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## THE LEGALITY OF EVIL OR THE EVIL OF LEGALITY?

Frederick Schauer\*

DAVID DYZENHAUS. *HARD CASES IN WICKED LEGAL SYSTEMS: PATHOLOGIES OF LEGALITY* (Oxford Univ. Press, 2d ed. 2010). Pp. 350. Hardback. \$110.00.

Lawyers and legal scholars have long been intrigued, puzzled, and sometimes embarrassed by the conduct of lawyers and judges in oppressive or otherwise evil governments. For anyone holding the romantic ideal of the lawyer as someone who stands up to injustice rather than serving as part of it, the widespread participation of lawyers and judges in demonstrably unjust legal systems and political regimes is an uncomfortable fact, sorely in need of explanation.

The phenomenon of the lawyer (and judge) as collaborator and enabler has generated a rich and enduring literature. Lon Fuller, building on the accounts of Gustav Radbruch,<sup>1</sup> examined the role of lawyers and judges in Nazi Germany,<sup>2</sup> and Robert Cover sought to explain why even seemingly anti-slavery northern judges routinely enforced the Fugitive Slave and other slavery-supportive laws, especially in the 1830s, 1840s, and 1850s.<sup>3</sup> And in 1991, David Dyzenhaus, a native South African (now a long time resident of Canada), explored the occasionally heroic but frequently cooperative and complicit role of lawyers and judges in apartheid South Africa.<sup>4</sup>

Twenty years later, Dyzenhaus has revised and republished his 1991 book, now slightly retitled as *Hard Cases in Wicked Legal Systems: Pathologies of Legality*.<sup>5</sup> The

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\* David and Mary Harrison Distinguished Professor of Law, University of Virginia.

1. GUSTAV RADBRUCH, GESAMTAUSGABE 83, 89 (Arther Kaufmann ed., 1990), translated in Bonnie Litschewski Paulson & Stanley L. Paulson, *Statutory Lawlessness and Supra-Statutory Law*, 26 OXFORD J. LEGAL STUD. 1 (2006). Radbruch's most famous claim was that legal positivism contributed to the rise of Nazism, a claim whose factual basis is contested in Stanley L. Paulson, *Lon Fuller, Gustav Radbruch, and the "Positivist" Theses*, 13 L. & PHIL. 313 (1994). See also Stanley L. Paulson, *Radbruch on Unjust Laws: Competing Earlier and Later Views?*, 15 OXFORD J. LEGAL STUD. 489 (1995). See generally JULIUS STONE, *HUMAN LAW AND HUMAN JUSTICE* 235-62 (1965); Barend van Niekerk, *The Warning Voice from Heidelberg – The Life and Thought of Gustav Radbruch*, 90 S. AFRICAN L. J. 234 (1973); Ian Ward, *Radbruch's Rechtsphilosophie: Law, Morality and Form*, 78 ARCHIV FÜR RECHTS- UND SOZIALPHILOSOPHIE 332 (1992).

2. LON L. FULLER, *THE MORALITY OF LAW* (rev. ed. 1969); Lon L. Fuller, *Positivism and Fidelity to Law – A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958).

3. ROBERT M. COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* (1975); see also MARK A. GRABER, *DRED SCOTT AND THE PROBLEM OF CONSTITUTIONAL EVIL* (2006).

4. DAVID DYZENHAUS, *HARD CASES IN WICKED LEGAL SYSTEMS: SOUTH AFRICAN LAW IN THE PERSPECTIVE OF LEGAL PHILOSOPHY* (1991).

5. DAVID DYZENHAUS, *HARD CASES IN WICKED LEGAL SYSTEMS: PATHOLOGIES OF LEGALITY* (2d ed. 2010).

revision and republication is a welcome development, not only because it brings renewed attention to this important book, and not only because the book's substantial rewriting and additions will be useful even for those familiar with the original version, but also, and most importantly, because this book engages the relevant jurisprudential literature with a depth and seriousness absent from the work of Radbruch, Fuller, Cover, and others.<sup>6</sup> Indeed, it is the substantial change in the jurisprudential terrain over the past two decades that provided for Dyzenhaus the principal motivation for the significant rewriting and subsequent republication.<sup>7</sup> Many of those who are engaged in contemporary jurisprudential debates may perhaps still be tempted to dismiss Dyzenhaus's efforts as unrelated to their concerns, but that would be a mistake. Much of the new material, especially Chapters Seven, Eight, and Nine, is devoted precisely to connecting Dyzenhaus's arguments about adjudication with modern jurisprudential debates focused on the nature of legal positivism, the relevance (or not) of legal positivism to adjudication, and the soundness (or not) of Ronald Dworkin's persistent challenge to legal positivism.<sup>8</sup> Whether he is ultimately right or wrong in connecting a certain style of adjudication with legal positivism, Dyzenhaus can hardly be accused of being unaware of the modern issues, or of being unsophisticated in understanding them. As a result, those who are interested in the connection (or lack thereof) between law and morality must treat this book as required reading.<sup>9</sup>

Yet, although Dyzenhaus engages the concerns and debates of contemporary jurisprudence on a largely conceptual and philosophical level, many of his claims are ultimately, like those of Radbruch, Fuller, and Cover before him, empirical and psychological. As I shall suggest here, to evaluate those claims, we must depart the realm of non-empirical jurisprudence in order to determine when, if ever, the strongly normative claims Dyzenhaus makes are in fact sound. Dyzenhaus's arguments are, importantly, exercises in counterfactual reasoning, for he maintains that some judges in some cases would have decided differently had the prevailing legal theory and adjudicative ideology been different. This is an important claim, but it is just as important to recognize the overwhelmingly empirical realm into which the claim takes us.

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6. See JEFFREY BRAND-BALLARD, *LIMITS OF LEGALITY: THE ETHICS OF LAWLESS JUDGING* (2010). It is worth noting here that Brand-Ballard's concerns in his thoughtful, careful, and impeccably researched book are in the neighborhood of those of Radbruch, Fuller, Cover, Graber, and Dyzenhaus, but he is more interested in what the judge should do, from the judge's perspective, than with which legal theories or institutional designs will facilitate certain judicial attitudes. Moreover, Brand-Ballard is less concerned with law in its morally pathological state than the others. "I think interesting questions about the ethics of lawless judging arise even in reasonably just legal systems. I shall argue that judges are sometimes ethically permitted to deviate from the law in order to avoid results that are only moderately unjust." *Id.* at 10. Still, Brand-Ballard's focus on the moral legitimacy of departures from positive law is similar to Dyzenhaus's, and the two books can usefully be read together.

7. See DYZENHAUS, *supra* note 5, at viii.

8. For the record, I should note that I believe that the legal positivist tradition going back to Bentham and Austin is more normative and more concerned with adjudication than many modern and post-Hartian positivists believe. See Frederick Schauer, *Positivism Before Hart*, 24 CAN. J. L. & JURISPRUDENCE 455 (2011).

9. An excellent contemporary overview and analysis of the various connections and disconnections between law and morality is Leslie Green, *Positivism and the Inseparability of Law and Morals*, 83 N.Y.U. L. REV. 1035 (2008).

## SOUTH AFRICA AS WICKED LEGAL SYSTEM

Informed by his own knowledge of South African legal practice and adjudication,<sup>10</sup> Dyzenhaus tethers his broader jurisprudential claims to what he refers to as a “case study” of South Africa under apartheid.<sup>11</sup> Yet the case study, while highly detailed, informed, and meticulously researched, is likely to disappoint those whose interests in law run more to the sociological than the doctrinal. And that is because the case study is largely an extended analysis of published judicial opinions. Understood on its own terms, the case study has much to teach us. But those steeped in Legal Realism might wonder whether this degree of focus on the written and public emanations of judges tells us as much about law, legal actors, and legal culture as would a study supplemented with materials that veer more in the direction of the sociological, the anthropological, the psychological, the cultural, and the political.<sup>12</sup> As I shall elaborate below, much of Dyzenhaus’s claim implicitly turns on the law-independent political and moral proclivities of the lawyers and judges of apartheid South Africa, and thus it would have been illuminating to know more about who these judges were, how they obtained their positions, what social and political circles they traveled in, and where they came out, apart from the law, on the politics and morality of apartheid.

Still, it is not Dyzenhaus’s aim to provide us with the legal ethnography of South African apartheid, however illuminating such a study might be. Accordingly, in terms of his jurisprudential goals, the case study serves the purpose moderately well. It displays the workings of the South African judiciary and details the reactions, especially the academic ones,<sup>13</sup> to the judiciary’s output. And it demonstrates that on many issues the South African judiciary was far from a monolithic functionary of the apartheid government. Thus, those who imagine the judges in apartheid South Africa as roughly indistinguishable from the Nazi bureaucracy will be disappointed, because the picture that Dyzenhaus portrays is of a judiciary more or less conscientiously following the rules of a highly complex and sophisticated legal system, often without immediate regard to whether following the rules would help or hurt the government in power. In Dyzenhaus’s fascinating discussion of the numerous judgments regarding the right to be heard in the

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10. I have neither cause nor sufficient knowledge to doubt the accuracy of what Dyzenhaus says about South African law, history, and politics, but it is worthwhile bearing in mind that insider perspectives are still perspectives, no less likely than outsider perspectives to suffer from the distortions of selective factual reporting and normatively laden interpretations. We can learn a great deal about South Africa from what Dyzenhaus recounts, but his account should no more be taken as definitive than would my account of New Jersey in the 1950s and 1960s.

11. See DYZENHAUS, *supra* note 5, at 34–164.

12. Thus, just as Karl Llewellyn stressed the difference between the “paper rules” that appear in law books and the “real” rules that influence legal outcomes, so too is it important to distinguish the written judicial opinion from how the author of the opinion actually reached his or her conclusion and from the actual effect of the decision on behavior or on future decisions. See generally KARL N. LLEWELLYN, *THE THEORY OF RULES* (Frederick Schauer ed., 2011).

13. The academic reactions are more illuminating than their American equivalents. For much of the period from the 1950s until the end of apartheid in the 1990s, academics, especially legal academics, were also significant players in fighting against, and occasionally in supporting, apartheid. Indeed, if we think of the academic commentary on the output of the South African courts as primary data, that data might be a useful proxy for speculation about what South African judges would have done under a different jurisprudential regime.

administrative context,<sup>14</sup> for example, the picture that emerges, or at least the one that Dyzenhaus paints, is one of political and moral blindness rather than active and conscious enthusiasm and support for the goals of apartheid.

#### THE TERMS OF THE DEBATE

So what then are we to make of the case study, and what are we to make of what Dyzenhaus makes of the case study? One way of understanding Dyzenhaus's project is as an analysis of the relative merits of natural law and legal positivism. Indeed, Dyzenhaus frames the issue in just these terms throughout the book.<sup>15</sup> But whoever chooses this frame, whether Dyzenhaus or anyone else, must then become embroiled in deeply contested questions about just what these highly charged and theoretically freighted terms mean. Indeed, questions about the meanings of these terms are so disputed that more than forty years ago Robert Summers urged jettisoning the term "positivism" entirely, arguing that it had become so contested as to be "radically ambiguous," and thus largely useless.<sup>16</sup> Much more recently, Joseph Raz, long understood as the most prominent living legal positivist, has taken a similar position, lamenting that the term "positivism" is more distracting than helpful.<sup>17</sup> Given that debates within legal positivism often profess to be about the "core commitments" of positivism rather than just applications around the edges,<sup>18</sup> the essentially contested nature of the term provides a strong argument for avoiding its use.

Much the same could be said about "natural law." For some writers, natural law is not a stance within legal theory at all, but rather a meta-ethical position about the status of morality, and thus a position largely unrelated to questions about the nature of law and legal systems as we know them.<sup>19</sup> But even within legal theory, the term remains contested between those who adopt the view that natural law entails the belief "that an

14. See DYZENHAUS, *supra* note 5, at 109-19. At issue was the natural justice principle of "*audi alteram partem*" (hear the other side) and it seems plain from Dyzenhaus's description of a series of cases involving Blacks, Communists, trade union activists, and the like that the judiciary was perfectly willing to interpret statutes attempting to limit the right to be heard according to their terms, and thus in favor of the government. But the judiciary did not always deny the right to a hearing, and the claims by the judges involved to be unconcerned with politics ring true. *Id.* at 116-17. Indeed, although Dyzenhaus finds the idea of a "political ideal of judicial responsibility . . . mysterious," he does not deny that the judges appeared to have an apolitical self-conception of their role, as opposed to having a substantive political and thus pro-government and pro-apartheid conception. *Id.* at 118.

15. On the very first page of the Preface to the Second Edition, for example, Dyzenhaus describes the case study as a "vindica[ti]on of] the natural law positions advanced by Lon L. Fuller and Ronald Dworkin rather than the legal positivism associated with H. L. A. Hart." DYZENHAUS, *supra* note 5, at vii.

16. Robert S. Summers, *Legal Philosophy Today – An Introduction*, in *ESSAYS IN LEGAL PHILOSOPHY* 1, 15-16 (Robert S. Summers ed., 1968), cited approvingly in Kent Greenawalt, *Too Thin and Too Rich: Distinguishing Features of Legal Positivism*, in *THE AUTONOMY OF LAW: ESSAYS ON LEGAL POSITIVISM* 1, 24 n.1 (Robert P. George ed., 1996).

17. See JOSEPH RAZ, *BETWEEN AUTHORITY AND INTERPRETATION: ON THE THEORY OF LAW AND PRACTICAL REASON* 9-10 (2009).

18. See, e.g., Kenneth Einar Himma, *Substance and Method in Conceptual Jurisprudence and Legal Theory*, 88 VA. L. REV. 1119, 1152 (2002); Andrei Marmor, *Legal Positivism: Still Descriptive and Morally Neutral*, 26 OXFORD J. LEGAL STUD. 683, 685 (2006).

19. See Mark Murphy, *The Natural Law Tradition in Ethics*, in *THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY* (Edward N. Zalta ed., Fall 2008 ed.), available at <http://plato.stanford.edu/archives/fall2008/entries/natural-law-ethics/>.

unjust law seems to be no law at all<sup>20</sup> and those who recognize that evil law is still law, even as its moral wrongness makes it defective as law, in much the same way that a car that steers erratically is still a car, but defective as a car.<sup>21</sup>

Thus, in characterizing both Lon Fuller and Ronald Dworkin as inhabiting the natural law universe,<sup>22</sup> Dyzenhaus treads on highly contested terrain, and little less so in his description of the characteristics of the positivisms of, for example, Thomas Hobbes, Jeremy Bentham, John Austin, and H.L.A. Hart. There is thus a risk that a book like this one, which attempts to connect some of the traditional debates of legal theory with a real case study of adjudication, will find itself trapped within those debates and trapped within the question of whether those debates are even relevant to, for example, questions about adjudication at all.

Dyzenhaus gives us a way out of the trap, however, by frequently presenting the issue as a contrast between common law and “plain fact” views of adjudication.<sup>23</sup> Putting aside whether “plain fact” adjudication is best so described — the term, after all, comes from Ronald Dworkin,<sup>24</sup> who opposes it on both descriptive and normative grounds — there is a real distinction here, and it is the one that Dyzenhaus seeks primarily to employ. On the one hand, we have a vision of common law adjudication as seeing the rules of the common law as contingent and temporary approximations of a deeper reality. This vision understands common law judges as legitimately empowered to depart from or revise those rules, even while recognizing their gravitational force and presumptive resistance to revision, in the process of deciding concrete cases. And thus this is the understanding captured by Lord Mansfield’s description of the common law as “working itself pure,”<sup>25</sup> by the primary theme of Guido Calabresi’s brief for the application of common law methods even to detailed regulatory statutes<sup>26</sup> and by the view of both John Baker and Gerald Postema that, historically, the common law viewed statutes as mere inputs into the constructive and interpretive processes of the common law judge.<sup>27</sup>

By contrast, the “plain fact” view, one that might plausibly be described as a civil law view but for the fact that actual civil law systems have long departed from it even to the extent they ever held it,<sup>28</sup> sees legislatively made rules as somewhere between strongly presumptive and absolute. When the rules are clear, the judge or other legal

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20. See Philip Soper, *In Defense of Classical Natural Law in Legal Theory: Why Unjust Law is No Law at All*, 20 CAN. J. L. & JURISPRUDENCE 201, 201 (2007) (quoting St. Thomas Aquinas’s *Summa Theologica*) (internal quotation marks and citation omitted).

21. See JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 23-24 (1980).

22. DYZENHAUS, *supra* note 5, at vii.

23. *Id.*

24. RONALD DWORKIN, *LAW’S EMPIRE* 6-15 (1986).

25. *Omychund v. Barker*, (1744) 26 Eng. Rep. 15, 23 (Lord Mansfield).

26. GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* (1982).

27. See JOHN H. BAKER, *THE LAW’S TWO BODIES: SOME EVIDENTIAL PROBLEMS IN ENGLISH LEGAL HISTORY* (2001); Gerald J. Postema, *Classical Common Law Jurisprudence (Part II)*, 3 OXFORD U. COMMONWEALTH L.J. 1 (2003).

28. See FREDERICK SCHAUER, *THINKING LIKE A LAWYER: A NEW INTRODUCTION TO LEGAL REASONING* 107-08 (2009). See generally JOHN HENRY MERRYMAN & ROGEKIO PÉREZ-PERDOMO, *THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE AND LATIN AMERICA* (3d ed. 2007).

actor has no choice but to apply them. This understanding of the plain fact view does not deny the contingent fact that many legal rules are linguistically indeterminate and so require the exercise of policy and moral judgment in their application. Nor does it deny the selection effect, the consequence of which is that the cases in which a legal rule straightforwardly indicates a result are disproportionately unlikely to be litigated, and, if litigated, are disproportionately unlikely to be appealed.<sup>29</sup> But what Dyzenhaus calls the plain fact view still captures a vision that is opposed to the vision of the common law. Under the plain fact view, a legal rule should be followed, applied, and enforced, even if the official doing the application or enforcement believes that the application or enforcement would produce outcomes that are morally defective, unwise as policy, or inconsistent with the deeper purpose lying behind the rule. By contrast, under the common law approach, an application of a rule that possesses any of these defects is legitimately an occasion for the applier or enforcer to revise the rule or to refuse to apply or enforce it on this particular occasion. And regardless of the labels we choose, and regardless of the extent to which these ideal types or prototypes reflect the messiness of actual legal systems, the two ideal types do represent a genuine difference in outlook, a difference in outlook that provides the purchase for Dyzenhaus's arguments.

#### ON WHAT MAKES HARD CASES HARD?

The distinction between the common law view and the so-called plain fact view informs the issue that appears first in the title of Dyzenhaus's book. He describes the questions with which he is concerned as "hard cases," but only under the common law view are the cases that comprise the larger case study hard cases at all. Under the plain fact view, a clear statute prohibiting, for example, blacks from residing in areas designated as white under the Group Areas Act, does not present a hard case when the question is, say, whether a black person living in such a location has violated the Act. Assuming there is no question about whether some black person was actually residing in the relevant locale, the legal question under the plain fact view is not hard at all. An anti-apartheid judge might face hard moral and personal questions about whether to disobey the law, resign his office, and so on, but the clear subsumption of some set of facts under some clear legal rules is not a hard case under the plain fact view.

Under the common law view, however, such a case could well be a hard one. Because a judge under the common law view may legitimately revise a rule which is seen to be bad policy, immoral, or unfaithful to the rule's background purpose, the common law judge faced with such a case is indeed confronted with a hard case. The fact that common law rules have a degree of stickiness as rules, and the fact that even the common law judge must recognize the values of stability and predictability, make clear that the immorality of the existing rule is not a sufficient condition for revising it. Thus, because under the common law view there are reasons to follow the rule and reasons to revise it or fail to apply it, the issue presents a genuinely hard case.

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29. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 517-54 (3d ed. 1986); see also Leandra Lederman, *Which Cases Go to Trial?: An Empirical Study of Predictors of Failure to Settle*, 49 CASE W. RES. L. REV. 315 (1999); George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984); Frederick Schauer, *Judging in a Corner of the Law*, 61 S. CAL. L. REV. 1717 (1988).

That Dyzenhaus uses the common law view to inform his opinion about what constitutes a hard case is no surprise. He clearly prefers the common law view to the plain fact view, a preference driven by moral and political considerations and by Dyzenhaus's moral and political distinction between rule by law and the rule of law.<sup>30</sup> Under the former, laws in the plain fact sense determine outcomes, and this approach is driven by the predictability and stability that consistently and persistently following the clear rules will bring. But the rule of law is something larger for Dyzenhaus, and it is the full range of moral considerations that make law worth having. In this respect, Dyzenhaus's approach to the rule of law is undoubtedly and unabashedly Fullerian, and, according to Dyzenhaus's understanding of Lon Fuller's contributions to legal thought, it was Fuller who provided the conceptual resources that enable us to distinguish the rule of (reasonable) law from rule by (formal) law.

Like Dyzenhaus's distinction between natural law and positivism, his distinction between rule by law and the rule of law usefully connects his case study and his larger agenda with important and longstanding issues about the nature of law and the devices of legality. But like his distinction between natural law and positivism, this distinction between the rule of law and rule by law runs the risk of embroiling both Dyzenhaus and his reader in potentially distracting disputes; in this case, about the very idea of the rule of law. These disputes are indeed intimately connected with what Dyzenhaus sets out to do, but it is not clear how much is added to the potentially more basic, at least in the context of adjudication, distinction between the plain fact view and the common law view. It is in the nature of any rule that it is actually or potentially both under- and over-inclusive with respect to its immediate background justification, and thus with respect to even larger questions of value.<sup>31</sup> Consequently, there is always the possibility that following a rule will produce a result different from and worse than the result that the ideal decision-maker would have produced absent the rule. What to do in such cases is both the enduring question about rule-based decision-making and one of the most enduring questions about legal decision-making generally. With respect to this question, however, Dyzenhaus's distinction between the common law and plain fact approaches provides all that is necessary to grasp both the fundamental question and the stakes that are involved in its resolution.

#### WHY IT MATTERS

Dyzenhaus makes clear his reasons for preferring the common law view. Only under this view, he says, is there the "potential"<sup>32</sup> for the right judge doing the right thing — we could call him Hercules — to use the resources of the law and of his office to make a moral improvement. And although this question resonates with the Hart-Fuller debate, it is important to notice the differences. In arguing against Fuller that legal positivism, as he understood it, allowed an individual or official to separate the question

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30. DYZENHAUS, *supra* note 5, at 223-57.

31. *See generally* LARRY ALEXANDER & EMILY SHERWIN, *THE RULE OF RULES: MORALITY, RULES, AND THE DILEMMAS OF LAW* (2001); FREDERICK SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE* (1991).

32. DYZENHAUS, *supra* note 5, at 254.

of the existence of law (or a law) from the obligation to obey it,<sup>33</sup> Hart said very little about the courses of action open to the lawyer or judge who believes a law to be immoral, but it is worthwhile pausing over this question here. A judge, to take the legal figure at the center of Dyzenhaus's concerns, could resign,<sup>34</sup> but in the normal course of things this is not going to make the law or its most immediate target — perhaps a defendant in a criminal case — better off. Or the judge could simply refuse to follow the bad law, but once again this is unlikely to result in improvement of that law. And since by hypothesis we are dealing with laws whose very clarity appears to dictate the morally unacceptable result, that same clarity will likely make disingenuous interpretation too transparent to be effective.

Thus, Dyzenhaus implicitly makes the plausible claim that a common law approach allows lawyers and judges to make the law better, while the plain fact view condemns the law to the moral state it had when it emerged from the legislature. The asymmetry is important. Under a plain fact view, not every judge will wish to improve the law, but no judge will be able to. And under a common law view, again not every judge will wish to improve the law, but those with the personal and moral inclination to do so will have at their disposal the legal resources to make the changes within the law. And this, it seems, is the very heart of Dyzenhaus's argument.

#### THE DECISION THEORY OF DECISION-MAKING

There is an ongoing dispute in the jurisprudential literature about the nature of the Hart-Fuller debate.<sup>35</sup> Under one view, Hart's advocacy of legal positivism and Fuller's advocacy of his own brand of natural law was a descriptive debate about the nature of law or the nature of the concept of law, with both theorists attempting to identify an existing essence to the very idea of law. And under this view, whether good or bad consequences flowed from one or the other was little more than a byproduct. If a positivist understanding of law was correct, then the fact that desirable consequences flowed from this was largely beside the point.

Under an alternative view, however, Hart and Fuller were engaged in an instrumental debate in which consequences were crucial. According to this view, both Hart and Fuller agreed that non-acceptance of evil governmental directives was desirable, and they were debating about which public and official understanding of the nature of law would best facilitate the desirable outcome, a debate premised on the view that the adoption by a polity of one or another view about the nature of law was in fact a

33. H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958).

34. On why resigning rather than cheating (or lying, if you will) is not necessarily always the better or more moral course of action in such cases, see Frederick Schauer, *The Questions of Authority*, 81 GEO. L.J. 95 (1992).

35. The basic issue is about the possibility (and *not* the inevitability, and not necessarily the desirability) of normatively prescribing what concept of law we ought to have. See Frederick Schauer, *The Social Construction of the Concept of Law: A Reply to Julie Dickson*, 25 OXFORD J. LEGAL STUD. 493 (2005). Hart seems sympathetic to the idea of a normatively-selected concept of law in H.L.A. HART, THE CONCEPT OF LAW 209-11 (Penelope A. Bulloch & Joseph Raz eds., 2d ed. 1994), and also in Hart, *supra* note 34. This interpretation of Hart is questioned in Green, *supra* note 9, at 1039, and perhaps by Hart himself in HART, THE CONCEPT OF LAW, at 240 (the "Postscript", leading Julie Dickson to describe Hart's seemingly two-faced view of the issue as "awkward." Julie Dickson, *Is Bad Law Still Law? Is Bad Law Really Law?*, in LAW AS INSTITUTIONAL NORMATIVE ORDER 161, 164 (Maksymilian Del Mar & Zenon Bankowski, eds., 2009).

matter of choice. The choice would be exercised implicitly and gradually, but it would be a choice nonetheless.

Whether legal positivism and natural law are outlooks that can be or should be chosen on instrumental grounds remains a subject of considerable debate,<sup>36</sup> even apart from what Fuller or Hart may have believed. But it is far less debatable that the choice between a plain fact and a common law view of what judges should do is in fact a choice. The contrast between common law and plain fact adjudication is a question of institutional design, and thus the issue, for Dyzenhaus and anyone else, is the question of the circumstances under which it is better for a society to choose one or another style of judging or to choose one or another understanding of just how legal actors should treat the rules that are made by legislatures and other governmental bodies.

That this is clearly a choice should be obvious, but it is less obvious how this choice should be made. For Dyzenhaus, as with Fuller before him, the common law style is clearly preferable, and preferable on moral grounds, because it is the style that provides good judges with the resources to improve evil law. But as Dyzenhaus explicitly recognizes,<sup>37</sup> it is also a style that gives morally misguided judges greater resources to undercut morally enlightened legislation.

Yet although Dyzenhaus recognizes the possibility of a perverse (from his perspective) use of the common law style of adjudication, he quickly dismisses it, and it is not quite clear whether he dismisses it acontextually, or whether, consistent with his case study, he seeks only to show that the common law style would have produced better outcomes in apartheid South Africa than the outcomes that were in fact produced. The latter may well be so, but if the point is to be generalized than the generalized conclusion must be based on the empirical assumption that judges are, in general, more morally sensitive than are the legislators in the same regimes. This is possibly true, but it may not be, and if it is false, then a common law style will empower those who are less morally enlightened to undercut the efforts of those who are more so.

This is a familiar debate in most legal systems. Justice Story was clearly correct in observing that it is a mistake to argue against a power from the possibility of its abuse.<sup>38</sup> But the truth of Justice Story's observation does not undercut the value, in any question of institutional decision-making design, of carefully assessing the decisions likely to be made by one or another decision-making institution, and of allocating power among institutions based on that assessment. Common law, as opposed to plain fact adjudication, is just such a question of institutional design and allocation of decision-making power. And although it is true that the common law approach creates a potential for improvement of bad law and that the plain fact approach makes it more difficult, whether the expected value of any improvements in bad law is greater than the expected harm of any erosion of good law is hardly a calculation that can be expected to be even

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36. See sources cited *supra* note 35. See also Liam Murphy, *The Political Question of the Concept of Law*, in HART'S POSTSCRIPT: ESSAYS ON THE POSTSCRIPT TO THE CONCEPT OF LAW 371 (Jules Coleman ed., 2001); Liam Murphy, *Better to See Law this Way*, 83 N.Y.U. L. REV. 1088 (2008); Jeremy Waldron, *Normative (or Ethical) Positivism*, in HART'S POSTSCRIPT, *supra*, at 411.

37. DYZENHAUS, *supra* note 5, at 171.

38. *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816).

roughly the same across all legal systems and across all regimes at all times and under all circumstances.

#### IS LEGAL THEORY CAUSAL?

The plain fact view and the common law view are theories of adjudicative power. And one of the interesting features of South Africa is that its so-called Roman-Dutch legal system, perhaps better understood as an amalgam between the somewhat more civil law, and thus plain fact, view of Dutch law, and the somewhat more common law view of English law, might plausibly be understood as creating a degree of discretion among judges about which style to adopt at the margins. Although common law and plain fact approaches co-exist within most modern legal systems, the fact that South Africa has a rather more formal combination of common law and civil law elements makes the co-existence more salient and the opportunity to choose one or the other at any time more overt. Thus, the judges that Dyzenhaus admires are those who took on a common law view that plainly had some currency within their legal system and then used that view to ameliorate, at times, some of the worst excesses of apartheid. Conversely, the judges that Dyzenhaus condemns are those who adopted a plain fact view that also had currency within the legal system, and accordingly accepted and literally applied most of apartheid law according to its enacted terms.

But the causal relationships here are far trickier than Dyzenhaus appears to assume. In order for adoption of the plain fact view to be a problem, there must exist some number of judges who would have been personally inclined to ameliorate apartheid law but were disabled from doing so because their internalization of the plain fact view blinded them to the opportunities they in fact possessed. In this respect, Dyzenhaus's empirical presuppositions resemble those of Cover and Radbruch. Cover claimed that the northern judges who enforced the Fugitive Slave and other slavery-supporting laws did so because they had an obedient view of formal law, rather than because they thought the Fugitive Slave laws were desirable.<sup>39</sup> So too with Radbruch, whose claim was that German lawyers and judges went along with Nazi law because of a "law is law" mindset, and not because they were sympathetic to the substance of Nazi law.<sup>40</sup> Thus, Dyzenhaus's claims about the deleterious effects of a plain fact view presuppose a critical mass of judges and lawyers opposed to apartheid who were disabled from acting on that view because they remained in the thrall of a disabling legal theory.

How much of this assumption is actually true is an empirical rather than philosophical question. In the late 1960s and early 1970s, the signature laugh line of the comedian Flip Wilson was "the devil made me do it." And it was a laugh line because it was understood that the character Wilson was portraying actually wanted to engage in various unseemly acts — usually involving women, alcohol, gambling, or all of them combined — but after the fact was trying to disclaim responsibility by blaming the devil

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39. As Cover made clear throughout his book, COVER, *supra* note 3, sympathy for the Fugitive Slave laws on the part of northern judges was more likely to have been based on a belief in the necessity of certain compromises in order to save the union than on genuine belief in the desirability of slavery.

40. See Brand-Ballard, *supra* note 6, at 9.

rather than himself.

There is something analogous in the “positivism made me do it” complaints of Radbruch and of Cover’s explanation of the acts of the judges who enforced the Fugitive Slave laws. Even assuming that Radbruch did not approve of the substance of the Nazi laws, and even assuming that the judges of whom Cover was writing did not endorse slavery, the desire to go along with the crowd is a strong motivation for many people. To the extent that that is so, it is hardly clear that, freed from the alleged shackles of the wrong legal theory, Radbruch or Cover’s judges would have behaved differently. Nor is it clear that, freed from the straitjacket of a plain fact view of law, the judges that Dyzenhaus condemns would have been inclined to make moral improvements in apartheid law. Apartheid, after all, did not persist without the active support or passive endorsement of vast numbers of whites, both English and Afrikaner. It is virtually inconceivable, therefore, that such actively supporting or passively endorsing whites were absent from the judiciary and the legal profession. There were indeed many heroic whites in the fight against apartheid, and Dyzenhaus appropriately features many of them. But whether having the wrong theory of adjudication exacerbated the wrongs against which these heroes were fighting requires knowing far more about the predilections of the judges and lawyers who adopted the allegedly wrong theory than appears to exist anywhere in the literature.

#### CONCLUSION

“If you have a hammer, every problem looks like a nail,” the venerable adage goes. And it is an adage of particular relevance here. Hart’s claim that one could recognize wicked law as law and still condemn or disobey it was analytically impeccable, but it leaves open an important empirical question: If people are trained exclusively in the formal law, and if their profession leads people to consult them because of their expertise in formal law, will they, as a consequence, be more inclined to see all problems as problems of formal law, just as the hammer-owner in the adage sees all problems as nails? Whether this is so is a psychological and not a philosophical question. But it is hardly implausible to suppose that a degree of professional inculcation that stressed the technical would produce some withering of the moral.

That this is a possibility does not make it a certainty, or even a probability. But the possibility may further reinforce the idea that many of Dyzenhaus’s theoretical claims become more or less plausible depending on the outcome of just this kind of empirical investigation. If apartheid-opposing individuals were, because of their formal and technical legal and judicial training and practice, less inclined to resistance than would otherwise have been the case, then Dyzenhaus’s normative arguments have a special resonance. But if lawyers and judges followed the letter of the law not because of the style of their legal training or the prevalence of a disempowering theory of adjudication but because they were in fact comfortable, for whatever reasons, with apartheid, then the moral importance of the distinction that Dyzenhaus stresses diminishes. It certainly makes a difference if a legal system is a plain fact system or a common law one, but whether it makes a moral difference, and the kind of moral difference it makes, may depend ultimately on the moral inclinations of lawyers and judges. What those moral

inclinations are in this or that legal system, and whether those moral inclinations are affected by styles of legal training or theories of adjudication or theories of law, are irreducibly empirical questions that even the best of jurisprudential thinking cannot answer. The singular virtue of Dyzenhaus's important book is in connecting sophisticated jurisprudential thinking with a detailed case study attempting to show the connection between the theory and the practice. But whether the theory connects with the practice in the way in which Dyzenhaus suggests, may vary more from system to system than even he appears to suppose.