
REVIEW ARTICLE

The Second-class Citizen in Legal Theory

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David Dyzenhaus, **The Long Arc of Legality: Hobbes, Kelsen, Hart**, Cambridge: Cambridge University Press, 2022, 500 pp, £29.99

INTRODUCTION

Generations of legal philosophers have come of scholarly age in a field preoccupied by the so-called Hart-Dworkin debate. Not all of them are happy about it. Recent critics have expressed scepticism about the way the debate frames questions in general jurisprudence, limiting philosophical investigation of law to inconsequential metaphysics and verbal disputes about what to call ‘law’.¹

The promise of Dyzenhaus’s book, *The Long Arc of Legality*, is to ‘break the deadlock’ by reorienting jurisprudential inquiry toward political questions about authority and legitimacy.² For Dyzenhaus, the central problem in philosophy of law arises from law’s claim to be authoritative, and not merely coercive: the putative authority of law can be compromised by delivering instructions not worthy of respect, or drained of significance by simply telling us what we already knew. To preserve a domain in which law is morally legitimate but not redundant, philosophy of law must be able to distinguish legal pathologies – to which law is uniquely accountable – from political pathologies, for which the solution is political. The key to doing so, he argues, is in looking to whether the state acknowledges a subject’s standing to ask, *but how can that be law for me?*

I count myself among the Hart-Dworkin debate’s sceptics, and I welcome Dyzenhaus’s methodological and disciplinary reorientation. In what follows I focus on what I take to be the book’s core argument: that law’s essential claim to legitimacy establishes a formal requirement to respect the equality of its subjects,

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1 See notes 4–6 below and accompanying text.

2 David Dyzenhaus, *The Long Arc of Legality* (Cambridge: CUP, 2022) 1.

and that therefore the rule of law is inconsistent with the existence of second-class citizens or spaces of no-law in which the state acts through prerogative rather than law.

I argue that this claim is both under- and over-inclusive. A social order in which law retains its claim to legitimacy can tolerate some formal but substantively *de minimis* distinctions among classes of subjects, while formally equal treatment of all subjects is consistent with substantive injustice that undermines it. If these objections withstand scrutiny, law's claim to political legitimacy cannot be as closely tied to formal legal equality among subjects as Dyzenhaus maintains. I am not myself entirely convinced that my objection is successful – it strikes me as insufficiently subtle for the complexity of the view. But I cannot quite work out how it fails, and each attempt to marshal additional theoretical resources from elsewhere in the text leaves it, as far as I can tell, still standing. The following argument is perhaps best understood as a sort of provocation: by pressing on what seems to me Dyzenhaus's weak point I invite him to explain what it is that I'm still missing. My objection may be one Dyzenhaus ultimately has the resources to respond to, but it is, I hope, illuminating to think it through. I will begin by briefly reviewing what I take to be the book's central ideas, leaving detailed exposition to others.³

THE PUZZLE OF AUTHORITY

Dyzenhaus's reorientation of the central problems of modern jurisprudence reflects a dissatisfaction with the terms of the 'Hart-Dworkin debate'. He has long maintained a sceptical stance toward the framing of philosophy of law in the Hart-Dworkin debate's shadow, accusing legal positivism of being a 'stagnant research programme' that has 'lost its substantive moorings', while noting that the 'malaise in legal theory' is not confined to positivism.⁴ In that sentiment he is not alone.

In the last couple of decades a growing chorus of legal philosophers has sounded similarly sceptical notes, suggesting that positivists and anti-positivists are too often simply 'talking past each other',⁵ or that philosophers of law are, borrowing Wittgenstein's memorable image, 'buzzing around the fly-bottle', in need not of new answers to well-posed questions but of being shown the way out.⁶

Dyzenhaus's own scepticism reflects a heterodox reading of the canon of modern jurisprudence, on which Hobbes, Kelsen, and Hart among others are principally concerned with understanding law as the institutional organ of state

3 Brian Bix, for example, offers a succinct overview of the book's arguments, with which I take my summary to be in accord. See Brian H. Bix, 'Book Review: David Dyzenhaus, *The Long Arc of Legality: Hobbes, Kelsen, Hart*' (2023) 133 *Ethics* 307.

4 David Dyzenhaus, 'Positivism's Stagnant Research Programme' (2000) 20 *OJLS* 703, 709, 719ff.

5 Liam Murphy, 'Better to See Law This Way' (2008) 83 *NYU L Rev* 1088, 1095.

6 Scott Hershovitz, 'The End of Jurisprudence' (2015) 124 *Yale L J* 1160, 1162. See also for example David Plunkett, 'Negotiating the Meaning of "Law": The Metalinguistic Dimension of the Dispute Over Legal Positivism' (2017) 22 *Legal Theory* 205; Raff Donelson, 'The Pragmatist School in Analytic Jurisprudence' (2021) 31 *Philosophical Issues* 66.

power. Dyzenhaus thus does not focus the book on the questions that have come to characterise 21st-century analytic jurisprudence – *What kind of facts ground legal facts?*, *Does positive law generate non-instrumental reasons for action?*, or *What is Law?*⁷ – but begins with what he calls the puzzle of authority: ‘that law is both a matter of right and might’.⁸ Law claims to *warrant* obedience, while expecting to be obeyed on pain of sanction. Its claim to be authoritative and not merely coercive can be compromised by delivering instructions not worthy of respect, or drained of significance by doing no more than telling us what we already knew.⁹

Dyzenhaus insists that legality and political legitimacy are conceptually intertwined: ‘one cannot elaborate a theory of law’s authority without elaborating a theory of its legitimate authority’,¹⁰ because ‘the idea that there could be an illegitimate legal authority is a contradiction in terms: an unauthoritative authority’.¹¹ At the same time, contained in the idea of legitimate authority is the idea that law is more than a reflection of what subjects are already obligated to do. Law claims a distinctive role in political affairs embedded in but to some degree autonomous from pre-legal political morality, while maintaining that its contribution is not merely to represent the state’s coercive power. ‘The task of philosophy of law’, therefore, ‘is to grasp what otherwise might seem to be mere power relationships as legal relationships in the sense of legal right’.¹²

Doing so involves appreciating that law has a task that is essentially political but distinguishable from politics writ large. Because we can see this most clearly not when things go well but when things go poorly, Dyzenhaus begins with the idea of law’s internal failure. When social pathologies emerge, we are forced to ask whether they reflect a breakdown in political order or a defect in the operation of law. If a pathology is legal, the legal order has a distinctive role to play in remedying it. If a pathology is political the solution is political, and the law is silent. It is only when law fails on its own terms that it loses its claim to being law at all, converting would-be right back into naked might, where ‘prerogative or legally unmediated power rules’.¹³ When we conceive of jurisprudence as ‘principally about explaining law’s authority’, the problem of very unjust law becomes ‘*the* problem for legal theory’,¹⁴ because it represents a breakdown of law so thoroughgoing as to undermine its claim to being law at all.

7 For those wondering how Dyzenhaus understands his project in relation to that set of questions, he devotes one appendix (Appendix I) to addressing the debate between inclusive and exclusive legal positivists and another (Appendix III) to positioning himself with respect to the Thomist tradition in natural law theory today associated with John Finnis. There is not an easy way to summarise the upshot of either discussion, and since it is not my purpose here to anchor Dyzenhaus in the prevailing debates of the day I will leave it to the reader to follow up on their own if they wish.

8 *The Long Arc of Legality*, n 2 above, 1.

9 *ibid*, 80.

10 *ibid*, 1.

11 *ibid*, 2.

12 *ibid*, 161–162.

13 *ibid*, 297.

14 *ibid*, 12.

Dyzenhaus's choice to frame the problems of modern jurisprudence this way means approaching philosophy of law not with the tools of conceptual analysis or analytic metaphysics, but by attending to political problems concerning the state's legitimacy. This is not to change the subject. To put the puzzle of authority in slightly different terms, it is the tension created by the shortcomings of positivistic and natural law theories of legality: if law is no more than an area of morals, there is no special role for legal theory in diagnosing and remedying its defects; if law is completely autonomous from morality, it cannot claim the mantle of legitimacy and is no more than the gunman writ large.

Dyzenhaus's solution, as I will explain shortly, incorporates elements of both leading approaches. It is a form of legal positivism situated within a larger, natural law-like contractarian theory of the state's authority. To translate back into the vocabulary of the Hart-Dworkin debate, legal facts, for Dyzenhaus, are grounded in social facts, but only when those social facts obtain in a larger context of legality. Before I say more to characterise the view that Dyzenhaus develops it will help to have his reading of the history of modern jurisprudence in view.

DYZENHAUS'S RECONSTRUCTION OF MODERN JURISPRUDENCE

Dyzenhaus cites, as antecedents to his reframing of the terms of the debate, some of those responsible for its current iteration. On his reading, Hart, Kelsen, and the others are all ultimately trying to grapple with the same issues: the authority of the state, the distinctive form of accountability the law has to its own internal defects, and the need to distinguish political morality in general from the inner morality of law.

Going back as far as Hobbes, according to Dyzenhaus, canonical figures in the history of modern jurisprudence have 'understood that to explain law as a matter of authority is to explain it as *de jure* authority', and thus, 'focused on the way in which legality plays a crucial role in transforming political might into legal right ... [T]he right in issue here is not right at large but ... *jus* or legal right, the idea of right intrinsic to legal authority.'¹⁵

The view that emerges in the book combines elements from nearly every major philosopher of law, under the umbrella of Kelsen's legal theory. Dyzenhaus places Kelsen at the foundation of his because, he believes, it is the only one 'capacious enough to accommodate the following pivotal ideas of philosophy of law of the last sixty years or so, all of which are needed to fill out this moderate position', including:

Hobbes's idea that the law is a 'publique Conscience;' Hart's idea of the authority law has in terms of practice-based acceptance and his concern about preserving the space for moral criticism; Kelsen's own idea of legal order as a hierarchy of norms unified by the basic norm; Radbruch's claim that extreme injustice is no law; Fuller's idea that any legal order will to some large extent comply with formal

¹⁵ *ibid.*, 4.

principles of legality which condition the content of law; and Dworkin's elaboration of the role of substantive moral principles implicit within the positive law in judicial interpretation.¹⁶

Of those listed in this passage, the idea that Dyzenhaus takes from Hobbes is perhaps the least familiar, but in broad strokes to say that the law is a society's public conscience is to characterise it as a repository for collectively negotiated norms of conduct, which 'contains the fund of the society's values ... transformed into law.'¹⁷ Values transformed into law are instantiated through Hartian social practices that reflect sociological acceptance of law's legitimacy. That acceptance, however, does not grant law the totalising power to settle all questions, immune to rational scrutiny. While there is leeway for law to deliver morally questionable results at the margins, if it is sufficiently compromised it ceases to be law at all.

This last suggestion may seem odd, given that positivism is often identified with the 'separation thesis' ('that there is no necessary connection between law and morality'¹⁸) or, in Kelsen's idiom, the slogan that 'law can have any content'. Dyzenhaus maintains, however, that 'the Separation Thesis has misdirected philosophy of law from 1958 to this day, despite the fact that Hart's successors assert not only that there are all sorts of necessary connections between law and morality but also that Hart himself never subscribed to' it.¹⁹

Hobbes as well is generally thought to have held that the authority of the sovereign is subject to no moral check or balance, but Dyzenhaus argues that 'the sovereign's subjection to the laws of nature is not only, as Hobbes sometimes said, a matter between the sovereign and God, with no effect on the relationship between the sovereign and its subjects ... the sovereign as ultimate judge is constrained by the laws of nature, not because it owes duties to its subjects ... [but] because of the duty the judges owe to the sovereign to interpret enacted law in the light of their understanding of the laws of nature.'²⁰ Thus even Hobbesian legality has a Fullerian 'inner morality'.

Hart at least 'took a tentative step' in this direction, arguing that 'if law is to function as a system of social control, its rules "must be intelligible and within the capacity of most to obey"', and thus 'law and morals must have a minimum content if they are to "forward the minimum purpose of survival which men have in associating with each other" and that "in the absence of this content" men would have "no reason for obeying voluntarily any rules"', without 'reasons for obedience ... addressed at least to the natural facts of human vulnerability, approximate equality, limited resources and limited understanding and will. This "natural necessity", he stated, has to qualify the positivist thesis that "law may have any content".'²¹

16 *ibid.*, 37.

17 *ibid.*, 422.

18 *ibid.*, 1.

19 *ibid.*, 367.

20 *ibid.*, 135-136.

21 *ibid.*, 68-69 (quoting H. L. A. Hart, *The Concept of Law* ch 9).

Dworkinian interpretivism is no less threatened by sufficiently unjust law where it embodies wicked principles, simply pushing the problem back a step,²² and to hold, with classic natural law theorists, that a (very) unjust law is simply not law at all is to ignore the injustice that emanates from legal systems by declaring it irrelevant: ‘the idea that moral principles will screen out repugnant principles brings Dworkin’s position uncomfortably close to Hart’s understanding of natural law positions as ... positivism with a minus sign: the law of any legal order is its positive law with extremely unjust laws subtracted.’²³ Dyzenhaus objects to this strategy because it runs afoul of his foundational Kelsenian commitment to grasping law as a unity.²⁴ But the problem confronts all legal theorists, he holds, because it ‘should matter to those who think that their legal orders are more or less just, or at any rate not too unjust, because it helps to alert them to problems of injustice which might be otherwise hard for them to detect.’²⁵

To this combination of ideas, Dyzenhaus adds one more of Hobbes’s, which is to characterise the Kelsenian *Grundnorm* in contractualist terms: ‘The basis of legal order’, Dyzenhaus holds, is not ‘coercion, [but] an obligation which derives from the social contract between the individuals in the state of nature whose agreement constitutes the state and authorizes the sovereign to act in their name’.²⁶ Thus, ‘those who find themselves subject to that power must regard the commands as issued with right, as *de jure*, and therefore as legitimate or just’,²⁷ and for legal positivists including Kelsen and Hart ‘an ongoing practice which constitutes legitimate authority of the sort early modern social theorists set out in versions of the social contract’ explains why.²⁸

In sum, Dyzenhaus’s reconstruction of the history of modern jurisprudence from Hobbes to Dworkin portrays law as a system of hierarchically organised social practices, regulating conduct according to a society’s values. At its foundation is a social contract embodied in a *Grundnorm* that unifies the legal order. Law is a source of *sui generis* authority, not just a channel for political morality, thanks to the social contract, but it is also constrained by a robust inner morality because its authority depends on upholding the social contract. When law is compromised on its own terms it breaks down as law, and the legal system is uniquely accountable to resolving legal pathologies while leaving other kinds of social pathology to the political process of re-negotiating the values it realises. We can thus see the state exercising ‘power mediated by law, where law means both enacted or positive law and fundamental principles of legality’.²⁹

22 See *ibid*, 43ff and § 1.3.

23 *ibid*, 313.

24 See for example *ibid*, 13.

25 *ibid*, 25.

26 *ibid*, 90; see also 161–162 (for Kelsen, ‘the idea of an original contract is more or less synonymous with “the concept of a foundational law or of fundamental law”’).

27 *ibid*, see also 154 (‘[S]overeignty – in the sense of the ultimate lawmaking power of a society – is a juridical idea, which must be explained as a matter of constituted authority, not in terms of an exercise of sheer or unmediated coercive power ... might is transformed into right through its mediation by law or, more precisely, by its exercise in the context of a legal order constituted by a candidate for the constitutionalist idea.’).

28 *ibid*, 162. See also 283ff.

29 *ibid*, 347.

FULL LEGAL STANDING AND SECOND-CLASS CITIZENSHIP

This picture does not directly solve the puzzle of authority with which Dyzenhaus begins, but it does provide the shape of an answer: there will need to be some criterion by which we can distinguish legal pathologies – the breakdown of law according to its own internal morality – from political pathologies, wherein the legal order channels substantive political injustice. That criterion should reflect that what is at stake is whether or not the social contract embodied by the *Grundnorm* is threatened, because that is what grants legitimacy to the legal order. For Dyzenhaus, that criterion is provided by the idea of full formal legal standing and its antithesis, second-class citizenship.

The twin concepts of formal legal standing and second-class citizenship are the fulcrum around which Dyzenhaus's theory turns, but they are neither directly defined nor elaborated in much detail, except by illustrative example. As a first pass, a subject is a first-class citizen to the extent that they have the standing to demand justification for law's putatively authoritative demands, and to expect 'an answer which, while it may not always be what they want, and may even be one of which they morally disapprove, does not undermine their status as first-class citizens in the jural community.'³⁰ Positive law does not compromise its claim to legality simply by drawing 'distinctions between groups of peoples' so long as it doesn't do so 'in ways which can[not] be justified to individuals in those groups on the basis of the fundamental legal principles of the order'.³¹

In contrast, the 'second-class citizen has one foot in the space of first-class citizenship or full status before the law, with the other in a space of law-created inferior status'.³² The second-class citizen is subject to a legal order that purports to hold itself accountable to the basic principles of legality, including the abstract idea of equality before law (that is, 'the specifically legal ideal of human dignity'³³) while in practice that abstract ideal is compromised by a systematic enshrining of legal subordination.³⁴

The intuitive idea is that law's commitment to formal equality (a key feature of its inner morality) provides a resource for individuals to seek redress.³⁵ When

30 *ibid*, 341–342.

31 *ibid*, 342.

32 *ibid*, 30–31.

33 *ibid*, 311.

34 For example, in apartheid South Africa, which maintained the official commitment to the abstract ideal of political equality, 'particular apartheid laws made it ever clearer that the animating political ideology of the ruling party was one of white supremacy. Black South Africans were as a result second-class citizens', *ibid*, 311.

35 An ambiguity that runs through the book, threatening to undermine some of my arguments, concerns whether formal legal standing is exhausted by the standing to initiate legal proceedings or otherwise to petition a judicial authority or is meant to capture something larger and more abstract about the normative relationship between the state and its subjects. See for example *ibid*, 31. My interpretive hypothesis is that in this context 'standing' as in the standing to petition a judge operates as a metonym for the metaphorical standing to demand accountability from the law, and it is compromised when subjects do not share in it equally. The alternative – that standing is a more specific notion that does not demand full formal equality before law – would be in significant tension with much of what he says and would lead to a thin notion of second-class citizenship unfit to play the role he sets out for it. Aside from the argumentative reasons for this presumption there is some textual evidence, in particular that certain kinds of discriminatory laws

formal legal standing is compromised, some subjects are second-class citizens. The solution is within law: law can articulate this problem, confronting society with the question whether its commitment to political equality is tarnished by the way it constructs categories. Courts may not necessarily be able to fix the problem, but the legal order contains the resources to bring the problem into the public gaze. The social contract that grounds the basic norm at the foundation of the legal order is vindicated. In contrast, if subjects enjoy the status of first-class citizens but are unsatisfied by the answers the legal system provides them because it has failed to realise their social values – including full substantive or material equality, as distinct from legal equality – law’s inner morality is unthreatened, and answers can only come through politics.

To put all of this together: there are distinctively legal ways of going wrong, forms of injustice that law on its own terms recognises as important to address, and which as a distinctively legal problem ought not to be consigned to moral theory.³⁶ Law can be unjust to a point, but it ceases to be law when it fails to command legitimate political authority. The mark of law’s breakdown is not substantive injustice but formal exclusion from full legal standing. This is because when law treats a class of subjects as second-class citizens, compromising their ‘standing before the law’,³⁷ it loses its capacity to answer their demand to justify its authority.³⁸ By facing, rather than declining to answer the question of authority when posed by a subject, the state demonstrates that it ‘wields

threaten equality of legal standing without depriving subjects of access to courts. For example, Dyzenhaus endorses Hart’s claim that while ‘it is possible for a social morality to openly disavow equality ... the principle of equality is an indelible principle of legality as well as of social morality ... [so] any positive law discriminations on the basis of colour or race are subject to legal challenge.’ Further, such a ‘formal commitment to the equality of all legal subjects before the law makes it possible for the discriminated against second-class citizens to challenge their status,’ in which case ‘[a] judge who hears such a challenge, and who wishes to maintain fidelity to law, should not treat the formal commitment to the principle as mere lip service, but must try to determine the content of the law so as to make it answer the question “But, how can that be law for me?”’ (*ibid.*, 376–377). In other words, being able to stand before the judge does not by itself establish first-class citizenship, but the judge working the law pure of status discrimination brings legality into harmony with itself by eliminating second-class citizenship. The social pathology associated with second-class citizenship ‘leads to tensions internal to the legal order ... because they have one foot in the first-class space, the other in the space constructed by the discriminatory law’ (*ibid.*, 300). The law denies subjects standing of any kind if it refuses to acknowledge their standing to pose the question and expect an answer, but not every answer vindicates the relevant equality of standing. The question is whether the law’s acknowledgment of a pathology, represented by a (metaphorical or actual) subject asking *but, how can that be law for me?*, implies the recognition that it is a legal pathology to which law is as such accountable. The balance Dyzenhaus needs to strike is that where formal legal equality is compromised the resources for cognising the problem are legal, and where substantive injustice occurs the resources for cognising the problem are political. He thus faces a dilemma, rooted in his own methodological commitment: if the category of legal defects expands to include substantive inequality in the presence of legal equality it threatens to collapse legal pathology into political pathology, but if it remains too narrow then it isn’t clear that it can do the contractarian work it is required to. I will return to this dilemma as the argument brings it into focus – see especially notes 46 and 57 below and accompanying text.

³⁶ See *ibid.*, 164.

³⁷ *ibid.*, 30.

³⁸ Second-class citizenship is the first stage of law’s breakdown, which corresponds in its fullest realisation with the ‘apartheid state’ in which ‘all legal subjects are regarded as equal before the law even though its statutory regimes go a long way to undermine the equality of the oppressed parts of the population’, *ibid.*, 330. When a class of subjects is afforded *no* formal legal standing

authority, rather than sheer or unmediated coercive power, over those subject to its rule'.³⁹

The worry I plan to pursue in what follows is that Dyzenhaus' focus on the legality-undermining injustice of formal second-class citizenship arbitrarily singles out just one specific way the question of authority can go unanswered.

BUT HOW CAN THAT BE LAW FOR ME?

The objection I want to explore involves putting pressure on the distinction between compromising the formal legal standing of the subject and other ways of doing injustice through law without, according to Dyzenhaus, relinquishing the claim to legitimacy. Intuitively it is not obvious that, even stipulating the tight connection between legality, legitimacy, and the social contract, legitimacy is always and only undermined by formal legal exclusion.

Legitimacy involves offering an answer to the question that a legal subject *should* accept, not on the basis of law's pre-existing authority (which would beg the question) but on the basis that it adequately justifies the law's demand: 'What makes law authoritative is that the officials who speak in its name can answer satisfactorily the legal subject's question "But, how can that be law for me?"'⁴⁰

What kind of answer adequately justifies the law's demand? It's not obvious that one will always be available so long as the law does not formally exclude the petitioner from full legal standing. Nor is it obvious that one will never be available even when it does. Consider, for example, a familiar 'Hobbesian' (though as Dyzenhaus argues, not Hobbes's) contractarianism, which holds that we are better off with any sovereign than in the state of nature. The question of authority is thus always effectively answered by *because I am the sovereign and I say so – or would you rather a life of continual fear and constant danger of a violent death?* On Dyzenhaus's view this answer isn't good enough, but it has some plausibility.⁴¹

they are said to live under a 'dual, prerogative state': a domain of no law at all, within or alongside a regime of law for subjects that are citizens, as in Nazi Germany. See *ibid*, 322. In between the two is the 'parallel state', in which one class of subjects lives under the jurisdiction of the same constitution and apex court as the rule-of-law state within which subjects are full citizens, but occupy a zone of thoroughgoing legal pathology that treats another class of subjects as not citizens at all, as in Israel and the Occupied Territories of Palestine or the antebellum United States. See *ibid*, 330, 336.

³⁹ *ibid*, 213.

⁴⁰ *ibid*, 2.

⁴¹ This is an admittedly oversimplified gloss on what I think is nevertheless the received view of Hobbes in the tradition of Anglophone political philosophy, prominent representatives of which include David Gauthier and Jean Hampton, and, on this point in particular, Sharon Lloyd. See David Gauthier, *The Logic of 'Leviathan': The Moral and Political Theory of Thomas Hobbes* (New York, NY: OUP, 1969); Jean Hampton, *Hobbes and the Social Contract Tradition* (New York, NY: CUP, 1986); S. A. Lloyd, 'Hobbes's Self-effacing Natural Law Theory' (2001) 82 *Pacific Philosophical Quarterly* 187. I take no position here on the ultimate merits of Dyzenhaus's Hobbes interpretation, nor on precisely what place in the secondary literature is occupied by the simplification to which it is juxtaposed.

So we will need a principled reason to say that that kind of answer cannot be enough. On the other end of the spectrum is the intuition that virtually no answer can be enough if it attempts to rationalise a legal command that is not justified on moral grounds. Why should I accept the legitimacy of an unjust law that seeks to coerce me against my moral judgment?

Adopting a contractarian methodology does not automatically solve the problem of authority. It's important to Dyzenhaus's project that law has a particular function beyond channeling and determining moral requirements.⁴² For Dyzenhaus to leverage contractarianism into a theory of law suited to play this role, he needs a standard by which to judge answers to the question of authority that does not accept all or none.

Dyzenhaus's argument rests on the connection between being 'a first-class citizen or full legal subject in such an order' and being 'able to accept that the legal order as a whole and its particular laws offer one the kind of reasons which are understandable as addressing one's interests'.⁴³ The answerability of the question of authority rests on the fact that 'even when such subjects strongly disagree with the content of the law, they must be in a position to recognize that the legal order as a whole serves the interests which are in the character of a legal order to serve and that its particular laws are interpretable in light of those interests', from which it supposedly follows that '[w]hen they ask the question "But, how can that be law for me?" a judge mindful of the judicial virtues can give a satisfactory answer'.⁴⁴ But it's not clear why we should expect never to find that judge's ability to give a satisfactory answer compromised by anything other than formal exclusion from full legal standing, nor why the latter should be expected always to compromise the former.

42 The determining function of positive law is connected to what Kant calls 'provisional right', which leaves a lot of work for positive to do but not of the same kind that Dyzenhaus is interested in, which makes for an illustrative contrast. See generally Martin Jay Stone and Rafeeq Hasan, 'What Is Provisional Right?' (2022) 131 *Philosophical Review* 51. Interpreters of Kant disagree about just how much room positive law has to determine how the Universal Principle of Right (UPR) (viz 'Any action is right if it can coexist with everyone's freedom in accordance with a universal law, or if on its maxim the freedom of choice of each can coexist with everyone's freedom in accordance with a universal law' (6:230)) is channeled into a determinate system of laws to regulate conduct, but, crucially, on even the most expansive reading, the role of positive law remains to fix a system of right that realises basic moral principles, which is structurally different from the role it plays for Dyzenhaus. See for example J. Colin Bradley, *Kant on Property, Production, and Freedom* (manuscript) (UPR requires individual ownership of productive capital assets); S. M. Love, 'Communal Ownership and Kant's Theory of Right' (2020) 25 *Kantian Review* 415 (UPR is consistent with communal property); Japa Pallikkathayil, 'Persons and Bodies' in Sari Kisilevsky and Martin J. Stone (eds), *Freedom and Force: Essays on Kant's Legal Philosophy* (Cambridge, MA: Harvard University Press, 2017) 37 (UPR requires only a system of positive legal rights to bodily autonomy). On all of these views positive law takes open-textured moral principles and turns them into applicable rules, rather than operating as a source of authority that can outrun pre-legal political morality and occasionally conflict with it.

43 *The Long Arc of Legality*, above n 2, 71.

44 *ibid.* This is the essence of the rule of law, which 'is a moral good because it is a political good, one which helps to make it possible for individuals to live together on stable and peaceful terms despite their very different views of the moral good for themselves', *ibid.*, 146.

Dyzenhaus's suggestion is that the question can be answered when, and only when, the law grants the petitioner full formal legal standing. I will argue that this is not a distinction that can bear the required theoretical weight.

DE FACTO AND DE JURE SECOND-CLASS CITIZENSHIP

Dyzenhaus uses the modifiers 'formal' and 'legal' to refer to the status of legal subjects, with second-class citizenship as just the first step along the spectrum of legal pathology.⁴⁵ But there is another kind of second-class citizenship constituted not through formal legal status but through a facially neutral policy architecture that systematically deprives one group of the ability to participate in public life on equal footing.

Consider a society not entirely unlike the Jim Crow south, but with a few differences. Perhaps *Plessy v Ferguson* came out the other way, or the Civil Rights Cases; one way or another, something like the 1875 Civil Rights Act is federal law, 'separate but equal' is unconstitutional, and as a matter of federal and constitutional law black citizens enjoy full formal legal equality with white citizens. The Redeemers were not deterred. Once the northern troops withdrew white southern Democrats retook control of state governments through fraud, manipulation, and terrorism, and once in power began to legislate with the same intent to deprive black citizens of access to public office, democratic control, and economic justice, this time exclusively through facially neutral laws.

From here there is a lot of room to flesh out the counterfactual in different ways. But let's take a handful of examples:⁴⁶ continued *de facto*

45 See n 38 above.

46 Any one example may be arguably a step toward *de jure* second-class citizenship once the details are worked out, but the general direction of the example is nevertheless illustrative. A line of response I will not consider here is that in fact a lot of the work my example is doing relies on features of it that disguise what Dyzenhaus would classify as a denial of full formal legal standing. I am confident that if so it is a weakness of the example, not of the argument itself – some hypothetical can surely be carefully formulated to demonstrate *de facto* but not *de jure* second-class citizenship, wherein a class of subjects has exactly the same formal legal standing as all citizens and yet is, as a substantive matter, denied meaningful access to equal participation in economic, civic, and political life through facially neutral laws that operate in a context of historical material inequality and effective subordination. Dyzenhaus could perhaps argue that the legislation enacted by white Democrats in the counterfactual Jim Crow south amounts to a refusal to acknowledge the black citizens' standing to demand that the law's authority be justified to them in virtue of being motivated by animus and developed with the aim of maintaining effective subordination. Their standing to petition a court against the enacted laws would be recognised and the enacted laws would not explicitly discriminate against them, but such deliberate attempts to subordinate black citizens are, Dyzenhaus could argue, tantamount to a denial of their standing to demand a justification of the authority the law claims over them, because deliberately legislating in order to subordinate a class of subjects conveys that the state doesn't think it owes any justification for that legislation's authority. I do not believe that this line of response works for the reason I discuss below (n 58 below and accompanying text), which is that this move threatens to inflate legality at the expense of its distinctiveness, re-raising the tension Dyzenhaus's view was supposed to address. The motives of legislators are a paradigmatically political concern, and, on the understanding of second-class citizenship I'm attributing to Dyzenhaus (see n 35 above) it is the formal features

exclusion from the franchise through poll taxes, literacy tests, judges turning a blind eye toward terrorism at the voting booth, gerrymandering; *de facto* residential segregation through redlining, block busting, racially restrictive covenants, and the ongoing effects of emancipation without land reform; continued *de facto* exclusion from economic activity through private discrimination in hiring (without civil rights laws against employment discrimination), court injunctions against labour organising (including and especially by sharecroppers), *laissez-faire* economic policy privileging incumbent wealth-holders, and routine terrorism against black-owned homes and businesses (the laws against which enjoy lax enforcement); and *de facto* criminalisation of poverty through vagrancy laws, prohibitions or protectionist licensing regimes for streetside commerce and ramped-up enforcement of petty property crimes; compounded by a second layer of segregation-enhancing law that relies on pre-existing inequalities to produce new ones (for example schools funded by property taxes on a district-by-district basis, in a context of extreme *de facto* residential segregation) while avoiding enshrining in any law a formal race-based distinction.⁴⁷

This the general shape of a regime of *de facto* second-class citizenship. On Dyzenhaus's view its subjects should recognise it as legitimate. When they ask, *but how can this be law for me?* the state will be in a position to provide a satisfactory answer, because it has granted them full formal legal equality.

A black subject in this counterfactual Jim Crow south may be better off than in the Hobbesian state of nature (though maybe not), but we have considered and rejected a response to the question of authority that the law was made by a state the petitioner is better off living within than without. But the fact that it was made by a state that grants the petitioner full formal legal equality, while enshrining their total *de facto* subordination and exclusion from public life, seems no better. The ability to petition a racist judge to set aside a facially neutral but intentionally and effectively racist law enforced by racist police is neither here nor there if the judge can be expected to go ahead and enforce it anyway. The fact that an egalitarian, Dworkinian judge could perhaps do better is not much consolation if there are no such judges around, and even if there are, it's not clear how much room they would have to maneuver around the regime. Having one's day in court is something, but it's not much, and subordination through law is reason to regard law as an oppressive force rather than an institution in which the petitioner participates and with which they can identify – the public conscience of someone else's public. In short, a gun to the head.

of law – its facial classifications in the assignment of political and civil rights – that determine whether it respects formal legal equality. If too much of politics bleeds into legality, law loses its claim to having a distinctive role, and risks collapsing into a redundant reflection of political morality.

47 Some of these examples are based on the immediate post-abolition legal regimes of Georgia and Jamaica. Richard Hill, a Stipendiary Magistrate in post-abolition St. Catherine, remarked that the law 'ha[d] been converting, as crime, trespasses into larcenies' and thus 'converted the plantation system into a means of invoking the law in favour of the employer against the labourer'. The Hon. Richard Hill to Mr. Austin, PP 1866 [3595], 108. For a larger discussion see Jonathan Booth, *The Legal Architecture of Emancipation* (unpublished manuscript on file with author).

ILLEGALITY AND INJUSTICE THROUGH LAW

The first response Dyzenhaus would likely offer is that the sort of injustice caused or constituted by *de facto* second-class citizenship is of great moral and political importance, but it isn't the kind of injustice that compromises legality. He acknowledges 'second-class status is much more legally problematic than the status of slavery, so long as the enslaved persons are relentlessly consigned to the status of objects or things',⁴⁸ because while much more morally problematic slavery does not involve the tension generated by the 'interaction of two legal spaces', only the existence of a legally created space of 'no-law'.⁴⁹

De facto second-class citizenship, as illustrated by the counterfactual Jim Crow south without formal legal exclusion, is injustice *through* law, but it is not the kind of distinctively *legal* injustice that cuts against law's legitimacy. 'What has gone wrong', on this view, 'is not only the institutionalization of injustice but also the fact that law has been made the instrument of injustice',⁵⁰ without thereby compromising law as law. Thus while *de facto* second-class citizenship undermines the substantive equality of a class of subjects, only *de jure* second-class citizenship 'undermines the equality of the legal subjects it targets, their equality before the law', and thereby 'imposes a cost on legal order', which gradually transforms legal order into 'another kind of order altogether, one of unmediated coercive power'.⁵¹

The trouble with this line of response is that for Dyzenhaus law's legitimacy is grounded in a contractarian political philosophy, which insists that law can create defeasible moral obligations because it is rationally accountable to its subjects. But there is no obvious reason why disclaiming of accountability through the denial of full formal legal status would make all the difference, but the rejection of accountability embodied in total subordination and material exclusion would make none. Taking the contractarian framework as a general philosophical commitment (and not just a legal-doctrinal one) and evaluating it on its own terms suggests that formal legal equality is just one among many factors in establishing law's legitimacy, and treating it as *the* mark of legitimacy begs the question. From this perspective the difference between *de jure* and *de facto* second-class citizenship is largely irrelevant. The latter produces a political system in which a class of citizens has no meaningful ability to participate in political or civic life, just as in the former but in different terms, which pay lip service to equal standing while materially denying it at every opportunity.

The subjects of *de facto* second-class citizenship are unlikely to get a satisfying answer to the question of authority because it's not clear that they have reason to accept the legitimacy of a state that systematically (but informally) subordinates them. Leaning on the distinction between legality-undermining legal pathology and mere injustice through law will not help.

Indeed, thoroughgoing *de facto* second-class citizenship as I've sketched it above is arguably worse than some forms of *de jure* second-class citizenship,

48 *The Long Arc of Legality*, above n 2, 334.

49 *ibid*, 300.

50 *ibid*, 36.

51 *ibid*, 88.

under which, for example, one group of subjects is formally denied full equal status but in practice provided with full access to participation in the political, civic, social, and economic life of the community.⁵² In nominally religious states like Iceland, or constitutional monarchies like the UK, a religion or a hereditary head of state position are formally encoded in the law, but in practice both function as secular liberal democracies.⁵³ It is a short imaginative distance to formal legal inequality on that model – for that matter, nominally religious states as such arguably already do have *de jure* second-class citizenship for subjects that are not affiliated with the state religion, if only in an entirely symbolic sense. Even such a limited form of second-class citizenship, according to Dyzenhaus, may erode the legality of the state, for ‘if one is legally recognized as having status as a legal subject for some purposes but not for others, the parts of the law which seem to relegate one to inferior status are put into question by those parts which do not when a legal challenge is mounted to the subject’s inferior status.’⁵⁴

Along similar lines, consider a state in which gay marriage is illegal but civil unions are allowed and come with all of the material benefits of marriage. Some gay activists were not only willing to accept this compromise pre-*Obergefell v Hodges*⁵⁵ but preferred it, due to the association of marriage as an institution with a broader suite of patriarchal and heteronormative social practices. The compromise position looks like a form of very limited *de jure* second-class citizenship a subject might well find more justified than nominal legal equality combined with material injustice. However much formally recognising the inferior legal status of a class of subjects compromises the legitimacy of those states’ law because ‘their first-class status in some respects affected positively the legal space in which their inferior status was entrenched’,⁵⁶ to the extent that they function as secular liberal democracies and maintain the material equality for gay citizens it’s not clear that their law is any less legitimate than that of a state with *de facto* second-class citizenship, and perhaps it is more so.

Dyzenhaus can accept that one type of state is clearly more unjust than the other, while insisting that one involves great injustice *through* law, without compromising legality, and the other involves relatively minor injustice of precisely the kind that does. But from the standpoint of contractarianism – standing outside of law’s internal coherence and asking whether the subject of the massively unjust state has reason to accept law’s legitimacy – it appears wholly arbitrary to suggest that it is harder for the state to offer a more convincing answer to the question of authority when it formally but insignificantly discriminates

52 A tempting but perilous historical counterfactual example might be drawn from the idea of a separate but genuinely equal Jim Crow regime, but entertaining fantasies of a gentler Redemption is hazardous, given the resonance with ‘Lost Cause’ propaganda and other more subtle apologetics. Thankfully, we needn’t reach for something so dramatic.

53 Finland, Norway, and Denmark are slightly more complicated cases, in terms of the relationship between religion and the state, but have quite strong claims to some of the greatest legal legitimacy insofar as they are unusually egalitarian, affluent societies – the law does less there to maintain and protect unjust socio-economic hierarchy than almost anywhere else.

54 *The Long Arc of Legality*, above n 2, 311.

55 *Obergefell v Hodges* 576 U.S. 644 (2015), established marriage equality in the United States.

56 *The Long Arc of Legality*, above n 2, 334.

between classes of citizens than when it effectively subordinates one class through facially neutral law. A state that does not recognise the full formal equality of gay citizens but presides over an egalitarian social order seems more agreeable on contractarian grounds than one with gay marriage and a high tolerance for homophobic harassment and even violence, like early 21st-century America. A state that does not recognise the full formal equality of members of one religious group (by subjecting them to public displays of the majority religion's iconography etc) but presides over an egalitarian social order free of religious discrimination seems more agreeable on contractarian grounds than the regime of *de facto* second-class citizenship in my counterfactual Jim Crow south.⁵⁷

Solving the puzzle of authority seems to require the possibility of political inequality without legal pathology, but sufficiently thoroughgoing material inequality appears to pose a greater threat to contractarian legitimacy than some forms of *de minimis* second-class citizenship. Perhaps the former can be reconceived as a species of legal pathology after all, but if any political pathology can be cognised as a legal pathology the scope for legality is too capacious, and the argument becomes vacuous: legality collapses back into political morality after all. If there is a way to get at the threads of legality running through a regime of *de facto* second-class citizenship, one will only be able to recognise it when

57 Dyzenhaus could object that while sexual minorities, adherents of a minority religion, or hereditary non-nobility are in some sense second-class citizens whom the law formally excludes from certain forms of legal recognition it grants others, this is not the kind of second-class citizenship that compromises legality. I am confident that this is not his view, though one of the occasionally frustrating ambiguities of the book is how little is said directly to precisify the relevant notion of second-class citizenship. However, in addition to the passages cited above in support of my interpretation (notes 35 and 46 above), he does in passing offer marriage inequality as an example of the kind of formal legal inequality that law is internally accountable to remedying. See *ibid*, 387, 440 n19. In short, the reason that these *de minimis* but *de jure* inequalities put formal standing in jeopardy, and thus constitute forms of second-class citizenship even if only symbolically, is that this is precisely the kind of distinctively legal pathology that Dyzenhaus is concerned with. Nevertheless, it is not clear that for law to foreclose high office on the basis of minority religion or equal marriage on the basis of sexuality constitutes denial of full formal standing, so perhaps Dyzenhaus could opt for a stricter conception of second-class citizenship to block my argument. On the narrower, adjudicatory conception of formal legal standing, sexual minorities, adherents of a minority religion, or hereditary non-nobility might be wrongfully discriminated against without being deprived of their standing to contest discriminatory laws, nor is it clear that discriminatory laws imply refusal to acknowledge subjects' standing to demand a justification of their authority. Why can't the law directly discriminate against you while at the same time recognising your standing to demand a justification of its authority over you, and granting you the same formal legal standing (if not the same legal rights) that it grants others (and vice versa)? As the history of marriage equality shows, the law can wrongfully directly discriminate against you while recognising your standing to file a lawsuit contesting the legality of the discriminatory law in question. The reason it isn't available to Dyzenhaus to take the view that adjudicatory standing suffices for first-class citizenship, relaxing the requirements of formal equality and conceptualising equal standing in minimal terms as the right to petition, is that the distinction couldn't do the work it is needed to. That distinction, while preserving first-class citizenship for the minority groups in substantively egalitarian liberal democracies, would even more clearly fail to satisfy the contractarian legitimization requirement, because being able to appear before a judge to contest a discriminatory law alone does not entail or even strongly suggest that the question of authority is answered in a way that vindicates law's authority.

one gets into the details of the context, and the success of the project will turn on a disconcertingly detailed factual analysis.⁵⁸

DYNAMISM, INTERPRETIVISM, AND THE LAWS OF NATURE

Another commitment of Dyzenhaus's may help. He adopts a version of dynamic legal theory, combining Hobbesian laws of nature⁵⁹ and Fullerian principles of law's internal morality into a Dworkinian interpretivist account of adjudication: 'Laws which are not interpretable in light of fundamental principles of legality lose their claim to authority because they do not bear the marks of having been enacted with legal right ... when laws are interpretable in this way, legal officials will be able to justify to the legal subject their exercise of authority. They will be able to answer adequately the question "But, how can that be law for me?"'⁶⁰

I sense that this cluster of ideas ought to help take some of the sting out of my objection, but it's not clear to me how.⁶¹ It imposes two constraints on legality: first, a constraint on 'the content of enacted law', which 'must also be interpretable by judges in light of the laws of nature',⁶² and second, a constraint on judges, who owe a duty to the sovereign 'to interpret enacted law in the light of their understanding of the laws of nature'.⁶³ Law's legitimacy is thus protected insofar as its content is conditioned by the laws of nature, 'because the laws of nature protect our interest in liberty and equality in a way which makes it rational for us in the first place to authorize the sovereign, the content of the

58 In principle Dyzenhaus could allow that such detailed factual analysis was required to discover hidden legal pathologies masquerading as political pathologies – indeed I suspect that he does, though this issue is not directly addressed in the book. As an example, a series of Canadian lower court decisions overruled the Supreme Court based on a meticulously accumulated factual showing that various seemingly neutral laws were working in a systematically unequal way, creating a sort of shadow form of second-class citizenship which the Supreme Court eventually acknowledged as a legal principle and not just a political concern. See *Canada (AG) v Bedford* 2013 SCC 72, [2013] 3 SCR 1101 and *Carter v Canada (AG)* 2015 SCC 5, [2015] 1 SCR 331. Crucially, if *de facto* inequality is allowed by a state simply staying out of its subjects' affairs it is more difficult to establish that legal pathology is at work, but when the state starts to actually govern people's lives through law, intervening in society through facially neutral laws to create inequality cognisable as formal second-class citizenship, that raises issues of legal pathology. However, if he were to take this approach then the intuitive idea of second-class citizenship would turn out to do less explanatory work than the book advertises, instead acting as a sort of repository for whatever political pathologies can be deemed to constitute legal pathologies on the merits. In other words, requiring this level of factual richness to get to a verdict on whether a pathology is within law's proper domain converts full formal equality from a criterion into a mere label.

59 Via the 'legality proviso', which holds that 'the laws the sovereign makes must be interpreted, and so must be interpretable, in light of the laws of nature', *The Long Arc of Legality*, above n 2, 106.

60 *ibid.*, 3; see also 2–3 ('First, [Hobbes's legal theory] explains authority as compliance with fundamental principles of legality – the right-giving basis of legal order. Second, it gives to officials a role in interpreting enacted law in the light of such principles ... Third, the way in which these two elements combine in a single legal theory requires invoking what I call a "constitutionalist idea". This is the idea of an ongoing practice which constitutes legitimate authority of the sort early modern political theorists set out in versions of the social contract.').

61 For a review that focuses on the role of dynamism in Dyzenhaus's theory see Thomas Bustamante, 'Interpretive Authority and the Kelsenian Quest of Legality' *Jotwell* 5 July 2022.

62 *The Long Arc of Legality*, above n 2, 135.

63 *ibid.*, 135–136.

enacted law will reflect those interests until the sovereign chooses explicitly to undermine those interests',⁶⁴ and insofar as 'legal officials, in maintaining these laws, a task which includes the activity of judges in interpreting enacted law, do the job of preserving the social contract by which subjects have agreed with each other to regard the law ... as binding on them'.⁶⁵

The trouble is that the Fullerian and Hobbesian laws of nature that Dyzenhaus endorses are consistent with quite a lot of unfreedom and substantive, material inequality. As far as I can tell the regime of *de facto* second-class citizenship I sketched above is consistent with Fuller's principles, with the possible qualification that routine racism in criminal adjudication would cut against generality and/or publicity. This can probably be cured by finessing the example: rules of evidence that privilege the testimony of racist police or allow credibility assessments that track a sense of 'upstanding citizenship' would permit judges and juries to arrive at racist outcomes without differentially enforcing laws. Likewise, most of Hobbes's laws of nature pose no problems for the regime, though the law of 'equal dealing' may require tweaking the example in more or less the same way as Fullerian generality.

An egalitarian judge may well be inclined to interpret those requirements as substantively as positive law will allow, and to bring the hypothetical subjects in my example as close as possible to full *de facto* citizenship, because 'the judge's question is whether they are under a duty to apply the law to whomever it affects, thus facing the affected subject with the question whether to obey the law, as interpreted by the judge'.⁶⁶ The judge takes it upon himself to be answerable to the question of authority, and 'the problem raised by the individual who cannot get an adequate answer to the question "But, how can that be law for me?" becomes most acute when the individual is a member of a group which has second-class status', whereas *de facto* second-class citizenship allows a motivated judge to meet the task.⁶⁷

Still, this particular line of response is most relevant to the question of what a judge ought to do when confronted with unjust law. The stalemate in jurisprudence Dyzenhaus's project is intended to break sets up an opposition between two accounts of a judge confronted with a 'very unjust' law: according to one he can refuse to apply it because it isn't law, according to the other he should acknowledge that it is law but refuse to apply it anyway.⁶⁸ Interpretivism, which was meant to trace a middle path through which the judge can rely on principles of justice to construct the law, ran into the same problem one level higher up: where the spirit of the legal system coheres around implicitly unjust principles, or the law is unambiguous and evil, he faces essentially the same choice. A judge in a regime of *de facto* second-class citizenship may exercise as much discretion as he has to bend the law toward substantive justice, but he will only have so much leeway.

64 *ibid*, 142-143.

65 *ibid*, 5; see also 368 ('principles of legality condition the content of law. For the discipline of legality makes more plausible Dworkin's claim that an answer to a question of law which shows the legal record in its best moral light will not include morally unacceptable principles.')

66 *ibid*, 51.

67 *ibid*, 31.

68 See *ibid*, 9.

In any case, the contractarian *Grundnorm* is meant to capture the dependence of legality on law's legitimacy vis-à-vis the subjects it binds, and a *de facto* second-class citizen is faced with the question whether the law is law for them, without any opportunity to construct it according to principles of substantive justice. So long as the natural legal resources Dyzenhaus relies on are consistent with *de facto* second-class citizenship, even if its injustice may be somewhat mitigated by a Dworkinian judge it still presents a problem for law's legitimacy that Dyzenhaus's dynamism, interpretivism, or Fullerian-Hobbesian legal naturalism cannot address.

While it is true that even the egalitarian Dworkinian judge will be limited in their capacity to direct the law toward the actual equal treatment of *de facto* second-class citizens, these citizens may accept the answer that it's law for them because it doesn't formally treat them as second-class, and in that it contains the seeds to actually ensure your equal treatment.⁶⁹

The first thing to say about this line of reply is that its effectiveness will likely depend on just how long the time horizon for legal progress is. A *de facto* second-class citizen would presumably not accept that while things are unequal now they may not be in 100 years, so long as the next several generations of judges continue gradually but consistently nudging the law in the right direction. But one might accept that while things are unequal now they are in the process of actively becoming better because formally equal citizenship provides the tools and today's judges are committed to using them.

Even within this limited set of political contexts in which the dynamic character of legality provides an additional resource for answering the question of authority, however, it remains unclear that full formal legal standing is either necessary or sufficient to enable this line of response. Compare, again, the two scenarios above: on one hand, full formal legal standing combined with systematic material subordination resulting in not just technical *de facto* second-class citizenship but thoroughgoing *de facto* second-class citizenship (as represented by the counterfactual Jim Crow south) and marginally compromised legal standing combined with material equality (as represented by the functionally secular liberal democracy with a nominal state religion). Under a short enough time horizon – say at a time of social upheaval and resurgent civil rights movement, mere years away from a 'second reconstruction' – it's possible that a *de facto* second-class citizen would find the promise of imminent transformation of formal equality into material equality sufficient to justify the law's authority. But in doing so they would be accepting an invitation to jointly commit to a collective social project of law's reconstruction, an invitation they would be rationally permitted to reject.

The Dworkinian judge promising imminent legal progress toward substantive equality grounded in formal legal quality cannot really be understood to justify the authority of the law as it exists now, only to invite the *de facto* second-class citizen to accept its authority now on the promise that it will realise its own egalitarian potential soon. Or, to put the point more mildly, the judge can be understood to attempt to justify the authority of the law as it exists now by

69 Thanks to Felipe Jiménez for pushing me to consider this line of response.

appealing to a near future, while conceding that law is not legitimate insofar as it stably takes the shape that it currently (and hopefully temporarily) does. This kind of justification, looked at through the lens of contractarian political philosophy, does not seem as strong as the one offered to the formal second-class citizen who enjoys total substantive equality. The law as it exists now will be experienced as an occupying force by the former, who is well within his rights to reject its claim to legitimacy – at least more so than the latter.

If the ultimate criterion of law's legitimacy is answerability of the question of authority it is simply not plausible that the question is more easily and more effectively answered by a Dworkinian judge addressing a member of a systematically subordinated group, on the grounds that their formal equality provides the judge with tools to nudge the law toward material equality, than by a Dworkinian judge addressing a member of a religious minority who is prohibited from holding elected office but for whom the law otherwise secures social and political equality.⁷⁰ Even in the narrow set of circumstances in which the dynamic character of law can be invoked to support an answer, the distinction between *de facto* and *de jure* second-class citizenship is doing very little work.

LEGAL REALISM AND THE DIGNITY OF STANDING

Dyzenhaus has (at least) one more response available before conceding that *de facto* second-class citizenship undermines legality by compromising law's ability to answer the question of authority: perhaps it is not arbitrary after all to distinguish between *de facto* and *de jure* second-class citizenship, because only formal legal exclusion deprives subjects of the opportunity to so much as pose the question of legitimacy to a state that recognises itself as obligated to provide an answer. In recognising the full formal legal standing of a subject, the law holds itself accountable to justifying itself, and in offering a justification it imparts dignity to the subject: 'To accept that onus is to accept that the law brought to bear must be understandable as treating the legal subject as someone with dignity as a responsible agent.'⁷¹

When 'dignity' is used as a unifying concept to capture a constellation of other, more substantial moral goods that flow from rational agency (as it is in some readings of Kant⁷²) it has a job to do, but if it names a moral property that is promoted by offering a justification for a law just as that law subordinates the

70 Indeed the promise of imminent progress may be more believable in this case, as judges nudging the law from marginally compromised formal legal equality toward full formal legal equality is probably a lighter lift than nudging it from systematic material subordination to substantive equality.

71 *The Long Arc of Legality*, above n 2, 405.

72 Compare for example Karl Ameriks, 'Dignity Beyond Price: Kant and his Revolutionary British Contemporary' (2021) 13 *Kant Yearbook* 1 and Ariel Zylberman, 'The Relational Structure of Human Dignity' (2018) 96 *Australasian J Philosophy* 738, with Jeremy Waldron, *One Another's Equals: The Basis of Human Equality* (Cambridge, MA: Harvard University Press, 2017). I have never been able to summon the intuition that dignity itself has all that much moral weight – philosophers' habitual emphasis on recognitional harms over material harms and power relations leaves me cold – so perhaps I am a particularly tough audience for this argument.

petitioner in every practical and material sense, it is difficult to see how it could have much significance.

That said, Dyzenhaus offers some empirical evidence that plaintiffs in human rights cases really do value having their day in court,⁷³ in a way that the concept of dignity captures, and, relevantly to my purposes, it promises to provide a principled basis for distinguishing the injustice of *de jure* second-class citizenship from that of *de facto* second-class citizenship, with a key concept of political morality, rather than a question-begging legal concept, bearing the weight. I think it nevertheless fails for a version of the same reason.

Let's return to the contrast between the counterfactual Jim Crow south (with pervasive but informal inequality) and a state with an official but superficial form of *de jure* second-class citizenship, on the model of state religion, constitutional monarchy, or prohibition on gay marriage. Dyzenhaus wants to be able to say that the former may be more unjust, indeed much more unjust, but as injustice through law it is not itself a threat to legality. Without having a principled reason to think that the latter is a greater threat to law's ability to justify itself this move looks arbitrary, but perhaps the idea that the law recognises itself as owing an account of itself to the subjects of only the former can supply a principled reason. I am sceptical.

This response seems to imagine that vis-à-vis *de jure* second-class citizenship the law refuses to justify itself to the subject at all. But that is not quite right: second-class citizenship consists in full formal legal standing in some areas but not others – to be fully excluded from legal standing is to live in under the prerogative state,⁷⁴ but a *de jure* second-class citizen may enjoy full formal legal standing for almost all purposes, save one or two. A member of a minority religion in a functionally secular but nominally religious liberal democracy with great social and economic equality, who is denied formal legal standing for the very narrow purposes of holding the highest political office (without converting) or seeing their faith recognised in the public square on equal footing with the majority religion (which, say, has its iconography incorporated into public symbols), is a *de jure* second-class citizen, and therefore has some reason to resist law's claim to total legitimacy. But for the most part she may happily (and reasonably) accept it, because it guarantees equal standing in the areas that matter most: participation in public, civic, and economic life. Dyzenhaus claims that when such a person poses the question of authority, and 'no adequate answer can be provided', an 'internal legal imperative kick[s] in which requires reform'.⁷⁵ But if an adequate answer to the question is available for nearly every purpose that matters, it's not obvious that the lack of one in a restricted, symbolic domain creates much of an imperative at all.

73 See for example, *The Long Arc of Legality*, above n 2, 318.

74 As unlikely as it might be in reality, a benevolent prerogative state, in which a class of subjects has no formal legal standing whatsoever but enjoys widespread positive freedom to participate in civic and economic life, would not justify itself to its subjects at all, and yet in a certain light they may nevertheless have reason to find it more legitimate than the state that makes them legally full citizens but *de facto* second-class citizens as sketched above. This stretches the application of the question of authority as a marker of constitutionalist legitimacy, and I'm not sure what to think about it, but I needn't take a position on the question here.

75 *The Long Arc of Legality*, above n 2, 400.

In contrast, in a state with *de facto* second-class citizens law recognises itself as owing its subjects an answer to the question of authority and works to provide one: ‘to be a subject of legal order is ... to be endowed with some aspects of citizenship because one is entitled to the kind of justification to which legal order in its nature is committed.’⁷⁶ There is, according to Dyzenhaus, dignity in that fact itself. But what if the justification is bad? What if it is transparently bad, so much so that one is struck by how obviously it serves to superficially rationalise the injustice of the law in question? The law in that case expresses ‘the principle which requires that legal subjects have the right to ask an independent official for reasons why the law applies to them in a way which addresses them as persons with dignity as responsible agents’,⁷⁷ but what dignity is there in the standing to demand a justification when the justification given is, per the realist, putting lipstick on a pig?

It’s hard to see why such justifications could be enough to overcome the threat to law’s legitimacy posed by the injustice of the society it creates. Being offered solemn intonations of, say, a colour blind constitution with a clear original public meaning, which a judge claims leaves him no choice but to strike down a law that would promote residential integration, is a form of recognition that does little to rescue law’s legitimacy in a ruling that perpetuates one’s systematic political, social, civic, and economic subordination. And, importantly, there does not seem to me to be a clear difference in kind between the legitimacy-promoting effect of offering a justification and the legitimacy-undermining effect of the decision, for the same reasons as above.

Suppose, however, that there is a difference in kind – that the dignity of legal standing has a special, close relationship with law’s legitimacy, which substantive social, political, and economic justice lacks. It’s not clear to me that this response to the realist works on its own terms. Sure, being offered the opportunity to plead one’s case before a judge bound by neutral procedures is worth something. But at a certain point, as the justification the law offers for itself drifts into the hard-to-take-seriously, is it not *more* insulting to be fed high-minded but implausible formalism, when one knows full well what’s really going on? There’s a range of outcomes where a substantively bad result – even a substantively unjust result – can be mitigated by appeals to higher principles, but surely there is a range beyond that range where it is a greater insult to a subject’s dignity that the law will not look one eye to eye and say, ‘sorry but that’s how it is’. Dignity may be something, but it’s not much, and it’s not simply a matter of formal legal standing; at some point form gives way to substance, and effective subordination can be made worse, not better, by attempts to rationalise it.

THE CONTINUUM OF LEGALITY

This is, from what I can tell, where things stand for Dyzenhaus’s view according to which full formal legal standing is the *sine qua non* of legality: any exclusion

⁷⁶ *ibid.*, 406.

⁷⁷ *ibid.*, 400.

from it is a threat to law's legitimacy, and any injustice consistent with it of no special concern to law as such. We've seen the view become increasingly sophisticated in response to attempts to put pressure on it, enriched by commitments to dynamism, interpretivism, Fullerian-Hobbesian natural law, and an emphasis on the dignity of legal standing. For all that, I do not think that the view succeeds. The threat that *de facto* second-class citizenship poses to law's authority cannot be explained away.

But one last possible response: perhaps we can see legality instead as set along a spectrum, where law is more or less legitimate but full formal legal standing does not establish total legitimacy, rather than a dichotomy between injustice through law and injustice that compromises law. This may in fact be closer to Dyzenhaus's actual view.⁷⁸ I suspect that throughout the book where he appears to endorse the strict dichotomy he is speaking loosely, and this precise question is not directly at issue. Whereas, when he addresses it head-on, he explicitly denies it: 'The closer a state is to the end of the continuum where there is largely compliance with legality, the more adequate will be the answers to the legal subject's question. Correspondingly, the closer it is to the other end, to ceasing to be a legal state since unmediated political discretion not law rules, the less adequate such answers will be'.⁷⁹

The first thing to say is that if there is a continuum of legality established by law's ability to answer the question of authority, it's not clear that full formal legal standing and partial exclusion from legal standing are adjacent at points linearly arranged along it. The upshot of the previous few sections is that in some cases *de facto* second-class citizenship is a greater threat to law's legitimacy than *de jure* second-class citizenship, not in spite of the dignity that full formal legal standing promotes even in a regime of *de facto* second-class citizenship but precisely because it doesn't. If there is a continuum of legality it is not one with full formal legal standing as a decisive factor at one point along it, but one that depends on a number of factors, all ultimately grounded in its ability to take up the question of authority, but no one privileged over all others.

Very well. Legality is a continuum, where the law's ability to justify itself to its subjects determines the extent of its legitimacy, and that does not depend solely on the degree to which it grants its subjects full formal legal equality. Is this a version of Dyzenhaus's view – perhaps the most faithful one – that can address the argument that bedeviled the simplified version? I'm not so sure. So long as the modified version preserves the key virtues Dyzenhaus aims to vindicate, perhaps the modification is friendly, if not faithful. Those virtues are to preserve

78 This helps to explain why Dyzenhaus holds that formal second-class citizenship undermines, and does not just compromise, legality: 'the parts of the law which seemed to relegate second-class citizens to inferior status could be used to throw into doubt those parts that did not, to the point where inferior status for a group was so entrenched that individuals in the group were no longer second-class citizens because they were governed by an entirely different regime of law', *ibid*, 329.

79 *ibid*, 32. See also 341–342 ('In a state on the rule-of-law end of the legality continuum, the subjects can in principle get an answer which, while it may not always be what they want, and may even be one of which they morally disapprove, does not undermine their status as first-class citizens in the jural community. Such a state exists when its enacted law which draws distinctions between groups of peoples does so in ways which can be justified to individuals in those groups on the basis of the fundamental legal principles of the order.')

a role for legal theory in making sense of pathologies that are distinctive to law – not to be foisted onto political morality – by recognising legitimate law as creating defeasible moral obligations even when it is unjust.

Can the ‘multi-factor continuum’ version of Dyzenhaus’s view preserve them? A full argument would take too long to develop but the general worry is that without a principled criterion for drawing a line between legal pathologies that compromise law’s legitimacy and forms of injustice through law that don’t, it’s not clear why a subject should ever accept law’s justification for itself while suffering legal injustice.

Consider an individual subject experiencing the same kind of exclusion from political, social, civic, and economic life of the *de facto* second-class citizen above, but without being a member of a similarly situated class of subjects. Should it make law any less of a foreign imposition that it doesn’t suppress others as well? I don’t see why. The subject asks, *but how can that be law for me?* and the state answers, or doesn’t, regardless of who else is asking. Likewise consider a subject who is not excluded from the benefits of citizenship across the board but as it happens is repeatedly on the short end of individually unjust decisions. Does the law have any greater claim in virtue of the randomness of its vicissitudes?

Consider a subject convicted as a teenager of a crime he did not commit, based on a coerced statement from a cognitively impaired family member, or simply based on a series of honest mistakes. After decades of unsuccessful appeals, on the eve of his execution, his lawyers uncover irrefutable evidence of actual innocence. The Court rejects his final appeal, on some arcane procedural ground that bars introducing such evidence at this stage.⁸⁰ Allowed before a judge one last time, he asks, *but how can that be law for me?*

Recall that the answerability of the question of authority rests on the fact that ‘even when such subjects strongly disagree with the content of the law, they must be in a position to recognize that the legal order as a whole serves the interests which are in the character of a legal order to serve and that its particular laws are interpretable in light of those interests’, from which it supposedly follows that ‘[w]hen they ask the question “But, how can that be law for me?” a judge mindful of the judicial virtues can give a satisfactory answer’.⁸¹ What sort of answer should the death row inmate be satisfied with? He has not experienced *de jure* second-class citizenship, nor, suppose, *de facto* second-class citizenship.⁸² He has been phenomenally unlucky. He experiences the law, which he has encountered since the dawn of his adolescence in the figures of the judge, the bailiff, and the warden, as an alien imposition. A gun to his head. Perhaps a judge can say that ‘the legal order as a whole serves the interests which are in the character of a legal order to serve and that its particular laws are interpretable in light of those interests’, but even Hobbes, the defender of largely unconstrained sovereignty, insists that ‘no man can transfer, or lay down his right

80 This example is based loosely on Oscar Smith, though embellished by elements of other notorious cases. See *In re Smith* 142 S. Ct. 2645 (2022).

81 *The Long Arc of Legality*, above n 2, 71.

82 In reality pervasive racialised oppression probably explains most if not all similar cases, but we can suppose otherwise.

to save himself from death, wounds, and imprisonment'.⁸³ If he is unpersuaded by any available answer, on what basis could it be said that he is refusing to accept law's legitimate authority over him?

The difficulty this example highlights is the very dilemma that has appeared and reappeared throughout this essay, that we need some way to carve out a space within which law's injustice does not compromise its ability to answer the question of authority, not as a matter of the degree of its injustice but as a matter of the form. Contractarian political philosophy was supposed to provide us the theoretical resources exogenous to law, with which to define that space within which law is only subject to endogenous standards of well-functioning. The question of authority promised to provide the criterion for legitimacy, but without begging the question it is not clear why self-acknowledged accountability to the question of authority, in the form of full formal legal standing, should be thought to draw a boundary around a territory of law's legitimacy.

As we've seen, taking the contractarian framework on its own political-philosophical terms, the perception of law as mere coercion can penetrate increasingly smaller such territories, until any injustice done to an individual subject calls into question not only the moral authority of the result but the legitimacy of the law that generated it. The idea of law's internal normativity can help, especially in the context of a Dworkinian judge who is faced with the opportunity to interpret law in light of the obligation to satisfactorily answer the question of authority. But the conceit of contractarianism is that it is the subject who asks the question, and the philosopher must be in a position to answer.

CONCLUSION

What we're looking for (well, what I'm looking for, and what I was hoping to find in *The Long Arc of Legality*) is a story about law's authority that doesn't collapse into the disguised authority of ordinary morality nor the coercive authority of the gunman, and that gives law its own distinctive task in regulating social life, with its own distinctive pathologies. This is what I take to be the core project of political legal theory, which gives philosophy of law a proper subject matter more robust than linguistic analysis of 'law'-talk or applied moral philosophy. My argument has been that Dyzenhaus, by relying on contractarian political philosophy, as articulated through the idea of accountability to the question of authority, doesn't quite get there. I hope that I've missed something. I'd like to conclude, however, by gesturing in the direction of an understanding of legality that, while abandoning the strict demarcation that Dyzenhaus grounds in the full formal equality of legal standing, preserves much of what is insightful and compelling about Dyzenhaus's project.

One part of the book I have not yet commented on is the discussion of the relationship between jurisprudence and metaethics contained in chapter

83 *Leviathan* (1651) (Indianapolis, IN: Hackett Publishing Company, reprinted Edwin Curley (ed), 1994) 14.29.

six. It seems to me that nothing in that chapter is directly responsive to the objection that I've raised here, but it does partly explain the methodological choice to derive the basic commitments of the rule of law from the structure of legal systems (and from the normative relationships that the law creates, in particular those that derive from the status of 'legal subject' in Dyzenhaus's 'jural community'), and perhaps point the way toward a conciliatory view of law.

As the final chapter of the book makes clear, Dyzenhaus's theory of law operates against a background view of morality as unsettled and indeterminate, and of law as an institution morally required to authoritatively settle certain questions. His scepticism about moral realism and traditional natural law theories of normativity and legitimacy are the flipside of a pragmatic view of morality, which is a central part of his defense of the formal account of the rule of law. I have defended a view of that general shape elsewhere,⁸⁴ and I think that the model of historically conditioned social practices playing a crucial role in realising otherwise empty, formal requirements of morality in concrete legal, political, and social institutions is crucial for seeing how moral requirements in general become authoritative.

If this is right then perhaps we can relax the dependence of law's legitimacy on the formal legal equality of its subjects while retaining a conception of law as a domain within political morality, marked out by distinctive pathologies to which it is committed to being responsive, in which determinacy is produced through legislation and adjudication. The boundaries between legality and other forms of political morality would be more porous than on Dyzenhaus's account, and there would then be some overlap between the law's accountability to rectifying *de facto* second-class citizenship and general social and political accountability to rectifying the same social pathology, but we could still recognise formal legal inequality as a distinctive pathology of law, and law's role in rectifying any injustice as having a distinctively legal character. Nevertheless we would have to concede that the answerability of the question of authority can be compromised by social pathologies other than formal second-class citizenship, as I've argued above. It seems to me that this is in the end a rather small concession to make.

84 See Jack Samuel, 'Toward a Post-Kantian Constructivism' (2023) 9 *Ergo* 1449.