MORAL ARGUMENTS FOR LEGAL THEORIES

AN IMPOVERISHED DIRECTION:

MORAL ARGUMENTS FOR LEGAL THEORIES

By

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ABSTRACT

In this dissertation, I aim to demonstrate that the debate between legal positivism and natural law theory cannot be settled through moral argumentation. To demonstrate this point, I lay out three criteria that must be fulfilled if a moral argument for a given theory is to succeed. I then examine arguments that have been put forth in the past in reference to the behaviour of citizens as well as judges. By showing the difficulty these arguments have in satisfying the three criteria, I simultaneously cast doubt on the possibility that future arguments of this kind will be successful. My aim is to put an end to a current trend in jurisprudence—choosing a conceptual theory of law on moral grounds. By doing so, I hope to refocus the debate on descriptive jurisprudence.

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Introduction

Legal philosophy, and the difficulty this discipline encounters, may be best captured by St. Augustine's understanding of time:

> What then is time? If no one asks me I know: if I wish to explain it to one that asks I know not.[1]

Similarly, law has this familiar but illusive personality. It is a human institution that serves, minimally, as a framework for our lives; and like our lives, it too has a dynamic element which further contributes to the philosophical problem of explaining it. Brian Bix illuminates this complication by posing the question: when is change an alteration of the existing system, and when does it mark the birth of a new system?[2] Further difficulties arise when we try to elucidate law over both temporal and cultural boundaries: is there some constant that can be located amongst all the differences?

H.L.A. Hart, among many others, believes that there is. Hart nicely elucidates his understanding of the philosophical project that he pursues in *The Concept of Law*:

> For its [*The Concept of Law's*] purpose is not to provide a definition of law, in the sense of a rule by reference to which the correctness of the use of the word can be tested; it is to advance legal theory by providing an improved analysis of the distinctive structure of a municipal legal system and a better understanding of the resemblances and differences between law, coercion, and morality, as types of social phenomena.[3]

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[1] H.L.A. Hart, The Concept of Law. 2nd edition. (Oxford: University Press, 1994), 14. Henceforth known as CL .

[2] Brian Bix "Patrolling the Boundaries: Inclusive Legal Positivism and the Nature of Jurisprudential Debate." The Canadian Journal of Law and Jurisprudence. (Vol.12, 1999), 28.

[3] CL, 17.

Many philosophers, Hart included, have spent a considerable amount of time fleshing out the relationships among the above concepts; one of the central areas of debate remains the complex relationship between law and morality.

Hart follows the positivist tradition and maintains that there is no necessary connection between law and morality. Like John Austin before him, Hart contends that "the existence of law is one thing; its merit or demerit is another."[4] This is labelled the positivists' 'separability thesis'; in the words of Hart *this means* "it is in no sense a necessary truth that laws reproduce or satisfy certain demands of morality."[5] While any given legal system may succeed in meeting such demands, it remains a conceptual possibility that a legal system could fail miserably in this respect and be categorized as wicked.[6]

This view stands juxtaposed to a natural law theory which contends that law must meet certain moral standards if it is to be truly law. For example, Aquinas defines law in the following manner: "Law is nothing else than an ordinance of reason for the common good, promulgated by him who has the care of the community."[7] If any precept put forth by the relevant government officials fails to meet the above criteria, then it does not

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[4] CL, 207.

[5] CL, 185-86.

[6] It is worth mentioning that there are two general branches within legal positivism: inclusive legal positivism or ILP, which states that legal validity may very well be dependent on the satisfaction of moral criteria in a given order; and exclusive legal positivism or ELP which states that the existence of law is determined only by criteria which deals with laws' pedigree or source. This distinction will become relevant later in this paper.

[7] Aquinas, St. Thomas, Summa Theologica, The Basic Writings of Saint Thomas Aquinas. (New York: Random House, Inc., 1945), 44.

qualify as law in the truest sense. In other words: "an unjust law seems to be no law at all."[8] My current interest, however, is not to declare a winner in this conceptual contest, rather I wish to address a current trend in jurisprudence: arguing for conceptual theories of law on moral and/or political grounds.

A number of theorists believe that the jurisprudential debate cannot be decided on descriptive grounds and thus they look to the potential moral and political effects the different theories of law can have in order to settle the debate. Given that law is an institution whose practical import is not incidental, it seems reasonable to suppose that our understanding of law may have an effect on our behaviour. Fredrick Schauer draws a disanalogy to make this same point:

> As against the assumption that theories of the practice will affect the practice, it could be argued that an explanatory legal theory will have no more of an effect on the law as a practice than an explanatory zoological theory will have on the behaviour of frogs. In the case of institutions such as law, however, the frog analogy seems strained, as it is likely that theories of the institution, even theories with only descriptive or explanatory (rather than prescriptive or normative) pretensions, may in the long term influence social understanding of the institution itself, and so may in turn affect the longer-term definition, nature, and staffing of the institution.[9]

This reciprocal relationship between the practice of law and our understanding of it seems plausible enough and I in no way wish to deny its existence. Yet I do want to sharpen the question: do any *particular* practical consequences result from the adoption

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[8] Ibid., 23. Here I am briefly outlining the traditional natural law position. In the third chapter I will be examining a more modern position of this kind—namely that of Ronald Dworkin.

[9] Fredrick Schauer, "Positivism as Pariah." in The Autonomy of Law: Essays on Legal Positivism. Edited by Robert P. George (New York: Oxford University Press, 1996), 33.

of any particular conceptual theory of law? More specific still, the question I wish to raise in this paper is whether there are any political or moral consequences that will result from the adoption of either legal positivism or natural law theory.

The distinction between *practical consequences* and *particular practical consequences* is of the utmost importance in this context. A current trend in jurisprudential circles, as we shall see, is to argue for a conceptual theory based on its supposed consequences in the practical world. Yet these arguments only hold weight if *particular* practical consequences can be confidently linked with a given conceptual understanding of law: it only makes sense to fault a theory if it is consistently connected with morally undesirable behaviour.

Note that there is the related question of whether such grounds should decide the debate in the legal arena. While I do not focus on this question, it is indirectly addressed by my thesis. I do not think that the accuracy of a given conceptual theory seeking to explain law is dependent on its practical import even if such practical import was identifiable. As can be deduced, I endorse Hart's descriptive methodology. However, since I aim to disprove the thesis that particular practical consequences follow from a given conceptual theory I am also simultaneously denying the methodological approach that attempts to settle the debate in reference to such consequences. Before I proceed any further, I wish to draw the reader's attention to some relevant distinctions.

There is an important distinction between a theory of law, a theory of adjudication, and a judicial method (which I also refer to as a judicial approach). A theory of law seeks to answer the question "what is law?" The answer usually involves an explanation

of the features of a legal system, its functions, its structure, and often its relationship to other concepts like law and morality. A theory of adjudication is a "theory about how judges do or should decide legal cases."[10] When articulating a theory of adjudication, it is likely, if not necessary, that the theorist outline a judicial method. This refers to the approach or reasoning process that a particular judge uses to decide cases. Some examples of judicial methods that will soon become relevant include the plain-fact method, in which judges seek to apply statute law in a manner that is consistent with the legislative intentions behind the statute, and the Dworkinian approach, which requires judges to make principle-based decisions that put the law in "its best moral light."[11] The importance of these distinctions will become clearer as the argument progresses.

I will now take a moment to situate my project in the current debate and give further content to the positions just touched upon. I will then articulate my thesis with more precision prior to outlining the structure of my argument.

Making an Argument on Moral and Political Grounds

In the *Concept of Law*, Hart explicitly states that one must resort to practical and/or moral arguments in order to choose between the different concepts of law:

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[10] W.J. Waluchow, Inclusive Legal Positivism. (Oxford: Clarendon Press, 1994), 32.

[11] It is also worth noting that Dworkin's theory is often understood as a theory of law that arises out of a theory of adjudication. This is important to keep in mind since it explains why Dworkin's theory is both a competitor with other theories of law like legal positivism and other judicial methods such as the plain-fact approach.

> If we are to make a reasoned choice between these concepts, it must be because one is superior to the other in the way in which it will assist our theoretical inquiries, or advance and clarify our moral deliberations, or both.[12]

An even more blatant moral endorsement of legal positivism put forth by Hart is the following:

> This sense, that there is something outside the official system, by reference to which in the last resort the individual must solve his problems of obedience, is surely more likely to be kept alive amongst those who are accustomed to think that rules of law may be iniquitous can anywhere have the status of law. [13]

However, these seem to be odd assertions for Hart to make since they appear to be contrary to his descriptive explanatory project—a project that prides itself on its morally neutral stance. In the *Postscript*, Hart responds to this charge (specifically to Dworkin) and reaffirms the moral neutrality of his project:

> My account is *descriptive* in that it is morally neutral and has no justificatory aims: it does not seek to justify or commend on moral or other grounds the forms and structures which appear in my general account of law though a clear understanding of these is, I think, an important preliminary to any useful moral criticism of law.[14]

While Hart still endorses such moral/political investigations, he makes it clear that they are not internal to his central project. He adds, however, that his descriptive theory can be a starting point for successful inquiries of this kind. Hence the choice between theories, if it is to be made in a way that is consistent with the Hartian project, must be made on conceptual grounds.

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[12] CL, 209. It can be seen how this assertion could have served as a seed for many projects that argue for a particular conception of law on grounds that are not themselves conceptual

[13] Ibid., 210.

[14] Ibid., 240.

Waluchow also draws our attention to the methodological inadequacy of choosing a conceptual theory on political and moral grounds. He states that there is "something very odd about attempting to refute a descriptive-explanatory thesis in this way."[15] Since our concern with this kind of project is philosophical understanding, our question should not be "whether it is a good thing for morality and law to be connected" but "whether they are connected."[16] Waluchow agrees with Hume that an opinion cannot be deemed false simply because there are dangerous consequences of holding it. He illustrates this point with the example of the Copernican Revolution: the social chaos attributed to this scientific discovery in no way refutes its truth.[17] Similarly, even if a certain understanding of law is found to lead to undesirable social consequences it may still prove to be the best concept. Again, I will restate that this paper aims to deny such connections and thus refocus the debate on the descriptive methodology.

Yet the very question of the nature of the debate is a lively one in legal philosophy. There are a number of theorists who call into question the very possibility of the descriptive approach endorsed by Hart and Waluchow, among others. Such theorists include the likes of Fredrick Schauer, Leiter, Perry, and Brian Bix. Liam Murphy, whose position will also be looked at, believes that the descriptive project is valuable but limited: this methodology can give us insight but it cannot ultimately settle the debate between the warring conceptions of law. What these theorists have in common is that

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[15] W.J.Waluchow, Inclusive Legal Positivism, 88.

[16] Ibid. These questions, which Waluchow cites, are quotations he takes from Soper's article "Legal Theory and the Claim of Authority." Philosophy and Public Affairs (Vol. 18, 1989, Issue 3), 214.

[17] Ibid., 89.

they each argue for a particular conception of law based solely or partially on practical arguments that usually centre on moral and/or political concerns.

Brian Bix is one of the legal philosophers who expresses scepticism regarding the viability of the descriptive project in the legal domain. Bix draws a distinction between descriptive projects in the physical sciences and social sciences and descriptive projects that are theoretical in kind. He notes that the answers given to questions like "How is light distorted by travel through daylight?" and "What effect did Protestant thought have on the rise of Capitalism?" are different in a significant way from theoretical questions like "What is art?" and "What is law?" The former projects attempt to describe the world by posing questions of "cause and effect that are in principle testable, through controlled experiments, careful observation, or the analysis of past events."[18] The central point is that the explanations settled upon are falsifiable—they can be modified or replaced if they fail to explain new data or if a theory is proposed which better explains the existing data. This is what happened when Copernicus hypothesised that the planets revolved around the sun not the earth: he gave us a theory that better accounted for the data we had pertaining to planetary motion.

Bix, however, maintains that questions pertaining to art and law are different in a way that significantly complicates, and potentially undermines entirely, the descriptive project in reference to these disciplines. He argues that questions like "What is art" or "What is law?" attempt to delineate categories and fail to be *testifiable* or *falsifiable* in

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[18] Bix, "Conceptual Questions and Jurisprudence." Legal Theory. (Vol. 1,1995), 466.

any obvious way: they lack the criteria that he sees as central to a descriptive project.[19] He illustrates this shortcoming by outlining some common criteria often used to explain why a certain artefact is not a piece of art:

> It does not have sufficient quality, it was not created with the requisite intention, it is too functional or practical, or it is tied too closely into daily life or religious belief.[20]

Which of these criteria are most central? Which are peripheral? When does an artefact cross the threshold from art to practicality? These questions do not have answers that are transparent, and when disagreement arises (which it often does) both the method of resolution and the very nature of the disagreement are often unclear. Similar difficulties arise when two people disagree as to whether the apartheid legal system in the Old South Africa qualifies as law.[21]

Moreover, Bix attributes the added obscurity surrounding such theoretical investigations to the complex connections of concepts like 'law' and 'art' to the empirical world. He even asserts that "[t]here is something basically paradoxical about putting forth a descriptive theory about a social institution or a social phenomenon. Social practices change, and it is not clear why other regularities of the past would affect our understanding of the present."[22]

I believe, however, that the above claim is over-stated—while attempts to understand human institutions such as law are complicated endeavours (for reasons that have been touched upon thus far, and reasons that will be mentioned in the remainder of

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[19] Ibid., 467.
[20] Ibid., 466.
[21] Ibid., 467.
[22] Ibid.

this paper). It is reasonable to maintain that there is enough commonality and regularity among different societies to make an investigation into law both possible and worthwhile. After all, we can continue to live with expectations of regularity and are seldom disappointed. The institution of law does not disqualify itself as a legitimate object of study simply because it has changed in the past and may change in the future. And while our concept must have boundaries to be meaningful, these boundaries need not be arbitrary or static. More importantly, we should not pre-suppose such conclusions prior to beginning the investigation. I will now turn to Liam Murphy's position, since it fleshes out the second step of the argument: the utilization of moral and political criteria to decide the jurisprudential debate.

While Liam Murphy believes the descriptive project has some use, he is doubtful that the debate can be settled on descriptive grounds; especially since one of the central competitors—Ronald Dworkin—puts forth a normative theory of law. In his view, moral and political arguments will tip the balance where description cannot.

Murphy makes an argument for legal positivism on purely moral and political grounds. He locates his argument in the Hart/Dworkin debate and outlines what he labels their substantive disagreement:

> Where they differ is that Dworkin believes, but Hart does not, that our political culture is better served if we understand law such that moral considerations play a role in its determination independently of social facts; Dworkin believes, but Hart does not, that it is politically for the best to understand law in such a way that shows it in its best light.[23]

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[23] Liam B. Murphy, "The Political Question of the Concept of Law." Draft. Forthcoming in a volume of essays regarding the Postscript to The Concept of Law, edited by Jules Coleman, 3.

This disagreement, according to Murphy, cannot be resolved on conceptual grounds; the superior understanding of law will surface only through moral and political argumentation. Murphy explains:

> This disagreement will survive, I believe, abstract reflection about the very idea of law. If this is right, then Hart and Dworkin's disagreement about the "proper" understanding of the concept of law cannot be adjudicated by any philosophical investigation into "our" concept of law.[24]

The deadlock must be broken by asking why the debate matters.[25] Murphy's answer is that the "political dimension of the dispute over the concept of law matters more than any purely intellectual concerns we might have."[26] It follows on Murphy's account that "[w]e must therefore approach the conceptual question about law as a practical aspect of political theory. The debate over the concept of law is a political argument for control as it were, over a concept of great ideological significance."[27] The theory, which yields the most favourable results in the realm of morality and politics, will be crowned victorious.

Unlike Murphy—who believes the winner of the debate will be *chosen* on moral and political grounds, Fredrick Schauer argues that little hinges on whether a certain conceptual theory is understood as a product of discovery or choice:

> But not much turns on whether the enquiry is labelled as one of choice or one of discovery. If one is a moral realist, and if one believes as well that the phenomena of law is a morally natural kind, then locating the contours of that kind will present itself as a task of discovery rather than choice. And if one is either an anti-realist, or a realist but does not believe that the phenomenon of law

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[24] Ibid.
[25] Ibid.,18.
[26] Ibid.,19.
[27] Ibid.,19-20.

> is a moral primary, then the task will look less like discovery and more like instrumental choice.[28]

What Schauer is concerned about rather, is that "under either approach, the task of defining law will not be one that takes the definitional task to be devoid of moral compass or consequence."[29] Schauer explicitly rests his argument on the assumption that the debate in legal philosophy has practical import: "I assume as well that theories of law can make a difference in practice, and that the difference they can make is an appropriate consideration for the legal theorist."[30] I wish to reverse these assumptions: I will not begin with the assumption that any particular theory will have any particular practical consequences. And if it is found that none does (which will largely be my argument) then basing one's argument on such grounds will be illegitimate. Hence the methodological approach put forth by Liam Murphy, Frederick Schauer, Neil MacCormick, and others, will be called into question: if no particular practical consequences follow from the theories in question, then their arguments, which are based on these assumptions, are nullified. Let me now articulate precisely what I mean by particular practical consequences and how a theorist would successfully establish an argument that demonstrated the moral or political superiority of a given theory of law.

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[28] Fredrick Schauer, "Positivism as Pariah," in The Autonomy of Law: Essays on Legal Positivism, 34.
[29] Ibid.
[30] Ibid., 32.

My Argument

My aim in this paper is to demonstrate that the jurisprudential debate is incapable of being decided on moral and/or political grounds. To do so I will forward my thesis that *no particular practical effect follows from the adoption of a particular conceptual theory of law.* Henceforth this thesis will be referred to as PPET (the Particular Practical Effect Thesis). However, this formulation of my thesis does not fully communicate my position. In order to articulate all that is involved with PPET, I will outline the three criteria that a theorist must establish if she is going to undermine it. I am therefore placing the onus on the theorists who wish to decide the jurisprudential debate on moral or political ground to prove that such a project is sound. In chapters one through three, I will demonstrate the failure of previous attempts to establish the necessary criteria while simultaneously drawing the reader's attention to the likelihood that future arguments of this sort will not meet with any greater success. The first chapter will examine whether positivism or natural law theory can be linked with confidence to particular practical effects in reference to citizens; more precisely, whether citizens are more complacent or contentious as a result of their theoretical leanings. The second and third chapters will examine a similar question in relation to the judge: can a connection be drawn between a judge's conceptual understanding of law and a particular practical effect?

In order to understand the kind of connections that must be established between the theoretical and the practical if PPET is to be disproven, we must look at the criteria that

need to be fulfilled in order to successfully put forth a jurisprudential argument on moral or political grounds. The three criteria are as follows:

> *C1: The theorist must be able to establish a pattern of behaviour that confidently links a particular legal theory to a particular practical effect.*

While the theory in question does not *always* have to lead to the particular practical effect in question, a confident connection needs to be established that would make it reasonable to believe that if the individual in question adopts a particular theory there will likely be a particular practical effect. It is important to note that an empirical claim is not enough to establish C1. Even if a theorist can point to a pattern of judicial decision-making furnished by judges who all claim to be positivists, she still must prove that positivism, and not some other variable, is responsible for the pattern. One must expect that if a given legal system educated judges to endorse the theory of law in question, the judges would furnish a similar pattern of decision-making.[31]

If the theorist succeeds in fulfilling C1, she must then fulfill C2:

> *C2: The pattern must carry moral and/or political weight: it must be capable of being evaluated as desirable or undesirable on these grounds.*

If moral and political grounds are going to be used to decide the debate in jurisprudence, then clearly the pattern established must be of moral or political significance. Those arguing for particular practical effects in the judicial arena have the task of convincing the reader that the pattern of decision-making that fulfills C1 is either morally and/or

[31] The "Reduce the Risk Argument" (RRA) in chapter three will demonstrate that the opposite need not be proven: a theorist need not demonstrate that if a judge converts from one conceptual understanding of law to another, that the pattern will necessarily change. This argument examines the possibility that a theory is to be preferred not because it is the only theory compatible with morally good results, but because it is less likely to lead to morally questionable patterns of decision-making.

politically desirable or undesirable. For example, whether citizens are critical or complacent is significant in this manner: a conscientious citizen who scrutinizes the law is, almost without a doubt, morally preferable to a citizen who blindly obeys official directives. In the judicial arena, as we will see, the moral evaluations prove to be less straightforward. As a result, establishing C2 becomes even more challenging. However, if a theorist does succeed in fulfilling C1 and C2, she must still satisfy C3:

C3: C1 and C2 must extend beyond a particular context.

If it is discovered that a certain conceptual theory leads to certain particular practical effects in a particular legal system (for example the apartheid system in South Africa), this is not enough to demonstrate that theory X is morally better than theory Y universally. Since the jurisprudential debate is occurring at the universal level of theory, the theory in question must be shown to bring about desirable or undesirable effects consistently and, at least to some extent, acontextually. The minimal requirement for the achievement of C3 is that the theorist must be able to demonstrate that C1 and C2 are fulfilled in legal systems that are of a single kind: for example a given theory (i.e. legal positivism) leads to a morally undesirable pattern of judicial decision-making in 'wicked' legal systems. Furthermore, the theorist must also prove that the theory in question, in this case legal positivism, does not lead to morally desirable patterns of judicial decision-making in other legal systems or kinds of legal systems. For if positivism is proven to furnish morally desirable effects in one legal system and morally undesirable effects in another, there are no moral grounds on which to praise it or condemn it: those who wish to settle the jurisprudential debate on moral grounds cannot declare positivism the winner

or the loser. As we will see, making the acontextual claims that are necessary to fulfill this criterion is a difficult task. Let me now outline the way in which my argument will unfold for the remainder of this paper.

Chapter one, as previously mentioned, will centre on the citizen. The first discussion will focus largely on the responses of citizens in the face of claims put forth by their governments. The concern is as follows: if the officials of a given legal system present their laws in accordance with natural law theory or legal positivism, are the citizens more likely to be complacent or contentious? The fear is that if officials couch statements about their regime in the language of natural law they will surround their laws in a moral aura—a moral aura that may not be warranted. The citizens may take these claims at face value and fail to actively assess the regime and its laws. A similar fear is articulated in reference to positivism: officials may take advantage of the authority law seems to have in and of itself and demand compliance from the citizens simply because "law is law." I will argue against both possibilities by demonstrating that a citizen's conscientiousness is independent of the *kinds of claims* put forth by the regime in question. As a result, C1 has not been established: the requisite pattern of behaviour will be the result of the critical disposition of the citizens and not the nature of the claims made by government officials.

There are two other arguments addressed in this first section. The first argument of the entire chapter examines whether or not anarchistic behaviour on the part of the citizen could be linked with her endorsement of natural law theory. Unlike the arguments outlined above, this one assumes that the individual, and not the officials, endorses

natural law theory. Again, I will argue against this possibility and reaffirm PPET. The final argument of this section will address whether the presence of a natural law filter[32] in a given regime may prove to have a particular practical effect on the behaviour of citizens. As to be expected, I also deny the ability of this link to undermine PPET.

In the second section entitled "Escaping One's Framework" I will no longer be concerned with the citizen's reaction to her government's endorsement of a given theory; instead I am concerned with potential practical consequences following from her endorsement of a given theory. My response, once again, will be to deny that her endorsement of a given theory will lead to any particular kind of behaviour, thereby reaffirming PPET. I do so, largely, by revealing that many theorists who endorse a theory on moral grounds fail to depart from their own conceptual framework.

Chapters two and three will examine the possibility that PPET could be undermined in the judicial arena. In other words: does a judge's endorsement of either positivism or a natural law theory lead to morally desirable or undesirable patterns of decision-making? Chapter two will answer this question in reference to legal positivism while chapter three will pose this question in reference to Ronald Dworkin's theory—a theory that can be understood as a modern version of natural law.

David Dyzenhaus' discussion of South African law will be used as a foil for my argument. Dyzenhaus puts forth an argument for natural law theories, such as Dworkin's, on purely moral grounds. He claims that judges in his case study who endorsed positivism rendered morally problematic verdicts—verdicts that served to

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[32] The term "natural law filter" will be explained at the start of this argument. See chapter two, footnote 20.

reinforce apartheid. Conversely, he states that judges who were conceptually aligned with natural law theorists like Dworkin rendered morally praiseworthy verdicts. By highlighting the numerous shortcomings in his argument, I simultaneously give credence to PPET.

In chapter two I will disprove Dyzenhaus' claims about legal positivism. My over-all approach is two-fold: I will sever the connection Dyzenhaus draws between positivism and the plain fact method and then I will demonstrate that the positivist judge can incorporate principles into adjudication. Hence I will illustrate Dyzenhaus' failure to satisfy the three requisite criteria, while also casting doubt on the possibility that future attempts will be more successful in doing so.

The last section of this chapter examines the possibility that a practical difference of the kind we are seeking can be located in the debate between exclusive legal positivism and inclusive legal positivism. While I do recognize a scenario where the judge's conceptual belief does make a practical difference, I draw attention to the number of variables that must be aligned for a practical difference of this kind to surface. Thus I shall reveal the challenges that C1 presents and then proceed to question the possibility of a theorist fulfilling C2 and C3.

The final chapter grants Dworkin the spotlight. I consider a slightly different line of argumentation that could threaten PPET. I call this argument the "Reduce the Risk Argument" or RRA. This argument recognizes that legal positivism is consistent with a range of judicial approaches. In reference to Dyzenhaus' case study, RRA acknowledges that a positivist judge was capable of rendering decisions that supported apartheid policy

as well as decisions that undermined these same policies. However, RRA also recognizes that the Dworkinian method always looks to principles and hence may be more likely to lead to morally desirable decisions than the positivist judge. In other words, if we endorse Dworkin's theory, we 'reduce the risk" of morally problematic judicial decisions.

I argue against RRA in the following manner: 1) I deny that Dworkin's adjudicatory approach leads to a single foreseeable decision in practice—this illuminates the challenge presented by C1; 2) I deny that Dworkin's theory leads to morally desirable effects in wicked legal systems; 3) A comparison between apartheid law and Nazi law highlights the problems with fulfilling C3. I conclude that RRA does not damage PPET. Let us now consider these arguments in detail.

Chapter 1: Conceptual Theories of Law and the Behaviour of Citizens

Let us begin by examining the criticisms that have been launched against natural law theory. Bentham claims that the natural law theory is dangerous as it could lead to two extremes: anarchy or reactionary thinking. The claim being made is causal: the assertion is not that natural law theory gives the individual a good reason for assuming one of these two stances, rather "[t]hat we are less likely to encounter this fallacious drift towards morally pernicious doctrines" if we accept the positivist theory.[1] Anarchical thinking and behaviour would result when the citizen judges that the laws in question (i.e. those precepts dictated by her government) are not laws in the truest sense as they fail to meet the moral criteria that natural law requires, and hence she chooses to disobey them. Liam Murphy correctly points out that "this argument supposes that people's decisions whether or not to obey apparent law are based solely on their determination of whether an apparent law is, indeed law."[2] Waluchow agrees that there is no logical connection between the natural law theory and this outcome; he rightly draws our attention to Aquinas' statement that "unjust human enactments purporting to be law must sometimes be obeyed in order to 'avoid scandal and disturbance.'"[3] He also notes Aquinas' belief that the sovereign is to have absolute authority in 'temporal matters' and is answerable for his injustices only to

[1] W.J. Waluchow, Inclusive Legal Positivism, 88.
[2] Liam Murphy, "The Political Question of the Concept of Law," draft, 28.
[3] W.J. Waluchow, Inclusive Legal Positivism, 92.

God. Waluchow is correct to conclude that "[t]his is hardly anarchistic thinking."[4] Since the morality of the law is not the only factor that determines whether or not the citizen obeys it, Bentham has not fulfilled C1 in reference to this line of argument.

What about Bentham's second charge: that natural law theory invites reactionary thinking? The citizen who adopts a theory of natural law will accept the law on the assumption that it passes the relevant moral tests: "[t]his is the law, therefore it is what it ought to be."[5] This kind of uncritical approach is referred to as "quietism." As Soper notes, MacCormick launches a similar criticism in his article "A Moralistic Case for Amoralistic Law?":

> If we insist that nothing is really 'law' unless it passes a substantive moral test as well as a 'formal sources' test, we risk enhancing the moral aura which states and governments can assume, even if our true hope is to cut out of the realm of 'law' evil and unjustifiable acts of legislation and of government.
>
> The argument of last resort here is an argument for the final sovereignty of conscience, and how best to preserve it... [A] powerful case, and perhaps a sufficiently powerful case, can be made out for the positivist position on purely practical and moral grounds. [6]

According to MacCormick, it is the positivist view that will bring about the desired critical attitude. Soper argues against this claim in the following manner: 1) if this is indeed the outcome, then positivism is not immune to it either; 2) that a citizens critical response to

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[4] Ibid.

[5] Ibid., 86-87.

[6] Neil MacCormick, "A Moralistic Case for Amoralistic Law." Valparaiso University Law Review. (Vol. 20 No. 1, 1985), 32-33. The substantive moral test mentioned will be utilized always by a natural law theorist, and contingently used by the endorser of inclusive legal positivism. Note, unless otherwise indicated, the term "positivism" will refer to exclusive legal positivism: it is the way the arguments I am examining have been framed and a practical difference is more likely to arise out of a contrast of two theories that have less in common. A potential practical difference between these two brands of positivism will be explored in the second chapter.

the law is independent from the claims made the regime (whether the officials align themselves with positivism or natural law). Soper illustrates this point by drawing on 'Ghandi' and 'Eichmann' character types. Before unpacking these two arguments, it is important to draw the reader's attention to an important detail in Soper's interpretation of the passage cited above. Soper believes that MacCormick is arguing that the *claims made by the government make a particular practical difference in the behaviour of the citizens*: If officials claim their directives meet the demands of natural law they may enhance the moral aura of the law which increases the risk of stifling the consciences of the citizens.[7]

In reference to his first line of argument, Soper states:

> Part of the problem here is that deciding between positivism and natural law at the level of legal theory will not affect the claims of officials within a society about the moral legitimacy of the laws they enact.[8]

He explains that while positivists deny a necessary connection between law and morality, "it does not prevent their claiming a contingent connection and asserting that their own legal order is, happily a moral one."[9] For example, the monarch who has the church behind him may be more likely to evoke a kind of moral awe in reference to his official directives; this is independent of whether the connection between the law and the church is

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[7] The other possible interpretation of this passage would be the following: if the citizen, not the government, endorses natural law then she risks enhancing the moral aura of the law, which may stifle her ability to critically assess it. Whether Soper is correct in his interpretation is not of pressing importance since this second possibility will be addressed in this chapter in the section entitled "Escaping One's Framework."

[8] Philip Soper, "Choosing a Legal Theory on Moral Grounds." In Social Philosophy and Policy. (Vol. 4, 1986, Issue 1),

[9] Ibid., 34. Note that this claim is significant as it holds for both inclusive legal positivism (which, as Waluchow notes is aligned with natural law theory in consideration of these claims), and for exclusive legal positivism.

seen as contingent or necessary.[10] Officials can theoretically align their regime with either natural law theory or legal positivism and still claim that their regime meets the demands of morality. Furthermore, the behaviour of the citizen does not hinge on the claims being made by the officials; rather it is the degree of contentiousness the individuals possess that is more likely to furnish a pattern of behaviour.[11] However, whether a citizen is complacent or contentious is independent of her conceptual leanings.

To illustrate this point, Soper invokes two character types: Ghandi (an ideally conscientious citizen), and Eichmann (a soldier-like citizen who "never appraises the law but always complies").[12] He then places his two caricatures into a positivist regime and asks the question: how will they behave? Ghandi will critically appraise the demands made on him; Eichmann will be his normal, unconscientious self and comply automatically with what the law demands. Soper then conceives of a theoretical revolution: natural law supplants positivism. I believe Soper is correct in his judgment that things would not change:

> Eichmann, of course, continues to obey without thinking as always, so the critical case is now that of Gandhi. But Gandhi's behaviour doesn't change either, since he reacts not to what legislators and judges claim is the case, but to what his moral

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[10] Ibid., 37.

[11] I say "more likely" since a person who critically assesses the law may still follow the law making her outward behaviour indistinguishable from an individual who blindly obeys. I will also address arguments that claim a certain theory of law is more likely to facilitate the desired critical attitude and is morally better as a result. Here, the theorist is not as concerned with the pattern of outward behaviour but rather with the critical awareness of the individual. Note, there may be a close relationship between the two: Waldron suggests the complacent individuals are more likely to be led "like sheep to the slaughter-house." See chapter 1, section entitled "Escaping one's Framework."

[12] Ibid., 33.

> conscience tells him is the case about the compatibility of formal law with moral requirements.[13]

Soper also considers the possibility that MacCormick's point—that positivism is more conducive to bringing about the desired critical attitude than natural law theory—might be an educational one. He presents this argument—one that MacCormick never explicitly advances—as follows:

> The way to bring up citizens so that they become Gandhis and not Eichmanns is to teach the positivist view from the beginning, instilling in yet-uninformed citizens the understanding that no moral tests are part of the criteria for law and urging such citizens to develop for themselves the capacity of sifting formal law through moral filters.[14]

The question now to be asked is whether ones conceptual theory of law can have any bearing on realizing this educational goal. Soper's reply is no:

> If we succeed in making citizens conscientious, it will not be because of the legal theory. It will be because of the arguments about why individual autonomy and moral reflection are inescapable and the judgments of others always potentially fallible. Those arguments are not arguments of legal theory, because they are arguments that both positivists and natural law theorists can and do accept. A good positivist knows there is no necessary connection between law and morality. But nothing in that knowledge explains whether he knows what morality is or, more importantly, whether he cares about finding out. Graduates of schools of positivism or natural law, it seems, must make their way to some other school to find their moral consciences.[15]

Thus the ability of a society to produce Ghandi-like citizens is not connected to citizens' indoctrination into legal positivism. Regardless of his legal theory, Ghandi needs a working conception of morality upon which his critical reflectiveness is founded—this practical morality is not acquired simply as a result of learning any given conceptual legal

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[13] Ibid., 34.
[14] Ibid., 35.
[15] Ibid.

theory. Consequently, if a pattern of behaviour is to be located, it will hinge on the citizens' degree of conscientiousness. And since the existence of this characteristic is independent of the conceptual theory endorsed, C1 has not been fulfilled.

Liam Murphy makes a slightly different claim in reference to quietism that can be dismissed on similar grounds. He suggests that the natural law approach puts the legal regime in a better light and hence is a dangerous position to hold:

> The opponent of the death penalty can actually rest more content because of her belief that, though the legal regime is imperfect, the over-all system is not bad, since, after all, the death penalty is not part of the legal order.[16]

The basis for this argument, as presented by Murphy, is that the statement "since this is presented as law, it probably is law, and therefore just" is more *intuitive* or "easier to see" than the statement "this apparent law is unjust and therefore not really law."[17] However, which statement is more intuitive depends not on the conceptual theory but on whether the individual in question is closer to Eichmann or Ghandi in his approach to law. The former is the kind of approach Eichmann would take since he is prone to deferring judgement and hence would trust the officials; Ghandi, as previously noted, would be critical: it is therefore likely that the second option would be more *intuitive* to him. As we can now see, those arguing against natural law theory on moral grounds have not done so successfully as the requisite criteria have not been met. Let us see if arguments put forth against positivism are more successful.

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[16] Murphy, "The Political Question of the Concept of Law," draft, 19. A 'legal regime" is that which comprises all official enactments that meet the proper pedigree criteria; the "legal order" is that which is in accordance with the criteria of morality (what remains from the legal regime once it has passed through a natural law filter).

[17] Ibid.

It is pertinent to mention that a similar charge is directed toward the positivist camp (specifically towards exclusive legal positivism). Fuller states that it is positivism, and not natural law, that brings about a kind of complacency.[18] This uncritical stance is the product of what is often termed "law is law" formalism—people may take law at face value due to a kind of inherent force it seems to claim by definition thereby thwarting critical reflection. Anthony D'Amato shares this fear, and makes the following case in response to MacCormick:

> Having completed during the day his analysis showing that a complete test of legal validity is the content-free pedigree test, he awakes suddenly at night realizing that his conception may lead to the worst kinds of official abuses of power. Any dictator's commands are "law" because the dictator is the constitutionally valid legal authority. Once labelled "law," the dictator's commands tend to be obeyed by a public that believes in labels. The public invests some amount of moral obligatoriness in the dictator's decree because it is "the law" even if the decree, in terms of its content, is immoral.[19]

Thus D'Amato is arguing in favour of a natural law theory—this stance, according to his reasoning, results in morally desirable consequences due to its ability to mesh with the common psychological reactions to 'law.' D'Amato claims that if citizens understand law as natural law then only those official decrees that are morally sound will be called law. And more importantly, only these morally sound laws will enjoy the peoples' obedience that often follows from this official label. However, there is an important oversight in this argument that Schauer is quick to address.

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[18] Lon Fuller, "Positivism and Fidelity to Law—A Reply to Professor Hart." in Philosophy and Law. 4th edition. Edited by Feinberg and Gross. (California: Wadsworth Publishing, 1991), 94.

[19] Anthony D'Amato, "The Moral Dilemma of Positivism." Valparaiso University Law Review (Vol. 20(1), 1985), 45.

Schauer notes that natural law theory does not have the 'psychological edge' as D'Amato fervently asserts in the above passage:

> Just as the positivist in D'Amato's account must seek to expunge the moral presumption from the public's view about the force of legal directives, so must D'Amato expunge from public understanding the view that all of the things now referred to as law in fact have some degree of moral worth.[20]

Whether one adopts either of the competing conceptual understandings of law, work must be done to avoid the blind obedience of the public in the face of official decrees. However, this work, as Soper pointed out earlier, is not accomplished by the theories themselves but rather involves the development of a moral conscience and a conscientious approach to public living. Furthermore, another point worth recalling is that the issue of obedience is not exhausted by the moral evaluation of the rule (or possibly the system) in question— there may be good reasons to abide by less than ideal laws. This point makes the connection between particular conceptual understandings of law and particular practical outcomes even more diffuse, as one's behaviour may not reflect one's beliefs about the morality of the laws in question. And more importantly for my purposes, C1 and C2 have not been proven.

There is another relevant topic that must be addressed prior to the closing of this particular strand of debate: do natural law filters (which can be present contingently in a legal positivist regime, or necessarily in a natural law regime)[21] have an impact on the

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[20] Frederick Schauer, "Positivism as Pariah" in The Autonomy of Law: Essays in Legal Theory, 44.

[21] The term "natural law filter" refers to the idea that the directives of officials in a given system must meet certain demands of morality if these directives are to be deemed law. Natural law theorists maintain that moral criteria must be met if the directive in question is truly law: recall that for Aquinas a directive is truly law only if it has been

critical attitudes of the citizens? What makes this an especially interesting question is that while both Waluchow and Soper argue against the variety of connections between theory and practice that were just examined, they both concede that the existence of moral filters in a society does have an impact. However, they disagree in regard to the kind of impact they have.

In Soper's discussion of the Ghandi/ Eichmann thought experiment he provides us with a hypothetical situation which I have not yet mentioned:

> To put the arguments in constitutional terms, imagine two Supreme Court decisions rejecting, say, a challenge to any opinion about the justice or morality of the draft law itself. One decision sustains the state's action on the basis of the Court's interpretation of existing statutes, but the Court explicitly disavows any opinion about the justice or morality of the draft law itself. The other decision reaches the same conclusion about the statute but also explicitly indicates—because of the due process clause in the constitution—that the statute passes minimum requirements of fairness and, thus, is not too immoral to be enforced.[22]

If a given system recognizes that moral criteria must be met before any official enactment is deemed valid law, then Soper fears this will prevent citizens making their own moral evaluations. He poses the following questions: "is not the latter decision more likely to deter citizens from making their own evaluations?" His own response is that he believes the argument "has some force" and thus leaves open the possibility that it might be

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enacted for the good of the community. A supporter of inclusive legal positivism maintains that a "natural law filter" may, but need not be present in a given community. For example, in Canada the *Charter* functions as this kind of filter since it lays out moral criteria that must be met if the statute enacted is to be valid law. However, inclusive positivists also leave open the possibility that legal systems exist that do not require that their laws meet any moral criteria.

[22] Philip Soper, "Choosing a Legal Theory on Moral Grounds," in Social Philosophy and Policy, 36.

desirable not to have such a moral filter.[23] It is unclear to me, however, why a conscientious Ghandi-like individual would be complacent simply because a judge determined that the statute in question was not too immoral to be enforced. The moral standards of this individual may be higher than those of the government; being the conscientious person she is, this individual will not blindly submit to the requirements of this law.

Waluchow makes the opposite claim about the existence of a moral filter within society. He notes that a charter society is less likely to suffer from reactionary thinking:

> If anything, reactionary thinking seems very unlikely within such a society, where citizens have a publicly recognized platform from which to challenge the legal validity of decisions made by their legal authorities.[24]

The question can be posed as to whether Waluchow is assuming a conscientious public in the above statement. At another instance Waluchow argues that Canada has enjoyed an increase in public awareness and political activity since the introduction of the *Charter*. While I do not deny the legitimacy of this claim, nor the possibility that such positive results could follow from the introduction of a *Charter*-like document in other nations, the claim remains empirical not conceptual. What would be the effect of a *Charter* in a society largely characterized by the Eichmann attitude? Its members would be uncritical as usual. We can now see with greater clarity that the conscientious approach, its existence and cultivation, is independent of one's endorsement of either conceptual theory.

The question regarding whether particular practical effects follow from the adoption of a particular conceptual theory has not yet been exhausted. The inability of such

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[23] Ibid.
[24] W.J. Waluchow, Inclusive Legal Positivism, 96.

arguments to fulfill C1 and C2 becomes clearer once we point out a flaw that can be found in many of these arguments: the tendency of a theorist to argue from within their own conceptual framework. It will be demonstrated once again that PPET is valid: neither the natural law theorist nor the legal positivist is denied the desired ability to critically evaluate positive law.

Escaping One's Framework

On the surface, many arguments that are put forth in favour of adopting a particular theory for moral and/or political reasons can be inviting: *of course* we want to avoid anarchy and quietism and if a given theory will aid us in attaining that goal then we should adopt this theory. But upon closer examination, we find that it is often the case that the theorist has not left his own framework when putting forth his argument. Anthony D'Amato, in response to MacCormick's "A Moralistic Case for Amoralistic Law" makes this charge.

MacCormick cites Hart's moral argument for legal positivism in which Hart asserts the following:

> What surely is most needed in order to make men clear sighted in confronting the official abuse of power, is that they should preserve the sense that the certification of something as legally valid is not conclusive of the question of obedience, and that, however great the aura of majesty or authority which the official system may have, its demands must in the end be submitted to a moral scrutiny.[25]

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[25] CL, 210.

D'Amato rightly illuminates Hart's inability to escape from his own positivist assumptions in the above argument:

> In this passage, Hart uses the term "legally valid" in the positivist sense, namely, a rule that has passed the *pedigree test* alone. How, then, can this passage constitute an objection to the naturalist viewpoint—as defined by Professor MacCormick himself—which requires that the rule must also pass the *content test* before it can be determined to have legal validity.[26]

Recall that the pedigree test requires that a rule is deemed law if it has been generated from the proper source. When viewing the world through a natural law paradigm, in order for official directives to be deemed law, they must also pass the *content test*: this involves assessing whether the rule in question is compatible with morality. With these definitions in mind, I will now return to Hart's quotation and flesh out D'Amato's complaint.

Hart, like Bentham, fears that the natural law position may lead to unquestioning obedience—the citizen will immediately link legality with morality and give their unquestioning obedience to the state. However, when we step out of the positivist's framework and into that of a natural law theorist we find this particular fear has been circumvented: prior to deeming any particular rule "law" the natural law theorist would have critically assessed it to see if it meets the demands of morality. And if we unearth an assumption that seems to be functioning in the quotation from Hart that was just cited—that moral justification is conclusive to obedience—we find that the natural law theorist will not blindly obey everything the state presents as legally valid. Rather she will only feel the moral obligation to obey the rules that passed the content test.

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[26] Anthony D'Amato, "The Moral Dilemma of Positivism," Valparaiso University Law Review, 44.

Furthermore, by denying certain official directives the title "law," the natural law theorist need not sever the association between the government and the inadequate rules. In other words, he does not have to identify 'law' (understood as passing the content test) with government and thus view the government in an over-all favourable light. Deryck Beyleveld and Roger Brownsword reinforce this claim:

> The effect of adopting natural-law theory is not to assign the study of morally permissible rules to the science of law, morally iniquitous rules to another discipline. Its primary effect is to make legal theory into a part of political and moral theory. The study of iniquitous rules is just as much a part of political and moral theory as is the study of morally permissible rules.[27]

The natural law theorist's over-all assessment of the regime can be made in light of both the directives that meet the criteria of morality and those that do not. Hence Hart's fear of the complacent natural law citizen remains in the realm of fear, not fact; C1 and C2 have not yet been fulfilled.

Fredrick Schauer, who follows Hart's lead, falls into a similar trap when arguing for legal positivism on practical grounds. While initially he appears to be putting forth a straightforward moral argument,[28] he ultimately rests his endorsement of positivism on contextual grounds. Schauer claims that positivism facilitates both a neutral and a

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[27] Deryck Beyleveld and Roger Brownsword, "The Practical Difference Between Natural-Law Theory and Legal Positivism." Oxford Journal of Legal Studies (Vol. 5, 1985), p. 15.

[28] Earlier in the article Schauer states: "legal positivism occupies the moral high ground, for it is legal positivism and not any of its alternatives that appears most easily to facilitate the suspended judgement that we are assuming to be desirable" (Fredrick Schauer, "Positivism as Pariah," in The Autonomy of Law: Essays in Legal Theory, 42). He also asserts "I am in actuality attempting to argue substantively and not just linguistically that it is morally valuable to recognize the distinction between the is and the ought that lies at the heart of the traditional positivist project" (*Ibid.*,45). This argument will be examined shortly.

sceptical stance towards law: the former looks at institutions in a factual manner, while the latter "is the mirror image of conservatism, taking the existence of an institution as a reason for suspecting it, and thus taking change from existing institutions to be at least presumptively valuable in its own right."[29] His central argument is as follows:

> This is not the place to determine whether one should have a conservative, neutral, or sceptical attitude towards existing institutions. My point here is not to resolve that question. It is only to make clear that if one were a sceptic in precisely the sense I have just described, and thus if one wanted the maximum amount of moral distance from existing social institutions, including but not limited to the law, then one would want to assure that the ability to locate those institutions, precisely for the purpose of applying some sceptical acid to them, was not tainted by the endorsement that scepticism strains to avoid. In other words, if one were a sceptic, one would want to be a positivist. But if one were to have a more favourable view of existing legal institutions, a view likely to be held by those already in them, then there are moral advantages to seeing the very idea of law as itself creating a moral norm that individual laws or legal decisions should be tailored to attain them.
>
> The choice between positivism and its opposition, therefore, assuming the choice to be instrumental in just the way both Hart and Fuller suppose, may depend on the situation of the chooser and the uses to which the choice must be put.[30]

This contextual argument falls short in several ways: 1) the argument seems to presuppose some form of scepticism—the very attitude he links solely with positivism and recommends to citizens who are members of a morally questionable regime; and 2) contrary to what Schauer suggests, the natural law theorist is not denied the sceptical stance.

Whether one should benefit from what Schauer identifies as the moral advantages of positivism or of natural law theory depends on a context that must be evaluated prior to making this choice. That is, the individual must determine if their system is worthy of

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[29] Frederick Schauer, "Positivism as Pariah," in The Autonomy of Law: Essays on Legal Positivism, 46.

[30] Ibid., 46-47.

"seeing the very idea of law as itself creating a moral norm." Hence this individual must be sceptical, or at least critical, prior to making such a judgement. Moreover, let us assume that this individual proceeds to extend a positive evaluation of his legal system. According to Schauer, it seems that he now ought to endorse an understanding of law that is of the natural law persuasion *and* cease to be sceptical. Schauer's contextual argument falls short for a couple of reasons: a) it is unlikely that a legal system will ever exist that could not be improved via criticism and change; b) law is dynamic, and one's endorsement of it should be continually scrutinized.

Furthermore, such contextual qualifications seem to conflict with his non-contextual endorsement of positivism on moral grounds:

> To take law and morality as necessarily conjoined is to run the risk of minimizing the moral space between the products that legality has given us until today and the goals we might wish an ideal legal system to accomplish.[31]

If this reasoning were sound, why, in any context would one desire to take such a risk? Even in a relatively morally agreeable system, would it not be beneficial to maintain this distance and continue to evaluate the status quo with the constant goal of improvement? In addition, it is worth noting that the sceptical attitude does not presuppose a negative evaluation—one may very well be suspicious of any institution that presents itself as legal, but may ultimately endorse it upon investigation. While the above passage seems to be an out-right endorsement of positivism on practical grounds, it falls short for the same reasons that Bentham's and Hart's arguments do. As we shall see, Schauer need not deny the natural law theorist his sceptical stance.

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[31] Ibid., 46.

Schauer has fallen into the same trap as Hart and MacCormick—he argues from within a positivist framework. The "products legality gives us" are legal products according to the positivist pedigree criteria—the gap between legality and morality created by conceptually separating them facilitates the achievement of social and/or legal goals within this framework. Such goal striving is denied the natural law theorist *only if* we conflate the moral stance of such a position and understand 'legality' in a positivistic fashion.[32] But by unfolding Schauer's own explication of these competing paradigms we discover that the individual who endorses natural law need not be denied his sceptical stance.

According to Schauer, natural law theory rests on legal positivism for its 'legal contenders':

> although the positions traditionally described as positivism and as natural law are commonly contrasted, and although the contrast is undoubtedly real in some respects, it turns out that all of those who subscribe to some version of anti-positivism, including but not limited to natural law, have a need for some form of identification of that which is then subject to moral evaluation. And so long as the alleged anti-positivists engage in the process of pre-moral identification of legal items, then it turns out that they have accepted the primary positivist premises, premises which are not at all about the proper uses of the word "law," but which are rather about the desirability and necessity of first locating that which we then wish to evaluate.[33]

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[32] Recall MacCormick's characterization of the citizen who endorses the natural law position. He presents this individual as one who simply follows orders because he assumes they are moral—this citizen, by conflating what is presented as law (in the positivist sense) and morality (this is law therefore it must be moral since law is moral) becomes complacent—a potential sheep for the slaughterhouse. Yet once the natural law lens is located within the citizen himself—the desired critical attitude results.

[33] Frederick Schauer, "Positivism as Pariah," in The Autonomy of Law: Essays on Legal Positivism, 43.

For the natural law theorists, what they initially locate can be termed "social directives": what legal positivists call 'law' but "in only a slightly different linguistic garb."[34] This is the pre-evaluative data that, according to Schauer, is a constant for both camps. Thus we have located the gap we were seeking; the gap that enables critical evaluation and prevents thoughtless complacency. For the positivist, the gap is located in the conceptual separation of legality and morality while the natural law theorist locates the gap between what they may call social directives and legal directives. In other words, positivists morally assess the law after they have identified it as law while the natural law theorist will morally assess the official directive prior to deeming it "law." Since neither theoretical camp is denied the ability to critically evaluate legal systems and their directives, C1 has not been met. Thus we are led to reaffirm the validity of PPET.

What often gives arguments like Hart's and Schauer's increased weight is their intuitive power—many of us identify law with rules and directives that have met positivist standards. An inspection of Jeremy Waldron's article "All We Like Sheep" provides a thorough examination of the problems of beginning with positivist assumptions when putting forth an argument for the moral and/or political superiority of legal positivism. Waldron situates himself within a positivist framework and his failure to step outside of it prevents his argument from succeeding. I will demonstrate that Waldron's argument fails to establish the criteria required to undermine PPET.

Waldron begins his essay with a quotation from Hart's The Concept of Law:

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[34] Ibid., 42.

> In an extreme case, . . . only officials might accept and use the system's criteria of legal validity. The society in which this was so might be deplorably sheeplike; and the sheep might end in the slaughter-house. But there is little reason for thinking that it could not exist or for denying it the title of a legal system.[35]

This statement brings a sense of urgency—of practical, and even moral urgency—to the conceptual debate in legal philosophy. We all should adopt positivism and we should do so as soon as possible since the threat of the abuse of power by government officials is a real threat. As Waldron notes, the consequences for adopting a narrow moralistic definition of "law" would be bad,

> . . . not only for sociological taxonomy but also for the pragmatics of moral judgement and action. We want people to respond to law not slavishly or mechanically, but critically, so that they will sometimes be willing (when it is morally appropriate) to resist law's demands.[36]

Implied by this quotation is the suggestion that natural law theory would enable the "slaughter," or at least be more powerless against it than positivism. Yet as we saw in the previous argument, the natural law theorist is not denied the 'gap' necessary for critical assessment of a legal system and/or its directives. It is useful to examine Waldron's argument in detail to gain greater insight into the way in which the legal positivist can make seemingly convincing arguments by relying on positivist assumptions, but fail to escape from their own framework thereby nullifying their own efforts.

Waldron aims to present us with a 'second line' of argument which is connected to the claims Hart made regarding the political and moral advantages of adopting the positivist position: specifically he is arguing for the desirability of the positivists'

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[35] Jeremy Waldron, "All We Like Sheep." The Canadian Journal of Jurisprudence (Vol. 12, 1999, Issue 1), 117. Also see CL, 177.

[36] Ibid., 170.

separability thesis through a method that he identifies as normative sociology[37]. Waldron begins by giving us a framework for his approach and then he fleshes out this framework using Hart's theory. This part of the essay will proceed in the following manner: 1) An exposition and critical analysis of the framework employed; 2) a summary of his presentation of Hart's theory within this framework; 3) my critical analysis of Waldron's project.

Waldron's framework

Waldron proposes, for his investigative purposes, that we adopt a tentative, and rather vague, definition of law that he simply terms the "positive definition": a "definition of 'law' in virtue of some [of] its social features."[38] He suggests that we can then decide whether to include any moral criteria in this definition as we proceed with our investigation. Waldron suggests that "[o]ne way of approaching this question would be to ask why most of us suspect the following statement is false:

1. Any system, which satisfies the positive definition, is just. [39]

He suggests that we would not agree that 1 is true and asks: "What makes 1 false? Why are there counter-examples to 1?"[40] What is significant to note is that Waldron is already presupposing a positivistic definition of law: If the positive definition of law is assumed to

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[37] The separability thesis states: "[I]t is in no sense a necessary truth that laws reproduce or satisfy certain demands of morality." (CL, 185-86).

[38] Jeremy Waldron, "All We Like Sheep," The Canadian Journal of Jurisprudence, 170.

[39] Ibid.

[40] Ibid.

be in line with Murphy's notion of legal order, then our answer would be different. Since a "legal order" unlike a "legal regime" is *just by definition*, it would be in accord with **1** and there would be no counter example available. The reason Waldron might be successful in pulling the reader in at this point is because we tend to intuitively think of law along positivistic lines (i.e. the law in Canada is that which has passed through the proper official channels). Hence we tend to agree with Waldron that there must be counter examples to **1**; but this does not give the valid ground that would enable us to deny the truth of **1**.

This leads Waldron to his second stipulation in reference to "the positive definition":

> **2**. A system, which satisfies the positive definition, *may well* be unjust *on that account.*

While he maintains **2** does not necessarily deem **1** false, it does alert us to the fact "that there is something about the positive definition which helps us explain why some of the systems which satisfy it are not just."[41] Again, if we were to conceive of this statement in terms of Murphy's distinction, then the positivist definition would simply draw our attention to the fact that some of the official enactments which claim to be law are not in fact law as they are unjust.

Waldron presents us with his third and final stipulation, which is compatible with **2**:

> **3**. A system which satisfies the positive definition *may well be* desirable *on that account.*

Waldron then explains the significance of this third criterion: "[t]here is something about the positive definition which helps explain why many of the systems which satisfy it are

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[41] Ibid., 171.

desirable. Indeed, it is because they satisfy the positive definition that they tend to be desirable."[42] Waldron states that, taken on its own, this line of thought can be attributed to thinkers like Bentham and Hobbes who assert that there is something desirable about the existence of a legal regime. However, if both **2** and **3** are to be true, the positive definition of law must have a degree of complexity—"complex enough to explain the desirability of the existence of a system of norms satisfying the definition *and* the potential for such a system to be unjust."[43] He now examines Hart's theory to demonstrate how his methodical framework does prove the desirability of legal positivism on moral grounds.

Waldron on Hart

Waldron begins this discussion by demonstrating how Hart's theory satisfies **3**. He does so by outlining the process by which a society moves from a pre-legal to a legal order.[44] Waldron follows Hart and characterizes the former as "a society whose members practice certain primary rules of conduct[45], but who do not have any way of deliberately changing their practices (on a society wide basis), or any way of authoritatively

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[42] Ibid.

[43] Ibid.

[44] It is important to note that there are a number of problems with this distinction. Waldron draws our attention to several: he mentions that there must be a transition stage from pre-legal to legal which is not dealt with by Hart as well as Hart's denial that things like marriage, adoption or wills could not exist without fully developed secondary rules See page 175.

[45] Waldron is using Hart's distinction between primary and secondary rules: "rules of the first type impose duties; rules of the second type confer powers" (CL, 81).

interpreting them, or any specialist organization to enforce them."[46] However, since this state of being can only be sustained in small communities, changes must occur to accommodate growth. Thus the primary rules become supplemented by secondary rules: rules about "rule change, rule ascertainment, rule interpretation and rule enforcement."[47] (Note that it is the existence of both primary and secondary rules which serves as Hart's positive definition according to Waldron). The pre-legal society as characterized by Hart would be unable to accommodate rapid change and hence suffer from the defects of stasis. The legal society would remedy this problem, as the introduction of secondary rules would increase certainty, flexibility and efficiency. These three characteristics of Hart's positive definition are what make it desirable. This leads Waldron to his next point, which is intimately linked to the one just discussed: how Hart's theory supports **2**.

Recall that **2** makes the following assertion: "a system which satisfies the positive definition *may well* be unjust *on that account.*" First off, Hart maintains that law must share a 'minimum content' with morality: it must serve the bare requirements of human survival.[48] Yet he qualifies this statement: these benefits need not apply to *all* within a given society.[49] Hence law gives no guarantees of just distribution. Furthermore, the transition from pre-legal to legal may go hand in hand with the promulgation of oppression:

> The introduction of law (in the sense of the union of primary and secondary rules) may well make things much worse from the point of view of those already harmed by the primary rules of obligation and may well facilitate new forms of exploitation

[46] Ibid., 172.
[47] Ibid.
[48] CL, 192-93.
[49] Ibid., 200.

> and oppression that would be impossible without it. By constituting an efficient and well-administered apparatus of coercion, secondary rules may put a powerful group in a position to subordinate the rest of society.[50]

When secondary rules become a part of the given society, primary rules take on a new characteristic—they became more "detached," allowing them to become "possible objects of deliberate change" or "explicit interpretation."[51] Waldron argues that primary rules, as a result of this change do not necessarily become entirely alienated from the individuals to whom they apply, but they do become weaker in their role of regulating human conduct. However, the ability to enforce these laws makes up for this loss. But again, this empowers officials, and hence law can become a tool of injustice more effectively than before.

Furthermore, the increase in complexity in the legal order calls for specialization; specialization that few citizens will attain. The officials have yet another potential tool for manipulation of the populace: knowledge of the legal system.[52] Thus it can be seen that Hart's positive definition satisfies **2** and **3**, and hence disproves **1**. Waldron proceeds to draw his central conclusion:

> It is not just a matter of semantic scruple to deny that law is necessarily moral. And it's not just a pragmatic issue either: a matter of keeping one's conceptual ammunition dry. It is a matter of normative sociology: considering what positive law actually is, its existence in a society raises a real serious prospect that it will be used to facilitate injustice and to confuse and mystify many of those who are subject to that injustice and who have no choice but to live under its auspices.[53]

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[50] Jeremy Waldron, "All We Like Sheep" The Canadian Journal of Jurisprudence, 175. Waldron cites Hart who makes a similar point (CL., 201).

[51] Ibid., 178.

[52] Ibid., 179-81.

[53] Ibid., 181.

Hence law is not something to which one owes blind obligation. It is important, according to Waldron, that we adopt a positivist conception of law so that we can recognize that law is indeed something to be wary of and which we must continually critically assess. "Law" must be understood along similar lines as institutions such as "army" or church" or "taxes"—institutions that may be used for good purposes as well as evil.[54] Consequently, we should heed Hart's warning and not seek assurance from the concept of law, since

> law—for all its advantages—may well turn out to be unjust. And if law may well turn out to be unjust, then it is surely one of the tasks of the positivist jurisprudence—one of its more important *moral* tasks—to teach and explicate that distinctive possibility, above all to those who might, for ignorance of it, end up as sheep in the slaughter house.[55]

This brings us to the end of the exposition of Waldron's article. While I believe that Waldron's message that we ought, continually, to critically assess our legal system is indeed crucial, I do not believe that our ability to do so hinges on legal positivism. I will now prove this point in my assessment of his argument thereby demonstrating that he has not established C1, or consequently, C2 or C3.

My Assessment

In order to assess Waldron's argument, I will once again draw upon Murphy's distinction between a *legal regime* and a *legal order*—the former representing official enactments that pass through the proper pedigree sources thereby allowing them to be

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[54] Waldron juxtaposes these terms against those that he sees as having a solid positive image, like "library" or "hospital." He believes that we should not conceive of law in this way as it would stifle our critical stance.

[55] Ibid., 186.

contenders for "law"; the latter representing "law" as it meets the necessary criteria of the morality demanded by the natural law theorist. Now let us apply this distinction to Waldron's account.

Waldron states that the desirability of Hart's positive definition (Hart's union of primary and secondary rules) is that it is able to account for **2**—" that law not only may be unjust but may well be unjust on account of its satisfying the positivist definition."[56] Waldron has argued that Hart's positive definition explains why law is capable of facilitating and magnifying injustice: the birth of a mature legal system also means that there is increased flexibility, certainty and efficiency, all of which can facilitate and magnify injustice by the officials. I wish to argue that while Hart does account for these features, the natural law theorist need not give up these "social facts." She can recognize that a *legal regime* has both primary rules and secondary rules, and that the incorporation of the secondary rules does in fact lead to the three characteristics cited above. In other words, the natural law theorist may account for these features in a different way, (one that does not require her to recognize their 'lawfulness'). She is also capable of realizing that these features of the system in question can breed injustice. And none of this prevents her from being critical of this system. She would be more likely to be led like a sheep to the slaughter-house **only if she attached moral value to whatever a positivist understands as law**. But once we escape from the positivist's framework we discover that she is not at greater risk of such a fate because she is theoretically aligned with natural law and not positivism.

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[56] Ibid., 172.

As we can now see, Waldron has not established the requisite criteria that would serve to undermine PPET. He has not successfully demonstrated that those who endorse positivism will prove to be less likely to "be led to slaughter" or that those who understand law in accordance with natural law theory will produce a pattern of compliance leading to the slaughter-house. Hence C1 and C2 have not been proven and therefore, neither has C3.

Our discussion of the moral and political arguments launched in reference to the behaviour of citizens has come to an end. We can now see that the theorists putting forth arguments in favour of either legal positivism or natural law theory on moral and/or political grounds have failed to fulfill the criteria necessary for disproving PPET. We will now look at similar arguments made in reference to judicial behaviour to see if they can fulfill C1, C2, and C3.

Chapter 2: Judicial Decisions, Legal Positivism, and PPET

The relationship between the judge and the law—a prominent topic in jurisprudence—provides an entrance point into the complexities and challenges encountered when one attempts to answer the foundational question: "what is law?" Holmes, at one point, exclaims that "[t]he prophesies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law."[1] While this view may leave out many salient features of the concept of law, the reasoning behind it seems transparent enough. Statute law provides rules that state, among other things, what behaviour will be punished. Yet since it is not the statute, but the judge's interpretation of it, that leads one to be deemed a violator of the law—is not the judge's word law in the most important sense? Pushed to its limits, this view raises key issues, for example the issue of the extent to which judgements can diverge from the black letter law before the legal system becomes a façade. While I will not delve into this particular problem, my current interest will focus on the judicial role.

The relationship between law and the judicial role is an interesting one, especially since judges are not bound by the law in the manner in which citizens are: unlike citizens who may be punished in various ways for their transgressions, judges may choose to strike down an existing statute, or override a precedent without analogous repercussions (and bear in mind I am in no way suggesting that this is an unfortunate

[1] O.W. Holmes, "The Path of Law." in Philosophy and Law. 4th edition. Edited by Feinberg and Gross. (California: Wadsworth Publishing, 1991), 41.

characteristic). This relationship becomes increasingly more dense when one adds other relevant ingredients to the mix: the competing conceptual understandings of law; the possibility that the reasoning the judge actually employed in a given decision is different from the reasoning that is used to justify the decision in the court-room and/or in the record books; the particular traditions of judicial interpretation which the judges are working within; and the expectations of politicians, citizens, and fellow judges. A number of these relationships will be parsed out during the unravelling of my argument; an argument that will focus on potential practical effects that the conceptual debate in legal philosophy may lay claim to in the judicial arena.

While the previous chapter explored whether the adoption of a given theory had a particular practical consequences with respect to the behaviour of citizens, I will now address this question in reference to judges. Does a judge's conceptual understanding of law make a practical difference of the kind necessary to disprove PPET? To answer this question in the affirmative one must be able to fulfil C1, C2 and C3. I aim to establish the soundness of PPET by demonstrating that the existing arguments put forth on this topic fail to meet these three criteria while simultaneously casting doubt on the ability of future arguments to do so.

Dyzenhaus' book Hard Cases in Wicked Legal Systems will serve as a foil for the discussion. As previously mentioned, Dyzenhaus puts forward an argument for Dworkin's theory on moral grounds. He draws a dichotomy between Dworkin's theory and legal positivism claiming that judges who endorsed the former made morally acceptable decisions and those who were aligned with the latter furnished a pattern of

morally problematic decision-making. More precisely, he argues that judges who endorsed legal positivism also endorsed Hobbes' ideal.[2] The positivist's allegiance to this ideal, according to Dyzenhaus, "squeezed out discretion" and forced the positivist judge to employ the plain fact method and render verdicts that re-enforced apartheid law.

Prior to a brief exegesis of Dyzenhaus's main argument, I will situate his project in the jurisprudential tradition—specifically in reference to the Hart/Fuller debate. I will then argue against Dyzenhaus' position in the following manner. I will begin by unravelling a number of difficulties in his argument against legal positivism. In the section entitled "Plain Fact Method" I will illuminate a number of difficulties a judge might encounter when trying to employ this method. The main thrust of my argument is will be that method does not lead to morally questionable results in all contexts. This point calls into question Dyzenhaus' ability to extend his argument beyond the borders of apartheid law, while also demonstrating the obstacles that obstruct the fulfillment of all three criteria.

I question the validity of Dyzenhaus' argument on another front in the second section called "Squeezing Out Discretion." My approach is two-fold: 1) I call into question his use of the "principle of charity" which, once discarded, opens up the possibility for alternate interpretations of the morally questionable actions of these judges; interpretations that no longer incriminate positivism; 2) By arguing against Dyzenhaus' assertion that positivists are tied to Hobbes' political ideal, I open up the possibility that positivist judges need not be wedded to the plain fact method.

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[2] Hard Cases, 221-222.

Consequently, those who wish to argue for or against legal positivism on moral grounds will have difficulty in fulfilling C1, and C2, as well as C3. This conclusion is buttressed in the following two sections that focus on the ability of both exclusive and inclusive legal positivism to account for the use of principles in adjudication. This fact opens up a myriad of possibilities for the positivist judge: including that she could have rendered anti-apartheid decisions that relied on principles. While these arguments illustrate the inability of Dyzenhaus to fulfill all three criteria, they also demonstrate the unlikelihood of other attempts to successfully undermine PPET.

The final argument examined in this chapter is one forwarded by W.J. Waluchow. He aims to locate a practical difference arising out of the debate between inclusive and exclusive legal positivism: in North American legal systems, a judge who endorses the former is more likely to deliver liberal verdicts, while the judge who endorses the latter will be more likely to give conservative decisions. I draw the reader's attention to the number of variables that must align in a certain way for this practical difference to materialize. Moreover, even if Waluchow is correct in his assessment, the problems surrounding the fulfillment of C2 and C3 still remain. Hence I re-affirm the viability of PPET. I wish to turn to Raz who casts some initial doubt on the link Dyzenhaus and others have attempted to establish.

Raz articulates a few of his misgivings pertaining to the connection between legal theory and judicial activity. His argument is directed at Dworkin— specifically at diffusing Dworkin's claim that "any judge's opinion is itself a piece of legal

philosophy."[3] Raz contends that a judge's opinions may be a "piece of legal philosophy . . . but discussions, arguments, or whatever regarding the nature of law they are not."[4] My concern, however, is not whether judges' decisions implicitly (or explicitly) address the question of the nature of law but whether their differing understandings of the nature of law do in fact lead to particular kinds of judicial decisions. Raz proceeds to address a relevant portion of my central concern by illuminating what he believes is implied by Dworkin's thesis:

> Dworkin's claim, as I understand it, does not rely on the fact that jurisprudence is occasionally invoked by the courts. It relies on a claim that jurisprudential theses are among the presuppositions of any decision by the courts, such that if the jurisprudential presuppositions of this or that court's opinion are false the decision is flawed. The chain of reasoning leading to this conclusion seems to be: The court relies on some or other propositions of law. In relying on them it relies on some criteria for their truth according to which, in its opinion, they are true propositions, but the assumption, explicit or implicit in the decision, that these are criteria for the truth of the proposition is a jurisprudential assumption. It is a part of, or a consequence of, an account of the nature of law.[5]

Raz then responds to the above proposition:

> Persuasive as this argument appears it is not valid as it stands. The thought that in order to know their own law the courts need to know that it falls under a general concept of law, or indeed, that they require legal theory in order to have the concept of law, is surprising.[6]

One of the reasons this is surprising, according to Raz, is that judges simply do not need a comprehensive conceptual understanding of law if they are to perform their job. He illustrates this point in reference to American law:

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[3] Joseph Raz, "Two Views of the Nature of The Theory of Law." Legal Theory (Vol.4, No.3, 1998), 276. See Ronald Dworkin, Law's Empire, 90.
[4] Ibid., 278.
[5] Ibid.
[6] Ibid.

> It would follow that in rendering decisions American judges, acting in good faith, as we can assume that they do, presuppose, perhaps, something about American law. This need not be much. It could be that it contains a particular rule, and that nothing else in it modifies the application of the rule to the facts of this case. Courts usually rely on a much richer set of beliefs, but they are commonly only about a tiny fragment of the law. They invariably rely on the assumption that there is nothing else in the law to upset the conclusion reached on the basis of the rules they relied on . . . How much knowledge they actually have is a contingent matter that is neither here nor there.[7]

Soper articulates a similar point by drawing an analogy between the legal theorist and the sociologist of religion.[8] The sociologist may draw our attention to certain features of religion that distinguish it from morality; similarly the legal philosophy often proceeds by articulating the features of a legal system that distinguish it from morality or coercion. And just as the sociologist of religion cannot be faulted for failing to aid members of the Catholic religion in resolving "arguments about whether or not their religion permits annulment in particular cases,"[9] it is also not the role of the legal philosopher to provide answers to particular cases that arise in given legal system.

Raz gives further support to his refutation of Dworkin by drawing our attention to the fact that "the concept of law is a historical product."[10] Historically, courts have been operating in the absence of such an understanding, which serves as further evidence that the process of adjudication is separate from theoretical inquiry into the concept of law. Dworkin may respond by saying that there is an implicit understanding of law operating in such instances. Proving the validity of such a response is not my current

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[7] Ibid., 279.

[8] Philip Soper, "Dworkin's Domain." Harvard Law Review (Vol. 100, 1987), 1175.

[9] Ibid., 1174.

[10] Joseph Raz, "Two Views of the Nature of The Theory of Law," Legal Theory, 280.

purpose; however, there are several points that arise from Raz's comments that do touch upon my present concerns. Simply because the concept of law is an historical product, does not—on these grounds alone—discount it from making a practical difference. If we agree with Raz, we can conclude that a judge need not operate with any conceptual theory or law. However, we can rephrase the problem and ask: *if* a judge does have a particular conceptual understanding of law, will it lead to a particular practical result? More specifically still can C1, C2 and C3 be satisfied in reference to judicial decision-making?

As previously mentioned, I will answer this question in the negative thereby reaffirming PPET. I will begin this discussion by revisiting the Hart/Fuller debate in reference to Nazi law. This will serve to articulate the jurisprudential debate which Dyzenhaus is looking to build upon and thus will be a useful backdrop to the particularities of Dyzenhaus' own argument that will be considered in turn.

In his article "Positivism and Fidelity to Law—a Reply to 'Professor Hart,'" Lon Fuller poses the following question:

> [l]et us suppose a judge bent on realizing through his decisions an objective that most ordinary citizens would regard as mistaken or evil. Would such a judge be likely to suspend the letter of the statute by openly invoking a "higher law"? Or would he be more likely to take refuge behind the maxim that "law is law" and explain his decision in such a way that it would appear to be demanded by the law itself?[11]

Fuller, contrary to Hart, believes that there is a real social danger which follows from a judge's acceptance of a positivistic conception of law: once law and morality are

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[11] Lon Fuller, "Positivism and Fidelity of Law—a Reply to 'Professor Hart,'" in Philosophy of Law, 85.

understood as having no necessary connection, judges can apply the law simply because it is the law (it has the proper pedigree) and need not demonstrate that it meets the requirements of morality. Natural law escapes this charge, according to Fuller and his supporters, since the concept of law on this conception has moral criteria built in—criteria that must be fulfilled if the ruling is to be deemed lawful. Hence the charge is that positivism, unlike natural law, can enable judges to 'hide behind the law' when enforcing morally questionable statutes.

David Dyzenhaus, in his book Hard Cases in Wicked Legal Systems asserts that legal positivism does indeed enable such dubious judicial behaviour. He couches his claims in a case study of South African law: South African judges successfully applied iniquitous statutes—ones that legally entrenched racist views—due to their positivistic conception of law.[12] He blames a positivistic understanding of law for trapping the judges into thinking that they had to apply statute law thereby over-looking moral principles. As we shall see, Dyzenhaus does not assume the judges in his case study actually desired to reinforce the morally questionable parliamentary agenda: they believed it was their duty to do so and thus viewed their rulings as having an air of legitimacy because they were 'required by law.' And while he is aware that most positivists espouse the view that judges have judicial discretion, which roughly amounts to the notion that the positive law 'runs out' leaving judges to choose between legally acceptable alternatives, Dyzenhaus provides an argument against this understanding that will be considered shortly. This argument is crucial for Dyzenhaus' case since if it is

[12] "Positivism" is to be understood as meaning exclusive legal positivism unless otherwise indicated since this is the way Dyzenhaus uses the term.

discovered that the judges in his case study were aware that their endorsement of legal positivism granted them discretion, their positivist commitments could very well have led to an alternate decision.

Conversely, Dyzenhaus alleges that a natural law understanding is superior since this understanding leads judges to endorse a common law method of adjudication: one which draws on principles found in precedents rather than simply applying iniquitous statutes. He aligns this approach largely with Dworkin's understanding of law.[13] I will consider the questions surrounding this approach in my final chapter. Presently, I aim to demonstrate that legal positivism has been unfairly accused. I will draw the reader's attention to some critical problems in Dyzenhaus' argument that prevent it from fulfilling C1, C2, and C3.

To begin my critique of Dyzenhaus' argument, we must first examine the charges he lays against positivism:

> My claim against contemporary legal positivism is the following. The judges of a common law jurisdiction who adopt a conception of law as law which meets a sources test will adopt such a view for a reason which ought to preclude them from accepting the positivist thesis about pervasive discretion. That reason is their allegiance to an authoritarian ideal of political responsibility which leaves no space for discretion because the positivist conception of law in the service of such an ideal gives rise to a plain fact approach. To persuade judges to adjudicate differently, one would have to persuade them to reject the political ideal which requires the conception of law as law which meets a sources tests. But that is to ask them to reject the central tenet of contemporary positivism. I will argue, that is, that contemporary positivism reproduces the pragmatic contradiction identified in Austin.[14]

[13] He also references Fuller, but my discussion will revolve around Dworkin's theory.

[14] Hard Cases, 239.

While I promise a full, albeit gradual exegesis of the above accusation, I wish to begin by unravelling some initial, largely methodological queries. Note that in this particular passage Dyzenhaus states that the reason judges adopt the sources thesis is their "allegiance to an authoritarian ideal of political responsibility." When this authoritarian ideal (which will be given content shortly) is combined with legal positivism there is no space for discretion—judges must utilize the plain fact approach. The claim here is not that positivism leads to the acceptance of an authoritarian ideal, which then leads to the plain fact approach (ultimately resulting in morally questionable rulings according to Dyzenhaus); rather the "authoritarian ideal" is what sets the morally iniquitous ball rolling, so to speak. If we isolate the above quotation then we can clearly see that legal positivism need not be rejected, only the authoritarian ideal: legal positivism is only dangerous *when in service of this ideal*. The argument, in this form is at least plausible.[15]

However, Dyzenhaus' argument doesn't remain on this path—we soon discover that he is arguing also that the acceptance of positivism leads necessarily to the authoritarian ideal, and consequently down the morally questionable slippery slope:

[15] An argument made along this line is as follows. While positivism is compatible with the plain fact method, it is compatible with other methods as well. Yet since a natural law understanding is incompatible with the plain-fact method then we should endorse it since we will therefore avoid the undesirable decisions produced by the plain-fact method. I have 3 responses: 1) I will demonstrate momentarily that the plain-fact method is context sensitive in a way that prevents one from asserting with confidence that it will lead to morally problematic decisions—that it will meet C2; 2) my discussion of Nazi law will highlight the contextual nature of this line of argument thereby thwarting the possibility that C3 will be established; 3) In chapter three I address a very similar argument I call RRA and demonstrate that it does not undermine PPET.

> Like Austin, they [Raz and Hart] both propose an account of law which, in the absence of Bentham's radical reforms,[16] leaves a gap for an explanation of judicial obligation. And this gap is appropriately filled *only* by a Hobbesian ideal of fidelity to law.[17] [my italics]

Further proof that, in Dyzenhaus' eyes, the problem begins with positivism is that he includes a chapter on English law to help solidify his case: He warns that benign legal systems should take heed of the lesson learned from studies of wicked legal systems.[18] The suggestion here is that legal positivism is the culprit, not its existence in the presence of an authoritarian ideal.

Thus the question becomes *if* a judge endorses legal positivism, do such morally questionable results follow? To answer this question we must first unpack several of Dyzenhaus' claims: a) What is the "plain fact method"? b) Why is the positivist denied discretion? By answering these questions we unveil the core of Dyzenhaus' argument: the vilification of the plain fact method which is paired, albeit unfairly, with legal positivism—this leading to a wholesale rejection of both. Following an exposition of the plain-fact method, I will draw the reader's attention to some general problems one encounters when attempting to unearth legislative intentions. The point of this section will be to call into question Dyzenhaus' vilification of the plain-fact method, while highlighting the contextual nature of his claims. These findings also help illuminate the challenges facing those who wish to disprove PPET. Further, I will demonstrate that the arguments put forth by Dyzenhaus which attempt to deny the positivist judge discretion

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[16] According to Dyzenhaus, Bentham is able to avoid the plain fact method due to his belief that hard cases should be decided by utilitarian principles. For further details on this view see pages 1-7 and 228-229.

[17] Hard Cases, 241.

[18] Ibid., 177.

are unsound. He misapplies the principle of charity and he unfairly links positivist judges to Hobbes' political ideal. By unravelling these missteps we discover that positivist judges have numerous options that create problems for those who wish to put forth a moral argument on behalf of this theory.

The Plain Fact Approach

Dyzenhaus explicitly roots the plain fact approach in Dworkin's discussion of the plain fact theorist (a label that serves as a linguistic guise for Dworkin's critique of legal positivism). Dworkin characterizes this theorist as one who believes that "questions of law can always be answered by looking in the books where the records of institutional decisions are kept."[19] In other words, they look to "the facts of the matter" to determine, and in the case of judges, to apply, the law; they do not invoke controversial principles of morality. It is worth mentioning that this understanding of positivism has generated a rather united response from positivists, all of whom reject this caricature of their theory. Such responses will be looked at in greater detail shortly, but first I wish to take a closer look at the particulars of Dyzenhaus' understanding of the plain fact method.

As to be expected, Dyzenhaus' articulation the of plain fact approach has much in common with the method employed by Dworkin's plain fact judge. Dworkin writes:

> Plain fact judges hold a particular political doctrine of judicial responsibility. They hold that the judicial role is not to make law in accordance with their convictions about what morality requires, but to apply the law as it in fact, on a particular conception of fact, exists. When the law is a statute, judges should, in

[19] Ronald Dworkin, Law's Empire, 7.

> deference to the supreme law-giver, attribute to the statute the meaning which Parliament in fact intended it to have.[20]

Dyzenhaus is quick to add that the plain fact method is not to be confused with 'mechanism' or 'formalism'—the traditional methods of 'black letter' adjudication that have been paired with legal positivism in the past. He insists that the judicial approach which concerns him currently is as complex as its common law competitor.[21] To articulate this point, and to thus simultaneously deepen and clarify his notion of the plain fact method, Dyzenhaus explains two tests employed by plain fact judges: the *counter pointer test* and the *historical design test.* The former is actualized when judges locate intentions in statutes that call for the over-ridding of common-law principles.[22] The second test looks to history for a pattern "that exists as a matter of historical fact in the legal acts and decisions of the past, mainly those of legislators."[23] In South African legal culture this amounts to recognizing and continuing the tradition of racial segregation and oppression—a tradition initiated and perpetuated by whites over the black majority. These two methods have much in common: they both favour statute law over common law principles, they both look to legislative intention for guidance, and neither relies on

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[20] Hard Cases, 217.
[21] Ibid., 219.
[22] Dyzenhaus uses *Cassem* to illustrate the workings of this test. This case involves the Group Area's Act (an act which enables officials to declare certain areas the possession of certain racial groups) and focuses on the question of whether the act should be interpreted in accordance with the principles of natural justice that requires the judge to hear the other side of the case. At issue is an individual's right to a fair trial. Judge Steyn ruled that legislative intentions implied in the Act suggest that such a right need not be considered. Dyzenhaus refers to this as a 'counter-pointer' as it leads to the over-riding of a common-law principle. See Hard Cases, 71-74.
[23] Ibid., 57.

the personal beliefs of judges.[24] They do, however, differ ever so slightly in their manner of unearthing the relevant intentions pertaining to administrative law:

> The historical design test focuses on the question, "What is the legislative intention as to policy?" The counter pointer test focuses on the question, "What is the legislative intention as to who should determine the intention as to policy?" In other words, the counter pointer test, unlike the historical design test, does not find a legislative intention as to policy but a legislative intention that the executive should determine policy unconstrained by common law constraints.[25]

Regardless of the exact technique employed, such excavation may prove to be more elusive than the above explanation suggests. I wish to consider, for a moment, some general problems associated with the search for intentions. This will serve to highlight the difficulties surrounding the establishment of the three criteria. In order for Dyzenhaus to meet C1 and C2 he must prove both that this method produces a pattern of morally undesirable decision-making and that positivism is blameworthy. Presently, I will be concerned with the former—the ability of this method to establish an undesirable pattern, as well as the ability of this pattern to arise in other legal systems (C3). As will be shown, unearthing the intentions behind a statute is not always possible. Further, even if it is possible in a particular system, the intentions discovered may not be 'wicked'. Consequently, even if the plain fact method may be employable in a given context it may not lead to morally problematic judicial decisions.[26]

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[24] Marshall makes an interesting point: personal belief is at play here—it is the judge's personal belief that he is to rely on legislative intentions in their decisions. See "Positivism, Adjudication and Democracy," in Law, Morality and Society, 139.

[25] Hard Cases, 75.

[26] Note I will be arguing against Dyzenhaus' claim that positivist judges are wedded to the Hobbesian ideal and therefore must employ the plain fact method. Thus even if it was discovered that the plain fact method leads to morally questionable decisions, positivism still cannot be blamed. This discussion simply aims to give further support to

There are a number of problems that hassle those in search of such intentions. I will spend a moment unpacking a few in an attempt to loosen the claimed connection between the plain fact method and the yielding of particular practical (undesirable) results. First of all, the possibility exists that there is a discrepancy between the plain meaning of a statute (as agreed upon by a community who share a linguistic practice) and legislative intentions. In other words, had the legislators foreseen such circumstances, they might have altered the wording of the statute to prevent a particular decision resulting from its application. Marshall illustrates the dilemma by pondering how a judge seeking legislative intentions would interpret the word "frequent." The judge has to determine if this term is applicable to an individual who has been at the same place for an extended period of time, but not on more than one occasion:

> Is he to ask himself what the legislatures would have thought about the application of the term 'frequent'? Or is he to ask himself what they would have done to meet the specific situation if they had been confronted with it? The answer to that may well be that they would have used a different term or made a different law.[27]

The mere seeking of intention seldom yields a single conclusive result; a point also noted by Waluchow who draws a distinction between 'particular' and 'general' intentions:[28]

PPET by showing how difficult it is to link a method of reasoning to a single outcome. And if a method of reasoning is unable to establish criteria 1-3, it is far less likely that a theory of law like Positivism will establish criteria 1-3.

[27] G. Marshall, "Positivism, Adjudication, and Democracy," in Law, Morality, and Society, 138. Also see Waluchow for a similar discussion in Inclusive Legal Positivism, pp. 256-257. Here he draws our attention to the absurdity of charging a cargo plane with a road tax even though it clearly falls under the heading of transport vehicle. If a literal interpretation of the statute in question is rendered, it would indeed be subject to such a tax.

[28] W.J. Waluchow, Inclusive Legal Positivism, 255. He credits this distinction to Gerald MacCallum.

> the former refers to the sense in which the legislators intended particular words to be understood (what they meant by those words), while the latter refers to the purpose(s) or aim(s) they intended to secure in framing the rule they did (what they meant to achieve).[29]

As Waluchow notes, the question then becomes: Which understanding of intention is to be favoured? There is no easy answer, if there is one at all. Waluchow and Soper have helped cast doubt on the ability of the plain fact method to yield a pattern of decisions necessary for fulfilling C1. The arguments that follow serve to reaffirm this finding.

There are other imaginable scenarios that ought to give pause. It is often the case that numerous legislators are involved in the passing of a given statute. How do we ascertain these intentions, and assuming it is possible to do so, whose intentions do we prioritize? Moreover, as Raz notes, there may be no relevant intention to be discerned: "Do we not know that sometimes members of parliaments vote knowing nothing and intending only to get home early?"[30] Another plausible scenario is that the intentions of the Parliament who enacted the statute conflicts with the goals and intentions of the current Parliament: to whom does the judge owe his allegiance? This is a plausible scenario for a system like South Africa. Dyzenhaus writes in his preface that oppression of the black majority harkens back to the arrival of the first white settlers in 1652. However the strict systematization of oppression and segregation dates back to the turn of the century.[31] It is reasonable to assume that different intentions existed over time and that cases may be decided differently (while employing the same judicial method)

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[29] Ibid., 256.
[30] Joseph Raz, "Authority, Law and Morality." The Monist (Vol. 4, 1998), 320.
[31] Hard Cases, vii.

depending on the intentions being taken into consideration. Again, the ability to establish C1 or C2 is called into question.

Dworkin has similar misgivings regarding the quest for legislative intentions. In "Political Judges and the Rule of Law" Dworkin makes mention of the rule-book model of adjudication—a model that prioritizes the explicit rules of the system and hence can be understood as a sister, if not a twin, of the plain fact method. Here he illuminates the fact that no particular judicial results follow from the plain fact method:

> Once again there is no assumption here that all reasonable lawyers will agree about what the legislators intended. On the contrary, defenders of the rule-book model know that even skilled lawyers will disagree over inferences of legislative intention drawn from the same evidence. They insist that the question of intention is never the less the right question to ask, because each judge who asks it is at least doing his best to follow the rule-book model and therefore (on this conception) to serve the rule of law.[32]

Once again we find that scepticism looms around the thesis that the search for legislative intentions leads to a particular practical result. Disagreements surrounding intention can arise and reasonably lead to different judicial decisions. We can find evidence within Dyzenhaus' case study that seems to support Dworkin's thesis and thereby undermine both the strong thesis as just stated (the unqualified rejection of positivism) as well as the weaker theses (that positivism ought to be rejected as a viable approach in authoritarian regimes or the even narrower version that South Africa ought to adopt the Dworkinian approach). For instance, Centlivres, A.J. (Acting Judge) looked to legislative intentions and delivered a ruling in favour of racial equality. For him it was:

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[32] Ronald Dworkin, A Matter of Principle. (Cambridge: Harvard University Press, 1985), 14-15.

> . . . impossible to assume that the Legislature . . . intended that one section of the community could be treated unfairly as compared with another section. The State has provided a railway service for all its citizens irrespective of race and it is unlikely that the Legislature intended that users of the railway should, according to their race, have partial or unequal treatment meted out to them.[33]

Consequently, it is possible that prodding for intentions may lead to a decision in accordance with justice, and not necessarily to one that further institutionalizes discrimination. If this is indeed the case, then Dyzenhaus' ability to fulfill C1 and C2 within the South African legal system is called into question.

Dyzenhaus seems to avoid this conclusion by interpreting the above passage in Dworkinian fashion—that Centlivres A.J. is "echoing Gardiner's claim in *Rasool* that judges should assume that the legislature and executive officials are engaged with the judges in the pursuit of justice within the law."[34] Yet we need not conclude that the judge in question was *assuming* such intentions as a consequence of his attempt to put the law "in its best light." Rather, he may have sincerely believed that the legislative intentions were those he articulated. Yet more importantly, even if Dyzenhaus is correct in his interpretation, positivism need not be rejected. As we shall see shortly, the judge who endorses positivism does not have to endorse the plain fact method of interpretation. The purpose of the above discussion is to blur the lines between the unfortunately sharp distinctions Dyzenhaus draws; distinctions that must be maintained if his thesis is going successfully to incriminate the plain-fact method, and what Dyzenhaus deems its theoretical counter-part: legal positivism.

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[33] Hard Cases, 64.
[34] Ibid., 65.

Dyzenhaus is, to some extent, aware of such difficulties and thus states that in the case of uncertainty concerning what the intentions of Parliament were, "they must resolve this uncertainty in accordance with the same doctrine of judicial responsibility."[35] Yet since the doctrine of judicial responsibility referred to here is none other than the search for legislative intentions, the problems surrounding this approach have not been resolved. And unfortunately, his succeeding elaboration does not seem to make the interpretive waters any less murky:

> They [the judges] must look not to what they think the law should be, but to sources of fact which seem to legitimize an attribution of actual intent to Parliament. If it so happens that it can be deduced from the public record how—as a matter of fact—those responsible for enacting the statute wanted it interpreted, this doctrine of judicial responsibility compels the judges—a matter of legal duty—to decide the law in accordance with that want.[36]

Dyzenhaus has not resolved the issues surrounding intention; he has simply repeated how a plain fact judge conceives of his role. Thus the problems surrounding the unearthing of legislative intentions remain and the three criteria have not yet been met. I wish to launch one last argument on behalf of Dyzenhaus to see if he can potentially establish C1 and C2 in the context of the apartheid legal system.

Despite all my objections to the plain fact method, the uniqueness of the South African legal system is worth considering. Dyzenhaus may be correct in his assessment that the intentions of the legislators were "starkly evident."[37] If so, then at least some of the problems just discussed in relation to the discernment of intentions will be laid to rest

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[35] Hard Cases, 217-218.
[36] Ibid,. 218.
[37] Ibid., 57.

in this particular judicial context. After all, he does make mention in his preface of the agenda of the Afrikaner Nationalist government:

> In the early 1950's, the Appellate Division, the supreme appellate court in South Africa, handed down decisions on the interpretation of apartheid laws which the government saw as an unjustified interference with executive action to implement apartheid policy. The government's reaction was to enact new statutes and amend the old in an attempt to make its intention clear that the courts were not to interfere.[38]

It may very well be the case that such intentions were largely discernible in this particular legal regime. All this grants Dyzenhaus, however, is the contextual point that the plain fact method may have served the interests of those (legislators and judges) who wished to maintain the morally iniquitous status quo in South Africa. He has not demonstrated C3: that the plain fact method is problematic in all contexts. If the intentions of legislators in a given system are morally commendable, or minimally, benign, then the search for such intentions need not be greeted with apprehension—of course this possibility rests on the assumption that the judge had access to these intentions. And as we will see in my closing discussion on Nazi law, the plain fact method does not always conspire with the oppressors in wicked regimes. Thus the possibility of incriminating positivism universally is significantly weakened since its partner in crime—the plain fact method—does not itself receive a guilty verdict in the international court. However, we have merely been perusing the surface of Dyzenhaus' argument— significantly deeper problems lie ahead for his thesis. I now wish to sever the link between the plain fact method and positivism.

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[38] Ibid., vii.

The Squeezing Out of Discretion

Recall the two things Dyzenhaus must demonstrate to fulfill C1 and C2: a) he must demonstrate that plain fact judges yield a pattern of morally problematic verdicts and; b) he must demonstrate that positivism is linked to the plain fact method in a way that would cause positivism to receive the same moral appraisal. The last section served to cast significant doubt on a.; I will now focus on b. Dyzenhaus attempts to demonstrate b. by claiming that the positivist judge, due to her alliance with the plain-fact method, does not see herself as having discretion: she does not believe that she has a choice with regard to her decision but believes that she is simply doing her job in accordance with the 'rule of law.'[39] "Discretion", understood here simply as the judge's ability to choose between alternative rulings in controversial cases, is a doctrine often professed in the same breath as legal positivism.[40] In South Africa, this would amount to a judge having

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[39] Dyzenhaus refers to these cases as "hard cases," cases, that is, where the law provides no clear decision. However, the plain-fact judges did not seem to treat the cases as hard cases since, as Dyzenhaus states, they felt they had no choice in the matter. Whether the cases are understood as hard cases or simply as morally controversial easy cases is not extremely important: what is important is Dyzenhaus' claim that the judges in question could have ruled otherwise and didn't due to their allegiance to the plain-fact method and its theoretical counter-part, legal positivism.

[40] Hart argues for the inevitability of judicial discretion by illustrating how the "open-textured" nature of language often permits two or more possible interpretations of the statute or precedent in question. The judge must then exercise her discretion in choosing between the viable alternatives. Hart uses the example of a case where a judge has to decide what counts as a vehicle given that a certain park does not allow vehicles in the park. The judge, in this example, has discretion to decide what falls within the category of vehicle: whether a stationary tank or a motorized toy qualifies as a "vehicle" is something the judge must decide. I should not that there are many highly complex issues surrounding the notion of judicial discretion which my present purposes allow me to leave unaddressed. For example there are questions surrounding the pervasiveness of

the option to validate or over-rule the statute in question. Note that some theorists argue that discretion may exist irrespective of whether any given judge believes they have this choice-making ability in a given case. Dyzenhaus, on the other hand, appears to be operating with the view that judges only have discretion if they believe they can indeed choose between alternative rulings. This will be the operative understanding of the term for the remainder of the argument. Before proceeding, it is crucial to draw the reader's attention to the reason why Dyzenhaus denies the positivist judge discretion: it is due to the positivist allegiance to a Hobbesian political ideal. I will give content to this ideal shortly when I refute the positivist connection with it. But first I wish to look at a potential response to Dyzenhaus' argument—a response articulated by Dyzenhaus himself.

Dyzenhaus is well aware that those who fall into the positivist camp will point to their commonly professed tenet that judges, at least in some cases, have discretion as a way to combat his charges against their theory. And since Dyzenhaus is criticizing the plain fact judges for their rulings, clearly the implication here is that they both could have and should have ruled otherwise. Thus the cases we are dealing with are ones that the positivists would likely call 'discretionary.' Dyzenhaus is well aware of this response—

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discretion: whether the law consists largely of easy cases leaving a "penumbra of uncertainty"; or whether the law consists largely in discretionary decisions (see G. Marshall, "Positivism, Adjudication, and Democracy," in Law, Morality, and Society, 140). Other questions surrounding strong versus weak discretion have arisen (see W.J. Waluchow, Inclusive Legal Positivism, Chapter 7). And whether discretion belongs to the positivist doctrine at all (See Himma, "Judicial Discretion and the Concept of Law." Oxford Journal of Legal Studies (Vol. 19, 1999)).

early on in his book he articulates a plausible response from the point of view of the positivist:

> It follows for positivists that if the majority judges thought they were under a legal duty to decide the case in this way, they were mistaken. Even worse, the judges might have known that they had a discretionary power, but pretended not to in order to conceal the fact that they were making a legally unenforced choice in favour of the status quo. But whatever their thoughts on the matter, they decided the case in accordance with a doctrine of judicial responsibility which has nothing to do with contemporary positivism. For since Austin's day, positivists have not advocated any doctrine of judicial responsibility, but merely a theory of law. Hence positivists can point out that judges who use tests like the historical design test do so because they hold a conservative doctrine of judicial responsibility and not because the judges are positivists.[41]

Dyzenhaus does not address the particularities of this argument at this point in his analysis. However, in his concluding chapters he presents us with a rival view that he endorses. His view hinges on what he believes to be the positivist's commitment to the Hobbesian political ideal. This doctrine, which the positivist simply cannot avoid according to Dyzenhaus, 'squeezes out' judicial discretion transforming the positivist doctrine from the theoretical Dr. Jeckyl into the practical Mr. Hyde.[42] Yet it will be demonstrated that the above hypothetical response is actually more accurate than the position Dyzenhaus ultimately defends. To prove this I will unearth the shaky grounds upon which his argument rests, including his "principle of charity" which serves to put the judges in question in "their best moral light." As well, I will question the positivist's allegiance to the Hobbesian ideal. These arguments will serve to sever the connection between positivism and the plain fact method thereby preventing Dyzenhaus from establishing C1: the positivist judge does not have to use the plain fact approach and

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[41] Hard Cases, 58.

[42] Ibid., 2-8, 246-247.

hence need not be held responsible for any pattern of decision-making that this method may yield.

Remember that the disappearance of discretion is crucial for the success of Dyzenhaus' argument: if plain fact judges understood that they were to choose between competing interpretations, then the fault lies not with positivism, but with their personal choice. Yet this claim, despite its centrality, rests on very questionable grounds: the principle of charity. Dyzenhaus writes:

> I suggest that for the time being we should adopt a principle of charity and take dissonant remarks at face value. We should, that is, take the remarks as indicating that the judges who make the remarks think that they are legally required to decide hard cases on statutory interpretation in accordance with the intentions which had in fact 'actuated' the statute, whatever the assessment critical morality would make of those intentions.[43]

What this seemingly innocent principle of charity precludes is an alternate, but equally plausible interpretation: that at least some, if not all, of the judges whose decisions reinforce apartheid clothe their arguments in the language of inevitability and rule of law, but in actuality are well aware that they are *choosing* to enforce apartheid policy. They may be ideologically aligned with it, or despite more principled commitments, they may view such decisions as prudentially best for their career. This would not be an unlikely alternative, particularly given Steyn's success in rising through the judicial ranks largely as a result, according to Dyzenhaus, of his affinity with apartheid policy.[44]

Dyzenhaus proceeds to relay what this principle of charity will enable—what amounts to the main argument of his book:

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[43] Ibid., 83.
[44] Ibid., 50-51.

> This policy allows us to consider a possibility which is otherwise excluded. It is that the judges who experience dissonance are expressing a wish that principles of critical morality could have played a part denied by what law required in the case. However the judges might still think that their decision is morally speaking the best one all things considered. For example, if plain fact judges hold a particular doctrine of judicial responsibility because, as I have suggested, they regard that doctrine as itself politically justified, then they will think that they are justified in excluding principles of critical morality.[45]

Dyzenhaus assumes that at least some of the judges who are reinforcing apartheid law are actually opposed to it: it is their commitment to the ideal of fidelity to law which trumps their loyalty to the principles of critical morality. And the only political ideal that could provide the requisite ammunition for overcoming such moral principles is the Hobbesian political ideal; this ideal gives the individual a reason for believing that he is justified in applying iniquitous statutes.

Recall that Hobbes founds his political theory on the primacy of order over chaos: any form of government is better than no government at all. Thus, as Dyzenhaus notes, this amounts to applying law that meets the sources test since only this satisfies the Hobbesian understanding of the function of law:

> In order for the will of the sovereign to be effective in creating order, it must fulfil three conditions, all of which hinge on blocking any resort to natural reason. First is that the sovereign and his will must be identifiable by the general population without them having to resort to their natural reason. Secondly, his will must be identifiable in like manner as a determination of what individuals must do. Thirdly, the individuals must be able to determine, without their having to resort to their natural reason, the content of the sovereign will, what it requires of them.[46]

Practically speaking, what this amounts to is the application of statute law– and in South Africa, the fortification of apartheid. As Dyzenhaus notes, "Hobbes provides us with a

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[45] Ibid., 83.
[46] Ibid., 222.

convincing account of the legitimation though not the legitimacy of law under conditions of oppression."[47] And it is this doctrine that the positivists simply cannot escape according to Dyzenhaus. Thus, on this understanding, positivism is trapped in a pragmatic contradiction: their seemingly benign theory of law transforms from Dr. Jeckyl into Mr. Hyde when it is put into practice. Roger Shiner brings increased clarity to this so-called pragmatic contradiction with his articulation of the matter:

> The contradiction, as I understand it, is the following. The positivist is committed, first, to the thesis that, in a hard case, the judge who exercises discretion in favour of the government of the day is so doing because she has discretion to do so: The law at that point has run out, and she is not "bound by any standards set by the authority in question" (Dworkin 1978, 32). On the other hand, since the positivist is also (supposedly) committed to the plain fact approach to the interpretation of legislation, as long as the issue before the court is one of the interpretation of legislation, then the judge does *not* have discretion; the judge is bound to interpret the legislation as the plain fact approach requires. So there is a contradiction. The judge both has and does not have discretion. And the judge is put in this contradictory position by the commitments of legal positivism.[48]

As Shiner points out, in order for the pragmatic contradiction to materialize as Dyzenhaus envisions, the judge in question must also believe in the absolute supremacy of Parliament. Yet this belief is not inherent in the nature of positivism.[49]

However, positivists need not accept the above diagnosis: they can begin by rejecting Dyzenhaus' application of the principle of charity since there is no sound reason to assume that the judges were struggling with their consciences. But even if, in some plausible universe, Dyzenhaus' understanding of the judges' dispositions was

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[47] Ibid., 223.
[48] Roger Shiner, "Dyzenhaus and the Holy Grail," Ratio Juris, 66-67.
[49] Ibid., 67.

accurate, positivism can still be released from any culpability: there is a readily available escape route.

While Hobbes may have embraced positivism, all positivists need not be Hobbesians. They do not have to embrace the Hobbesian understanding of social order which is intimately linked to his belief in legislative supremacy. Hartney reinforces this point, noting that modern positivists have gone to great lengths to distance themselves from the command theory of law endorsed by Bentham and Austin—a theory that has a more natural connection to Hobbes' understanding of law. Legal positivism need not be permanently wedded to any other beliefs a given positivist might hold, whether it is utilitarianism or scepticism:

> . . . legal positivism itself does not involve any theory of political obligation or of judicial duty. . . It is not a linguistic theory, a moral theory or a theory about judges' moral duties. Some theorists may be legal positivists because they are moral sceptics or utilitarians or political authoritarians or because they believe all laws are commands, but none of these theories are part of legal positivism.[50]

Reinforcing this point, Waluchow rightly states that Raz shares Hobbes' positivist commitments but does not endorse his understanding of the obligation to obey the law: Raz believes there is rarely such an obligation.[51]

Furthermore, what Hobbes has provided us with is a theory of compliance in addition to a theory of law: they are not one and the same and should not be treated as such.[52] A theory of compliance puts forth conditions required for obedience while a

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[50] Michael Hartney, "Dyzenhaus on Positivism and Judicial Obligation." Ratio Juris. (Vol. 7, 1994, Issue 1), 48.
[51] W.J.Waluchow, Inclusive Legal Positivism, 64.
[52] Ibid.

theory of law tries to answer the question: what is law? In reference to the former, Hobbes believes any form of civil society is to be preferred over no civil society and hence citizens should comply with all the orders of the ruling power.[53] And while Hobbes may present a theory of law that is positivistic, other positivists do not have to endorse his theory of compliance.

It is also worth noting that such an endorsement would posit a necessary connection between law and morality. Raz explains:

> A necessary connection between law and morality does not require that truth as a moral principle be a condition of legal validity. All it requires is that the social features which identify something as a legal system entail that it possesses moral value. For example, assume that the maintenance of orderly social relations is itself morally valuable. Assume further that a legal system can be the law in force in a society only if it succeeds in maintaining orderly social relations. A necessary connection between law and morality would then have been established . . .[54]

Christine Sypnowich implicitly agrees with the above reasoning stating that Hobbes can be viewed as having a foot planted securely in both the natural law tradition and positivist camp. Recall, "for Hobbes, natural law and natural rights refer to our prudential interests in self-preservation, and thus any government which preserves order rules in accordance with natural law."[55] Consequently, the positivist has another very concrete reason to reject Hobbes' understanding of law. And as we shall see in the next

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[53] This is a rough outline of Hobbes' position. See Hobbes, Leviathan. Indianapolis: Hackett Publishing Company, Inc., chapter. XVII.

[54] Joseph Raz, "Authority, Law and Morality," The Monist, 311. Note that while Raz is making this point as part of an argument against ILP, it serves our current purpose.

[55] Sypnowich, Christine, "Social Justice and Legal Form." Ratio Juris (Vol. 7 No.1, 1994), 76.

section, positivists may realistically opt to replace Dyzenhaus' characterization of the positivist judge with their own detailed understanding of adjudication.

By revealing such nuances, particularly the ways in which principles can enter into the positivist understanding of law and adjudication, we increase the distance between modern positivists and Hobbes while simultaneously undermining the possibility of establishing C1, C2, and C3. Dyzenhaus' case study can illustrate this last point: if utilizing principles in judicial decision-making is consistent with legal positivism then the morally superior 'principled' judgements—those which took a stand against apartheid policy—could have been made by positivist judges.[56] This would open up the possibility that positivist judges could furnish a pattern of morally acceptable decision-making. Consequently, if we have knowledge of a judge's positive commitments, we still have no good reason to presuppose, on the basis of that knowledge alone, what verdict she will render and whether that verdict will be morally acceptable. Let us now examine the ways in which legal positivism—in both its exclusive and inclusive forms—can account for the utilization of principles in judicial decision-making.

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[56] It is worth mentioning that even if the judges who delivered morally questionable rulings in Dyzenhaus' case study happened to be positivist, this does not establish C1 and C2. While a pattern of morally problematic decision-making may have been furnished, positivism does not shoulder the blame. The reason being is that the theorist must prove that it is reasonable to believe that if this theory is to be endorsed either in the future or in other contexts, it will yield these morally problematic results. The fact that a judge may be a positivist fails to give us a reason to pre-suppose that either morally good decision or morally questionable decisions will be rendered. A possible challenge, which I refer to as the "Reduce the Risk Argument", will be dealt with in the third chapter.

Exclusive Legal Positivism

Exclusive legal positivism—the theory Dyzenhaus simply refers to as "positivism"—endorses the sources thesis: the view that law is identifiable by reference to pedigree criteria alone. In other words, "all law is source-based."[57] Dyzenhaus attributes this view to both Raz and Hart;[58] however, since it is more accurately credited to Raz, this particular discussion will be confined to his thoughts. Recall that it is this view that has been indicted with the charge of inadequacy as it leads, according to Dyzenhaus, to morally questionable judicial rulings due to its alignment with the plain fact method. One can easily see the reasoning that leads one to such conclusions— the identification of law is a factual, not a moral enterprise and hence when judges "apply the law" to given cases, they are led to apply these plain facts often at the expense of making the morally best decision. While problems with the plain-fact method have been explored, I now wish to draw out the inaccuracies in the above reasoning. As we shall see, "law as law" formalism is a mere caricature of positivism—it glosses over the myriad of nuances present in the writings of both inclusive and exclusive legal positivists.

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[57] Joseph Raz, "Authority, Law and Morality," The Monist, 295.

[58] Hart explicitly aligns himself with inclusive legal positivism in the postscript to The Concept of Law: He rejects Dworkin's suggestion that he is a "plain fact" positivist and reminds him that he has ignored "my explicit acknowledgement that the rule of recognition may incorporate as criteria of legal validity conformity with moral principles or substantive values"(CL 1994, 250).

As Coleman notes, in order to respond to Dworkin's charge, positivists must account for the "fact that moral norms figure importantly in adjudication."[59] Coleman also notes that Raz's theory does have such resources; resources which will now be examined.

In "The Problem about the Nature of Law," Raz employs an analogy with human action in an attempt to communicate the way in which moral considerations figure in the adjudicatory process. Specifically, the distinction is between the *deliberative* and *executive* stages in a person's attitude to the prospect of a certain action. The former refers to the state where "the person considers the merits of alternative courses of action," and it "terminates when he reaches a conclusion as to what he should do."[60] The executive stage comes into effect "if and when he forms an intention to perform a certain act"; Raz adds that "[I]n the executive state he is set to act if and when the occasion arrives."[61] The filling out of the analogy can now be seen: moral considerations enter into the deliberative state, while the identification of law is akin to the executive stage (and in accordance with Raz's understanding of law, such identification does not rely on moral argumentation).

Raz admits that this distinction, in practice, may prove to be blurred at times:

> On many issues statutes represent but the first step towards a 'pure' executive stage. They may have to be supplemented by delegated legislation and perhaps even by further administrative action. Sometimes litigation reaches the courts in matters which have not reached a 'pure' executive stage in the matter at issue and

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[59] Jules Coleman, The Practice of Principle. (Oxford: University Press, 2001),190.
[60] Joseph Raz, "The Problem about the Nature of Law," in Ethics in the Public Domain, 206.
[61] Ibid.

> the court have to resort to non-legal, i.e. non-executive, considerations to resolve the dispute.[62]

At first glance this blurred edge may seem to undermine Raz's distinction: if all law cannot be identified with the executive stage then not all law is immune to moral argument for its identification. However, such a concern need not detain him: moral argumentation can still be reserved for the task of law application. This becomes clearer with the introduction of other key terms and distinctions employed by Raz.

The point that I wish to reinforce is that the ascertainment of legal standards can be accomplished, according to Raz, without resort to moral arguments. Yet it does not follow that "the standard will be capable of being *applied* without recourse to moral argument."[63] In fact, he notes that the law itself directs officials precisely to such considerations:

> The Law itself quite commonly directs the courts to apply extra-legal considerations. Italian law may direct the courts to apply European community law, or International law, or Chinese law to a case. It may direct the court to settle a dispute by reference to the rules and regulations of a corporation, or an unincorporated association, or by reference to commercial practices or moral norms. In all these cases legal reasoning involves much more than merely establishing the law.[64]

Here Raz is relying on a distinction made earlier in his discussion: he divides legal reasoning into *reasoning about the law* and *reasoning according to the law*. It is the former that relies on social facts. The latter may involve moral argumentation.[65] Raz

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[62] Ibid., 208

[63] Ibid., fn 16, 206. My italics.

[64] Joseph Raz, "On The Autonomy of Legal Reasoning," Ethics in the Public Domain, 333. Raz also notes that such considerations leave room for the "possibility that the law gives morally unacceptable directions to the court." (*Ibid.*)

[65] Ibid. 332-33.

also recognizes that moral considerations may trump legal considerations altogether: "Sometimes courts ought to decide cases not according to law, but against it. Civil disobedience, for example, may be the only morally acceptable course of action for the courts."[66] All of this leads Raz to distinguish three questions which occasionally, if not often, are mistakenly fused: a) how should a case be decided according to the law b) how should a case be decided all things considered? c) what is existing law on the issue in the case? [67] Dyzenhaus does not seem to give due attention to these separate questions in his dealings with positivism. He appears to believe that a positivist judge faced with an easy case could refuse to think that the answer he gives to c. is the answer he must give to a., let alone the answer he must give to b. And in a hard case where the answer to c. is not clear, the positivist judge seems to have only one possible response to c. on Dyzenhaus' account: the positivists' allegiance to the Hobbesian political ideal requires them to look to legislative intentions to decide how the case should be decided according to the law. However, as previously demonstrated, a positivist is not wedded to Hobbes' political ideal and hence to the plain fact approach. The answer a judge will give to a., b., and c., does not become transparent once we are told that the judge endorses positivism. A judge with positivist commitments may rule for or against the defendant for numerous plausible reasons. Hence C1 has not yet been established. This conclusion is reinforced through an examination of inclusive legal positivism.

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[66] Joseph Raz, "On the Autonomy of Legal Reasoning", 328.
[67] Ibid., fn 1, 328.

Inclusive Legal Positivism

Dyzenhaus barely acknowledges inclusive legal positivism as a viable theory of law. He proceeds to dismiss these "incorporationists" along side their exclusive sister:

> Incorporationists assert that when, as a matter of fact, moral principles have been incorporated into law, judges are under a legal duty to decide hard cases in accordance with the answer supplied by correct moral argument. But since, as I will now argue, it is legal positivism that leads to such standards being squeezed out of law, particularly in the context of a wicked legal system, incorporationists offer no better advice than do Hart and Raz to judges who adopt the plain fact conception of law. For like positivists, incorporationists will urge judges to begin with a purely factual enquiry into the law on a matter and such enquiry will find that moral standards are overborne by other considerations.[68]

While it has already been demonstrated that his vendetta against positivism is misplaced, he also misconstrues inclusive legal positivism. While these theorists maintain that it is conceptually possible for a legal system to exist whose laws are identifiable on plain fact alone (thereby maintaining their positivist commitments), they do not hold that this is necessarily the case:

> On this view, which we have called inclusive legal positivism, moral values and principles count among the possible grounds that a legal system might accept for determining the existence and content of valid law.[69]

Moral values are not secondary in determining the validity of law as Dyzenhaus suggests: if a given law fails to measure up to the relevant moral standard then it also fails to attain legal validity. Thus while pedigree standards may be used to identify candidates for valid law, the moral criteria may deem the statute or precedent in question invalid and hence inapplicable.

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[68] Hard Cases, 243.
[69] W.J.Waluchow, Inclusive Legal Positivism, 82.

It is worth noting that part of this discussion will be somewhat superfluous in one sense: we have already demonstrated that judges who endorse positivism can account for the use of moral principles in adjudication. This, as we have seen, serves as evidence against Dyzenhaus' claim that a judge's positivist commitments prevent her from invoking principles in her decision, consequently preventing her from making the "morally correct decision." Also recall that this point serves to undermine the potential for establishing C1: a positivist judge can, but need not, invoke moral principles and hence the likelihood of positivist judges producing a pattern of decision-making of any kind is significantly diminished.[70] In this section I aim to bring further clarity to the way law and morality interact in the judicial domain by drawing upon a number of illuminating distinctions put forth by Waluchow; namely the distinctions between law, its "institutional force" and its "moral force." These terms will also yield an alternate reading of the tension present in the South African legal system. And when we focus our attention specifically on the moral force of the law, not only do we potentially deepen our understanding of the situation in South Africa, we also find another way in which different conceptual theories give the same advice to judges.

Waluchow rejects the suggestion that Hart's theory leads to the judicial approach involving the unquestioning application of positive law.[71] He helps to clarify the way in

[70] And as we will see in chapter three, even if the judge in question always invokes principles, the possibility of furnishing a pattern of decision-making is unlikely.

[71] He adds that there are implications of Hart's theory for how judges decide cases but this is not one of them. For instance: "If, for example, one's theory of law says that laws are pedigreed rules which do not necessarily accord with minimal moral demands, then one's theory of compliance will likely, though not necessarily, demand that one always subject laws to moral scrutiny and comply only if they measure up." (W.J.

which the positivist position can accommodate a complex understanding of the judicial role by way of some key distinctions, the most important being the distinction between "the law," its "moral force," and it "institutional force."[72] Moral force is the moral obligation of a judge (or citizen) to abide by the requirements of the law.[73] This will be explained in further detail shortly; my current focus is the institutional force of law. Institutional force "is a function of the person's legal power (if any) to alter existing law so as to nullify its effect upon a decision,"[74]; elsewhere this is expressed as the institutional responsibilities of judges with respect to the law.[75] What this distinction points to is the significant insight that "the law is not always legally binding on judges."[76] The judicial practice existing in a particular society will provide the judge with the contours of his role; as we will see, such contextual requirements may enable the judge to exercise the freedom to over-rule precedents. And as Waluchow notes, we need not look

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Waluchow, Inclusive Legal Positivism, 64). Recall that this implication was noted also by Soper, as we saw in the first chapter; he also makes explicit that natural law theorists make their moral evaluation prior to deeming something law. Waluchow does put forth an argument for the ability of conceptual legal theories (namely ILP and ELP) to make a practical difference. This argument will be examined shortly.

[72] Waluchow is explicitly drawing upon Dworkin's own distinction between the grounds and force of law: the former being "circumstances in which particular propositions of law should be taken to be sound or true"; and the latter being "the relative power of any true proposition of law to justify coercion in different sorts of exceptional circumstances" (Ronald Dworkin, Laws Empire, 110). While Waluchow notes this deeper understanding will not nullify Dworkin's arguments, he suggests Dworkin would benefit by integrating this revised understanding into his theory.

[73] W.J.Waluchow, Inclusive Legal Positivism, 39.

[74] Ibid.

[75] Ibid., 33.

[76] Ibid.

to wicked legal systems, but simply to this familiar practice to fortify the validity of the above distinction.[77]

This judicial ability to override precedent, both its very presence and the degree to which it can be exercised, is not a-contextual. Rather the particular system in question will determine which judges have the power to overrule precedents. A lower court judge may not be able to exercise this power, while a judge in a higher court in the same system may have the power to do so. The difference is a result of "the ground rules of adjudication accepted by the judges within the legal system."[78] Furthermore, such ground rules may prove to be quite restrictive—the English system gives the judges less leeway than other comparable systems—in which case the judges may be required to apply the law, even in cases where they express a wish to do otherwise.[79] Recall that this desire is one attributed to the plain fact judges in Dyzenhaus' case study. Now an additional possibility for understanding such desires is open to us.

Recall that Dyzenhaus contends that this attitude is the result of the judges' adherence to the plain fact method paired with a positivistic conception of law. Earlier, I raised the possibility that the judges were politically, or merely prudentially, aligned with apartheid and merely couched their reasoning in the language of regret in the hopes of clouding their true motives. Now we have a third possibility: the ground rules of adjudication in South Africa at the time proved to be constraining on judges. This is a viable possibility, especially given the fact that the legislature gave explicit instructions

[77] Ibid.
[78] Ibid., 34.
[79] Ibid., 34-35.

to the judges to abide by statute law,[80] coupled with the compliance by many, if not most judges. With the introduction of Waluchow's distinction, we can now shift the current paradigm ever so slightly to consider another reading of the situation in South Africa: The tension between the two judicial approaches—that of enforcing apartheid law versus overruling it—may arise out of a tension in the adjudicatory ground rules and not differing legal theories. Evidence is available to lend support to this hypothesis: The instructions given by the current legislators conflict with the judicial oath that requires judges to proceed with an eye to equality.[81] Dyzenhaus does not seem to recognize this possibility and, naturally, has no arguments against it. Consequently, further doubt is cast on his position.

Moreover, if we assume that the institutional force of the law is such as to prevent South African judges from over-ruling mistaken precedents, we can account for the deviant moral judges by looking to a third distinction: the moral force of law. Moral force is the moral obligation of a judge (or citizen) to abide by the requirements of the law.[82] While the institutional force of law exists irrespective of the moral standing of the regime, the judge in question may have "a moral right, perhaps even the moral duty, as a morally responsible, autonomous person in a position of some influence and (non-

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[80] Hard Cases, vii.

[81] Ibid., 49. Judges swear "to administer justice to all persons alike without fear, favour or prejudice," an indication that they ought to be colour blind. Note, however, that the remainder of the oath states that they are to take South African laws and customs into consideration with each case presented to them. Hence there even seems to be tension within the judicial oath itself.

[82] W.J. Waluchow, Inclusive Legal Positivism, 39.

normative) power, to try to escape its institutional force any way he can."[83] Remember that Raz gave the same advice.[84] And it is likely, if not undeniable, that Dyzenhaus has this moral force in mind—particularly given the fact that Dworkin nearly conflates the distinction between law and its moral force.[85] What is germane to my argument is that all three conceptual camps call on judges (or minimally provide a space for judges) to solidify their standing as moral agents: thus all three theories can lead judges to the same practical result.

Prior to turning my attention to Dworkin's theory, I wish to examine one more argument surrounding positivism and its judicial implications: specifically I wish to examine an argument put forth by Waluchow which aims to establish that a practical difference in judicial approaches follows from a judge's adoption of either inclusive or exclusive legal positivism.[86] He draws the reader's attention to the possibility that a judge who endorses ILP may be more likely to adopt a liberal approach to *Charter* interpretation while a judge who endorses ELP may be led to a more conservative approach. Waluchow explicitly couches his argument in a specific context: modern North American legal systems. Furthermore his argument is confined to judicial interpretation of the *Charter of Rights and Freedoms* in Canada and the interpretation of the *Bill of Rights* in the United States. By narrowing the scope, the number of variables decreases making the possibility of linking theory and practice more plausible. In the

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[83] Ibid.

[84] Joseph Raz, "On the Autonomy of Legal Reasoning," in Ethics in the Public Domain, 328.

[85] Ibid., 38.

[86] Due to the frequency with which "inclusive positivism" and "exclusive positivism" will be mentioned, I will now refer to them as ILP and ELP respectively.

argument that follows, I aim to uncover a number of variables that must be in place if the connection between a particular legal theory and a particular practical effect is to be maintained. While I do present a scenario where the conceptual theory can be understood as making a practical difference, I wish to demonstrate the difficulties surrounding such connections. If C1 cannot be established with confidence, neither can C2 or C3: PPET will remain unscathed. And even if all the variables do happen to align in the way Waluchow suggests they might (that ILP judges may often take a liberal approach to judicial interpretation of the Charter, while ELP judges tend to be more conservative in their approach) we still are not guaranteed C2 or C3. This is because we simply can't evaluate the moral standing of a given decision prior to its being made, nor can we assume all the relevant variables will align in the same way in other contexts. These points will be given further support once a closer examination of Waluchow's argument is undertaken.

ILP verses ELP

In Waluchow's article, "Charter Challenges: A Test for Theories of Law," he ends his discussion with an examination of what is at stake: how might judicial practice be affected by the adoption of different legal theories? It is important to note that for Waluchow, this is not an argument in favour of ILP over ELP: such arguments must be made conceptually. He clearly states that this discussion of judicial consequences is peripheral to his main project and is intended to show only that the adoption of a theory

can have practical consequences and that we therefore have reason to pursue the correct theory.[87]

As previously mentioned, Waluchow locates his discussion in reference to judicial interpretation of the *Charter*. Recall that those who endorse ELP will maintain that when a judge resorts to moral arguments they are going beyond the law: only pedigree sources can be used to determine what is law. Conversely, the supporters of ILP understand the *Charter* as a kind of natural law filter. This implies that even though an official order has passed through the proper pedigree channels, it may be in conflict with one or more of the rights specified by the *Charter* and hence fail to attain legal validity.[88] While the discussion thus far has been largely focused on the debate between positivists and natural law theorists, it is worth noting that Waluchow's presentation of the judge who endorses ILP is akin to a judge who believes in natural law: both will understand that the inclusion of moral arguments in their interpretation of the *Charter* will be simply a part of applying the law, and does not entail going outside it.

Waluchow lays out the three common methods of interpretation: 1) the "literalist", "textualist", or "strict constructionalist" position: those who believe that "judges should be faithful to the text of the constitution"; 2) the "intentionalist" or "originalist" approach: those who think judges should attempt to be consistent with the "intent of the original framers"; 3) or the "liberal" approach: those who conceive of the constitution as a "living tree" which needs to be interpreted in line with ever-changing political

[87] W.J. Waluchow, Inclusive Legal Positivism, 214.

[88] If a judge overturns a certain 'law' because it is found to conflict with the moral criteria in the *Charter*, ILP will understand it as never having been law.

morality.[89] Waluchow adds that 1 and 2 generally involve judicial restraint, while 3, according to Waluchow, is more active since it strives to be in accord with "current trends in political morality."[90] The claim being made is that the conceptual theory endorsed by the judge in question will lead to a certain judicial approach. In other words, there exists, according to this argument, the potential for the formation of a pattern of judicial behaviour; a pattern that would establish C1. Prior to putting forth his argument, Waluchow draws our attention to the common assumptions that serve as a basis for his claims.

Waluchow states: "judges generally prefer to view and present themselves as always applying the law."[91] Lord Radcliff draws our attention to the 'legislative role' of judges, but advises that they should not present themselves as making law. The reason is that the public does not like to think that un-elected official possess that kind of law-making power: they prefer to understand the judicial role as largely limited to interpretation.[92]

Waluchow then speculates on how these beliefs will effect judicial interpretation in light of ILP and ELP:

> If ELP were accepted as an accurate reflection of the nature of law, then the tendency would be for judges to retreat from arguments of political morality in *Charter* Challenges. And if political morality is excluded entirely, we seem left with things like "literal meaning," "framers' intent" and so on.[93]

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[89] W.J. Waluchow, "Charter Challenges: a Test Case for Theories of Law." Osgoode Hall Law Journal. (Vol. 29,1991, Issue1), 207-8.
[90] Ibid., 209.
[91] Ibid., 210.
[92] Ibid., 211.
[93] Ibid., 212.

Likewise, if a judge is a supporter of the ILP position, then "such a retreat is far less likely."[94] Waluchow adds: "[s]he and others will view her decision, not as one which encroaches upon forbidden territory, but as one which is required by the normal judicial duty to discover and apply the law that is."[95]

First, in regard to Waluchow's underlying assumptions: I agree with Waluchow that judges in Canada and the United States like to *present* themselves as interpreting the law largely because the public is comfortable with this role. However, whether judges like to *view themselves* as either interpreting the law or creating it is a separate issue, which is not and need not be connected to the way they like to publicly present themselves. Lord Radcliff is an ideal example: he believes that he is creating law but wants to be perceived as interpreting it. Thus it is possible that a judge endorses ELP (and hence believes that moral arguments are outside the law), may still employ these arguments knowing, happily, that others may well see him as interpreting the law. Judicial restraint does not follow causally from the judge's adoption of ELP, rather the judge's comfort level with his "legislative role" will determine whether he actively interprets the constitution in accordance with 3 (the liberal approach), or whether he retreats to the approaches offered by 1 (literalist) and 2 (originalist).

Marshall in "Positivism, Adjudication, and Democracy" reinforces this point. He refers to the common view that the judiciary ought to be subordinate to the legislator and that policy decisions should be made by elected officials as "extra-judicial views about

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[94] Ibid.
[95] Ibid.

democracy."[96] Marshall rightly points out that such views need not be entailed by a particular conceptual theory. Hence the theory to which they are contingently linked cannot be held responsible for the conservative views potentially espoused.[97]

Further, just because the ILP judge sees herself as applying the law, does not mean that others will necessarily see her as performing this function (as Waluchow seems to suggest in the above quotation). The judge deciding a particular case may have understood her role as such, but the public may disagree: the public, who are questioning the judge's decision, may themselves be supporters of the liberal approach—they simply disagree with the particular application of this method.

Moreover, it is conceivable that a judge applies the moral arguments, and remains conservative in her decisions. Such a judge would not be perfectly in line with 3, but she still rejects 1 and 2. She will use moral arguments but practice judicial constraint more characteristic of 1 or 2. Her conservative approach is independent of her use of moral argument that, as argued earlier, is independent of her theoretical leanings.

Note that I am not arguing that a conceptual theory is unable to make a practical difference. Rather, I wish to demonstrate that this line of argument has not established the requisite criteria to disprove PPET. Even if Waluchow is correct in his assessment of the situation, he has only established C1: he has demonstrated that formation of the required pattern is possible. Waluchow may be at least partly content with this, especially since the aim of his argument is not to establish PPET but to forward the

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[96] G. Marshall, "Positivism, Adjudication, and Democracy," in Law, Morality, and Society, 133.

[97] Ibid.

weaker claim: that conceptual theories may make a practical difference.[98] Waluchow does seem to suggest his argument also furnishes evidence for C2 since he favours the liberal approach (which he links to ILP) over the conservative approach (which he links to ELP). However he does not make the stronger claim that liberalism is morally superior to conservatism. Therefore the argument that follows is not against Waluchow but rather to unearth further difficulties surrounding the establishment of C2.

If C2 is to be fulfilled, the theorist must demonstrate that the pattern of judicial decision-making that has been identified is either morally desirable or morally undesirable. However it may be difficult to assess whether a liberal approach or a conservative approach is morally preferable. That is, whether the looking to current trends in popular morality in a given society is morally preferable to looking to more conservative sources, like the text of the constitution or the intentions of the original framers. In order to make a case for C2, the theorist must articulate the moral standard of evaluation and proceed to demonstrate why one approach is preferable on moral grounds. Yet even if this is accomplished C3 presents a further challenge. It is possible that in a given society the values found in the constitution or those expressed by the original framers are of a higher moral standing than the values currently adhered to by the majority of citizens. Hence the claim will be contextual, not universal. Note that I am not seeking to demonstrate that it is impossible to morally evaluate patterns of judicial decisions; I am, however, drawing the reader's attention to some additional obstacles that hinder the attainment of C2 and C3.

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[98] W.J.Waluchow, "Charter Challenges: a Test Case for Theories of Law." Osgoode Hall Law Journal, 207.

Establishing C3 is difficult for other reasons as well. Recall that this criterion requires that the particular practical effect can be extended to other contexts. Fulfilling this requirement is doubtful given all the variables that must align for the establishment of C1 and C2; variables that include the judge's views about democracy, the judge's comfort level with "law-making", the public's discomfort with law-creation, as well as the ability of a certain approach to lead to morally and/or politically better decisions. Even if these variables align in the necessary fashion in modern day North American society, it is highly unlikely that they will align in other contexts. I therefore assert with confidence that PPET has not yet been successfully disproven.

This chapter has demonstrated that legal positivism does not lead to any particular practical outcomes of the kind necessary to threaten PPET. The focus on the judicial arena will be maintained in chapter three where I will defend PPET against Dwokin's theory of law.

Chapter 3: Dworkin and PPET

Dyzenhaus sets up a dichotomy between positivism conjoined—or shall I say misconjoined—with the plain fact method and the common law approach understood through a Dworkinian lens. The previous chapter served to undermine the sharpness of this dichotomy while proving the validity of the PPET. This was achieved primarily by two lines of argument: 1) by demonstrating that positivism need not be conjoined with the plain fact method and 2) that the judge who endorses legal positivism is capable of utilizing principles in her decision-making process. The significance of this second line of argument is that it demonstrates that the morally acceptable decisions delivered by judges in old South Africa—those which Dyzenhaus attributed solely to judges who endorsed a natural law theory such as Dworkin's—were capable of being delivered by a judge who endorsed positivism. The grounds upon which Dyzenhaus, or any other theorist, could argue for the moral superiority of a given conceptual theory are significantly weakened since a positivist judge is capable of rendering the same kinds of decisions as a Dworkinian judge.

However, there remains an argument that could potentially damage the PPET: the possibility that the Dworkinian approach consistently leads to morally better decisions and even though positivist judges may be capable of rendering these same decisions, with positivism we are taking a greater risk since it is compatible with other methods. If this line of argument holds, Dworkin's theory could be seen as morally preferable since, unlike positivism, Dworkin's theory is able to guarantee with greater

certainty morally better results. I will call this challenge the "Reducing the Risk Argument" or the RRA.

This chapter will defend PPET against RRA. I will argue that RRA fails because Dworkin's judicial method does not successfully meet the three criteria necessary for defeating PPET. Let us begin by reviewing these criteria.

PPET, or the "Particular Practical Effect Thesis", is calling into question the project of arguing for conceptual theories on moral grounds. This thesis denies that particular practical effects follow from a given theory. While this may be a rather vague statement, it gains clarity once we look at the criteria a theorist must meet to disprove PPET. Let us recall these three criteria:

> *C1. The theorist must be able to establish a pattern of judicial decision-making that confidently links a particular legal theory with a particular practical outcome.*

The theory in question need not *always* lead to the particular practical outcome in question, but there must be an observable pattern *and* this pattern must be attributable to the theory in question. If a conceptual theory of law is to be held responsible for the pattern observed in judicial decisions, it must be reasonable to assume that the pattern will continue if judges continue to endorse the theory in question. Recall that judging operates largely in a binary framework: a defendant is guilty or innocent; the right to an abortion is upheld or denied. We must be able to assert with confidence that the verdict a Dworkinian judge will arrive at in a given case if Dworkin's theory is to be connected with any kind of pattern. Recall some of the numerous variables that muddle the possibility of making such connections: the judge does not fully understand nuances of

the theory she endorses; her self-understanding diverges from the belief system revealed in practice; the fact that reasoning given in the decision may not be the same as the reasoning she actually employed when arriving at the decision; or the sway of personal beliefs (whether they be moral, political, or prudential). However, if this pattern is established, despite the myriad of obstacles, we then must meet the second criterion:

> *2. That the pattern must carry moral weight: it must be a morally desirable or morally undesirable pattern of judicial decision-making.*

If the pattern discovered is morally benign, then it will not serve as evidence against PPET since there are no moral grounds upon which to endorse a given theory. It is no coincidence that Lon Fuller looked to Nazi Law and David Dyzenhaus to apartheid law: they were aware that if positivism was to be understood as morally inferior to natural law theories, then they would have to point to patterns in judicial decision-making that carried moral weight. If, however, a theorist does manage to meet criteria 1 and 2, criterion three remains to be satisfied.

> *3. That C1 and C2 are proven to be acontextual.*

If the jurisprudential debate is going to be decided on moral grounds,[1] then a given theory has to consistently display a confident connection to morally loaded judicial decision-making. If a theory leads to morally worthy patterns in some contexts and morally questionable patterns in others, then the moral grounds necessary to disprove PPET are not available. Moreover, there is the problem of articulating a standard for

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[1] I wish to remind the reader that I do not believe that the jurisprudential debate should be decided on moral grounds, even if this were a possibility. Conversely, I believe that it should be settled on conceptual grounds.

moral evaluation that must also be overcome. Let us now take a look at Dworkin's theory.

Dworkin's theory fuses fact and justification: the 'soundest theory of law' is the one that best fits the pre-interpretive legal data and simultaneously provides the best moral justification of the given system. The interpretation delivered by the Dworkinian judge must 'fit' the system: it must account for as much of its legal history (e.g. statutes and precedents) as possible. However, the interpretation furnished must also put the system in its "best moral light." This involves construing the legal history in a way that secures "a kind of equality among citizens that makes their community more genuine and improves its moral justification for exercising the political power it does."[2] Dworkin uses the analogy of writing a chain novel to explain his interpretive theory: an author adding a chapter to a pre-existing work must account for what is already there if her chapter is to make sense, however she will naturally aim to enhance the aesthetic quality of the work in progress by adding to it with a rendition that puts the pre-exiting text in its best light.[3] Similarly, a judge must account for pre-existing law while rendering an understanding of the law that reflects Dworkin's professed political ideals of justice and fairness.

Further, Dworkin constructs an ideal judge, Hercules. Hercules is capable of rendering the best interpretation of a given legal order: his omniscience enables him to find the "right answer" to the case before him. While Dworkin is aware that human judges will necessarily fall short of this ideal, he urges them to pursue it nonetheless.

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[2] Ronald Dworkin, Law's Empire, 96.
[3] Ibid., 228.

And in pursuing it they are rejecting the positivist doctrine of discretion: the exercising of personal choice in difficult cases. Dworkin explicitly rejects the dichotomy of law application and law creation that would make this doctrine relevant.[4] For him, the law resembles a seamless (or nearly seamless) web: thus the law has an answer for the presiding judge.

It is plausible that one could be led to several relevant hypotheses after reading this brief exposition of Dworkin's thought. It seems possible to expect that judges employing this method of decision-making will deliver similar rulings—especially since Dworkin articulates the values that the judge should prioritize, namely justice and fairness with an emphasis on individual rights, as well as the interpretive method that is to be employed by the judge, namely what Dworkin terms "constructive interpretation." Hence it also seems plausible, at first glance, that Dworkin may furnish evidence against PPET: Dworkin's constructive interpretation aims to put law in its morally best light which, as just mentioned, involves the affirmation of individual rights whenever possible— this theory seems to have the potential, not only to produce a pattern of judicial decision-making, but to produce the required 'morally superior' pattern. Further, it appears, on the surface at least, quite plausible that Dworkin's theory can achieve such morally commendable results in most, if not all, contexts. In other words, it seems to have the potential to satisfy all three criteria necessary to disprove the PPET and uphold the RRA.

However, I wish to dispel this suggestion. My first step will illuminate the difficulties in the ability of Dworkinian judges to meet C1: I will demonstrate the

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[4] Ronald Dworkin, Taking Rights Seriously. (Cambridge: Harvard University Press, 1977), 81-82.

problem Dworkin's theory faces forming the requisite pattern of judicial decision-making. The first step in this line of argument involves showing that his method may lead to different judicial decisions even though the judge in question is seeking a single 'right answer.' Second, I will invoke Dworkin's distinction between "policy" and "principle" in order to accumulate evidence against the ability of his method to meet C1 and C2. To do so I will cast further doubt on the ability of Dworkin's theory to arrive at unique decisions and hence form the necessary pattern. This distinction will also demonstrate that if such patterns happen to surface (despite the odds) there is no guarantee that these decisions, based on principle, will be morally superior to those based on policy. I have another line of argument directed at C2, which focuses on the inability of Dworkin's theory to be applied to wicked legal systems. Dworkin's interpretive method has two dimensions: "fit" and "justification." When the judge is performing her function in a wicked legal system, there may be no "moral justification" that "fits" this particular legal system (a point Dworkin acknowledges, as we will see). Consequently, Dworkin's theory does not have the resources to furnish the "morally superior pattern of judicial decision-making". While this discussion also highlights the contextual nature of any links between judicial practice and legal theory, it is the final discussion of Nazi Law that brings this point to the forefront.

In my discussion of Nazi law, I will once again use Dyzenhaus' work as a foil for my larger concern: I will provide evidence for PPET by demonstrating the difficulties surrounding the establishment of C3. Recall that Dyzenhaus makes the claim that the plain fact approach (and its conceptual counter-part legal positivism) are especially

dangerous when evoked by judges in oppressive regimes. I aim to illuminate the contextual nature of his argument by demonstrating that the plain-fact approach, if it had been utilized in Germany, may actually have led to morally favourable outcomes under Nazi rule in Germany. This point highlights the inability of a theorist to consistently link a judicial method (in this case the plain fact method) with morally better or morally worse results in different legal systems.[5] So even if Dyzenhaus had been successful in his project—successful, that is, in linking positivism and the plain-fact method and demonstrating that together they are responsible for morally questionable decisions—we find that the same pattern is not achieved in other contexts. And if such links cannot be made a-contextually, we have no moral grounds for choosing between conceptual theories at the universal level: positivism would win the battle on one occasion and Dworkin on another. Consequently we are left with the very problem the moral arguments were turned to solve: the fact that there is no clear winner in the jurisprudential debate. Now let us traverse the terrain just outlined with more precision.

Let us turn to Dworkin's "right answer thesis." In a discussion of the Fugitive Slave Laws, Dworkin seeks to demonstrate how the application of his theory is capable of making a practical difference: it would have brought about the "right answer"—the freedom of the fugitive slaves. The Fugitive Slave Laws refer to procedures enacted by the United States Congress in 1793 and 1850 "through which a slave who had escaped to a free state might be arrested by a slave-catcher without a warrant, brought before federal

[5] Recall that I have already attempted to point out problems with linking the plain-fact method with morally questionable results within the apartheid system.

officials, and then returned to his master."[6] The judges who were presiding over the trials of such slaves applied the statutes in question, thereby returning the slaves to their masters. Dworkin believes that the judges in question, namely Joseph Story and Lemuel Shaw, applied these statutes against their moral consciences[7] and that jurisprudence played an important role in leading them to the 'wrong decision'.[8]

The first step in his argument is his claim that the laws in question were unsettled:

> The slavery cases are interesting cases and puzzling only because they were not easy cases; the law was not already settled against the slaves, though the judges said it was.[9]

While Dworkin provides a number of possible explanations for why the judges in question chose to rule against the slaves and against their own consciences, ultimately he points the finger at jurisprudence:

> The debate between natural law and positivism had squeezed out a third theory of law according to which the rights of the slaves were as much institutional, and much more the responsibility of judges to protect, than the national policies of appeasement.[10]

The 'third theory of law' referred to in the above passage is Dworkin's theory. Thus his claim is that a judge who understood law as Dworkin does would have delivered the correct verdict: freedom for the slaves. Whether Dworkin is correct in his portrayal of the role that natural law theory or positivism played in the situation is an open question. A more important question for my current purpose is whether Dworkin is correct in

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[6] Ronald Dworkin, "The Law of the Slave-Catchers." in Philosophy and Law. Edited by Feinberg and Gross. (California: Wadsworth Publishing), 178.

[7] Ibid., 178.

[8] Ibid., 178-79.

[9] Ibid.

[10] Ibid., 180.

claiming that his theory would lead to the morally superior particular practical results. This is what has to be proven for RRA to hold.

Hart responds to Dworkin's characterization of the situation, questioning whether the law on the issue was in fact unsettled as Dworkin claimed:

> None the less anyone considering this theory and especially its application to the Fugitive Slave cases must I think be visited by doubts on two main scores. The first is the latitude which Professor Dworkin permits himself and so would allow to the courts in drawing the line of distinction between what is to be taken as settled law from which the guiding justificatory principles are to be derived, and what as unsettled law providing the hard cases to be decided by reference to the principles derived. Thus for the theory to have any application to the Fugitive Slave Act cases the relevant law must at the time of the decision be taken not to have been settled. But the judges themselves, as Professor Dworkin says, said that it was settled. 'The law was not already settled though the judges said it was.' He implies that the judges could not have believed what they said for according to him in spite of what they said they believed they were making new law. [11]

If Hart is correct, then a Dworkinian judge would be required to enforce the statute. This would erase the practical difference posited by Dworkin and hence prevent this argument from damaging PPET.

The second point Hart makes is the very point needed to disprove RRA: that Dworkin's theory does not lead to a single 'right answer' as he supposes. Hart writes:

> More important is the doubt whether Professor Dworkin has established something which is central to his case, namely that a judge will not frequently be faced with alternative equally correct ways of applying this [Dworkin's] theory, when, in seeking to avoid 'the failure of jurisprudence' of which Story and Shaw were guilty, he tries to extract from the existing law the principle that will yield the correct decision in a hard case. It is right and illuminating to speak of the existing pull over the judge, but that there will not quite often be equal

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[11] H.L.A. Hart. "Law in the Perspective of Philosophy." Essays in Jurisprudence and Philosophy. (Oxford: Clarendon Press, 1983), 156.

> gravitational pulls in different directions seems to me something still to be shown.[12]

Thus if Hart is correct, as I believe he is, we have reason to believe that the Dworkinian theory is unable to furnish the necessary pattern that would disprove PPET since we do not know before hand which way a Dworkinian judge will rule.

An alternative understanding, as articulated by Mackie, is that Dworkin's theory results in more of the law being unsettled. [13] If this is indeed the case we may have located a practical difference between the theories: if a Dworkinian judge views more of the law as unsettled, then this may well impact her reasoning in the case at hand and potentially the verdict. This point is implicit in Dworkin's reasoning: had the judges viewed the law as settled then they would be required to apply it. Hence we have unearthed the possibility that a particular practical effect results from viewing the law as unsettled. And if Mackie is correct in his assessment of Dworkin's theory—that Dworkinian judges will view more law as unsettled—then judges who adopt this approach may be able to furnish a pattern of principled decisions supplanting iniquitous statutes. However, while a practical difference may have been brought to light in this instance, it is much more difficult to assert with any confidence that a judge will indeed render a particular verdict—that is, furnish a *particular* practical effect of the kind necessary to undermine PPET.

The fact that a given judge views the law as unsettled, while another views it as settled, does not allow us to assert with confidence which way the verdict will go—an

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[12] Ibid., 156-57.

[13] John Mackie, "The Third Theory of Law." in Philosophy and Law. Edited by Feinberg and Gross. (California: Wadsworth Publishing), 185.

argument from Mackie will support this point momentarily. Nor does it tell us whether the verdict delivered by a given judge would have been different if she had viewed the law in an alternative manner. If the judge who viewed the law as settled came to view it as unsettled, the question remains open as to whether the decision would in fact be different or whether merely the rationale would be different but the verdict the same. For example, instead of arguing that the Fugitive Slave Laws are unsettled and deciding against what might appear to be settled law in favour of the slave-owners, the same judge could make an argument for over-turning the statute in question.[14] Thus whether the law is understood as settled or not may affect the reasoning of the judge, but it does not ensure a particular verdict, and hence does not ensure that C1 will be met.

Mackie provides further support for this point by drawing our attention to the fact that a Dworkinian reasoning process need not lead in only one direction. Even if the Dworkinian judge views the law as unsettled, and strives to put the law in its 'best moral light" as Dworkin suggests, the verdict rendered may still vary from judge to judge. He illustrates this point by creating his own Dworkinian judge, Rhadamanthus, who employs the Dworkinian method. Unlike Hercules, however, Rhadamanthus decides to send the fugitive slaves back to their masters:

> What principles that are relevant to this case are implicit in the settled law? The fundamental fact is the Union itself, which arose out of an alliance, against Britain, of thirteen separate and very different colonies. It was recognized from

[14] Dworkin may respond that a positivist judge would not take such measures, as they understand the judicial role as subordinate to that of legislators. Yet as Marshall points out, this is a view about democracy that, while compatible with positivism, does not follow necessarily from positivism. (G. Marshall, "Positivism, Adjudication, and Democracy," in Law, Morality, and Society, 133). And as the previous chapter demonstrated, judges who endorse positivism do have principles at their disposal.

> from the start that these colonies, and the states which they have become, have diverse institutions and ways of life. The Union exists and can survive only through compromises on issues where these differing institutions and ways of life come into conflict. One salient principle, then, enshrined as clearly as anything could be in the federal constitution and in various statutes, is that the rights which individuals have in virtue of the institutions of the states in which they live are to be protected throughout the Union. A Virginian slave-owner's property in his slaves is one of these rights; the clear intention of Article IV, Section 2, of the Constitution and of the Fugitive Slave Acts is to protect this right. Therefore, whatever merely technical defects may be found in them the law of the land, as determined by the third theory of law [Dworkin's Theory] which I hold, is that the alleged slave should be returned from Massachusetts to Virginia, where it can be properly decided, by the evidence of many witnesses, whether he is in fact the slave of the man who claims him.
>
> The contrary view, that the constitution presupposes a conception of freedom antagonistic to slavery, cannot be upheld. Jefferson, who actually wrote the Declaration of Independence, and who later was mainly responsible for the amendments, which most strongly assert individual rights, was himself a slave-owner. The individual freedom, which the Constitution pre-supposes, was never intended to apply to slaves. Nor will the requirements of procedural justice, which can indeed be seen as principles enshrined in the settled law, support a finding in favor of the alleged slave. On the presumption that slave-owners have legally valid property rights in their slaves, procedural justice will best be served by sending the alleged slaves back. The conception of federalism does, no doubt give the state of Massachusetts the power to supervise the capture of men and women in its territory, but this power must be exercised in ways that respect the institutions of Virginia, especially as these are further protected by federal law.[15]

Mackie's point illuminates a problem inherent in Dworkin's 'right answer thesis': the simple fact that reasonable people disagree, and in this instance reasonable judges. While they may agree on method, they may disagree on the result of the application of this method to a given case.[16] If a Dworkinian judge can reasonably decide for either the plaintiff or the defendant (even in morally charged cases such as the one just outlined) we must conclude that we cannot be sure of the verdict before it is delivered. If this is

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[15] Ibid., 186.

[16] Dworkin also concedes that judges are not infallible and that they will sometimes make mistakes at some point.

the case, not only is it doubtful that a pattern will surface, it is also doubtful that we can be certain that this pattern will be morally commendable. Furthermore, even if a pattern surfaces that seems to be connected to this method of adjudication, we still lack the ability to recommend the theory with confidence: while previous judges may have delivered morally desirable verdicts based on Dworkinian reasoning, we have no assurance that future judges will apply this method and yield the same results.

Further grounds for doubting RRA are brought to light by the following considerations. While the thesis that there is, in theory, a right answer to all legal questions is contentious, the inability of ordinary judges to consistently hit the mark absent the guidance of Hercules makes Dworkin's thesis all the more questionable. As Soper notes:

> In the absence of a real Hercules to resolve the dispute, one is hard pressed to explain how behaviour is affected by the fact that one is instructed to seek a system-determined "right answer" instead of being told that more than one solution (within a reasonable range) is system-acceptable, even though there may be in some theoretical sense an extra-systematic right answer.[17]

Once again we are unable to pin in practice a particular practical result unto the Herculean method. Since there is no particular practical outcome that can, within the realm of everyday judging, be linked consistently with this method, we cannot presuppose that the application of the method will indeed yield morally desirable results, or even results morally better than those rendered by a positivist judge. Consequently PPET is left standing—while Hercules may furnish the necessary pattern of decision-making, real judges may prove to fall short in reference to this requirement.

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[17] Philip Soper, "Legal Theory and the Obligation of a Judge: The Hart/Dworkin Dispute," Michigan Law Review. (Vol. 75, 1977), 509.

In fairness to Dworkin, he recognizes that judges may make mistakes—they may fail to render the "right" verdict since they lack the moral insight of Hercules. He proceeds to emphasize that, despite the very real possibility of mistakes, the judges' technique is what is most important: "We must commend techniques of adjudication that might be expected to reduce the number of mistakes . . ." [18] According to Dworkin, his theory may not eliminate mistakes, however it may prove to "reduce the risk" of judicial errors. I have two rejoinders to Dworkin's reply: 1) I will question whether Dworkin's expectation just articulated is realistic; 2) I will suggest the possibility that Dworkin's right answer is not necessarily the morally best answer.

Waluchow's discussion of utilitarianism provides a useful analogy that serves to undermine Dworkin's belief that his method will "reduce the number of mistakes" judges make. Waluchow points to the fact that utilitarianism professes to have "right answers" in the realm of morality, yet it is unrealistic to expect the correct decisions to be made by those who employ the utilitarian method:

> A philosopher whose aim was clearly not the provision of action guides was G.E. Moore who was happy to concede that his "ideal utilitarians" seldom tells us, with any degree of certainty, whether our actions are in fact morally right. The consequences of our actions, Moore thought, are numerous, unpredictable and in many instances unknowable.[19]

Similarly, we can also doubt that Dworkinian judges will hit the mark with any degree of consistency. Furthermore, the possibility exists that Hercules' decision is not the morally best decision. By examining Dworkin's distinction between "principle" and "policy," we discover that this may not be the case: not only are we given further reason

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[18] Ronald Dworkin, Taking Rights Seriously, 130.
[19] W.J. Waluchow, Inclusive Legal Positivism, 93.

for questioning the ability of the Dworkinian approach to fulfill C1, we also have reason to believe that he cannot fulfill C2 either.

Recall that Dworkin believes that principle should trump policy in judicial decision-making. Arguments of principle "justify a political decision by showing that the decision respects or secures some individual or group right" while arguments of policy "justify a political decision by showing that the decision advances or protects some collective goal of the community as a whole."[20] Furthermore, Dworkin claims that arguments of principle require 'articulate consistency' meaning that individual rights are to be applied uniformly in all cases where they apply. Conversely, policy considerations, on his account, are piecemeal: they need not be applied to all situations of a similar kind. The example Dworkin provides is *Spartan Steel*: a judge pursuing the policy of economic efficiency in this particular case need not extend this goal to other cases that are similar. The economy may be flourishing at a later date and may not need the support given to it via decisions that prioritize economic efficiency.

With this distinction in mind, one could hypothesize that judges' attempts to mimic Hercules will result in decisions of a certain kind: they will favour individual rights over policy considerations. On the surface it seems as if we may be able to link a decision-making pattern with the Herculean method: it seems reasonable to presume that a Herculean judge will rule in favour of individual rights with the regularity required by C1. However, the argument that follows draws on Dworkin's own points in order to

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[20] Ronald Dworkin, Taking Rights Seriously, 82.

demonstrate the difficulty that still remains in fulfilling C1. While a Dworkinian judge may reason differently, this in no way insures a different pattern of decision-making.

Dworkin concedes that "[d]ifferent arguments of principle and policy can often be made in support of the same political decision."[21] He outlines this point by drawing on potential arguments made in favour of racial segregation: an official could support this political decision by stating that "mixing races caused more overall discomfort than satisfaction"; or the same policy could be supported on principle by "appealing to the rights of those who might be killed or maimed in riots that desegregation would produce."[22] Dworkin adds that decisions made on principled grounds will ultimately be more powerful than those made on the basis of policy. Thus Dworkin may argue that the practical difference may be occasionally locatable in the actual decision rendered but more often it is the reasoning employed that definitively separates judicial decisions that are principle-based versus those that are policy-based. Hence Dworkin may wish to locate a practical difference in the reasoning process: future judges may be influenced by what he calls the 'more powerful' reasons provided by principle and thus be led via this line of reasoning to morally better results in the future by consistently extending the rights granted. However this claim is weak as well. Judges operate in a binary framework: the defendant is guilty or not guilty; the right to an abortion is upheld or denied. Neither a principle-based reasoning process, nor a policy-based reasoning process guarantees a particular decision; hence judges of the present or of the future

[21] Ibid., 96.
[22] Ibid.

cannot confidently be expected to furnish a pattern of decision-making. Hence C1 remains unfulfilled.

Let us dwell a little longer on this distinction: if we return to Dworkin's original definition of policy we find that it simply refers to collective good and principle refers to group rights or individual rights.[23] And as noted, Dworkin believes that if the judge is to put the law in its best moral light, he is to rule in accordance with principle. Ruling in accordance with principle becomes more difficult when it is recognized that this distinction between "principle" and "policy" does not always materialize in the way Dworkin seems to suggest it does. In a given case, the judge may find that there are two competing arguments of principle: the language rights of the majority francophone population in Quebec may come into conflict with individual rights of the Anglophone minority. Even if Dworkin would choose to identify the latter with "community goals" and not "group rights," the morally best decision in such a case is not transparent.

Marshall draws our attention to some further ambiguities within Dworkin's distinction:

> Individuals and minorities may have goals, and communities or majorities may have rights. A goal is anything that is aimed at or perhaps anything that it would benefit an individual or a community to aim at. But there is no reason why a goal might not be, or aim at, the protection of a right or the maximization of rights.

This point lends further credence to the possibility that decisions based on policy may be the same as those based on principle, especially if the policy being implemented is the protection or maximization of rights. It might be fair to say that in this case the judge

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[23] Ibid., 80.

who is pursuing a rights-based policy may be indistinguishable from a Dworkinian judge in any given case. This undermines the possibility of fulfilling C1 and C2.

Dworkin would disagree, however. He would most likely respond that the policy-based judge differs from Hercules in a significant way: unlike principle-based decisions, 'articulate consistency' is not demanded by policy decisions. Consequently a judge who operates on the basis of policy is less likely to rule in accordance with principle on a consistent basis. He may very well favour the policy of economic efficiency as in the case of *Spartan Steel*—a decision that, according to Dworkin, is clearly of lesser moral value. Hence Dworkin would likely maintain that Hercules holds the moral high ground.

Soper provides us with a possible response to Dworkin. He couches his argument in terms of Dworkin's juxtaposition of Hercules and the pragmatist judge: the former, as expected, makes decisions based on principle, and the latter makes decisions based on policy. Hercules' approach, according to Dworkin, embodies the adjudicative principle of integrity. Integrity, as we will see, demands articulate consistency:

> The adjudicative principle of integrity instructs judges to identify legal rights and duties, so far as possible, on the assumption that they were all created by a single author—the community personified—expressing a coherent conception of justice and fairness.[24]

Dworkin denies that a Pragmatist judge has any allegiance to this principle. Rather legal pragmatism requires the following:

> . . . that judges do and should make whatever decisions seem to them best for the community's future, not counting any form of consistency with the past as valuable for its own sake.[25]

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[24] Ronald Dworkin, Laws Empire, 225.
[25] Ibid., 95.

Since judicial decisions are political decisions, Dworkin believes they should be made in a politically responsible way—the politically responsible way involves a judge drawing upon "some general political theory he sincerely holds" in order to differentiate one case from the next.[26] A task that necessitates looking to judicial decisions of the past.

Soper draws our attention to the fact that a pragmatist judge does not have to be denied the principle of integrity. In other words, a judge who favours policy does not have to sacrifice articulate consistency. Recall that for Dworkin, a pragmatist judge need not be concerned with past decisions when ruling; he may choose to ignore them as he is concerned only with the future.[27] Soper points out that there is an alternate explanation for the behaviour of the pragmatist judge that is consistent with the principle of integrity: the pragmatist judge does not have to "ignore" precedents that are inconsistent with her community goals, she can simply over-rule such precedents. If understood in this manner, the pragmatist judge's behaviour is indistinguishable from the behaviour of Hercules since Hercules over-rules precedents that are inconsistent with the principles he endorses. Soper illuminates the possibility that a pragmatic decision may very well be "that of a single author, consistently *maximizing* justice or efficiency without worrying about past political decisions except for reasons of strategy."[28] In other words, the pragmatist judge may furnish a pattern of judicial decisions that mirrors the decision-making pattern that Hercules would furnish; the only difference being that Hercules

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[26] Ronald Dworkin, Taking Rights Seriously, 87.

[27] Ibid., 162.

[28] Philip Soper, "Dworkin's Domain," Harvard Law Review, 1181. While Dworkin may reject Soper's characterization of the pragmatist judge, this is not of pressing concern. Regardless of the name we give Soper's judge, we now have an argument that demonstrates that policy concerns are not inconsistent with 'articulate consistency.'

would prioritize individual rights and the pragmatist judge would prioritize the good of the community. The question can now be posed as to whether or not Hercules occupies the moral high ground as Dworkin suggests. Soper maintains that Hercules is not the clear winner. He draws the conclusion that Dworkin is simply rehearsing the old philosophical debate between the community and the individual and delivers the following assessment: "What we need is some independent, prior argument for preferring principle over policy—but that is exactly the dispute between utilitarians and Kantians that has been going on for some time now."[29] If Dworkin is to establish C2, he must also provide us with a conclusive reason for believing that principle-based judicial decisions are morally preferable to policy-based decisions.

This section has aimed to cast doubt on Dworkin's ability to undermine PPET by casting doubt on the ability of his theory to fulfill C1, C2, and C3. This goal will be maintained in the next section that focuses on the inability of Dworkin's theory to be applied to wicked legal systems.

Dworkin and Wicked Legal Systems

Now let us turn to wicked legal systems. As previously mentioned, I will illustrate the inability of Dworkin's theory to deal with wicked legal systems. When it is applied to wicked legal systems, we find that the element of "fit" may prevent a morally justifiable decision from being rendered. If this is the case, then Dworkin's theory does

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[29] Ibid.

not succeed in "reducing the risk" (In other words, RRA has not been proven). So even if Dworkin's theory can somehow overcome the challenges presented in the previous section, and establish C1 and C2 in reference to morally acceptable legal systems, C3 can only be fulfilled if his theory meets the current challenge.

Recall that Dworkin's theory is two-dimensional as it involves both 'fit' and 'moral justification.' The interpretation of the legal system in question must account for the legal history while placing this history in its 'morally best light'. However, when Dworkinian's "constructive interpretation" is applied to a system like the one found in old South Africa—the fit is uncomfortable at best. Soper concurs:

> [I]f Dworkin's claim was meant to be universal, it seemed easy to imagine or find examples of legal systems in which the dimension of "fit" would force judges to reach decisions that, even under the best possible justification, were immoral.[30]

As we can see, Dworkin's theory is clearly not "Risk Reducing": it may quite possibly lead to morally questionable verdicts in wicked systems. So even if a pattern were to be established by a Dworkinain judge, it may very well be an immoral one.

Dyzenhaus, who argues that Dworkinian judges will serve a medicinal role in wicked legal systems, is aware of this criticism. He claims that in the case of South African law, there are liberal principles existing amongst the morally unacceptable ones.[31] He believes that the "screening out" power of Dworkin's theory can enable the judge to shed the morally questionable principles and extend the morally praiseworthy ones:

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[30] Philip Soper, "Dworkin's Domain" in Harvard Law Review, 1167.
[31] Hard Cases, 32-40

> He [Dworkin] claims that the requirement which his theory imposes on judges—that they provide an argument which shows the legal record in its best moral light—will tend to screen out or exclude morally unacceptable principles.[32]

The problem that this 'screening out' power encounters when it is applied to wicked legal systems is that too much of the legal history must be 'screened out' if morally favourable decisions are to be made. Even Dworkin admits that there is a threshold that cannot be crossed if the constructive interpretation rendered is to be a viable interpretation of the legal system in question.

Dworkin points out that only a limited amount of the history of a given legal system can be deemed mistaken if the dimension of "fit" is to function properly:

> Hercules must expand his theory to include the idea that a justification of institutional history may display some part of the history as mistaken. But he cannot make impudent use of this device, because if he were free to take any incompatible piece of institutional history as a mistake, with no further consequences for his general theory, then the requirement of consistency would be no genuine requirement at all.[33]

In wicked regimes, like that of apartheid South Africa, there was an extensive history of inequality and hence a great number of statutes and precedents that would have had to have been discounted as mistaken were favourable interpretations to emerge. But were this the case, then such interpretations, as Dworkin recognizes in the above passage, would cease to be interpretations of the system in question; rather, they would be closer to morally acceptable fictions. This point can be illustrated in relation to Dworkin's understanding of the process of constructive interpretation as being akin to writing a chain novel. If we were to find Iago too morally reprehensible and thus chose to write

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[32] Ibid., 29.

[33] Ronald Dworkin, Taking Rights Seriously, 121.

him out of the plot, or if we chose to alter his character traits and render him a saint even though he is firmly established as the play's villain in Act I, the play ceases to be Othello. It would no longer make sense as a Shakespearean tragedy, and it may even fail to be a coherent plot of any genre. Similarly, one cannot discount central features of a legal system and claim that one is interpreting that very system.

A possible response to the above argument could take the following form: if Othello is conceived as a chain novel, is it not possible that Othello may be a story about an evil villain who becomes increasingly more virtuous as the play progresses? This objection, when applied to a legal system, assumes the following form: is it not possible that decisions made by judges that attempt to put the law in "its best moral light" may succeed over-time in improving the moral standing of the legal system? Moreover wouldn't a theory that instructs judges to put the legal system in its best moral light be more likely to achieve this goal? I do not wish to deny the possibility that judicial decisions may transform a legal system in this way. However, my point is that Dworkin's theory does not necessitate such rulings: a judge who employs Dworkin's method, and thus stays true to the dimension of "fit," may very well be left to reinforce apartheid law. Dworkin's discussion of Judge Seigfried helps to illustrate this point.

Dworkin is not oblivious to the problem that his theory encounters when it is used to explain wicked legal systems. He admits the possibility of a sceptical interpretation, a possibility brought to life as he envisions stepping into the shoes of Judge Siegfried—an acting judge in a wicked legal system. If we were to place ourselves in his shoes, Dworkin acknowledges that we "might decide that the interpretive attitude is wholly

inappropriate there, that the practice, in the shape it has reached, can never provide any justification at all, even a weak one, for state coercion."[34] The question then arises as to what the judge should do given his unfortunate predicament. Dworkin posits that "we will think that in every case Siegfried should simply ignore legislation and precedent altogether, if he can get away with it, or otherwise do the best he can to limit injustice through whatever means are available to him."[35] It is worth noting that this response takes the judge outside of Dworkin's theory: he is no longer putting the settled law in its best moral light—he is no longer satisfying the dimensions of 'fit' and 'moral justification' when making his decision. Implicitly Dworkin is admitting that to do so would mean ultimately reinforcing a morally bad status quo—a point that Raz drew our attention to in reference to apartheid law and thatWaluchow illuminates in his discussion on 'moral force.'

We can now see that Dworkin's response to the situation is aligned with the response many positivists give to such a situation. Thus we have various legal theories advocating the same judicial response, and thus the possibility that all three conceptual positions lead to the same ruling. Consequently, even if we are made aware of the judge's theoretical commitments, we still have no way of predicting which way the ruling will go. If no particular decision can be expected, neither can a particular pattern

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[34] Ronald Dworkin, Law's Empire, 105.
[35] Ibid.

of decisions. Hence C2 and C3 are not yet accounted for and hence PPET remains standing.[36]

While the above discussion presented explicit evidence against C1 and C2, problems of context also rise to the surface: even if, against all odds, someone was able to prove that Dworkinian judges consistently made morally commendable decisions in the United States, we still could not place his theory on a jurisprudential moral pedestal since it may also lead to morally questionable results in wicked systems. In such systems the 'fit' requirement necessitates that the justificatory principles employed be less than ideal. A comparison between Nazi Law and South African law will further substantiate the difficulties surrounding acontextual evaluations of the legal theories.

Nazi Law: A Counter Example

The comparison between Nazi Law and apartheid law will primarily serve to demonstrate the difficulties surrounding the fulfillment of C3. Recall that C3 requires

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[36] Michael Hartney, in his article "Dyzenhaus on Positivism and Judicial Obligation" suggests a rather counter-intuitive 'moral stance' that a judge could assume when faced with such political contexts: the possibility that one may actually help fight apartheid via the application of morally iniquitous statutes. His reasoning is as follows: once parliamentary supremacy is recognized by at least the majority of judges in the system (as was the case in South Africa), judges who resist application of statutes are merely tinkering with a very powerful system. Real change, history has shown, comes from the outside often in the form of revolution and such political upheaval is more likely to arise against a system that is wholly lacking in virtue. Hartney's point casts further doubt on the ability to establish C2 as it draws our attention to the difficulties surrounding the moral evaluation of judicial decisions. However, the judicial behaviour suggested by Hartney requires sacrificing justice in the present while having a tremendous faith in the lessons of history. See pages 50-51.

that C1 and C2 can be shown to be acontextual. In other words, even if a project like Dyzenhaus' were to be successful in linking a given conceptual theory with a morally weighted pattern of decision-making in South Africa, he still must show that these findings extend beyond this one legal system. The reason for this, as previously stated, is as follows: if a theory is going to win or lose the conceptual debate in legal philosophy on moral grounds then the theory must lead to morally desirable or morally undesirable consequences with some consistency. Furthermore, a given theory must not furnish morally desirable results in some contexts and morally undesirable results in others: if this were the case, it could not be deemed the winner or loser in the debate.[37]

Let us assume, for the sake of argument, that Dyzenhaus was indeed successful in establishing the first two criteria. He satisfies C1 by successfully linking positivism with the plain-fact method and then demonstrates that judges who employ this method furnish a particular pattern of judicial behaviour. He satisfies C2 by illustrating that this pattern is morally undesirable—that these judges re-enforced the system of apartheid. Dyzenhaus is aware of the fact that if his project is going to succeed, he must also prove that his findings extend beyond a single context. He does so by referencing English law[38] and via the claim that wicked legal systems are the most vulnerable to the morally iniquitous pattern of legal decision-making that legal positivism and the plain fact method bring about. Dyzenhaus stresses "it is under conditions of oppression that the considerations on which a plain fact approach fastens will be most in evidence in

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[37] I wish to remind the reader once more that I do not endorse the project of determining the superior jurisprudential theory on moral or political grounds.

[38] Hard Cases, Chapter 10.

statutory materials."[39] Thus an examination of Nazi law, which shares unfortunate characteristics with apartheid law—expressly their perpetuation of blatant and systematic racial inequality and the oppressive nature of their rule—serves to reveal the difficulty with making such non-contextual claims. As we will see, it is very difficult to suppose plausible that positivism and the plain fact method would have brought about morally desirable judicial decisions in Nazi Germany. This is due to a poignant dissimilarity between the two legal systems: The judges who supported Nazi rule in Germany had to ignore statute law and make decisions in the spirit of the movement: In South Africa, statute law and the spirit of the movement were consistent. The importance of this difference will become clearer once we revisit the plain fact method and look with greater detail at Nazi law.

Recall that according to Dyzenhaus, the plain-fact judges understand their role in the following manner: "They hold that the judicial role is not to make law in accordance with their convictions about what morality requires, but to apply the law as it in fact, on a particular conception of fact, exists."[40] They are to apply, not overrule, the statutes enacted by Parliament and if uncertainties arise, they are to look to the well-documented legislative intentions of Parliament for guidance. In apartheid South Africa, these intentions would have directed the judge to re-enforce the inequities of the apartheid system. In Germany there was an important difference: we will see shortly that statute law (and the intentions of those who had enacted it) was often in conflict with Nazi policy. If judges had chosen to apply statute law and be faithful to the intentions that

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[39] Ibid., 244.
[40] Hard Cases, 217.

motivated its enactment, (assuming this knowledge were available) their decisions would likely have failed to support the Nazi party. Ingo Muller's book Hitler's Justice lends credence to this possibility.

Muller notes that Germany under Nazi rule was no longer a "mere state under the law"; rather the Nazi's political ideology, understood as the spirit of the movement, supplanted traditional understandings of legality.[41] The shift, as Muller points out, translates into what the Nazis saw as "the victory of the state over the letter of the law."[42] Judges were to look solely to Nazi ideology and not to statutes when making their decisions:

> There was no mistaking the fact "that the rule that a judge's sole obligation is to the law now means something different from what it used to," for "we seek an obligation which is more reliable, more vital, and deeper than the misleading obligation to the letter of thousands of paragraphs, which can be twisted.[43]

It may not be unreasonable to suggest that if Nazi judges had employed the "plain fact" method of interpretation, such abuses could have been avoided. The above quotation suggests that the Nazis wanted to avoid black letter law—which had been enacted by previous governments with more benign agendas—in order to facilitate their oppressive and discriminatory policies. Moreover, when the National Socialists promulgated their own laws, they used vague wording thereby preventing both literal and plain fact interpretations of their statutory enactments. Instead the Nazi's directed judges to invoke the spirit of Nazism:

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[41] Ingo Muller, Hitler's Justice. (London: I.B. Tauris & Co Ltd., 1991), 71.
[42] Ibid., 24.
[43] Ibid., 72.

> National Socialist criminal law was "less concerned with the clarity of statutory provisions than with material justice" Stability of law and protection of individual rights were thrust aside in favor of this mystical "material justice," which could supposedly be grasped only through "an overall view of its essential nature." For this reason, laws ought to be formulated purposively in vague and fuzzy wording: "General provisos, admission of analogy, recognition of healthy popular opinion as a source of law, and admission of direct immediate recognition of what is just . . . are criteria of National Socialist criminal law.[44]

While clearly the intentions of the party in power were the source of injustice—the plain fact approach is not the allied force serving the oppressive ends of the party in power. Again, had the judges used this method in looking to statute law and interpreted it as it was intended by the legislators who enacted it, and not in the spirit of Nazism, the resulting verdicts may well have been praiseworthy.[45] If Dyzenhaus had been successful in establishing C1 and C2, the comparison to Nazi Germany prevents C3 from being established. Hence we still lack the necessary evidence for condemning, or upholding, positivism on moral grounds. Those looking to crown a given theory as victorious on moral grounds find themselves with no clear winner.

This exploration of the legal atmosphere in different wicked regimes serves to highlight Dyzenhaus' failure to realize the extent to which context influences the kinds of practical connections he is attempting to make. Even if Dyzenhaus had established C1 and C2, C3 still eludes him: PPET is still not disproved. If a philosophical conclusion is to be drawn regarding the moral standing of a given conceptual theory of law the

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[44] Ibid., 75.

[45] I am aware that the judge may not have been able to make such decisions due to the political climate and the potential repercussions of deciding a case against Nazi ideology. This possibility supports PPET: the political concerns of a judge may prove to influence her verdict more than any other factor, including theoretical commitments.

particular practical result furnished in more than one sociological context or the findings will remain sociological and contextual.

Conclusion

Let us assess the standing of the "Particular Practical Effect Thesis." As mentioned in the introduction, there is a trend in jurisprudential debate in which theorists are looking to moral and political arguments to settle the debate between natural law theories and legal positivism. My thesis has served to question the possibility of such projects. I began by outlining the three criteria that must be fulfilled if an argument for or against a given theory on moral and/or political grounds is going to be successful. These criteria required that an acontextual, morally significant pattern, be linked with confidence to a particular conceptual theory. An empirical study, like Dyzenhaus' case study of South African law, is not required for these three criteria to be met. It is more important that the theorist establish, through philosophic argumentation, that the fulfillment of these criteria is a realistic possibility. However, my thesis has attempted to demonstrate the numerous challenges that this task presents.

In the first chapter, my focus was on the citizen and her relationship with the law, the central question being whether she was more conscientious, complacent, or anarchistic as a result of her conceptual orientation. The conclusion drawn, with the help of many accomplished legal theorists, was 'no'. The first arguments that were examined were focused on claims put forth by the regime. MacCormick asserted that there was a danger associated with natural law theory—it enabled officials to hide behind the moral aura of the law when enacting questionable statutes. A similar charge was imputed against positivism since officials who endorse this understanding could simply recite the

credo 'law is law' and expect obedience without demanding that it meet any moral standards. Both charges assume an unconscientious public who simply accept the word of the officials—a disposition Soper links with Eichmann. The conscientious, Ghandi-like, citizen will submit the law to moral scrutiny regardless of the claims being put forth by the regime. I conclude that, in this instance, the link claimed between the conceptual and practical was simply non-existent.

Similar arguments were then explored from the point of view of the citizen: the concern was no longer the claims being made by the regime, but focused on the individual's own understanding of law. The same conclusion is drawn. The arguments examined in this section all revealed an identical shortcoming: they failed to escape from their own framework. Once this is revealed we discover that both understandings of law have the much sought after gap: the gap that allows for moral scrutiny of the regime and/or its directives. Those who endorse natural law evaluate its worthiness prior to deeming it law; the positivists do so after such identification has already taken place. Consequently, neither view leads to blind obedience.

I wish to digress for a moment in order to entertain a possible line of questioning. Given the above arguments, one can raise the question at this point whether the debate is merely semantic: the competing theories just use different labels for the same thing. What is deemed 'social directives' by one's theory is 'law' by another. And since there are no concrete practical effects that flow from either theory, couldn't the entire discussion be a semantic quibble? Obviously I do not endorse this sceptical view and hence wish to provide some preliminary responses. What comes to mind initially is a

defence of the broadest philosophic principle: the search for knowledge for its own sake. The concept of law lives in the company of other, much debated, concepts like art, beauty, and truth. Furthermore, knowledge of law also, as Raz notes, provides us with knowledge of ourselves: law is a human institution and by gaining a greater understanding of it, we come to know ourselves.[1] But there are other implications too that might be more convincing to those who do not value such lofty pursuits. One's understanding of law will impact on one's understanding of legal rights and duties--which are very practical concepts. Bringing clarity to these kinds of concepts may help us to better understand our role as citizen and our relationships to the courts as well as to others. While these replies are rough, they do indicate several avenues along which a complete response could proceed. Let us now return to our main concern.

The question was then posed in relation to judicial activity: is there a discernible link between particular practical consequences and conceptual theories in this realm—a link that could undermine PPET? I admit the plot thickens when this topic is explored, especially since in the course of my exploration of this topic I stumble upon two connections between theory and practice that, at first glance, seem to threaten the sustainability of PPET. The first arises in my discussion of inclusive and exclusive positivism: with Waluchow's aid, I present a scenario where the judge's view does make a practical difference. I then show the way in which a number of variables must align in order for the practical difference in question to materialize; variables, such as views about democracy that are not entailed by the conceptual theory. More importantly, I

[1] Joseph Raz, "Authority, Law and Morality," The Monist, 322

question the possibility that this line of argument is capable of fulfilling C2 and C3: a moral evaluation of the potential pattern of decision-making presents an obstacle since the moral standing of liberal or conservative judicial approaches is not transparent. Further, the ability to show that this practical difference is likely to arise in other legal contexts also presents a challenge due to the number of variables that must be aligned for a practical difference to materialize. Thus PPET still stands.

Once positivism is freed from Dyzenunhaus' accusations—a task accomplished by arguments in chapter two—a second potential threat to PPET surfaces. Namely, that Dworkin's theory, if put into practice, would "reduce the risk" of morally problematic decision-making. I explore this possibility in my third chapter by entertaining an argument that I call the "Reduce the Risk Argument." RRA states that Dworkin's theory is morally superior since it reduces the risk of a judge rendering a morally questionable verdict. I question the ability of RRA to discredit PPET in the following manner.

I begin by demonstrating how Dworkin's method cannot guarantee that a consistent particular practical outcome will result and hence it fails to establish C1. I also question the possibility that Dworkin's theory could satisfy C2: not only does the establishment of C2 rely on the fulfillment of C1, but there is no assurance that Dworkin's method would result in the morally best judicial decisions. I prove this point via two lines of argument: 1) I draw the readers attention to the fact that rulings based on principles and not policies, and individual rights and not community goals do not necessarily lead to morally preferable judicial decisions; 2) I elucidate how Dworkin's method does not yield morally preferable results in wicked legal systems—recall how the element of "fit"

constrains the element of "moral justification" thereby preventing a judge who uses this method from arriving at a morally desirable decision. This second point also serves to call into question the ability of Dworkin's method to fulfill C3; a task also undertaken by the final argument of the paper that examines Nazi Law.

I end the chapter with a discussion of Nazi law: here I aim to illuminate the problems encountered when a theorist tries to establish C3. It is very plausible that if C1 and C2 are established in a given legal context, these findings will not hold in other legal systems. I argue that even if Dyzenhaus had been correct in connecting positivism with the plain-fact method--and hence was warranted in condemning positivist judges for re-enforcing apartheid--his argument would have been hard pressed to survive beyond this country's borders. I demonstrate how the plain-fact method may well have led to morally desirable decisions in Nazi Germany. This discussion illuminates the variables that hinder the fulfillment of C3. And if C3 cannot be established, then the grounds for determining a winner in the jurisprudential debate are non-existent.

Note that I am not arguing that one's beliefs about law have no bearing on one's daily life—specifically on one's behaviour either as citizen or judge. Rather, I am attempting to draw the reader's attention to the difficulties that a theorist encounters when she attempts to make links between certain kinds of behaviour and particular conceptual theories of law; links of the kind that could undermine PPET. Consequently my inclinations on this issue are closely aligned with Raz's professed understanding of the complex relationship between people and their beliefs:

> People do not believe in all that is entailed by their beliefs. Beliefs play a certain role in our lives in supporting other beliefs, in providing premises for our

> practical deliberations. They colour our emotional and imaginative life. More generally they are fixed points determining our sense of orientation in the world.[2]

Beliefs, including beliefs about law, form part of the paradigm through which we view the world. It is quite likely then, that they play a role in our navigation of the world, possibly even on a daily basis. In other words, I am not denying that one's beliefs cannot or do not make a practical difference; I am denying the ability of one theoretical understanding of law to make a particular practical difference of the kind necessary to undermine PPET. An analogy may be useful to help summarize my overall position. And if my findings are correct, then the winner of the jurisprudential debate cannot be determined on moral and/or political grounds.

The victor in this conceptual battle, in my humble opinion, ought to be crowned in the conceptual arena via descriptive jurisprudence. Why, after all, should law be deemed incapable of conceptual parsing? Indeed, it is a dynamic human institution that may not abide by the laws of physics, or any other such rigid criteria. However, neither does law exist in such a state of flux and utter inconsistency that we cannot speak of it with any degree of intelligence. Jules Coleman, who practices descriptive jurisprudence, is committed to the "revisability of all beliefs."[3] He recognizes that the result of conceptual analysis—for example our conceptual understanding of law—is not immune to change. A comparison to Otto Neurath's image of sailors fixing a ship at sea is useful to illustrate how this potential for change can be reconciled with stability: all the pieces of the ship

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[2] Joseph Raz, "Authority, Law and Morality," The Monist, 313.
[3] Jules Coleman, The Practice of Principle, 8-9.

are removable and replaceable, but not all at once.[4] Similarly, Coleman does not deem any part of his conceptual understanding of law to be immune to change, but change, as with the renovation of the ship, occurs in small steps thereby maintaining the integrity of the concept. Many other astute theorists, such as Hart and Waluchow, endorse similar methodologies.

Further credence is given to conceptual analysis when we re-examine the ink already spilled: while it is sometimes difficult to evaluate competing understandings, it does not take long to discover that all arguments are not on an equal playing field. While my purpose in this paper was not to declare a winner in the battle, one may credibly exist. Hence the burden of proof of demonstrating the inadequacy of the descriptive project rests on those so opposed to it. In any case, I stand by my claim that moral and political arguments of the sort examined have proved inadequate to serve as an alternative to this method.

However, Coleman's methodological commitment just mentioned also speaks to the dynamism present in legal theory. Thus the door is left lightly ajar for future jurisprudes to demonstrate what I have painstakingly tried to argue against: that particular practical consequences do follow from the adoption of a given conceptual theory of law. I do, however, remain doubtful with respect to the success of these projects. If such relationships are discovered, they will most likely be contextual in nature. Hence projects that look for connections between the practical and theoretical should be aware

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[4] Otto Neurath, "Protocal Sentences." Logical Positivism. translated by George Schick, edited by Alfred J. Ayer. (Glencoe, Ill.: Free Press, 1959, 199, 201. Ronald Dworkin also utilizes this example. See Law's Empire pp. 111, 139.

of the limitations of their project. However, these limited projects may still be worthwhile since it is valuable to have a continued awareness of potential practical effects that the debate in legal philosophy may have in different legal contexts. Yet I remain hopeful that the conclusions drawn from this thesis will put a halt to projects that look to moral grounds to settle the debate between legal positivism and natural law theory: a case simply cannot be made for moralistic or amoralistic law on moral grounds.

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