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LEGISLATIVE SUPREMACY AND LEGISLATIVE INTENTION: INTERPRETATION, MEANING, AND AUTHORITY

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[A]cts of parliament that are impossible to be performed are of no validity: and if there arise out of them collaterally any absurd consequences, manifestly contradictory to common reason, they are, with regard to those collateral consequences, void. ... [W]here some collateral matter arises out of the general words, and happens to be unreasonable; there the judges are in decency to conclude that this consequence was not foreseen by the parliament, and therefore they are at liberty to expound the statute by equity, and only *quoad hoc* disregard it.[1]

INTRODUCTION

THE doctrine of parliamentary sovereignty, understood as a principle of unqualified legislative power, depends on familiar, but questionable, assumptions about legal authority and statutory interpretation. It supposes that a legislative command, by dint of the "plain language" it deploys, can determine the outcome of particular cases, however cogent may be the reasons for a different decision in all the circumstances. Though established principles of interpretation may enable judges to resist absurd or unjust consequences, when the text admits of ambiguity or doubt, a plain and unambiguous injunction must be accepted at face value. Even a "strained" interpretation, intended to safeguard the rights protected by the European Convention, must at least be "possible"; and what is possible (it is widely assumed) is largely a matter of semantics, rather than moral or political judgment.[2] If the various presumptions of legislative intent invoked by common law courts

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[1] Sir William Blackstone, *Commentaries on the Laws of England* (London 1765), vol. 1, p. 91.

[2] See Human Rights Act 1998, s. 3. For critical analysis, see Geoffrey Marshall, "The Lynchpin of Parliamentary Intention: Lost, Stolen, or Strained?" [2003] P.L. 236. Aileen Kavanagh has rightly challenged the prevailing consensus: see Kavanagh, "The Elusive Divide between Interpretation and Legislation under the Human Rights Act 1998" (2004) 24 O.J.L.S. 259, and "Statutory Interpretation and Human Rights after *Anderson*: a More Contextual Approach" [2004] P.L. 537.

help to preserve the rule of law, they nonetheless give way, like the rule of law itself, to explicit contrary command.[3]

An alternative vision, emphasising the common law constitution from which Parliament derives its authority, repudiates this standard picture as a misrepresentation of our legal experience and understanding. It denies that legal authority can eliminate moral judgment, insisting that a statute determines the outcome of pertinent cases in accordance with its most reasonable interpretation; and it rejects the notion that the "plain words" of a text can be self-sufficient—clear and unambigous even when (on a literal reading) apparently commanding grave injustice. In this alternative understanding, an Act of Parliament is a contribution to an existing order of (common law) justice, which it supplements and modifies but never wholly supplants. It takes its true meaning from an understanding of the law as a whole, so that its modifications of existing law do not create arbitrary and unjustified distinctions between persons who should, in justice, be treated the same. On this view, the rule of law, understood as a principle of constitutionalism, remains fundamental, curtailing the legislative power to threaten the principal bulwarks of the citizen's freedom and dignity.[4]

The standard conception of absolute or unqualified sovereignty is apparently confirmed by the absence of any practice of constitutional review: British courts do not (at least under normal circumstances) strike down duly enacted statutes on constitutional grounds. If, however, absolute sovereignty is merely the expression of an official practice, or consensus, that constitutes (in part) the British "rule of recognition",[5] its normative status in constitutional theory is problematic. For the questions of authority and interpretation that arise in the shadow of this fundamental rule are often the subject of doubt and controversy. As a *formal* device that serves chiefly to distinguish questions of legal validity from extra-legal matters of political morality, the rule of recognition is largely irrelevant to constitutional analysis. Satisfied by the avowed application of duly enacted statutes, and violated only by their explicit rejection, the rule has little or no bearing on what an Act is understood to mean. Questions of meaning and interpretation, at

[3] The connection between legislative intention and legislative supremacy is emphasised by Jeffrey Goldsworthy in his attempt to defend the constitutional doctrine against damaging scepticism about the existence (or ascertainability) of such intention: see Goldsworthy, "Legislative Intentions, Legislative Supremacy, and Legal Positivism", in J. Goldsworthy and T. Campbell (eds.), *Legal Interpretation in Democratic States* (Aldershot 2002).

[4] See further Allan, *Law, Liberty, and Justice: The Legal Foundations of British Constitutionalism* (Oxford 1993) and *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford 2001).

[5] See H. L. A. Hart, *The Concept of Law*, 2nd ed. (Oxford 1994), chs. 6 and 7; Jeffrey Goldsworthy, *The Sovereignty of Parliament: History and Philosophy* (Oxford 1999), ch. 10.

least in any case of serious doubt, engage all those considerations of political morality that the rule of recognition (conceived as a matter of political fact) purports to exclude from "descriptive" analysis. A rule of "recognition" *identifies* a statute as a source of law; but the practical consequences are, necessarily, a separate matter of normative legal theory.[6]

However extravagantly the breadth of Parliament's lawmaking power is portrayed, it must be asserted within the context, and hence the boundaries, of the existing legal order: Parliament cannot alter everything at once. It is, moreover, a requirement of the rule of law (closely allied to the basic idea of formal justice, or equality before the law) that a statute should be interpreted so far as possible consistently with the general body of rules and principles with which it belongs, understood as a reasonably coherent whole.[7] But since the appropriate balance between immediate purpose and enduring principle is a matter of judgment, in which questions of practical governance combine with those of political morality, judicial evaluations are plainly critical.

It is, moreover, a cardinal principle of common law (reflecting the principle of the rule of law) that a statute's authority attaches to its formally enacted text, which must be distinguished from the intentions, desires or purposes of legislators, whether regarded as separate individuals or as a collective body sharing common aims. Such intentions and purposes are pertinent only insofar as they illuminate the text: "Parliament, under our constitution, is sovereign only in respect of what it expresses by the words used in the legislation it has passed".[8] Legislative supremacy is therefore a matter of the special authority of the canonical text, which must be accorded an officially approved meaning, for all practical purposes, by the courts of superior jurisdiction. Legislative supremacy, or parliamentary sovereignty, therefore entails a counterbalancing judicial sovereignty: the consequences of formally enacted texts for the content of people's rights and duties are ultimately a matter of authoritative judicial determination.[9]

[6] As an account of common law reasoning, within Anglo-American legal systems, my theory of statutory interpretation does not depend on any particular view of the correct relationship between legal and moral judgment, as regards the criteria of legal validity, as a matter of general (analytic) jurisprudence.

[7] See Neil MacCormick, *Legal Reasoning and Legal Theory* (Oxford 1978), especially pp. 103–107. See also Ronald Dworkin, *Law's Empire* (London 1986). Dicey's theory of parliamentary sovereignty, though formally absolute, was in substance qualified by the judges' powerful interpretative function, exercised in defence of the rule of law: A. V. Dicey, *Introduction to the Study of the Law of the Constitution*, 10th ed. (London 1959), ch. 13; see Allan, *Constitutional Justice*, pp. 214–215.

[8] *Black-Clawson International* v. *Papierwerke Waldhof-Aschaffenburg* [1975] A.C. 591, at 638 (Lord Diplock).

[9] See further Allan, *Constitutional Justice*, especially ch. 7. See also Allan, "Constitutional Dialogue and the Justification of Judicial Review" (2003) 23 O.J.L.S. 563.

Respect for the legislative will may perhaps be thought to privilege the "ordinary" meaning, as the safest guide to the intentions of any (hypothetical) legislator endorsing those words. But the "ordinary" or "plain" or "literal" meaning gives way, as appropriate, to a more purposive reading: we best conform to legislative intention when we acknowledge the context in which the text was approved, understanding the "mischief" it was sought to remedy and avoiding constructions having absurd (and presumably unintended) consequences.[10] It follows, however, that we cannot separate our inquiry about what Parliament has done from our evaluations about what, as a reasonable legislature, it ought to have done. Any endeavour to interpret the statute as a coherent and intelligible contribution to good governance, broadly compatible with the wider system of rules into which it must be fitted, draws on our understanding of what good governance entails. Co-operation with the statutory purpose therefore engages the moral judgment appropriate to furtherance of the common good.[11]

There must be a reconciliation of interdependent sovereignties, in which a working consensus over legal principle is substituted for the formal consensus that supplies the rule of recognition. The statutory text must be construed as an expression of legislative intention: it must be accorded an interpretation that makes sense of it as a purposive enactment, expressing the will of a legislative majority. The formally enacted words impose important constraints: the relevant intentions and purposes are those that the textual provisions, on their most plausible construction, embody.[12] What is most plausible, however, will depend on considerations of context. Particular words will take their sense from the endeavour to which they contribute; the "literal" meaning must give way, if judicial submission to the legislative will is genuine, to a contextual and purposive approach. In turn, however, the legislative endeavour will be itself interpreted, most plausibly, in the light of those fundamental values or commitments that the constitution is normally understood to protect.

It does not follow that citizens' basic rights are wholly impervious to legislative interference; but the rule of law imposes a strong presumption in their favour. Since a statute is normally an attempt to modify the law within a specific field rather than to rewrite it entirely, the legal and constitutional foundations can be

[10] See MacCormick, *op. cit.*, pp. 203–213. See also John Bell and Sir George Engle, *Cross on Statutory Interpretation*, 3rd ed. (London 1995), ch. 1.
[11] Cf. Lon L. Fuller, *Anatomy of the Law* (New York 1968), especially pp. 82–99.
[12] See *Black-Clawson* [1975] A.C. 591, at 613; see generally Bell and Engle, *Cross on Statutory Interpretation*, ch. 2.

fairly assumed to remain unaltered unless the context plainly dictates otherwise. Even where the statutory changes are radical, they must find their true—fully elaborated—meaning within the wider legal order they seek to modify.

The notion of unqualified parliamentary sovereignty is ultimately grounded, therefore, in an implausible theory of statutory meaning or interpretation. It attributes legal authority to a formally enacted text on the assumption that the words can dictate a literal or "ordinary" or intended meaning owing little or nothing to judicial construction or evaluation. When we perceive the critical dependence of text on context, both immediate and more enduring, the complex interaction between statutory command and established principle—between legislative will and common law reason—is made apparent. A statute's meaning and authority are necessarily enmeshed within a wider corpus of legal and constitutional principle; legislative supremacy is confined by judicial appraisal of the reasons that inform and explain the Act, or properly qualify its meaning and application. The sovereignty of Parliament is ultimately the sovereignty of the reasons that *justify* its enactments, insofar as justification is available within the limits of political morality.[13]

An Imaginary Dialogue

Sir Rupert Cross explained that general presumptions of legislative intent, such as the presumption that statutory powers must be exercised reasonably, were not merely supplementary to the text: "they also operate at a higher level as expressions of fundamental principles governing both civil liberties and the relations between Parliament, the executive and the courts".[14] They operate as "constitutional principles which are not easily displaced by a statutory text"; although some may be rebutted by implication, others must be overridden expressly. If, however, such presumptions truly reflect deeply-rooted principle, the possibility even of express rebuttal may in some cases be closer to fiction than reality. The principles that require minimum standards of fairness and reasonableness in the treatment of individuals by executive agencies,

[13] For a similar perspective on sovereignty, see Luc B. Tremblay, "General Legitimacy of Judicial Review and the Fundamental Basis of Constitutional Law" (2003) 23 O.J.L.S. 525. I do not, of course, deny that enactment of a statute alters the grounds of correct legal judgment; but the nature and scope of the change must be regarded as the joint responsibility of Parliament and courts. Parliament disturbs the existing balance of reasons for judgment, in exercise of its authority; the court determines the consequences for particular instances (by refining the distinctions between types or classes of case). The legitimacy of legislation is always a condition of its authority, effective within certain boundaries (which in extreme cases may leave little or no scope at all for any practical consequences).

[14] Bell and Engle, *Cross on Statutory Interpretation*, p. 166.

for example, must be viewed as integral features of the rule of law. Their abstract formulation gives wide scope for accommodation to the administrative context in question; but their abrogation or repudiation would threaten the legal order itself, in its essential character, obliging us to choose a more conservative reading of apparently radical provisions.[15]

We might usefully invoke an image of the ideal or representative legislator, whose understanding reflects the general intentions and purposes of those actual legislators who approved the statutory text.[16] He may be (loosely) identified with the draftsman, conceived as the servant of the legislature, obedient to its wishes. He is the true author of the text because, in his hands, the words approved accurately express an intelligible and self-consistent command that satisfies the relevant intentions and purposes. Our ideal legislator is not only a gifted and painstaking communicator, but one who is appropriately sensitive to the demands of constitutional principle, respectful of citizens' rights and the requirements of justice or fairness as regards the balance between public benefits and individual burdens. The correctly constructed text, then, is the one that the reasonable, competent and conscientious legislator, having the general purposes the enactment discloses, could or would have approved, giving due weight to the rule of law as an enduring constitutional precept. The tensions that may exist, in particular instances, between legislative intention and the citizen's reasonable expectations are resolved in the process of construction: the correct interpretation is the one that neither the representative legislator nor the conscientious citizen, acting in good faith in the light of settled constitutional principle, could reasonably reject.

The ideal or representative legislator is the court's interlocutor in an imaginary dialogue in which the judges can test their assumptions and textual inferences. How far must settled principles or long-established rules be qualified or overridden to enable the new provisions to achieve their objects? To what extent were such conflicts apparently foreseen and implicitly provided for? Our confidence about the outcome of such imaginary dialogue will vary with the circumstances; there will generally be no clear distinction in practice between ascertaining the legislative intention, correctly conceived, and imposing what seems the most reasonable solution in the circumstances. The legislative purpose is itself in part constructed, the general objective identified proving indeterminate

[15] See further Allan, *Constitutional Justice*, ch. 5, and "Constitutional Dialogue".

[16] I am assuming that we can identify shared intentions and purposes at a relatively abstract level, even when they diverge at the level of detail (see further below). If no such shared intentions could be identified to constrain interpretation, the idea of representative democracy itself would seem to be rendered incoherent.

at the specific level of the particular case; the exercise of critical judgment is inescapable.[17] The dialogue is as fictional—equally the product of private reflection—as the court's interlocutor; but there is no escape from the kind of inquiry it represents. Such an inquiry is entailed by an effort to interpret the legislative scheme as the work of a reasonable law-giver, who seeks to further justice and promote the common good.[18]

We cannot dispense with notions of purpose in statutory interpretation because it is only by attributing purposive intentions to the legislature that we can make sense of its enactments. A strictly literal construction, reflecting considerations of semantics and syntax alone, would detach the words from the implicit background assumptions on which effective communication depends.[19] Yet we cannot distinguish sharply between the intentions we discover and those we supply; nor can we separate clearly the limitations we infer from those we impose. That is not so much a consequence of the vagueness of statutory terms as a product, more broadly, of the "open texture" of language. Our purposes (or those we attribute to the legislature) are always somewhat inchoate, awaiting further thought and clearer definition; and we cannot foresee the ever-changing circumstances that perforce provoke their adaptation and revision: "Open texture is the ineliminable possibility of vagueness, the ineradicable contingency that even the most seemingly precise term might, when it confronts an instance unanticipated when the term was defined, become vague with respect to that instance".[20]

The necessarily creative character of statutory interpretation, to which Lon Fuller drew attention,[21] reflects these infirmities of language, purpose and foresight. A statute ultimately means what the courts decide it ought to mean in particular instances because, until the relevant circumstances arise to test our understanding, probing the limits of existing definitions, it remains at least partly indeterminate with respect to those circumstances. The interpretative enterprise is undertaken, of course, within the limits

[17] Cf. Bell and Engle, *Cross on Statutory Interpretation*, p. 33.
[18] Cf. Andrei Marmor, *Interpretation and Legal Theory* (Oxford 1992), pp. 28–34.
[19] See Goldsworthy, "Legislative Intentions, Legislative Supremacy, and Legal Positivism", above, pp. 52–56; see also Goldsworthy, "Implications in Language, Law and the Constitution", in Geoffrey Lindell (ed.), *Future Directions in Australian Constitutional Law: Essays in Honour of Professor Leslie Zines* (Sydney 1994), pp. 157–161. But Goldsworthy's distinction between "genuine" and "creative" interpretation is too sharply drawn, resting on doubtful claims about the ascertainability of "speaker's meaning".
[20] Frederick Schauer, *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* (Oxford 1991), p. 36. See further F. Waismann (R. Harre, ed.), *How I See Philosophy* (London 1968), ch. 2.
[21] See Lon L. Fuller, *The Morality of Law*, revd. ed., (New Haven and London 1969), pp. 82–91.

of reasoned and persuasive legal argument; but these are as much the constraints of constitutional principle and moral judgment as those of legislative diktat, conceived as an extra-legal or wholly independent source of power. Instead of a legislative intent conceived as a matter of ascertainable fact, we must search for a meaning which, while faithful to the legislative purpose, most plausibly understood, is also consistent (so far as possible) with settled legal principles.[22]

It is an established common law principle that statutes are understood as not requiring the performance of duties, even when imposed in apparently absolute terms, if to do so would enable someone to benefit from his own serious crime. A woman who had unlawfully killed her husband (for example) could not recover the statutory widow's allowance.[23] Since, it is assumed, the courts "have no power to dispense with the laws enacted by Parliament or ... to disapply them", the principle operates as a rule of interpretation.[24] It has been extended to cases where the performance of a serious crime might be facilitated: "Parliament must likewise be presumed not to have intended to promote serious crime in the future".[25]

It is an entirely reasonable presumption; there is no serious threat to the statute's integrity. But the intention is attributed rather than (in any straightforward sense) discovered; and the attribution does not depend on the principle having been authoritatively declared (and so drawn to Parliament's attention) before the statute was passed.[26] In practice, the statutory duty is modified by the specific requirements of public policy that the judges identify from time to time, according to their own estimations of the public good in the infinitely varied circumstances of succeeding cases.[27] So the distinction between legislative command and judicially approved principle or policy is not, in practice, capable of clear definition. The formal sovereignty of

[22] According to Larry Alexander, we cannot deny the facticity of legislative intentions without destroying an Act's authority: we must choose between locating an actual intent and passing authority to the interpreter: see Alexander, "All or Nothing at All? The Intentions of Authorities and the Authority of Intentions", in Andrei Marmor (ed.), *Law and Interpretation: Essays in Legal Philosophy* (Oxford 1995). But since such intent will almost always be counter-factual (the events in view not having been contemplated), the distinction between fact and value proves elusive: the counter-factual must be constructed, not discovered. We should acknowledge that authority is *shared* between lawmaker and interpreter (the latter defering to the former's aims and purposes within the constraints of reason).

[23] *R.* v. *Chief National Insurance Commissioner, ex p. Connor* [1981] Q.B. 758. See also *Riggs* v. *Palmer* 22 N.E. 188 (1889), considered below.

[24] *R.* v. *Registrar General, ex p. Smith* [1991] 2 Q.B. 393, at 402.

[25] *Ibid.*, pp. 403–404.

[26] *Ibid.*, p. 404.

[27] McCowan L.J. frankly admits that "the principles of public policy are constantly being developed": Parliament "must be taken to have intended" that the official "should obey public policy as found by the court to exist at the time the matter comes before it".

Parliament may be saved, if we wish, by recourse to the abstract doctrine that "the legislature must be presumed, unless the contrary intention appears, not to have intended to imperil the welfare of the state or its inhabitants";[28] but it would be hard, would it not, to imagine a statute that, on its true construction, ousted that presumption?

Interpretation and Meaning

A competent legal interpretation is one that maintains an appropriate balance between different levels or senses of meaning. In ordinary speech, the literal or acontextual (or "utterance") meaning gives way, in some degree, to intended meaning—our understanding of the message it was the speaker's intention to convey; co-operation between author and reader both permits and requires us to place the words within their apparently intended context. The literal meaning nonetheless retains a certain independent force, derived from the "semantic autonomy" of language.[29] The immediate context helps us to make sense of a communication which, in its form and structure, depends on more general understandings throughout the wider linguistic community; and those more general understandings impose important constraints on our freedom to substitute intended for literal meaning.

In the absence of a single speaker, whose intentions or expectations can be reliably ascertained, a statute can only be accorded an "intended" meaning in the sense of purpose and structure: we can seek the "intention of the statute" by ascribing a meaning to particular provisions that makes sense of its enactment as a purposive communication, consistently construed.[30] The relevant intention is essentially metaphorical, since it does not belong to any particular author, whether draftsman or legislator; but the mode of constructive interpretation its delineation requires is a necessary means of loyal co-operation between judge and Parliament.

The semantic autonomy of language will limit, but not extinguish, our freedom to choose a reading we prefer. It will generate what may be called a "semantic intention"—the inferences properly drawn from the deliberate choice, in context, of the language actually employed. Any discrepancy between the literal meaning and the intention, in that sense, must be resolved in

[28] *Ibid.*, p. 405.
[29] Schauer, *Playing by the Rules*, pp. 55–57.
[30] Lon L. Fuller, *The Morality of Law*, pp. 82–91.

favour of the latter; and our understanding of the instructions authoritatively given will naturally reflect our assumptions about what any reasonable law-giver would be likely to require. The relevant "intention", then, is the one we may legitimately attribute to our ideal legislator, whose purposes are qualified, in so far as his language permits, by reference to well established legal and constitutional principles. Our ideal legislator, or something of that sort, is the device we need to "make the best sense we can of an historical event—someone, or a social group with particular responsibilities, speaking or writing in a particular way on a particular occasion".[31] We must give appropriate weight not only to the literal text, as the authorised expression of the legislative purpose, but to the context in which it was drafted and adopted and the circumstances in which it must now be applied.

Ronald Dworkin's robust rejection of the "speaker's meaning" view of interpretation, in *Law's Empire*, was intended, primarily, to emphasise the difference between intended meaning and the true or legal meaning (all relevant considerations taken into account). His contrast between "conversational" and "constructive" interpretation was, no doubt, overdrawn. If legislation were not, in some sense, "an occasion or instance of communication"[32] between legislature and (*inter alia*) judiciary, our aspirations for democratic self-governance would be hopelessly deluded. Since, as Dworkin's later work makes clear, we cannot dispense with an account of an author's semantic intentions—the meaning he apparently intended to convey—we cannot divorce our analysis of textual meaning from its source in the author's effort to communicate his wishes.

It does not follow, however, that the meaning of the text is identical to any actual legislator's expectations, as regards the correct resolution of any particular case; those expectations, even if they could really be known or safely surmised, might be quite eccentric, poorly grounded in the statutory language when read as a whole. The text embodies the intentions and purposes of our ideal legislator (rather than the "super-mental state of the statute or institution" that Dworkin derides) as they are revealed by his deliberate mode of expression. Any knowledge we have about the consequences of a provision actually envisaged by those who drafted or approved it is certainly relevant, at least in so far as it is knowledge readily available to citizens or their legal advisers. It may assist in understanding the context in which the statute was passed; but we must remember always that it is the text that was

[31] Ronald Dworkin, "The Arduous Virtue of Fidelity: Originalism, Scalia, Tribe, and Nerve" (1997) 65 Fordham L. Rev. 1249, at p. 1252.
[32] Dworkin, *Law's Empire*, p. 315.

enacted, and not the opinions or expectations of its authors, even if (as, of course, will rarely be the case) they were unanimous.

It is the text's dependence on context that explains the limited reference traditionally made by English courts to committee reports, where recommendations for reform have preceded the adoption of new legislation. Such reports or recommendations help to explain the legislative background—the "mischief and defect" that the provision was broadly intended to address.[33] It is the statutory text itself alone, however, that reveals the remedy actually provided for, even if it may properly be read in the light of the reasons that prompted its enactment. Statements made during parliamentary debates, where admissible according to established judicial practice, fulfil a similar explanatory, as opposed to performative, function. They are strictly subservient to the authoritative text, but may nonetheless illuminate the context.[34]

Now, even a rule's intended (non-literal) meaning will prove seriously under or over-inclusive in respect of many concrete instances, generating doubtful consequences that no-one either specifically intended or probably foresaw; and in these circumstances the true (or legal) meaning, correctly determined, may diverge from both literal and intended meaning. It will depend on the gravity of the lack of correspondence between the purposes served by the rule and its apparent consequences in the particular case: when those purposes are seriously threatened, or even strongly outweighed, it may be right to decide that an exception to the rule is necessarily (or, at least, most reasonably) implied. Naturally, the rule cannot be purged of all under or over-inclusiveness—making its correct formulation entirely subservient to the circumstances of application—without eliminating its authority: the rule would then collapse into its (assumed) underlying justifications. But it is normally legitimate to read in qualifications and exceptions that common sense demands.

The true or legal meaning of a provision is the sense that best reflects the various requirements of political morality, all fairly taken into account. It does not exist outside or prior to those moral or constitutional judgments, ordained by rules of language operating on their own. Meaning must be constructed in the light of the background values we treat as fundamental. The constraints imposed by the literal meaning on a purposive interpretation chiefly reflect, as regards their severity, the respect we owe to those subject

[33] Cf. *Heydon's Case* (1584) 3 Co. Rep. 7a, at p. 7b.

[34] While, therefore, Hercules must treat legislative statements primarily as "political events important in themselves", and "not as evidence of any mental state behind them", they may cast helpful light on the shared purposes and understandings that constitute the legislative context (*Law's Empire*, p. 316).

to the rule. Since, in the case of statutes, the underlying purposes may be far less obvious to the ordinary person (or even his legal advisor) than to state officials, considerations of fairness reduce the scope for major departures from the plain (literal) meaning of the text. In certain contexts, such as the ordinary criminal law, such requirements of fairness will operate with especial force.[35]

Judgments of political morality are also involved, however, in determining the extent to which "plain" meanings must give way in the face of undesirable consequences in particular instances. Where common law principles, reflecting settled expectations or understandings, are applied to delimit the scope of enacted rules, legal outcomes that would be widely thought unjust or inexpedient will be excluded; and there can be no *a priori* objection on democratic grounds, for there has been no legislative determination of the particular case (in all its complexity) that the interpreter finds problematic. And if such a mode of interpretation is indeed legitimate, it *determines* the true meaning of the statutory provision: moral or political judgment precedes the ascertainment of legal meaning; it does not qualify a meaning that enjoys a prior status on semantic grounds alone.

The distinctions between literal, intended (or purposive), and true (or legal) meanings are of fundamental importance to the rule of law. They explain the irrelevance of any particular legislators' (or draftsman's) hopes or expectations; and, most importantly, they show why the intentions of a bill's government sponsors lack any special authority in the elucidation of the statute's meaning. The practical difficulties in divining particular legislators' hopes or expectations (or their counterfactual equivalents) and the arbitrary nature of the choices involved in constructing their institutional counterparts—problems Dworkin's discussion so clearly reveals—are matched by constitutional objections of equal gravity.[36] The citizen should, in principle, be bound by the formally enacted text, reasonably construed in the light of the apparent legislative context. The rule of law is plainly distinct from the rule of the legislator whose intentions lack firm moorings in the pertinent text.

The famous decision in *Riggs* v. *Palmer*[37] shows, if properly understood, that legislative intention is to be constructed by appeal to something like our ideal legislator, whose language accurately reflects an enactment's general purposes, regarded in

[35] The presumption in favour of a strict construction of penal statutes is now largely an application of the broader principle that changes in the law should be clearly made: see Bell and Engle, *Cross on Statutory Interpretation*, pp. 172–175.

[36] Cf. Johan Steyn, "*Pepper* v. *Hart*; A Re-examination" (2001) 21 O.J.L.S. 59, especially pp. 67–70.

[37] 22 N.E. 188 (1889).

their wider context. A man who had murdered his grandfather was held to be disqualified from inheriting his victim's estate even though he was named as beneficiary in the will, which satisfied the express requirements of the applicable statute. The New York Court of Appeals majority conceded that "statutes regulating the making, proof, and effect of wills ... if *literally construed*, and if their force and effect can in no way and under no circumstances be controlled or modified, give this property to the murderer".[38] However, they denied the appropriateness of a literal construction and affirmed the view that statutes could be "controlled in their operation and effect by general, fundamental maxims of the common law", such as the principle that no one should profit from his own wrong.[39] The correct construction depends on context, and the context includes all those general principles of law that can be properly invoked in determining the true meaning of the rule enacted.

Frederick Schauer insists that "the events involved in *Riggs* fell rather plainly within the linguistic grasp of the most locally applicable rule, the Statute of Wills".[40] Since the result of applying the rule was morally unacceptable, it was overridden by reference to the more general common law principle. But it is only by treating the enacted rule as equivalent to its literal (or acontextual) meaning that we can distinguish so sharply between the rule's application (or non-application) and its meaning or correct construction. Although Schauer distinguishes between literal meaning and speaker's (intended) meaning, as regards linguistic communication in general, he makes the former a central plank of his analysis of rules. A rule diverges from its underlying justification by entrenching a generalisation that is closely tied to a specific verbal formulation.[41] When entrenched, the generalisation dictates a decision in the particular case even when its justification is not thereby advanced; and the statute therefore dictated an unfortunate result in *Riggs*, according to Schauer.

Now, it is true that the meaning of a text cannot be reduced to its author's supposed intentions or expectations; but it does not follow that the scope of the rule can be determined acontextually. The point of divergence between the rule and its underlying purpose is always a matter of legal or moral judgment, not

[38] *Ibid*., p. 189 (emphasis mine).
[39] Cf. *Re Sigsworth* [1935] 1 Ch. 89; *Cleaver* v. *Mutual Reserve Fund Life Association* [1892] 1 Q.B. 147, at p. 157: the principle "must be so far regarded in the construction of Acts of Parliament that general words which might include cases obnoxious to this principle must be read and construed as subject to it".
[40] Schauer, *Playing by the Rules*, p. 209. See also Schauer, "Constitutional Invocations" (1997) 65 Fordham L. Rev. 1295, at pp. 1305–1306 and n. 44.
[41] Schauer, *Playing by the Rules*, ch. 4.

something dictated by the words alone. We do not deny the semantic autonomy of language when we refuse to privilege the literal meaning; we merely insist on the difference between literal and true meanings. Schauer argues that we should not disguise the desirability of rejecting or revising a rule, to avoid absurd results, in an implausible theory of meaning.[42] But we cannot reject or revise a rule until we have properly determined its meaning and scope; and these are not dictated by the literal sense of the text, abstracted from its legal and constitutional context.

Schauer points to what he considers a widespread confusion between "what a rule indicates and what a judge ought to *do*": both Fuller and Dworkin are alleged to have conflated questions of the meaning of a rule and what should be done in the area of its under and over-inclusiveness. If the "notion of meaning collapses into what a decision-maker in a particular environment should do on a particular occasion", we have embraced an implausible particularist theory of meaning inconsistent with the nature of rules.[43] But Schauer paints too stark a picture here, treating as black and white what is really a matter of degree. Provided that a rule retains its ability to control a range of central cases, where its prescription is not defeated by conflicting considerations, it need not govern more doubtful cases when the reasons against its application are powerful. When we acknowledge the critical role of interpretation in setting the proper boundaries to rules, the supposed distinction between meaning and application disappears. A rule's meaning is coextensive with the propriety of its application to determine the result in a limited range of cases; beyond that range it offers no guidance, its terms (on correct understanding) being inapplicable in all the circumstances.

Fuller was right to insist that if a rule had a core of settled meaning, it had it in virtue of some understanding of its purpose: the central cases cannot be identified on the basis of the core meanings of the words alone.[44] Admittedly, Schauer is anxious to stress the contingent character of legal systems that grant interpretative latitude to judges. A more formalist system might require judges to apply the rules without regard for purpose: "Such an approach would reflect a decision to prefer the occasional wrong or even preposterous result to a regime in which judges were empowered to search for purpose or preposterousness, for it might be that such empowerment was thought to present a risk of error

[42] *Ibid.*, p. 59.
[43] *Ibid.*, pp. 209–215.
[44] Lon L. Fuller, "Positivism and Fidelity to Law—A Reply to Professor Hart" 71 Harv. L.R. 630 (1958).

or variance of decision even more harmful than the tolerance of occasional absurd results''.[45] Within a common law legal system, wherein judges are expected to limit unintended violations of freedom and personal security, however, the virtues of formalism are not normally highly prized, at least at the level of the superior courts. The balance between rule-formalism and contextual interpretation is itself something that such courts possess constitutional authority to determine.[46]

The cogency of Schauer's critique of positivism, as a description of Anglo-American legal systems, does not depend (as he seems to think) on his favoured account of *Riggs*. Noting the extent to which such values as predictability and certainty are regularly sacrificed to the goal of reaching the best answer, in the light of all morally relevant considerations, he describes the result as one of ''presumptive positivism''.[47] The rules have presumptive force only, giving way in the face of strong countervailing reasons: the ''most locally applicable and pedigreed rule'' will be tested in every case against a larger set of considerations which will override it when sufficiently powerful. That account explains ''not only why Riggs's grandson did not inherit, but also why a host of almost but not quite as unworthy beneficiaries *do* inherit''.[48] If, however, the ''rule'' is properly ''overridden'' under certain circumstances, as a matter of law, correctly understood, it is by the same token inapplicable in the relevant cases: its scope is curtailed by moral or social considerations that enjoy a legitimate constitutional status.

It does not matter, for any practical purpose, whether we regard the Statute of Wills as rendered inapplicable by overriding common law principle or whether we treat the statute as containing, on its true construction, an implied exception to its literal terms. These are only alternative formulations of what is, substantively, the same interpretative conclusion: if, indeed, there is an implied exception to the literal text of the statute, it exists in virtue of the common law principles that guide our interpretative efforts. Such principles are part of the wider legislative context that our ideal legislator assumes; they are the taken-for-granted background of any purposive measure that, once enacted, must take its place within

[45] Schauer, *Playing by the Rules*, p. 214.

[46] Andrei Marmor argues, like Schauer, that Fuller's work addressed the normative question of whether a rule should be applied in particular circumstances, rather than ''the question of what following a rule consists in (which interested Hart)''. The latter question is a matter of adherence to the rule's meaning, as determined by a grasp of the standard instances of the concept-words it employs. See Marmor, *Interpretation and Legal Theory*, ch. 7. If, however, courts must settle the boundaries of rules, they are part authors of them; and if those boundaries are set by reference to moral criteria, the separation between law as it is and law as it ought to be is in practice blurred (as Fuller maintained).

[47] *Playing by the Rules*, pp. 196–206.

[48] *Ibid*., p. 203.

the general body of law. We cannot determine what the statute truly enacts, as opposed to the literal meaning of the text, without undertaking the task of constitutional judgment that legal interpretation entails.[49]

A careful reading of the judgments shows that the court drew no distinction between application and meaning, rightly regarding them as alternative descriptions of the same legal issue. The propriety of the court's conclusion was affirmed by appeal to legislative intention, showing that there was no repudiation of the statute's authority, correctly conceived: "It is a familiar canon of construction that a thing which is within the intention of the makers of a statute is as much within the statute as if it were within the letter; and a thing which is within the letter of the statute is not within the statute, unless it be within the intention of the makers".[50] The distinction between application and interpretation would only assume importance if there were grounds for thinking that the court's reading contradicted the "intention of the makers"; but the stronger our assurance that we do not flout the legislative scheme or purpose, fairly interpreted, the better the case for maintaining that, on its true construction, the statute does not generate the result we think abhorrent.[51]

Dworkin's analysis of *Riggs* v. *Palmer* in *Law's Empire* correctly relied on both limbs of the judgment—in so far as it makes sense to separate them—and the view that he has since abandoned that analysis in favour of a new intentionalist stance, downgrading the constitutional role of the common law, is not persuasive.[52] Dworkin's earlier discussion did not deny the relevance of legislative intention, properly understood: it denied only that such intention could be equated with the states of mind (whether factual or counterfactual) of particular legislators. The court's appeal to legislative intention is cited in support of Dworkin's own distinction between the literal text and the "real" statute awaiting construction; and although the notion of "makers' intention" awaits the

[49] Charles Silver has argued that since Earl J. "admitted that the plain language of the statute" entitled the beneficiary to inherit his grandfather's estate, the question at issue was "whether equitable principles could temper the application of the statute": "Elmer's Case: A Legal Positivist Replies to Dworkin" (1987) 6 *Law and Philosophy* 381, at pp. 383–385. If, however, the statutory provision is legitimately disapplied in such cases, on the most persuasive account of the applicable law, there is a perfectly good sense in which we can say that the "plain language", taken literally, is an inaccurate (or at least incomplete) guide to the true meaning of the rule.

[50] 22 N.E. 188, at p. 189.

[51] Does a statute of wills provide for a beneficiary to enjoy a bequest procured by deception or blackmail if its provisions are silent on such matters? *Ibid.*, p. 190.

[52] Jeffrey Goldsworthy makes this assertion: see Goldsworthy, "Dworkin as an Originalist" (2000) 17 *Constitutional Commentary* 49, at pp. 68–69. Schauer makes a similar complaint, relying on the highly dubious distinction between "extra-textual" and "contra-textual" interpretation: see Schauer, "Constitutional Invocations", above.

explanation Dworkin provides, it is made quite clear that Earl J. was at least broadly on the right track. The judge made no appeal to any empirically identifiable expectation or opinion, even if (as Dworkin suggests) he envisaged a problematic counterfactual intention.[53]

Fidelity to the statutory command is, accordingly, a complex ideal; it involves the exercise of moral judgment as much as sensitivity to the nuances of language. Our reconstruction must respect the legislative intention in the critical sense that it should be *consistent* with the text, correctly understood; and the majority decision in *Riggs* met that requirement. The majority in *Riggs* were right "in holding that, according to the better interpretative reconstruction, those who created the Statute of Wills did not intend to say something that allowed a murderer to inherit from his victim".[54] There was, in other words, no need to override or repudiate instructions authoritatively given: the text could be read in the light of common law principle, and departures from its literal meaning accepted, without violating legislative supremacy. If there had been any threat to legislative supremacy—a genuine issue of legal authority—the decision would, presumably, have gone the other way.

Interpretation and Authority

The implications of Schauer's analysis for the doctrine of legislative supremacy have been noted with consternation by Jeffrey Goldsworthy.[55] In his view, Schauer's account of *Riggs* is not only inconsistent with the court's explanation of the decision, but objectionable for constitutional reasons. The principle of legislative supremacy means (according to Goldsworthy) that statutes are not subordinate to judge-made common law principles: in the event of inconsistency between them, the common law must always give way to the statutory command. If judges could override or amend the Statute of Wills, to give effect to common law values, they must have power to treat other statutes in a similar manner; the result is a form of judicial supremacy inconsistent with accepted constitutional law. It is acknowledged that the literal application of statutes is often inappropriate, literal meanings giving way to the protection of certain values, intentions or purposes; but

[53] *Law's Empire*, p. 19.
[54] Dworkin, "Does the Constitution Deserve our Fidelity? Reflections on Fidelity" (1997) 65 Fordham L. Rev. 1799, at p. 1816.
[55] Jeffrey Goldsworthy, "Legislative Intentions, Legislative Supremacy, and Legal Positivism", in Goldsworthy and Campbell (eds.), *Legal Interpretation in Democratic States*, pp. 57–58.

Goldsworthy supposes that a positivist account of the constitutional position can nonetheless survive:

> If these are the actual or presumed values, intentions or purposes of the legislature, then legislative supremacy over statutes is preserved. The judicial role is that of an agent striving to interpret and apply statutes equitably, so as better to serve the legislature's values, intentions and purposes. If, instead, the judiciary can change or override the literal meanings of statutes to make them consistent with its own values, intentions or purposes, then it has effective supremacy over statutes.[56]

If Goldsworthy's analysis is easier to reconcile with constitutional doctrine, however, it also reveals the doctrine's malleability; for the choice between different characterisations of *Riggs* (I have argued) is ultimately arbitrary, its correctness and constitutional legitimacy being unchallenged. Although, formally, *Riggs* can be squared with the doctrine of legislative supremacy, by a suitable descriptive explanation, in *substance* the meaning and application of a statutory text were heavily dependent on judicial evaluation, coloured by common law principle. In the result, Goldsworthy's distinction between legislative and judicial supremacy looks rather less persuasive. His distinction between the values, intentions or purposes of the legislature and those of the judiciary has largely dissolved in the effort to interpret the statute in conformity with common sense. Our ideal legislator, whose values, intentions and purposes are shared by a majority of actual legislators, so far as one can fairly conclude, is also faithful to the values, intentions and purposes of the judges, in so far as they enjoy a constitutional status reflected in the common law.

We can affirm the consistency of the court's interpretative conclusions with legislative supremacy when we are confident that its decision elaborates—rather than frustrates—the statutory scheme. When we make the proper assumption that legislators act reasonably for the public good, seeking equitable solutions to complex problems, we can engage them—or at least our ideal legislator—in imaginary dialogue, anticipating possible objections and pondering our ability to meet them. We will attribute to our interlocutors the same sensitivity to powerful arguments of legal and political principle that we ascribe to anyone else we engage in (actual) moral debate. In that way, interpretation is duly collaborative: exceptions and qualifications are made to the literal meaning of the text on the reasonable assumption that they would have elicited its authors' general approval.

[56] *Ibid.*, p. 66.

Dworkin no doubt goes too far in saying, in the context of *Riggs*, that it is "a perfectly familiar speech practice not to include, even in quite specific instructions, all the qualifications one would accept or insist on: all the qualifications ... that 'go without saying' ".[57] The results of our imaginary dialogue will rarely be quite so plain. We may only think that our qualification of the literal text would have commanded the legislators' assent (if the dialogue were real) after protracted debate and reflection (and that a minority of legislators might well have remained unpersuaded). But our "interpretative reconstruction" would be no less legitimate; for we have no alternative to accepting the logic of our own considered convictions, combined with our trust in the good faith and reasonableness of the legislative majority. Our reconstruction becomes illegitimate only when our qualifications of the literal text begin substantially to undermine the objects or purposes we understand the statute to further; and even then the degree to which those purposes may be curtailed, without impropriety, will depend on the importance of the countervailing considerations of public good or political morality we believe to be widely recognised (by members of the legislature as much as by other citizens).

There is no clear-cut distinction, either in theory or in practice, between elaboration of the statutory scheme to meet unforeseen events, on the one hand, and its curtailment or qualification to forestall unwanted consequences, on the other. It is always a matter of political judgment how far the literal sense of a provision may be qualified, in the interests of justice, without abdicating responsibility for implementing the statute. The graver the threat to principles of political morality, widely acknowledged or embedded in the general law, the more appropriate is a restrictive reading of the statutory provision: it is a legitimate inference that such a reading would command widespread assent. If the decision in *Riggs* was indeed defensible, as Goldsworthy seems to accept, legislative supremacy is plainly a gentler, more accommodating discipline than he acknowledges. It permits a construction of statutes in conformity with fundamental common law principles unless, on the most reasonable view, the result would encroach *too far* on the legislative intention that the text most naturally reveals—a judgment of context and degree that the Act itself cannot control. Legislative supremacy is therefore a largely *formal* principle, satisfied by the conscientious effort to give *appropriate* effect to the statutory purposes, having regard to the strength of any countervailing reasons that apply in the circumstances arising.

[57] Dworkin, "Reflections on Fidelity", p. 1816.

The true meaning and effect of any provision is the product of constitutional dialogue between the court and our ideal legislator; and the legitimacy of the interpretation, in any particular case, depends on the strength of the reasons offered to support it. Where there are powerful reasons for adopting a restrictive reading of a statutory provision—to forestall a result repugnant to fundamental constitutional values—a narrow construction may be fully justified. In some cases, legislative supremacy is (formally) consistent with an interpretation that sharply curtails the literal (or ordinary) sense of a statutory rule. It follows, however, that legislative authority cannot escape the confines of the wider moral and political discourse which (in a liberal democracy) provides its context and governs its reception. Authority is tamed by reason—common law reason—because the intelligibility and effectiveness of its injunctions alike depend on continued co-operation and shared understanding between officials from the different branches of government.

In that sense, even a sovereign legislature is confined by settled understandings of the larger constitution from which its sovereignty is ultimately derived. It is finally subject to the rule of law because it can change existing legal rules only by participating, through accepted modes of law-making, in the dialogue that seeks to *persuade* other citizens and officials of the need for change. The more deeply embedded the legal principles affected by new legislation, the harder it will be to find words capable of authorising (what the interpreter considers) serious constitutional damage. The words depend on their context; and the context is always larger than the immediate objectives of those in temporary charge of the legislative machinery, however well-intentioned their ambitions. Linguistic resources are ultimately circumscribed by our bedrock assumptions or convictions about the nature of (British) liberal democracy and the ideals of human dignity and personal autonomy on which it rests.[58]

A statute that, on its face, permits a government minister to perform a quintessentially judicial function—determining the minimum sentence of a convicted offender—must be read subject to the qualification that the minister should act judicially. He cannot be allowed to bow to "public clamour", induced by a notorious crime, or retrospectively to increase a "tariff" sentence, because such behaviour violates the rule of law unacceptably.[59] It is true that such decisions may appear to challenge Parliament's deliberate

[58] It is only in the (extreme) case of a statute starkly repudiating the rule of law (*e.g.*, *ad hominem* legislation) that it would be necessary to deny it all legal validity: see Allan, *Constitutional Justice*, chs. 7 and 8.

[59] See *R.* v. *Secretary of State for the Home Department, ex p. Venables* [1998] A.C. 407 and *R.* v. *Secretary of State for the Home Department, ex p. Pierson* [1998] A.C. 539.

choice to place the release of murderers within the Home Secretary's discretion; but Parliament cannot authorise what would in practice amount to abuses of such discretion. The "plain language" of the Act, though better reflecting the more immediate (or obvious) legislative purpose, must give way to a more nuanced (if less obvious) reading, more faithful to fundamental constitutional values.[60] The courts' refusal to accept the more obvious meaning of privative clauses, purporting to exclude judicial review of administrative action, provides another familiar illustration. The true meaning of such a clause depends not only on a systematic construction of the statute in which it appears, but also on the theory of the rule of law within which (and subject to which) such a statute obtains its normative force.[61]

The right to a fair criminal trial is absolute: the rule of law cannot countenance the state's prosecution of unfair proceedings against the accused. Legislation affecting the conduct of the trial, including the admissibility of evidence, must therefore be understood as intended to clarify the requirements of fairness, whether by reinforcing safeguards against wrongful conviction or, alternatively, defining the acceptable boundaries of those safeguards in the context of competing interests (such as the protection of other witnesses from unjustified humiliation and distress). No interpretation of a statute that *jeopardised* the right to a fair trial, on a conscientious assessment of the minimum content of that right, could be properly defended as a faithful reading. It would be a constitutional solecism—a denial of the good faith in which all are understood to serve the polity as a basic order of justice—to treat a provision as intended to impair a fundamental right critical to the preservation of the rule of law.

Confronted by a provision that threatened to undermine the right to a fair trial, the House of Lords in *R* v. *A* was willing to subordinate semantic constraints, so far as was necessary, to considerations of justice, according to the insistent demands of the particular case.[62] The Youth Justice and Criminal Evidence Act 1999, section 41 excluded evidence of sexual behaviour of the complainant, in a trial for a sexual offence, where the pertinent

[60] See especially *Pierson*, p. 587: Parliament "legislates for a European liberal democracy founded on the principles and traditions of the common law" (Lord Steyn). For further analysis, see Allan, *Constitutional Justice*, pp. 142–148. It follows that the House of Lords' decision in *R. (Anderson)* v. *Secretary of State for the Home Department* [2002] UKHL 46, [2003] 1 A.C. 837 is open to question: there were good (common law) legal grounds for requiring the minister to accept judicial advice on the appropriate tariff, reinforced (or confirmed) by the Human Rights Act, s. 3.

[61] See *Anisminic Ltd.* v. *Foreign Compensation Commission* [1969] 2 A.C. 147; Allan, *Constitutional Justice*, pp. 210–213.

[62] *R* v. *A (Sexual Offence: Complainant's Sexual History)* [2001] UKHL 25, [2002] 1 A.C. 45.

issue was one of consent, unless the behaviour was contemporaneous with the alleged offence or "so similar" to the complainant's conduct at the time of the alleged offence that the similarity could not "reasonably be explained as a coincidence". Since evidence of previous sexual relations between complainant and defendant would sometimes be relevant, and its exclusion therefore unfair, such evidence was held to be admissible without proof of "some rare or bizarre conduct": the trial judge must decide whether a sufficiently significant similarity existed in the circumstances of the case.[63]

A robust approach to a rather narrowly technical provision thereby achieved an appropriate reconciliation between opposing, but legitimate, interests of complainant and defendant. Lord Steyn explained that it was "realistic to proceed on the basis that the legislature would not, if alerted to the problem, have wished to deny the right to an accused to put forward a full and complete defence by advancing truly probative material".[64] On the one hand, the statute must be interpreted so as to suppress the "mischief" that had provoked its enactment. Evidence of the previous sexual experience of rape victims was not be to adduced, as it had been in the past, when its relevance to questions of consent or credibility was, on proper analysis, very weak. On the other hand, evidence of a sexual relationship between complainant and accused, where it was truly relevant in all the circumstances, must be permitted notwithstanding the apparently restrictive statutory conditions. Accordingly, the test of admissibility was held to be whether the evidence, although *prima facie* excluded, was "nevertheless so relevant to the issue of consent that to exclude it would endanger the fairness of the trial . . .".[65]

Doubting that "ordinary methods of purposive construction" enabled them to achieve this result, the judges invoked the obligation imposed by the Human Rights Act 1998, section 3, to interpret statutes (where "possible") in a manner compatible with European Convention rights. It was therefore permissible to adopt a linguistically "strained" interpretation in order to reconcile the 1999 Act with Article 6 of the Convention, guaranteeing the right to a fair trial. Since the Human Rights Act does not purport to curtail parliamentary sovereignty, however, the case remains a

[63] *Ibid.* [135]–[137] (Lord Clyde). Similar conduct could be admitted, in a suitable case, on the basis that it demonstrated the complainant's affection for the defendant: [163] (Lord Hutton). Whether or not a similarity is "coincidental" depends on the specific context in point. Compare the dependence of a judgment that circumstances are "exceptional" on the legislative context and underlying rationale: see *R.* v. *Offen* [2001] 1 W.L.R. 253.

[64] *Ibid.*, [45].

[65] *Ibid.*, [46].

perfect example of the constructive dialogue that intelligent interpretation, sensitive to constitutional principle, always entails. Although semantic considerations place genuine constraints on what is acceptable, they are rarely decisive. In practice, almost anything is "possible" when the requirements of justice are sufficiently pressing; and, properly understood, the common law reaches precisely the same conclusion.

Lord Hope, admittedly, observed that the Human Rights Act prescribed only a rule of interpretation, which did "not entitle the judges to act as legislators"; and he denied that it was permissible simply to read into section 41 of the 1999 Act a provision allowing evidence required to ensure a fair trial under Article 6. The "entire structure" of the Act contradicted such an idea: "The whole point of the section, as was made clear during the debates in Parliament, was to address the mischief which was thought to have arisen due to the width of the discretion which had previously been given to the trial judge".[66] But the distinction between legislation and interpretation is ultimately a matter of degree, as Lord Hope's acquiescence in the court's agreed conclusion confirms. He stressed the need for a precise identification of the statutory words that were being construed so as to comply with Article 6; but he was nonetheless willing to leave the task of construction to the trial judge in the light of the specific facts of the particular case, in accordance with the test (entailing the inclusionary discretion) that Lord Steyn provided.

The distinction between legislation and interpretation is neither plain nor value-free, for it presupposes a view about the statute's true meaning which (as I have argued) entails a judgment of political morality. For Fuller, the statute's structural integrity provided a framework for the judge's creative interpretative role; but that structure (we can infer) is as much a function of the institutional and constitutional context as the product of any canonical form of words. The contrast between approaches—Lord Hope's adherence to the semantic "niceties" that Lord Steyn forsook[67]—was more apparent than real; when the facts of the case sufficiently demanded it, the words would prove compliant. An appropriately "constitutional" meaning displaced a more "purposive" construction which, though reflecting the legislative intention, narrowly conceived, would violate rights that Parliament—on the most persuasive view—had not sought to abrogate. However draconian the text, on its most natural reading, the trial judge must be allowed sufficient freedom to apply the

[66] *Ibid.*, [109].
[67] *Ibid.*, [45].

statute equitably, granting the protection for witnesses provided for up to, and no further than, the point that the defendant's right to a fair trial starts to be infringed. The judge's inclusionary discretion is an integral part of the defendant's right: it is, therefore, part of the constitutional landscape in which Parliament must be understood to build.

Conclusion

I have argued that a statute's true meaning is as much the product of legal and moral judgment as of rules of semantics and syntax; and its authority is grounded in the reasons that best explain and qualify the text enacted. Those reasons include the general intentions and purposes of the statute's authors, insofar as these are fairly embodied within its text, viewed within the pertinent social and political context. But they also encompass the reasons we have for curtailment or qualification of those general purposes when, under certain conditions, such considerations are powerful. The doctrine of legislative supremacy gives the last word to Parliament, then, only in a purely formal (and somewhat misleading) sense; even the "last word" must be interpreted in accordance with those precepts of the rule of law that distinguish constitutionalism from dictatorship or populism. For questions about the content and character of legal doctrine concerning the scope of legislative power arise, in practice, only in the light of the general constitutional scheme that such power is understood to further and reflect.

Notions of absolute sovereignty ignore or contradict our experience of common law adjudication, with its rich admixture of legal analysis and moral judgment. In practice, a largely formal doctrine is squared with an evolving constitutionalism by appropriate interpretative creativity, allowing a genuine but critical engagement between the legislative will and judicial evaluation. The choice between legislative and judicial supremacy, which we are supposedly confronted with, is arbitrary on close inspection because the antithesis entailed is false. When we perceive that legislative intention is properly the "intention of the statute", rather than the desires or expectations of certain officials,[68] we can acknowledge the inescapably creative judicial role while rejecting charges of constitutional heresy or revolutionary zeal. For there is no genuine question here of a tussle between legislative power and judicial

[68] See Fuller, *The Morality of Law*, p. 87.

aggrandisement: ''When issue is joined in these terms the whole problem is misconceived''.[69]

Blackstone's careful distinction between a statute's ''main object'' and its merely ''collateral'' consequences has important implications for the character of the doctrine of parliamentary sovereignty he defended. Since the judges were to construe an Act so as to suppress the ''mischief'' in view and advance the ''remedy'' provided, what was not, on proper analysis, ''within the mischief'' was not ''within the remedy''.[70] Judicial interpretation must be informed by the reason and justice of the common law, which would help to identify those ''absurd consequences, manifestly contrary to common reason'' in respect of which an Act was, in substance, ''void''. We recognise a merely ''collateral'' consequence, of course, by perceiving its absurdity; so our account of the statute's true meaning, and hence the nature and scope of the duties it prescribes, depends on the considerations of policy and principle we invoke in our efforts to make sense of the statutory scheme. If, in formal mode, we acknowledge Parliament's unqualified supremacy, its power to alter the common law is still constrained by the limits of our capacity to determine its intentions. Perhaps Parliament might (under certain conditions) authorise a man to act as judge in his own cause; but we have to be able to ''conceive it possible'' that such a thing was really envisaged before acceding to an interpretation that had that consequence.[71]

Just as it was scarcely conceivable that Parliament would actually make a man judge in his own cause, so it seemed ''inconceivable'' that the New York Statute of Wills truly contemplated a murderer inheriting his victim's estate.[72] A conclusion apparently so ''unreasonable'' that it would constitute a ''reproach'' to the state's jurisprudence and an ''offence against public policy'' will be steadily avoided in the absence of very powerful countervailing arguments.[73] In defending the propriety of ''equitable'' construction of statutes, Earl J. undertook, in effect, the kind of imaginary dialogue with the ideal or representative law-maker I have advocated. He cited Bacon's Abridgement, according to which we must suppose the lawmaker present and ask him

[69] *Ibid.*
[70] Sir William Blackstone, *Commentaries on the Laws of England*, vol. 1, pp. 87–88.
[71] *Ibid.*, p. 91. Compare Coke's judgment in *Dr. Bonham's Case* (1610) 8 Co. Rep. 107, 118a, affirming that Acts infringing ''common right and reason'' were void at common law. It could be safely assumed that the authors of statutes made ''against law and right'' would not truly intend their apparent consequences.
[72] 22 N. E. 188, at p. 190.
[73] Although he doubted the legitimacy of an equitable construction, Gray J. (dissenting) also denied that ''public policy'' required it: the testator's wishes might be frustrated and the court was imposing a further penalty on the offender.

whether he intended to comprehend the case that has arisen: "Then you must give yourself such answer, as you imagine he, being an upright and reasonable man, would have given".[74] A reasonable man, of course, would deprecate encroachments on settled principles or existing rights unnecessary or disproportionate to the immediate end in view.[75]

The defence of absolute parliamentary sovereignty is undermined by its adherents' failure to notice the subtleties of its characteristic portrayal in the principal writings of the common law tradition. Dependent on the purely formal notion of the "rule of recognition", the counterpart constitutional doctrine is likewise merely formal.[76] In practical application, a statute's authority is circumscribed by the intentions reasonably *attributed* to Parliament, which reflect the moral and constitutional assumptions that inform our grasp of the enactment's meaning. Legal obligations are not, then, merely matters of fact;[77] nor are statutory injunctions equivalent to their literal or even intended meanings. Legal obligations are the product of reasoned judgment in all the circumstances, wherein literal and intended meanings are pertinent but not conclusive.

Jeffrey Goldsworthy's demand for evidence of the practice of judicial invalidation of statutes misses its target;[78] for it takes for granted a distinction between (legitimate) restrictive interpretation and (illegitimate) "disobedience" which I am calling into question. If a statute's true meaning is, in part, judicially constructed, its power to do serious damage to the rule of law (on a literal reading of its provisions) is implicitly curtailed. When we examine specific cases that exhibit a reconciliation between competing constitutional imperatives, the banality of the question concerning the correct formulation of the rule of recognition is made apparent. The various decisions can only be applauded or condemned by recourse to the reasons of policy and principle that inspired them, and our assessment of their strength. The distinction between obedience and disobedience to an unjust "law" depends on interpretative judgments that defy the clear separation between legal and moral reasoning on which a positivist analysis depends.

[74] Matthew Bacon, *A New Abridgement of the Law*, 7th ed. (London, 1832), vol. 7, p. 459.
[75] The court's proper reluctance to give statutes a meaning that does violence to fundamental principle is surely the key to making sense of the dialectic between reason and sovereign will at the heart of common law theory. See further Mark D. Walters, "Common Law, Reason, and Sovereign Will" (2003) 53 U.T.L.J. 65. See also Walters, "St. German on Reason and Parliamentary Sovereignty" [2003] C.L.J. 335.
[76] For general discussion, see Jeffrey Goldsworthy, *The Sovereignty of Parliament*, ch. 10; Allan, *Constitutional Justice*, ch. 7.
[77] Jeffrey Goldsworthy, "Homogenizing Constitutions" (2003) 23 O.J.L.S. 483, at p. 492.
[78] *Ibid.*, pp. 497–502.

If there exists an official consensus that affirms the content of the British rule of recognition, it confirms at the same time the practical irrelevance of positivist legal theory.[79] For there is no consensus on the limits of interpretative creativity; nor would any such consensus—detached from the specific questions of meaning raised by particular statutes—have any genuine content or make any genuine sense.[80] A doctrine of absolute sovereignty can no more give helpful answers to complex issues of statutory authority, when these arise in practice, than appeals to "speaker's meaning" can settle contentious questions of legal interpretation. When a system of law is fully open to the demands of reason, it resists categorical or final answers to abstract questions of meaning, interpretation or authority: for these questions are too closely connected to be treated separately; and their solution must be sought within the practical context in view, both immediate and (so far as seems reasonable) more fundamental and enduring.

[79] See Goldsworthy, *The Sovereignty of Parliament*, pp. 250–259. No such alleged consensus would be likely to survive under the pressure of serious abuses of power, widely recognised as such: see Lord Woolf of Barnes, "*Droit Public*—English Style" [1995] P.L. 57, at pp. 67–69; Sir John Laws, "Law and Democracy" [1995] P.L. 72, at pp. 84–92.

[80] For the perplexities involved in seeking clear doctrinal answers to general questions of interpretative authority under the Human Rights Act 1998, based on doubtful conceptions of statutory meaning, see Geoffrey Marshall, "The Lynchpin of Parliamentary Intention: Lost, Stolen, or Strained?" [2003] P.L. 236. Marshall's objection to the idea that section 3 introduces a new interpretative regime quite distinct from the ordinary purposive and contextual one is valid; but his view of contextual interpretation is unduly narrow: the true meaning of a provision is the one that best reflects the statutory purpose, interpreted (as far as good faith and practicality allow) consistently with the European Convention rights now acknowledged as having strong presumptive force.