, explanations that make sense of more different kinds of things, to explanations that seem too narrowly tailored to one kind of datum.

*Conservatism.* We prefer explanations that leave more of our other well-confirmed beliefs and theories intact to those that don't, *all else being equal* (that is, without cost to *other* theoretical desiderata).<sup>100</sup>

Clearly, this list is not exhaustive. Dyzenhaus' insistence on political prescriptivism has the effect of excluding these — and related — issues from our criteria for the success of competing legal theories. At the very least, these meta-theoretical values must come into play if we are forced to choose between rival theories that are inseparable on political grounds. Perhaps they even compete with the political arguments themselves. Whichever is the case, Dyzenhaus' blanket exclusion of this kind of non-political value from legal theory is odd.

The cumulative effect of the various unargued methodological moves that Dyzenhaus makes is that he is methodologically isolated in the field of legal theory: isolated both in the austerity of his prescriptivism and in his practice of projecting that methodology onto descriptive writings by engaging with them *as if* they share it. I have struggled in this section to provide fully articulated arguments that his methodology is wrong. Indeed, it could well prove to be correct. But it is a position that clashes with the arguments of theorists who have explicitly considered these issues at every turn. The final section will explore an example of the peculiar consequences that this methodological approach has in the context of Dyzenhaus' treatment of one discrete issue.

### C. THE HOBBSIAN RED HERRING

One of the most remarkable aspects of Dyzenhaus' exchange with Kramer is the account that Dyzenhaus deploys of the jurisprudential disagreement between Hart and Raz concerning the correct account of what it means to say that officials 'accept', in Hart's technical sense, the rule of recognition.<sup>101</sup> Dyzenhaus' discussion of that debate

<sup>100</sup> Brian Leiter, 'Explaining Theoretical Disagreement', (2009) 76 *University of Chicago Law Review* 1215, 1239.

<sup>101</sup> On Hart's confined use of 'accept' as a term of art referring to the adoption of the internal point of view, see Adam Tucker, 'Uncertainty in the Rule of Recognition and in the Doctrine of Parliamentary Sovereignty' (2011) 31 *Oxford Journal of Legal Studies* 61.

is remarkable because, as Kramer notes, it appears to bear no resemblance to the texts he purports to be discussing, as a brief overview will illustrate.<sup>102</sup> Raz argued that the attitude of acceptance necessarily expresses either the belief that the rule in question is morally justified, or the pretence or ‘avowal’ of such a belief.<sup>103</sup> Hart disagreed. ‘To my mind’, he argued, ‘the inclusion of this as a necessary component of acceptance is a mistake’.<sup>104</sup> Dyzenhaus cites, and claims to be discussing, Hart’s two main discussions of the problem, in which Hart stakes out two reasons for rejecting Raz’s view with some clarity. First, he considers it to present ‘an unrealistic picture of the way in which ... judges envisage their task’.<sup>105</sup> Secondly, he argues that Raz is led astray by his otherwise distinct argument that normative statements express the existence of objective reasons to act in the way they require.<sup>106</sup> Dyzenhaus reports this argument in terms that appear foreign to anyone who has read the original. He identifies two strands in Hart’s argument:

The first is methodological, that to look beyond the fact that judges do ... to why ... might import their moral perspectives into the positivist conception of law, which then might cease to be general and value free. The second is the concern about the path ending in a Hobbesian notion of a prior moral obligation to obey the law.<sup>107</sup>

Dyzenhaus goes on to characterise the contours of the second argument as follows. First, he reduces Raz’s argument to the claim that participants in legal practice ‘sense that there are moral reasons for obedience’. Secondly, he notes that this is a claim that ‘must be based on an argument of political theory’. Finally, he observes that this argument must in turn lead ‘to the conclusion that there is a prior moral obligation to obey the law.’<sup>108</sup>

From any perspective, Dyzenhaus’ argument is perplexing.<sup>109</sup> But for present purposes, its most important feature is that it simply does not correspond to the debate

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<sup>102</sup> The passage in question serves as the foundation of Dyzenhaus’ discussion of Kramer’s own stance on that issue. As I understand it, its role is both to situate Kramer’s position in comparison to the rival positions of Hart and Raz and, importantly, to generate a criticism of Hart’s position which Dyzenhaus argues also applies to Kramer’s stance: ‘There is, however, a serious problem here for Hart’s methodological position, which also affects Kramer’s position’: Dyzenhaus n 9, 712.

<sup>103</sup> Raz, above n 80, 28.

<sup>104</sup> H L A Hart, *Essays on Bentham* (Oxford University Press, 1982) 157.

<sup>105</sup> *Ibid* 158.

<sup>106</sup> *Ibid* 159.

<sup>107</sup> Dyzenhaus, above n 9, 711.

<sup>108</sup> *Ibid* 712.

<sup>109</sup> For example, his exposition overlooks one half of Raz’s argument, namely the possibility of a mere pretence or avowal of belief in the law’s legitimacy. This would have nothing to do with arguments from political morality. Similarly unless judges’ sense that the law is justified is *true*, which Hart and Raz certainly do not argue, then there are no grounds to resort to political argument at all, other than the (*ex hypothesi*) false political argument that the judge, if pressed, would presumably rely

he purports to be discussing and the texts to which his citations point. Hart's reasons for dismissing Raz's stance, outlined above, have nothing to do with 'methodology', and there is no mention of Hobbes or of prior obligations to obey the law. By this stage, Kramer had lost patience with Dyzenhaus. Having pointed out that Dyzenhaus' 'citation ... simply makes clear that Hart nowhere expressed the misgivings which Dyzenhaus ... imputes to him', he summarily dismisses Dyzenhaus' interpretation. 'The unease supposedly felt by Hart is a figment of Dyzenhaus' imagination', he notes. Dyzenhaus' persistent references to Hobbes are, he concludes 'nothing more than a red herring'.<sup>110</sup>

However, if we take into account Dyzenhaus' conception of legal philosophy as outlined above, we can construct a more understanding reading of Dyzenhaus' argument. It derives from his projection of austere, prescriptive arguments onto the original texts, so that the arguments of Raz and Hart are being read as exhortations to those in legal practice. With this in mind, Dyzenhaus' account of their debate has a coherence which Kramer overlooked. Raz's argument that judges either believe in the legitimacy of law or (at least) appear to do so is transformed into an argument that judges *should* believe in the legitimacy of law. And then it makes sense for Dyzenhaus to argue that Raz's stance must ultimately be grounded in an argument of political morality that leads to the defence of an obligation to obey the law. For why else would Raz be exhorting the judiciary to believe in the law's moral legitimacy? This understanding even holds if, unlike Dyzenhaus, we do not allow the second component of Raz's stance — that those judges who don't morally endorse the law at least pretend to do so — to drop out of the picture. For there is no reason to exhort judges to at least pretend to believe in the moral legitimacy of the law unless we are armed with a prior political argument that they ought to do so. But, as I hope is already becoming clear, this is not a legitimate reading of the disagreement between Hart and Raz. Hart and Raz were engaged in a wider debate about the normativity of law, and in one guise this focused on the meaning of judges' statements when they assert the existence of legal obligations in delivering their judgments.<sup>111</sup> For Hart, such statements have a special meaning; judges 'may mean to speak in a technically confined way', in which their expression of legal duties only makes sense in light of the legal context in which they are spoken. On this view, legal obligations are a distinct species of obligation. For Raz, on the other hand, asserting a legal obligation is to assert the existence of a moral obligation. The truth or falsity of this assertion is, of course, a further question. Dyzenhaus' eccentric interpretation of one facet of this debate transforms it. He effectively precludes Raz from going on to argue, as he in fact does, that those assertions are often false by alleging that his stance must be derived from the unstated belief that they are usually true. But in doing this, Dyzenhaus renders himself unable to claim that his interpretation displays even the bare minimum of fidelity to the

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on. For a discussion of some of the substantive flaws in the argument Dyzenhaus attributes to Hart, see Kramer, above n 21, especially 698 and following.

<sup>110</sup> Kramer, above n 21, 699.

<sup>111</sup> See Hart, above n 104, 159 for Hart's expression of the debate in terms of the *meaning* of judges' statements when applying the law.

argument that he purports to be discussing. This problem arose in Dyzenhaus' discussion of only one small debate — a matter of only several pages — that was perfectly intelligible before he imputed unstated and inconsistent political undertones to Raz's contribution.

#### **IV. Conclusion**

This article has examined David Dyzenhaus' distinctive argumentative technique of connecting undesirable political phenomena with the arguments and the influence of legal positivism. This technique has the surprising consequence of casting those who oppose Dyzenhaus in the debate about the nature of law as also thereby his (sometimes unwilling) opponents in various substantive political arguments — about the scope of state power, the limits of judicial review, what we can learn from terrible injustices like apartheid, and more. But the legal positivism that Dyzenhaus deploys in this way is often unrecognisable to its proponents. I have shown that this is because Dyzenhaus' distinctive conception of legal philosophy drives his understanding of legal positivism at every turn, and that acknowledging this is the only way in which his (sometimes idiosyncratic) understandings of positivism can make any sense. The argument explored in the previous section is truly remarkable. And the broader arguments that I have canvassed in the rest of this article are simply that situation writ large. Dyzenhaus faces a double obstacle if his arguments are to succeed. First, he must establish that his radical view on the methodology of legal positivism, which is a strikingly austere version of prescriptivism, is sound. Secondly, he must establish that it is legitimate to project that methodology onto writings which do not follow it, by reading legal theories that do not correspond to that methodology as if they do, by imputing motivations and meanings to them that they don't contain but that he believes they ought to. I do not believe that either of these obstacles can be overcome.