The Morality of The Common Law

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This essay is about the problem of determining the possibility and nature of a connection between morality and law. Its purpose is to indicate, by reference largely to some recent problems of the law of contract and the law of torts, the way in which judges are compelled to look at the nature of the common law system in order to extract some basic principles, from which decisions can be made in different instances. The argument is put forward that such principles are culled from the innate morality *of the common law, which itself is a product of society in general and the legal nature of that society in particular.* Justice, *indeed, is what the judges declare it to be: in making such declarations the judges are governed by what they find to be the fundamental concepts of* legal rules *— and these concepts are variable.*

THE ISSUE STATED

Jurisprudence is not a reserved occupation; reserved, that is, for some select few, who indulge in a remote, grandiose, mysterious form of celebration, and live in a rarified atmosphere in which we lesser beings involved in the law cannot be expected to breathe and survive. Jurisprudence is what goes on in the courts every day. Nor do I mean "jurisprudence" as that term is employed by civil lawyers. I mean the philosophy of law. Inevitably, this must be part of the everyday life of almost every lawyer, especially those who occupy judicial positions. Professor Dworkin's dichotomy, between "hard cases" and others,[1] is a little forced. There are more such "hard cases" than might be thought. And, at least from time to time, every judge has to become something like the "Hercules" of Dworkin's imagination.

A recent illustration of the importance and relevance of "jurisprudence" can be found in the case of *Nissan Auto Co. (Canada) Ltd.* v. *Pelletier.*[2] This concerned the question of whether the Quebec legislature could validly abolish representation of a party by counsel

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[1]Dworkin, *The Model of Rules,* (1967) 35 U. Chi. L.R. 14; *Hard Cases,* (1975) 88 Harv. L.R. 1057. See also the collection of these and other essays in his book, *Taking Rights Seriously* (London: Duckworths, 1977), critically analyzed and discussed by Richards, *Taking "Taking Rights Seriously" Seriously,* (1977) 52 N.Y.U.L.R. 1265. The concept of "hard" or "penumbral" cases is also found and considered in Hart, *The Concept of Law* (Oxford Univ. Press, 1961), and in Hart, *Positivism and the Separation of Law and Morals,* (1958) 71 Harv. L.R. 593.

[2](1977), 77 D.L.R. (3d) 646.

in the Provincial Court, Small Claims Division. In reaching his decision — that the abolition was not *ultra vires* — Deschenes, C.J., canvassed the relevance of natural law, positive law, and the fundamental freedom of the citizen. He held that natural law was not just a figment of the imagination of legal philosophers, but in fact governed, and indeed was part of, the positive law of Quebec and Canada.

The plain fact of the matter is that when certain issues fall to be determined by a court, the question of what is the law is bound up with the purpose to be served by the law. In other words, Why is the law what it is? Or, What ought the law to be? These questions, in their turn, cannot be considered in isolation. They must be looked at in connection with what I may term the justification of the law. By this I mean the ultimate rationale for any given legal rule or principle in particular, or for the entire body of the law in general. This is the central issue in jurisprudence; to elucidate the justification of law is at the same time to explain what law is. The nature of such elucidation depends very much upon the standpoint from which one makes the enquiry. Is he a philosopher, sociologist, theologian, lawyer? How he approaches the issue will influence his ultimate response.

From the lawyer's point of view, I would suggest that there are basically *two* main approaches to the problem of the justification of law.[3] First of all, it is possible to achieve this by looking at the technical, legal, and internally logical bases of the law. Secondly, it can be done by ignoring such matters, regarding them as relevant only to the resolution of problems arising within a legal system, and appertaining only to the more concrete principles of any such system. Instead, the law is justified by appealing to what may be termed meta-legal, or extra-legal, facts or doctrines. Theories belonging in the first category are those which are more positivist in nature, seeking to exclude from consideration everything that is in any way emotive, laden with value, or possibly irrational and illogical, and almost certainly bound up with individual preferences as to the content of the law. Theories in the second category are those which invoke such doctrines as natural law, or rely heavily upon sociological considerations or similar emphases.

Positivism is a logical possibility but a practical absurdity, and so much so that it is not altogether easy to identify any modern writer on legal theory as a positivist pure and simple, since, if you scratch the back of a positivist, you will find that he is really a non-positivist. Some self-professed proponents of the more positivist notion or approach to law have attempted to describe a concept or ideal model of law, or of a legal system, that is wholly self-explanatory, and does not depend upon any extrinsic factors. That, at least, is the theory. It is, indeed, the aim or intent of the writers in question. However, it seems to me — as it has seemed to many others — that to provide an explanation that goes

[3]J. C. Smith, *Legal Obligation* (Toronto: University of Toronto Press, 1976), pp. 4-17 gives *four* basic theories, *viz.*, derivative, coercive, formal, and debunking. It seems to me that these merely involve variations of the original two theories.

so far, and no further, on the ground that beyond a certain point the inquiry ceases to belong to the realm of legal or jurisprudential thought, is not entirely helpful. Nor, perhaps, is it totally honest; the basis such writers put forward as the *terminus ad quem* or *a quo* of their investigations is often one that directly and purposefully involves some such extra-legal concepts and discussion. Their explanation is unsatisfactory beyond a certain point — which is not to say that their investigations do not throw some light upon the nature of law. I am simply suggesting that they are incomplete. Incomplete, that is, out of the choice of the writer. What these writers are saying, in effect, is that to go further requires certain empirical investigations of a different character from the analytical study hitherto pursued.

With the niceties of this debate, and the sometimes difficult problem of determining the precise nature of an individual legal philosopher's approach to the issues in hand,[4] I am not directly concerned. What does concern me is the issue of the morality of the law. In other words, can it be correct to seek the justification for law in principles of morality? Is this, in fact, inevitable? In speaking of "law", in this context, I am confining myself to the common law; *i.e.,* to judge-made law, or, perhaps a little more broadly, to the way in which judges interpret and apply law, whether it be initially judge-made law or statutory in origin. Obviously, whatever a legislature enacts may have almost any kind of justification in the wide sense. In the narrow sense, it is "justified" in terms of the legislative competence of the body in question (*e.g.,* is it an enactment of the Parliament of Canada acting under the *British North America Act,* or of the Legislature of Ontario acting *intra vires*?). We cannot really presume to discuss the justification of legislation except in the narrowest technical way. But we can, and must, look at the justification of the law which is made by the judges. I am speaking, naturally, of the system with which I am the most familiar — *i.e.,* the law in common law countries, those which have derived their systems from England. It is really that system of which legal philosophers in England and the United States are talking when they discuss the nature of law and legal thinking.[5]

[4]*E.g.,* is Hart's concept of law truly a type of positivism, minus the sanction theory of Austin? Or does it depend on some sort of moral foundation, even if it is not that of the natural lawyer? *Cf.* Lovin, *H.L.A. Hart and the Morality of Law,* (1976) 21 Am. J. Jur. 131. Do the efforts of Dworkin and J. C. Smith to explain law in terms of "ordinary language analysis" approximate more to the logical analysis of law or the non-logical extra-logical analysis?

[5]Continental writers, with the possible exception of Kelsen, because they start from a different basis, inevitably end, I would suggest, with a totally different outlook on such questions. This is not surprising in view of the comparative (but not absolute) difference in the situation and powers of courts in their countries (as contrasted with England, Canada, and the United States, and the other countries of the common law system). There is, I suggest, a jurisprudential issue connected with the recognition of this judicial power by such diverse writers as Austin, Hart, Dworkin and Kelsen. In some way or another, by reasoning which fits in with their varied positivist approaches to law, they explain satisfactorily — to themselves at any rate — how and why law may validly be made by judges. In other systems there may be less need for some philosophical explanation, since the powers of courts in such systems may be (a) more limited, or (b) more explicitly contained within the structure of the legal system. A good illustration of the latter is Switzerland, where courts have the constitutional power to determine "hard" cases — *i.e.,* where no positive law exists, by behaving as if they were legislatures and creating law for the situation.

For the Anglo-Canadian or American lawyer, therefore, the crux of the question, What is law?, or of the problem of discovering the justification of law, is to be found in the nature and functioning of the judicial system. In other words, it relates to, and stems from, the extent to which courts lay down the law. Not only is it necessary to enquire how and why they do so, it is also vital to consider the reasons behind their exercise of this power. On what philosophical, or judicial basis, therefore, do courts in our legal system determine what the law shall be? To what school of jurists, it may be asked, do the judges belong? My suggestion — for which I claim no great originality of thought — is that there is indeed some crucial, even innate, connection or relation between law and morality. However, the problem is to define and expound the nature of this morality, its sources, and its content.

THE LIMITS OF THE ISSUE

Much, if not all, of the debate that has gone on in past years on the relationship of law and morals, or morality, seems to have turned on such matters as whether suicide, abortion, homosexuality, and so forth, ought to involve criminal liability; or, whether it is proper to obey a law which is deemed offensive to morality, even though the law may have been enacted or created by a body having authority to do so under the specific legal system *(e.g.,* as with the case of Nazi Germany).[6] With the greatest respect for those who have engaged in such controversies, I would suggest that to discuss the problem in such terms and along such lines is almost to create your straw men in order to knock them down easily; that is, to fashion the problem in a manner which permits you to arrive at the answer you intended to achieve before setting out upon the discussion. In the context in which I am considering this question — namely, what the courts do, and how they create law — these are not entirely legitimate issues, even though they may influence the content and nature of the debate to which I have referred.

So far as concerns, for instance, the problem of the laws of Nazi Germany, the question may well depend on how the issue is raised. If it is asked, in an abstract sense, whether the laws passed by Nazis were valid German law, the answer must be that, within that system, and as long as the laws were passed in accordance with the current constitution, such laws were valid. As long as Germany was a state for the purposes of international law, and enacted legislation in conformity with its own legal structure, no one *within* that system could legitimately

[6]Hart, *Positivism and the Separation of Law and Morals, supra;* Fuller, *Positivism and Fidelity of Law — A Reply to Professor Hart,* (1958) 71 Harv. L.R. 630; Devlin, *The Enforcement of Morals* (London: Oxford Univ. Press, 1954), and *Law and Morals (Birmingham: Holdsworth Club of the University of Birmingham, 1961); Hart, Law, Liberty and Morality* (Stanford: Stanford Univ. Press, 1962); Fuller, *The Morality of Law* (New Haven: Yale Univ. Press, 1964), especially chap. III.

refuse to obey. It might be morally obligatory to do so, and even praiseworthy to do so. Indeed, the most laudable activity would have been to destroy the system which permitted the passage of such laws. And, it might be added, refusal to obey such laws might have precluded liability under international law for wrongs committed as a consequence of obedience to the Nazi state and its legal system. Whereas obedience, while it meant that the party in question was behaving legitimately according to German law, was misbehaving, and acting criminally, as later declared according to international law.

However, it is one thing to say that the laws of Nazi Germany may have conflicted with the principles of international law, and quite another to say that they were not valid laws. The situation might be different if the law of a given state recognises that international law is part of its own law. On the other hand, if we ask whether a court, after the fall of Nazi Germany, should recognise its laws, the answer may well be different. An international court, such as that at Nuremberg, is fully entitled to disallow the validity of Nazi legislation and refuse to accept it as an excuse for behaviour that is criminal under international law. If it is a German court that is faced with this issue, it could be that *subsequent* legal developments in Germany permit the court to refuse or deny recognition to Nazi legislation, on some legal basis required by the post-Nazi system. Finally, if the court is a non-German court, the position may be clearer. Indeed, in a recent case,[7] the House of Lords refused to recognise Nazi legislation depriving Jews of their German nationality, on the ground that to do so was against the public policy of England; *i.e.*, it was contrary to *English law* to accept such legislation by a foreign country, otherwise perfectly valid, as being binding.

Such matters as whether suicide should be a crime, or homosexuals should be prosecuted, are examples of issues not for courts but for legislatures. It is true that, from time to time, certain aspects of these, or similar moral issues, are raised in the inevitable course of deciding *other* legal problems. For example, it might be said that the law of negligence in tort, or the duties of a fiduciary towards his beneficiaries (especially in regard to the way the concept of a fiduciary has been enlarged in recent years by the courts),[8] raise *moral* issues. So, also, where a court has to decide whether to recognise and enforce a contract that has as its purpose something which is arguably immoral; for instance, a contract to provide homosexual services by one adult to another; or a contract whereby a man and woman cohabit and agree as to the sharing of certain property.[9] Similarly, where a person would inherit property on the death of X, but that inheritor is in fact the murderer of X, on what basis does, or should, the law deny the

[7] *Oppenheimer* v. *Cattermole*, [1976] A.C. 249.

[8] *Regal (Hastings) Ltd.* v. *Gulliver*, [1942] 1 All E.R. 378; *Reading* v. *A.G.*, [1951] A.C. 507; *Boardman* v. *Phipps*, [1967] 2 A.C. 46; *Canadian Aero Service Ltd.* v. *O'Malley* (1973), 40 D.L.R. (3d) 371; *Abbey Glen Property Corp.* v. *Stumborg* (1976), 65 D.L.R. (3d) 235; *Evans* v. *Anderson*, [1977] 2 W.W.R. 385; *H. L. Misener & Sons Ltd.* v. *Misener* (1977), 77 D.L.R. (3d) 428.

inheritance? This is a problem that has been raised by Professor Dworkin to illustrate the workings of his doctrine of law — which is sharply in contrast with the positivist notions of Professor Hart.

Professor Hart would eschew any introduction of ideas of morality into the juristic discussion of law. For him, the concept of law owes nothing to, and is not directly involved with, issues of morality. Hence, for many others, including Professor Dworkin, his analysis of "law" leaves many gaps. It fails to deal with the situation where there is no recognised — or recognisable — rule for determining an issue. It leaves much to something akin to "judicial discretion" (which has sometimes been described as "a little black box").[10] Dworkin seeks to dispose of the problem by a different analysis, which, in one sense, also avoids any appeal to morality, but, in another sense, is in effect an alternative way of invoking morality without directly identifying it as such. Dworkin's notion of *principles,* as distinct from *rules,* envisages the existence or creation of such principles by the courts, which cull them from the law itself in some mysterious way (which Dworkin has strenuously, but, I would suggest, unsuccessfully, striven to elucidate and analyse). Such principles — for example, the one about not making a profit from one's own wrongdoing, which resolves the difficult issue of the murderer who, according to the strict rule of law, ought to inherit — are themselves part and parcel of the law, not introduced *ab extra.*[11] The attempts by Dworkin to explain the nature and functioning of the law constitute an endeavour to retain the attitude of a positivist while, at the same time, making the juridical or jurisprudential nature of law less formalistic and rule-oriented, more self-sufficient and self-explanatory.[12]

Such endeavours, admirable though they may be, and stimulating though they have been, as evidenced by the quantity of critical writing that has emerged in the past decade (much, if not all, of it devoted to the suggestions of Hart and Dworkin),[13] involve controversy about

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[9]In the United States recently, the latter type of agreement, which once would have been thought of as invalid (being against public policy, since it promoted illicit intercourse), has become accepted as valid and operative. Legislation has achieved much the same result in some jurisdictions, (*e.g.,* Ontario, under the *Family Law Reform Act,* 1978). On the subject of immoral contracts, see Dwyer, *Immoral Contracts,* (1977) 93 L.Q.R. 386. It may be regarded as still doubtful whether a contract for homosexual cohabitation would be equally as acceptable.

[10]Hart, *The Concept of Law, supra,* chaps. VII, VIII and IX.

[11]Does this mean that Dworkin's theory is that the law is parthenogenetic?

[12]See Dworkin, *Judicial Discretion,* (1963) 60 J. Phil. 624; *The Model of Rules,* (1967) 35 U. Chi. L.R. 14; *Social Rules and Legal Theory,* (1972) 81 Yale L.J. 855; *Hard Cases, supra; Taking Rights Seriously, supra.*

[13]McCallum, *Dworkin on Judicial Discretion,* (1963) 60 J. Phil. 638; Sartorius, *The Justification of the Judicial Decision,* (1968) 78 Ethics 171; *Social Policy and Judicial Legislation,* (1971) 8 Am. Phil. Q. 151; Raz, *Legal Principles and the Limits of Law,* (1972) 81 Yale L.J. 823; Greenwaldt, *Discretion and Judicial Decision,* (1975) 75 Col. L.R. 359; Reynolds, *Dworkin as Quixote,* (1975) 123 U. Pen. L.R. 574; Steiner, *Judicial Discretion and the Concept of Law,* (1976) 35 Cam. L.J. 135; Notes, *Dworkin's Rights Thesis,* (1976) 74 Mich. L.R. 1167; Hart, *Law in the Perspective of Philosophy,* (1976) 51 N.Y.U.L.R. 538; Sober, *Legal Theory and the Obligation of a Judge: The Hart/Dworkin Dispute,* (1977) 75 Mich. L.R. 473; Richards, *Taking "Taking Rights Seriously" Seriously,* (1977) 52 N.Y.U.L.R. 1265; Weinreb, *Law as Order,* (1978) 91 Harv. L.R. 909.

unreal issues. I have already questioned the utility of discussing some of what may be called the traditional issues of the relation between law and morality. So far as concerns the more practical issues — such as those which I have mentioned about enforcing certain contracts, or developing the law relating to fiduciaries and their duties — the connection between morals or morality, in the strictest, narrowest sense, on the one hand, and the doctrines and rules of the law, on the other, is something which I hope will become clearer later on. For reasons which will emerge, I do not find very helpful the writings of those authors who seek to set up idealised models of a legal system and test actual legal systems thereby. Professor Hart's vision of the law is, with respect, much removed from reality (although it has a certain appeal from the point of view of its abstract, logical approach). Professor Dworkin's novel — or perhaps pseudo-novel — theories are equally abstract, and suffer from the additional disadvantage of being more complex, requiring some very artificial reasoning and the acceptance of some strange, even awkward, notions. While both writers have been raised in the common law system and, presumably, are endeavouring to explain and describe a concept of law that will fit such a system (and perhaps may not fit any other system), it seems to me that, unless and until some of the difficulties and inconsistencies inherent in their views have been solved or eradicated, they have not provided a final, definitive analysis which enables the lawyers of the common law system to differentiate morality from law, and relate these two models of explaining or describing human behaviour to each other.

It is with the common law that I am concerned. Hence, for the English, and therefore the Canadian or American, lawyer, it is central to his understanding of the law and the legal process to appreciate what the courts do, and the extent to which they are the respositories and the progenitors of law. Although a tremendous quantity of our law is now statutory or quasi-statutory in character, as compared with a century or two ago, it is still fundamentally true to say that the courts are an important source of the law. The powers, position, and functions of a court in the common law system make that system what it is, and serve to differentiate it in character and philosophy from others. This perhaps explains why jurists emanating from that system have such a different approach to the philosophy of law from jurists trained elsewhere. Jurists perhaps, but not necessarily judges. It is my thesis that the judges of the common law are less positivist or realist than the legal philosophers of the common law, (which, perhaps, is why those philosophers have such great difficulties today). If the common law had been quite as positivist, empirical, and realist as the writers have attempted to show, there might not have been such great disputes about the common law system. It is the judges who have thrown askew the neat theories of the philosophers.

THE TASK OF THE JUDGE

To understand the *modus operandi* of the common law, it is necessary to begin from a simple, elementary point. The judicial oath in common law countries, however it is precisely worded, usually requires the judge to administer justice or to do right according to law. This involves two distinct ideas. On the one hand, the judge is to do right, to achieve justice, a just result. But, at the same time, he must do so by applying the law. He is not free to do whatever he wishes, or to decide a case in accordance with his own prejudices, interests, feelings or disposition. Everyone would agree that to do right, or justice, is the aim of the law. But what is "right"? What is "justice"? To the Nazis, justice was National Socialist justice. To communists, justice is Marxist, or Leninist, or Stalinist, or Maoist justice. To us, or to many of us, the concept of justice possesses inherent moral features or harmonies. It was put slightly differently, or more specifically, by the Romans. To the Emperor Justinian, *"justitia est constans et perpetua voluntas ius suum cuique tribuens"*[14]: Giving every man his due. In other words treating every man as he deserves (in which case, as Hamlet says,[15] who would escape whipping) or, perhaps, to be a little more precise, and more in keeping with some form of the judicial oath, to give every man his "right".

This leads straight into the whole concept of legal rights. For only when a person has a *right* (however that be defined or understood), will he have any entitlement at the hands of the court, or from such other official as administers the particular aspect of the law that is involved. This line of enquiry, I suggest, leads to a paradox. The judges are bound to administer justice according to law. That is to say they are to enforce rights created by the law. They are therefore bound by the law, in the same way as all of us, whether litigants, accused persons, officials or others, are bound. All save the Queen (and even she in some respects) are bound and governed by the law — at least in our system. That is, in part at least, what we mean by the rule of law. However, it is the judges who declare what the law is. Hence, the judges are only bound by whatever they say they are bound by. The justice they pursue and administer is justice according to what they declare to be justice, which seems to negate the very idea of justice and law. How can this apparent paradox be resolved?

This question is at the heart of the recent debates arising out of Hart's statement of his concept of law made nearly twenty years ago. Hart's book has become the central piece of writing in modern jurisprudential theory and discussion. It is the vortex of neopositivism. The problem

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[14]Moyle, J.E., ed., *Imperatoris Justiniani Institutionem Libri Quattuor* (5th ed., Oxford, 1923). Book I, Title I, *Principium.*

[15]Shakespeare, *Hamlet, Prince of Denmark,* Act II, sc. 2.

is really one of dealing jurisprudentially with the question of cases that do not readily subsume themselves under any recognised, accepted rule of law. In other words, when a judge has to "make" the law which he administers in order to achieve a just result, can what he is doing be brought within the framework of a positivist explanation of law? Or must it be admitted, albeit regretfully, that such an explanation cannot cope with such instances, with the result that at least part of the law is not amenable to any logical, structural exposition, but remains within the domain of some possibly metaphysical explanation?

With the various scholarly attempts to resolve this problem over the past few years I am not concerned. Instead, I am interested in the way the judges themselves resolve their difficulty — which, perhaps, they do not perceive of as being a difficulty! They are bound to achieve a just result; they are bound by the law, and they cannot simply say "There is no law, therefore we cannot supply an answer". They *must* find an answer, even where there is no statute (or similar piece of legislation) that tells the judge what to do, and where there is no earlier case law which provides similar guidance.

Let me make clear that I am talking about two different kinds of cases (which I do not think is done by the writers previously mentioned, who seem to think, in my view, that the problem only arises where there is no prior law — so-called "hard" or "problem" cases). First of all, the case may be one of "first impression"; *i.e.,* a case governed by no existing legal rule. This may be because it is totally new and unforeseen by previous legislation or decision, or because it may involve a conflict of rules (or, in the terminology of Dworkin, a conflict of rules and principles — which other writers have suggested is not really the case, since rules are principles, and *vice versa).* Secondly, a case may raise a problem because there *is* an answer, which is dictated by previous legislation — or more frequently, earlier decisions — and the strict, logical application of the canons of construction of statutes and documents, or of precedents, will lead to a certain result. Yet, at the same time, the judge thinks that to apply such doctrines in their full force may lead to the regulation of the case by law, but hardly to the achievement of a just result — or, in other words, to the administration of justice.

In both types of cases, even the first, it may be possible to determine the issue by accepted doctrines such as that of precedent. All that may be required, even in the first type of case, is a logical extension, or a linguistic re-interpretation, of a prior law or rule. To do so, however, and to produce thereby a certain result, may offend the judge's innate sense of propriety or justice. Or, it may involve him in a conflict between what he perceives of as being "legal" (*i.e.,* within the ambit of the legal system he is applying), and what he understands as "reasonable" or "fair". Some legal rules are sufficiently flexible or nebulous to permit the maximum amount of freedom to a

judge to achieve a just result without undergoing the traumatic experience of the kind of conflict I have been describing. Others are more rigid, and their logical application may produce consequences that are not harmonious with "justice". The problem, and its resolution, may be illustrated by some examples collected from the law of contracts and the law of torts, all of which are highly topical and very much in dispute at the present time.

ILLUSTRATIONS

A contract is an agreement between two or more persons that is made in accordance with certain requisites of the common law, such as offer and acceptance, consideration, and possibly writing. Once the parties have agreed with sufficient certainty on the terms of their agreement, a binding obligation is created. Over the centuries, the courts made plain that consent was vital. Yet consent, once given, was fully effective even if the party consenting did not fully appreciate to what he had given his consent, as long as he had been given a chance to know what that was. Hence, if there was some mistake which affected his ability to consent, or some fraud or physical coercion, the party thus subjected to some manipulation of his will to consent might be able to plead that he ought not to be bound by the ensuing obligation. In the absence of such factors, however, once a party agreed to terms proposed by the other party, the former was bound to perform or pay damages in default. What if the contract was not beneficial to one party? What if he had bargained on certain assumptions as to the future, as to his present position, or as to the meaning of the contract, and these turn out to have been unfounded (although there was no mistake, fraud, *etc.*)? The rule of the common law was clear: once a contract is made and is originally valid, it remains valid and enforceable whatever happens.

Because of the insistence that bargains once made must be kept (in the absence of say, fraud), if one party agreed to exonerate the other party from any, or any special kind of, liability in respect of a breach of that other party's obligations under the contract, such an agreement would bind the one exempting the other from the liability. Hence, a man might suffer loss through the other party's breach of contract, and not be able to claim any compensation (or might have the recoverable compensation limited to a small, even a derisory sum). The logic of contractual doctrine led inevitably to the conclusion that a party to a contract could preclude the remedies which would normally apply. The attitude of the law was that if you were willing to agree to having no protection under the contract, that was your own business, unless you were misled into making such an agreement, or otherwise had your free will overborne.

In both these situations, what you have in modern developed law are the logical products of early legal concepts, namely freedom of contract and *consensus ad idem.* So, in a sense, you could say that in cases which involved situations of these kinds, the law was clear. The contract was to be upheld and enforced even though one party might suffer unpleasant consequences, or some financial or other loss. The terms of the contract might be harsh. It might have been foolish for the party now going to suffer to have entered into such an arrangement, but the attitude of the law was plain: the courts do not rewrite contracts. They do not protect the foolish or foolhardy. Look out for yourself. *Caveat emptor.* And so on.

More recently, however, there has been a change. The courts are beginning to take into account factors other than mistake, fraud, and coercion of the old, crude type. They are prepared to state that certain aspects of a contract cannot be excluded by agreement, so as to render a party immune from liability if he does not perform them. It is unnecessary to discuss the technical features of these matters. Suffice it to say that what the courts are doing, even when they clothe their thoughts and views in technical language which makes it appear that their decisions are inherently justified by older authority and doctrines established earlier, is saying that it is unthinkable — *i.e.,* contrary to everyday morality and good sense — to enforce such agreements regardless of the consequences of such enforcement. Such contracts must be revised, rewritten, or reconstructed in order to make them reasonable. If they cannot be so treated, then they are bad and must be ignored. They are unenforceable; they do not create binding obligations.

The courts are looking beyond the mere fact of seemingly valid agreement or *consensus,* and are examining the underlying morality of upholding and enforcing certain types of contracts. Apart from the equitable interferences previously mentioned, there have always been reasons for denying validity to some contracts; for example, that they were contrary to law or public policy, such as contracts to commit crimes, or contracts in restraint of trade, or contracts to commit immoral acts such as prostitution. Now they seem to be striking at other contracts, which do not offend in these ways. Why? And how?

This is the crux of the matter for our present purposes. What is the justification for overturning settled doctrines of law and causing the concept of contract, as previously understood, to mean something else? Instead of a contract meaning an agreement that conforms to certain formal requirements or essential features, we must now speak of a contract as an agreement that is acceptable to the courts as being just, fair and reasonable (as well as conforming to the older pre-requisites). We have now, in effect, a more flexible, nebulous notion of contract. It is the basic notion of agreement or consent that is at the heart of contract. In this respect the courts feel that it is much more necessary to subject that

notion to greater scrutiny and develop in more depth an understanding of what is meant by "agreement".

The impetus towards this comes, I think, from the change in the nature of society. The age of the common man has led to the age of consumerism. Contract, a type of jural relationship into which only a small and wealthy segment of society formerly entered (in the days before progressive societies moved from status to contract, in the famous words of Sir Henry Maine[16]), has become one which many people of all classes, wealthy and poor, intelligent and otherwise, become involved in as a matter of course.

It would have been in keeping with previous views on morality to leave the law of contract unchanged. After all, if the basis of the older law was the moral principle, *pacta sunt servanda,* then it should not make any difference whether such *pacta* were between individuals, corporations, public bodies, or whomsoever you will. If justice requires that like cases be treated alike, then the character of a contracting party should not make any difference if the contract is otherwise of the same order. There appears to be prevalent nowadays, however, the view that justice demands some differentiation between contracting parties and contractual situations, even though outwardly such differences may not exist in formalistic terms. It seems to me what we are seeing in operation is the application of some "new" morality to the law of contract. The older principles of law could solve the problems, but might achieve an unjust result if they were applied. Hence the need to invent new doctrines, or modify or adapt old ones, in order to prevent injustice being perpetrated by too rigid an application of the strict doctrines of the law. This "new" morality could be said to be drawn from the needs of modern society, the newer relationships that have come about in recent decades, or from much earlier notions of "commercial" morality that have been articulated, or have been an inarticulate premise of the law, in the past.

I shall return later to this question of morality and its relations with justice. Let me first deal with the examples taken from the law of torts. One of these is the question of liability for pure economic loss.

By a long, slow process the common law gradually evolved a concept of liability to compensate for harm caused through physical acts committed negligently, even though there was no special contractual or other relationship between the parties concerned, save for the physical nexus established by the negligent act and the eventual suffering of the harm. Until recently, however, there was a great reluctance on the part of the courts to extend such liability to cases where only economic loss was suffered, in the absence of any physical injury to a person or his property. There were logical reasons for this and the

[16]Sir Henry Maine, *Ancient Law* (London: Murray, 1905), chap. V, p. 161.

precedents were against it. Ultimately, the courts in England and Canada came to the conclusion that to draw any distinction between physical and economic injury was absurd. As long as the essential ingredients for negligence liability could be established, the nature of the injury or loss suffered by the victim should not make any difference to the issue of the wrongdoer's liability. Essential to the victim's case was the existence of a duty of care owed to him by the wrongdoer. What this involved, very shortly and succinctly for present purposes, was foresight of the possible injury to the victim; *i.e.*, injury of the kind suffered in the result.

Out of such cases, however, there arose another problem. Suppose an injury to X, to whom damage, whether physical or economic, was foreseeable, could or did cause some economic loss to Y as a direct or even foreseeable consequence. Should the negligent party who damaged X also be liable to Y? For example, I break a water pipe carrying water to your factory. This is caused by my negligent use of a mechanical shovel. The pipe belongs to the municipality, not to you, but because it is broken there is no water for your factory for several days, during which time you have to close down and lose a lot of money in orders unfulfilled. Perhaps your workmen lose their wages for that time. Should I be liable not only to the municipality for damaging its pipe but to you (and maybe your workers) for your economic loss?

These various forms of loss are all directly brought about by my original negligent act. They are also foreseeable, in the light of modern conditions, and the common knowledge of the average, reasonable man. On the application of what may be termed traditional negligence tests, or classical tort analysis, one would think that there ought to be liability for all these different losses. Why, and how, should, or can, the law differentiate between the various injured parties?

This is still a very vexed issue in the modern law of torts. What is of concern in the present context are the conflicting principles that might be applied in its ultimate resolution. First of all, there is the possible attitude that a wrongdoer should be made to compensate those injuriously affected by his wrongdoing. On that basis everyone who suffered because I was negligent should have a claim against me in respect to his or her specific loss. Secondly, there is the argument that to make me liable indefinitely might be both unreasonable and even unprofitable. It would be unreasonable because there is something innately unsound about holding a person guilty and responsible for everything that follows from his act or omission. It might be unprofitable to make me liable so extensively for two reasons: first, it might discourage me from ever doing anything lest I make myself liable for a vast outlay by way of damages; secondly, because I might go bankrupt if I had to pay everybody, so that in the end no one would get very much, if anything. What then do you do about this problem? Should

conduct that is harmful lead to legal responsibility in every instance? Or should there be occasions when guilt does not involve liability?

The second example is that of intentionally caused harm which does not fall within one of the recognised categories of tort liability, such as conspiracy, inducing a breach of contract, or intimidation. The issue is whether every time I deliberately cause you economic loss I should be responsible in law, even though my conduct does not amount to some form of accepted tortious behaviour. Again, we observe a conflict in the law. The principles which have emanated from the precedents would restrict or confine tort liability in certain well-defined channels. Outside of these, harm which is caused to another, albeit wrong in a moral sense, is considered by common law to be *damnum absque injuria.* There is also considerable feeling, in modern times especially, when there have been new developments which make it clear how much damage can be inflicted on others, and which in many ways are not presently amenable to the jurisdiction of the law, that the law should be able to require people who act in such ways to compensate those injured as a consequence.

Yet again there is a conflict, not only between two approaches to the resolution of a legal problem, but also between two opposing ends or principles underlying the law. To provide a remedy whenever one person suffers economic harm through the deliberate misconduct of another might be laudable. How far do you take this? What sort of connection should there be between the original act of the alleged wrongdoer and the ultimate harm in respect of which compensation is sought? How direct should it be? If it is regarded narrowly, some deserving injured parties might be remediless. If it is looked upon as being enough if there is any kind of historical connection between act and consequence, as well as the requisite intention, it might be found that the net of responsibility is being cast too wide. It might lead to excessive penalisation or stultification of actions, in the same way as was seen earlier in relation to economic harm caused negligently. There is a difference, of course. He who acts deliberately to cause harm may merit harsher treatment than he who is merely careless or neglectful. Is this sufficient difference? On what basis?

So we come to the crux of these problems. How do the courts determine what conduct is to be tortious, and thus susceptible to an action to provide compensation? Can they create new forms of liability, beyond the range of earlier, pre-existing ones? If so, on what grounds? Are they limited by the doctrine of precedent, by the settled, received law? Or are they free to go further? How free? This is very much the same sort of issue as mentioned earlier in connection with contractual doctrines and the ability of the courts to overthrow settled principles of the law, upset contracts otherwise valid, or deny validity to agreements which, strictly speaking, conform to all the requirements of the law of contract. Once again we are faced with the question: what can the courts do, and on what basis?

CONCLUSIONS

These four situations illustrate what I was speaking of previously. They exemplify the two possibilities. In the contract cases, the courts have been asked to forego settled law, and the logical deductions that ought to have been made from earlier authorities, in order to provide what might be considered to be a juster, fairer result in certain instances. In the tort cases, the courts have been asked to provide a remedy — and therefore, justice — in cases which are not strictly covered by earlier precedents, and require for their solution either a determination that the law does not cover such instances, which is a denial of justice to injured parties, or the invention or creation of law to permit justice to be done to those who have suffered loss.

It is not as simple as that, however. Giving justice to the party suffering if the contract is enforced in all its strictness, or to the party undergoing injury or loss, means — or involves, perhaps — the denial of justice to a party who has contracted on the faith and in the belief that he has made a binding arrangement that will fix and determine the relationship between himself and the other contracting party, or the denial of justice to the party who has acted on the footing and belief that he was not doing anything that would involve him in liability. Thus, in a sense, the resolution of such instances on the basis of justice to the 'injured' party may involve the breach or overthrow of one of two allegedly fundamental principles or standards of law: *pacta sunt servanda* and *nulla poena sine lege.*

Such principles have not emerged out of nowhere. They are not uttered simply for effect. Presumably they enshrine what may be conceived of as an important basis upon which any rational and just system of law should be founded. The cases which I have given as illustrations raise the problem of whether such principles are absolute and necessary parts of our legal system, or may be qualified or reinterpreted in suitable instances. This is a real, and not an imaginary or academic, problem. The application of such principles, which presumably are designed to promote justice, may lead to injustice in a concrete instance. Their rejection in a given instance, for the purpose of ensuring that justice be done with respect to a particular party, or class of parties, may produce concrete justice but may cause an infringement of abstract justice. Which is to be preferred? Is it possible to reconcile both?

In a sense this is also the question which permeates the recent debates of Hart, Dworkin and others. We find either a conflict of rules — such as, valid contracts should be enforced — with principles — such as, nobody should take advantage of his own wrong — or a conflict of principles — such as, every wrong has a remedy, but *nulla poena sine lege.* The judge has to make a choice. How does he do it? He may find the answer in the bowels of the precedents. By skilful management of the language of earlier judges, he might be able to obtain guidance

towards the end which he should be pursuing. Insofar as he can discover such guidance, and can claim to be bound by the doctrine of precedent (or, if you prefer, insofar as he can avoid the burden of choice), then he has solved his problem. He has made no choice, or, if you like, he has chosen by choosing not to choose.

Where precedents are lacking or are insufficient to solve his problem, then the judge must look elsewhere for guidance in the resolution of his problem. He is faced with a conflict of fundamental principles, either of which could be applied to settle the dispute, and both of which are equally binding, and equally "normative". To what source is he entitled to go to resolve his difficulty by making his choice? Is there any rational or other basis upon which he makes it? This is where Hart and the others differ *inter se,* as well as where they differ from realists, natural lawyers, sociological jurists, and others. And this, I suggest, is where the question of the morality of the common law comes into the picture.

Professor Lon Fuller provides us with an outline of what he terms "the morality upon which the law is made possible".[17] He gives some basic notions which underlie the concept of law, insofar as it may be said to have any moral basis whatsoever. Expressly or impliedly in what he writes can be found the idea that general principles, such as *pacta sunt servanda,* are part of that underlying foundation of morality without which there cannot be acceptable law, at least as we in the common law system understand law. Why is this?

There are various possible answers: for instance, that such principles ensure that the law treats equal situations equally — which is often said to be an essential feature of justice, or justice according to law; or, that once a man has given his word he ought to be bound by it, unless there is a valid, moral reason for releasing him from such obligation — which is a strictly moral approach to law; or, that social policy, the foundations of civilised society, the society which we have evolved, demand that agreements be kept, else the fabric of that society will crumble; or, that the political structure of our society is founded on the notion that agreements will be maintained, since the very constitutional set-up from which all else stems is based upon some tacit, if not express, agreement as to the way in which our society, our State, is organised, and once you say that agreements are not necessarily binding, you open the way to the breakdown of society and the State; or, you could say that it is an observed fact of society that agreements are usually kept, whence it may be derived empirically, or sociologically, that such a concept is fundamental, and rightly ranks as one of the key principles underlying the law. The same kind of exposition can be made with respect to the doctrine of *nulla poena,* and any others that come to mind in the same category.

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[17]Fuller, *The Morality of Law, supra,* chap. II.

The judges, presumably, know all this. Indeed they may have enunciated it at one moment of time or another, giving one or more of these reasons as the justification for (a) their attitude on a particular problem, and (b) its ultimate resolution. Professors Hart and Dwo.kin, on the other hand, would deny this. They repudiate any such new-fangled version of the old doctrine of "natural law". When Dworkin speaks of political morality or institutional morality in connection with background rights underlying other, both abstract and concrete, rights, he, presumably, is using such expressions to denote "extra-legal" considerations, not logically part and parcel of the concept or definition of law. When Hart writes of a "principle of recognition" from the use of which the judges can discover and justify the law that they invoke and apply, he, presumably, is also seeking to discover a logical, or sociological, basis for a legal system, not one that is rooted in natural law concepts or ideas.

That, indeed, may be the case, or the intention, of those writers. I would respectfully suggest, however, that the apparent or alleged distinction between what is extra-legal, and what is not, is capable of being blurred. So far as Hart is concerned, it has been suggested[18] that his primary rules of obligation — the guts of the law so to speak — involve much of a moral character, while both his primary and his secondary rules (of which the principle of recognition is a good example) involve a general recognition of a moral obligation to obey the law — which, in a sense, brings into play, once again, the whole notion of natural law. With respect to Dworkin, if political or institutional morality is of such importance with regard to the discovery of principles by a judge who has to determine "hard cases", and if such morality is at the back of all legal rights, then, once again, how completely or successfully has he been able to exclude or dispense with some concept of natural law in his analysis of law and judicial functions? What I suggest, therefore, is that Dworkin's ideas, much like those of Hart, really amount to a re-presentation of earlier ideas of *natural* rights (which is another version of natural law) dressed up in a different guise. What he is doing is very much a case of "old wine in new bottles" — which is why I referred earlier to his theories as "pseudo-novel".

Despite these, and other, efforts to eradicate the notion from the language and reasoning of jurisprudence, it seems to me that, whatever its true meaning (and it has had different meanings at different historical periods), "natural law" in some shape or form must always be a part of our understanding of law. Indeed, the very principles of Hart and Dworkin, the ideas which they have propounded, seem to partake of such "natural law" (albeit in a modified form). That they do, in my view, suggests that, disguised though it might sometimes be, there is a moral basis for law — at least the law which we understand

[18]Lovin, *Hart and the Morality of Law, supra.*

and apply in the common law world. This is just what Deschenes, C.J., said in the recent Quebec case to which I have referred:[19]

> To pretend to deny the natural law in the heart of man, would be to cut the positive legislation from any moral inspiration and to deprive it of any tie with an order of superior values which our society believes in and aspires to legitimately. The Court refuses to sanction such barbarous surgery.

However, as with the moral system, so with the legal: there are conflicting principles that are difficult, if not sometimes impossible, to reconcile. It is this undeniable fact that creates problems with regard to the role of morality in law, the question that has arisen as to the "validity" of a legal system — such as that which obtained and operated in Germany during the existence of the Nazi regime — and the general conflict between positivist and natural law theories of law. If there were no such conflicts, there would be much less scope for disagreement as to the nature and effect of law, or as to the true, underlying basis of law. The conflicts exist, however. All that a court can do (since courts have to deal with the actual, the practical, the immediately necessary, and not the ideal, the desirable, and the ultimate reaches of conduct) is to make some practical adjustment between such conflicting principles and render judgments that are, if not the best that can be conceived of, at least the best that can be achieved.

The search for justice is not a search for the absolute. It is a search for the most reasonable, after balancing all the various conflicting moral principles that could apply.[20] The role of the law is compromise. This, I venture to suggest, is a more succinct, if less elegant, way of putting what Dworkin and Sartorius have expressed in their attempts to define and describe what courts do when they decide 'hard cases', in terms of finding the solution that is most consistent with the underlying principles of the legal system. The doctrine of precedent, for example, is one tool which the courts employ in their search for the just and the reasonable. Precedent is an aspect of justice, because such a doctrine assists in the attainment of the ideal of treating like cases, and persons, alike. It does not always work, but it works more often than it fails.

At some stage, however, as we have seen, the doctrine fails to help. Indeed, it may obfuscate or prevent the attainment of the ideal of justice. When that occurs it may be necessary to appeal from the unsophisticated notion of precedent to the more glamorous or exotic ideas of the 'higher' morality. In other words, from the strictness of legal doctrine to the nebulous and less constricting notions of "justice", "fairness" or "doing right".

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[19]*Supra*, footnote 2, at 651; see also *Chabot* v. *School Commission of Mamorandiere* (1957), 12 D.L.R. (2d) 796.

[20]But the task of the judge may be looked upon differently, *viz.*, as settling disputes, by some appropriate means, or as making law or policy; see Weiler, *Two Models of Judicial Decision-Making*, (1968) 46 C.B.R. 405; *Legal Values and Judicial Decision-Making*, (1970) 48 C.B.R. 1.

This is sometimes expressed in terms of making a so-called "policy" decision. There are many modern instances, notably in the law of tort, when appeal has been made to the idea of "policy". Indeed, in the law of contract, and elsewhere, there is sometimes an appeal to a general notion of "public policy" in order to determine issues of contractual validity. It seems to me that there is something both confusing and even hypocritical about referring to what is being done as making a decision on the basis of policy. What, after all, is meant by "policy"? Whose policy? How is it discovered? What are its ingredients? How do judges know what policy is, or ought to be?

The courts ought to be deciding cases before them on the basis of "justice" (leaving open for the moment what is meant by that term). The very minimal content of justice, I would suggest, is provided by some sort of doctrine of precedent. The moment you abandon such doctrine, you set sail without navigational aids upon a sea of unknown depths and bounds. If precedent is abandoned, then, in its place, the courts ought to be looking for, and paying regard to, some other aspects of justice, since treating like cases alike does not exhaust the content of the concept 'justice', in view of the fact that not all cases are or can be alike, or even sufficiently similar, to render other principles or aspects of justice unnecessary.

"Policy", I suggest, although it may seem to be intended to serve such purpose, does not. If you examine what the courts have said or done in the name of policy, what you find is that they are appealing to various social, economic, or practical factors which they regard as indicating the way a particular decision ought to go. Policy, in other words, is perhaps only another way of saying expediency — or at least, what the particular judge in the particular case thinks of as being expedient. One of the most famous arguments against the creation of liability in certain instances — *i.e.*, that it would open the floodgates of litigation to permit such action — is an argument of policy or expediency. It has been successful at various times, but later courts have often rejected that argument in the particular situation, and have succumbed to the request for a remedy. Obviously, all judges at all times do not have the same views on expediency. That is why "policy" is such a bad explanation, or basis, on which to make law and determine unsolved problems. The use of the notion of policy is not the way to achieve justice. Indeed, justice and policy, so far from being allied or similar, may turn out to be in opposition. It may not be politic to endeavour to do that which is just. Policy may dictate a solution that does not advance justice, and *vice versa.*

There may be one construction or interpretation of "policy", however, that does make it accord more with the notion of justice. That is if "policy" is understood to mean not what is expedient or practical, but what is consistent with the general trend of the law, and

is deducible, if not in logic, then at least as a matter of sentiment, from what has gone before. If it is accepted that the existing rules of the law are founded upon a desire to achieve justice, and are organised along such lines, then new rules, if they are harmonious with the previous ones, should also be just, or capable of giving a just result. The court must, therefore, look to the nature and heart of the rules, in order to discover not only their superficial content, but also their purpose or policy. Once it has done this, it can reason further towards the application or adaptation of such rules to the case before it.

This, indeed, is the morality of the common law. It is the inner, harmonious order of the rules from which further developments can take place. As Lord Mansfield, a great proponent of both natural law and the moral content and purpose of the law, once said: "The reason and spirit of cases make law, not the letter of particular precedent". While accepting that it is no easy task to discover such "reason and spirit", what I have called the inner, harmonious order of the rules of law, I would nevertheless argue that to do so is not beyond the wit of judges, and indeed, is the very onerous task which is placed upon them in the judicial role.

Hence, in making decisions of a particularly difficult nature, where, perhaps, the precedents do not provide totally adequate guidelines, they must have certain doctrines or principles foremost in their minds. As has been pointed out by some commentators, when statutory provisions are in question, the canons of construction in effect give the court the necessary guidance. Such elementary, basic notions as construing penal statutes strictly, and presuming that a statute does not abrogate common law rights unless it states so specifically and clearly, are in fact the kind of moral underpinnings of the law that reveal which way it is supposed to be going, and how it is meant to be understood and applied.

Where the common law is concerned, there are similar, if not always as clear, indications of what the law is about and how it should be interpreted and utilised. Agreements must be kept; true, but they should not be made the instruments of oppression, so as to permit one party to exercise unreasonable control over another who has no true freedom to bargain and make an agreement. Penalties should not be imposed upon someone when such penalties did not exist previously; true, but a person who acts deliberately to harm, or in a negligent fashion, knows that sometimes, in some circumstances, he may be liable if he causes harm. He is not totally unaware or ignorant of the prospect of liability. Accordingly, it is not unjust to make him liable *ex post facto,* as it were, in such situations. He is not to be treated in the same manner as the man who is legitimately oblivious of the possibility that his conduct may be somehow wrongful. (This would be the case, for example, if the courts suddenly said that all injuries

were actionable, even if they were totally accidental. There have been times when such liability was the case, and at a period when the prevailing morality of the law was in favour of such strict liability. Some vestigial aspects of this philosophy can be found embedded in our law — though they are gradually being absorbed by other doctrines; the morality of the law of tort in modern times is not that of a hundred or two hundred years ago).

In the same way other areas of the law have undergone change in the light of different views of the ultimate purpose and morality which they serve. Such developments, I suggest, indicate the extent to which the law constantly strives to achieve certain moral standards consistent with the underlying basis of the society which it organises, regulates, and administers.[21] If the judges are not exactly the guardians of the morality of society, they are sometimes the beacons which light the way for society to find the path towards what is right and just. And the common law, which they expound and apply, notwithstanding Mr. Justice Holmes, *is* "a brooding omnipresence in the sky".

[21] *Cf.* the remarks of Lord Diplock, dissenting, in *Hyam* v. *D.P.P.*, [1975] A.C. 55 at 89, cited with approval by Lord Edmund-Davies in *D.P.P.* v. *Lynch*, [1975] A.C. 653 at 716.