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Adjudication and the Law

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Abstract:

It can be compatible with justice and the rule of law for a court to impose new legal liabilities retrospectively on a defendant. But judges do not need to distinguish between imposing a new liability, and giving effect to a liability that the defendant had at the time of the events in dispute. The distinction is to be drawn by asking which of the court's reasons for decision the institutions of the legal system had already committed the courts to act upon, before the time of decision. I explain these conclusions through an assessment of the last episode in the debate between H.L.A.Hart and Ronald Dworkin.

It is a popular misconception that the rule of law requires judges to decide disputes just by giving effect to the law. The misconception would work greater injustice, if lawyers and judges had any precise, general technique for distinguishing between the law, and the considerations that count in favour of making new law. But lawyers and judges equivocate between applying the old law, and making new law. Operative judicial utterances are radically unspecific on this ostensibly fundamental point.

So if the judges decide a dispute by saying,

'We hold that the defendant is liable to…'

-they typically do not specify whether they mean:

'We hereby give effect to a liability that the defendant had at the time of the events in dispute,'

-or:

'We hereby impose a new liability on the defendant.'

They may mean neither the one nor the other; their intentions may be as unspecific as their linguistic acts.

If the misconception were true, it would be urgent judicial business to resolve the equivocation that arises from this widespread, characteristic lack of specificity in judicial discourse. But in fact, judges can do justice according to law without resolving it.

I will defend those claims, and I will argue that the equivocation between making new law and applying old law (I will call it 'the equivocation') is not generally irresoluble. It is to be resolved by asking which of the court's reasons for decision the institutions of the legal system had already committed the courts to act upon, before the time of decision. I will explain these conclusions by way of examining the last episode in the debate between H.L.A.Hart and Ronald Dworkin.

I. Hart and Dworkin: the last word

Part of the value of H.L.A.Hart's work is that it has inspired people to disagree with him. It is worth sorting out how to do so. There is an irony in his work. More clearly than anyone else had done, he clarified a

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fundamental problem of jurisprudence: how to explain the 'normativity' of law (that is, its character as a set of guides or purported guides to behaviour, which can be stated in the 'normative' language of rights and obligations).[2] The irony is that he offered a *description* of social behaviour as an answer to the question. He thought that the normativity of law is to be explained simply by pointing out social facts, such as the fact that officials take a critical, reflective attitude to their shared practice of treating certain facts as tests for the validity of their law.

But no attitude explains the nature of a right or an obligation- legal or other. So no one can explain the normativity of law purely by describing actions or attitudes.[3] Another aspect of this irony is that although Hart explained the importance of the internal point of view, he made that point of view unintelligible by refusing to ask the question (the *crucial* question, from the internal point of view) of whether it is a good point of view to take. The irony can be summed up by saying that Hart mistook the role of description in answering the problems about the nature of law that he identified.

Ronald Dworkin has developed his provocative theory of law as a way of disagreeing with Hart's descriptive approach. But Dworkin does not merely reject the attempt to explain the normativity of law by describing official behaviour and attitudes. He also rejects Hart's descriptive claim itself: the claim that officials in a community share a practice of accepting standards for the validity of their law. Dworkin presents the disagreement not only as a philosophical disagreement about the nature of law, but also (and for the same reasons) as a *legal* disagreement about what rights a person has at a particular time in the law of a particular jurisdiction. If it is a legal disagreement as well as a philosophical disagreement, then Dworkin can argue his case as a lawyer, and he does.

Most recently, in his Hart Memorial Lecture,[4] Dworkin presents the disagreement by arguing the tort case of Mrs.Sorenson, an imaginary claimant who was injured by a generic drug. Eleven manufacturers carelessly supplied the harmful drug. Any one manufacturer would uncontroversially be liable to compensate Mrs.Sorensen, if she proved that it had supplied the pills that injured her. If she was injured by pills supplied by more than one manufacturer, each would be liable. But because of the generic marketing of the drug, she cannot even prove that she took a single pill supplied by any particular manufacturer. Her lawyers argue that each manufacturer is liable to compensate her in proportion to its share of the market for the drug –they ask for 'market share damages'. They assert a principle that 'those who have profited from some enterprise must bear the costs of that enterprise as well' (4). I will call that the 'internalization principle' (in fact, I think their argument will need to rely also on a further principle, that liability to compensate a claimant like Mrs.Sorenson is *an appropriate technique for making enterprises bear those costs* –I will call that the 'remedial principle').

The manufacturers argue that the claim contradicts 'the long-established premise of tort law that no one is liable for injury he has not been shown to have caused' (4). I will call that the 'causation principle'. On his own approach to identifying legal rights, Dworkin says, a court might find the causation principle 'so firmly established that Mrs.Sorenson must therefore be turned away', or might 'find support' for the internalization principle. He does not say what support there is for either argument.

Now, according to Hart,

> …the existence and content of the law can be identified by reference to the social sources of the law (e.g. legislation, judicial decisions, social customs) without reference to morality except where the law thus identified has itself incorporated moral criteria for the identification of the law. [5]

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[2] See especially *The Concept of Law*, 2nd ed. (Oxford: Clarendon Press, 1994) at 57.

[3] Various writers have explained why, including Ronald Dworkin: see his discussion of the distinction between concurrent and conventional morality in *Taking Rights Seriously*, 2nd ed. (London: Duckworth, 1977) 51-53. Perhaps the most straightforward and devastating argument against Hart's explanation of social rules is Joseph Raz's account of the 'fatal defects' in the foundations of Hart's theory of law: *Practical Reason and Norms*, 2nd ed. (Princeton: Princeton University Press, 1990) pp.53-58.

[4] A lecture given at Oxford University in February 2001, published in a revised form as 'Hart's Postscript and the Character of Political Philosophy' (2004) 24 *OJLS* 1-37; references in the text by page numbers in round brackets are to that publication. The lecture became Chapter 6 of Dworkin, *Justice in Robes* (2006, Harvard University Press).

[5] *The Concept of Law*, n.2 above, 269; quoted *ibid.* at 4.

Dworkin calls that a 'sources thesis', and he views it as fatal *to Mrs.Sorenson's case*. For Dworkin does tell us the following about the law of her jurisdiction:

> No legislature or past judicial decision has made morality pertinent in Mrs.Sorenson's case… (4)
>
> No "source" of the kind Hart had in mind had provided that people in Mrs.Sorenson's position are entitled to recover damages on a market-share basis, or stipulated a moral standard that might have that upshot or consequence. (20)

Based on Hart's 'sources thesis', Dworkin concludes that Hart's theory of law is against Mrs.Sorenson: 'So far as the law is concerned, he would have to say, she must lose.' (4)

Dworkin's argument takes the following form:

1. Hart claims that the content of the law can be identified by reference to social sources without reference to morality (unless the law so identified has incorporated moral criteria).
2. No legal right to a remedy for Mrs.Sorenson can be identified by reference to social sources without reference to morality (and no legal source has incorporated a moral criterion that would help her).
3. Therefore, Hart would have to say that so far as the law is concerned, Mrs.Sorenson must lose.

Why does this argument help Dworkin? Because Dworkin invites us to presume that the lawyers for Mrs.Sorenson might stand up and make an argument with straight faces, and that it might be a good argument. Or at least, the lawyers for the drug companies would have to meet it. He describes the situation with an extravagant indefiniteness, relying on our imagination to postulate the possibility of a genuine controversy, where Hart's theory rules out controversy (because the theory necessitates one resolution to the dispute). If Dworkin's argument were sound, then Hart's theory of the nature of law would take sides against Mrs.Sorenson, in a genuine controversy over the content of the law of her jurisdiction. That would undermine Hart's 'sources thesis'. For, if the sources thesis is aligned with one side and against the other in a genuine legal dispute, then the sources thesis is not a general truth about law, but only a traditionalist argument in favour of one side in a dispute over what the law really is.

But Dworkin's argument is unsound, and this ostensible disagreement over Mrs.Sorenson's case is the wrong way to disagree with H.L.A.Hart. Step 2 in Dworkin's argument is unsupported: nothing in the scenario as Dworkin presents it gives reason to think that it is true. I will explain that controversial claim in section III. But in section II, I will argue that there is another, more straightforward reason why Dworkin's argument is unsound: the conclusion in step 3 does not follow from steps 1 and 2.

II. The law may empower the court to impose a new legal liability

What if the social sources of the law do not support the conclusion that Mrs.Sorenson has a legal right to compensation? Contrary to Dworkin's argument, that would not mean that, so far as the law is concerned, she must lose. If the law gives the court power to create a new legal rule entitling her to damages, and to give effect to that new rule in the case, then the law does not require that she lose.[6] Granting for the sake of argument Dworkin's premise 2 (that no legal right to a remedy can be identified by reference to social sources, without reference to morality…), it may yet be possible to identify a power to impose a new liability, by reference to sources. Then the law leaves it to the court. Even if a binding precedent were *against* Mrs.Sorenson, the law would only be *prima facie* against her, if a court has power to overrule the precedent. Every actual common law system gives some courts that power in some degree, as well as power to decide an issue of first impression. Far from imposing a general ban on awards of compensation of a kind that has never been ordered before, the law commonly gives a court a restricted authority to make a novel award.

[6] The same will be true if the law gives the court the power to dispense her from a legal requirement without making any rule; but I will discuss changes in the law, rather than dispensations from it.

The restrictions on that authority are important in what follows; they vary among common law jurisdictions, and they are complex and controversial in each jurisdiction, and they may change over time within a jurisdiction. In real common law jurisdictions, not every rule of the common law is subject to overruling by judges. There has never been a common law jurisdiction in which the judges had authority to adopt a new rule that would indenture the directors of the drug company in servitude to Mrs.Sorenson. In English law, there is no reason to think (e.g.) that judges have power to overrule the common law doctrine of *res judicata*, or the common law doctrine that a decision of the High Court is not subject to judicial review on grounds of error in the High Court. But those restrictions are compatible with a very significant power to change doctrines of the common law. We can generalize at least enough to say that the judges' power to develop the law is limited, but the law does not define the limits.[7]

Hart wrote that the doctrine of precedent is compatible with 'two types of creative or legislative activity': *distinguishing* the earlier case by 'narrowing the rule extracted from the precedent', and *widening the rule* by discarding 'a restriction found in the rule as formulated from the earlier case'.[8] He could have added the creative activities of overruling, and of setting a precedent in a case of first impression. The powers to undertake such creative activities are instances of the power of judges to make new law. That power (in varied forms) is a central characteristic of the common law (and of other systems too).

The resulting irony is that, far from favouring the drug companies in Mrs.Sorenson's case, Hart's theory of law is (so far as it goes) more favourable to her than Dworkin's is. Not because it says anything in particular about the law of her jurisdiction, but because it allows for the possibility of a judicial power to award compensation on new grounds (even on grounds that the law rejected at the time when she was injured). On Dworkin's own view of how to decide Mrs.Sorenson's case, the judges may find that the causation principle 'is so firmly embedded in precedent that Mrs Sorenson must therefore be turned away with no remedy.' (4) A judge who agrees with Hart's view of the role of sources in law need not go along with that sort of injustice. Judges are characteristically responsible for exercising a power to change the law –a power that, for all its complex and undefined restrictions, may extend to an unjust rule that is very 'deeply embedded in precedent' or 'long-established' (4).

This is a radical breakdown in Dworkin's argument. Because Hart asserted the possibility that the law may allow for judicial change in the law, his theory of law negates the view that Dworkin superimposes on it (the view that, so far as the law is concerned, Mrs.Sorenson must lose). But it is easy to see the attitude that Dworkin would take to the suggestion that judges might create a new liability in Mrs.Sorenson's case. In fact, he expresses that attitude later in his essay, in response to an imaginary scenario in which judges 'explicitly and rigorously enforced the sources thesis' (32). That phrase misstates the imaginary situation, because no one can 'enforce' the sources thesis. We need to understand Dworkin as referring in what follows to judges who (i) consider the sources thesis to be true, and (ii) find no source in their jurisdiction for a legal right to compensation for Mrs.Sorenson. In that case, Dworkin says,

> Judges who thought it intolerable that Sorenson should have no remedy… would be forced to declare that, in spite of the fact that the law favoured the defendant, they would ignore the law and hence ignore legality and award her compensation. They would announce that they had a 'discretion' to change the law… through the exercise of a fresh legislative power that contradicts the most basic understanding of what legality requires… (32)[9]

Taking on an unlawful discretion would indeed amount to ignoring (or, at least, disregarding) the law and legality. But such a judge will not be disregarding the law if the law itself authorizes the making of such an

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[7] Perhaps all that can be said generally is said by John Finnis in his discussion of the ways in which the legal system 'systematically restricts' the feedback of considerations 'from the justificatory level of straightforward practical reasonableness back into the level of practice', *Natural Law and Natural Rights* (1980), at 312.

[8] *The Concept of Law*, n.2 above, 135.

[9] Remember that on Dworkin's own view, a judge might find that Mrs.Sorenson has no legal right to a remedy (4; see discussion above) –in which case a judge who found it intolerable that Mrs.Sorenson should have no remedy would have to 'ignore legality'. Such a judge would presumably face a crisis in the tension between justice and integrity, discussed in *Law's Empire* (Cambridge Mass.: Harvard University Press, 1986) 177, and might have to abandon the 'interpretive attitude'.

award, by empowering the court to change the law with retroactive effect. Would such a legal power *itself* disregard the value of *legality*? We can certainly think of legal powers that contradict the ideal of legality – such as an uncontrolled executive power of detention. But I will argue that a judicial discretion to change the law with retroactive effect is not necessarily contrary to the ideal of legality.

The rule of law and retroactive decision making

'Legality' is Dworkin's term for the rule of law;[10] he states the principle by saying that 'Legality insists that [the state's coercive power] be exercised only in accordance with standards established in the right way before that exercise' (24). That view of the principle of legality is unduly constricted.[11] For our purposes, the important mistake is the idea (an idea that, according to Dworkin, is part of 'the most basic understanding'[12] of the ideal) that the rule of law is generally opposed to retroactive impositions of legal liabilities or other legal burdens. The lawmaking power of common law judges *would* run contrary to the rule of law, if retroactive decision making were generally contrary to the rule of law.

But the rule of law is opposed to *arbitrary* government, and retroactive decision making is not necessarily arbitrary. Uncontrolled executive detention is arbitrary in the relevant sense. It is generally arbitrary to impose retroactive taxes, or to create retroactive regulatory offences. In each case of arbitrariness, the defect in the law is that it is failing to control the life of the community in a way that can be distinguished from what Aristotle called the rule of people (the mere say-so of officials).[13]

When legality or the rule of law is a reason not to change a rule retroactively, it is so only because the retroactive change would be arbitrary in that sense. Mrs.Sorenson's case is itself an excellent instance of the possibility of retroactive imposition of a liability with no such arbitrariness. Each drug company owed its customers a duty to take care in the production and supply of drugs. That duty was recognized by law, and was enforceable through an action in tort at the suit of customers who could prove causation by a particular defendant. Suppose that the law *did* require proof of causation, so that the drug companies could use a generic marketing scheme to escape liability for injuries caused by their breach of a duty of care. And suppose that, on the basis of accurate advice to that effect, the companies supplied the drug to the public in the expectation that there would be no liability.

There is nothing arbitrary in upsetting an expectation like that. That is, the change in the law has a rationale that is distinguished from the mere say-so of the judge, by the fact of a breach of a duty of care. Changing the law retroactively would prevent an abuse of the law. If the change imposed a legal liability not known to the law at the time of the events in dispute, then, far from representing an arbitrary use of power by a judge, the change in the law might vindicate the rule of law. By departing from a *legal* requirement of proof of causation, the court would be giving an extraordinary effect to the drug companies' *legal* duty of care.

We can imagine circumstances that would make it arbitrary to impose a new liability retroactively –which shows that retroactivity is not arbitrary in itself. It would be arbitrary for a court to impose such a liability if it were repugnant to an existing scheme of regulatory control of pharmaceutical manufacture accompanied by state compensation for injuries caused by defective pharmaceuticals. And it would be arbitrary for a court to impose market share liability if doing so would distribute to good manufacturers part of the cost of mistakes or bad faith on the part of bad manufacturers, taxing good manufacturers and distorting competition in a way that injures consumers. But there is no such problem if the manufacturers all produced the same product, and should all have known that the chemical was dangerous (as Dworkin says of Mrs.Sorensen's case (4)).

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[10] As Dworkin points out: '…the value of legality –or, as it is sometimes more grandly called, the rule of law…' (24).

[11] It is a mistake, for example, to characterize the rule of law as merely a limit on the state's coercive power (because the rule of law also demands positive exercise of that power, and also demands control of many forms of private action).

[12] (32); cf. 'It is central to legality that a government's executive decisions be guided and justified by standards already in place, rather than by new ones made up *ex post facto*…' (35).

[13] *Politics* 3.16, 1287^{a}19. For discussion of this sense of arbitrariness, see Endicott, 'The Reason of the Law', (2003) 48 *American Journal of Jurisprudence* 83-106 at 90-95.

The potential effects on other cases of any judicial change in the law (retroactive or prospective) may be sobering. A good judge stays sober, and does not change the law without asking whether the resulting precedent will work injustice in other cases (even then, the judge will need to hope that future courts will deal responsibly with the implications for unforeseen cases). Uncontrolled judicial law making *would* violate the rule of law, but retroactive judicial law making need not be uncontrolled. Even overturning a precedent on the very point might show no disregard at all for the rule of law.[14] The fact that an unjust rule is deeply embedded will make a good judge circumspect. But a good judge will not hold back from his or her responsibility, and will not need to be convinced that the liability was already part of the law when Mrs.Sorenson was injured.

That problem of distinguishing between the old and the new in the law is not generally in issue in adjudication, and the distinction is often very unclear. The subtlety of advocates and judges allows them to argue and to decide cases without resolving or even addressing the unclarity. And the rule of law is a dynamic ideal that may itself require judges to create new liabilities. On the one hand, as John Finnis has pointed out, concern for the rule of law 'works to suggest new subject-matters for authoritative regulation.'[15] But then, Finnis has also argued that the crafting of new standards can only be done properly by those who know what 'new dispute-resolving standard' best fits the posited law.

> This selection, when thus made judicially, is in a sense 'making' new law. But this judicial responsibility… is significantly different from the authority of legislatures to enact wide measures of repeal, make novel classifications of persons, things, and acts, and draw bright lines of distinction which could reasonably have been drawn in other ways. This significant difference can reasonably be signalled by saying that the 'new' judicially adopted standard, being so narrowly controlled by the contingencies of the existing posited law, was in an important sense *already part* of the law.[16]

Here Finnis expresses the equivocation between old and new dramatically: the selection of a *new* dispute-resolving standard is in one sense 'making' new law. But in another sense, the new standard can be said *already* to be part of the law.[17]

A new dispute-resolving standard that is repugnant to the existing posited law would certainly be 'new' in a stronger sense than a standard that is narrowly controlled by the existing law. But I think that the phrase 'already part of the law' is a misleading signal for the compatibility of the new standard with (important features of) the existing law. The selection of the morally right standard may legitimately be *new* to the law in the *focal* sense –in the sense that pays attention to the reasons the court has for imposing a liability in a case like Mrs.Sorenson's. The reasons for awarding damages are reasons of justice. By that I mean that the reasons are found in the injustice of leaving Mrs.Sorenson without a remedy, and not in the legal system's commitment to giving a remedy in such a case. Whether it is appropriate to impose the new liability depends in part on the possibility of doing so without distorting the law. That is an important rule-of-law constraint. But when that constraint does not forbid the new liability, the *reason to impose* it (both to

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[14] Unless the court's action displayed a lack of respect for the rule of law in some special way, e.g. if a lower court contravened a rule that only higher courts have power to overrule the precedent in question.

[15] *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980), 271.

[16] John Finnis, 'Natural Law: The Classical Tradition', in Coleman and Shapiro ed., *Oxford Handbook of Jurisprudence and Philosophy of Law* (2002) 1-60, at 10-11. Cf. Joseph Raz, *The Authority of Law* (1979) at 97: 'the distinction between applying an existing law and applying a new one is seen to be more a difference of degree than of kind'.

[17] Compare the following judicial statement of the ambiguity: 'The common law, which in a constitutional context includes judicially developed equity, covers everything which is not covered by statute. It knows no gaps: there can be no "casus omissus." The function of the court is to decide the case before it, even though the decision may require the extension or adaptation of a principle or in some cases the creation of new law to meet the justice of the case. But, whatever the court decides to do, it starts from a baseline of existing principle and seeks a solution consistent with or analogous to a principle or principles already recognised.' *McLoughlin v O'Brian* [1983] AC 410, Lord Scarman at 429-30. Like Finnis, Lord Scarman suggests that the court must in some cases create *new* law, and yet there are no gaps (so that in another sense, he implies, the court does not create new law).

require compensation for Mrs.Sorenson, and as a rule for the future) is the justice of the internalization principle and the remedial principle. Those considerations of justice would be the same regardless of the law of her jurisdiction. They get none of their force (in their call on the conscience of the judge) from the law, although the judge may not act on those considerations if the law prohibits it.

So in the focally important sense of 'new law', it can be quite appropriate for a court to make new law and to apply it retroactively. There is nothing generally wrong with that way of creating new rules. The practice of doing so can be both rule-governed and retroactive, and can be authorized and restrained by the law. So there is nothing *generally* wrong with retroactive decision making, or retroactive law making, or retroactive judicial law making, or even retroactive judicial imposition of legal liabilities. It runs contrary to the rule of law only when it shows disregard for the value of controlled decision making. It can be wrong for a variety of other reasons, when it shows disregard for the interests of the people subjected to unexpected liabilities (for instance by *unfairly* upsetting expectations), or when it exaggerates the court's institutional competence.

But to view it as necessarily illegitimate for the courts to impose a new legal liability on the drug manufacturers is to value legalism, rather than legality.

III. Does Mrs.Sorenson have a legal right to damages?

So Hart's theory allows the possibility that judges could lawfully create new legal rights and liabilities in a case like Mrs.Sorenson's. But, moreover, his theory does not even support the view that Mrs.Sorenson has no legal right to damages. It says nothing on this point.

Dworkin suggests that on Hart's theory, she can have no legal right to damages, given Hart's 'sources thesis', and the fact that market share damages are novel. So Dworkin says that in Mrs.Sorenson's jurisdiction, 'No legislature or past judicial decision has made morality pertinent in Mrs.Sorenson's case…' (4). But as *sources*, Hart did not only have legislation or past judicial decisions in mind. He referred to 'legislation, judicial decisions, social customs' as sources, and social customs include the customs of the judges. If Mrs.Sorenson lives in a common law jurisdiction,[18] the tradition of the common law makes morality *highly* pertinent in her case. It is the social custom for judges to listen to moral arguments as to how they should decide cases, and to state moral considerations in their reasons for decision. The courts are courts of justice, as well as courts of law. Where a novel claim is made, the common law tradition includes a complex array of social rules empowering and, in fact, requiring judges to take responsibility for a just resolution to the dispute.[19]

Dworkin has often taken Hart to be committed to the view that the law can be identified by finding a *declaration* of it the social sources of the law.[20] So he writes,

> Hart said that morality becomes relevant to identifying the law when some 'source' has decreed that morality should have that role… (23)

[18] It seems that she does, because Dworkin mentions that in Mrs.Sorenson's jurisdiction, a principle may be 'firmly embedded in precedent' (4). But is not very important whether she is in a common law jurisdiction; in other systems too there can be judicial customs of the kind discussed in the text below.

[19] But in any legal system, that responsibility is restricted. The rule of law *is* against judges resolving every case purely on grounds of justice, because of the arbitrariness of trusting the parties to the judges in a way that would bring no order to their varying notions of justice, and would leave the process open to mere abuse. Cf. the restrictions that legal systems put on judicial law making discussed in the text above at n.7.

[20] Compare Dworkin's phrase, 'stipulated a moral standard' (20), or the following recent statement of the 'positivism' that Dworkin attributes to Hart: 'A classic form of that theory of law holds that a community's law consists only of what its lawmaking officials have declared to be the law, so that it is a mistake to suppose that some nonpositive force or agency …can be a source of law unless lawmaking officials have declared it to be.' Ronald Dworkin, 'Thirty Years On' (2002) 115 *Harvard Law Review* 1655. In fact, no form of any theory has ever held that the law consists of what lawmaking officials have *declared to be the law*.

Hart did not say that. He said that morality becomes relevant to identifying the law when 'the law thus identified has itself incorporated moral criteria'.[21] And by 'thus' he meant by a source, not by a decree. The common law, in particular, is made not only by judicial 'decrees' of this rule or that in reasons for judgment, but by the customs of the judges: their regular treatment of certain ways of exercising their jurisdiction as mandatory or permissible.

That fact seems to present an easy objection to Dworkin's argument: Mrs.Sorenson may have a legal right to damages, the existence and content of which can be identified by reference to moral criteria for the identification of the law, because the common law itself incorporates moral criteria, in virtue of the judges' custom of treating it as permissible for them to act on (restricted) grounds of justice.

But that approach would be unstable. It would afford no way of distinguishing between the making of new law on the ground that justice requires it, and the identification of existing legal rights by reference to moral criteria incorporated by the custom of the judges. On Hart's theory, a court that awards damages on grounds of justice is still applying the law, if the law has itself 'incorporated' some aspect of justice as a criterion for the identification of the law. Suppose that it is the custom in Mrs.Sorenson's jurisdiction for judges to use arguments of justice as grounds of decision (where doing so is consistent with their responsibilities[22]). Does the custom incorporate morality into the law? Or does it authorize judges to exercise discretion? Here Hart's theory falls silent, providing no way of distinguishing grounds of decision that do and do not give effect to the law as it existed at the time of the events in dispute. In a common law system in which it is customary for courts to resolve disputes on the basis of (some) considerations of justice as well as on the basis of source-based considerations (that is, in any common law system), Hart has no way of distinguishing decisions that give effect to old law, from decisions that lawfully craft new liabilities and impose them retroactively.

Hart and the equivocation

In fact, Hart *deliberately* fell silent on this question of what judges are doing when they resolve disputes on moral grounds. In the 'Postscript' to *The Concept of Law*, he wrote, 'It will not matter for any practical purpose whether in so deciding cases the judge is *making* law in accordance with morality (subject to whatever constraints are imposed by law) or alternatively is guided by his moral judgment as to what already *existing* law is revealed by a moral test for law.'[23] It seems, though, that he refrained from answering the question not because it would not matter for any practical purpose, but because it would depend on the objectivity of moral considerations.

The conclusion that judges in such cases are giving effect to existing law would only be tenable, Hart thought, if there are 'objective moral facts'.[24] If there are no such facts, then 'a judge, told to apply a moral test, can only treat this as a call for the exercise by him of a law-making discretion…'. If there *are* 'objective moral facts' then, on Hart's view, the question *does* arise as to whether judges in such cases are exercising discretion or giving effect to existing law. But Hart insisted that 'legal theory should avoid commitment to controversial philosophical theories of the general status of moral judgments'.[25] And he simply did not say anything about how it would be best to describe judicial conduct in deciding on moral considerations, if those considerations *are* objectively valid.

We can sum up Hart's approach to Mrs.Sorenson's legal rights: whether it is even possible that she has a legal right to damages, incorporated into the law of her jurisdiction by the judges' custom of acting on (certain) moral considerations, depends on whether there are 'objective moral facts' –a question on which he insisted on taking no view for the purposes of legal theory. If there are no such facts, the

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[21] *The Concept of Law*, above, n.2 at 269.

[22] So that they will not, e.g., act on grounds of justice that are inconsistent with their doctrine of precedent or with the separation of powers between the courts and the legislature. See n.19, above.

[23] *The Concept of Law*, n.2 above, 254. That statement of Hart's is discussed in John Eekelaar, 'Judges and Citizens: Two Conceptions of Law' (2002) 22 OJLS 497 at 508, and Brian Leiter, 'Legal Realism, Hard Positivism, and the Limits of Conceptual Analysis' in Jules Coleman, ed., *Hart's Postscript* (Oxford University Press, 2001) 355, 362.

[24] Ibid. 253.

[25] Ibid. 253-4.

judges' custom of basing decisions on moral considerations is necessarily a custom of exercising discretion to create new liabilities. If there are such facts, then the question is open (and Hart does not address it).

The result is a radical incompleteness in his theory of law, which incidentally led to incoherence in his supposed endorsement of 'soft positivism'. Consider two statements about 'soft positivism', in his 'Postscript' to *The Concept of Law*:

> …the rule of recognition[26] may incorporate as criteria of legal validity conformity with moral principles or substantive values; so my doctrine is what has been called soft positivism …[27]

That statement suggests that 'soft positivism' holds that moral considerations may be incorporated into the law. But no:

> Of course, if the question of the objective standing of moral judgments is left open by legal theory, as I claim it should be, then soft positivism cannot be simply characterized as the theory that moral principles or values may be among the criteria of legal validity, since if it is an open question whether moral principles and values have objective standing, it must also be an open question whether 'soft positivist'[28] provisions purporting to include conformity with them among the tests for existing law can have that effect or instead, can only constitute directions to courts to *make* law in accordance with morality.[29]

In light of this latter statement, we can only take Hart as thinking *not* that a rule of recognition 'may incorporate as criteria of legal validity conformity with moral principles' (even though he says so), but that a theory of law *cannot deny* that such incorporation may happen. In spite of Hart's statement that his theory 'is what has been called soft positivism', he did not hold that moral considerations can be incorporated in the law. In Hart's theory, the issue depends on a question about the objectivity of morality, on which he would take no view. Taking 'soft positivism' in the meaning suggested in the first statement above, he could not actually endorse it or deny it.

The equivocation in judicial practice

So Hart offers no elucidation of the distinction between judicial law making, and the application of moral criteria incorporated in the law. You might say that Hart was faithful to his experience as a Chancery barrister, and to the practices of judges. They do not generally distinguish, either. Judges can vindicate novel claims without saying what does and does not count as a *legal* consideration in their judgment. Lawyers can argue, and judges can resolve disputes, without any theory that draws a distinction between legal and non-legal considerations. I do not at all mean that judges need not decide according to law; only that they must also decide justly (without losing sight of the restrictions on their capacity to do justice), and that they can do both without having resolved the equivocation. They can make arguments and act on reasons that do not even presuppose any view on the issues that Dworkin addresses. And that is not simply because judges can decide unreflectively: a reflective judge can articulate sound reasons for decision without using the word 'law', and without the concept of law entering his or her mind. For example, a good judge might decide in Mrs.Sorenson's favour,[30] on the following grounds: the justice of the internalization and remedial principles, the spuriousness of the attempt to apply the causation principle in a way that forms a shield for injustice, and the possibility of taking this new step without distorting the approach of future courts to more or less remotely analogous issues of tort liability (or other legal problems). None of those potentially good grounds for decision in adjudication presupposes any resolution to the dispute between Dworkin and Hart. A judge can legitimately act on such grounds while puzzled by the debate, or while

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[26] Hart ought to have said 'a rule of recognition or a rule of law'.
[27] *The Concept of Law*, n.2 above, 250.
[28] The statement is awkward because no *provision* is 'soft positivist'; perhaps that is why Hart put the phrase in quotation marks. A provision that some right or liability depends on a moral consideration is interpreted by a 'soft positivist' *theory* as incorporating that consideration as a legal test of validity.
[29] *The Concept of Law*, n.2 above, 254.
[30] I say 'might' because we know so little of the law of her jurisdiction.

taking either side in it, or while ignorant or scornful of it. It is a debate over the best general, explanatory account (that is, the best theory) of the reasoning of the good judge.

What should we expect of that account of judicial reasoning? It will point out the various capacities of institutions of the community (the legislature, executive authorities, courts in previous decisions…) to bind the court in certain respects by their actions. It will point out the judges' responsibility to find a just resolution to issues that the institutions of the community have never addressed. And it will articulate the restricted but important role that judges can exercise in overturning standards to which the system has been committed (and was committed at the time of the events in dispute), in the interests of justice. It will include the claim that, in carrying out their responsibilities, judges may act on considerations that are *new* to the law at the time of the court's decision, in the focally important respect that they are good reasons for decision even though the institutions of the system have not already committed the court to act upon them. And the best account of good judicial reasoning need not term these considerations 'the law' (in the way that forensic and judicial rhetoric might find convenient).

In Mrs.Sorenson's case, if (1) the law commits the judge to do justice where it can be done without damaging the law, and (2) justice demands compensation, and (3) compensation can be awarded without damaging the law, then it may seem attractive to the judges to say that she already has a legal right to damages. Saying so will downplay the crucial, genuinely new aspect of the right (and the novelty of the correlative liability). For it will be genuinely new to the law, if the law has not previously committed the judges to do justice *by awarding market share damages*.

I propose that this is how to resolve the equivocation. It means that justice and the rule of law demand a great deal of judicial law making in the development of the common law.

IV. Conclusion

Sometimes a court can lawfully resolve a dispute on grounds of decision to which the institutions of the legal system had not committed the court before the decision. Doing so can be just, and consistent with the rule of law. These conclusions offer a way to resolve the equivocation between the old and the new in law.

But distinguishing the legally appropriate standards that were and were not part of the law before the decision is not essential to good judging. Judges can act with due regard for the acts of legislatures and other public authorities, and of courts in previous decisions, without accomplishing the philosophical task that Hart and Dworkin have worked at. Judges need not carry out that task, in order to do justice in the controlled, restricted fashion that the rule of law demands. The philosophical task requires a sound and articulate understanding of the work of judges and other officials (it does not require any rule for the use of the word 'law', although it requires an understanding of the ambiguities with which people use it). Judges can accomplish the task as well as anyone, of course; and then (but only then) they will need to disagree with both Hart and Dworkin.

For Hart provides no way of distinguishing between the application of moral criteria incorporated in the law, and legally authorized judicial law making on moral grounds. The problem with Hart's theory is not that it sides with the drug companies: for all we can tell from his theory, a decision in favour of Mrs.Sorenson might well apply a moral criterion that has been incorporated into the law (by a judicial custom of acting on considerations of justice). The problem is that Hart offers no resolution to the equivocation between applying the law as it existed at the time of the events in dispute, and acting on a non-legal consideration.

And Dworkin's theory turns the equivocation into a crisis. If retroactive judicial law making really were contrary to 'the most basic understanding' of the rule of law, then it would be urgent judicial business, in every legal dispute, to resolve the distinction between the old and the new. Judges could not act on a standard that was not already part of their law, without abandoning their commitment to the rule of law. But judges face no such crisis: they can act responsibly, with comity toward legislative and executive authorities, with due regard for the precedents of their court and other courts, with respect for the ways in which the parties have tried to order their own lives, and with attention to the interests of the parties and of the community, without resolving the equivocation in the concept of law that perplexes everyone (including judges) who tries to articulate it and to resolve it.

Judges with a good theory of law will have, in some degree, a sound, articulate understanding of what they are doing. Good judges who have a misguided theory of law will misunderstand something important about what they are doing. Between philosophy and judicial practice, the logical priority ought to

be clear. Good judges (like good Members of Parliament, or good social workers) need do no philosophy to do their job, although they will need to dive right into it if they are to get at an abstract understanding of what they are doing right. The legal philosopher has no choice but to articulate the work of the good judge.