David Dyzenhaus. *The Long Arc of Legality: Hobbes, Kelsen, Hart*. Cambridge University Press 2022. 500 pp. $49.99 USD (Hardcover ISBN 9781316518052); $38.99 USD (Paperback ISBN 9781009048866).

Dyzenhaus is a prolific scholar in the philosophy of law, having published numerous important books and articles critiquing the legal positivist school. In this ambitious new work, Dyzenhaus aims to break the 'deadlock' between the two main schools of legal philosophy, natural law and legal positivism (1). The central problem at issue in this debate, he writes, is the 'puzzle of law's authority: that law is both a matter of might and right' (1). Dyzenhaus argues that the way out of this puzzle requires rejecting Hart's key dogma, the separation thesis, that there is no necessary connection between law and morality. The authority of law must depend on its moral legitimacy, 'what legal subjects in fact accept and what they have reason to accept' (1).

Now this might sound like it is simply endorsing traditional natural law theory. But Dyzenhaus claims that he is establishing a third way, a new position distinct from both natural law and legal positivism. For him, there is a necessary connection between law and moral reasons, but it is a connection that is 'internal' to law rather than a connection to an 'external' morality (16). This means, he argues, that law's authority depends on the legal subject's being able to ask of any law the question, 'how can that be law for me,' which he raises repeatedly (and arguably excessively) throughout the book. The answer to that question, Dyzenhaus argues, can only be 'adequate' when it 'preserves the subject's place as a free and equal member of the jural community' (286). This rules out the existence of 'second-class citizens,' as in an apartheid or slave state.

In order to defend this thesis, Dyzenhaus embarks on a long, detailed and complex historical excursion through classic writers in the philosophy of law, especially Hobbes, Kelsen, and Hart. He uses these thinkers to develop what he calls the 'constitutionalist idea' (162), the idea that there is necessarily a 'constitutional reciprocity' between ruler and ruled (146), and that therefore legal positivism is wrong: the law cannot be 'content-neutral' but must embody basic principles of respect for each individual citizen. However, Dyzenhaus insists that his position is not a natural law theory either, in that it is cast in political and legal terms, not in terms of law's correspondence to moral principles (160). He defends this constitutionalist idea as continuous with the social contract tradition.

Along the way, Dyzenhaus presents some striking reinterpretations of these thinkers, notably of Hobbes. The consensus view, and one that Hobbes explicitly states, is that there can be no such thing as an unjust law, since the sovereign has absolute authority. Dyzenhaus argues that Hobbes' position is far more nuanced than that (or less charitably, that his position is less consistent than that), and that Hobbes did recognize that the sovereign's laws must not violate the laws of nature. Dyzenhaus also presents interesting re-thinkings of Hart and Kelsen (among others), paying close attention to both their major and minor works.

A further and even more striking thesis defended by Dyzenhaus is that the traditional debate in legal philosophy is mistakenly framed as one between natural law and legal positivism. Instead, he insists, the 'fundamental divide' in legal philosophy is that between a 'dynamic' conception of law

versus a 'static' one (248). He charges that legal positivism, Hart in particular, mistakenly endorses a static notion of law which downplays the role of ambiguity and the need for judicial interpretation. For Hart, the focus is on the 'core' of the law where the meaning is clear; ambiguity is consigned to the penumbra, and Hart has no good account of how one is to interpret the law at the periphery. Dyzenhaus instead suggests that a dynamic view of law is preferable, one in which law is continually subject to judicial interpretation. Both in practice and in principle, judges will not simply exercise pure discretion, but aim to follow moral and constitutional principles to guide them in interpreting law. In this way, judges exert significant control over the law (even in the Hobbesian state), and even have the power to resist the sovereign when the laws themselves are unjust. Dyzenhaus illustrates this practice historically through reference in particular to the apartheid laws in South Africa, where judges were able to use the 'constitutional principles' of legality to limit the injustice of apartheid laws.

Dyzenhaus is surely right that Hart's theory, and much of legal positivism, is at fault for ignoring or downplaying the role of judicial discretion, for obvious reasons: they do not want to admit that judges are or should be guided by moral principles where the law is unclear. However, Dyzenhaus does not make a convincing case that this is the central issue in legal philosophy, or that it would be more productive to approach the debate through the dynamic/static philosophy. Indeed, he spends surprisingly little time defending such a striking new position. But in fact, a legal positivist theory could easily be made 'dynamic': the idea would be that judges should deal with ambiguity by simply determining what the sovereign would have wanted (as opposed to what morality requires). This is in fact the Originalist theory of Constitutional interpretation. I think Dyzenhaus also overemphasizes the role of ambiguity in the law; where the law is clear but unjust, it will not be 'dynamic,' and judges will have no ability to guide the law in moral directions. One might also wonder just how much Dyzenhaus accepts his own thesis, since he rejects legal positivism as static, but also criticizes natural law theory even though it is already dynamic. He also finds the resources for his own theory in the legal positivist tradition (Hobbes, Kelsen, Hart) – suggesting that even for him, the issue is not fundamentally one of static versus dynamic.

In any case, for all his talk of recasting the debate in terms of dynamic/static, in fact Dyzenhaus' argument proceeds largely along the lines of the traditional one: does the authority of law depend on its moral status or not. On this issue, he comes down squarely on the side of natural law: law's authority depends on its moral legitimacy. Dyzenhaus of course insists that he is defending a somewhat different view, that law depends on political rather than moral legitimacy. But this claim is not wholly convincing. The basic 'constitutional' principles of legality that he defends are grounded in the idea of respect for the individual, equality, and liberty, but it seems arbitrary to call these principles political rather than moral; surely they are both. Moreover, the idea that these principles are somehow 'internal' to law rather than external, an idea derived from Lon Fuller, is rather opaque (both in Fuller and Dyzenhaus). It is difficult to say what precisely it means for equality and liberty to be 'internal' to law, nor does there seem to be much of anything at stake whether we label them internal or external. One feels that Dyzenhaus creates an argument that does not need almost 500 pages of detailed textual exposition to establish; why not simply defend the reasonable

view that law needs to be aligned with moral principles in order to have authority? And do we really need Hobbes, Kelsen, and Hart to reach this conclusion? Nor is it clear to me why we need social contract theory to support the relatively straightforward idea that a regime is not justified unless it treats its citizens with respect.

Nonetheless, the book is a valuable contribution to the debate, in its close readings of important historical figures and its attention to concrete historical examples, notably that of South African apartheid, of which Dyzenhaus had firsthand experience. He is less successful in his analysis of the Israel/Palestine situation, calling Israel's presence in the West Bank a form of de facto 'military conquest,' inexplicably not mentioning that the reason for Israel's presence there is the repeated attempts at actual military conquest of Israel by the Palestinians and Arabs.

In any case, Dyzenhaus' overall thesis in the book is sound: that the law's authority must be grounded in morality, though one might have wished for a less complex and lengthy method of arriving at this conclusion. Dyzenhaus remains an important critic of legal positivism, and this book is full of useful and important contributions to the debate.

Whitley Kaufman, University of Massachusetts Lowell