Theories, Principles, Policies and Common Law Adjudication

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I. The controversy

The relevance of theories

In *Roxborough v Rothmans of Pall Mall*,[1] Justice Gummow suggested that 'caution' was appropriate when considering 'any all-embracing theory of restitutionary rights and remedies founded upon a notion of "unjust enrichment"'.[2] His Honour went on to say –

> To the lawyer whose mind has been moulded by civilian influences, the theory may come first, and the source of the theory may be the writing of jurists not the decisions of judges. However, that is not the way in which a system based on case law develops; over time, general principle is derived from judicial decisions upon particular instances, not the other way around.[3]

His Honour expressed concern that, if unjust enrichment were to be seen as 'a definitive legal principle', a likely outcome would be the restriction of 'substance and dynamism' by 'dogma' and that the 'dogma' will 'tend to generate new fictions in order to retain support for the thesis' as well as 'distort well settled principles in other fields'.[4] It is clear from his Honour's comments that he regarded legal theorists – and unjust enrichment theorists, in particular – as engaged in 'top-down' reasoning, whereby the theorist posits an ideal form for the law and then works out the implications of that theory for particular cases.

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1 (2001) 208 CLR 516.

2 Ibid 544.

3 Ibid

4 Ibid 545.

The former President of the New South Wales Court of Appeal, The Honourable Keith Mason, has been more favourably disposed towards theorising:–

> We need theories for road maps or hypotheses and for deciding whether an existing authority is to be applied, distinguished or overruled. Even the professed incrementalist is confronted with deciding what is "an increment too far". ... We look to scholars like Salmond, Fleming, Treitel, Birks and Stapleton to map out structures for understanding fields of law or the essence of particular causes of action. As for the grand summaries of our greatest jurists (for example, Dixon J's exposition of estoppel), these theories help explain the jumble of existing case law. They also point the way towards orthodox developments and offer guidance in knowing when to distinguish or overrule apparent departures from orthodoxy.[5]

Mason's remarks point to the inevitably of theorising in common law reasoning. Making sense of the history of dispute resolution as *principled* dispute resolution and disseminating the underlying principles among the participants in the legal system requires that judges (together with practitioners and scholars) give considerable attention to the underlying structure of the law. Unless a dispute is identical in all relevant respects to a previously adjudicated dispute, adjudicating upon the dispute necessitates the formulation of a hypothesis as to the values which the previous case law expresses. Adjudicators need to do this in order to determine whether the present case is really of the same type as the previous case or is a case which must be treated differently. Reliance upon theories does not seek to deny or downplay history for the sake of the imposition of an ideal form of the law for which the theorist has a subjective preference. As understood by Mason, theorising is genuinely and wholeheartedly concerned with understanding what the law *is*.

One prominent private law scholar has taken issue with the characterisation of the unjust enrichment theory as 'top-down' reasoning. Andrew Burrows described Justice Gummow's 'top-down reasoning' comment as 'surprising' and protested that 'the whole restitution movement has been the very antithesis of top-down reasoning'.[6] Burrows suggested that his Honour was aiming his criticism at the wrong target:-

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5 The Honourable Keith Mason AC, 'What is Wrong with Top-Down Legal Reasoning' (2004) 7 *The Judicial Review* 9, 23.

6 Andrew Burrows, 'The Australian law of restitution: has the High Court lost

> In the light of the 'top-down reasoning' objection, it is ironic that, in seeking to allay the fears of those who had traditionally rejected the language of unjust enrichment as too discretionary and open-ended, Birks precisely stressed that the law of unjust enrichment that he was advocating was 'downward-looking to the cases' and did not seek to 'draw on an unknowable justice in the sky'... The common law is developed precisely by the articulation of principle from a mass of decisions. Recognition of the principle against unjust enrichment represents nothing more, and nothing less, than the application of standard common law techniques and shows the common law working at its brilliant best. Indeed, Gummow J's preference for the language of unconscionable retention shows that he himself, inevitably as an appellate judge, has sought to articulate an underlying principle.[7]

Burrows pointed out that there are many legal scholars who are concerned with imposing 'top-down' theories on the law – such as the purveyors of law and economics and feminist critiques of law.[8]

Justice Gummow's framing of his remarks as an attack upon inappropriate 'top-down' reasoning, which is to be contrasted from appropriate 'bottom-up' reasoning, might be criticised as setting up a false dichotomy. The point made by Mason and Burrows appears to be that common law reasoning necessarily involves a combination of 'bottom-up' and 'top-down' reasoning. Accordingly, there is a type of theorising – namely, observing the legal practice of a community and then proposing theories about what moral principles are implicit in that legal practice – which is indispensible to common law legal reasoning. This type of theorising stands apart from theorising which imposes upon the law values and ideas which are external to the law as practised. Under the former type of theorising, a theory is offered as a plausible explanation as to why the law is justified in treating a group of cases in the same way. It is 'bottom-up' in the sense that it attempts to explain the established legal practice.

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its way?' in Elise Bant and Matthew Harding (ed), *Exploring Private Law* (2010) 67, 73.

7 Ibid 74 (The reference to Birks's work is to Peter Birks, *An Introduction to the Law of Restitution* (revised ed, 1989) 19.).

8 Ibid.

The prevailing legal practice which has to be explained is the body of *decisions* made by courts. More specifically, what has to be explained is the attachment of a particular type of consequence – that is, the award of a particular form of relief or not, as the case may be – to a case consisting of particular facts. The fundamental commitment of common law judges to decide cases in ways which are consistent with the decisions of earlier courts in the same system requires those judges to adopt a working assumption that the outcomes in cases – the cases that were decided by the courts whose decisions bind them, at least – were legally correct. It is, on the other hand, consistent with this fundamental commitment to adopt a critical attitude towards the reasoning which those earlier courts used to justify those decisions. The particular rules stated in earlier cases may have been adequate to decide the earlier cases but, upon the further consideration prompted by today's case, may be revealed to be inadequate or incomplete. The process of identifying the best possible explanation for according the same treatment to a group of cases may be carried out in relation to small groups of case, which are factually similar to today's case, or to much larger groups of cases right up to the level of whole departments of law, such as 'contract law', 'tort law' or even 'private law'. Indeed, to the extent that those actions and decisions which invoke 'the law' as their justification do not fit into a single 'supportive structure', the law may be criticised as being incoherent.[9]

Once a plausible theory about the coherence of a group of cases has been proposed, the theory may be used in two ways. First, it may be used as a basis for determining whether a novel case – that is, a case which does not fall unambiguously within the scope of a rule articulated in a previous case – ought to be treated as falling within the scope of that rule. The pertinent question is whether admitting the case to the group of cases caught by the rule maintains the coherence of the group as a group of cases for which a particular type of legal response is justified. Secondly, it may be used to engage in retrospective evaluation of particular decisions. Small groups of cases which had hitherto been recognised as warranting the same treatment might, in the light of a theory which provides a plausible explanation for a larger range of cases, be revealed to be incoherent groups. In other words, particular cases may be identified as rogue cases on the basis that they do not fit what, for the time being, appears to be the best available theory as to the justification for deciding a group of cases in the same way. The process is 'top-down' only to the extent that a theory about the best justification is used as a signpost towards what Mason called 'orthodox developments' and

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9 As to coherence and 'supportive structure', see Robert Alexy and Aleksander Peczenik, 'The Concept of Coherence and its Significance for Discursive Rationality' (1990) 3 *Ratio Juris* 130.

away from 'unorthodox developments'.[10] 'Orthodoxy', in this context, is measured by the extent to which the development fits the system as a whole. Over time, explanations which have a large range of plausible application will drive out logically incompatible explanations with a narrower range of application, so that the overall tendency will be in the direction of the greater coherence of the whole system. Explanations with a narrower range of application which are logically compatible with the larger range explanations – in the way, for example, that 'mistaken payment' is compatible with 'unjust enrichment' - can, of course, be retained as explanations for smaller categories within the larger supportive structure.

The foregoing sketch of common law reasoning, which combines 'bottom-up' and 'top-down' dynamics, shares some important features with a model of legal reasoning proposed by Richard Sutton.[11] Sutton spoke of 'an ordered flow' whereby the 'natural tendency – in an area of law with settled generalities – is to move from the case law ... on to giving it meaning ... and finally on to fitting the more important clusters of meanings into the broad systematisation'.[12] Where the relevant area of law is less settled, the process of reasoning may become 'iterative and circular'[13] rather than strictly linear:-

> It is a series of repetitions around a self-contained system. These pass back and forth between the case law and the textbook generalisation, before any particular group of laws assumes its optimal, most evolved form.[14]

Unjust enrichment theory – as proposed by Birks and Burrows, at least – is proposed and utilised more or less according to the methodology sketched in the foregoing paragraphs. It attempts to explain the existing legal practice in terms of abstract moral principle and, accordingly, can operate as a guide to the application of the law to hitherto unforeseen cases. In other words, all of the instances of awarding relief in a restitutionary measure are understood as outworkings of a moral principle that demands the reversal of unjust enrichment and, accordingly, novel categories of restitutionary relief can be identified as being orthodox or unorthodox developments according to whether they are explicable in terms of the principle of unjust enrichment. Accordingly, the immediate trigger for

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10 Mason, above n 5, 23.

11 Richard Sutton, 'Restitution and the Discourse of System' in Charles Rickett and Ross Grantham (ed), *Structure and Justification in Private Law* (2008) 127.

12 Ibid 133.

13 Ibid.

14 Ibid.

claiming or ordering the restitution of a mistaken payment remains the plaintiff's mistake. 'Mistaken payment' is an instance – along with total failures of consideration and payments under duress – of 'unjust enrichment'. What the law gains is a provisional explanation as to why a diverse collection of real-world events attracts a similar type of legal response.

While critics of the unjust enrichment theory (such as Justice Gummow) make much of Peter Birks's reference to civilian structures and sources, the agenda of forcing the common law into a civilian mould was one which Birks categorically disowned:-

> The aim was not to achieve a forced assimilation to the civilian structure described in [Reinhard] Zimmermann's great book. It was merely to show that, with many differences of detail ... the structure of the common law of obligations is in fact not very different from that derived by the civilian systems from Roman law. Differences do of course multiply in the descent from larger to smaller structures. Nor was it the intent to prove even the larger structural point once and for all, but only to shift the onus to those who think they see a quite different picture. Much more than finality, which is perhaps best never attained, what the common law needs and has not been having is a vigorous and continuing taxonomic debate.[15]

Of course, theories are always open to criticism and revision. The unjust enrichment theory is controversial. Some scholars are deeply sceptical about its explanatory value.[16] Among those who agree that the theory has explanatory value, there is disagreement about what particular legal phenomena fall within the scope of the theory.[17] The proper way to evaluate and respond to a controversial theory is to explore the body of legal practice which it claims to explain and consider whether, upon closer inspection, it does actually explain that practice. Theorists who cling

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15 Peter Birks, 'Definition and Division: A Meditation on *Institutes* 3.13' in Peter Birks (ed), *The Classification of Obligations* (1997) 1, 35.

16 Steve Hedley, 'Unjust Enrichment: The Same Old Mistake?' in Andrew Robertson (ed), *The Law of Obligations: Connections and Boundaries* (2004) 75-85; Joachim Dietrich, 'The "Other" Category in the Classification of Obligations' (in the same volume) 111, 113-114.

17 For example, compare Peter Birks, 'Property, Unjust Enrichment and Tracing' (2001) 54 *Current Legal Problems* 231, 242-245 with Graham Virgo, *The Principles of the Law of Restitution* (1999) 12 and RB Grantham and CEF Rickett, 'Property Rights as a Legally Significant Event' (2003) 62 *Cambridge Law Journal* 717, 743.

tenaciously to theories which cannot explain large areas of legal practice expose themselves to just criticism. All theories are liable to be controversial and all are vulnerable to ultimate rejection but, as instruments of legal interpretation, theories are an indispensible element of common law reasoning. A system of law based upon an accumulation of judicial decisions cannot – if it has any hope of maintaining itself as a *coherent* system - do without theories about what those decisions *mean* in a more general normative sense.

Developing the law?

The controversy over the relevance of theories is closely related to the controversy over the extent to which trial courts and intermediate appellate courts can develop the law. This controversy is, at its core, a controversy about the locus of legal authority. It involves a disagreement about whether that authority is to be found in the historical utterances of courts – particularly those of final appellate courts – or in the abstract normative framework to which a community has committed itself through the decisions of its courts. One's answer to that question determines how one identifies what the existing law of a community is. This, in turn, affects how one thinks about decisions of courts in so-called 'hard' cases – that is, where the outcome cannot be determined simply by the mechanical application of a rule stated in a statute or in previous case.

Gerald Postema has noted that notions of 'novel cases', 'gaps in the law' and 'judicial discretion' are 'theory dependent'.[18] The very idea that there may be a gap in the law which a court has to fill is, according to Postema, associated with a particular form of legal positivism which adheres to what he calls the 'Institutionalized Autonomy Theory' – in short, the view that there are cases in which 'while judges may be *deciding the law*, they are not reasoning or deciding *according to the law*' and that this is a proper exercise of their judicial responsibilities.[19] Depending upon one's answer to the question about the locus of authority, one might think that a hard case reveals a 'gap' in the law which the court fills by making new law or that a hard case provides the opportunity for the identification of norms or values which are implicit in the pre-existing law and the occasion for translating those norms or values into verbal formulae which address classes of cases – namely, rules. These opposing ways of thinking about hard cases correspond with two different senses of what it means to 'develop' the law. The sense in which one understands the verb 'develop' sets the argument off on a particular course.

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18 Gerald J Postema, 'Law's Autonomy and Public Practical Reason' in Robert P George, *The Autonomy of Law: Essays on Legal Positivism* (1996) 79, 94.

19 Ibid.

One possible course can be observed in the extra-judicial writings of the Honourable Dyson Heydon:-

> An intermediate appellate or trial court will also have to decide whether or not gaps are best left as gaps – areas where conduct which has not hitherto been criminal and which has not hitherto been capable of being interfered with by civil remedies should remain permitted.[20]

The association between the practice of judges in developing the law and the existence of 'gaps' in the law envisages that the court which 'develops' the law has a real choice about the direction in which the law shall be developed. A court which proceeds to fill the 'gap' is, according to Heydon, 'taking advantage of a freedom which, since its decision will constitute a precedent, it wishes to deny to, or heavily qualify for, later courts'.[21] Moreover, distinguishing an earlier case is seen to be 'the creation of a gap'.[22] This language conveys the notion that, where no known rule decides the case, then there is no single correct answer dictated to the court by previous judicial decisions and that filling the 'gap' involves a strongly creative process. If a court articulates a hitherto unknown cause of action or awards a novel remedy or extends the application of a known cause of action or remedy to a novel case, that court is seen to be creating hitherto non-existent law rather than applying pre-existing law. The unavoidable implication for Heydon is that, since new law is being created, the task ought, as a general rule, to be left to the ultimate appellate court.

Within the limits set by its premises, Heydon's argument makes sense. Yet, an implicit starting premise is a fairly narrow view as to what constitutes legal authority. It regards the existence of legal authority as primarily a matter of history. The lack of prior legal practice which is directly on point – that is, prior case law which is alike in all relevant respects to the case at hand – amounts to a lack of authority to decide the case in any particular way. The inescapable conclusion is that the act of a judge who, in this type of case, 'develops' the law is effectively an act of retrospective legislation. Accordingly, for Heydon, the maintenance of certainty in the law demands that resort to gap-filling ought to be exclusively the prerogative of the ultimate appellate court. Heydon seems to have been expressing what Emily Sherwin has described as 'the positivist assumption that only authoritative rules have the status of law'.[23] The

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20 The Honourable JD Heydon, 'How far can trial courts and intermediate appellate courts develop the law?' (2009) 9 *Oxford University Commonwealth Law Journal* 1, 18.

21 Ibid 19.

22 Ibid.

23 Emily Sherwin, 'Legal Positivism and the Taxonomy of Private Law' in

underlying concern seems to be that '[r]eference to higher-order principles diminishes the settlement value of rules and may result, on average, in more erroneous decisions'.[24] This emphasis upon the 'settlement value of rules' to the apparent exclusion of all other considerations is, of course, not characteristic of legal positivism as a whole. Many self-declared legal positivists would regard Heydon's position as extreme.[25]

On the question of development, as with respect to the relevance of theories, Mason has taken the other side of the argument. Mason, in speaking of 'orthodox developments' and 'apparent departures from orthodoxy', appeared to contemplate that a development of the law was not a choice by the judge as to the direction which the law should take but a judgement about what the law must, as a matter of logic, already be, bearing in mind the prior practice of the courts in other cases. Judges who, after examining prior decisions, formulate theories about the values expressed by the law more generally can use those theories to arrive at views about what the law requires in the cases before them. For these judges, the process of theorising is necessary in order to determine whether the present case is alike in all *relevant* respects to the previous case law (even though it may not be alike in *every* respect).

This theoretical disagreement between Mason and Heydon was borne out in their respective reasons for judgment in *Harris v Digital Pulse Pty Ltd*.[26] In that case, Mason P was prepared to recognise a power to award exemplary damages as a remedy for breach of fiduciary duty as 'a compelling analogy of tort law, having regard to the desirability of coherence in legal doctrine'.[27] Heydon JA, on the other hand, thought that it was 'a fiction to treat the award of exemplary damages for breach of fiduciary duty as merely reviving a muted jurisdiction' and that 'to

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Charles Rickett and Ross Grantham (ed), *Structure and Justification in Private Law* (2008) 103, 125.

24 Ibid 126.

25 Compare, for example, HLA Hart's much more nuanced view about judicial development of the law:-

'At any given moment, judges, even those of a supreme court, are parts of a system the rules of which are *determinative enough at the centre* to supply standards of correct judicial decision. These are regarded by the courts as something which they are not free to disregard in the exercise of the authority to make those decisions which cannot be challenged within the system. *Any individual judge* coming to his office ... finds a rule ... established as a tradition and accepted as the standard for the conduct of that office. This circumscribes, while allowing, the creative activity of that office.' (HLA Hart, *The Concept of Law* (2nd ed, 1994) 145 (italics added)).

26 (2003) 56 NSWLR 298.

27 Ibid 340.

recognise for the first time so muted a jurisdiction is in reality to create it'.[28] The disagreement revealed by these remarks is not merely a disagreement about the proper interpretation of the available legal materials. It is also a disagreement about the nature of the authority provided by previous case law. In short, Heydon JA thought that a decision provides authority for what was done in that case – so that, if something has not previously been done, there is a 'gap' in the law concerning the circumstances - if there are any - in which such an act or decision would be justified. Mason P thought that a decision provides authority for any outcome which is logically justified on the basis of that decision, if we regard the decision as part of the outworking of a coherent system of principle. Accordingly, awards of exemplary damages in tort cases would provide authority for awards of exemplary damages in breach of fiduciary duty cases if the breach of fiduciary duty in question is an analogous type of wrong to those in which exemplary damages had previously been awarded.

Mason's understanding appears to align with Postema's understanding. Postema has remarked that 'evaluative and moral arguments will be needed just to uncover the law established by a precedent decision'.[29] In other words, ascertaining the scope and reach of a judicial decision – that is, for *what* does the decision provide a precedent – will frequently involve theorising about the values implicit in the decision. When the process of judicial reasoning is understood in this way, judges are no longer seen to be creating law or filling gaps in the law. Instead, they are seen to be working out the implications, for a hitherto unencountered situation, of the system of values which appears to be embodied in the known law. Until fairly recent times, it was this school of thought – usually gathered under the banner of the 'declaratory theory of law' - which represented the conventional wisdom of common lawyers.

II. The declaratory theory of law

Judges do not make law

Put simply, the declaratory theory of law is the notion that common law judges, when deciding cases in which no previously articulated rule of law determines the outcome, do not make new law but declare what the law must be in order for the previous legal practice of the community to make sense as a coherent system of principle. The novel case merely provides the opportunity to declare what the law is and always must have been. The declaratory theory presupposes a body of principle which is identifiable as

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28 Ibid 386.

29 Postema, above n 18, 98.

the law but which may, hitherto, not have been expressed verbally. Sir Owen Dixon was a notable advocate of this view:-

> It is taken for granted that the decision of the court will be "correct" or "incorrect", "right" or "wrong" as it conforms with ascertained legal principles and applies them according to a standard of reasoning *which is not personal to the judges themselves.* ... At every point in an argument the existence is assumed of *a body of ascertained principles or doctrine* which both counsel and judges know or ought to know and there is a constant appeal to this body of knowledge. In the course of an argument there is usually a resort to case law, for one purpose or another. It may be for an illustration. It may be because there is a decided case to which the court will ascribe an imperative authority. But for the most part it is for the purpose of persuasion; persuasion as to *the true principle or doctrine* or the true application of principle or doctrine to the whole or part of the legal complex which is under discussion.[30]

The understanding of legal authority which is at the core of this view sees legal authority as something which exists independently of particular verbal propositions. The particular verbal propositions that exist are, rather, explications (however partial and approximate) of a larger body of principle which governs relations between participants in a legal community but which is open to further discovery and explication.

Sir Owen perceived that the prevalence of this view of the common law was in jeopardy. He referred to 'minds more susceptible to currents of thought' who ask themselves '[w]hy should they not regard the legal system as a branch of knowledge depending upon the subjective notions of the men, considered collectively, who occupy seats in courts of ultimate resort?'[31] Such minds would fail to perceive the boundary between legitimate and illegitimate judicial development of the law:-

> It is one thing for a court to seek to extend the application of accepted principles to new cases or to reason from the more fundamental of settled legal principles to new conclusions or to decide that a category is not closed against unforseen instances which in reason might be subsumed thereunder. It is an entirely different thing for a judge, who is discontented

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30 The Right Honourable Sir Owen Dixon, 'Concerning Judicial Method' (1956) 29 *Australian Law Journal* 468, 470 (italics added).

31 Ibid.

> with a result held to flow from a long accepted legal principle, deliberately to abandon the principle in the name of justice or of social necessity or of social convenience.[32]

John Gava has emphasised that the conception of judicial development expressed in the first half of this passage was one in which 'the authorities, rules and techniques of the common law were not *optional* restraints, they were binding'.[33] The 'change' in the law contemplated by this conception of development was what was necessary – and nothing more than was necessary – in order to decide the case before the court.[34]

Since Sir Owen Dixon's time, the declaratory theory of law has fallen out of fashion. In some circles, including large sections of the judiciary and the legal academy, it is positively disreputable. Lord Bingham has suggested that the declaratory theory does not sit well with contemporary judges' experience of judging:-

> The declaratory approach is radically inconsistent with the subjective experience of Judges, particularly appellate Judges, of the role which they fulfil day by day. They know from experience that the cases which come before them do not in the main turn on sections of statutes which are clear and unambiguous in their meaning. They know from experience also that the cases they have to decide involve points which are not the subject of previous decisions, or are the subject of conflicting decisions, or raise questions of statutory interpretation which apparently involve genuine lacunae or ambiguities. They know, and the higher the Court the more right they are, that decisions involve issues of policy.[35]

Sir Anthony Mason has cited this passage, apparently approving of Lord Bingham's dismissal of the declaratory theory. In particular, Sir Anthony assented to the notion that judges have regard to 'policy factors and values'[36] in deciding what the law ought to be. Whereas the declaratory

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32 Ibid 472.

33 John Gava, 'Another Study in Judging: Sir Owen Dixon and Yerkey v Jones' (2010) 26 *Journal of Contract Law* 248, 251.

34 Ibid.

35 Tom Bingham, *The Business of Judging: Selected Essays and Speeches* (2000) 28.

36 The Honourable Sir Anthony Mason, 'Legislative and Judicial Law-Making: Can we locate an identifiable boundary?' (2003) 24 *Adelaide Law Review* 15, 21.

theory, as presented by Sir Owen Dixon, might be seen to proceed on the premise that the law as received might be best understood as expressing certain values – that is, judges reason by reference to values which are *internal* to and *immanent* in the law and which can be seen to provide the community's prior legal practice with its intellectual coherence[37] – Sir Anthony's conjunction of values and policies points to the imposition upon the law of value judgements and other judgements which are *external* to the law. Referring to the judgment of the majority of the High Court in *Cattanach v Melchior*[38] (in which the plaintiffs sought to recover the costs of raising a child which had been born after a negligently-performed sterilisation operation), Sir Anthony suggested that the problem which faced the court was that 'there is no general consensus in today's community of values respecting the importance of life'.[39] Moreover, the 'modern emphasis on the need for openness and transparency' required judges to be explicit about their reliance upon values and policy considerations.[40] These remarks betray a resignation to a state of affairs in which there are disputes in which the prior law cannot be determinative and the judges have to draw upon their direct observation of community opinion on moral questions that touch upon the case. In other words, the notion that judges resolve such disputes by reference to considerations which are internal to the law is seen to be a fiction and it is inevitable that a judge will, from time to time, have to refer to community standards which are external to the law. On this understanding, a judge in a hard case engages in the 'legalization'[41] of norms which, prior to the judge's adjudication, existed only outside of the law.

Some other holders of high judicial office have sought to 'reinterpret' the declaratory theory so as to accommodate what they perceive to be the contemporary reality. In *Kleinwort Benson Limited v Lincoln City Council*[42], Lord Goff of Chieveley said of the declaratory theory:-

> [I]t does not presume the existence of an ideal system of the common law, which the judges from time to time

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37 As to 'immanence', see Ernest J Weinrib, 'Legal Formalism: On the Immanent Rationality of Law' (1988) 97 *Yale Law Journal* 949, 962-963.

38 (2003) 215 CLR 1.

39 Mason, above n 36, 21.

40 Ibid.

41 The term 'legalization' has been used by Peter Cane. According to Cane, there are two 'basic modes' of norm legalization – 'adjudicative' and 'legislative'. See Peter Cane, 'Taking disagreement seriously: courts, legislatures and the reform of tort law' (2005) 25 *Oxford Journal of Legal Studies* 393, 402. For a contrasting view (to Cane's), see Ernest J Weinrib, 'Legal Formalism', n 36, 956.

42 [1999] 2 AC 349.

> reveal in their decisions. The historical theory of judicial decision, though it may in the past have served its purpose, was indeed a fiction. But it does mean that, when the judges state what the law is, their decisions do, in the sense I have described, have a retrospective effect.[43]

His Lordship's comments seem to have been aimed primarily at the practice of 'prospective overruling' whereby a court which is inclined to find that the law, properly understood, is other than it has hitherto been generally understood or articulated in previous cases may announce this but decline to apply the 'new' law to the case at hand. In his Lordship's eyes, the declaratory theory did, at least, serve the useful purpose of reminding the judiciary of their obligation to apply the law as they understand it to be, even if that law consists of a development of – in the sense of adding to the verbal articulation of – existing principle.[44] John Finnis, in commenting upon this aspect of the *Kleinwort Benson* case, said that the declaratory theory emphasises 'the duty of judges to differentiate their authority and responsibility, and thus their practical reasoning, from that of legislatures'.[45] For judges, the 'facts about precedent ... have their directiveness only by virtue of legally normative standards' which 'can on occasion give reason to reject and depart from even a well settled and judicially approved understanding of the law'.[46]

Ronald Dworkin has perhaps been the most prominent recent promoter of the declaratory theory. Dworkin, in stating that 'propositions of law are true if they figure in or follow from the principles of justice, fairness, and procedural due process that provide the best constructive interpretation of the community's legal practice',[47] expressed a form of the declaratory theory. According to Dworkin, a judge who has to articulate a novel proposition of law in order to decide a hard case does not make law, in the sense of creating new rights and duties, but draws upon principles which are implicit in prior legal practice in order to determine what the rule ought to be:-

> When a judge declares that a particular principle is instinct in law, he reports not a simple-minded claim about the motives of past statesmen, a claim a wise cynic can easily refute, but an interpretive proposal:

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43 Ibid 378.

44 Ibid.

45 JM Finnis, 'The fairy tale's moral' (1999) 115 *Law Quarterly Review* 170, 173.

46 Ibid 172.

47 Ronald Dworkin, *Law's Empire* (1986) 225.

> that the principle both fits and justifies some complex part of legal practice, that it provides an attractive way to see, in the structure of that practice, the consistency of principle integrity requires.[48]

The value of Dworkin's work is that it sets out a version of the declaratory theory which recognises that deciding what the law requires in a particular case is not a simple mechanical process. It requires the exercise of careful judgement about what is the *best* interpretation of the prior legal practice. Accordingly, it does not conform to the caricature that critics of the declaratory theory think that they have considered and rejected. Krygier captured this point in the following passage:-

> A judge who claims in a hard case, that his decision is governed by law *might* just be saying that he is deducing an answer from a deductive combination of a legal rule and the facts before him. If so he is wrong. But he might be expressing, however inarticulately, something more complex: the sense that his decision involves him in giving what Dworkin describes as 'theoretical argument' about what the law requires in the case at hand.[49]

There is a sense in which the legal practice of a community amounts to a tradition of that community, of which the rules which have been articulated in a linguistic form are merely a partial explication. A judge who is loyal to the tradition of the particular legal community must, when confronted with a hard case, find a solution which 'is *coherent* with ... the tradition and the values the judge takes to be implicit in it, rather than merely logically consistent with its existing explicit rules'.[50] That judge would reject solutions which 'though logically consistent with existing rules, make no sense of the whole or make less sense in light of some underlying principle which gives coherence to the whole'.[51]

Principles and policies

Under the declaratorist view of adjudication, 'development' of the law by judges is to be understood as the interpretation of the established practices of a community – viewed as a coherent system of principle - so as to find a

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48 Ibid 228; See also Ronald Dworkin, *Taking Rights Seriously* (1977) 81.

49 Martin Krygier, 'Julius Stone: Leeways of Choice, Legal Tradition and the Declaratory Theory of Law' (1986) 9 *University of New South Wales Law Journal* 26, 37.

50 Ibid 38.

51 Ibid.

solution (to a novel legal problem) which is complimentary to and consonant with the established practices. Within the common law, the relevant 'established practices' are the decisions of the courts. It is to be denied that judges *make* law in the sense of fashioning rules which are calculated by them to produce outcomes which are desirable according to criteria which are external to the law – that is, not implicit in the established practices. If the rule of law means what it says – that is, that law (as opposed to particular people) rules – then legal consequences ought to attach to an event on the basis of that event's membership of a category of events to which it *deserves* to belong, regardless of any person's preference as to the outcome in the particular case or any person's calculation as to what outcome would maximise the welfare of the community as a whole. An event deserves to belong to a category if there is a principled basis – discoverable within the established practices - for saying that the event deserves to attract the same consequences as the other events which are incontrovertibly members of that category. This is an exercise in moral reasoning, but the question of what is morally justified and required is to be answered entirely by reference to the view of right and wrong which is implicit in the established practices of the community. This is the *community's* sense of morality.[52] It can be viewed as a *shared* sense of morality on the basis that it represents the best possible interpretation – as a normative system – of the community's established practices.

Another way of stating the argument set forth in the previous paragraph is to say that common law adjudication must proceed according to *principle* rather than *policy*. Some clarification of what is meant by 'policy' is appropriate at this point. The prohibition on policy considerations is limited to the first of two notions of policy described by Ernest Weinrib:-

> [P]olicy involves articulating some independently desirable goal(s) and then dealing with a particular tort case in a way that forwards these goals or, if they are in tension, balances some against others to produce a result that is desirable overall.[53]

Weinrib acknowledged that the word 'policy' is sometimes used to describe a type of reasoning in which a judge either 'compares the relevant

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52 What I have in mind here is something like David Hume's idea of a 'general sense of common interest' which 'all the members of the society express to one another, and which induces them to regulate their conduct by certain rules'. (David Hume, *Treatise of Human Nature*, Book III, Part II, Section II); See also Friedrich A Hayek, *The Constitution of Liberty* (1960) 62-63.

53 Ernest J Weinrib, 'The Disintegration of Duty' in M Stuart Madden (ed), *Exploring Tort Law* (2005) 143, 177.

characteristics of one case with other cases that instantiate the same general conception' or 'elucidates the meaning of the conception in a way that coherently construes both the legal relationship between the parties and the whole ensemble of legal concepts'.[54] Policy, in the second sense, is not to be excluded from the process for it is, according to the declaratorist view, a necessary element of common law adjudicative method. When Dworkin used the word 'policy' in *Law's Empire*, he employed it in the first of the two senses identified by Weinrib. So where, for example, 'a government committed to material equality adopts programs that make sections and classes more equal in material wealth as groups', the pursuit of that strategy is a matter of policy.[55] The correctness of decisions are to be assessed by 'asking whether they advance the overall goal, not whether they give each citizen what he is entitled to have as an individual'.[56] Understood in this way, 'policy' is necessarily concerned with the pursuit of goals. Principle, by way of contrast, is concerned with whether decisions accord with the best possible interpretation – as a normative system – of the community's established practices.

This distinction between principle and policy – so understood – is crucial to the declaratorist view of adjudication for two reasons:-

1. It enables judges to differentiate their reasoning from that of legislators;

2. It enables declaratorists to differentiate their interpretive enterprise from the methods of the 'legal realists' and related schools of thought.

John Finnis's emphasis upon the first of these reasons was referred to in the previous section of this paper.[57] Dworkin's differentiation of judicial reasoning from legislative decision-making runs along similar lines. According to Dworkin, a legislature may justify the creation of new legal rights by demonstrating 'how these will contribute, a matter of sound policy, to the overall good of the community as a whole.'[58] The legislature does not – at least not as an element of behaving constitutionally – have to argue that citizens have, in principle, a pre-existing entitlement to the benefit which the legislation will confer upon them. The act of the legislature is – or, at least, may be – a decision about what alteration to the distribution of benefits and burdens would advance the welfare of the

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54 Ibid 185.
55 Dworkin, above n 47, 222-223.
56 Dworkin, above n 47, 223
57 Finnis, above n 45.
58 Dworkin, above n 47, 244.

community. The only justification required is the legislature's calculation that the measure will produce favourable outcomes for the community. A judge, on the other hand, cannot impose consequences upon a person for failing to act in a way in which that person had, on the basis of the best normative interpretation of the established practices, no prior duty to act. To do so would 'not fit the character of a community of principle'.[59] In so far as the known rules do not determine the outcome, the judge must decide the case 'on grounds of principle, not policy'.[60]

In the ensuing discussion of the famous 'nervous shock' case, *McLoughlin v O'Brian*,[61] Dworkin rejected an interpretation of the prior law which allowed recovery of compensation for emotional injury 'when a practice of requiring compensation in their circumstances would diminish the overall costs of accidents or otherwise make the community richer in the long run'.[62] Dworkin rejected this interpretation on the basis that it does not state a 'principle of justice or fairness'.[63] In so far as the interpretation consists of a judgement that it is 'sometimes or even always in the community's general interest to promote overall wealth in this way', it proposes 'a policy that government might or might not decide to pursue in particular circumstances'.[64] In this respect, it differs from the type of justification which judges ought to employ. Sir Owen Dixon seems to have had exactly the same distinction in mind when he contrasted the legitimate judicial practice of deciding that 'a category is not closed against unforseen instances which in reason might be subsumed thereunder' with the illegitimate practice of abandoning established principle 'in the name of justice or of social necessity or of social convenience'.[65]

The distinction between principles and policies corresponds with a difference between, on the one hand, judgements as to whether a particular person possesses attributes – such as the commission of a particular type of action - which justify coercing *that* person and, on the other hand, the desirability of particular outcomes and what means are best adapted to achieving those outcomes. Accordingly, Dworkin's idea of integrity operates in different ways depending upon whether it is integrity in principle or integrity in policy which is being pursued. Refraining from prosecuting a person for an offence in the pursuit of a policy of reducing the cost of criminal prosecutions does not necessarily justify refraining from

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59 Ibid.
60 Ibid.
61 [1983] 1 AC 410.
62 Dworkin, above n 47, 240.
63 Ibid 242.
64 Ibid 242-243.
65 See above n 30 and accompanying text.

prosecuting other people for the same offence in the future. The *policy* of reducing the cost of criminal prosecutions is not concerned with ensuring that two potential defendants are treated justly according to the same standard. It is concerned with the aggregate welfare of the community. It may be just as expensive to prosecute the second person as it was to prosecute the first one, but integrity in *policy* would not be undermined by a decision to prosecute in the second case if, it is decided that owing to improved fiscal circumstances or some other factor, the public welfare would be advanced by prosecuting. If, on the other hand, the decision not to prosecute in the first case had been taken on grounds of *principle*, then fidelity to the notion of integrity requires that any other person whose situation is the same (in all relevant respects) is treated in the same way.[66] What explains the need for identical treatment of the two potential defendants is that the reason for refraining from prosecuting the first of them was concerned with the justice of prosecuting a particular individual. If it is unjust to prosecute the first person, it would be equally unjust to prosecute the second person.

One might state the distinction between principles and policies more succinctly by stating that principles are concerned with the justice of actions by and against *individual persons* while policies are concerned with the aggregate welfare of the community. The former are end-independent while the latter are concerned with desirable outcomes. When the distinction is viewed in this way, a practical justification for requiring courts to confine themselves to principles, while leaving the prioritisation of policies to legislatures, comes to light. That justification, shortly stated, is that judicial proceedings are not the correct forum for making empirical judgements about what will serve the welfare of the community as a whole. There are two more specific reasons why this is so.

The first of these reasons is that judicial proceedings are concerned with the positions of the parties to the dispute and are not well-adapted to receiving evidence about the likely effects of the court's order upon the broader community. Kylie Burns has noted the lack of 'any guiding principles as to authenticity, notice or necessary evidential support' of social fact evidence.[67] It is important to explain the context of these remarks. Burns did not suggest that social facts have no role to play in legal adjudication but warned merely of 'a totally unregulated judicial use of social facts'.[68] Burns made the entirely valid point that social facts evidence is often necessary in judicial proceedings. She identified four types of social

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66 Ibid 224.

67 Kylie Burns, 'The way the world is: Social facts in High Court negligence cases' (2004) 12 *Torts Law Journal* 215, 221.

68 Ibid.

facts which are commonly used – namely, 'interpretation of adjudicative fact', 'context statements', 'consequence statements' and 'mixed principle and social fact statements'. Judicial use of the first two types and the last type of social fact is not especially problematic. A court may, in order to make sense of the facts of a case or to place the case in a broader social context, make use of factual assumptions that could fairly be considered to be matters of common wisdom or 'common experience' within the relevant community – e.g. that consumption of alcohol affects people's cognitive and motor capacities, although experienced drinkers might be less severely affected than others.[69] Equally, observations in broad terms about the values which the law protects – e.g. the 'fact' that the law attaches importance to the 'physical integrity of an individual's person and property'[70] – are observations which judges are qualified to make on the basis of their judicial knowledge and experience.[71] What the law does is a matter in respect of which judges have expertise.

It is the third category of social facts – namely, suppositions about the consequences that a particular outcome or the adoption of a particular rule would have on the parties or the community generally – which corresponds with 'policy'. Burns did not single out this category for special treatment, but perhaps it ought to be singled out on the basis that it gives rise to its own set of problems. At the very least, reliance upon social facts of this type must be underpinned by significant social scientific evidence which has been tested in the same way that any other evidence is tested. Courts are accustomed to hearing expert evidence. Nevertheless, the social facts which enter into 'policy' considerations are of a different order of complexity to the types of facts which are commonly established by expert evidence, such as the prognosis for a personal injuries plaintiff's injury or the market value of a block of land. Policy considerations, being concerned with broad social effects of an outcome or of the adoption of a rule, may involve suppositions about the future behaviour of large numbers of individual actors in circumstances which cannot readily be foreseen. Even if the relevant phenomena have been studied by social scientists, we cannot necessarily be satisfied that their findings about the past will tell us very much about the future.

The second reason why judicial proceedings are not the correct forum for judgements about the public welfare is that judges are not democratically elected officials. They are supposed to be chosen on the basis of their possession of a particular type of technical expertise – namely, knowledge of the content of the existing law of the community and

69 *Joslyn v Berryman* (2003) 214 CLR 552, 580 (Kirby J).

70 *Cattanach v Melchior* (2003) 215 CLR 1, 71 (Hayne J).

71 Burns, above n 67, 230.

experience in the modes of reasoning associated with working out the implications of that body of knowledge[72] – rather than the fact that they represent the community or different sectors of the community. Indeed, they are, in their intellectual formation and professional background, distinctly (and appropriately) unrepresentative of the communities whom they serve. Even where the likely effects of the pursuit of particular policies can be anticipated with a reasonable degree of certainty, judges are not the right people to be making decisions about what social and economic goals the community ought to pursue and about trade-offs between conflicting goals. Judges are incapable of representing the variety of preferences which may exist within a community in relation to the necessary trade-offs and, being non-elected officials, lack the democratic legitimacy to engage in what effectively would be an act of retrospective legislation. In a politically pluralist environment, the task of performing the necessary trade-offs should be left to a democratically-elected legislature. Judicial decision-making must proceed wholly on the basis of principles which are implicit in the established legal practice of the community.

The distinction between principle and policy also serves to differentiate the interpretive enterprise of the declaratorists from the various forms of legal realism. Steve Hedley has observed that both groups of theorists look for 'patterns in how the legal system behaves' and 'pay relatively little attention to what legal actors *say* they are doing, when they consider that this will enhance legal understanding'.[73] Allan Beever and Charles Rickett – who are self-declared interpretivists - have freely admitted that the interpretive enterprise involves '*ex post facto* rationalisation' of the previous behaviour of the legal system but insist that this is a problem 'only if the theorist claims that her rationalisation of a case necessarily reflects the intentions of the judges who decided that case'.[74] In theorising about what *principles* are immanent in decisions of courts, one does not have to form a view about the subjective state of mind of any of the judges. One merely has to form a view about what the law must be

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72 On this point, see James Penner's suggestion that the kind of 'moral expertise' possessed by common law judges is an expertise which arises from '*continuing* acquaintance with the things our concepts of which are learned by acquaintance ' and relates to 'the values and dis-values our thick ethical concepts represent'. See James Penner, 'Legal Reasoning and the Authority of Law' in L Meyer, S Paulson and Thomas Pogge (ed), *Rights, Culture and the Law: Themes from the Legal and Political Philosophy of Joseph Raz* (2003) 71, 93-94.

73 Steve Hedley, 'The Shock of the Old: Interpretivism in Obligations' in Charles Rickett and Ross Grantham (ed), *Structure and Justification in Private Law* (2008) 205, 207 (emphasis added).

74 Allan Beever and Charles Rickett, 'Interpretive Legal Theory and the Academic Lawyer' (2005) 68 *Modern Law Review* 320, 324.

taken to require of us – in terms of abstract normative demands – if the decision is to make sense as part of a coherent and principled body of practice. It may turn out that the best interpretation of the law's normative demands coincides precisely with a historical judge's intention, but it need not necessarily do so. It is the best interpretation of the law's normative demands, rather than the judicial intention, which is decisive as to what is the law. In confining its theorising to the principles immanent in decisions, the interpretive enterprise of the declaratorists confines itself to a normative framework which is embodied in the established practices of the community. This normative framework is certainly an interpretation of the established practices, but it is not an interpretation of the intentions of the individual decision-makers. The interpretation's status as the best possible interpretation rests on the notion that it enables the established practices (taken as a whole) to be seen as a systematic working out and application of that normative framework.

Declaratory theory and development

From the perspective of the declaratory theory, hard cases do not involve gaps in the law so much as instances in which the dispute before the court is novel to the point that there is no *direct* authority which dictates that the plaintiff (or the defendant) must win in a case of that type. A lack of direct authority may consist of the absence of any rule at all which could potentially apply to the case. It may also consist of doubt or uncertainty about whether a previously articulated rule covers the case before the court. The *language* in which a rule was couched in the previous case may cover the factual situation presented by today's case, but a system based upon accumulation of case law admits the possibility that this was an incomplete or inaccurate statement of the true rule. The true rule – that is, the rule which offers the best fit within the system as a whole – might exclude the facts of today's case. In any event, it is not obvious from the outset that the previously articulated rule disposes of the case. Therefore, an interpretive exercise is necessary even to determine whether there is direct authority applicable to the case. The interpretive exercise is concerned with discovering whether the principled system, to which the known rules can be seen to belong, provides authority for a decision other than a decision by a direct and literal application of the previously articulated rules. In this way, the law develops by way of the recognition of additional rules and exceptions to or glosses upon the previously articulated rules. Easy cases, by way of contrast, are those in which, once difficulties in ascertaining the facts have been overcome, it is clear that the case can be disposed of by the direct application of a well-established rule.

In hard cases, it is nonetheless possible – and the court's duty – to find within the previous case law reasons for deciding the case one way or the other. From this perspective, a judge who, after a due consideration of the previous case law, says that the law is X and, therefore, the plaintiff (or the defendant) should win, does not create new law but offers an opinion as to what the law requires in a case of this type. A judge who, upon arriving at the conclusion that this is the best possible interpretation of the law, fails to apply those conclusions about the law to the case at hand – on the basis that only the legislature or the ultimate appellate court can 'develop' the law – would be failing in her or his obligation to decide the case according to law. Of course, a judge's opinion about what the law requires may be open to criticism on the basis that the judge has neglected to take into account relevant previous case law or that her or his reasoning is faulty in some way. Nevertheless, the existing system appears to recognise that possibility and provides a solution. If the losing party believes that the judge's interpretation of the law is incorrect, that party may appeal to a higher court. In this way, it is the ultimate appellate court's opinion as to what is the best possible interpretation of the law which finalises the matter. This is what we mean when we say that the ultimate appellate court is the paramount interpreter of the law. We do not mean that lower courts cannot act upon interpretations which have not previously been expressly endorsed by the ultimate appellate court. Equally, we do not mean that the ultimate appellate court has a power to develop the law which lower courts do not have.

III. Conclusion

At their best, warnings about theorising about the law are a reminder that attempts to explain the law in terms of the abstract values which it expresses must be firmly grounded in actual legal practice. The theorist should avoid the temptation to impose an ideal form – preferred on the basis of values external to the law's practice – upon the law. Perhaps that is the point which Justices Gummow and Heydon wanted to convey. To go further and reject theorising is to discard a means of ensuring that judicial reasoning is principled and coherent, thus reducing the common law to a collection of judicial edicts. Perhaps the law governing the award of restitutionary remedies cannot be completely understood by reference to the idea of unjust enrichment. Perhaps private law, as a whole, cannot be adequately explained by the idea of corrective justice. Nevertheless, the types of theorising which the unjust enrichment and corrective justice ideas represent are indispensible to reasoning about the common law as a system of *law*. If those theories cannot explain the legal practices which they claim to explain, the appropriate response is to propose theories with greater explanatory power. If the common law is really to be a system of law – as

opposed to a loose collection of judicial edicts which have authority simply by reason of the office of those who issue them – then all of its norms must ultimately be grounded in a common 'supportive structure'.[75] To dispense with theorising about the ultimate and intermediate supportive structures of the law is to abandon an essential instrument of interpretation.

[75] Alexy and Peczenik, above n 9, 131.