

An Interpretivist Theory of the Principle of Legality

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## Declaration

I, Conor Crummey, confirm that the work presented in this thesis is my own.

Where information has been derived from other sources, I confirm that this has been indicated in the thesis.

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## Abstract

In this thesis, I develop a theory of the ‘principle of legality’, the method of statutory interpretation used by judges of UK courts where fundamental common law rights and principles are at issue. While both judges and public law theorists have engaged with this method of interpretation at length, I identify a number of important questions about it that remain unanswered. In order to develop answers to these questions, I first argue that any theory of statutory interpretation must be premised on a broader theory of general jurisprudence, that is, a theory about the nature of legal rights and obligations. I endorse a non-positivist account of legal obligations, wherein such obligations are viewed as genuine moral obligations. In particular, I argue that Ronald Dworkin’s theory of ‘law as integrity’ makes the best sense of the principle of legality. On this view, the correct interpretation of a statute is determined by principles of political morality. When judges employ the principle of legality, they are engaged in first order moral questions about the obligations that obtain in virtue of the statute’s enactment. This view, I argue, does a better job of accounting for key aspects of the practice than other theories, in particular those that view the principle of legality as a method of working out the intentions of the legislature. I show that a non-positivist theory of the principle of legality leads us to better answers to the outstanding questions identified at the beginning of the thesis.

## Impact Statement

It is difficult to understate the importance of the principle of legality in the contemporary constitutional landscape of the UK. This method of interpretation is used by judges to interpret statutes in cases involving ‘common law rights’: that body of domestic law originating in UK courts and developed by the judiciary over centuries. In light of contemporary political developments, the adjudication of common law rights has taken on renewed significance, and the need for a coherent theory to guide the application of the principle of legality has become pressing.

In recent years, successive governments have proposed either the repeal or amendment of the Human Rights Act 1998 (HRA). Legislation currently before Parliament amends the HRA to restrict the claims that can be brought against members of the British armed forces for human rights violations committed abroad, and a review of the HRA is planned by the current government. Since 2014 the UK’s withdrawal from the European Convention on Human Rights (ECHR) has also been discussed, and the UK’s exit from the EU will be complete on 31 December 2020. It is possible that in the next few years, the avenues for rights protection through law in the UK will be significantly reduced.

Against this background, judges and academics have, in recent times, given renewed attention to common law rights. The principle of legality is the method of interpretation by which judges determine the legally correct reading of a statute in cases where common law rights are in play. Application of this principle, however, has been inconsistent. The common law has developed in

a piecemeal fashion, and the content of common law rights is less clear than those enumerated in the ECHR and incorporated by the HRA. The definition and scope of such rights remains a controversial and unresolved question. The question of whether the principle of legality can be used to protect such rights *at all* is an open and unresolved one.

This thesis will take forward contemporary scholarly debate on the principle of legality, by offering a theoretical account of the practice. The philosophical inquiry undertaken in the proposed project holds out the promise of guiding judges in a more principled enforcement of domestic rights. It will also, crucially, contribute to and take forward theoretical understanding of the main principles of the UK constitution: parliamentary sovereignty, the rule of law and the separation of powers.

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A PhD can seem an all-encompassing thing, one that totally defines the period of one's life in which it was written. I am lucky that this hasn't been the case. When I think of the last 4 and something years, I think mainly of my great fortune in meeting Sophie Walsh and sharing countless adventures with her. Her love and support made possible this work and much more besides.

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## Thesis Introduction

*'Statutes often go into considerable detail, but even so allowance must be made for the fact that they are not enacted in a vacuum. A great deal inevitably remains unsaid... One function of the word "presumption" in the context of statutory interpretation is to state the result of this legislative reliance (real or assumed) on firmly established legal principles. There is a "presumption" that mens rea is required in the case of statutory crimes, and a "presumption" that statutory powers must be exercised reasonably. These presumptions apply although there is no question of linguistic ambiguity in the statutory wording under construction, and they may be described as "presumptions of general application"... These presumptions of general application not only supplement 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. They operate here as constitutional principles which are not easily displaced by a statutory text...'*<sup>1</sup>

### 1. Background and Research Questions

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<sup>1</sup> John Bell and George Engle, *Cross on Statutory Interpretation* (3<sup>rd</sup> edn, OUP 1976) 142-143. This was cited by Lord Steyn in *R v Secretary of State for the Home Department, ex p Pierson* [1998] AC 539, the first case to use the phrase 'principle of legality'.

In recent years, the method of statutory construction known as the ‘principle of legality’ has seen a resurgence in UK public law practice. According to this principle, judges must interpret statutory provisions consistently with common law rights and principles, unless the wording of the provision unambiguously empowers the executive to interfere with such principles. As the quoted extract from *Cross on Statutory Interpretation* indicates, similar interpretive mechanisms exist in other contexts too. *Cross* points to presumptions in criminal law. We might also add the requirement that domestic law be interpreted consistently, where possible, with international treaty requirements,<sup>2</sup> with the European Convention on Human Rights (‘ECHR’),<sup>3</sup> and with EU law.<sup>4</sup> Similar interpretive mechanisms also exist in other legal systems. EU courts, for example, are required to interpret national legislation consistently with unimplemented EU directives.<sup>5</sup>

After the enactment of the Human Rights Act 1998 (‘the HRA’), the principle of legality received less judicial attention, as more claims were brought under section 3 of the HRA, which requires judges to interpret statutory provisions, insofar as possible, consistently with the ECHR. In recent

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<sup>2</sup> The US courts have the same requirement in the ‘Charming Betsy canon’, set down in *Murray v The Schooner Charming Betsy* 6 US (2 Cranch) 64 (1804).

<sup>3</sup> Human Rights Act 1998, section 3.

<sup>4</sup> European Communities Act 1972, section 2(4); *R v Secretary of State for Transport, ex p Factortame (No 2)* [1991] 1 All ER 70. The 1972 Act has now been formally repealed by the European Union (Withdrawal) Act 2018, however the European Union (Withdrawal Agreement) Act 2020 provides that the relevant parts of the 1972 Act will continue to have effect for the duration of the ‘implementation period’.

<sup>5</sup> *Marleasing SA v La Comercial Internacional de Alimentacion SA* [1990] ECR 1–4135, Case C-106/89.

years, perhaps owing to the lingering political threat to the HRA,<sup>6</sup> judges have once again begun to employ the principle with more frequency, sometimes emphasising that the common law offers as much protection in a given context as the ECHR.<sup>7</sup> In this thesis, I do not examine the possible political or sociological causes of this move. Rather, I want to help contribute to the resolution of controversial legal and philosophical questions about the principle of legality.

The scope, nature, and legitimacy of the principle are matters of deep disagreement and uncertainty. The passage from *Cross on Statutory Interpretation* quoted at the beginning of this introduction points towards some of these puzzles and controversies. *Cross* speaks of ‘legislative reliance (real or assumed) on firmly established legal principles’, but what principles trigger legality’s use? How ‘firmly established’ need they be? What exactly are legal principles to begin with? The authors say that these presumptions ‘apply although there is no question of linguistic ambiguity in the statutory wording under construction’, pointing to the fact that these disagreements are not empirical disagreements about what wording a statute actually carries, but rather philosophical disagreements about the interpretation of those words and their impact on our legal obligations. They say that they ‘operate at a higher level as expressions of fundamental principles governing both civil liberties and the relations between Parliament, the executive and the courts’,

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<sup>6</sup> Richard Clayton, ‘The Empire Strikes Back: Common Law Rights and the Human Rights Act’ [2005] *Public Law* 3. See also Roger Masterman and Se-shauna Wheatle, ‘A Common Law Resurgence in Rights Protection?’ [2015] *European Human Rights Law Review* 57.

<sup>7</sup> See for example *Osborn v Parole Board* [2013] UKSC 61 [57].

but how do such principles operate in the UK's idiosyncratic constitution? What does it mean for principles to be 'fundamental' and how we distinguish these principles from other sorts of principles?

These are not just matters of abstract, theoretical concern. Such controversies are to be found throughout the cases in which the principle of legality is employed, and they have a real bearing on the correct resolutions of such cases. Judges disagree about how what rights trigger the principle's application, about how ambiguous statutory wording must be to permit the strike down of secondary legislation, and about what the legal consequences would be in a case where the legislature unambiguously sought to remove a fundamental common law right, such as the right to judicial review. If we cannot resolve these disagreements, we can at least attempt to understand their bases, and try to set out some guiding principles for how we might engage with them and avoid talking past each other.

In order to properly engage with these sorts of questions, we must also engage with a more abstract inquiry: how do we justify the principle of legality to begin with? Suppose we wish to know, for example, whether the principle should apply only where legislative wording is extremely vague or unclear. In other words, we want to know how 'clear and express' statutory wording must be in order to legally license the violation of specific rights. We can only answer that question by reflecting on what the principle of legality is for; what

its purpose is. In order to guide doctrinal development, we need an account of the normative underpinnings of the practice.<sup>8</sup>

The main claim of this thesis is that when judges employ the principle of legality, they are not making a ‘presumption’ in any real sense. Legality is not a means of discerning the intentions of Parliament. Rather, we should understand talk of a ‘presumption’ about such intentions as shorthand for a much more complex process of moral reasoning. Judicial use of this method of interpretation is entirely justified, I argue, once we recognise this process of moral reasoning for what it is.

## **2. The Relationship Between Theories of Public Law and General Jurisprudence**

How do we tell whether a method of interpretation is justifiable? This depends, in part, on a broader question: what *is* a method of statutory interpretation? I hope it will be uncontroversial to say that I take a method of statutory interpretation to be a method for figuring out what contribution a statute makes to the law. Any statute seeks to effect some change in our legal rights and obligations. The legal rights and obligations that obtain for us in virtue of a statute’s enactment are what I mean by a statute’s ‘contribution to the law’.<sup>9</sup> A

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<sup>8</sup> Jason Varuhas, ‘Taxonomy and Public Law’ in Mark Elliott, Jason Varuhas and Shona Wilson Stark (eds) *The Unity of Public Law? Doctrinal, Theoretical, and Comparative Perspectives* (Hart Publishing 2018) 49.

<sup>9</sup> The phrase is from Mark Greenberg, ‘Legislation as Communication? Legal Interpretation and the Study of Linguistic Communication’ in Andrei Marmor and Scott Soames (eds) *Philosophical Foundations of Language in the Law* (OUP 2011). I make no claim at this point about whether legal rights and

method of interpretation is justified, then, if it helps judges accurately tell us what our legal rights and obligations are. The principle of legality is no different. It is justifiable as a method of interpretation if its application accurately tells judges what the law is.

This is not as simple as it might sound. The nature of legal rights and obligations themselves is a matter of deep philosophical dispute. Saying that a method of interpretation should tell us what *the* law is requires that we have a sense of what *law* is. It follows that in order to tell whether and how the principle of legality is justified, we must engage with questions about the nature of law. We must have some explanation of how the actions of legal institutions like Parliament and the courts result in legal obligations on the part of the citizenry. Once we have such a theory, we can then ask whether a given method of interpretation does a good job of telling us what those obligations are. For example, if legal obligations are genuine moral obligations, and what legal obligations we have depends on principles of justice found in the common law, then a method of statutory interpretation will likely need to include moral reasoning of one sort or another.

The justification for using this or that method of interpretation, then, is dependent on a theory of general jurisprudence; a theory of what makes the content of the law what it is, or of how legal facts are determined. General jurisprudence is, to borrow Ronald Dworkin's phrase, the 'silent prologue' to adjudicative decisions, in public law as in all other branches of law.<sup>10</sup> Whether

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obligations are moral in character or not. That, plainly, would beg the question.

<sup>10</sup> Ronald Dworkin, *Law's Empire* (Hart Publishing 1986) 90.

legality is justifiable as an interpretive method is dependent on further questions at the level of general jurisprudence. If a method of figuring out what the law is proves to be inconsistent with theories about what *makes* the law what it is, then it is a bad theory of interpretation. The relationship is roughly equivalent to that between a method for working out difficult sums, and a theory of mathematics.<sup>11</sup>

In this thesis, I engage with just this sort of inquiry. I argue that a *non-positivist*, or *interpretivist* theory of general jurisprudence makes the best sense of the principle of legality, and can help to guide its application going forward.<sup>12</sup> According to the theory I put forward, legal obligations are genuine moral obligations. When judges invoke the principle of legality, they are trying to determine what obligations we hold in virtue of a statute's enactment by engaging in a complex process of moral reasoning.

By deploying an interpretivist theory of general jurisprudence to engage in a detailed analysis of a particular public law doctrine, I hope to contribute to

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<sup>11</sup> My thanks to Simon Palmer for the analogy. For the avoidance of doubt, my claim is not an empirical one. I do not claim that judges consciously engage with such questions in their cases. Most of us do not consciously engage with the fundamentals of mathematics when we do sums, but those forces determine the truth or falsity of our answers.

<sup>12</sup> Throughout, I refer interchangeably to 'interpretivist', 'anti-positivist' and 'non-positivist' theories of general jurisprudence. Some might object that it is a mistake to equate 'interpretivism' with the other two labels, because 'interpretivism' is associated specifically with the non-positivism of Ronald Dworkin, and one could have a non-positivist theory that is not Dworkinian. In the title of this thesis, I refer to an 'interpretivist' theory of the principle of legality, primarily because I prefer a label that does not define itself in opposition to other theories, as 'anti-positivism' and 'non-positivism' do. In Chapter 4, I try to clarify the nature of debates between these different versions of non-positivism. For now, nothing substantive should be seen to turn on my choice to equate interpretivism with anti-positivism and non-positivism.

and take forward recent developments in public law theory. In recent years, a rich tradition of scholarship has brought political philosophy to bear in analysing the theoretical foundations of UK public law. Martin Loughlin, for instance, as well as analysing the concepts of constituent power, sovereignty, rights and representation, has offered a unified theory of public law as the form of law that legitimises the modern State.<sup>13</sup> Nick Barber has built a theory of the fundamentals of constitutionalism on an Aristotelian account of the State as a particular kind of social group.<sup>14</sup> Trevor Allan, as well as engaging closely with the sort of interpretivist theory of general jurisprudence that I endorse in this thesis, has developed a rich conception of the common law based on a Hayekian understanding of liberty.<sup>15</sup>

While I hope that the theory that I develop here can be seen as part of this body of scholarship, the approach that I take differs slightly. First, while the theory that I endorse is partly a theory of political legitimacy, I focus primarily on bringing contemporary, analytical *legal* philosophy to bear on public law. The aforementioned theorists make great progress by engaging with the broader canon of political philosophy.<sup>16</sup> I focus on self-consciously using general jurisprudence to make sense of public law doctrines. I say that I ‘self-consciously’ use general jurisprudence because part of my claim is that

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<sup>13</sup> Martin Loughlin, *The Idea of Public Law* (OUP 2003); Martin Loughlin, *Foundations of Public Law* (OUP 2010).

<sup>14</sup> Nick Barber, *The Constitutional State* (OUP 2010); Nick Barber, *The Principles of Constitutionalism* (OUP 2018).

<sup>15</sup> TRS Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (OUP 2001); TRS Allan, *The Sovereignty of Law: Freedom, Constitution and Common Law* (OUP 2013).

<sup>16</sup> Allan, to be clear, also engages closely with the sorts of jurisprudential theories that I engage with here.

any theory of the principle of legality necessarily pre-supposes a theory of legal obligation. Many theories in public law, I show in Part II of the thesis, presuppose legal positivist theories that do not, on closer examination, support their claims. By paying closer attention to the connection between general jurisprudence and public law theory, I hope to make progress in the latter.

The theory that I use is an interpretivist, or non-positivist theory of general jurisprudence. The application of such a theory to UK public law is relatively rare, though not in itself novel. Theorists have successfully made use of interpretivism to argue that public lawyers must engage with legal and political philosophy,<sup>17</sup> and to develop rich accounts of constitutional law generally.<sup>18</sup> The main contribution that this thesis makes is in deploying such an interpretivist theory to give detailed analysis of a specific doctrine in public law. By giving sustained attention to the principle of legality through an interpretivist lens, I offer a more philosophically satisfactory account of this aspect of our public law practice than has heretofore been given in public law theory.

### 3. Overview of Chapters

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<sup>17</sup> Stuart Lakin, 'Debunking the Idea of Parliamentary Sovereignty: The Controlling Factor of Legality in the British Constitution' (2008) 28(4) *OJLS* 709.

<sup>18</sup> Allan, *Constitutional Justice* (n 15); Allan, *The Sovereignty of Law* (n 15); Dimitrios Kyritsis, *Where Our Protection Lies: Separation of Powers and Constitutional Review* (OUP 2017).

Part I of the thesis engages in a doctrinal analysis of the key cases on the principle of legality. From these cases, I extrapolate six key questions about the principle of legality. These questions, taken together, make up the research agenda for the rest of this thesis. They are:

1. Is legality simply a statutory presumption, or does it include a 'justificatory' aspect, such as a requirement that any interference with a common law right be necessary or proportionate?
2. Should we conceive of a broader conception of legality than either a statutory presumption or a justificatory standard? How clear does statutory language need to be in order to license interference with a right or principle?
3. What rights and principles trigger legality's application?
4. What is the relationship between the rights engaged and the language of the statute being interpreted?
5. Is legality a method that should be limited to the interpretation of statute, or might it apply to the interpretation of the prerogative as well?
6. Does a proper understanding of legality entail that judges can 'strike down' legislation in extreme circumstances?

In Part II, I consider the account of legality given by one influential account of statutory interpretation, which I call 'intentionalism'. According to this theory, the legal obligations that obtain in virtue of a statute's enactment

are determined by Parliament's intentions.<sup>19</sup> When judges invoke the principle of legality, on this view, they are engaged in the factual exercise of trying to work out what Parliament intended. They presume that Parliament did not intend to violate important rights and principles, however this presumption can be defeated by clear statutory language. At first glance, this account might seem to be supported by judicial language. Judges frequently speak of legality in terms of a 'presumption' about parliamentary intention. Nevertheless, I argue that this appearance is misleading, and that in fact intentionalism fails to explain key aspects of the practice.

In Chapter 2, I try to clarify precisely what it is that intentionalists claim. I argue that many of intentionalism's central claims are ambiguous or confused. Most seriously, they conflate a statute's 'linguistic meaning' (the communicative content of a statute) and its 'legal meaning' (the contribution that a statute makes to the law). Intentionalists assume without argument that these different forms of meaning are the same. In fact, they are very different, and further argument is needed to demonstrate any relationship between the two. Crucially, I argue that the sort of further argument that is required to rescue intentionalism as a coherent theory of a statute's *legal* meaning must be made at the level of general jurisprudence. If intentionalism is to function

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<sup>19</sup> I speak throughout this thesis of the 'determination' of legal obligations, as well as of 'law-determining' actions or practices. I follow Mark Greenberg in using this phrase to refer to practices that 'in part determine the content of the law'. Mark Greenberg, 'How Facts Make Law' (2004) 10 *Legal Theory* 157. In other words, it refers to the political actions that make the law what it is. This includes the enactment of statutes, executive action taken under secondary legislation, use of the prerogative power, and common law court decisions.

as an explanation of a statute's contribution to the law, then it must be shown that it follows from an explanation of what makes the law what it is.

In Chapter 3, I consider whether any theories of general jurisprudence support intentionalism, I argue that none of the most influential theories of general jurisprudence, including those on which intentionalists seem to implicitly rely, support the claims that intentionalists make. Intentionalists usually rely on some form of legal positivism. I examine the positivist theories of HLA Hart and Joseph Raz, and demonstrate that neither offers support for intentionalism.

I argue that intentionalism, because of its myopic focus, fails entirely to account for the role of moral reasoning in judicial adjudication where the principle of legality is engaged. According to intentionalism, judges are and should be engaged only in the factual exercise of uncovering that intention. Legality, however, it is a method of interpretation that judges use to work out what the law is that involves them appealing to controversial arguments of political morality. As such, it is fundamentally irreconcilable with intentionalism. Intentionalists must resort to unconvincing attempts to explain away legality.

I conclude this part of the thesis by attempting to rescue some role for legislative intentions, by offering a moralised, or *interpretive*, conception of intention. On this view, legislative intention is itself something that can only be attributed to a legal institution through normative reflection on the sort of institution that it is, and the sorts of intentions that it *should* have. This conception, I believe, offers a promising way of taking legislative intent

seriously, while recognising that our reasons for doing so are fundamentally moral.

In Part III of the thesis, I attempt a fresh start in thinking about the principle of legality. I have argued that any theory of legality must be supported by a theory of general jurisprudence. In this part of the thesis, I deploy an interpretivist, or non-positivist, theory of general jurisprudence to develop an account of the principle of legality. According to interpretivism, what legal rights and obligations depends in part on principles of political morality. The enactment of a statute, on this view, is a political act whose *legal effect* is determined by these moral principles.

Non-positivism, as the label suggests, is usually cast as a response to legal positivism, in particular the contemporary theories associated with HLA Hart, Joseph Raz and more recently Scott Shapiro. While I engage with each of these theorists at various points in the thesis, I do not cast the interpretivist account of legality that I develop as a response to positivism. This thesis is not about the explanatory failure of positivism in public law, but rather about the explanatory success of interpretivism. It is legitimate, I believe, to evaluate the explanatory success of non-positivism on its own merits, rather than as a remedy for positivism's failures. The theory that I set out in this part of the thesis is a freestanding theory of legal obligation, tied to a theory of political legitimacy. It would follow from the truth of this theory that many of positivism's claims are wrong, but there is no need for positivist claims to be the starting point.

In Chapter 4, I attempt to clear the ground in non-positivist theory. I argue that what non-positivist or interpretivist theories disagree on is the question of what principles determine the legal impact of law determining actions, such as the enactment of statutes. I then examine different ways of answering this question, by examining Mark Greenberg's 'Moral Impact Theory', Immanuel Kant's postulate of public law, and Ronald Dworkin's theory of a 'true political community' and the corresponding principle of 'integrity'. I argue that it is this last theory that offers the most coherent answer to the question of what principles determine the impact of legal actions, and therefore the most promising route for explaining the principle of legality.

On this view, the principles that feature in determining a statute's legal impact are assigned that role by the more abstract principle of 'integrity', or 'principled consistency'. According to this theory, a political community in which rights and obligations are enforced through centralised coercion, under specific conditions, is a valuable sort of community whose members are treated with equal concern. The specific conditions are these: coercive enforcement must only be employed where its use is licensed by principles of political morality drawn from past decisions about when such force is justified. On this view, what impact a statute has on our legal obligations is determined by the principles of political morality picked out by the more abstract principle of integrity. In the remainder of the thesis, I show that this jurisprudential theory allows us to make good sense of judicial use of the principle of legality in UK adjudication.

In Chapter 5, I return to the principle of legality, and show that theoretical accounts of this principle change when we move away from intentionalism, and examine the principle through the lens of interpretivism. I do this by considering the relationship between two principles of the UK constitution: parliamentary sovereignty and the rule of law. Public law theories have struggled to reconcile these principles, particularly in the face of more expansive judicial invocation of the rule of law. I argue that the theory of law as integrity allows us to see these not as conflicting principles, but rather as packages of moral principles that each play a role in determining the legal impact of statutes.

The principle of legality, on this view, is not a ‘presumption’ about Parliament’s intentions. That is just shorthand for a more complex process of moral reasoning. Rather, judges invoking the principle of legality are attempting to work out the legal impact of the statute before them by engaging with the principles of political morality. The upshot of this view, I argue, is that the role that can legitimately be played by ‘rule of law’ principles in determining the correct outcome of legal cases is much greater than is often supposed in public law theory.

Finally, in Chapter 6, I apply the theory developed in Chapters 4 and 5 to the cases discussed in Chapter 1. I show that this theory makes sense of these cases in a way that intentionalism could not. It also provides us with satisfying answers to the difficult questions about legality outlined above. This includes answers to some of the most pressing and controversial questions in public law. For example, I argue that it follows from my theory that the

principle of legality should apply to judicial interpretation of the royal prerogative as well as statute, and that judicial 'strike down' of legislation is both a legitimate and uncontroversial aspect of our legal practice.

This theory, then, has relevance for the doctrinal development of public law. By engaging questions about the nature of law, we can better guide judges in interpreting what law is. It is hoped that it will point towards more satisfying, coherent resolutions to constitutional controversies in public law theory.

## Part I: Hard Questions About Legality

Before building up a theoretical account of the principle of legality, we need a doctrinally accurate picture of the practice itself. In the following chapter, which makes up this Part I of the thesis, I set out such a picture. I highlight the main contexts in which judges have made use of the principle, and highlight aspects of the practice that any theory of legality must be able to explain. I conclude by summarising some hard questions about the principle's use that any theory should help us to answer.

Presumptions of statutory construction like the principle of legality have a long pedigree in common law adjudication.<sup>20</sup> In *R (Morgan Grenfell and Co Ltd) v Special Commissioner of Income Tax*, Lord Hoffmann stated that 'the wider principle itself is hardly new' and traced it 'at least' to *Stradling v Morgan*.<sup>21</sup> Similarly, Mr Justice Byles's statement that 'although there are no positive words in a statute requiring that a party shall be heard, yet the justice of the common law will supply the omission', can be read as an ancestor of the principle of legality.<sup>22</sup> Recently, in *Privacy International v Investigatory Powers Tribunal*,<sup>23</sup> the Court retrospectively described the decision in *Anisminic v Foreign Compensation Commission* as an instance of legality's

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<sup>20</sup> Alison Young, 'Fundamental Common Law Rights and Legislation' in Mark Elliott and Kirsty Hughes (eds) *Common Law Constitutional Rights* (Hart Publishing 2020) 226.

<sup>21</sup> *R (Morgan Grenfell and Co Ltd) v Special Commissioner of Income Tax* [2002] UKHL 21 [8]. *Stradling v Morgan* (1560) 1 Pl 1999.

<sup>22</sup> *Cooper v Wandsworth Board of Works* (1863) 14 CBNS 180.

<sup>23</sup> *Privacy International v Investigatory Powers Tribunal* [2019] UKSC 22 [99]-[100].

application.<sup>24</sup> *Cross on Statutory Interpretation* speaks of the pedigree of ‘presumptions of general application not only supplement 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’.<sup>25</sup> Similarly, an older edition of *De Smith on Judicial Review*, written prior to most of the decisions discussed in this thesis, states, ‘It is a common law presumption of legislative intent that access to the Queen's courts in respect of justiciable issues is not to be denied save by clear words in a statute’.<sup>26</sup>

While the employment of something like the principle of legality may have a much longer history, I will confine my analysis primarily to more recent times in which the principle has been explicitly elucidated. I begin with a string of cases in the 1990s in which the principle was used to determine the legality of executive action in prisoners’ rights and access to justice cases. I then examine what are generally considered the canonical statements of the principle, to which judges generally return when employing it. After that, I look at the principle’s development in cases involving various fundamental common law rights. I then look at two more recent contexts in which the principle has been used to determine the legality of executive action in what could broadly be called ‘separation of powers’ cases. In the first of these

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<sup>24</sup> *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147.

<sup>25</sup> Bell and Engle (n 1) 142-143.

<sup>26</sup> SA Smith, Jeffrey Jowell and Andrew Le Sueur, *De Smith, Woolf and Jowell: Judicial Review of Administrative Action* (5<sup>th</sup> edn, Sweet & Maxwell 1998) para 5-017. This passage was cited in *R v Lord Chancellor, ex p Witham* [1998] QB 575. The new edition has been updated to include discussion of the contemporary cases on legality.

contexts, the courts have used the principle to interpret legislation that, the executive claimed, licensed the ‘ousting’ of the courts’ jurisdiction over certain cases. In the second separation of powers context, I briefly look at whether recent courts decisions on the scope of prerogative power can be viewed as applications of the principle of legality outside its usual context of the interpretation of statute. Finally, I look at well-known *obiter* statements that hint at the possibility of the courts refusing, under certain circumstances, to recognise the legal force of legislative enactments.

Some might object that we cannot properly understand the principle of legality by limiting the analysis to this time period. As noted above, interpretive presumptions like legality have a long pedigree. From the very earliest days of the use of legislation to make law in England, common law theorists sought to construe statutory language narrowly so as to preserve the purview of the common law.<sup>27</sup> While this longer history undoubtedly provides important context for a full understanding of the operation of statutory presumptions, there are good reasons for focussing primarily on the period that I identify.

The main reason is that the development in the common law in the period that I identify is characterised by the connection between UK constitutional development and the wider development of human rights protection in Europe, and the attempts to reconcile the move towards greater legal protection of human rights with the UK’s idiosyncratic constitutional doctrines.

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<sup>27</sup> Gerald Postema, *Bentham and the Common Law Tradition* (2<sup>nd</sup> edn, OUP 2019) 17.

In the 1970s and 1980s, judgments against the UK by the European Court of Human Rights in Strasbourg began to influence domestic law. The Strasbourg Court found that the UK had violated European human rights law in relation to the prohibition on inhuman and degrading treatment,<sup>28</sup> freedom of speech,<sup>29</sup> and the right to privacy.<sup>30</sup> By the time the HRA came into force in 2000, the court in Strasbourg had found violations of the Convention in 64 cases taken against the UK.<sup>31</sup> Domestically, judges used the Convention as an aid to interpret the common law.<sup>32</sup> Against this background, UK judges in the 1990s began to develop common law rights in deeper ways than they had previously. While the connection here is somewhat speculative, it is difficult to view this turn towards greater rights protection as entirely divorced from the wider European turn towards human rights protection, and towards the strengthening of the role of courts as guardians of democratic values.

The enactment of the HRA by the Labour government of the time saw Convention rights incorporated into domestic UK law. This resulted, for a time, in a diminished judicial focus on common law rights, as claims were adjudicated under the HRA instead. The common law began to receive renewed focus, however, as Conservative Party plans to repeal the HRA

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<sup>28</sup> *Ireland v United Kingdom* [1978] ECHR 1.

<sup>29</sup> *Sunday Times v United Kingdom* [1979] ECHR 1.

<sup>30</sup> *Dudgeon v United Kingdom* (1981) 4 EHRR 149.

<sup>31</sup> Anthony Bradley and Keith Ewing, *Constitutional and Administrative Law* (15<sup>th</sup> ed, Longman 2011) 403.

<sup>32</sup> Lord Goff, for instance, stated: 'I conceive it to be my duty, when I am free to do so, to interpret the law in accordance with the obligations of the Crown under [the Convention]'. *Attorney General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109, 283. This is discussed in Adam Gearey, Wayne Morrison and Robert Jago, *The Politics of the Common Law: Perspectives, Rights, Processes, Institutions* (Routledge-Cavendish 2009) 215.

gathered momentum. In 2006, the repeal of the HRA became official Conservative Party policy. In 2014, they published a policy document on its repeal.<sup>33</sup> This momentum of this push slowed for a while, but recently, the Justice Secretary again signaled that the HRA would need to be 'looked at carefully'.<sup>34</sup> Even if it is not repealed, a strategy seems to be developing of undermining parts of the legislation through amendment. To give one example, a bill currently before Parliament would amend the HRA to include a clause designed to make it more difficult to claim that British military personnel acted unlawfully for the purposes of section 6 HRA by committing crimes overseas while on duty.<sup>35</sup> In the face of these developments, judges and theorists have turned to common law rights with renewed focus.

What would happen to common law rights in the event of the HRA's repeal is far from clear. These rights have developed against the background just described. It is well established that the development of the common law

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<sup>33</sup> 'Protecting Human Rights in the UK: The Conservatives' Proposals for Changing Britain's Human Rights Laws' (2014), available at: <[https://www.amnesty.org.uk/files/protectinghumanrightsinuk\\_conservativeparty.pdf?vhzrAQkxzwCH8hbjeYhhcu5B5lyPp\\_9K=>](https://www.amnesty.org.uk/files/protectinghumanrightsinuk_conservativeparty.pdf?vhzrAQkxzwCH8hbjeYhhcu5B5lyPp_9K=>)>.

<sup>34</sup> Owen Boycott, 'Government Plans to Remove Key Human Rights Protections' *The Guardian* (13 September 2020) <<https://www.theguardian.com/law/2020/sep/13/uk-government-plans-to-remove-key-human-rights-protections>> accessed 15 December 2020.

<sup>35</sup> Overseas Operations (Service Personnel and Veterans) Bill, s 11. Section 7(5)(a) of the HRA provides that a person who believes a public authority has acted unlawfully towards them can bring proceedings up to one year after the conduct complained of, while section 7(5)(b) gives judges discretion to allow for a longer time period if they consider it 'equitable having regard to all the circumstances'. Any longer period, however, is 'subject to any rule imposing a stricter time limit in relation to the procedure in question'. What the new bill would do is introduce a stricter time limit for prosecution of armed personnel overseas, reducing the discretion for a longer time period in section 7(5)(b) of the HRA. This would reduce the potential for legal proceedings to be brought for historical crimes, to give one example.

is influenced by statute.<sup>36</sup> It is unlikely, in the event of the HRA's repeal, that common law rights would simply reset to the position that they were in prior to the HRA's enactment (a period during which they were, in any case, already being influenced by developments in European human rights law). Whatever the future of statutory human rights instruments in the UK, it is vital that we understand the nature and content of common law rights and principles, and understand them within the political context just described. The contemporary development of the principle of legality is part of this political picture.

This backdrop – the European-wide turn towards human rights protection, the HRA's enactment, the resulting two decades of jurisprudence around the content of incorporated Convention rights, and recent efforts to repeal or undermine the HRA – provides the crucial context for understanding the contemporary development of the principle of legality. All of this is to say that the period that I examine here constitutes an identifiable, contemporary political moment, one deserving of its own focussed analysis. We should not lose sight of earlier cases and developments that provide context, but the development of the principle of legality during this period is a response to a particular set of political circumstances, and is deserving of its own analysis.

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<sup>36</sup> Tom Hickman, *Public Law After the Human Rights Act* (Hart 2010) 50; Jack Beatson, 'The Role of Statute in the Development of Common Law Doctrine' (2001) 117 LQR 247.

## Chapter 1. Mapping the Principle of Legality

### Introduction

In this chapter, I map the development of the principle of legality, from its formulation in early cases, through its further development in cases involving fundamental common law rights, and more recent cases in which the proper roles of legal institutions like the courts and the legislature were themselves under threat. The main takeaway from these cases is that judges, when they employ the principle of legality, engage in complex inquiries in political morality in order to determine what the law is. The aim of any theory of legality should be to explain whether this practice is justified as a means of working out what the law is and, if so, offer some guidance on what sorts of principles can legitimately feature in this process. After mapping the development of the principle of legality in the courts, I draw from these cases six key questions that any theory of legality must answer.

### 1. Early Cases

In its modern formulation, the principle of legality first received serious judicial attention in *R v Secretary of State for the Home Department, ex p Leech*.<sup>37</sup> Here, the Court was asked to determine whether Rule 33 of the Prison Rules, which provided that communication between a prisoner and their solicitor

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<sup>37</sup> *R v Secretary of State for the Home Department, ex p Leech* [1994] QB 198.

could be read and examined by prison officials, was unlawful. Section 47 of the Prison Act 1952 empowered the Secretary of State to make rules for the management of prisons.<sup>38</sup> Lord Steyn said that there was a 'presumption against statutory interference with vested common law rights',<sup>39</sup> and that 'it will be a rare case in which it could be held that such a fundamental right was by necessary implication abolished or limited by statute'.<sup>40</sup> The Court held that while the Secretary of State could lawfully empower legal officials to screen some letters between a prisoner and their solicitor, they could not screen letters concerning legal communication. Since section 47 of the 1952 Act did not by express words license the violation of the right to privileged communication with one's legal representative, the Court 'read down' the power in Rule 33.<sup>41</sup>

It is interesting to note that in this case, the Court held that the justification for the sort of power claimed by the prison officials would have to include a proportionality element. The question of whether the 1952 Act conferred a legal power on the Secretary of State to pass rules licensing the screening of legal communication, that is, depended in part on whether the use of such a power was proportionate to the aims it sought.<sup>42</sup> The principle of legality is usually thought of in terms of the presumption that general statutory language will not license the violation of certain rights and principles. But this

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<sup>38</sup> Many of the most significant cases in legality's early development, both in these early cases and in the classic statements discussed in the next subsection, were brought by prisoners and involved the interpretation of this same piece of legislation.

<sup>39</sup> [1994] QB 198, 209.

<sup>40</sup> *ibid* 212.

<sup>41</sup> Young (n 20) 226.

<sup>42</sup> [1994] QB 198, 209.

is only the first aspect of the principle. *Leech* demonstrates a second aspect, which we might call the 'justificatory aspect'. When judges engage this aspect of legality, they assume not only that general statutory language does not license the violation of rights, but also that any interference with such rights must be justified against some substantive standard. In *Leech*, that standard was proportionality. In other cases, discussed below, the standard has been 'necessary to achieve a legitimate aim'. This has led Jason Varuhas to describe the *ratio* in *Leech* as an 'augmented' principle of legality, one that was diluted in subsequent cases, in which the justificatory aspect was not invoked.<sup>43</sup> Whether and when such a justificatory aspect should be included in legality's application, and whether that standard should be proportionality, necessity, or something else depending on the circumstances, are further controversial theoretical questions to which this body of case law gives rise. I discuss these issues further in the final section.

In *R v Lord Chancellor, ex p Witham*, the Court considered secondary legislation that introduced new court fees.<sup>44</sup> Section 130 of the Supreme Court Act 1981 provided that the Lord Chancellor could set fees for the 'Supreme Court' (then referring to the Court of Appeal, High Court, and Crown Court). The applicant wished to bring defamation proceedings, but could not afford the fees, and legal aid was not available for defamation claims. Laws LJ

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<sup>43</sup> Jason Varuhas, 'Administrative Law and Rights in the UK House of Lords and Supreme Court' in Paul Daly (ed), *Apex Courts and the Common Law* (University of Toronto Press 2018) 276; Jason Varuhas, 'The Principle of Legality' (2020) 79(3) *Cambridge Law Journal* 578, 592. Varuhas's view is that the augmented version of legality was revived recently in *R (UNISON) v Lord Chancellor* [2017] UKSC 51.

<sup>44</sup> [1998] QB 575. This case is a spiritual ancestor to *R (UNISON) v Lord Chancellor* [2017] UKSC 51, discussed below.

spoke at length of the constitutional right of access to a court',<sup>45</sup> and spoke of what a right's nature as 'constitutional' entailed:

In the unwritten legal order of the British State, at a time when the common law continues to accord a legislative supremacy to Parliament, the notion of a constitutional right can in my judgment inhere only in this proposition, that the right in question cannot be abrogated by the State save by specific provision in an Act of Parliament, or by regulations whose vires in main legislation specifically confers the power to abrogate. General words will not suffice. And any such rights will be creatures of the common law, since their existence would not be the consequence of the democratic political process but would be logically prior to it.<sup>46</sup>

It seems then that a court will be especially willing to employ the principle of legality where a 'constitutional' right or principle is at stake. Laws LJ also specified that where the right of access to court was at stake, it would not be enough for a statute to permit the violation of that right by 'necessary implication'.<sup>47</sup> The statute, according to his lordship, would need to be explicit.

*R v Secretary of State for the Home Department, ex p Pierson* was the first case in which the interpretive method was referred to as the 'principle of

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<sup>45</sup> [1998] QB 575 [9].

<sup>46</sup> *ibid* [13].

<sup>47</sup> *ibid* [24].

legality'.<sup>48</sup> Here the Criminal Justice Act 1967 permitted the Home Secretary to release on license a prisoner serving a life sentence, if recommended by the Parole Board. Both the trial judge and the Lord Chancellor recommended a tariff of 15 years. The Home Secretary set the tariff at 20 years. When asked by the defendant's solicitor for the reasons for the higher tariff, he cited two mistaken claims: that the prisoner's offence was not an isolated incident (it was) and that the crime was premeditated (which had not been argued or established). The applicant then sought review of this decision, claiming that the decision to 'increase' his tariff was unlawful.<sup>49</sup>

Lord Steyn noted that because Parliament had not expressly authorised the Home Secretary to increase tariffs retrospectively, the power conferred on the Home Secretary must be read in accordance consistently with the principle that punishment not be retrospectively increased. Therefore the decision was unlawful.

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<sup>48</sup> [1998] AC 539.

<sup>49</sup> The judges talked throughout of an 'increase' in the sentence, although this was not in a literal sense the case. Rather, because of the importance of the principle at stake, the Home Secretary's decision was treated as a *de facto* increase. Bingham MR in the Court of Appeal set this out clearly:

The applicant's penal term was originally fixed at a period five years longer than the term recommended by the judges (which was already said by the trial judge to be substantially longer than the average period of custody for murder) because the Home Secretary considered the case to have serious aggravating features. It is now accepted that the Home Secretary was wrong to think that the case had those serious aggravating features. But the penal term remains the same. In substance that amounts to an increase in the penal term.

*R v Secretary of State for the Home Department, ex p Pierson* [1996] 3 WLR 547, 560B.

In setting out the principle of legality, he took care to distinguish it from the existing common law presumption that a *vague or ambiguous* statute not be read as violating fundamental rights. He stated:

There is no ambiguity in the statutory language. The presumption that in the event of ambiguity legislation is presumed not to invade common law rights is inapplicable. A broader principle applies. Parliament does not legislate in a vacuum. Parliament legislates for a European liberal democracy founded on the principles and traditions of the common law. And the courts may approach legislation on this initial assumption. But this assumption only has prima facie force. It can be displaced by a clear and specific provision to the contrary.<sup>50</sup>

Lord Browne-Wilkinson, though he would have dismissed the application, similarly stated:

A power conferred by Parliament in general terms is not to be taken to authorise the doing of acts by the donee of the power which adversely affect the legal rights of the citizen or the basic principles on which the law of the United Kingdom is based unless the statute conferring the power makes it clear that such was the intention of Parliament.<sup>51</sup>

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<sup>50</sup> [1998] AC 539, 587-588.

<sup>51</sup> *ibid* 575.

The disagreement between Lords Steyn and Browne-Wilkinson on the resolution of the case is of the sort that any account of the principle of legality needs to explain. Judges can agree that a fundamental right or principle applies, and that mandates the use of a principle of statutory construction, but disagree on how the statute should ultimately be interpreted. These are not disagreements about the wording of the statutory text itself – as Lord Steyn stated, there was no ambiguity in the statutory language - but rather about its *legal effect*, i.e. its effect on our legal rights and obligations. What the disagreement seems to turn on are differing conceptions of the content of the particular constitutional right involved. Accounting for such disagreements is not as simple as it might sound. For example, I argue in the next chapter that theories that claim that legal obligations are determined solely by the intention of Parliament struggle to account for the controversial nature of these decisions, where deep, normative arguments seem to feature in the outcome of the adjudication.

## 2. Canonical Statements

The statement of legality often treated as canonical was given by Lord Hoffman in the Court of Appeal in *R v Secretary of State for the Home Department, ex p Simms*,<sup>52</sup> and reinforced by the House of Lords in *R v Secretary of State for the Home Department, ex p Daly*.<sup>53</sup> While these are usually taken as the most influential elaborations of the principle, the spirit of

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<sup>52</sup> *R v Secretary of State for the Home Department, ex p Simms* [2000] 2 AC 115.

<sup>53</sup> *R v Secretary of State for the Home Department, ex p Daly* [2001] UKHL 26.

the formulation is the same as that given in *Pierson*. I categorise them separately here mainly for chronological neatness. The difference between these cases and the earlier statements above is mainly one of emphasis rather than substance.

*Simms* again concerned section 47 of the Prison Act 1952, which conferred on the Home Secretary the power to make rules for the governance of prisons. The Prison Rules, enacted in accordance with this statute, put restrictive conditions on the opportunity for prisoners to give oral interviews to journalists. The applicants in this case were prisoners who wanted to give such interviews, as part of an effort to convince the public of their innocence. The prison informed them that they could give such interviews only if the journalists agreed not to publish any part of them.

Once again, Lord Steyn emphasised the role of fundamental rights in determining the proper legal reading of the statute at issue. In considering the argument that the statute should be construed extensively to permit this sort of restriction, he said:

Literally construed there is force in the extensive construction put forward. But one cannot lose sight that there is at stake a fundamental or basic right, namely the right of a prisoner to seek through oral interviews to persuade a journalist to investigate the safety of the prisoner's conviction and to publicise his findings in an effort to gain access to justice for the prisoner. In these circumstances even in the

absence of an ambiguity there comes into play a presumption of general application operating as a constitutional principle...<sup>54</sup>

Lord Hoffman, in the same case, gave the most oft-cited articulation of the principle:

Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights... The constraints upon its exercise by Parliament are ultimately political, not legal. But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words.<sup>55</sup>

The controversial questions that arise from this formulation are obvious. What does it mean for a right to be 'fundamental' in the relevant sense? How specific need statutory wording be to override such a right? Can the wording be less precise if the right is 'less fundamental'? What does it mean for constraints to be legal rather than political? This last claim is a familiar one in public law scholarship, but it is extremely vague and ambiguous. It invokes a theory of law's nature (a distinction between what counts as a 'legal' constraint and what does not) without offering any justification for such a theory.

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<sup>54</sup> [2000] 2 AC 115, 130.

<sup>55</sup> *ibid* 131.

*Simms* demonstrates that the courts are willing to identify fairly concrete and specific rights at common law. The right, as Lord Steyn put it, ‘of a prisoner to seek through oral interviews to persuade a journalist’ to investigate on their behalf, is here understood as a contextual application of the more abstract right to free expression. What is important to note here is the controversial nature of such rights. This is one of the complicating factors in any analysis of legality. Methods of statutory construction are supposed to accurately reveal the content of our legal obligations. Here, it seems like the correct interpretation of the law is dependent on the resolution of controversial questions about the concrete application of an abstract political right. Whether the right to free speech guarantees oral interviews with journalists while in prison is not necessarily obvious. It is a conclusion that can only be reached through arguments in political morality. As we shall see in the next chapter, this has consequences for theories that attempt to explain away the principle of legality by arguing that it is simply a tool used as part of a factual inquiry into legislative intention.

The approach taken in *Simms* was approved by the Court in *Daly*. This case concerned a policy of the Home Secretary empowering prison officials to search prisoners’ cells, and to read correspondence between a prisoner and their solicitor found in their cells, the latter ‘only if the Governor has reasonable cause to suspect that their contents endanger prison security, or the safety of others, or are otherwise of a criminal nature’.<sup>56</sup> The policy

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<sup>56</sup> The Security Manual, para. 17.72. These new rules were enacted after the decision in *Leech*, which had held that powers made pursuant the Prison Act

permitted the prison officials to read such correspondence without the prisoner present. It was this last part of the policy that the applicant challenged, claiming that this violated his right to privileged legal correspondence.

Lord Bingham cited with approval both *Simms* and *Pierson*, as well as the holding in *Leech* that ‘a fundamental right such as the common law right to legal professional privilege would very rarely be held to be abolished by necessary implication’.<sup>57</sup> In particular, he relied on Lord Browne-Wilkinson’s statement of legality in *Pierson* (although Lord Browne-Wilkinson dissented in the outcome that case). Applying the principle of legality, he held that while the ban on prisoners being present during searches of their cells could be justified, the blanket ban on prisoners being present during the reading of their correspondence was ‘greater than is shown to be necessary to serve the legitimate public objectives already identified’, and was thus unlawful.<sup>58</sup>

Here we see Lord Bingham relying on the second aspect of legality, previously elaborated in *Leech*, and discussed above.<sup>59</sup> That is, he held that not only would the Court assume that a statute did not override fundamental rights unless it used clear and express words, but also that any power that a statute gave to an agent of government would be constrained by the requirement that that any restriction on a fundamental right be necessary to achieve a legitimate objective. This aspect, as Young points out, was reaffirmed, after

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1952 were drawn too wide. The proviso cited above was an attempt to draw more specific powers.

<sup>57</sup> [2001] UKHL 26 [10].

<sup>58</sup> *ibid* [19].

<sup>59</sup> Young (n 20) 227.

something of a hiatus, in *UNISON*, when it was held that the Tribunals, Courts and Enforcement Act 2007 did not empower the Lord Chancellor to set tribunal fees at such a rate as to constitute an unnecessary interference with the right of access to justice.<sup>60</sup>

The standard demanded as part of this second, justificatory aspect of the principle of legality has fluctuated over the years. As noted above, in the earlier case of *Leech*, the Court used proportionality as the relevant standard, rather than necessity. Again, we need some way of adjudicating between these different standards, and deciding which, if either, are appropriate in this or that case. For example, should proportionality apply where certain rights are at issue, and necessity when other rights or principles are at stake? Again, this is the sort of question with which we can only engage when we have a proper understanding of the normative foundations of legality.

### 3. The Development of Common Law Constitutional Rights

After the enactment of the HRA, there was something of a hiatus in the principle of legality's development. Most cases were settled instead using the new interpretive power in section 3 of the HRA. This is not to say that the principle went completely ignored. Though *A v Secretary of State for the Home Department (No 2)* was decided primarily on the basis of Convention rights, for example, Lord Bingham stressed that as a common law matter, a statute could not be read as permitting the admissibility in tribunal

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<sup>60</sup> *ibid* 228; [2017] UKSC 51.

proceedings of evidence obtained by torture, unless the statute used clear and express language to that effect.<sup>61</sup> It is fair to say, however, that common law rights were not the main focus during this period.

In recent years, there has been a resurgence in judicial adjudication of common law rights, and in the employment of the principle of legality to interpret legislation with the potential to threaten such rights. In this subsection, I discuss more recent cases in which legality has been employed to determine what the scope of executive power where fundamental rights are at stake.<sup>62</sup> It is difficult to discern a coherent pattern in these cases. It is not always clear, for example, which particular rights will trigger legality's application.

We saw above that the courts have employed the principle of legality to discern the law in cases involving the right to free speech (*Simms*), access to justice (*Witham*) and the right against retrospective punishment (*Pierson*). The courts, however, are not always specific about the rights that are at issue. In *Leech*, for instance, Lord Steyn noted that the protection of legal correspondence between a prisoner and their legal representative 'derives from the law of confidentiality'.<sup>63</sup> The more relevant harm caused by reading

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<sup>61</sup> *A v Secretary of State for the Home Department (No 2)* [2005] UKHL 71 [51].

<sup>62</sup> I define the exercise of legality in this way because I think it is a mistake to speak, as public lawyers often do, of judges using legality 'to protect fundamental rights'. That may, practically speaking, be the outcome, but legality is a method of interpretation whose function is to help judges work out what the law is. Its use would be appropriate if these rights partly determine what the law is, and inappropriate if these rights do not partly determine what the law is. The motivation of the judges in using it is neither here nor there in assessing its appropriateness as a method of interpretation.

<sup>63</sup> [1994] QB 198, 209.

legal correspondence, however, is surely that it interferes with the right to legal representation, rather than with simply a general right to confidentiality. This, however, receives no mention in the judgment. An absence of detailed consideration in the more abstract right from which these concrete rights derive, then, makes it more difficult to uncover any coherent principle guiding legality's development.

*Ahmed v HM Treasury* provides an excellent example of the development of the principle of legality into the two different zones of traditional 'constitutional' territory: fundamental rights and the separation of powers.<sup>64</sup> The Supreme Court had to consider the lawfulness of two Orders in Council – the Terrorism (United Nations Measures) Order ('TO') and the Al-Qaida and Taliban (United Nations Measures) Order ('AQO') - that allowed for the freezing of terrorist suspects' assets. The United Nations Act 1946 empowered the Treasury to pass Orders in Council in order to give effect to resolutions of the UN Security Council. Both orders were held to be unlawful. The TO was quashed, while the offending section of the AQO was suspended for a month to give the Treasury time to adjust it.

One reason for the unlawfulness of the orders was that they gave the executive almost total discretion to determine whether individuals should be placed on the list of persons whose assets could be frozen. Such an unlimited delegation to the executive of powers to interfere with the rights of the person, the Court said, could only be achieved through unambiguous statutory

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<sup>64</sup> *HM Treasury v Ahmed* [2010] UKSC 2.

language.<sup>65</sup> Lord Hope stated that he ‘would approach the language of section 1 of the 1946 Act, therefore, on the basis that Parliament did not surrender its legislative powers to the executive any more than must necessarily follow from the words used by it.’<sup>66</sup> We see here the beginnings of a legality trigger that has come to the fore in more recent years, and which will be explored further in the next section. This is the use of the principle to interpret statutory provisions that purport to alter the powers of legal institutions.

The second trigger for the principle of legality, in this case, was the purported interference with the applicants’ right to peaceful enjoyment of their property. The majority held that the 1946 Act did not clearly license the violation of this right, and as such the orders were *ultra vires*. Lord Hope’s consideration of this point once again highlights the difficulty in determining these issues:

Some interference with the right to peaceful enjoyment of one's property may have been foreseen by the framers of section 1, as it authorises the making of provision for the apprehension, trial and punishment of persons offending against the Order. To that extent coercive steps to enable the measures to be applied effectively can be regarded as within its scope. But there must come a point when the intrusion upon the right to enjoyment of one's property is so great, so overwhelming and so timeless that the absence of any effective means

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<sup>65</sup> *ibid* [45].

<sup>66</sup> *ibid* [47].

of challenging it means that this can only be brought about under the express authority of Parliament.<sup>67</sup>

Lord Hope acknowledges a point here that seems intuitively obvious: the more important a right, and the greater the encroachment on that right, the more restrictively a statute should be read. But this leaves us with more questions than answers. How do we assess a right's importance? How great must an intrusion be?

The quoted extract also points to the interactivity of common law rights and principles. Lord Hope emphasises that the absence of any effective means of challenging the intrusion plays a role in determining legality's stringency here. In other words, the extent to which the statute in question sanctioned the violation of the right to proper legal procedures *constrains* the extent to which the statute can sanction empower the executive to intrude on property rights. Had it allowed proper means of challenging the executive's designations of terrorist suspects, the giving of the Orders in Council might have been within the powers granted by the 1946 Act. Various common law rights, then, interact together in determining the legal effect of the parent legislation, and the lawfulness of secondary legislation made pursuant to it. In this case, the separation of powers principle and the common law right in question interact in determining the effect of the statute on our legal obligations. Again, we see highlighted starkly the controversial nature of these

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<sup>67</sup> *ibid* [76].

adjudicatory questions, and the need for coherent principles to guide the application and scope of legality.

The uncertainty around which rights trigger the principle of legality and what these rights require in specific circumstances is highlighted in cases in which the courts have had to consider the lawfulness of ‘closed material procedures’. In *Bank Mellat v HM Treasury*, the Court held that the rights of ‘open justice’ and ‘natural justice’ may trigger the principle of legality.<sup>68</sup> The former refers to the principle that justice be administered in a public fashion. This is familiar from Fullerian conceptions of the rule of law, but there is some debate over whether this principle has achieved the status of a right that is itself a ground of review at common law.<sup>69</sup> ‘Natural justice’ was here understood as the principle that ‘every party has a right to know the full case against him, and the right to test and challenge that case fully’.<sup>70</sup>

Here, the Court had to decide whether to permit the use of a closed material procedure, under which the applicants, an Iranian Bank subject to financial restrictions enacted through secondary legislation, would be unable to see the evidence on which those restrictions were based. Both the majority and Lord Hope in dissent agreed that the principles of open justice and natural justice meant that the legislative framework must be read in accordance with the principle of legality, but disagreed entirely in their

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<sup>68</sup> *Bank Mellat v HM Treasury* [2013] UKSC 38.

<sup>69</sup> Joanna Bell, ‘Common Law Constitutional Rights and Executive Action’ in Mark Elliott and Kirsty Hughes (eds) *Common Law Constitutional Rights* (Hart Publishing 2020) 255. See also Lon Fuller, *The Morality of Law* (revised ed, Yale University Press 1969). I discuss this and other conceptions of the rule of law in Chapter 5.

<sup>70</sup> [2013] UKSC 38 [3].

interpretations of that framework. The majority, led by Lord Neuberger, held that since the Constitutional Reform Act 2005, which specifies the role and power of the Supreme Court, was silent as to whether a closed material procedure could be used in the Supreme Court, the principle of legality actually demanded that that statute be interpreted as *permitting* such procedures. Their reasoning was that any alternatives to closed material procedures were even less desirable than the closed procedures, and so a closed procedure was necessary in order to give effect to the right of litigants to appeal to the Supreme Court.<sup>71</sup>

Lord Hope, for his part, believed that the principle of legality demanded precisely the opposite outcome. The use of closed material procedures, he said, ‘erodes fundamental common law principles’ and should be viewed as lawful only if statutory wording is explicit on that point.<sup>72</sup> I analyse which interpretation of this point of law is the correct one in Chapter 6.<sup>73</sup> The important point for present purposes is that this disagreement once more highlights the complex normative arguments that feature in legality’s application. The judges here did not disagree about the wording of the statute

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<sup>71</sup> *ibid* [55]-[56]. This facilitative reasoning – i.e. the notion that closed material procedures facilitate effective judicial review rather than hindering it – seems to have continued recently in *R (Haralambous) v Crown Court at St Albans* [2018] UKSC 1. In Chapter 6, I argue against the appropriateness of this type of reasoning.

<sup>72</sup> *ibid* [84].

<sup>73</sup> On closed material procedures more generally, see Eva Nanopoulos, ‘European Human Rights Law and the Normalisation of the “Closed Material Procedure”: Limit or Source?’ (2015) 78 *MLR* 913. Daniella Lock has also argued that recent judicial acquiescence to the use of closed material procedures in new contexts has rested on worrying underdeveloped grounds. Daniella Lock, ‘A New Chapter in the Normalisation of Closed Material Procedures’ (2020) 83(1) *MLR* 202.

that they had to interpret. Rather, they disagreed about the demands of certain legal principles (open justice, natural justice, the right of appeal to the Supreme Court etc.), and disagreed about the legal rights, obligations and powers that obtained in virtue of both the relevant statutory scheme and these legal principles. Judges, when they employ the principle of legality, seem to uncover what our legal obligations are by engaging with controversial arguments in political morality. Any theory of legality must account for this aspect of the enterprise.

In one of the most significant applications of the principle of legality in recent years, the Supreme Court held that changes to the cost of employment tribunal fees introduced by the Lord Chancellor were unlawful, on the grounds that they constituted an interference with the right of access to a court.<sup>74</sup> The Courts, Tribunals and Enforcement Act 2007 empowered the Lord Chancellor to set tribunal fees. The Court, however, unanimously held that unless it used clear and express language, the 2007 Act did not empower the Lord Chancellor to set the fees at a rate that would exclude many from being able to access tribunals, thus violating their right of access to a court. Lord Reed applied the justificatory aspect of legality that was stressed in *Leech and Daly*, i.e. that it is assumed that any interference with a fundamental right that a statute does license must be reasonably necessary to achieve a legitimate objective.<sup>75</sup> Here, an increase in fees could in principle be justified on the basis that it frees up resources that can be used elsewhere in the justice system, or that it deters frivolous claims. However, the particular fees that

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<sup>74</sup> [2017] UKSC 51.

<sup>75</sup> *ibid* [88]-[89].

were introduced were at a rate that was unaffordable for many, and the Lord Chancellor had not shown that less onerous fees would be inadequate for achieving those ends.<sup>76</sup>

The inclusion of the justificatory aspect of legality first developed in *Leech*, after a period during which judges seemed to neglect it, presents a puzzle. It is not clear whether this aspect – in this case, the requirement that any interference be necessary to achieve a legitimate aim - should be included in every instance of legality's application is another question that any theory of legality should help answer.<sup>77</sup> It is not obvious from the foregoing cases that the courts have developed any consistent, principled basis for when the justificatory aspect comes into play. In order to say whether the justificatory limitation is a legitimate aspect of legality, and in order to develop a principled basis for its application, we need to be able to say whether that limitation accurately tells us what the law is in these cases. This means that we must be able to say whether the content of the legal powers that statute affords members of the executive is constrained by a normative concept like 'necessity' or 'proportionality'.

What is notable about the cases discussed in this subsection so far is that while they are cases involving the purported violation of some

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<sup>76</sup> *ibid* [99]-[101].

<sup>77</sup> Varuhas views this as an 'augmented' version of the legality principle, and goes through some reasons that might explain, from a practical or tactical point of view, why the courts developed it. For example, because it makes public interest group standing easier to establish, as opposed to substantive review claims, in which an individual litigant will generally need to demonstrate standing. He also notes that in all of the cases in which the 'implied limitation' has been included, the empowering provision in question was extremely broad, and empowered the creation of secondary legislation. Varuhas, 'The Principle of Legality' (n 13) 592-600.

fundamental right, they all also include what might be termed a 'separation of powers aspect'. In each, the court employs the principle of legality not just to protect the particular right at issue, but also to protect some conception of the proper roles of each legal institution. In *Ahmed*, the Court was influenced largely by the fact that the TO and AQO gave over to the executive almost total discretion to determine who was subject to asset freezing orders; a power, we can infer, that should only have been wielded directly by Parliament. What influenced the Court's interpretation of the statutory scheme, then, was not just the right of peaceful enjoyment of one's property, but a conception of the proper institutional roles of Parliament and the executive. In *Bank Mellat*, the principle of 'open justice' necessarily includes a conception of the proper institutional role of the courts. Similarly, in *UNISON*, the right of access to a court includes a conception of the court's institutional role. In excluding some from accessing legal tribunals, the Lord Chancellor, as well as violating the individual rights of those litigants, was preventing the courts from carrying out their proper governmental function.

As we shall see in the next subsection, the courts have been increasingly willing to employ the principle of legality in what we might view as the separation of powers context. It is interesting to note, however, that they seem far more willing to employ the principle in the protection of fundamental rights when those rights also include a separation of powers aspect. It is of course true that all legal rights include a separation of powers aspect to some extent. The protection of any legal right requires a functioning court system, and an executive without untrammelled power. We can, however, think of

rights that do not engage separation of powers concerns quite so directly. *Simms*, for instance, concerned the right of free speech, and did not seem to include an ‘institutional’ aspect in the same way as, say, *Ahmed*. The same could be said of *Leech*, concerning the protection of private correspondence between litigants and their solicitors. While these early cases sometimes included institutional aspects, the courts tended to stress the function of the principle in protecting rights first and foremost. In practice, it may simply have been easier for the courts to adjudicate these ‘pure’ rights cases under the HRA. If, however, legality’s principle’s application is to be limited to cases with separation of powers concerns, the courts should articulate some compelling reason why.

Finally, the courts have applied legality in a series of cases concerning a general right to liberty. First, in *B (Algeria) v Secretary of State for the Home Department (No 2)*, the Court had to decide whether B’s release on bail was lawful.<sup>78</sup> The Immigration Act 1971 allowed the Justice Secretary to detain persons who were to be deported. There was, however, no way for B to be lawfully deported, because of the treatment he would face in Algeria. Separately, B had been released under bail conditions following a decision of the Special Immigration Appeals Commission (SIAC). B argued that, following the decision that his detention would be unlawful, bail conditions amounted to a deprivation of liberty. The Court of Appeal concurred, and ruled that the SIAC did not have bail jurisdiction in these circumstances. The Secretary appealed to the Supreme Court, who upheld the Court of Appeal’s judgment.

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<sup>78</sup> *B (Algeria) v Secretary of State for the Home Department (No 2)* [2018] UKSC 5.

In doing so, the majority applied the principle of legality:

[D]espite the fact that the purpose may be to effect a release from detention, I consider that this similarly attracts the presumption of statutory interpretation because the conditions which may be attached to a grant of bail are capable of severely curtailing the liberty of the person concerned...<sup>79</sup>

This case demonstrates once again the normative complexity of some of the legal analyses in cases where legality is employed. Here, a person's detention was considered unlawful under one statute (the 1971 Act), and this, in combination with a fundamental common law right against unlawful detention, coloured the legal effect of the 2005 Act, which established the bail jurisdiction of the SIAC.

The right to liberty again partly determined the proper interpretation of the legislative scheme under consideration in *Secretary of State for Justice v MM*.<sup>80</sup> Here the Court held that the Mental Health Act 1983 did not permit the Justice Secretary to set conditions on release that would amount to a deprivation of liberty. As such, the principle of legality was engaged, and the majority found that the legislative framework would only be interpreted as permitting such conditions if clear and express language was used.<sup>81</sup> Lord

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<sup>79</sup> *ibid* [29].

<sup>80</sup> *Secretary of State for Justice v MM* [2018] UKSC 60.

<sup>81</sup> *ibid* [31]. Unusually, it was MM themselves that wanted such conditions. They wanted to be released from hospital and were willing to consent to such extremely restrictive conditions on their release. The Secretary argued that

Hughes, though dissenting on the question of whether this in fact was a deprivation of liberty, since the person in question had already been deprived of their liberty, agreed that the statute should be interpreted in line with the principle of legality.<sup>82</sup>

Finally, in *Welsh Ministers v PJ*, the Court again had to decide whether patients detained under the Mental Health Act could be released subject to conditions that amounted to a deprivation of liberty under section 5 ECHR.<sup>83</sup> The statutory scheme was slightly different to the one reviewed in *MM*. Here, the person was released under a ‘Community Treatment Order’ (CTO), under which the patient is released into a care home, but under highly restrictive conditions. The Welsh Ministers’ main argument was that because the conditions in a CTO could not be enforced, they could amount to a deprivation of liberty. The relevant part of the Mental Health Act says that ‘There are no sanctions for failing to comply with the conditions in a CTO’, although the patient can be returned to hospital.<sup>84</sup> The Court of Appeal held that there was an implied power in the Mental Health Act to apply restrictions that amounted to a deprivation of liberty, since the aim was the gradual reintroduction of the patient to society.

The Supreme Court disagreed, with Lady Hale stating:

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because such restrictions would amount to a deprivation of liberty under Art 5 ECHR, the Secretary could not lawfully release them under those conditions.

<sup>82</sup> *ibid* [44].

<sup>83</sup> *Welsh Ministers v PJ* [2018] UKSC 66.

<sup>84</sup> *Welsh Ministers v PJ* [2017] EWCA Civ 194.

We have to start from the simple proposition that to deprive a person of his liberty is to interfere with a fundamental right – the right to liberty of the person. It is a fundamental principle of statutory construction that a power contained in general words is not to be construed so as to interfere with fundamental rights.<sup>85</sup>

Since the Mental Health Act did not so provide in clear and express words, such a deprivation of liberty was unlawful.

#### **4. Separation of Powers I: The Courts**

The most recent doctrinal developments of the principle of legality have involved the courts employing the principle in order to protect some conception of the separation of powers; that is, of the proper roles of legal institutions. In recent years the courts have employed legality more rigorously where their own institutional role has been threatened. When assessing whether secondary legislation or executive decisions can lawfully remove, limit or encroach upon the proper institutional role of the courts, they have demanded an extremely high level of specificity from the parent legislation, often holding that such legislation does not license separation of powers violations even where it seems fairly ‘clear and express’.

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<sup>85</sup> [2018] UKSC 66 [24].

*Evans v Attorney General* provides one such example.<sup>86</sup> Section 53(2) of the Freedom of Information Act 2000 provided that the Attorney General could overturn decisions of the Upper Tribunal to grant FOI requests, where the Attorney General had ‘on reasonable grounds’ formed the opinion that the release of the information would not be in the public interest. Lord Neuberger, giving the plurality judgment, held that if the 2000 Act was to have the ‘remarkable effect’ of permitting a member of the executive to veto the decision of a judicial body, then the language used must be ‘crystal clear’.<sup>87</sup>

This judgment was striking because the statutory language used was fairly explicit, so much so that Mark Elliott describes Lord Neuberger’s judgment as a performance of ‘radical interpretive surgery’.<sup>88</sup> The provision in question seemed to fairly plainly state that the Attorney General was empowered to set aside certain court decisions. I will not comment on the correctness or otherwise of this judgment until I have fleshed out a theory of legality in greater detail in subsequent chapters. It is notable, however, that the Court made greater demands of the parent statute where its own institutional role was under threat.<sup>89</sup> A theory of legality should tell us whether this more searching standard is justifiable in this context. Do separation of

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<sup>86</sup> *Evans v Attorney General* [2015] UKSC 21.

<sup>87</sup> *ibid* [58].

<sup>88</sup> Mark Elliott, ‘A Tangled Constitutional Web: The Black-Spider Memos and the British Constitution’s Relational Architecture’ (2015) *Public Law* 539, 546.

<sup>89</sup> Varuhas refers to this as a ‘proactive’ principle of legality. On this version of the principle, ‘provisions which touch basic norms are read down as far as possible so as to maximally preserve those norms’. I am not sure how far speaking only in terms of ‘basic norms’ takes us here, since fundamental individual rights are surely basic norms too. Varuhas’s taxonomy, however, gets the analysis on the right track in trying to identify the normative foundations of legality’s application when different principles are in play. Varuhas, ‘The Principle of Legality’ (n 13) 600.

powers principles, for instance, play a stronger role in determining the legal effect of primary legislation than certain rights do? Or should the Court be more assertive in rights cases as well? Such questions require us to grapple with arguments of constitutional theory and political morality.

It has been noted that the Court in *Evans* was careful to couch its reasoning in terms of the rule of law, giving the judgment something of a grounding in individual rights. Masterman and Wheatle view this as evidence of a judicial trend of ‘a prioritisation of the relationship between the individual and the state’ while being ‘more tepid in addressing the relationship[s] between organs of state’.<sup>90</sup> This trend, they believe, has been upended by *R (Miller) v Prime Minister* and *Cherry v Advocate General for Scotland* (‘*Cherry/Miller*’), discussed below.<sup>91</sup> However the Court couched their reasoning, we can say that substantively the case involved the protection of separation of powers principles. The Court seemed to treat a conception of the proper allocation of power among state institutions, in other words, as playing a role in determining the proper legal outcome of the case.

The use of the principle of legality in interpreting the law where principles concerning the role of the courts are in play was seen most recently in the interpretation of a so-called ‘ouster clause’. *R (Privacy International Ltd)*

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<sup>90</sup> Roger Masterman and Se-shauna Wheatle, ‘Unity, Disunity and Vacuity: Constitutional Adjudication and the Common Law’ in Mark Elliott, Jason Varuhas and Shona Wilson Stark (eds), *The Unity of Public Law? Doctrinal, Theoretical and Comparative Perspectives* (Hart Publishing 2018) 140.

<sup>91</sup> *R (Miller) v Prime Minister* and *Cherry v Advocate General for Scotland* [2019] UKSC 41 (‘*Miller/Cherry*’); Roger Masterman and Se-Shauna Wheatle, ‘Miller/Cherry and Constitutional Principle’, *UK Constitutional Law Association Blog* (14 October 2019), available at: <<https://ukconstitutionallaw.org/2019/10/14/roger-masterman-and-se-shauna-wheatle-miller-cherry-and-constitutional-principle/>>.

*v Investigatory Powers Tribunal* demonstrates again the role of separation of powers principles in determining Court's interpretation of the law, even where legislation seems on its face fairly clear in licensing interference with such principles.<sup>92</sup> In this case, the Court considered s 67(8) of the Investigatory Powers Act 2000, which provided that '[Except as provided by virtue of s 67A], award, orders and other decisions of the Tribunal (including decisions as to whether they have jurisdiction) shall not be subject to appeal or be liable to be questioned in any court'.<sup>93</sup>

The majority held that there exists a fundamental common law presumption that the jurisdiction of the High Court cannot be excluded by vague or ambiguous words. Following *Anisminic*, they said that 'a determination', as referred to in the provision, should be held to apply only to a *legally valid* determination. The proviso in parentheses above – 'including decisions as to whether they have jurisdiction' - seemed to indicate a direct effort to distinguish this provision from the provision considered in *Anisminic*.<sup>94</sup> The majority in *Privacy International*, however, held that the ouster clause in the 2000 Act did not apply to 'purported determinations', and that a 'purported determination' included a purported determination as to whether the IPT had

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<sup>92</sup> I do not wish to overstate the clarity of these legislative schemes. They do not explicitly spell out that they license the violation of constitutional principles. Nevertheless it is certainly the case that they could be read as much less ambiguous than legislation considered in previous cases of legality's application. Clarity is a normative concept, not an empirical one, and what counts as 'clear and express' is a difficult normative inquiry.

<sup>93</sup> *R (Privacy International Ltd) v Investigatory Powers Tribunal* [2019] UKSC 22.

<sup>94</sup> Benjamin Ong, 'The Ouster of Parliamentary Sovereignty?' (2020) *Public Law* 41, 42.

jurisdiction in the matter.<sup>95</sup> In other words, if the IPT was legally mistaken in determining that it had jurisdiction, then that determination was merely a ‘purported’ one and was still subject to judicial review. This seems finally to explicitly collapse the distinction between an error of jurisdiction and an error of law; a distinction that most would now admit was abolished in *Anisminic*, notwithstanding the judges’ own framing in that case.

Lord Carnwath emphasised the strong presumption against reading a statute as ousting judicial review. In so doing, he explicitly de-centred the role of parliamentary intention in determining the proper reading of the statute, arguing that focussing only on unearthing Parliament’s intention ‘treats the exercise as one of ordinary statutory interpretation, designed simply to discern “the policy intention” of Parliament, so downgrading the critical importance of the common law presumption against ouster’.<sup>96</sup> Lord Carnwath seemed to distinguish legality from orthodox conceptions of statutory interpretation, at least where certain separation of powers concerns are at issue. The majority quite clearly set out the principle that the standard of clarity demanded of a legislative provision will be higher where the jurisdiction of the High Court is at issue.

Even more remarkably, Lord Carnwath, with whom Lord Kerr and Lady Hale agreed, went as far as to suggest, in *obiter* statements, that binding legal effect could not be given to a statutory provision that purported to oust the jurisdiction of the High Court to decide on such matters.<sup>97</sup> In other words, they

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<sup>95</sup> [2019] UKSC 22 [104]-[112], [164]-[165].

<sup>96</sup> *ibid* [107].

<sup>97</sup> *ibid* [144].

seemed to indicate that even had the statutory provision been even more explicit than it already was, they may have struck it down for unconstitutionality.<sup>98</sup> This seems to reinforce and expand on similar *obiter* statements on the ‘disapplication’ of statutes made in the cases discussed in section 6, below.

*Privacy International* offers the most striking statement of the constitutional potential of the principle of legality to date. It is strong evidence that the content of the legal rights, powers and obligations that obtain in virtue of a statute’s enactment are determined in no small part by constitutional, separation of powers principles.

## 5. Separation of Powers II: Parliament and the Executive

*Privacy International* demonstrates the use of legality in cases where the role of the courts is at stake. Recent litigation surrounding withdrawal from the European Union and the Prime Minister’s effort to prorogue Parliament demonstrate a different aspect of the separations of powers playing a role in determining the courts’ interpretation of the law when using legality. The first *Miller* case, *Miller v Secretary of State for Exiting the European Union*, demonstrates the Supreme Court using the principle to interpret the European Communities Act 1972 consistently with the proper institutional role of Parliament.<sup>99</sup> *Miller/Cherry*, concerning prorogation, did not concern the

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<sup>98</sup> Ong (n 94) 49.

<sup>99</sup> *Miller v Secretary of State for Exiting the European Union* [2017] UKSC 5.

interpretation of statute.<sup>100</sup> Nevertheless, the approach taken by the Court in interpreting whether the use of the prerogative to prorogue Parliament was lawful was certainly reminiscent of legality's application.<sup>101</sup> This provides another puzzle that a theory of legality should help solve: should the principle of legality be used in interpreting legal sources other than statute? Taken together, the two cases demonstrate the increasing reliance on the principle of legality, or some analogous principle, to work out what the law is in cases involving separation of powers concerns.

In *Miller*, the Court held that the European Communities Act 1972 did not permit the government to trigger Article 50 of the Treaty on the European Union without an Act of Parliament. The Court emphasised that the constitutional changes brought about by membership of the EU, including the EU rights conferred on UK citizens, could not be allowed to be altered without parliamentary approval, unless that was provided by clear and express statutory wording.<sup>102</sup> As well, then, as constraining the lawful limits of executive decision-making and secondary legislation, the common law also constrains the transfer of legal power from statute to prerogative. If it is claimed that a statute provides for the lawful use of the prerogative under certain circumstances, then the principle of legality will be used as the interpretive tool to work out the prerogative's limits.

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<sup>100</sup> [2019] UKSC 41.

<sup>101</sup> Alison Young, 'Prorogation, Politics and the Principle of Legality', *UK Constitutional Law Association Blog* (13 September 2019), available at: <<https://ukconstitutionallaw.org/2019/09/13/alison-young-prorogation-politics-and-the-principle-of-legality/>>.

<sup>102</sup> [2017] UKSC 5 [87], [108].

There is another aspect of *Miller* that has the potential to have even more far reaching significance. Above, I said that the Court used the principle of legality in the interpretation of the ECA 1972. In this way, the principle of legality was used to indirectly determine the scope of the prerogative, by interpreting a statute that, it was claimed, licensed the use of the prerogative in specific circumstances. It is also possible to read the Court's judgment as using the principle legality to interpret the scope of the prerogative *directly*, independently of any statute licensing the prerogative's use. Alison Young has argued that the Court in *Miller* did precisely this.<sup>103</sup> According to Young, the Court limited the scope of the prerogative power, holding that it did not include a specific power to withdraw from a treaty if that would alter domestic law or frustrate primary legislation. Such a holding – 'reading down' a legal power to interpret it consistently with common law principles – is precisely what courts do when they employ the principle of legality, but here they applied it when working out the legal scope of the prerogative.<sup>104</sup>

This reading of *Miller* now has a great deal more support after *Cherry/Miller*. After this case, it seems that the common law constrains the use of the prerogative generally, even where there is no statute providing for its use.<sup>105</sup> Here the Court held that the Prime Minister's decision to prorogue Parliament for a period of six weeks was unlawful, or rather, that it had no legal effect at all. In so doing, the Court explicitly invoked separation of powers concerns, both when justifying the Court's own role in holding that the

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<sup>103</sup> Young, 'Prorogation, Politics and the Principle of Legality' (n 101).

<sup>104</sup> *ibid.*

<sup>105</sup> *ibid.*

prorogation power was justiciable,<sup>106</sup> and in invoking the principle of the executive's accountability to Parliament in holding that prorogation under these particular circumstances was not within the scope of the prerogative power.<sup>107</sup>

There are two notable takeaways from these cases. First, the Court was far more explicit in invoking separation of powers concerns to justify this interpretation than they were in, for example, *Evans*.<sup>108</sup> The future application of legality, it seems, will require arguments in constitutional theory and political morality concerning the proper allocation of institutional power.<sup>109</sup>

Secondly, it seems that the principle of legality has begun to take on the status of a constitutional principle whose use is not limited to the interpretation of legislation, but features as a tool for interpreting the law more generally, when certain fundamental constitutional concerns are at issue.<sup>110</sup> Whether we should refer to this as an expansion of the principle of legality or the development of a separate, analogous principle is not yet clear. To know that we need to say more about the normative foundations of legality, so that we can know if the same normative foundations guide the principle's development in this new context.

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<sup>106</sup> [2019] UKSC 41 [52].

<sup>107</sup> *ibid* [55]-[61].

<sup>108</sup> Roger Masterman and Se-Shauna Wheatle, 'Miller/Cherry and Constitutional Principle' (n 91).

<sup>109</sup> For a separation of powers-centered theory of the UK Constitution, see Kyritsis, (n 18). For a recent treatment of the relationship between separation of powers and other constitutional principles, see Nick Barber, *Principles of Constitutionalism* (n 14) chapter 3.

<sup>110</sup> Young, 'Fundamental Common Law Rights and Legislation' (n 20); Paul Craig, 'The Supreme Court, Prorogation and Constitutional Principle' (2020) *Public Law* 248, 252.

## 6. Strike Down?

The final context within which the principle of legality can be discussed can be dealt with briefly. In several *obiter* statements, judges have made conceptual space for primary legislation whose violation of common law rights is so egregious that the courts would hold that such legislation has no legal effect. They have in effect opened conceptual space for constitutional strike down of legislation. As of yet this has not occurred, nor is it immediately likely, but the Court's acknowledgment of even the theoretical possibility is of huge constitutional significance.

First, in *R (Jackson) v Attorney General*, Lord Steyn gave the example of legislation that sought to abolish judicial review, noting that in such circumstances, the Court 'may have to consider whether this is a constitutional fundamental that even a sovereign Parliament acting at the behest of a complaisant House of Commons cannot abolish'.<sup>111</sup> Lady Hale and Lord Hope both made similarly overt statements about the limitations of Parliament's lawmaking power.<sup>112</sup>

In *AXA General Insurance Ltd v Lord Advocate*, Lord Hope again considered the example of legislation that sought to remove the right of judicial review, stating that in such a set of circumstances, 'The rule of law

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<sup>111</sup> *R (Jackson) v Attorney General* [2005] UKHL 56 [102].

<sup>112</sup> *ibid* [107] (Lord Hope), [159] (Lady Hale).

requires that the judges must retain the power to insist that legislation of that extreme kind is not law which the courts will recognise'.<sup>113</sup>

Most recently, the majority in *Privacy International* affirmed these statements. Lord Carnwath acknowledged that ouster clauses of the sort considered were not examples of the extreme kind contemplated in *Jackson* and *AXA*. He noted, however, that a clause that purported wholly to exclude the supervisory jurisdiction of the High Court might be such an example.<sup>114</sup> This example, more specific than that offered in the earlier cases, again sees the Court expressing a concern with its own institutional role, as well as with individual rights, which was how the hypotheticals in *Jackson* and *AXA* were framed. The Court seems again to be developing a more robust conception of the separation of powers. The development from *Jackson/AXA* to *Privacy International* mirrors the development from *Evans* to the same case.

Whether the strike down would be an extreme variation of legality's application or the employment of a different constitutional function is an open question. The answer, once again, depends on the normative foundations of each function. Young argues that they perform different functions, and so should be conceptually distinguished.<sup>115</sup> Legality, she claims, is a tool for (i) protecting fundamental common law rights, and (ii) protecting a conception of the proper separation of powers.<sup>116</sup> A strike down power, on the other hand, should be understood as a tool for 'preserving the constitutionally hierarchical

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<sup>113</sup> *AXA General Insurance Ltd v Lord Advocate* [2011] UKSC 46 [51].

<sup>114</sup> [2019] UKSC 22 [144].

<sup>115</sup> Young, 'Fundamental Common Law Rights and Legislation' (n 20).

<sup>116</sup> *ibid* 246.

relationship between the legislature and the executive and upholding the constitutional role of the judiciary'.<sup>117</sup>

I consider this argument in more detail, and ultimately reject it, in Chapter 6. For now, it is worth noting that the type of normative analysis that Young proffers is precisely the kind that is required. In order to tell what sorts of legislative intrusion might invite strike down, and what precise relation that possibility bears to the principle of legality, we need a fleshed out, justificatory theory of the principle of legality.

### **7. A Broader Principle of Legality?**

There is another way of making sense of the principle of legality to which I would like to draw attention. I will deal with it only briefly here, but an expansion of it will make up a great deal of the argument in the rest of this thesis.

From the foregoing discussion, we can bring together two ways of understanding the principle of legality. First, we might understand it simply as a statutory presumption: that Parliament did not intend to violate fundamental rights. Secondly, we can view it as a justificatory principle, imported from the ECHR: that any interference with fundamental rights must be justified against some standard (whether necessity or proportionality). Both models find support in judicial expressions. We might also view the principle as representing some combination of both: Parliament is presumed not to intend

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<sup>117</sup> *ibid.*

to interfere with fundamental rights, but if it does intend to interfere, it is presumed to intend to interfere only in a *justifiable* way.

The justificatory reading clearly offers a greater protection of rights than the presumptive reading. There is, however, a way of making sense of legality that is broader still. We might take our starting point Lord Steyn's statement in *Pierson*: 'A broader principle applies. Parliament does not legislate in a vacuum. Parliament legislates for a European liberal democracy founded on the principles and traditions of the common law.'<sup>118</sup> This statement reflects the idea that living in a liberal requires commitment to a particular set of principles and values. It reflects the idea, further, that the UK has committed to those values in its common law tradition.<sup>119</sup> Common law rights, on this view are not identified just by their pedigree, by looking to the common law's origins. Rather, they are identified by engaging with the question of what principles and values we have committed to as a liberal democracy, and what impact these values and principles have on our legal rights and obligations.<sup>120</sup>

The principle of legality, on this view, is a method of construction designed to work out what legal rights we hold *in virtue of this broader scheme of principle*. This would make sense of legality's application in several of the contexts above. It may justify the departure from explicit statutory

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<sup>118</sup> [1998] AC 539, 587.

<sup>119</sup> This idea is at the heart of Trevor Allan's work. See TRS Allan, *Constitutional Justice* (n 15).

<sup>120</sup> This sort of approach to the common law, focussing on the values that animate it in the present moment rather than solely on its pedigree, is not foreign to the common law tradition. Gerald Postema details how Hale, for example, rejected the arguments of Coke and the Levellers that common law was legitimated by *history*, i.e. by its origins, which were impossible to trace. Postema (n 27) 21. I discuss this point further below in Chapter 4, section 5.

wording to protect certain rights, though it must acknowledge that statutory wording may, for democratic reasons, matter a great deal. It would almost certainly have the consequence that legality might have a much broader application than has so far been acknowledged. The principles that trigger legality's application would not be limited to those already acknowledged in common law cases. Rather, we would need to engage in reflection on the principles that we are committed to today. The history of the common law would be the beginning of the inquiry, not the end. It would seem likely that we could justify its application to the prerogative, where the democratic pull of legislative wording does not apply. Finally, it would do away with distracting and fruitless inquiries into what rights count as 'fundamental'. The inquiry would instead focus on what rights and principles we hold in a liberal democratic state.

This would also have another notable consequence for public law, which is that the body of jurisprudence relating to the interpretation of the HRA would remain relevant for the interpretation of *common law rights*, even in the event of the HRA's repeal. That body of case law would not disappear with the HRA.<sup>121</sup> Rather, it would remain as an expression of the interpretation of certain rights and principles that are viewed as vital in a liberal democracy, and would have legal relevance in the proper interpretation of common law rights. Common law rights, that is, would not simply reset to the position that

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<sup>121</sup> This point is discussed in Adam Gearey et al (n 32) chapter 10.

they were in prior to 1998. The HRA jurisprudence would be important for legality's proper application.<sup>122</sup>

A recent case illustrates several of the questions about legality explored in this chapter. In particular, it raises questions about the extension of legality to uses of the prerogative, and the expansive conception of legality outlined in the previous section. *Elgizouli v Secretary of State for the Home Department* concerned a challenge to the legality of a use of the Home Secretary's 'mutual legal assistance' power, in a context such assistance might lead to the imposition of the death penalty.<sup>123</sup> The power to offer mutual legal assistance with another State is a prerogative power enjoyed by the Home Secretary. As part of long-standing practice, when using this power, the Home Secretary would seek assurances that any information shared would not be used to directly or indirectly see the death penalty imposed. In this case, the applicant's son had joined Islamic State, and been involved in the deaths of US and UK citizens. The US requested evidence from the UK Home Secretary that was necessary to prosecute him in the US. The Home Secretary sought the usual assurance, however it was not given, and in fact the new US administration displayed active hostility to perceived interference in their criminal process.<sup>124</sup>

In the end, the Home Secretary's decision was held to be unlawful because it violated the Data Protection Act 2018. What is more pertinent, for

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<sup>122</sup> Further, judges would not be limited by the 'mirror principle' in determining the content of these rights. For an argument that the mirror principle limits judicial creativity in this regard, see Jonathan Lewis, 'The European Ceiling on Human Rights' (2007) *Public Law* 720, 732.

<sup>123</sup> *Elgizouli v Secretary of State for the Home Department* [2020] UKSC 10.

<sup>124</sup> *ibid* [37].

present purposes, was the disagreement among the judges as to whether the decision was also unlawful under common law. It was argued that there existed a common law principle to the effect that it was unlawful to facilitate the imposition of the death penalty. Lord Kerr argued forcefully that such a principle existed, however this was rejected by the other judges. Lord Kerr's judgment is best read, I believe, as offering an expansive conception of legality of the kind that I outline above, one that views legality as integrated into a broader, moralised conception of public law more generally. Lord Carnwath and Lord Reid's judgments, by contrast, express more orthodox judicial review principles.

Lord Kerr relied extensively on the notion that the common law is sensitive to external stimuli that promote its further development. He gave great weight to changing public attitudes to the death penalty,<sup>125</sup> the jurisprudence of the Strasbourg Court,<sup>126</sup> the development of EU law on the subject, and the consensus among European countries that the death penalty is unacceptable.<sup>127</sup> Such factors, he said, should colour contemporary interpretations of Article 10 of the Bill of Rights 1688, which prohibits 'cruel and unusual' punishment. In effect, Lord Kerr advocated a conception of common law rights that is of a piece with the 'living instrument' interpretations prevalent in the scholarship of other constitutional systems.<sup>128</sup> On this conception, the common law prohibits the facilitation of the death penalty, and

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<sup>125</sup> *ibid* [102].

<sup>126</sup> *ibid* [107].

<sup>127</sup> *ibid* [111].

<sup>128</sup> Wil Waluchow, *A Common Law Theory of Judicial Review: The Living Tree* (CUP 2007); George Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (OUP 2007).

so the Home Secretary's provision of mutual legal assistance without assurances from the US was unlawful.<sup>129</sup>

It may be odd to cast this in terms of legality, however I believe that it is best understood as perhaps the most expansive conception of that concept yet offered by the courts. In effect, it adopts the broad conception described in the previous section, and applies it to the prerogative, rather than just statutory interpretation. In this sense, the judgment is best viewed as an extension of Lord Steyn's dictum in *Pierson*: 'Parliament does not legislate in a vacuum'. Neither, Lord Kerr insists, does the government use the prerogative in a vacuum. This we know from *Cherry/Miller*. But he goes further in specifying what this means. In this case, it means that the law is shaped partly by moral principles developed in a wider political context, one that has been characterised by a strong turn away from utilitarian thought, and towards the upholding of individual rights. He is very careful to specify that this is not about a wider European human right having direct effect, but rather the wider political context influencing the development of the common law.<sup>130</sup>

The other judges disputed Lord Kerr's characterisation of this development as 'incremental'. They disagreed not that the common law could develop, but that it could develop as rapidly as Lord Kerr wished. I will not engage here with their judgments, which are considered further in Chapter 6. I set out the case here only to show that Lord Kerr's judgment might be justified as part of an extremely broad conception of the principle of legality, one that views that principle not just as a statutory presumption or a demand that

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<sup>129</sup> [2020] UKSC 10 [142].

<sup>130</sup> *ibid* [118].

statutes be justified against some common law standard, but rather as the expression of a principle that the content of the law (whether statutory or prerogative) is determined by specific principles of justice. In Chapter 6, I re-examine this case and argue that on the conception of legality outlined in Part III of this thesis, Lord Kerr's judgment was the correct one.

## 8. Some Hard Questions

The foregoing discussion attempted to highlight that in using the principle of legality, judges engage in complex normative analysis in determining what the law is; analysis about important rights and principles, and the role that they play in determining the correct outcome of cases. The principles that trigger legality's application seem to be closely associated with the traditional territory of constitutional law: fundamental rights and the separation of powers. A great number of questions remain unanswered, however, if judicial application of legality is to be justified as a principled, coherent mechanism of adjudication. I have touched on these questions above. In this section, I enumerate more explicitly the questions that a theory of legality should help answer.

There are six questions in total. The first two aim to decipher what exactly judges are *doing* when they employ the principle of legality. They are questions about the nature of the principle of legality itself. Once we have a clear picture of these, we can turn to questions of legality's scope and application. Questions three to six are questions of this kind. In Chapter 6, I will return to these questions, and show that the theory developed in this

thesis allows us to reach satisfactory answers to each of them. The questions are as follows.

First, is the principle of legality simply a 'presumption' about legislative intention, or should the application of legality include a justificatory aspect, such as the 'implied limitation' developed in *Leech*, and picked up again in *UNISON*? That is, as well as construing statutes under the presumption that a statute does not permit the violation of fundamental rights, should judges also presume that any such violation that is permitted must be necessary to achieve a legitimate aim? Should this standard be upgraded under certain circumstances to proportionality? In either case, should these limitations apply in all cases or only in some? So far, the courts have shown little consistency on this.

Secondly, should we conceive of legality as an even broader principle, according to which various rights principles of liberal democracy determine what legal obligations obtain in virtue of a statute's enactment?

Thirdly, what rights or principles trigger legality's application? It is vital that any theory of legality offers an answer to this question. A theory of legality cannot be a purely local one. It must be part of a broader theory of public law practice. What rights the common law protects, and the extent to which it protects them, is notoriously difficult to work out. The early legality cases demonstrated that judges would use the principle where the right to confidential legal correspondence (*Leech* and *Daly*), the right of access to the courts (*Witham*, and picked up later in *UNISON*), or the right against retroactive increase of punishment (*Pierson*) are implicated. In *Simms*, it was

used where rights derivative from freedom of speech were concerned. Later, we see it used strongly to protect a general right to liberty, in *B (Algeria)*, *MM*, and *Welsh Ministers*.

It is not clear, however, what other rights invite the common law's protection and legality's application. The courts have been reticent, for example, to acknowledge a common law right to vote.<sup>131</sup> Nor has the common law recognised a general right to privacy.<sup>132</sup> Other rights have been recognised, but it is clear that the common law offers far less protection to them than the European Convention on Human Rights. Gavin Williamson points, for example, to cases in which common law courts have actively obstructed the right to freedom of association.<sup>133</sup>

In *R (Child Poverty Action Group) v Secretary of State for Work and Pensions*, the Court held that the statutory removal of a local authority's common law right to restitution of a mistaken payment did not trigger the principle of legality.<sup>134</sup> This was because this common law right was not a

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<sup>131</sup> *Moochan v Lord Advocate* [2014] UKSC 67 [34]; *Shindler v Chancellor of the Duchy of Lancaster* [2016] EWCA Civ 469. See Jacob Rowbottom, 'Freedom of Expression and the Right to Vote' in Mark Elliott and Kirsty Hughes (eds) *Common Law Constitutional Rights* (Hart Publishing 2020).

<sup>132</sup> David Seipp, 'English Judicial Recognition of the Right to Privacy' (1983) 3 *OJLS* 325; Kirsty Hughes, 'A Common Law Constitutional Right to Privacy – Waiting for Godot?' in Mark Elliott and Kirsty Hughes (eds) *Common Law Constitutional Rights* (Hart Publishing 2020).

<sup>133</sup> Gavin Williamson, 'Searching for a Chimera? Seeking Common Law Rights of Freedom of Assembly and Association' in Mark Elliott and Kirsty Hughes (eds) *Common Law Constitutional Rights* (Hart Publishing 2020).

<sup>134</sup> *R (Child Poverty Action Group) v Secretary of State for Work and Pensions* [2010] UKSC 54 [31]. This involved a local authority's common law right to restitution of a mistaken payment. Section 71 of the Social Security Administration Act 1992

‘fundamental’ one.<sup>135</sup> How do we tell whether a right is ‘fundamental’? Does this differ from the claim that a right is ‘constitutional’?<sup>136</sup>

The courts have also shown inconsistency in applying the principle of legality to common law rights that have been recognised as triggering the principle’s application. In *Ahmed*, discussed above, the Court applied the principle of legality to the United Nations Act 1946, holding that it did not license the creation of the TO and AQO. In *R (Gillan) v Commissioner of Police for the Metropolis*, on the other hand, the Court declined to use the principle of legality in interpreting the Terrorism Act 2000, which provided for enhanced stop and search powers for the police.<sup>137</sup> In both cases, the common law right to liberty was at issue.<sup>138</sup>

Had the Court applied the principle of legality in each case but come to different conclusions, this would be unremarkable. There were a number of differences between the cases that might have justified the different outcome.<sup>139</sup> What is less easy to explain, however, is why the Court in *Gillan* declined to apply the principle of legality at all, rather than weighing these differences as part of legality’s application. For example, if the language of the Terrorism Act was much clearer than the language in the United Nations Act, then that might justify the former having the effect of permitting stop and frisk powers, notwithstanding the presumption against the statute’s violating the

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<sup>135</sup> *ibid* [31].

<sup>136</sup> Andrew Burrows, *Thinking About Statutes: Interpretation, Interaction, Improvement* (CUP 2018) 71.

<sup>137</sup> *R (Gillan) v Commissioner of Police for the Metropolis* [2006] UKHL 12.

<sup>138</sup> Above, I discussed *Ahmed* in relation to peaceful enjoyment of property, but the right to liberty was also discussed.

<sup>139</sup> Young, ‘Fundamental Common Law Rights and Legislation’ (n 20) 242-243.

common law right to liberty. Intuitively, it is the presence of the right that should engage the principle of legality, not the clarity of the wording. The latter is a factor in the legality equation, not a trigger for the principle's use.

A theory of legality, then, should tell us what rights trigger legality's application, and under what circumstances. They should help us either justify or condemn seeming inconsistencies like that between *Ahmed* and *Gillan*. It should also explain what bearing this history has on the application of legality today. Intuitively, it matters whether the common law has historically offered protection to a given right. Such history has a bearing on our legal rights today. Equally, however, the common law must be allowed to develop and not to stagnate. An analysis of what common law courts have historically done is the beginning of the inquiry, not the end. A theory of legality should include some guidance in working out what role the common law's history has in determining what common law rights must factor in legality's application today.

All of this relies on a more fundamental question: what does it mean to say that a right is protected at common law? In subsequent chapters, I argue that this question cannot be answered simply by looking to the legal record. Rather, we must interpret the moral significance of that record to work out what rights and obligations we hold in virtue of it. For now, I will simply note that the answer to the question of what rights are protected at common law, and therefore feature in legality's application, is premised on a broader inquiry about the nature of legal rights generally.

Fourthly, a theory of legality should tell us something about the relationship between the right engaged and the clarity of the statutory language. How clear does statutory language need to be in order to defeat the presumption against rights violation? If provisions like those in *Evans* and *Privacy International* are not unambiguous enough, then what would be? Relatedly, if a right or principle is more important than others, should this make the demand on statutory clarity greater? If so, then we are back to the question of what rights and principles the common law recognises, and how we order them hierarchically. I noted above that the courts have seemed to make the greatest demands of statutory wording when separation of powers concerns are at issue. If this approach is the correct one, then the application of legality in the future will require further development of a conception of the separation of powers in the UK constitutional order. Again, such questions presuppose more fundamental questions, about the relationship between legislative enactments and the legal obligations that obtain in virtue of them.

Fifthly, is legality an adjudicative principle whose use is limited to the interpretation of statute, or should judges use the principle to work out the legal scope of the prerogative power as well? If the latter, then should common law rights exert precisely the same influence on the proper interpretation of the prerogative power as they do on statute? Or, for instance, should such rights exert a greater influence, given the prerogative's comparative lack of democratic legitimacy?

Sixthly, should the interpretation of statutes in line with common law rights leave room for the strike down of legislation? If so, is this an extension of legality, governed by the same principles, or something different?

## **Conclusion**

All of the questions identified above are premised on a final, and more basic question: is legality a justifiable method of interpretation to begin with? Does it actually help judges to work out what the law is? If not, then there is little point discussing what rights trigger its application, or how clear a statute need be to license the violation of those rights. In order to answer this question, I will argue in the next part of this thesis, we need to connect a theory of public law with a theory of general jurisprudence. That is, we need a theory that tells us the relationship between legal actions, like statutory enactments or common law decisions, and the legal rights, powers and obligations that result from those actions. Once we know how the law is what it is, we can say whether this or that method of interpretation explains what the law is in a given instance.

The questions identified in this section are controversial and difficult ones. I cannot hope to answer them all definitively in this thesis, however I will try to form some principles to guide discussion of them. To do so, I will argue in favour of a non-positivist theory of general jurisprudence, and argue that understanding legal obligation in accordance with this theory helps us make sense of the principle of legality as a method of interpretation. This in turn

should allow for a clearer, more structured and more principled approach to answering the difficult questions identified here.

## Part II: Intentionalism and Legality

In Part I of the thesis, I said that the aim of a theoretical account of a method of statutory interpretation is to explain whether that method allows judges to determine what legal rights and obligations obtain in virtue of a statute's enactment. It follows that a theory of statutory interpretation must necessarily be premised on a more abstract theory of the nature of legal obligation. In the two chapters that make up this part of the thesis, I consider and reject one influential theory of statutory interpretation and the account that it gives of the principle of legality.

This theory of statutory interpretation is called 'intentionalism'. According to intentionalism, a statute's contribution to the law, or legal impact, is determined by the intentions of the legislature. These intentions are a matter of complex, psychological fact. When judges employ the principle of legality, then, they are usually engaged in the fact-finding exercise of working out what the legislature *intended* the statute to mean. When a court is faced with an ambiguously worded statute, they will interpret that statute consistently with fundamental rights *because* they believe that the legislature did not intend to legislate inconsistently with fundamental rights.<sup>140</sup> Legislative intention, on this view, is what determines a statute's contribution to the law.

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<sup>140</sup> There is some necessary ambiguity here around what it means to 'legislate contrary to fundamental rights'. This may mean that the legislature create *legal* obligations that are inconsistent with some more fundamental *legal* obligations. Or it may mean that the legislature seeks to create a *legal* obligation that would conflict with a pre-existing *moral* obligation, where those categories are distinct kinds of normativity. Or it may mean, for example, that

Underlying this conception is the view that legislating is an act of human communication, which can be imperfect and often unreliable. The principle of legality is one tool of statutory interpretation that judges use to help them to work out the communicative content of the statute against this background of imperfection. With lawmaking, the legislature must communicate a particular meaning against a backdrop of further legal rules, principles, conventions etc. Jeffrey Goldsworthy, who offers a sophisticated defence of the intentionalist view, expounds this point at length:

It is impossible to make explicit all the background knowledge that is essential to properly understand any communication, because every item that is expressly mentioned necessarily depends on others that are taken for granted. Even if it were possible to expressly mention all of them, the result of doing so would be so prolix and convoluted that it would be very difficult to read, let alone to understand... Judges are therefore often justified in claiming that by interpreting statutory language restrictively, so that it does not disturb common law principles, they are giving effect to Parliament's implicit intention.<sup>141</sup>

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the legislature claims that their actions create genuine moral obligations that conflict with other genuine moral obligations. In the latter case, the legislature might simply be said to be mistaken in thinking that their actions have this effect. This issue will be explored further in subsequent chapters, but to avoid begging the question, I remain agnostic for the moment as to what is meant by 'legislating contrary to fundamental rights'. There is enough of a common core of agreement – that the legislature is misbehaving in some way, by affording insufficient respect to fundamental rights – for us to proceed.

<sup>141</sup> Jeffrey Goldsworthy, *The Sovereignty of Parliament: History and Philosophy* (OUP 1999) 251-252.

Judges, then, do give effect to Parliament's *implicit* intentions when employing the principle of legality. They can legitimately do so either because those intentions are obvious in the context in which the statute is examined, or because Parliament has delegated to judges some power to interpret what Parliament would have intended in a context that it did not anticipate. Appeals to the rule of law, or common law constitutional rights, on this view, are just heuristics for figuring out the intentions of Parliament in the face of the inevitable fallibility of human communication. The meaning of a statute, Goldsworthy claims, is 'what the legislature appears to have intended it to mean, given evidence of its intention that is readily available to its intended audience'.<sup>142</sup>

Goldsworthy distinguishes between 'clarifying' and 'creative' interpretation.<sup>143</sup> The former takes seriously the intentions of the speaker. It acknowledges that communication will involve omissions and ambiguities, but asserts that intention can nevertheless be discovered through proper consideration of context and circumstance. 'Creative' interpretation involves the remedying of defects in legislative communication. This method too, according to Goldsworthy, is consistent with legislative intention – it avoids the legislature frustrating its own intention, in effect, through errors or omissions.

It is clear from UK legal practice, Goldsworthy claims, that judges engage in both 'clarifying' and 'creative' interpretation.<sup>144</sup> That is, they

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<sup>142</sup> Jeffrey Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates* (CUP 2010) 248.

<sup>143</sup> *ibid* 236-247.

<sup>144</sup> *ibid* 230-231.

interpret statutes to bring greater clarity to the literal meaning of the statutory wording, but they also reconstruct this wording to bring it in line with the meaning that Parliament clearly intended it to have. This is a necessary element of our practice, again because of the foibles of ordinary language usage: 'Although those who draft such [legal] documents usually attempt to be very explicit, some degree of dependence on assumptions is inescapable'.<sup>145</sup>

Crucially, however, the judge's legitimate power to creatively interpret a statute is restricted by the intentions of Parliament. Judges have, to use Dworkin's distinction, 'weak' rather than 'strong' discretion in this sense.<sup>146</sup> Legislative intention sets the limits of legitimate judicial creativity.<sup>147</sup> This account thus offers a neat union of a linguistic theory that puts intention at the centre of communicative content, and an orthodox, *ultra vires* centred picture of judicial review.

Of course, there may be cases in which it is clear that judges are not interested in giving effect to the legislature's intentions, such as cases where that intention is deeply immoral. In such a case, a judge employing legality is deliberately misinterpreting the law in order to give it a more morally acceptable meaning. Instances of such a 'noble lie' are, according to Goldsworthy, relatively rare, and moreover, 'the fact that the lie is felt to be required indicates that the judges themselves realize that their disobedience

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<sup>145</sup> *ibid* 240.

<sup>146</sup> Ronald Dworkin, 'The Model of Rules II' reprinted in *Taking Rights Seriously* (Duckworth 1977).

<sup>147</sup> This part of the account draws on the familiar Hartian story about judicial discretion, necessitated by the 'open texture' of rules. HLA Hart, *The Concept of Law* (3<sup>rd</sup> edn, Clarendon Press 2012).

is, legally speaking, illicit'.<sup>148</sup> Perhaps the judges of the Supreme Court in *R (UNISON) v Lord Chancellor*, for example, knew in their hearts that Parliament had in fact intended to permit the exclusion of those who could not afford the new tribunal fees.<sup>149</sup> They thus acted beyond their legal mandate, in order to prevent such an unjust outcome. Legally speaking, on this view, their decision was incorrect.<sup>150</sup>

This view provides us with some answers to the difficult questions about legality set out at the end of the previous chapter. On the intentionalist view, the principle of legality is a *presumption* about Parliament's intentions. It may contain a justificatory aspect – i.e. a requirement that legislative interference with fundamental rights be necessary or proportionate – but only if that follows from the implied intentions of the legislature. Legality can be triggered on this view, only where legislative wording is vague enough to make 'clarifying' or 'creative' interpretations legitimate. There is no reason to think, on this view, that legality would also apply to the prerogative, that judges may legitimately strike down legislation, or that the principle of legality should be conceived of as a broader principle in the manner discussed in the previous chapter.

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<sup>148</sup> Goldsworthy, *The Sovereignty of Parliament* (n 141) 252.

<sup>149</sup> [2017] UKSC 51.

<sup>150</sup> The reasoning that leads Goldsworthy to these two possibilities seems inconsistent. On one hand, it is claimed that we should take judges at face value when they claim to give effect to Parliament's implicit intentions, because to think otherwise 'is to think that for many centuries, judges have been confused or lying'. Goldsworthy, *The Sovereignty of Parliament* (n 141) 251. Yet when judges do depart from statutory meaning, we are to put this down to dishonesty rather than consider the possibility that it might be a legitimate part of the interpretive process.

Intentionalism is extremely influential in theories of public law. This may be due to the undeniable support it finds in the language that judges use. As discussed in Chapter 1, judges regularly couch the principle of legality in terms of a presumption about Parliament's intentions. In its most famous formulation, for example, Lord Hoffman stated: 'the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost'.<sup>151</sup> Other mentions of Parliament's intentions are innumerable.

The question, however, is what judges are doing, not what they say they are doing. In making sense of legal doctrines, we should not be reticent of looking beyond the terms in which judges themselves frame these doctrines. Judges often make use of shorthand in articulating judicial doctrines, and we should not always be tied to the labels they use in analysing the deeper theoretical foundations of the doctrines. This is not to say that we should ignore judicial self-description, only that such self-description should mark the beginning rather than the end of the inquiry.

Indeed, there are now a number of judicial statements that seem to cast doubt on whether there is any substance to judicial invocation of legislative intentions. Lord Nicholls, for instance, states: '[T]he intention of Parliament' is an objective concept, not subjective. The phrase is a shorthand reference to the intention which the court reasonably *imputes* to Parliament in respect of the language used.'<sup>152</sup> Justice Kirby of the Australian High Court, writing extra-judicially, says: "[I]t is unfortunately still common to see

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<sup>151</sup> [2000] 2 AC 115, 131.

<sup>152</sup> *R v Secretary of State for the Environment, Transport and the Regions, ex p Spath Holme Ltd* [2001] 2 AC 349, 397 (my emphasis).

reference . . . to the “intention of Parliament”. I never use that expression now. It is potentially misleading’.<sup>153</sup> The most explicit rejection of intentionalism by a sitting judge comes from Lord Burrows in his recent Hamlyn lecture. Lord Burrows argues that the concept of legislative intention is ‘an unhelpful fiction’, that masks the other reasons judges have for reaching this or that interpretation.<sup>154</sup> It is not enough, then, for intentionalism to point to what judges say about what they are doing. Judges disagree on the conceptual meaning of legislative intent, and on the precise role that it plays in fixing the correct outcome of adjudication.

Over the two chapters in this part of the thesis, my aim is to show intentionalism fails to explain the principle of legality. In Chapter 2, I try to clarify precisely what it is that intentionalists claim, and what sort of arguments they need to make to demonstrate their claims. I argue that many of intentionalism’s central claims are ambiguous or confused. Most seriously, it conflates the linguistic ‘meaning’ of a statute, on the one hand, and a statute’s contribution to the law, or ‘legal meaning’, on the other. These two concepts are different in important ways and should be kept distinct. If intentionalism is a theory about linguistic meaning, I argue, then it is trivially true. If it is a theory about a statute’s contribution to the law, then it is incoherent, at least without further argument. Crucially, I argue that the sort of further argument that is required to rescue intentionalism as a coherent theory of a statute’s

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<sup>153</sup> Michael Kirby, ‘Towards a Grand Theory of Interpretation: The Case of Statutes and Contracts’ (2002) *Statute Law Review* 95, 98.

<sup>154</sup> Burrows (n 136) 17. For Goldsworthy’s response, see Jeffrey Goldsworthy, ‘Lord Burrows on Legislative Intention, Statutory Purpose, and the “Always Speaking” Principle’ (forthcoming 2020) *Statute Law Review*.

*legal* meaning must be made at the level of general jurisprudence. If intentionalism is to function as an explanation of a statute's contribution to the law, then it must be shown that intentionalism follows from an explanation of what makes the law what it is.

In Chapter 3, I consider attempts to anchor intentionalism to a theory of general jurisprudence. I argue that intentionalism is not justified by the positivist theories of jurisprudence that intentionalists usually invoke. This failure to demonstrate a connection with a theory of what determines the content of the law means that intentionalism is of little value as a theory of interpretation at all, and fails to explain the principle of legality. I attempt to rescue some role for legislative intentions, by offering a moralised conception of intention. On this view, legislative intention is itself something that can only be attributed to a legal institution through normative reflection on the sort of institution that it is, and the sorts of intentions that it *should* have. This conception, I believe, offers a promising way of taking legislative intent seriously, while recognising that our reasons for doing so are fundamentally moral.

## Chapter 2. Meaning and Intentions

### Introduction

'Intentionalism' is an account of statutory interpretation that has exerted a great deal of influence over public law theory. According to intentionalism, judges, when interpreting legislation, are usually attempting to work out what meaning the legislature *intended* the statute before them to carry. This line of thought has an influential pedigree in theories of US constitutional interpretation. Intentionalists of that tradition argue that the meaning of a given constitutional provision is fixed by the intentions of the Framers at the time of enactment.<sup>155</sup> Judges, when interpreting what the Constitution demands, must ask themselves what demands the Framers intended it to make.<sup>156</sup> Within UK public law, intentionalists argue that the 'meaning' of a legislative enactment depends on the intentions of the Parliament that enacted it.

Intentionalism views the intentions of past political actors, whether constitutional framers or an iteration of the UK Parliament, as a complex psychological fact. The job of the judge, on this view, is to uncover as best they can these intentions.<sup>157</sup> When judges employ the principle of legality, on

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<sup>155</sup> Michael J Perry, 'Interpretivism, Freedom of Expression and Equal Protection' (1981) *Ohio State Law Journal* 42.

<sup>156</sup> Paul Brest, 'The Misconceived quest for the Original Understanding' (1980) *Boston University Law Review* 60; Antonin Scalia, *A Matter of Interpretation* (Princeton University Press 1997); Sotirios A Barber and James E Fleming, *Constitutional Interpretation: The Basic Questions* (OUP 2007) chapter 5.

<sup>157</sup> Intentionalism can be distinguished from 'textualism', another, slightly different variation of constitutional originalism. According to that tradition, a

this view, they are making use of an interpretive presumption aimed at uncovering Parliament's intentions. Underlying this conception is the view that legislating, including constitution making, is an act of human communication, which can be imperfect and often unreliable. Intentionalists often appeal to innovations within the philosophy of language to support their claims.

In this chapter, I argue that intentionalism is incomplete as a theory of statutory interpretation. The problem is that intentionalism conflates the linguistic meaning of a statute, on the one hand, and what Greenberg calls a statute's contribution to the law, or 'legal meaning', on the other. These two concepts are different in important ways and should be kept distinct. 'Linguistic meaning' refers to the communicative content of a statute; i.e. to what the enactment of a statute communicated (if we treat legislation as an act of communication).<sup>158</sup> 'Legal meaning' refers to the legal rights and obligations that obtain in virtue of a statute's enactment.

The aim of statutory interpretation is to uncover a statute's *legal meaning*. A theory of statutory interpretation, therefore, should explain how

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constitutional provision must be read as meaning what it would have meant at the time of enactment, given the social and political context of the time. There is however a great deal of overlap between the two and, as we shall see, some philosophers of language have sought to collapse the distinction. I will refer throughout this chapter to intentionalism, but most of the points that I make apply, *mutatis mutandis*, to textualism as well. For difficulties with the textualist approach, see Ronald Dworkin, *A Matter of Principle* (HUP 1985) [hereinafter '*AMOP*'] 34-38; Mark Greenberg, 'Beyond Textualism' (2019) *UCLA School of Law, Public Law Research Paper No. 19-41*.

<sup>158</sup> The parenthetical proviso is important, since as we shall see, there are reasons to doubt that legislation functions in the same way as ordinary communication. I remain agnostic on the question of who legislation is communicated *to* on this model. It could be an act of communication to the judge, the legal subject, the reasonable listener etc. Nothing in my argument turns on this.

and why a statute results in particular legal obligations. Intentionalism, however, makes sense only as a theory about a statute's linguistic meaning. On its own, an explanation of a statute's linguistic meaning tells us nothing about the legal rights and obligations that obtain in virtue of that statute, and therefore nothing about how judges should resolve cases. Intentionalism, insofar as it fails to give a full account of a statute's legal meaning, is inadequate as a theory of statutory interpretation. In the next chapter, I consider possible ways to rescue intentionalism by connecting it to a theory of general jurisprudence. First, however, I will try to clarify what intentionalists claim, and draw attention to important ambiguities.

The argument in the present chapter proceeds as follows. In section 1, I elaborate on the distinction between a statute's linguistic meaning and its legal meaning. I show why this distinction is important and why the end of any theory of statutory interpretation is an explanation of a statute's legal meaning. Statutory interpretation is concerned with explaining the legal obligations that obtain in virtue of a statute's enactment. A theory that offers only an explanation of a statute's linguistic meaning is incomplete. In section 2, I highlight the way in which intentionalism conflates linguistic and legal meaning, and the problems that this causes for intentionalism. Intentionalism's claims would make sense if they were understood as claims about a statute's linguistic meaning, however this would tell us nothing about the correct resolution of cases. If understood as an account of the statute's legal meaning, however, intentionalism's arguments are incomplete. In

section 3, I highlight several problems that result intentionalism's failure to distinguish between linguistic and legal meaning.

### 1. 'Meaning' and Theories of Statutory Interpretation

The question of what makes a theory of statutory interpretation successful depends on the prior question of what exactly statutory interpretation *is*. At the very least, we need a working idea of what statutory interpretation is. What do judges do when they interpret statutes? Legal theorists and public lawyers typically contend that statutory interpretation is aimed at discovering the *meaning* of a legislative text. Natalie Stoljar, for example, says: 'In very general terms, an interpretation is an hypothesis, based on data generated by an object of interpretation, about the meaning of the object of interpretation'.<sup>159</sup> According to Boudreau et al, 'judges need not search for the legislature's actual intent when interpreting statutes. Rather, they must figure out what the legislature's statutes *mean*'.<sup>160</sup> Joanna Bell states that the 'The question which courts address is always taken to be one of what a given

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<sup>159</sup> Natalie Stoljar, 'Interpretation, Indeterminacy and Authority: Some Recent Controversies in the Philosophy of Law' (2003) 11(4) *The Journal of Political Philosophy* 470, 470.

<sup>160</sup> Cheryl Boudreau, Mathew McCubbins and Daniel Rodriguez, 'Statutory Interpretation and the Intentional(ist) Stance' (2005) 38(5) *Loyola of Los Angeles Law Review* 2131, 2131-2132 (my emphasis). The authors draw this distinction in the course of arguing against strict forms of intentionalism. They argue that we need not think of legislative meaning in terms of actual intentions. Instead we work out the meaning of a communication by *imputing* intentionality to the speaker. They do not explain what makes their theory one about statutory meaning, or why literal intentionalism is not aimed at working out statutory meaning, because they do not explain what 'statutory meaning' means, beyond asserting that it is determined by what they say it is determined by.

provision *means*'.<sup>161</sup> Intuitively, this may seem a natural starting point. The statutory text is certainly the object of legal interpretation and it seems to make sense to speak of interpreting the text's meaning. Intentionalists, when pressing their claim, typically argue that looking to legislative intentions is the proper way to work out the meaning of the legislative text.

There is, however, a great deal of ambiguity around the use of 'meaning' in theories of public law. The crucial mistake is that intentionalists treat the 'meaning' of a statute as synonymous or co-extensive with the legal rights and obligations that obtain in virtue of that statute's enactment. This, however, is a controversial philosophical claim, one that demands a theory that is typically not offered in the intentionalist literature. Intentionalism relies on a vague, undefined conception of statutory 'meaning' to make out its key points.

A great deal of this confusion can be attributed to a theoretical model according to which legislating is viewed an act of communication. The rights and obligations that obtain in virtue of legislation, on this model, are those that the legislature communicated through authoritative enactments. It follows that in order to work out our legal rights and obligations, we simply need to work the linguistic or communicative content of the legislature's communications.

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<sup>161</sup> Bell (n 69) 269. Bell's article offers a clear picture of the various challenges involved in theorising the complex role of common law constitutional rights in the modern public law landscape. This is very relevant when thinking about intentionalism, which purports to offer a simple answer to these complex questions.

Because it follows this model, the sorts of arguments that intentionalism employs are ones directed towards the linguistic content of legislation.<sup>162</sup>

In order to clear some of this ground, I will distinguish between different senses of ‘meaning’, and try to clarify which senses map onto the claims of intentionalism. I will rely on two crosscutting sets of distinctions. The first, between ‘speaker’s meaning’ and ‘sentence meaning’, is well known in philosophy of language.<sup>163</sup> These concepts are deployed to explain the linguistic or communicative contents of acts of communication.<sup>164</sup> Because of their reliance on the model of legislation as communication, intentionalists assume that these sorts of claims explain, without further argument, the legal obligations that obtain in virtue of statutes as well.

I argue, however, that such arguments within philosophy of language do not carry over to legal interpretation. To defend this claim, I bring out a second distinction: between the ‘linguistic meaning’ of a legislative provision and its ‘legal meaning’, or the rights and obligations that obtain in virtue of a statute.<sup>165</sup> Cashing out the linguistic meaning of a statute in terms of sentence and speaker meaning, I argue, tells us nothing about the *legal meaning* of a statute. I then attempt to demonstrate that a statute’s *legal meaning* is the

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<sup>162</sup> Mark Greenberg has elaborated on and argued against this model and related jurisprudential claims. Mark Greenberg, ‘The Standard Picture and Its Discontents’ in Leslie Green and Brian Leiter (eds) *Oxford Studies in Philosophy of Law, vol. 1* (OUP 2011) [hereinafter ‘SP’]; Mark Greenberg, ‘LAC’ (n 9).

<sup>163</sup> This distinction is developed in the work of Paul Grice. HP Grice, ‘Meaning’ (1957) 66(3) *The Philosophical Review* 377. Grice uses the term ‘utterer’s meaning’ rather than ‘speaker’s meaning’. For simplicity and consistency, I will continue to use ‘speaker’s meaning’.

<sup>164</sup> I use ‘linguistic’ and ‘communicative’ content interchangeably.

<sup>165</sup> What Mark Greenberg calls a statute’s ‘contribution to the law’. Greenberg, ‘LAC’ (n 9).

proper object of explanation for any theory of statutory interpretation. Intentionalism, inasmuch as it fails to offer an explanation of a statute's legal meaning, is incomplete.

#### *A. Speaker's Meaning and Sentence Meaning*

The first distinction, between 'speaker's meaning' and 'sentence meaning', is developed in the work of Paul Grice. This is a complex and sophisticated body of work, and I am aware that engaging with it only briefly, I may be eliding complex debates within philosophy of language. Nothing in the present argument, however, turns on such debates, because my primary argument is that regardless of whichever theory of 'meaning' we subscribe to in ordinary language, more is needed to explain a statute's legal meaning. Grice's theory is the most useful for exegetical purposes because it is so well known, and because intentionalists seem implicitly to adopt many of its premises. I introduce it here to try to bring clarity to some of the claims that intentionalists make.

The key distinction in Grice's work is between 'speaker's meaning' ('what did a speaker mean when she uttered sentence  $x$ ?') and 'sentence meaning' ('what does sentence  $x$  mean?'). Speaker's meaning, for Grice, is cashed out in terms of the speaker holding specific kinds of intentions.<sup>166</sup> I mean  $x$ , he says, if I utter  $x$  with the intention of inducing a certain belief in my audience, and I intend that that belief be induced by way of the audience

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<sup>166</sup> Grice (n 163). Grice uses the phrase 'utterer's meaning'.

recognising my intention to induce it. Suppose that, noticing that your shoelace is untied, I point to your shoe and say 'careful'. I intend from this combination of word and gesture that:

1. You recognise that your shoelace is untied;
2. You recognise my intention to make you realise that your shoelace is untied; and
3. That you take my intention in (2) as part of your reason for believing that your shoelace is untied.

What a speaker 'means' when she says something is explained here in terms of complex, audience-directed intentions.<sup>167</sup>

Speaker's meaning, here, is the more basic aspect in terms of which sentence meaning can be defined. The meaning of a sentence depends on what the speaker intended to achieve through the sentence.<sup>168</sup> Later, Grice refines this somewhat. A sentence means *p* among a group of speakers, he says just in case that group has the procedure of using it to intend that *p*.<sup>169</sup> For example, because one of the ways that English speakers use the phrase 'The door is closed' is to indicate that the door is in fact closed, one of the

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<sup>167</sup> Stephen Neale, 'Paul Grice and the Philosophy of Language' (1992) 15(5) *Linguistics and Philosophy* 509, 515. Philosophers also distinguish what a speaker *implicates*, rather than what they mean. 'I have a quite a few other calls today' can mean that I have quite a few other calls today, and imply that I want to stop talking to you. Nicos Stavropoulos, 'Words and Obligations', Andrea Dolcetti, Luís Duarte d'Almeida and James Edwards (eds), *Reading HLA Hart's 'The Concept of Law'* (Hart Publishing 2013) 156-7.

<sup>168</sup> Grice (n 163); Neale, *ibid*.

<sup>169</sup> HP Grice, 'Utterer's Meaning, Sentence-Meaning and Word-Meaning' (1968) 4(3) *Foundations of Language* 225, 233.

meanings of the sentence 'The door is closed' is that the door is in fact closed.<sup>170</sup>

The key Gricean claim, then, is that sentence meaning can be analysed in terms of the speaker's meaning, and speaker's meaning can be analysed in terms of complex, audience-directed intentions. In recent years, philosophers of language have claimed that we can make progress in theories of statutory interpretation precisely by paying closer attention to these developments in philosophy of language. Stephen Neale draws on Grice's work to develop a theory of statutory interpretation that dissolves the distinction between textualism and intentionalism. According to Neale, textualism remains coherent only if anchored in legislative intent. This is because, as we know from Grice, the semantic content of a communicative act generally underdetermines the (sentence) meaning of that act. A sign that reads 'Children Under 12 Admitted Free of Charge' could be read as communicating that *only* children under twelve are admitted free of charge, or just that children under twelve are admitted free of charge (leaving open the possibility that children over twelve are also admitted free of charge). The second, plainly absurd, reading is the only one available to a 'naïve textualist' who considers only the semantic content of the text.<sup>171</sup> In ordinary communication, we rely on what Grice calls 'conversational implicatures'; maxims of communication according to which, roughly speaking, the hearer

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<sup>170</sup> Richard E Grandy and Richard Warner, 'Paul Grice' (2017) *The Stanford Encyclopedia of Philosophy*, available at: <https://plato.stanford.edu/archives/win2017/entries/grice/>.

<sup>171</sup> Stephen Neale, 'Textualism With Intent' (unpublished manuscript) 44.

can work out what the speaker meant by the way she said something.<sup>172</sup> In order to determine the meaning of the sign in this case, any textualist thesis requires a 'bedrock intentionalist thesis'.<sup>173</sup> Reflection on meaning in ordinary language, on this view, tells us that while various pieces of evidence may be brought forward to explain the meaning of a text, such meaning is *constitutively* determined by speaker's intentions.<sup>174</sup>

We can see how the picture of communication would be of interest to intentionalists. If lawmaking is a process of deliberate communication, and communication works in the way that Grice claims, then it seems to follow that the 'meaning' of a statute should be explained in terms of the complex, audience-directed intentions of its enactors.<sup>175</sup> The conclusions that Neale and others reach, however, are too quick. This takes us to the second of our two distinctions.<sup>176</sup>

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<sup>172</sup> HP Grice, 'Presupposition and Conversational Implicature' in Peter Cole (ed) *Radical Pragmatics* (Academic Press 1981).

<sup>173</sup> Neale, 'Textualism With Intent' (n\_\_\_\_) 64.

<sup>174</sup> As Andrei Marmor points out, a textualist can concede that intentions play the role that Neale claims, while pointing out that what is 'communicated' by a speaker is also reliant on some conception of what an objective reasonable hearer would deduce from the communication. In such a case, facts about what counts as an objective notion of reasonable hearer would also play a constitutive role in the statute's meaning. This internal debate within textualism need not detain us here. Andrei Marmor, *The Language of Law* (OUP 2014) 116.

<sup>175</sup> Larry Alexander, 'Legal Positivism and Originalist Interpretation' in Andrei Marmor (ed) *Law and Interpretation: Essays in Legal Philosophy* (Clarendon Press 1997). For an overview of this version of intentionalism, see Stoljar (n 159) 475.

<sup>176</sup> I will remain agnostic about whether it is possible to attribute intentions in the Gricean sense to collective bodies. The points that I make about intentionalism apply whether or not this is the case. It is worth pointing out however that it is not obviously the case that collective entities can or do have intentions in this sense.

## B. Linguistic Meaning and Legal Meaning

If we assume that statutory enactment is an act of communication, in the same way as or similar to ordinary communication, then a statute has some definable communicative content. Call this the ‘linguistic meaning’ of the statute. The debates discussed in the previous section, on the relationship between sentence and speaker meaning, will plainly have a bearing on debates over a statute’s linguistic meaning. We will ask questions about, for instance, whether the linguistic meaning of a statute is determined in the same way as the meaning of a sentence in ordinary language.<sup>177</sup>

The neo-Gricean view of communication offers a sophisticated account of the linguistic meaning of a statute, if we do choose to view statutes as acts of communication.<sup>178</sup> We must be careful, however, not to conflate the question of *what a statute communicates* with the question of *what legal rights and obligations obtain in virtue of that statute’s enactment*. The latter concept is what I refer to as a statute’s ‘legal meaning’.<sup>179</sup> Legislation usually results, we generally think, in legal rights and obligations that obtain in virtue of that

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<sup>177</sup> For an overview of the linguistic puzzles that statutory interpretation presents, see Lawrence Solan, ‘Linguistic Issues in Statutory Interpretation’ in Lawrence Solan and Peter Tiersma (eds) *The Oxford Handbook of Language and Law* (OUP 2012).

<sup>178</sup> As Greenberg points out, there are various important differences between statutory enactment and ordinary communication, which the communication theorists must account for. Greenberg, ‘LAC’ (n 9).

<sup>179</sup> *ibid.* ‘Legal meaning’ is something of a misnomer here, since it does not refer to ‘meaning’ in the linguistic sense. I use it here only for neatness.

legislation.<sup>180</sup> When asking ‘what does this statute mean?’ we might mean ‘what legal rights and obligations do I have in virtue of this statute?’ This is a different to the question of what a statutory text communicates.

Does this distinction matter? Some theorists view a statute’s linguistic and legal meaning as identical. They believe that a statute’s contribution to the law is determined by its linguistic meaning.<sup>181</sup> This is true, they claim, simply in virtue of the fact that legislation just *is* a special instance of communication. The model of legislation as communication seems to fit neatly with theories of general jurisprudence that view legal obligations as obtaining in virtue of *authoritative* pronouncements of legal institutions. On this view, the linguistic meaning of a statute is determined by legislative intentions, and a statute’s contribution to the law is determined by its linguistic meaning.

The model of legislation as communication, however, is problematic. Not every practice involving language is an instance of communication. Mark Greenberg points out several ways in which ordinary communication and lawmaking are asymmetrical.<sup>182</sup> For one, legislation typically involves *aims* of some kind beyond just the exchange of information, which is all that is

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<sup>180</sup> I am agnostic, at this point, about whether such rights are genuine moral rights or not. Plainly it would be question begging to take a position on that here.

<sup>181</sup> Scott Soames, ‘Interpreting Legal Texts: What is, and What is not, Special About Law’ in Scott Soames, *Philosophical Essays, Volume 1* (Princeton University Press 2009). Strangely, Neale notes that what a statute states, or means, ‘leaves wide open the question of the contribution it makes to the law’. Neale, ‘Textualism With Intent’ (n 171) 7. As Greenberg points out, however, many of Neale’s claims in the same paper only make sense if he is talking about the statute’s contribution to the law. Greenberg, ‘LAC’ (n 9) fn 26.

<sup>182</sup> Greenberg, ‘LAC’ (n 9); Stavropoulos, ‘Words and Obligation’ (n 167).

involved with ordinary communication.<sup>183</sup> For another, we cannot ask lawmakers for clarification about the nature of their ‘communication’; a key tool in working out what another participant in a conversation ‘meant’.<sup>184</sup> There are reasons, then, to doubt that a statute’s linguistic meaning is determined in precisely the same way as ordinary language, since many of the features of ordinary conversation are missing in lawmaking.

Building on Greenberg’s point about the absence of the possibility of asking the legislature for clarification, Stavropoulos notes that it would not be appropriate to ask for such clarification even if we were able. This is because:

[A]ny information the authors might be able to offer after the fact does not seem *relevant* to the reader’s task of working out the statute’s legal impact. Lawyers seem to assume that, once the statute is enacted, the matter of its impact is out of its authors’ hands.<sup>185</sup>

It would be perfectly feasible to ask for such clarification in many instances, particularly with recent pieces of legislation, in which the makeup of Parliament is precisely as it was at the time of enactment. It is not difficult to imagine some mechanism for seeking Parliament’s feedback on the legal rights and obligations that they intended to bring about with a particular piece of legislation. That there is no appetite for such a mechanism should tell us that any such intention is irrelevant to the legal obligations that obtain in virtue

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<sup>183</sup> Greenberg *ibid.*

<sup>184</sup> *ibid* 64-68.

<sup>185</sup> Stavropoulos, ‘Words and Obligations’ (n 167) 159-60.

of the statute.<sup>186</sup> At the very least, it is not the only consideration that judges take into account when deciding on the correct interpretation of a statute.

There are reasons to think, then, that legislative intentions underdetermine the *legal meaning* of a statute. There are three possible explanations for this. First, it could be that lawmaking *is* like ordinary communication, but Griceans are wrong that sentence meaning is cashed out in terms of speaker's meaning, and speaker's meaning in terms of intentions. Secondly, it could be that the Gricean model is the right one for ordinary communication, but legislation *is not* like ordinary communication, and the linguistic meaning of a statute is not cashed out in the same way as the meaning of sentences in ordinary language. Thirdly, and most importantly for now, it could be that whether or not legislation is like ordinary communication, the statute's nature as an act of communication is not what determines the legal rights and obligations that obtain in virtue of the statute's enactment.

Crucially, wherever we come down on the first two hypotheses, we cannot disprove the third by establishing that legislation is an act of communication. Proponents of the communicative model must show that the nature of legislation as an act of communication, and not some other factor, is what determines the statute's impact on the law. This is not asking proponents of that view to prove a negative. Any theory of statutory interpretation owes us an explanation of why statutes make the contribution to the law that they do. Even if it can be shown that legislation is the same as

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<sup>186</sup> It is also plausible to think that Parliament often does not have any particular intentions relating to the legal rights that obtain in virtue of legislation. The intentions that MPs have often relate to policy objectives, rather than specific legal rights.

ordinary communication in the relevant ways, such that legislative intentions determine the linguistic meaning of a statute, that by itself still would not tell us anything about the legal obligations that obtain in virtue of that statute. Theories of language are silent as to legal meaning, because it is not 'meaning' in any sense familiar to philosophy of language. Whether or not legislation is as similar to ordinary communication as neo-Griceans claim, it should be clear that it cannot be assumed without explanation that a statute's linguistic meaning and legal meaning are identical. That claim requires further argument. By equating legal meaning with linguistic meaning, we beg the question in favour of theories that view legal acts such as legislation as acts of communication.

To illustrate this point further, notice that there are plenty of obligation-generating practices that involve communication, but within which the role of communication in grounding obligation is an open question. Greenberg highlights promising as one such example.<sup>187</sup> Few would deny that making a promise involves communication. Yet there are theories of promising that claim that the content of a promissory obligation can depart from the content of what the speaker communicated.<sup>188</sup> This is because other facts might determine the precise impact that the promise has on our rights and obligations. What is at issue here is not whether one theory of promising offers a better explanation of the phenomenon than another. The point is that *any* account of the relationship between the act of communication involved in

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<sup>187</sup> Greenberg, 'LAC' (n 9).

<sup>188</sup> TM Scanlon, 'Promises and Practices' (1990) 19(3) *Philosophy and Public Affairs* 199; Seanna Shiffrin, 'Promising, Intimate Relationships and Conventionalism' (2008) 177(4) *Philosophical Review* 481.

a promise and the obligations that obtain in virtue of it demands explanation. The same is true of law. Even if legislating is a form of communicating, the linguistic content of what is communicated may not by itself determine the statute's contribution to the law. When linguistic meaning and legal meaning are treated as synonymous, theories like intentionalism or textualism, which make sense as theories about a statute's linguistic meaning, become the only game in town when it comes to working out a statute's legal meaning.

The distinction between linguistic and legal meaning, and the explanatory primacy of the latter, is implicit in several theories of general jurisprudence. Ronald Dworkin, for instance, distinguished between 'conversational' and 'constructive' interpretation. The interpretation of social practice (a matter of constructive interpretation) aims 'to interpret something created by people as an entity distinct from them, rather than what people say, as in conversational interpretation'.<sup>189</sup> He notes that one theory of artistic interpretation is that it works like conversational interpretation; that is, we 'listen' to what the author was trying to say and work out what they intended to communicate.<sup>190</sup> The truth of this claim, however, would necessarily be 'a *consequence* of having applied the methods of constructive interpretation to art, not of having rejected those methods'.<sup>191</sup> Similarly, the linguistic content of a statute might ground legal rights and obligations, but it must be shown that this follows from the nature of legal practice.

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<sup>189</sup> Dworkin, *Law's Empire* (n 10) 50.

<sup>190</sup> *ibid* 51-52.

<sup>191</sup> *ibid* 54.

Dworkin recognised that it could conceivably be argued that the correct interpretation of a social practice might be determined by participant intentions, but only if the truth-determining role of intention was argued for as part of the best interpretation of the practice. The sorts of claims that participants in a social practice make are claims about what the practice means, not about what the participants mean.<sup>192</sup> We might make claim that the meaning of the practice depends on the meaning we as participants intend it to have, but this can only be true as a result of the nature of the practice. A theory that affords a privileged place to legislative intentions in grounding legal rights and obligations must show not just that intentions ground the linguistic meaning of the statute, but that the resultant legal rights correspond to this linguistic meaning.

It is not just non-positivist theories that recognise the primacy of legal meaning over linguistic meaning. This explanatory priority remains the same if we do not view legal obligations as genuine moral obligations. Suppose we instead take the view, developed by Scott Shapiro, that legal norms are ‘plans’ or ‘plan-like norms’.<sup>193</sup> Legal obligations, on this view, are ‘perspectival’ obligations in the Razian sense, i.e. obligations from law’s perspective.<sup>194</sup> What judges need to work out, on this theory, is the plan-like norm that each statute contributes to the legal order. Whether the content of that norm depends on the linguistic content of the norm is another matter, requiring further argument. The same point applies *mutatis mutandis* to Raz’s own

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<sup>192</sup> *ibid* 63.

<sup>193</sup> Scott Shapiro, *Legality* (Belknap Press 2011) 127-128.

<sup>194</sup> *ibid* 186-188.

theory. That is, the object of statutory interpretation is the legal norm, not the linguistic content of the norm-creating directive.

The aim of statutory interpretation is to interpret the legal rights and obligations (however we understand that term) that obtain in virtue of a statute's enactment. If these rights are constitutively determined by a statute's linguistic meaning, then of course judges must identify the statute's linguistic meaning. But this connection must be argued for. What judges aim to interpret is the legal meaning of statutes. It is legal meaning that tells us the correct resolution of a given case, and so it is legal meaning that a theory of statutory interpretation should help us discover.

If a theory of statutory interpretation explains only a statute's linguistic meaning, then it is incomplete. We are entitled to demand an explanation of why the legal meaning of that statute matches its linguistic meaning. In the next section, I argue that intentionalism is incomplete for precisely this reason. Intentionalists conflate linguistic and legal meaning. They plainly believe that their arguments have a bearing on the correct resolutions of legal proceedings, but their arguments make sense only as claims about the determination of linguistic meaning. As such, they have no bearing on the correct resolution of legal proceedings.

## **2. What Do Intentionalists Mean?**

### *A. Meaning in Intentionalism*

Intentionalism views the intentions of past political actors, whether constitutional framers or an iteration of the UK Parliament, as complex psychological facts. The job of the judge, on this view, is to uncover as best they can these intentions. Underlying this conception is the view, highlighted earlier, that legislating, including constitution making, is an act of human communication, which can be imperfect and often unreliable. Intentionalism's core claim is that the meaning of a statute is 'what the legislature appears to have intended it to mean, given evidence of its intention that is readily available to its intended audience'.<sup>195</sup>

We now know that we can understand this in one of two ways. First, it might be that intentionalism makes the claim that legislative intentions determine the linguistic meaning of a statutory provision. On this reading, the intentionalist cashes out the linguistic meaning of a statute in much the same way that the neo-Gricean cashes out sentence meaning, i.e. by positing a constitutive role for complex, audience-directed intentions. If this claim were true, it would be trivially so. This is because, as we have seen, linguistic meaning on its own tells us nothing about a statute's contribution to the law. Alternatively, intentionalists might be understood as claiming that legislative intentions determine the legal rights that obtain in virtue of a statute's enactment. In this case, intentionalism really would have something to say about adjudication, and therefore about whether the principle of legality is an appropriate method of interpretation.

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<sup>195</sup> Goldsworthy, *Parliamentary Sovereignty* (n 142) 248.

It matters a great deal, then, which sort of claim intentionalism makes. The trouble is that while intentionalists seem to view their theory as one about legal meaning, the arguments that they make typically speak only to linguistic meaning. This results in confusion and ambiguity. The problem, I believe, is that intentionalists take for granted that a statute's linguistic and legal meanings are necessarily identical, because they assume that legislation is just an instance of ordinary communication. The result is that intentionalism purports to say something about legal meaning, but it offers arguments that speak only to linguistic meaning. Below, I try to clarify the arguments that intentionalism makes, and set out what sort of further arguments intentionalism needs in order for its claims to be coherent.

Jeffrey Goldsworthy, in the course of arguing for intentionalism, asks whether we should 'hold that [statutes'] full meanings depend partly on factors other than their literal meanings'.<sup>196</sup> His answer is that 'full meaning' depends on complex, audience-directed intentions. We are given no indication, however, about whether 'full meaning' corresponds to linguistic or legal meaning. In the next sentence, he refers to the 'true meaning' of a statute. The debate is then framed as a choice between intentionalist theories, 'which hold that the true meaning of a statute is determined partly by the intentions or purposes of the legislature that enacted it', and non-positivist theories, 'which hold that the meaning of a statute is partly a function of moral principles'.<sup>197</sup>

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<sup>196</sup> Jeffrey Goldsworthy, 'Legislative Intentions, Legislative Supremacy, and Legal Positivism' (2015) 42 *San Diego Law Review* 493, 494.

<sup>197</sup> *ibid.*

These competing theories are explicitly referred to as ‘intentionalist and natural law theories of meaning’.<sup>198</sup>

Does ‘true meaning’ refer to linguistic or legal meaning? If it refers only to linguistic meaning, then Goldsworthy’s contrasting of intentionalism with non-positivism would not make much sense. Non-positivist theories do not make any claims about the linguistic meaning of statutes.<sup>199</sup> To be more precise, non-positivists may make such claims, but there is, to borrow a phrase, no necessary connection between non-positivism and theories in philosophy of language. What non-positivism does claim is that moral principles determine a statute’s legal meaning. Non-positivist theories are clear about this; they are concerned with the genuine moral obligations that obtain in virtue of legal practice. If the linguistic meaning of a statute plays a role in grounding these obligations, then it is because morality assigns it such a role. If intentionalism is a direct competitor to such theories, as Goldsworthy

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<sup>198</sup> *ibid* 495. Goldsworthy uses ‘natural law theories’ as a broad term to refer to natural law theories proper, mentioning Michael Moore by way of example, and interpretivist theories like Dworkin’s. Goldsworthy’s points apply equally to both, so he does not need to distinguish between them. The same is true here. We need not worry about distinguishing between different forms of non-positivism for now, since my main point is that *no* theories of general jurisprudence should be cashed out in terms of ‘meaning’ in the linguistic sense.

<sup>199</sup> It is confusing to speak, as Goldsworthy does, of ‘natural law theories of *meaning*, such as those of Michael Moore and Ronald Dworkin, which hold that the meaning of a statute is partly a function of moral principles, irrespective of the legislature’s intentions or purposes (if it had any)’, or ‘common law theories, according to which the *meaning* of a statute is partly a function of common law principles of interpretation.’ My emphasis. These are not theories of ‘meaning’ in any familiar sense. Casting these as theories of meaning makes sense only if linguistic and legal meanings are identical, which is precisely what such theories reject. This framing only serves to mask the distinction between linguistic and legal meaning, and beg the question in favour of theories that deny that there is any such distinction.

suggests, then intentionalism must make claims about the legal obligations that obtain in virtue of statutory enactments (though intentionalists would dispute that these are genuine moral obligations).

Further, we can infer from the fact that intentionalism purports to explain the reasons that judges have to resolve cases in certain ways that intentionalists feel that they have something to say about legal meaning. Intentionalists argue that because intentions fix the 'meaning' of a statute, the role of the judge is to figure out what the legislature intended in order to interpret the statute before them. If this referred only to linguistic meaning, then the truth of intentionalism would not by itself result in any true statements about how judges should resolve cases. These statements only make sense if a statute's linguistic and legal meanings are identical.

However, as I have argued in the previous section, it does not follow from the claim that legislating is an act of communication that the legal meaning of a statute is determined by its linguistic meaning. The elision of the distinction between linguistic and legal meaning is evident in the arguments that Goldsworthy makes for preferring intentionalism to 'literalist' statutory interpretations. In one article, he lists a number of cases in which the consequences would have been 'absurd' if judges stuck rigidly to the literal meaning of the text.<sup>200</sup> For example:

Rule 14(2) of the Magistrates' Courts Rules 1968 (UK) states that at the conclusion of the evidence for the complainant, "the defendant may

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<sup>200</sup> Goldsworthy, 'Legislative Intentions, Legislative Supremacy, and Legal Positivism' (n 196) 496-498.

address the court." It does not provide that the court must listen to the defendant's address. Nevertheless, this is surely implied.<sup>201</sup>

The outcomes yielded in examples like this one, when the 'literal meaning' of statutes is sought, are treated as absurd *because* those literal meanings are clearly very far from what the legislature intended to communicate. Such intentions, however, speak only to a statute's linguistic meaning. Goldsworthy's argument here is that it would be absurd to take a literal reading of the statutory text in working out its legal meaning, because that would clearly depart from its linguistic meaning (which is in turn determined by intentions). But what role linguistic meaning plays in determining the obligations that obtain in virtue of a statute's enactment is precisely the question at issue. Goldsworthy begs the question, and he does so because of a failure to distinguish between linguistic and legal meaning. If the claim were that it would be absurd to say that a statute's *linguistic* meaning cannot depend on its literal meaning, then we could understand this as a stand-in for a broader, Gricean argument about linguistic content. This, however, tells us nothing about a statute's legal meaning. Goldsworthy cannot claim, at least without further argument, that the outcomes in his examples are *legally* absurd, only that they are linguistically absurd. My point here is not that the literalist interpretations Goldsworthy points to are correct; only that their inappropriateness must be argued for properly, not assumed.

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<sup>201</sup> *ibid* 497.

Further, the sort of argument that intentionalists would need to make to demonstrate that intentions ground legal meaning is a very difficult one to make out. Intentionalists do not just claim that legislative intentions play *some* role in fixing a statute's legal meaning. If this were the case, they would not find much resistance. Non-positivists, for example, could agree with that point, while holding that intentions can only have a role in fixing a statute's contribution to the law in virtue of moral facts, and that other moral values also partly determine the statute's legal impact. On this view, judges should try to ascertain legislative intentions, and then work out what the moral impact these intentions have, in combination with any other relevant facts. Intentionalists, though, typically claim that judges should *only* be interested in working out what intention the legislature held.

Ekins and Goldsworthy, for example, claim that 'the object of statutory interpretation is the intention of the enacting Parliament, and [...] the point of particular principles of interpretation (maxims, presumptions and so on) is to infer this intention from both textual and contextual evidence.'<sup>202</sup> Here, Ekins and Goldsworthy assert too much. The object of statutory interpretation, in more abstract terms, is to work out the legal obligations that obtain in virtue of a statute's enactment. The claim that a statute's contribution to the law is determined by legislative intentions is a further argument that must be defended. Ekins and Goldsworthy cannot claim to make something to say about a statute's contribution to the law, while offering arguments that speak

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<sup>202</sup> Richard Ekins and Jeffrey Goldsworthy, 'The Reality and Indispensability of Legislative Intentions' (2014) 36(1) *Sydney Law Review* 39, 42 (my emphasis).

only to linguistic meaning. Lord Burrows, writing extra-judicially, captures this shortcoming nicely:

Even if we were to accept that Dr Ekins is providing a valid explanation for the traditional reliance on Parliamentary intention, it is clear that the explanation provides no assistance at a practical level in answering the questions on statutory interpretation that the courts face... In deciding on the best interpretation of a statute, the courts need to rely on the more concretised ideas that revolve around the words, context and purpose of the statute. Reliance on the 'high-level' idea of Parliamentary intention is unhelpful, at best, and has a tendency to mask the true reasoning and power of the courts.<sup>203</sup>

*B. 'The Content of the Law'*

The ambiguous use of 'meaning' in intentionalism operates in tandem with another ambiguous concept: that of the 'content of the law'. It merits teasing out this notion here, because it is another concept that begs the question in favour of specific jurisprudential theories.

According to Goldsworthy, the doctrines of parliamentary sovereignty and legislative intent 'help determine the content of the law'.<sup>204</sup> The 'content'

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<sup>203</sup> Burrows (n 136) 18-19. Lord Burrows is here specifically addressing Ekins' fleshed out theory of legislative intention, as set out in Richard Ekins, *The Nature of Legislative Intent* (OUP 2012).

<sup>204</sup> Jeffrey Goldsworthy, 'The Real Standard Picture and How Facts Make It Law: A Response to Mark Greenberg' (2019) 64(2) *American Journal of*

of the law, however, is another hazy notion. This could refer to the totality of rights and obligations that obtain in virtue of the actions of legal institutions.<sup>205</sup> Or it could refer to the totality of linguistic communications ‘uttered’ by legal institutions.<sup>206</sup> We might similarly speak of the ‘content’ of a novel as meaning either a definitive list of the words and sentences in the book and what they ‘mean’ in a linguistic sense, or we might mean the story that the novel tells, the characters that it conjures etc.

These possible readings of legal ‘content’, it should be evident, map onto the distinction between a statute’s ‘linguistic’ and ‘legal’ meaning. The ambiguity in intentionalism’s use of ‘meaning’ bleeds into discussion of ‘content’. Intentionalists (and many legal theorists more broadly) treat these two possible meanings of ‘content’ interchangeably. A list of all legal obligations just *is* a list of the linguistic contents of various legislative acts, if we assume that linguistic meaning and legal meaning are the same. This,

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*Jurisprudence* 163, 174. There is also ambiguity around what it means for a doctrine to ‘help determine’ the law. This might mean help determine in an evidentiary or epistemological sense. I.e. it could be that legal rights and obligations are constitutively determined by something else, but that intentions provide a useful guide for working it out. Or it might mean that intentions themselves *constitutively* determine a statute’s contribution to the law, i.e. that the intentions are what make it the case that the statute’s contribution to the law is what it is. This would collapse entirely the distinction between a statute’s linguistic and legal meanings, with the former cashed out in neo-Gricean terms. It would seem most natural, given the claims intentionalism makes, that ‘determine’ here means *constitutively determine*.

<sup>205</sup> This is how Greenberg uses the term. Mark Greenberg, ‘The Moral Impact Theory of Law’ (2014) 123 *Yale Law Journal* 1288, 1295.

<sup>206</sup> This becomes even more confused if we try to think about where common and customary law fit in. Are they communications too? If not, how do they contribute to the ‘content’ of the law, if the content of the law is something different from the rights and obligations that obtain in virtue of legal actions?

again, is a result of the undefended assumption that the linguistic and legal meanings of a statute are necessarily identical.

The dual conflation in discussion of ‘content’ and ‘meaning’ is evident even in the work of philosophers of language. This can be seen in Soames’s analysis of the well-known case *Smith v United States*.<sup>207</sup> The petitioner in this case attempted to trade a gun for cocaine. He was prosecuted under a statute that provided for an increased penalty for any person who ‘uses a firearm’ in the course of a drug trafficking crime. The question was whether trading a gun, rather than using it as a weapon, activated the increased penalty. A great deal of the Court’s discussion turned on the ‘meaning’ of the word ‘use’. The majority believed that ‘use’ should be read in its ‘ordinary meaning’, which in this context included trading. Justice Scalia, in dissent, argued that the ordinary meaning of ‘use’ depends on the context. In this case, the ordinary meaning of ‘use’ plainly excluded ‘using as a means of exchange’.

The mistake that both majority and dissent make, according to Soames, is thinking that the outcome of this case turns on the ‘ordinary meaning’ of any particular word in the statute: ‘The Court here tacitly assumes that the content of the statute – what it says about additional penalties – is given by its meaning, which is identified as the ordinary or natural meaning of its words’.<sup>208</sup> What this demonstrates, he says, is ‘a shared conflation of the meaning of the statutory language with the content of the resulting statute’.<sup>209</sup>

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<sup>207</sup> Soames (n 181). *Smith v United States* (1993) 508 US 223. This is also discussed at length by Neale (n 171). Neale’s interpretation is challenged in turn by Greenberg, ‘LAC’ (n 9).

<sup>208</sup> *ibid* 12-13.

<sup>209</sup> *ibid* 14.

This seems correct. But what Soames goes on to claim is more problematic, and it speaks once more to the conflation of linguistic and legal meaning, and the role that the ambiguity around legal ‘content’ plays in this conflation. The issue, he claims, is that the ‘meaning’ of a sentence underdetermines what we use that sentence to communicate. In *Smith*, the Court failed to recognise that the ‘ordinary meaning’ of the word ‘use’ underdetermined the meaning that Congress intended to convey. Hence, we must look to congressional intentions, to figure out what was actually intended.

Stavropoulos points out that such an argument runs into great difficulty in the absence of evidence about what intentions legislators actually held.<sup>210</sup> In the absence of such evidence, we seem forced to *attribute* intentions to legislators, letting in the sort of normative political theory that intentionalism supposedly rejects. I pick up on this difficulty for intentionalism in more detail in the next chapter. For now, there is a more fundamental issue with Soames’s claim. He claims that ordinary meaning underdetermines the communicative content of a statute. But as we have seen, what the statute ‘communicates’ is not the same as ‘what contribution a statute makes to the law’. Or at least, it must be shown to be the same. What is at issue is not just ‘a shared conflation of the meaning of the statutory language with the content of the resulting statute’, but a conflation between two senses in which we speak of the ‘content’ of a statute: its linguistic content, on the one hand, and its contribution to our legal obligations, on the other. We are owed an

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<sup>210</sup> Stavropoulos, ‘Words and Obligations’ (n 167) 265.

explanation of why and how the linguistic meaning of a statute bears on our legal rights and obligations, and there is no reason to think that a normatively inert philosophy of language can provide it.

The 'content of the law', then, is another label that muddies the waters, by begging the question in favour of a particular explanation, or rather begging the question in favour of the claim that no further explanation is needed. To see this, it is worth reflecting on what work the word 'content' is doing here. Consider the following. There are what we might call 'legal actions': statutory enactments, common law decisions etc. Then there are legal rights and obligations. On a non-positivist view, these are the only theoretical tools we need to explain the nature of law. There are things that happen in the world, and there are the rights and obligations that obtain in virtue of them. The 'content of the law' suggests a third object of inquiry, existing in between the other two. On this view, we have legal actions, which create something called 'law' with a definable 'content', and then we work out what obligations we hold in virtue of that content. What do we gain by adding in this new element? Certainly it makes sense if we assume that legislation is an act of communication. We have communications, then we have a list of what has historically been communicated, then we work out what we are entitled to in virtue of those communications. The 'content' of the law, understood in this way, is another phrase that subtly begs the question in favour of the view that legislating is an act of communication.

### 3. Problems for Intentionalism as a Theory of Legal Meaning

The claim that a statute's legal meaning is determined by legislative intentions runs into a well-known problem. This is that legislators are possessed of multiple sorts of intentions, at different levels of abstraction.<sup>211</sup> Further, legislators can have *conflicting* intentions, and it is not obvious how judges should discriminate between them without reliance on arguments of political morality. If judges, when they employ the principle of legality, are trying to work out the intention of the legislature, then we are entitled to ask which intentions they are interested in. The problem for intentionalism is that it lacks the resources to explain how judges should adjudicate between these intentions without using their own judgment about the moral appropriateness of each. In that case, however, judges are not really looking to intentions at all, but rather appealing to the sorts of arguments of political morality that intentions are supposed to override. The upshot is this point is this: intentionalism can only answer the challenge posed by the multiplicity of legislative intentions by abandoning the claim that intentions themselves are what determine a statute's legal meaning.

#### A. *Abstract and Concrete Intentions*

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<sup>211</sup> Dworkin uses this point, repeatedly and forcefully, against intentionalism. See Ronald Dworkin, 'Constitutional Cases' in *Taking Rights Seriously* (Bloomsbury 1977) 133-137; *AMOP* (n 157) 48-55; *Law's Empire* (n 10) 362. George Letsas applies the same critique to those who claim that intentionalism should be applied to interpretation of the European Convention on Human Rights. George Letsas, 'Intentionalism and the Interpretation of the ECHR' in Malgosia Fitzmaurice, Olufemi Elias and Panos Merkouris (eds), *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years On* (Brill 2010).

I might hold the intention that I act as a good friend; that is, that I conduct myself with my friends in accordance with the value of friendship. This is a fairly abstract intention. I also have more concrete beliefs about what this abstract intention demands in certain circumstances. During the Covid-19 pandemic, I intend to phone my friends more often, because I believe that my abstract commitment to friendship is served by my checking in on them. My abstract intention is to be a good friend, or to stay faithful to the value of friendship. My concrete belief is that this means that I should stay in touch with them during a difficult time.

There may be times, however, when my abstract and concrete beliefs conflict. There may be times when I am simply wrong about what friendship demands. Suppose my friend is immunocompromised, and is therefore at much greater risk from Covid-19. Now suppose I believe that the value of friendship means that I should travel across London to visit my friend in person. Most would, I think, agree that I am mistaken here about what the abstract value of friendship demands.<sup>212</sup> Now suppose that you have to advise me on what the best course of action is, and you want to help me to remain faithful to my intentions. What is more important, my abstract or concrete intention? If you tell me to visit my friend, then you will be ensuring that I fail in my abstract intention to be a good friend. It is difficult to see how you can advise, without reflecting yourself on the value of friendship and what

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<sup>212</sup> Not to mention the fact that I would obviously also be mistaken about my all things considered moral obligations, once factors of social responsibility and even legal obligations are taken into account.

it demands. In other words, the tension between my two intentions can only be resolved by something external to my intentions.

In the US constitutional context, the framers of the Constitution might have had the abstract intention that the Fourteenth Amendment guarantee equality among citizens, and more concrete intentions about whether this guaranteed more specific outcomes. For example, they likely would not have intended it to prohibit racial segregation in schools. Similarly, the drafters of the ECHR may have held the abstract intention to protect and promote human rights in Europe, as well as more concrete intentions about what demands that abstract commitment made in more specific circumstances.<sup>213</sup>

Intentionalists in the US constitutional context tend to believe that judges should seek out concrete legislative intentions in interpreting statutes. Otherwise, they would have to engage in the sort of moral and political theorising of their own that intentionalism frowns upon. If the Framers intended only that the Constitution protect equality, whatever that is taken to mean by the justices of the Court, then constitutional adjudication is not just a matter of uncovering facts about legislative psychology. Rather, judges must make substantive decisions of political morality determining what equality demands *in service of* the abstract intentions of the drafters.<sup>214</sup>

The problem is that in many cases, there is little justification for choosing concrete over abstract intentions. Suppose the two sorts of intention conflict. Dworkin points out that it was likely the case that the Framers of the

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<sup>213</sup> Letsas, 'Intentionalism and the Interpretation of the ECHR' (n 211) 267-268.

<sup>214</sup> Dworkin, *AMOP* (n 157) 49.

US Constitution believed that the government should treat citizens equally, but would not have believed that segregated schools would violate this conception of equality.<sup>215</sup> Most would agree that the Framers were mistaken in the latter belief. They were wrong to think that that concrete belief was consistent with their abstract belief about equal treatment. But do we interpret the Constitution correctly here by remaining faithful to the concrete intention or the abstract one? Dworkin's point is that it is impossible to answer this question without engaging with principles of political morality that might tell us which intention is the relevant one:

Some part of any constitutional theory must be independent of the intentions or beliefs or indeed acts of the people the theory designates as Framers. Some part must stand on its own in political or moral theory; otherwise the theory would be wholly circular.<sup>216</sup>

Some controversial conception of democracy, for instance, might explain a preference for concrete intentions, but appeal to this sort of principle is precisely what intentionalists want to avoid.

Before pursuing this line further, it is important to explain how this point is relevant to theories about the principle of legality. One might claim that this concern applies only to cases where the object of interpretation is a provision for protection of a particular, vaguely worded right. This would limit the concern to US constitutional interpretation, and probably interpretation of the

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<sup>215</sup> *ibid* 48-49.

<sup>216</sup> *ibid* 54.

ECHR. In the case of UK statutory interpretation, however, there is only the intention about the contribution to the law to be made by specific pieces of legislation. In a case like *UNISON*, for example, what sort of abstract intention can Parliament have held about a provision to grant the Lord Chancellor power to set employment tribunal fees?<sup>217</sup>

The distinction between these sorts of cases is illusory. When judges use the principle of legality, they engage with the interplay of statute and common law principles that are typically expressed in language that is just as abstract as that of US constitutional provisions. In both instances, rights and principles influence the contribution to the law made by particular legislative acts. In the US constitutional context, the right to equal treatment might determine that a statute seeking to enshrine racial segregation in schools has no legal effect. US intentionalists must work out whether the abstract or concrete intentions of the Framers are the most relevant.

In the UK context, the claim that intentionalists make is slightly different, but not in a way that does away with the concern raised above. On their view, common law rights are not legally binding standards.<sup>218</sup> A statute's legal meaning is determined solely by the intentions of the statute-drafters. However, they still need to account for the principle of legality; those cases in which it looks a lot like judges are working out the effect of constitutional rights on the legislative process. What they say, recall, is that Parliament intends to legislate consistently with certain fundamental rights. This does not mean that such rights exist as a matter of UK law, separately from Parliament's will. But

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<sup>217</sup> [2017] UKSC 51.

<sup>218</sup> Goldsworthy, *Parliamentary Sovereignty* (n 142) chapter 2.

thinking about such rights as purely moral, non-legal norms may give us a clue as to Parliament's intentions. If this is our explanation, then the problem of adjudicating between abstract and concrete intentions is as relevant here as it is in the US context. If Parliament intends to legislate consistently (or inconsistently, where it uses 'clear and express' language to indicate so) with fundamental rights, then it can still hold abstract and concrete intentions in relation to these rights. There will be occasions when these two types of intention pull in opposite directions. If a court is to determine a provision's contribution to the law by asking whether Parliament intended that provision violate a fundamental right, it needs to be able to decide whether the relevant factor is Parliament's abstract or concrete understanding of the right in question.

For example, Parliament can hold the intention that it legislates consistently with the right of access to a court. In other words, it can hold an intention that it legislates consistently with an abstract understanding of the right of access to a court. It may also hold concrete ideas about what the right of access to a court requires. It may believe, for instance, that empowering the Lord Chancellor to set extortionately high tribunal fees is consistent with that abstract right. Suppose a judge thinks that Parliament is *wrong* in this particular concrete intention. She believes that such a reading would violate the right of access to justice that Parliament intends to uphold. Should she ignore Parliament's concrete intentions in order to give effect to its abstract intentions?

There may be an easy answer if we rely on arguments of political morality. We might say that democracy demands that we stick to concrete intentions, no matter how problematic they are. Or some conception of justice and fairness, or democracy itself properly understood, might make abstract intentions relevant. But intentionalists eschew these sorts of explanations. Rather, they introduce a new kind of intention to adjudicate between abstract and concrete. As we will see, however, this only pushes the problem to a further level of abstraction.

### *B. Meta-Intentions*

To explain how judges adjudicate between abstract and concrete intentions without resorting to moral argument, intentionalists introduce a new kind of intention: what have been called ‘interpretive intentions’,<sup>219</sup> ‘meta-intentions’,<sup>220</sup> or sometimes ‘standing commitments’.<sup>221</sup> The idea is that the drafters of legislation have intentions about how judges should interpret legislation; that is, intentions about whether judges should prioritise the legislators’ abstract or concrete intentions. It is open to the intentionalist to argue that it was the intention of the legislative drafters that judges should

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<sup>219</sup> Brest (n 156) 215; Dworkin, *AMOP* (n 157) 52.

<sup>220</sup> Dworkin, *Law’s Empire* (n 10) 364; Letsas, ‘Intentionalism and the Interpretation of the ECHR’ (n 211) 268.

<sup>221</sup> Goldsworthy, ‘The Real Standard Picture’ (n 204) 188.

construe the text before them in accordance with either the drafters' abstract or concrete intentions.<sup>222</sup>

This line of argument comes up when intentionalists account for occasions in which judges seem to depart from the obvious reading of a statutory provision, in order to give it a reading that is consistent with some fundamental right. In Chapter 1, we saw examples of such cases.<sup>223</sup> On such occasions, it may be said that courts:

[M]ay be justified in adjusting the meaning of a provision in order to protect such a right or principle, on the ground that Parliament can reasonably be presumed to have a standing commitment to respect it, and therefore must have overlooked the provision's impact on it.<sup>224</sup>

Parliament, on this explanation, adopts a meta-intention: an intention about how its intentions are to be interpreted. The meta-intention here in effect says: 'in cases of ambiguity, it should be assumed that our intention is that the legal meaning of the provision is consistent with common law rights'. In other words, the meta-intention points to an abstract intention: that the statute's contribution to the law be consistent with a common law right.

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<sup>222</sup> Powell argues persuasively that the Framers of the US Constitution held no such intention. H Jefferson Powell, 'The Original Understanding of Original Intent' (1985) 98(5) *Harvard Law Review* 885.

<sup>223</sup> See in particular the discussion in that chapter of *R (Evans) v Attorney General* [2015] UKSC 21 and *Privacy International v Investigatory Powers Tribunal* [2019] UKSC 22.

<sup>224</sup> Goldsworthy, 'The Real Standard Picture' (n 204) 188.

When Parliament uses ‘clear and express’ language, on the other hand, it signals its intention that judges read the provision in accordance with its concrete intention. The concrete intention here is that the statutory makes a specific contribution to the law, *whether that contribution violates a specific right or not*. The fact that Parliament is *aware* that its statutes will be read in this way, according to Goldsworthy, vindicates this interpretation of the practice: ‘If I know that others attribute standing commitments to me, and do nothing to disavow them, I corroborate the attribution and dispel misgivings about it’.<sup>225</sup>

Meta-intentions, then, help us to get around the difficulty of adjudicating between abstract and concrete intentions concerning the interaction between a statutory provision and common law rights, where those intentions seem to conflict. The meta-intention, in effect, is that we resolve these conflicts by looking to the statutory wording. If the wording is clear and express, then Parliament had a concrete intention as to the statute’s contribution to the law, and it is that concrete intention that must be followed.<sup>226</sup> If the wording is ambiguous, then Parliament held the abstract intention that the statutory

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<sup>225</sup> *ibid.*

<sup>226</sup> We could articulate this in one of two ways. We could say that Parliament intends that the statute’s contribution to the law violates common law rights, and that we end up with a piece of statutory law that conflicts with common law rights (understood in their ‘mythological’ sense). Or we could say that Parliament has a concrete intention about what the common law right actually requires, and that this intention is what determines what that right requires. The first option seems to me to make more sense, as it leaves common law rights intact as a metric for measuring the justifiability of the legislative action, even if we view it as an ‘extra-legal’ metric. As I have articulated it here, the intentions in question are intentions about the relationship between a statute’s contribution to the law and common law rights.

provision not make a contribution to the law that would conflict with common law rights. Parliament's standing commitment resolves the conflict.

The problem, however, is that the conflict is not really resolved; just pushed back to another level of abstraction. This difficulty becomes evident when we try to explain why Parliament's standing commitment, or meta-intention, or interpretive intention, should be of any relevance in determining a statute's contribution to the law. Why should we answer the question of how to adjudicate between abstract and concrete intentions by looking to such meta-intentions? Dworkin puts the problem clearly:

[O]ur present enterprise – trying to define a suitable conception of constitutional intention – is part of the project of justifying looking to intention, not part of discovering what was intended. We are trying to state, more exactly than is usually done, the *sense* or *kind* of collective intention to which we have reason to defer. But then we cannot, without begging the question in the same way, say that we should defer to one kind or sense of intention rather than another because those whose intentions are picked out in that description intended we should.<sup>227</sup>

Put simply, we need to be able to explain *why* we should adjudicate between a legislature's abstract and concrete intentions by looking to their meta-intentions. There are coherent arguments of political morality that might fit the

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<sup>227</sup> Dworkin, *AMOP* (n 157) 54.

bill.<sup>228</sup> What we cannot do, without lapsing into circularity, is claim that legislative intentions are relevant because the legislature intends them to be relevant.

Presumably, legislators, when they attempt to pass legislation that would violate fundamental rights, do not think that that is what they are doing. Rather, they are simply mistaken about the nature or scope of the right in question. Suppose legislation is passed which gives the Education Secretary the power to pass regulations governing schools, 'including permitting the exclusion of pupils on racial grounds'. Presuming that we can still say that the legislators in question believe in the value of equal personhood, the intentionalist would still say that what matters is their concrete belief (evidenced by the 'clear and express language used') that the legislation they passed does not violate this right.<sup>229</sup> What is doing the work is the meta-

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<sup>228</sup> This, incidentally, is why Goldsworthy's claim that Dworkin is in fact a closet originalist misses the mark. See Jeffrey Goldsworthy, 'Dworkin as an Originalist' (2000) 17 *Constitutional Commentary* 49. Goldsworthy picks up on a distinction that Dworkin makes between 'semantic' and 'expectation' intentions in *Freedom's Law*. Because Dworkin's moralised constitutional theory takes seriously the semantic expectations of the Framers, Goldsworthy says, that theory is indistinguishable from originalism. But it is absolutely consistent with the interpretive method to say that legislative intent should be taken seriously, because there is a moral argument to that effect to be made. The real takeaway is that originalism only makes sense as an interpretive theory, not the other way around. On this see Mark Greenberg's claim that the moral impact theory is the theory best placed to explain the sorts of claims that both textualism and intentionalism make. Greenberg, 'Beyond Textualism' (n 157).

<sup>229</sup> They might alternatively say that this is a case where the legislature simply does not believe in the value of equal persons, even as an abstract matter. It is simply a case of evil legislation being passed by a Parliament whose legal authority is a matter of social fact. This need not detain us for present purposes, because we can imagine cases in which abstract and concrete intentions do conflict, and in these cases the intentionalist would favour one or

intention of the legislature that judges take legislative use of ‘clear and express’ language as a signal that the legislature’s concrete intentions are to determine the statute’s contribution to the law. But what the judge was trying to work out to begin with was the way in which the legislature’s intention determined the statute’s contribution to the law. If she finds that the legislature intended her to prefer one or other of its intentions, then she needs to figure out why that further, meta-intention is relevant. Intentionalism may well make an important contribution in signaling the importance of legislative intentions. But we cannot be intentionalists all the way down. Sooner or later, we need some normative justification of the practice. If we commit to such a theory, however, then we are abandoning the thesis that legislative intentions alone determine a statute’s legal meaning.

The need to explain the relevance of intentions comes into focus when we realise that statutory interpretation is primarily a matter not of determining a statute’s linguistic meaning, but rather a statute’s contribution to the law. If it were enough to explain a statute’s linguistic meaning, then a Gricean account grounded in complex, audience-directed intentions might fit the bill. If such intentions make a difference to our legal rights and obligations, however, then a great deal of further explanation is required. I argue in detail in the next chapter that a moral explanation, grounded in an interpretivist theory of general jurisprudence could accomplish this, but it would require intentionalists to justify their theory at the level of first order moral philosophy.

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the other depending on the meta-intention of the legislature, as evidenced by the language used.

## Conclusion

According to intentionalism, when judges engage in statutory interpretation, they are attempting to work out the legislature intended. This is because the legal meaning of a statute depends on its linguistic meaning. When judges invoke the principle of legality, they are making a declaration about what they *presume* the intention of the legislature to be. They presume that the legislature did not intend to license interference with fundamental rights and principles. They use such a presumption because the legislature also holds a 'meta-interpretation' that they do so.

This, however, brings us back to the problem of how to explain why any legislative intentions feature in determining a statute's legal meaning. Why is this meta-intention relevant at all? This requires further argument. We have said that a method of interpretation is appropriate if it allows judges to work out a statute's legal meaning (i.e. the obligations that obtain in virtue of that statute's enactment). Any theory of statutory interpretation, then, must be premised on a theory of the nature of legal obligation. Intentionalism offers a theory of statutory interpretation without an obvious connection to a theory of general jurisprudence. Intentionalists assume that a statute's legal meaning is fixed by its linguistic meaning, but do not offer arguments to support this.

The sort of argument needed is a general jurisprudential one. Intentionalism is most coherently understood as the claim that our legal rights and obligations are what they are in virtue of the intentions held by a legislature when it enacted pieces of legislation. This leads them to the claim

that judges, when employing the principle of legality, are attempting to interpret the contribution that the statute before them made to the law by asking what contribution its enactors intended it to make. In order to show that intentions determine a statute's contribution to the law, however, intentionalism must necessarily rest on a further theory about what determines the relationship between law-making actions and legal rights and obligations. Intentionalism, in other words, must show that the claims that it makes follow from a theory of the nature of law. In the next chapter, I consider such attempts to give intentionalism a jurisprudential foundation.

## Chapter 3. Intentionalism and General Jurisprudence

### Introduction

In the previous chapter, I distinguished between a statute's linguistic meaning and its legal meaning, and argued that the latter is the proper object of statutory interpretation. Proponents of intentionalism seem to claim that legislative intentions determine a statute's legal meaning, however the arguments they offer speak at most to linguistic meaning. In order to bridge the gap between linguistic and legal meaning, intentionalists could argue that it follows from a theory of general jurisprudence that intentions determine the legal as well as linguistic meaning of a statute. This would be the right sort of argument to make. As I have argued, any theory of statutory interpretation must be premised on a broader theory of legal obligation. In this chapter, I consider ways in which we might try to nest intentionalism within a theory of general jurisprudence.

Although they do not often make the connection explicitly, we can infer from the arguments they make that intentionalists think that intentionalism is supported by legal positivism. I argue here that intentionalism in fact is not supported by the most prominent positivist theories. In fact, the theory of general jurisprudence that offers the best support for intentionalism is a non-positivist, interpretivist account. Legislative intentions play a role in determining a statute's contribution to the law, on this view, because morality assigns them such a role.

The argument proceeds as follows. In section 1, I consider attempts to anchor intentionalism to exclusive legal positivism. I examine Joseph Raz's authority-centred theory, as well as Scott Shapiro's 'planning theory' of law, and show that neither provides support for intentionalism. In fact, exclusive legal positivists are careful to say that no particular theory of interpretation follows from their claims. In section 2, I consider whether intentionalism might be true in virtue of a Hartian rule of recognition. Again, I find that this theory offers no support for intentionalism. In section 3, I argue that the only theory of general jurisprudence that could provide some support for intentionalism is non-positivism. Finally, in section 4, I put forward a radically different way of conceiving of legislative intentions within an interpretivist model. On this view, legislative intention is *itself* something that can only be attributed to a legal institution through normative reflection on the sort of institution that it is, and the sorts of intentions that it *should* have. This conception, I believe, offers a promising way of taking legislative intent seriously, while recognising that our reasons for doing so are fundamentally moral ones.

The overall argument is this: intentionalism, as it is usually presented, fails to explain the principle of legality. This is because intentionalism is not supported by any theory of general jurisprudence. As we have seen, the claim that legislative intentions determine a statute's contribution to the law can succeed only if it can be shown to follow from a theory of general jurisprudence. Legislative intentions may play such a role, but not because legislation is an act of communication, such that we only need to engage in a factual inquiry to work out what the legislature intended. Rather, morality

makes it the case that legislative intentions partly (though not fully) determine statute's contribution to the law. This is supported by a theory of general jurisprudence according to which *any* fact in the world can have law-determining relevance on moral grounds. This view puts intentionalism in its proper place within an explanation of the principle of legality: as one part of a larger moral account of that part of legal practice.

### 1. Exclusive Positivism and Intentionalism

One might think that Razian positivism might provide a natural jurisprudential home for intentionalism.<sup>230</sup> I have stressed that it cannot be assumed without argument that the communicative nature of lawmaking plays any role in determining the legal obligations that obtain in virtue of legislation. Raz's theory does offer a sophisticated jurisprudential defence of lawmaking as a deliberate, communicative act. According to Raz, it is a conceptual fact that legal norms are created through deliberate, authoritative acts of will by a

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<sup>230</sup> To be clear, I should emphasise that intentionalists do not generally explicitly couch their arguments in the terms I discuss in this section. They are, however, ambiguous as to what theory of general jurisprudence lies behind their claims, and they often seem to make Razian-sounding claims. My aim here has been to show that if they wish to rely on exclusive legal positivism, then an argument from conventionalism is their only option. But this argument fails when it runs into the problem of theoretical disagreement. Exclusive legal positivists are generally aware of these problems, and they take care to emphasise that their theories are theoretically modest, and do not necessarily yield this or that method of interpretation. See for example John Gardner, *Legal Positivism: 5 ½ Myths in Law as a Leap of Faith* (OUP 2013).

lawmaking institution.<sup>231</sup> Law, through its officials, claims to bind citizens morally through such acts of deliberate lawmaking. The claim, to glide over several elements of a complex theory, is that citizens are better able to comply with the moral reasons that apply to them by following law's edicts than they would be if they guided themselves by their own judgment. This is Raz's 'normal justification thesis'.<sup>232</sup> Whether law actually has legitimate authority to bind morally is a further question, the answer to which depends on how well law fulfils this function.

Given the centrality of *deliberate* lawmaking in this theory, one might think that intentionalism is the only game in town. If legal norms are norms that lawmaking institutions made deliberately, then surely the content of those norms is the content that the lawmaking institution intended them to have. Interestingly, however, Raz denies that his theory of law results in the truth of intentionalism. Other exclusive positivists similarly distance themselves from intentionalism. Below, I explain why intentionalism does not follow from the authoritative picture of law. I then explain that on this view, legislative intentions can only be assigned a law-determining role through a convention among legal officials. This version of intentionalism, however, is subject to another fatal flaw: it is unable to explain the pervasive disagreements among judges as to the correct interpretation of statutes.

#### A. *Intentionalism and the Normal Justification Thesis*

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<sup>231</sup> Joseph Raz, *Practical Reason and Norms* (New edn, Princeton University Press 1990) chapter 5; Joseph Raz, *The Authority of Law: Essays in Law and Morality* (Clarendon Press 1979).

<sup>232</sup> Joseph Raz, *The Morality of Freedom* (OUP 1986) 53.

Andre Marmor, a proponent of the Razian view, argues persuasively that a law-determining role for legislative intentions does not follow from Raz's normal justification thesis. Marmor distinguishes between two ways in which legal authority might be legitimated through the normal justification thesis: legal officials might either provide the solutions to coordination problems, or they might have access to expertise that citizens do not.<sup>233</sup> If either of these is true, it could be said that citizens would do better at conforming to the moral reasons that apply to them by following the officials' directives. Of these two, however, only the expertise justification might yield intentionalism. To be more precise, only the expertise justification yields the conclusion that judges should rely on the 'further intentions' of the legislature about what the precise legal effect of the statutory text should be, beyond the standard intention of making law.<sup>234</sup>

If legal authority is legitimate in virtue of those who enact the law having better access to the reasons that apply to citizens, then it is natural to think that the contribution that statutory enactments make to the law is determined by the intentions of the enactors. We have reason to take the legislature's further intentions into account when their authority hangs on expertise. If legal authority is legitimate in virtue of the provision of coordination solutions, however, then we are not necessarily led to intentionalism. It doesn't matter what the legislature intended in these cases; it

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<sup>233</sup> Andre Marmor, *Interpretation and Legal Theory* (Clarendon Press 1992) 177-178.

<sup>234</sup> I discuss this 'standard intention' in the next subsection. See also *ibid* 165-168.

only matters that the resultant norm is one that everyone must follow.<sup>235</sup> The legislature acting in any way at all solves the coordination problem, regardless of what precise effect they intended their action to have.

On this view, the authoritative picture provides support for intentionalism in only a limited number of cases. What is relevant for present purposes is that it is difficult to see how many cases involving the principle of legality could be among the cases where intentionalism might be relevant by the lights of the normal justification thesis. We would need to show that the authority of legislation at issue in these cases is grounded in the expertise of the legislature. Take again the example from *R (UNISON) v Lord Chancellor* of legislation empowering the Lord Chancellor to set the fees for Employment Tribunals.<sup>236</sup> Does such legislation help us better comply with the reasons that apply to us in the sense that the legislature is better able to access the reasons that determine who is best placed to set the fees for Employment Tribunals? Or does it help us better comply with the reasons that apply to us in the sense that it offers a definite answer to the question of who decides questions about Employment Tribunal fees? There doesn't seem to me to be an obvious answer. If anything, it seems like a bit of both. Even if we believe this to be a pure expertise example, however, we can imagine other cases in which legality is employed that clearly fall in the coordination example. At most, the normal justification thesis provides support for intentionalism only in cases unambiguously governed by expertise.

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<sup>235</sup> *ibid* 178.

<sup>236</sup> [2017] UKSC 51.

There is another reason that it seems inappropriate to describe the deployment of legality in interpreting legislation in terms of the normal justification thesis. This is that the principle of legality involves the interplay of statute law and paradigmatically common law constitutional principles. Each of the two descriptors – common law and constitutional – makes trouble here.

First, the normal justification thesis underdetermines the proper mode of interpretation when constitutional principles are in play. Marmor, for instance, notes that his thesis does not apply to US constitutional law, because the introduction of strong form judicial view clearly skews the picture away from legislative authority. Such a dynamic is ‘bound to yield different questions, and different doctrines, also bearing on the justification of intentionalism’.<sup>237</sup> Raz, for his part, argues that the authoritative basis of constitutional law actually yields *creative* methods of interpretation, and not any form of originalism.<sup>238</sup> While ordinary statutory interpretation may not produce such complications, engagement with common law constitutional rights seems to sit somewhere between the two. It does not yield the same panoply of questions that a system with strong form review might, but describing it as an instance of ordinary legislative interpretation seems to buy, to borrow a phrase, ‘uniformity at the price of distortion’.<sup>239</sup>

The ‘common law’ aspect of common law constitutional rights also causes complications. Raz views the authoritative model primarily as a thesis

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<sup>237</sup> Marmor, *Interpretation and Legal Theory* (n 233) 173.

<sup>238</sup> He means ‘creative’ here in a much stronger sense than the ‘creative interpretation’ permitted under intentionalism, discussed in the previous chapter.

<sup>239</sup> Hart (n 147) 38.

about legislation. It does not apply to customary law, and the position of common law is unclear.<sup>240</sup> This model explains the legitimacy of legislative interpretation because that is the only form of lawmaking that can unambiguously be viewed as *deliberate* lawmaking. Cases in which legality is deployed occur at the intersection of statutory and common law. Judges interpret legislation, but they seek to do so consistently with common law principles. If each of these sources of law derives its authority in different ways, then the method of interpretation yielded by the authoritative picture is an open question. If the model of authority underpins only one part of the equation that judges are grappling with in cases involved in legality, then it is natural to think that that picture underdetermines the method of interpretation that results. Intentionalists will likely fall back on the claim that common law rights are 'mythological', but that is a controversial claim that requires defending. It cannot without begging the question be made true by any theory of the legitimacy of sources of law.

*B. Minimal Intentions, Conventionalism and Disagreement*

According to Raz, the relevant intention 'is very minimal and does not include any understanding of the content of the legislation'.<sup>241</sup> A legislator's intention, he says, is simply the intention that the text of the bill they are voting on *becomes law*.

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<sup>240</sup> Raz, *Between Authority and Interpretation: On the Theory of Law and Practical Reason* (OUP 2009) 276 ('BAI').

<sup>241</sup> *ibid* 284.

The reason for this is that the legislative process takes place against a backdrop of interpretive conventions, and these conventions may *not* point towards legislative intention about the content of legal norms as the primary interpretive tool. The legislature is aware of these conventions, and can legislate accordingly. In order to take seriously the authority of the legislature, then, it is enough to interpret legislation in accordance with existing interpretive conventions, even if these conventions make no reference to legislative intention. John Gardner puts the point clearly:

So long as one can work out more or less how the relevant others will read what one says or does, one can also adapt what one says or does to anticipate their readings. If one can work out that the relevant others are perverse types who will always read 'cat' to mean 'dog', one can make the dog-regulating laws one meant to make by passing a Cat Regulation Act. By this feedback route, one has the power intentionally to determine what law one makes even though the norm for interpreting that law does not refer to one's intentions...<sup>242</sup>

On the Razian view, then, the only intention that Parliament has is the intention *to change the law*.<sup>243</sup> The upshot is this: intentionalism follows from

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<sup>242</sup> Gardner (n 230) 44.

<sup>243</sup> John Gardner, 'Some Types of Law', in *Law as a Leap of Faith* (OUP 2013) 61. A slightly different point, offered by textualists as arguments against intentionalism, is that legislative wording is typically the result of bargains and compromises among members of the legislature. By attributing any sort of general purpose to it (e.g. by attributing one unifying intention to it) we override that nexus of compromises. JF Manning, 'The Absurdity Doctrine'

Razian positivism only contingently, if it is conventionally in use in a given legal system.

Intentions also have a minimal and contingent role in Scott Shapiro's 'planning theory' of law; a sophisticated development of exclusive positivism.<sup>244</sup> According to Shapiro, legal systems are best conceived of as complex, plan-like norms issued by legal officials, who are authorised to make plans for the community. The fundamental aim of legal systems, on this view, is to compensate for the deficiencies in alternative means of social planning.<sup>245</sup> Like Raz, Shapiro grounds the authority of law in its capacity to coordinate action. The legal form of planning allows us to plan 'in the "right" way, namely, by adopting and applying morally sensible plans in a morally legitimate manner'.<sup>246</sup>

Adopting this picture of general jurisprudence might help clarify one ambiguity in intentionalism, namely, what exactly legal officials have intentions *about*. On one view, we might say that they have intentions about commands that they wish to give. The philosophical problems with the view of law as commands, however, are well documented and accepted.<sup>247</sup> Plans, then, might offer a more sophisticated answer. Legal officials, we might say, intend to create plans for others. Their normative power to do so itself obtains in

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(2003) 116 (8) *Harvard Law Review* 2387, 2390. For discussion on this point, see Mark Greenberg, 'Beyond Textualism' (n 157).

<sup>244</sup> Shapiro (n 193).

<sup>245</sup> *ibid* 171.

<sup>246</sup> *ibid*.

<sup>247</sup> Hart (n 147).

virtue of a ‘master plan’, setting out who gets to make social plans for the community.<sup>248</sup>

Once again, however, it would not follow from such a picture of law that judges can or do look to the intentions of the legislature in interpreting the ‘plan’ that the legislature created by enacting a statute. On the planning theory, law’s aim is a moral one: to coordinate action for morally appropriate ends by developing a shared plan for action. The correct way of interpreting the constitutive elements of this plan, however, depends, according to Shapiro, on the level of *trust* afforded by the plan to the interpreter.<sup>249</sup> If a low level of trust is afforded to judges, they should stick to techniques like intentionalism or textualism. If a high degree of trust is afforded to them, the judge’s own moral faculties may legitimately feature to a greater extent. The degree of trust afforded to judges is in turn determined by the degree of trust afforded to *citizens*, as evidenced in the rules of the system.<sup>250</sup> If a legal system seems to take a dim view of human nature, for instance, then judges should follow a correspondingly constrained interpretive methodology.<sup>251</sup>

A full analysis of Shapiro’s theory is beyond the scope of this thesis. The important point for now is that on this theory too, no interpretive method is mandated by the nature of law. Indeed, Shapiro argues that it is a boon of the

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<sup>248</sup> Shapiro (n 193) 180.

<sup>249</sup> *ibid* 357

<sup>250</sup> *ibid.*

<sup>251</sup> *ibid* 336.

planning theory that it leaves room for theoretical disagreements as to the appropriate interpretive method for working out the contents of these plans.<sup>252</sup>

If the intentionalist wishes to argue that intentionalism follows either from a conceptual account of the authoritative nature of legal practice (cashed out either in terms of Razian authority or Shapiro's plans) then they must appeal to a version of conventionalism. That is, they must argue that intentionalism follows from the shared attitude of legal officials. Perhaps we might read Goldsworthy's thorough history of the concept of parliamentary sovereignty in this way, i.e. as evidence of the UK's particular conception of the appropriate level of trust to be afforded to judges.<sup>253</sup>

The conventionalist version of intentionalism, however, suffers from a fatal flaw. This is that it is unable to satisfactorily account for the pervasive disagreement among judges when they apply the principle of legality. In many of the cases discussed in Chapter 1, the judges disagreed on the rights that trigger legality's application, how 'clear and express' statutory wording need be in order to license interference with a right, whether legality applies to the prerogative, whether it includes a 'justificatory' aspect such as a test of necessity or proportionality etc. In *Pierson*, for example, Lord Browne-Wilkinson agreed with the majority that the statute in question should be read

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<sup>252</sup> *ibid* chapters 12 and 13. Shapiro has long recognised, in a way that several fellow positivists have not, the seriousness of the threat posed by Dworkin's challenge that positivism fails to account for theoretical disagreements among judges. Scott Shapiro, 'The "Hart-Dworkin" Debate: A Short Guide for the Perplexed' in Arthur Ripstein (ed) *Ronald Dworkin* (CUP 2007) 35-37.

<sup>253</sup> Goldsworthy, *The Sovereignty of Parliament* (n 141).

consistently with common law rights.<sup>254</sup> He disagreed, however, on the question of whether prisoners enjoyed a right not to have their punishment increased.<sup>255</sup> It is entirely implausible disagreements such as these, which focussed on the existence or non-existence of common law rights, as disagreements over Parliament's intention. The argument that intentionalism is true as a result of conventionalism sets far too high an empirical bar for itself.<sup>256</sup>

The best that the intentionalist can do at this point is to argue that Parliament's intention is to delegate responsibility for determining a statute's legal meaning to judges.<sup>257</sup> This would explain the disagreements, since the statute's legal meaning would not be dependent on controversial arguments of political morality, but crucially only because Parliament willed it so. At what cost, however, has intentionalism bought this explanation? On this version of the view, legislative intentions do not determine the legal impact of a statute at the fundamental level. Rather, they are only relevant because interpretive conventions make them so. Nor, we now add, do legislative intentions

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<sup>254</sup> Like many other judges, Lord Browne-Wilkinson did articulate the principle of legality in terms of parliamentary intention: 'A power conferred by Parliament in general terms is not to be taken to authorise the doing of acts by the donee of the power which adversely affect the legal rights of the citizen [...] unless the statute conferring the power makes it clear that such was the intention of Parliament'. [1998] AC 539, 575.

<sup>255</sup> *ibid.*

<sup>256</sup> Shapiro can explain such disagreements because the appropriateness of any method of interpretation on the planning theory is a contingent manner. Such disagreements merely point to competing accounts of the 'economy of trust' in the UK legal order. Intentionalists, however, make the stronger claim that such conventions point to their preferred method of interpretation, and only it. This undoes the planning theory's careful efforts to extricate itself from the challenge of theoretical disagreements.

<sup>257</sup> I consider arguments like this in greater detail in the next chapter.

determine the legal meaning of a statute on even a surface level. Rather, the intentions simply direct judges to make up their own minds.

This might be a palatable strategy if it were used to explain away an insignificant number of penumbral cases. The problem, however, is that in fact it would need to be employed to explain an embarrassingly large section of public law. As Dimitrios Kyritsis points out, *any* legislative provision must in principle be determined consistently with fundamental common law rights if it is possible to do so.<sup>258</sup> It is judges who are asked to settle controversies surrounding the demands of these common law rights, even if we believe that it is the intention of the legislature to delegate this role to them. Judges, then, must determine a statute's legal meaning using resources other than legislative intent. In relying on meta-intentions, the intentionalist concedes that the legal meaning of any statutory provision is liable to be underdetermined by the linguistic content of the statute.

Exclusive legal positivists generally accept that judges must apply moral standards to decide the outcomes of hard cases.<sup>259</sup> They just assert that these are extra-legal, rather than legal standards. This strategy is somewhat strained for any legal positivist, once we realise just how much of the adjudication works in this way. It leads us to the strange conclusion that a great number of the norms in the legal system do not become 'legal' until some judge interacts with them.<sup>260</sup> Whether or not this is a sound strategy for

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<sup>258</sup> Dimitrios Kyritsis, 'Interpreting Legislative Intent' (draft paper, manuscript on file with the author).

<sup>259</sup> Shapiro (n 193) 272.

<sup>260</sup> Ronald Dworkin, 'Response' in Scott Hershovitz, *Exploring Law's Empire* (OUP 2006) 306.

the average exclusive positivist, it is an embarrassing one for intentionalists, because it forces them to all but abandon their primary diagnosis of what judges actually do in deciding cases.

We began this section by positing a possible strategy for intentionalism: the claim that it is an interpretive convention among judges that they look to legislative intentions. If legislative intention is only relevant because it is a convention, and then legislative intention directs judges *back* to their own judgment, then legislative intention no longer plays any role in determining a statute's legal meaning at any level. It is difficult then to see what reason there is for retaining any role for legislative intent.

### *C. Conclusions on Exclusive Legal Positivism*

It is worth summarising the view of interpretation yielded by the authoritative picture. First, the claim that statute making is necessarily a deliberate act of will does not entail the claim that any particular intentions about the legal effect of that statute determine the text's contribution to the law. The only relevant intention, in that regard, is the minimal intention that the text create law. Secondly, the normal justification thesis, which explains the conditions under which a legal institution has legitimate authority, plausibly yields intentionalism only in cases where the normal justification is satisfied through legislative *expertise*, and not in cases where it is satisfied through coordination solutions. Intentionalism, then, might be justified only in a subset of cases, and is certainly not a necessary product of the normal justification

thesis. Finally, the authoritative picture yields no particular method of *constitutional* interpretation. If common law constitutional rights can be said to be *constitutional* in the proper sense then such rights are doubly removed from intentionalism. Each descriptor indicates a layer of removal: *common law* rights are not deliberate acts of lawmaking, and the interpretive methods that apply to *constitutional* rights are not the same as those that apply to the interpretation of ordinary legislation.

All of this is important because the claim, in the UK context, tends to be that intentionalism is true in virtue of the truth of the doctrine of parliamentary sovereignty. Parliamentary sovereignty, however, in its orthodox conception, is little more than shorthand for a theory of legal authority.<sup>261</sup> According to proponents of the most systematic and well-developed theory of legal authority, that theory does not yield intentionalism. Intentionalism is not then, on this positivist picture, made true by the nature of law as such. Far from it. If we wish to argue that parliamentary sovereignty yields intentionalism, then we must give some account of parliamentary sovereignty as a local constitutional doctrine, including an explanation of what it is that makes parliamentary sovereignty itself true.

There are two ways that such an argument might go. First, it might still try to retain the claim that Parliament is authoritative in the Razian sense. That theory held, recall, that the proper interpretive method was the one conventionally in force at the time of enactment of the statute in question. It might then be argued that the convention in use in the UK is a strict form of

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<sup>261</sup> I develop an alternative understanding of parliamentary sovereignty and its relationship with the rule of law in Chapter 5.

intentionalism. What is relevant, on this view, is that Parliament held the minimal intention that the text they enacted becomes

law, given the interpretive conventions in place at the time of enactment, and the interpretive convention that they knew to be in place was one that appealed to Parliament's own further intentions. This, however, would involve abandoning the claim that legislative intention is normatively significant in and of itself, and not just because its normative significance is conventionally assigned.

This route also provides an extremely strained reading of the cases in which the principle of legality is employed. At the very least, it cannot apply to cases in which judges use the principle of legality to interpret very old legislation, which was enacted before the development of the common law rights at issue. The enactors of such legislation have taken into account an interpretive convention that did not exist at the time.<sup>262</sup> Moreover, if all that makes intentionalism relevant is the force of convention, then intentionalists can have no complaint about that convention changing. The continuing development of the principle of legality presents a series challenge in that regard. If the principle continues to develop in such a way that it seems

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<sup>262</sup> Aileen Kavanagh makes this point in relation to intentionalist readings of section 3 of the Human Rights Act:

[I]f we view s 3 as introducing a new presumption of Parliamentary intention, it means that at least with reference to pre-HRA legislation, judges are applying a presumption which Parliament could not have known or foreseen when it enacted the original legislation.

Aileen Kavanagh, 'The Role of Parliamentary Intention in Adjudication under the Human Rights Act 1998' (2006) 26(1) *OJLS* 179, 205.

implausible to say that judges are only seeking out the legislature's intentions, then intentionalism is a dead letter by the lights of its own argument.

The second strategy available to the intentionalist is to argue that Parliamentary Sovereignty obtains in virtue of an inclusive legal positivist theory of general jurisprudence.<sup>263</sup> It is to such an argument that I now turn.

## 2. Inclusive Legal Positivism, the 'Standard Picture' and Intentionalism

An alternative argument for intentionalists is that intentionalism and Parliamentary Sovereignty are true in virtue of a Hartian rule of recognition. In recent work, Jeffrey Goldsworthy puts forward a defence of intentionalism that draws in part on Hartian positivism. He argues that the doctrine of parliamentary sovereignty in UK public law is best understood in terms of a particular model of the relationship between the law of the United Kingdom and the practices that establish that law.<sup>264</sup> This model, which Mark Greenberg calls 'the standard picture', is akin to the authoritative model discussed in the previous subsection: an institution whose directives become law simply in virtue of their having been authoritatively pronounced.<sup>265</sup> The

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<sup>263</sup> Inclusive legal positivism allows that moral principles, as well as social facts, may feature in grounding legal facts. It holds, however, that such moral facts are assigned their law-determining role by social facts. See for Jules Coleman, *The Practice of Principle: In Defence of a Pragmatist Approach to Legal Theory* (new edn, OUP 2006). Hart endorsed this version of positivism in his posthumously inserted postscript to the third edition of *The Concept of Law*. Hart (n 193) 250-254.

<sup>264</sup> Goldsworthy, 'The Real Standard Picture' (n 204).

<sup>265</sup> Mark Greenberg, 'SP' (n 162). Greenberg views the Standard Picture as implausible, and therefore implicit commitment to it as making trouble for

‘doctrine of legislative intent’, Goldsworthy says, is itself correct in virtue of the truth of this particular understanding of parliamentary sovereignty.

Parliamentary sovereignty, according to Goldsworthy, is a local instantiation of this sort of authoritative model. It is a settled part of UK constitutional practice, he claims, that the content of the law is what it is in virtue of the authoritative directives of Parliament.<sup>266</sup> The standard picture obtains in the UK, then, in virtue of the practice and shared attitude of legal officials. The claim seems to be that legislative intentions determine a statute’s contribution to the law, and this is true in virtue of the convergent practices of legal officials. Intentionalism obtains, in essence, as a matter of local, rather than general jurisprudence.<sup>267</sup>

This claim, however, is deeply confused. In effect, it inverts the usual positivist story, according to which law is authoritative, and *therefore* criteria of legal validity are determined by the convergent practice of legal officials. It cannot be the case that the authoritative model is *made true* by convergent official practice, unless the law-determining role of official practice is first made true by the authoritative picture. The standard picture is a model that

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positivism. Since some positivists may object to the label, and my overall point here is that positivism does not yield intentionalism, I will avoid that label, and will generally talk about the ‘authoritative’ model. Goldsworthy, however, accepts the label and seeks to take Greenberg’s arguments head on. The dialectic of Goldsworthy’s paper is that the constitutional doctrines of Parliamentary Sovereignty and Legislative Intent are local instantiations of the Standard Picture, and that their very existence disproves Greenberg’s claim that the Standard Picture cannot obtain.

<sup>266</sup> Goldsworthy, ‘The Real Standard Picture’ (n 204) 169-172.

<sup>267</sup> This leaves open the possibility of moral tests for legal validity, such as, for example, requiring consistency with constitutional principles. In this way, the doctrine ‘exemplifies inclusive legal positivism’. It just so happens, however, that in the UK, no such moral tests are picked out. Laws are valid just in case they are authoritatively declared.

can only be true of law as such. It is not one that can be locally true by official practices. This is because the relevance of official practice in determining what counts as law only makes sense if we presuppose the authoritative model. This is why Raz's theory, for example, begins with a complex conceptual account of the nature of authority, and its relationship with legal practice. Rules of recognition exist within the conceptual space opened up by that model, not the other way around. The argument is that law claims authority, and therefore we must have conventional means of identifying what counts as law. It is not that rules of recognition *make it the case* that this or that legislature claims authority. Rules of recognition do not and cannot themselves validate the authoritative model. To say that the authoritative model is true in virtue of official practices begs all the important questions.

Many theorists who believe in the existence of a rule of recognition posit, following Hart, that the UK's is something along the lines of 'whatever the Queen in Parliament enacts as law, is law'.<sup>268</sup> Goldsworthy claims that the doctrine of parliamentary sovereignty:

[I]n effect officially adopts legal positivism in relation to statute law: it explicitly deems every enacted statute to be legally valid regardless of its moral quality. Its existence is an embarrassment to anti-positivist theories, to say the least; they must agree that it has all along been some kind of massive collective delusion.<sup>269</sup>

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<sup>268</sup> Hart (n 147) 148.

<sup>269</sup> Goldsworthy, 'The Real Standard Picture' (n 204) 169. In a footnote, he characterises TRS Allan's theory as one that makes the claim that UK public

Notice how much extra work the rule of recognition is asked to do on Goldsworthy's theory, in comparison with Hart's formulation. Not only must it identify what counts as law, it also validates the authoritative model itself.

This is a mistake, because the rule of recognition is not supposed to do any such metaphysical work. It is only supposed to explain what the *sources* of law are.<sup>270</sup> It does not have anything to say about how these sources make law or ground legal obligations. The relationship between sources of law and *law* is something that must be argued for independently of legal practice. Legal positivism is just not the sort of thing that can be 'officially adopted', unless perhaps morality puts some special store by official adoption, in which case the theory is not a positivist one at all. Positivism is a thesis that is either true about law as such or not true at all.

Hart's original formulation of the UK's rule of recognition had something of the extemporaneous about it. He did not elaborate at great length on what evidence there was for this particular formulation. It served as a useful example for his jurisprudential claims, based on prevailing constitutional scholarship at the time. What we can confidently say is that this formulation does *not* mean 'whatever the Queen in Parliament enacts as law, is law, because the Queen in Parliament has authority to enact it'. The important point is that this description could all be true on the Hartian theory, but not all true in virtue of the rule of recognition. Only the claim that 'What the Queen in

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law has in fact labored under such a 'delusion'. As we shall see in subsequent chapters, this is a somewhat unfair caricature of Allan's claims. See TRS Allan, *The Sovereignty of Law* (n 15).

<sup>270</sup> Gardner, 'Legal Positivism: 5 ½ Myths' (n 230).

Parliament enacts counts as valid law' can be true in virtue of the rule of recognition. The second part - 'because the Queen in Parliament has authority to enact it' – can only be made true by a more fundamental argument about the nature of law.

As I discussed in the previous subsection, Raz offers just such an argument, and it flows from the specifics of his argument that intentionalism does *not* necessarily follow from an authoritative model. Intentionalists, then, owe us either their own account of legal authority, or an explanation for why Raz is wrong about the conclusions for interpretation reached on his theory.

### **3. Rescuing Intentionalism I: A Moralised Role for Intentions**

Where does this leave the concept of legislative intention in a theory of the principle of legality? When judges invoke that method of interpretation, they often couch what they are doing in terms of a *presumption* about what Parliament intended. Intuitively, there is something in what intentionalists claim. Any theory of legality must account for the fact that judges appeal to legislative intentions in this way.

The inference that intentionalism comes to in order to explain this piece of data, however, misses the mark. Intentionalists infer that judges, when they invoke the principle of legality, engage in a factual excavation of Parliament's actual intentions. While this seems to make a good sense of judicial self-description of the activity, it in fact tells us very little of use about the practice. In the previous chapter, I argued that the arguments that intentionalism relied

on spoke only to the linguistic meaning of a statute, and not its legal meaning. This alone tells us nothing about how to determine the legal obligations that obtain in virtue of a statute's enactment.

In order to argue that legislative intentions determine a statute's legal meaning, intentionalism must show that its thesis follows from a broader theory about the nature of law.<sup>271</sup> Intentionalists often try to situate their theories within the legal positivist tradition. As we have seen, however, intentionalism does not follow from either of the major schools of positivist thought. How then, can we explain the way that judges talk about legislative intent in a way that shows a connection between such intentions and the *legal meaning* of a statute?

There is one remarkably simple solution open to intentionalists. Legislative intentions determine a statute's contribution to the law, they might say, because morality assigns them such a role. A particular conception of democracy, for instance, could do the explanatory work here. This would require intentionalists to reject legal positivism. A constitutive role for morality in grounding legal rights and obligations is irreconcilable with positivism.

Instead, this route would require intentionalism to commit to a non-positivist theory of general jurisprudence. On this view, moral principles determine the impact of statutory enactments on the law. This would explain why judges seek to uncover legislative intentions when they interpret statutes. They do so because the aim of statutory interpretation is to figure out that statute's contribution to the law, and they believe that morality assigns

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<sup>271</sup> Shapiro, *Legality* (n 193) 331.

legislative intentions a role in determining a statute's contribution to the law. This is supported by a theory of general jurisprudence according to which a statute's legal impact is determined by moral principles.

This would provide intentionalists with a route to addressing the difficulties set out at the end of the previous chapter. I argued there that intentionalism lacked the resources to explain how judges could choose between a legislature's abstract and concrete intentions concerning a statute's impact on the law. In *UNISON*, for instance, the legislature may have held the abstract intention that the 2007 Act not license interference with the right of access to a Court, and the more concrete intention that the Lord Chancellor be able to set tribunal fees at a level that would exclude some from access to employment tribunals. These two intentions conflict and the Court must choose which one determines the statute's legal impact.

Non-positivism has the resources to adjudicate between these intentions. The non-positivist might make the case, for instance, that a strict majoritarian conception of democracy meant that the legislature's concrete intentions were the relevant ones. A non-positivist with a more nuanced conception of democracy might argue that we vest legislatures with lawmaking authority so that they can make decisions about justice on behalf of the community. What matters, then, is the legislature's abstract intention that the statute be consistent with the demands of justice.

This is a simplistic sketch of the non-positivist view. In Part III of the thesis, I flesh this view out in greater detail. First, however, I wish to show how a moralised view of legislative intentions might rescue intentionalism. For

now, it is worth noting that while a non-positivist theory of general jurisprudence can explain the role assigned to legislative intention in determining a statute's legal impact, it is highly unlikely that intentions play as strong a role as intentionalists typically contend. Such a role would have to rely on a controversial, somewhat simplistic conception of democracy. Few argue that a proper understanding of democracy entails that a legislature may enact whatever laws it wishes.<sup>272</sup>

Intentionalists often point out that their opponents cannot help but rely on legislative intentions.<sup>273</sup> This, however, is perfectly understandable. Intentionalism's opponents need not claim that legislative intentions are irrelevant, only that something other than legislative intentions must *make* them relevant. On the non-positivist view, moral principles play this role. This view of intentions gets us on the right track for analysing the principle of legality. It allows for a morally assigned role for legislative intentions, while acknowledging that other moral principles may also play a law-determining role. This can help us explain the cases in which judges seem to depart from the linguistic meaning of a statute. In these cases, both legislative intentions and other principles (common law rights, principles etc.) determine a statute's impact on our legal rights and obligations.

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<sup>272</sup> A positivist could contend that even if a legislature can create any *legal norm* it wishes, they cannot generate corresponding moral obligations to obey those norms. Under non-positivism, the distinction between legal norm and moral obligation is collapsed, so that argument is no longer open.

<sup>273</sup> Goldsworthy, 'Lord Burrows on Legislative Intention' (n 154) 7-8; Ekins and Goldsworthy (n 202) 59-60.

#### 4. Rescuing Intentionalism II: The Moralised Content of Intentions

In Part III of this thesis, I set out a non-positivist, moralised conception of the principle of legality. Before turning to this, however, I wish to make one final argument in relation to legislative intentions. This is that on a moralised conception of legislative intention, it is not just the case that morality determines what role the intentions of Parliament feature in determining a statute's legal impact. There is also a further, stronger sense in which legislative intention is moralised. Morality, I wish to argue, determines what intentions Parliament in fact holds. Another way of putting this is that the concept of legislative intent is itself an *interpretive* concept, i.e. a concept whose content can only be determined through reflections on its normative underpinnings.<sup>274</sup> On an interpretivist view, not only does morality determine the legal impact of legislative intent; it also determines the content of legislative intent itself.

I will come to this conception by a slightly indirect route, by considering another important line of argument that casts doubt on some of the claims that intentionalism makes. This is the argument that Parliament is not the sort of institution that is *capable* of having intentions at all, or rather that the sort of intention that Parliament can have is fundamentally different to the sorts of intentions with which we are familiar. By engaging with the debate between intentionalists and sceptics about legislative intent, I hope to highlight a third way of thinking about legislative intent as a fully moralised concept.

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<sup>274</sup> Dworkin, *Law's Empire* (n 10) chapter 2.

I do not go as far as that of the sceptics. I do not argue that Parliament *cannot* have an intention. Rather, I argue that legislative intention is that sort of intention that can only be gleaned through reflection on the kind of institution that Parliament is and the kinds of intentions that it *should* have. Conceived of in this way, we can rescue the important kernel of truth in intentionalism; that there are reasons why the intentions of the legislature should be taken seriously.

Following the argument proposed here, the intentionalist view is misguided in thinking that the intention of Parliament is something that can be discerned as a matter of bare fact. If the intention a legislature can be said to hold is partly a moral question, then the claim that legislative intention determines a statute's contribution to the law becomes a very different kind of claim. Morality, on this view, calls the shots when it comes to establishing legislative intention. This is separate to the claim that morality determines the impact of that intention on the law, though as we shall see in previous chapters, there are good reasons for believing both claims.

It is important to avoid caricature when speaking of arguments that are 'sceptical' about legislative intentions. Both Goldsworthy and Ekins seem to read these arguments as expressing wholesale scepticism about the existence of any collective intentions at all. Parliament, on this strong sceptical view, is not the sort of institution capable of any cognition whatsoever. To speak of legislative intention is akin to speaking of the intention of a wall. Goldsworthy, when assessing the sceptical argument, dismisses it in this way:

To see why this is not plausible, it is necessary to take the argument seriously (which those who make it rarely do), and consider what it would be like to attempt to understand a statute without treating it as expressing any intentions. Its meaning would have to be derived solely from the conventional semantic meanings of its words and conventional rules of grammar.<sup>275</sup>

The choice put forward here is between intentionalism (in the sense of recognising that the *collective* intention of the legislature) and a particularly rigid form of textualism.

This analysis, however, mischaracterises the sceptical argument in important ways, and elides other ways in which intention can be constructed that are entirely separate from reliance on semantic arguments. For one thing, sceptics do not attempt to understand a statute ‘without treating it as expressing any intentions’. Indeed, it is often part of the sceptics’ claim that legislation often expresses the intentions of *individual members* of legislative bodies. Their further claim, however, is that we have no reason to think that these disparate intentions can be collated into a *collective* intention.<sup>276</sup> As Waldron puts it:

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<sup>275</sup> Goldsworthy, *Parliamentary Sovereignty* (n 142).

<sup>276</sup> Jeremy Waldron, *Law and Disagreement* (OUP 1999) 128; Kenneth Shepsle, ‘Congress Is a “They,” Not an “It”’: Legislative Intent as Oxymoron’ (1992) 12 *International Review of Law and Economics* 239.

Beyond the meanings embodied conventionally in the text of the statute, there is no state or condition corresponding to “the intention of the legislature” to which anything else – such as what particular individuals or groups of legislatures said, wrote, or did – could possibly provide a clue...

There simply is no fact of the matter concerning a legislature’s intentions apart from the formal specification of the act it has performed.<sup>277</sup>

This claim is a weaker one than that characterised by Goldsworthy. Waldron’s argument is that there is no reason to treat a multi-person assembly, made up of various political alliances, as expressing any sort of collective intention. Therefore, there is no reason to think that any sort of intention features in fixing the legal meaning of a statutory provision.

I will leave aside for the moment Waldron’s claim that there is no reason to view a legislative assembly as expressing a collective assembly. I touched on it here simply to point out that intentionalists do not seem to address that claim head on. I wish to put forward a slightly different view. On this view, scepticism about legislative intention need not be full-throated scepticism about the possibility of a body like a legislature being the sort of thing that can express a preference or an intention. Rather, the claim is that the ‘intention’ that a legislative body can have is fundamentally different to the type of intention that different sorts of collective bodies can have.

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<sup>277</sup> Waldron, *ibid* 142.

The tactic that I have in mind begins in the same vein as that of the sceptics; by noting that gleaning an 'intention' from what often seems a loose collection of political alliances is a complicated business. Plainly, we do not mean that we want to know the precise individual motivation of each Member of Parliament. But we might still be able to *attribute* intention to a corporate body.

Philip Pettit usefully distinguishes between two sorts of cooperative groups: those whose 'members may act for shared goals... without ever forming a joint intention', and those who 'may form the special, shared intention that over time they together should constitute a corporate agent or agency: a body that simulates the performance of a single agent with a single mind'.<sup>278</sup> Pettit offers the Westminster Parliament as an example of the latter, incorporated sort of representative body.<sup>279</sup> He points to the fixed-majority system, and the generally coherent system of legislation that is a corollary of it, as evidence of this. One might think this an idealised picture. Doubtless, support for legislative programs can be motivated by personal ambitions and party faction alignments. In general, however, the characterisation holds true. Because the executive is composed of members of the party with the most seats in Parliament, MPs face pressure – sometimes backed by the

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<sup>278</sup> Phillip Pettit, 'Varieties of Public Representation' in Ian Shapiro, Susan Stokes, Elisabeth Wood and Alexander Kirshner (eds) *Political Representation* (CUP 2010) 62.

<sup>279</sup> *ibid* 63. Pettit views the US Congress, on the other hand, as an unincorporated cooperative group. Thanks in part due to the sheer size of the United States, and the corresponding diversity of interests among constituencies, legislative programs tend to be cobbled together with more barter and compromise. Whether or not Pettit overestimates the solidarity of Parliament, I think that his characterisation of Parliament as an incorporated group is broadly accurate.

implementation of the whip system - to form a coherent 'party line'. In the US, because the executive is elected directly, members of Congress are under greater pressure to please constituents, rather than party.<sup>280</sup> Regardless of how coherent one believes parliamentary action over time to be, we can still say that as a *normative* matter, Parliament is supposed to function as an incorporated, cooperative group. When Parliament functions well, this is how it works.

Plainly, the intentions of such an entity cannot be a matter of brute fact. Deducing the 'intention' of a group whose ambition is, over time, to 'simulate the performance of a single agent with a single mind' is not a task for psychologists. It is a matter of normative reconstruction. We can interpret the intentions of such a group in light of the sort of body that it is, and the sort of aims it is *supposed* to have. We ask what kind of 'single agent with a single mind' the group intends to be, and we interpret its actions in light of this overarching purpose. Dworkin, speaking in the context of debates around the relevance of the intentions of the Framers of the US Constitution, puts this point clearly:

Both sides to this debate suppose that the intention of the Framers, if it exists at all, is some complex psychological fact locked in history waiting to be winkled out from old pamphlets and letters and proceedings. But this is a serious common mistake, because there is no such thing as the intention of the Framers waiting to be discovered,

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<sup>280</sup> *ibid* 84-85.

even in principle. There is only some such thing waiting to be invented.<sup>281</sup>

To 'invent' a legislative intention is not to conjure one out of nothing. Rather, it is to construct one through normative reflection on the purpose of the legislative institution.

This should not be seen as a radical departure for theorists of legislative intention. This sort of analysis takes seriously the status of the legislature as a group agent, something that intentionalists urge us to do. Goldsworthy, for example, says:

Despite occasional suggestions that collective intentions are mythical entities that cannot really exist, it is obvious that they can. We see them in action when we watch team sports, and hear them when we listen to orchestras. If legislation were never the product of collective intentions within legislatures, it would be quite a mysterious phenomenon.<sup>282</sup>

The analysis to which I have signalled, based on Pettit's work, takes seriously the idea that legislation is the product of collective intentions within legislatures, but it pushes the analysis on. The point is that legislatures are

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<sup>281</sup> Dworkin, *AMOP* (n 157) 39.

<sup>282</sup> Goldsworthy, *The Sovereignty of Parliament* (n 141) 251.

not sports teams and they are not orchestras.<sup>283</sup> They are legislatures; complex political machines with aims that can only be deduced by reflecting on what legislatures are for.

Dworkin arrives at a similar conclusion by a different route.<sup>284</sup> He points out that in working out what meaning a particular legislator intended a statutory provision to carry, it will not do simply to ask what that legislator's hopes and expectations were.<sup>285</sup> An MP might hope that a particular piece of legislation will prove so popular that it will increase the vote share of their party. But this hope does not tell us anything about her intention for the statute. Rather, we would do better to look to that legislator's *record*; to ask what sort of commitments she has made in the past, as evidence of the sort of political convictions she holds now, that might make sense of her political behaviour in voting for a particular statute now.

A judge examining such convictions, however, might find that a legislator's concrete convictions about a specific statute clash with her more abstract political convictions. Suppose a Member of Parliament has been a lifelong ally of trade unions, but she votes in favour of a piece of legislation that drastically limits the power of unions to call for industrial action. Her reasoning is that she believes that recent strikes in UK universities unfairly

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<sup>283</sup> This is not to say that football teams and orchestras are the sorts of entities whose intentions can be worked out in purely factual terms either. One cannot understand the collective intention of an orchestra without being able to say something about what an orchestra is *for*, i.e. performing music. I am grateful to Andreas Vassiliou for this point.

<sup>284</sup> This is related to the distinction between abstract and concrete intentions discussed earlier. We see here how viewing legislative intention as a normative, or interpretive, concept, helps us to resolve that issue as well.

<sup>285</sup> Dworkin, *Law's Empire* (n 10) 335.

impacted on students' educational experiences. Here, we might say that her concrete conviction about university strikes conflicts with her more abstract commitment to the importance of trade unions. Is the judge interpreting this piece of legislation to prefer her concrete commitments or her more abstract ones? There is no obvious answer to this question. It will depend, Dworkin says, on 'what system of convictions provides overall the best justification for what she has done in office'.<sup>286</sup> That is, we ask what makes the best sense of the legislator's overall convictions.

Once we move away from mental states, and towards an individual's record of political commitments, Dworkin argues, we have no reason to aggregate the 'intentions' of individual legislators. In the absence of some formula for aggregating such intentions, Dworkin claims, we would do better to look at the record of the *legislature*. Intentionalists with this conclusion so far, even if they do not agree on how we got there.

Dworkin's argument for this final step is different from mine in an important way. Dworkin's reason for abandoning the attempt to aggregate individual intentions is that the judge he describes engaging in the process of working out the meaning of the statute before him – Hermes - is attempting to read the statute consistently with the demands of integrity, or principled consistency.<sup>287</sup> If Hermes were to attempt to aggregate all of the respective convictions of individual legislators in such a way that the statute could be viewed as part of a coherent scheme of principle, he would end up trying to work out what sort of individual convictions could be attributed to the

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<sup>286</sup> *ibid.*

<sup>287</sup> *ibid* 336.

legislature as a whole. Therefore, there is no motivation for working out the individual convictions in advance. Hermes can skip that step, and go straight to attributing an intention to the legislature as a whole.

My argument at this point is slightly different, though not inconsistent with Dworkin's. His argument in *Law's Empire* for why we need not look to individual intentions is motivated *by* integrity, which has already entered the picture. On my account, we make that step even before integrity comes into play.<sup>288</sup> We attribute intentions to the legislature because the legislature is, in Pettit's terms, an incorporated representative body. The only way to work out the intention of such a body is to attribute one to it, by reflecting on the sort of body that it is. Integrity will enter later, in determining what sorts of intentions we can attribute to Parliament, when we ask more specific questions about the sort of institution it is and the sorts of aims it should have.<sup>289</sup> Legislative intent, on this view, is 'the result of, rather than an alternative to, a theory about the object and purpose of' Parliament itself.<sup>290</sup>

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<sup>288</sup> In Part III of the thesis, I argue that the theory of law as integrity makes the best sense of the principle of legality. The moralised conception I put forward here, then, follows both from the institutional nature of the Westminster legislature and from the nature of law, though I save the latter argument for later.

<sup>289</sup> The notion that we need to reflect on the sort of body a legislature is in order to attribute intentions to it should not be controversial to proponents of intentionalism. Richard Ekins, in setting out his theory of legislative intentions, evokes the notion of a parliamentary purpose. A legislature is the sort of group, he says, that 'uses a set of procedures to structure its coordinated action to the end that defines the group, the end for which the group acts'. This purpose, according to Ekins, is 'to exercise legislative capacity for the common good'. Ekins (n 203) 219.

<sup>290</sup> Letsas, 'Intentionalism and the Interpretation of the ECHR' (n 211) 269. Letsas is speaking here in the slightly different context of ECHR interpretation.

This seems to me a promising way of making sense of the way judges often talk about the role of intention in interpretation. At the outset of this part of the thesis, I noted that there is a tension in the judicial treatment of legislative intentions. Judges invoke such intentions, but they are often ambiguous about what precisely is involved in that invocation. Some assert, in rather vague terms, that legislative intention is an ‘objective’ matter. Lord Nicholls, for instance, states: ‘[T]he intention of Parliament’ is an objective concept, not subjective. The phrase is a shorthand reference to the intention which the court reasonably imputes to Parliament in respect of the language used.’<sup>291</sup> The moralised view of legislative intent allows us to bring more precision to this formulation. Legislative intent is objective insofar as there are true answers to moral questions. The courts ‘impute’ an intention to Parliament, on the view I put forward, not by reflecting on the nature of Parliament as a group agent, as Ekins claims, but rather by attempting to make the best moral sense of the language Parliament used.

Further, many judges deny that there is any substance to invocations of legislative intent at all. Lord Burrows, in his Hamlyn Lectures, claims that judicial talk of legislative intention is actually ‘an unhelpful fiction’.<sup>292</sup> Statements such as those of Lord Nicholls in the previous paragraph serve to mask the fact that judges reach conclusions about the proper intentions of Parliament on other grounds, unrelated to legislative intention. As Lord Burrows notes, this view also finds support among several of his colleagues

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<sup>291</sup> [2001] 2 AC 349, 397.

<sup>292</sup> Burrows (n 136) 17.

on the bench.<sup>293</sup> Justice Kirby, for instance, writes: “[I]t is unfortunately still common to see reference . . . to the “intention of Parliament”. I never use that expression now. It is potentially misleading’.<sup>294</sup> Similarly, Lord Justice Laws states: ‘The notion of intention . . . denotes a conscious state of mind whereby . . . [a] person proposes to act in a particular way. Since it denotes a state of mind, which is a characteristic of a single person, it cannot be possessed by a group, or an institution’.<sup>295</sup> The moralised view offers a way of reconciling such scepticism about the substance of legislative intent with the common judicial use of that phrase. Legislative intent is not a mask for other means of interpretation. Rather, other means of interpretation are used to determine legislative intent, because moral principles partly ground legislative intent itself.

Lord Burrows goes on, in his Hamlyn Lectures, to advocate a purposive approach to interpretation:

When we talk of ‘purpose’, we are looking for the policy behind the statute or statutory provision. Identifying the policy is not dependent on identifying any person’s intentions. It may be said to be analogous to identifying the principle behind a common law precedent and that, too, is not dependent on trying to identify any person’s (i.e. judges) intention.<sup>296</sup>

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<sup>293</sup> *ibid.*

<sup>294</sup> Kirby (n 153) 98.

<sup>295</sup> John Laws, ‘Review: Richard Ekins, *The Nature of Legislative Intent*’ (2016) 132 *LQR* 159.

<sup>296</sup> Burrows (n 136) 19-20.

Once again, we can now say that working out the policy behind a statute is not simply a factual matter, but a matter of making good moral sense of the actions of Parliament. The distinction between finding the purpose/policy of a statute, and finding the intention of the legislature on this view, is largely a semantic distinction.

A moralised approach to legislative intention, it is worth noting, avoids several of the difficulties faced by intentionalism.<sup>297</sup> One of the most serious problems with the intentionalist view is that it struggles to account for the controversial nature of rights questions. As we have seen, according to intentionalists, the principle of legality is in essence a maxim of communication, according to which Parliament holds the standing intention that it not create legal norms that violate fundamental rights. For this reason, only clear and precise wording should be taken to overcome this presumption. Whether or not a statutory provision violates a given right, however, is a matter on which reasonable people can disagree.<sup>298</sup> Whether the scope and content of the right of access to justice, for instance, precludes the setting of employment tribunal fees at a certain level is likely to be a matter of deep disagreement. Indeed, the answer to that question will depend on many other

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<sup>297</sup> I follow Dimitrios Kyritsis here in speaking of a ‘moralised’ understanding of legislative intent. Dimitrios Kyritsis, ‘Interpreting Legislative Intent’ (n 253). There is one slight distinction between our uses of the label, though the uses are not inconsistent. Kyritsis uses it to speak of a view wherein the legal impact of legislative intention – the bearing that such intentions have on the law - is partly determined by morality. As I have indicated, I share this view. In this section, however, I also argue that we can only work out *the content of that intention itself* through moral reflection. So the view I put forward here is doubly moralised. This is not, I believe, inconsistent with Kyritsis’s view.

<sup>298</sup> *ibid* 12.

factors, such as GDP in the country. Members of Parliament may not even have considered that the right of access to justice was implicated at all in this instance. Given the pervasive disagreement around rights, it seems implausible to say that the courts, in cases in which common law rights are engaged, can confidently have thought that Parliament intended the rights-compliant reading that they gave to the statute.

If we take the view of intentions that I have put forward, we might say that Parliament is not the sort of entity whose purpose includes the violation of fundamental rights. It therefore is not *capable* of having the intention, qua Parliament, to violate such rights. The upshot of this is that parliamentary intention is determined partly by controversial moral questions about the scope and content of rights. This is not just to say that the bearing such intentions have on the law is partly determined by morality. It is to say as well that *the content of the intention itself* is partly determined by morality. The process is moralised all the way down. When judges employ the principle of legality, on this view, they are seeking to engage with questions of political morality, not work out the literal intention of Parliament by way of conversational maxims. This view seems to me to offer a more promising route for analysing the principle of legality.

Aside from offering a better fitting explanation of rights adjudication, the moralised conception of parliamentary intention avoids other difficulties that Ekins and Goldsworthy's accounts run into as well. To return to the issue of meta-intentions, one such intention that members of legislative assemblies hold, according to Ekins and Goldsworthy, is the standing intention to 'change

the law when there is good reason to do so'.<sup>299</sup> When a bill is enacted, the content of the legislature's intention *is* the content of the bill, regardless of each individual members' own intention. Greenberg has pointed out that this explanation requires quite a bit of evidence to demonstrate its truth as a matter of 'psychological reality'.<sup>300</sup> The moralised account does not face this burden. It asserts that the content of legislative intention is itself a matter of interpretive construction.

The moralised account also allows us to explain the fact that a statute is 'always speaking', i.e. that a statute purports to settle legal questions that did not exist at the time of the statute's enactment.<sup>301</sup> These questions, which commonly involve technological or medical developments, could not have been part of the literal intentions of any legislator, or the group intention of Parliament, understood as a complex psychological fact. For example, a statute entitling the police to search written correspondence might be held to apply to email correspondence, even if the statute were enacted before the dawn of the internet.<sup>302</sup> The moralised approach makes it perfectly sensible that such statutes should apply to contemporary questions. The same question is asked when new, unforeseen questions arise under these statutes: what intention should we attribute to Parliament, given the sort of

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<sup>299</sup> Ekins and Goldsworthy (n 202); Ekins (n 203).

<sup>300</sup> Mark Greenberg, 'Legal Interpretation' (2019) *UCLA School of Law, Public Law & Legal Research Paper No. 19-40*.

<sup>301</sup> Lord Burrows (n 136) 22.

<sup>302</sup> Lord Burrows offers similar examples, *ibid*: *Barker v Wilson* [1980] 1 WLR 884 (whether a statute permitting police to search a banker's 'books' allow them to inspect microfilm); *Royal College of Nursing of the UK v Department of Health and Social Security* [1981] AC 800 (whether a statute permitting abortion 'by a registered medical practitioner' meant that a new abortion technique that required only a nurse and not a doctor was unlawful).

institution that it is and the sort of intention it should have? Thus Lady Hale, in holding that a local authority's obligation to provide housing to victims of 'violence' under the Housing Act 1996 applied to victims of non-physical domestic abuse, was correct to state: '[W]here Parliament uses a word such as 'violence', the factual circumstances to which it applies can develop and change over the years... The essential question... is whether an updated meaning is consistent with the statutory purpose'.<sup>303</sup>

The notion that this sort of normative work might be involved in interpreting legislative intention changes how we ought to think about the principle of legality. If parliamentary intentions are worked out through normative reflection, legality may represent the recognition that Parliament cannot coherently be understood to have had the aim of violating fundamental rights or principles, because Parliament *cannot* intend to legislate with such an aim. Parliament's intention constrained by considerations of political morality.

It is uncontroversial to say that Parliament is not the sort of entity that *should* violate fundamental rights. No entity is that sort of entity. What may seem controversial is the proposition that Parliament *cannot* have such an intention. But this need not be controversial. If Members of Parliament are engaged in the process of forming collective agency over time, it stands to reason that the individual intentions of non-rights-compliant members should not be allowed to derail this aim. Parliament is an entity charged with justly creating rights and obligations. Even where there is a descriptive sense in

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<sup>303</sup> *Yemshaw v Hounslow London BC* [2011] UKSC 3, [25]-[27]. Endorsed by Lord Burrows (n 136) 26.

which the members that enacted a particular statute might have intended a rights-violating result, it does not follow that the intention of Parliament *qua* Parliament was the same. This is not to say that the moralised conception of legislative intention put forward could not reflect the wicked descriptive intentions of these imagined legislators. It might do, but this would, as Kyritsis notes, 'be grounded in the (controversial) proposition that the value of democratic self-rule sometimes overrides human rights principles'.<sup>304</sup>

If the intentions of Parliament can only be worked out through moral reflection, then working out the rights and duties that flow from statutory enactments becomes a matter of moral argument. If Parliament is an incorporated representative body whose intention is a matter of interpretation, then we must reflect on principles like the rule of law, justice and democracy to work out what bearing Parliament's enactments have on our rights and duties.

Conceiving of legislative intention as a moralised concept offers a starting point for thinking about the principle of legality. It can help us to explain, in particular, the seeming dissonance between what judges say they are doing, and what they in fact seem to be doing. Judges say they are making a presumption about the intentions of the legislature. They often seem, however, to interpret statutes by appealing to controversial arguments in political morality. The inconsistency here dissipates when we conceive of legislative intentions in a moralised way. In a sense, judges do appeal to the

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<sup>304</sup> Kyritsis (n 253) 17.

intentions of Parliament. These intentions can only be worked out, however, precisely by engaging with arguments in political morality.

## Conclusion

I began this chapter by explaining that intentionalists might be able to show that legislative intentions determine the legal meaning of a statute by showing that such an account followed from a theory of general jurisprudence. Intentionalism, however, is unsupported by the positivist theories to which intentionalism usually appeals. A version of intentionalism could, however, be supported by a non-positivist, or interpretivist theory of general jurisprudence. Interpretivism, furthermore, can help intentionalism to resolve otherwise insurmountable difficulties in its account. By committing to the theory that moral principles determine the legal impact of statutes and other sources of law, we can explain the relevance of intentions in determining a statute's legal meaning, in a way that seems otherwise impossible.

Finally, I offered one way in which we can still envisage a role for intentions, by viewing legislative intent as a moralised concept. On this view, we work out what Parliament intended by reflecting on the sort of institution that it is, and the sort of intentions that it *should* have. Even this is just a starting point. This is only the beginning of a theory that assigns importance to legislative intentions. We would still need to explain why those, morally constructed intentions, play a role in fixing a statute's contribution to the law. But the explanation has begun on the right foot, by using the normative

resources that intentionalism denies itself and accepting that any explanation we can give is moralised all the way down.

What remains to be explained, if we take this view, is what moral principles feature in constituting legislative intent, and in determining a statute's contribution to the law. If we can answer this question, we will be a great deal closer to answering the difficult questions about legality set out in Chapter 1. In the remainder of the thesis, I will offer a more thorough interpretivist account of the principle of legality. Legislative intentions still play a morally assigned role in this account, but the account rejects the model of legislation as communication. Legislative enactments are just events in the world, whose moral impact must be interpreted by judges. The fact that the legislature intended its enactments to have specific legal impacts is, likewise, just another fact whose moral impact demands interpretation.

### Part III: A Non-Positivist Theory of the Principle of Legality

Throughout this thesis, I have emphasised that a theory of statutory interpretation must follow from a theory of general jurisprudence. In this part of the thesis, I develop a *non-positivist* theory of the principle of legality. A non-positivist theory is one that views legal obligations as genuine moral obligations. When judges interpret a statute, on this view, they are attempting to work out a subset of the moral obligations that obtain in virtue of that statute's enactment.<sup>305</sup> The principle of legality, it follows, is a method of working out what obligations obtain in virtue of the statute to which the method is applied. One of the main tasks for a non-positivist theory is to explain what moral principles feature in determining a statute's legal impact.

Such an account avoids the failings of the intentionalist theories discussed in Part II. It does not conflate a statute's linguistic and legal meaning. A non-positivist theory aims squarely at explaining the legal obligations (which it understands as genuine moral obligations) that obtain in virtue of a statute's enactment. If a statute's linguistic meaning is relevant, it is only because morality makes it so. As discussed at the end of Chapter 3, there is still room for the concept of legislative intentions, on this view. But

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<sup>305</sup> I say 'a subset' because any number of moral obligations might obtain in virtue of a statute's enactment, but we would not view them all as relevant to legal adjudication. Suppose I promise to meet a friend 'soon'. After making this promise, Parliament enacts a statute mandating a state-wide lockdown for two months, beginning in one week's time. It might plausibly follow that I have an obligation to my friend to fulfil my promise before the lockdown begins. But we would be unlikely to call this a 'legal' obligation.

such intentions must themselves be understood in moralised terms, and their law-determining role fixed by morality.

The other major advantage of the non-positivist view is that it makes good sense of the pervasive disagreements around the principle of legality. In Chapter 1, we saw that judges disagree about the rights that trigger legality's application, the weight to be afforded to statutory wording etc. On a non-positivist view, such disagreement is perfectly natural. The weight attached to moral principles fluctuates depending on contextual circumstances, and reasonable people can disagree on their application. Disagreements around the principle of legality, we shall see, are first order moral disagreements of this kind.

Some might argue that I cannot put forward a non-positivist account of legality without having first shown that positivist accounts fail. It is true that I am not engaging fully in this thesis with the success of positivism generally. I believe, however, that it is legitimate to evaluate the explanatory success of non-positivism on its own merits, rather than as a remedy for positivism's failures. The theory that I set out in this part of the thesis is a freestanding theory of legal obligation, tied to a theory of political legitimacy. It would follow from the truth of this theory that many of positivism's claims are wrong, but there is no need for positivist claims to be the starting point.

Moreover, public lawyers have struggled to put forward a satisfactory account of the principle of legality. If non-positivism does a good job of explaining this aspect of legal practice, then that is a mark in its favour. My

methodology at this point, then, is akin to one of reflective equilibrium.<sup>306</sup> The non-positivist theory of general jurisprudence helps us make sense of the principle of legality, and the principle of legality is further evidence of the success of non-positivism.

The chapters proceed as follows. In Chapter 4, I try to clear the jurisprudential ground by differentiating between strands of non-positivism, and showing how they should engage with each other. I advocate the Dworkinian view of 'law as integrity'. In Chapter 5, I show what consequences this jurisprudential framework has for theories of the UK constitution. In particular, I show that it offers a more satisfactory way of talking about, and reconciling, the constitutional principles of parliamentary sovereignty and the rule of law. Finally, in Chapter 6, I return to the principle of legality, and show how this view of public law practice can help us to answer the difficult questions about legality set out in Chapter 1.

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<sup>306</sup> John Rawls, *A Theory of Justice* (2<sup>nd</sup> ed, Harvard University Press 1999) 46-53.

## Chapter 4. What is Non-Positivism?

### Introduction

In the introduction to this Part of the thesis, I recounted the main takeaways from Part I and Part II. When using the principle of legality, judges seem to determine what legal rights and obligations we have by partly engaging in reflection on principles of political morality. These principles – whether specific common law rights or principles deriving from the separation of powers – determine the legal impact of statutory enactment. As we saw, theories that attempt to cast legality as a factual excavation of legislative intent fail to explain this aspect of adjudication. Their failure is largely due to their inability to connect their explanation with a theory of general jurisprudence. In this part of the thesis, I offer an account of the principle of legality that puts this moralised aspect of the practice at its heart. The account that I give derives from a non-positivist theory of general jurisprudence.

According to non-positivist theories, legal obligations are genuine moral obligations. Law, on this view, is a ‘branch’ or ‘domain’ of morality. This will be my starting point for explaining the presence of moral reasoning in legality’s application. It is important to note that this is not the same as the claim that the law *includes* moral principles, as well as legal rules.<sup>307</sup> This sort of

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<sup>307</sup> Stavropoulos refers to this as a ‘hybrid’ interpretivist position. I discuss these further in Chapter 5, section 2.B. The non-positivist position that I set out here is of the sort that Stavropoulos calls a ‘pure’ interpretivist one. Nicos

distinction between legal rules and principles only makes sense if we assume that there is a definable 'legal content' that exists separately from legal *obligations*, and the law-making actions in virtue of which those obligations obtain. I argued in Chapter 2 that it was a mistake to speak of the 'content of the law' as something distinct from legal obligations. This distinction only makes sense on a 'two systems' view of law and morality. On a non-positivist view, properly understood, principles of political morality determine the impact that a statute (or other lawmaking action such as a common law decision) has on our legal rights and obligations.

There are, however, different non-positivisms. Theories might agree on the premise that law is part of morality, but disagree on exactly what this means.<sup>308</sup> They might agree that legal obligations are genuine moral obligations, but disagree about how, if at all, they are distinct from other sorts of moral obligations. This has important consequences for how we think about legality. Different explanations about the precise moral nature of law may result in different rights triggering legality's application, for example. In this chapter, I try to clear some of this ground, by providing a sense of the important arguments in non-positivist jurisprudence. When we better understand what it means to say that law is part of morality, we can begin to ask how we should think about the principle of legality as a tool for

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Stavropoulos, 'Legal Interpretivism' (2014) *The Stanford Encyclopedia of Philosophy*, available at:  
<<https://plato.stanford.edu/archives/sum2014/entries/law-interpretivist/>>.

<sup>308</sup> For an overview and engagement with the recent literature, see TRS Allan, 'Law as a Branch of Morality: The Unity of Practice and Principle' (2020) 65(1) *American Journal of Jurisprudence* 1.

determining the impact of specific moral principles on our legal rights and obligations. We can then more readily answer questions about what rights and principles trigger legality's application, the weight that must be given to statutory wording etc.

In section 1 I begin by setting out two ways that we can distinguish 'domains' of morality generally in moral philosophy. On the first method, we delimit a domain of morality by specifying a relationship or practice that is *valuable* in some way that means that it gives rise to rights and obligations that flow from that value. On the second method, we delimit a domain of morality by specifying a relationship or practice that places persons in a position of *vulnerability*, and this element of the practice gives rise to rights obligations. Which explanation we choose will have a direct impact on the content of the law.

I then look to two of the most influential non-positivist theories, and show that they each employ one of these strategies. In section 2, I examine Mark Greenberg's 'Moral Impact Theory' of law, and show that it delimits the legal domain of morality by articulating a specific *value* to legal practice. While the Moral Impact Theory makes a significant contribution to contemporary non-positivism, I argue that the way in which it delimits the legal domain of morality is insufficiently precise. In sections 3 and 4, I set out an alternative account, based on the work of Ronald Dworkin. In section 3, I consider the argument that we might delimit the legal domain of morality by focussing on the vulnerability to coercion to which legal practice makes citizens. While this is more precise than the Moral Impact Theory, it struggles to explain how

genuine obligations could obtain to begin with. In section 4, I build on this account by introducing Dworkin's idea of a 'true political community', and the corresponding principle of integrity. I argue that this account, which combines the 'value' and 'vulnerability strategies', successfully explains what is special about legal practice as a domain of morality.

One of my aims in this chapter is to engage in a ground clearing exercise for non-positivism. These theories have developed over many years and often in response to specific debates with positivism. I wish to show how non-positivist theories can engage with *each other*. Non-positivists are not disagreeing about whether or not law and morality constitute separate domains of normativity. In fact the non-positivist's position on this question is the defining feature *of* non-positivism. For non-positivists, legal obligations are genuine moral obligations, and different non-positivist theories offer competing claims about what makes these obligations distinct from other moral obligations.

Once this is done, we will be in a position to explain the principle of legality. My overall argument, following Dworkin, is that the impact that a statute's enactment has on our legal rights and obligations is determined by principles of political morality drawn from previous decisions about when the coercive enforcement of obligations is justified. These principles of justice determine a statute's legal impact. When judges invoke the principle of legality, I argue, they are attempting to work out a statute's legal impact against this jurisprudential backdrop. That is, they are considering what

particular principles of political morality determine the impact of the statute before them.

## 1. Value and Vulnerability

Viewing legal obligations as genuine moral obligations provides a natural starting point for making sense of adjudicative methods that are plainly moralised. It leaves us, however, with a host of further questions. Primarily, what principles can judges legitimately rely on in working out a statute's contribution to the law? Another way of asking this is this: is there anything distinct about legal obligations among moral obligations? Can we talk about law as a *domain* of morality, as we might do promises, or obligations of friendship, or family? All of these domains have principles, rights and obligations *specific* to those domains. If law operates in the same way, and we can determine what is special about the legal domain, then we will be much closer to answering questions about which moral principles determine our legal rights and obligations, and which play no law-determining role.

First, we might clarify what it means to speak of morality in terms of *domains*. It might mean that we can distinguish categories of moral obligation by their source. I might have a family obligation simply in virtue of the fact that it is an obligation that I owe to a family member. This is different from an obligation that I owe to people other than my family. A promissory obligation is such because its source is a promise that I made. This makes it different from an obligation that obtains in virtue of non-promissory reasons.

This is not an inaccurate way to talk about moral domains, but it doesn't tell us anything particularly interesting about those domains. What is interesting about categorising obligations in this way is not really that they obtain in virtue of certain sources. What is interesting is that there are *reasons* why these sources generate obligations. My obligation to hold an umbrella over a family member while it is raining obtains in virtue of 'sources': (i) the fact that it is raining; and (ii) the fact that they are a family member.<sup>309</sup> Most people would likely think of this as a family obligation rather than a 'weather obligation'. This is because there is something morally relevant about the fact of family-ness that does not apply to the fact that it is raining.<sup>310</sup> The fact that it is raining is just a background circumstance that gives specific content to my family obligation. But the fact that I am related to someone is just a fact, like the fact that it is raining. So why is it different?

One reason might be that it is a special type of relationship. In this case, we might categorise moral obligations in terms of different kinds of special relationships that are capable of generating responsibilities that we owe to others. John Gardner posits that special relationships generate

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<sup>309</sup> It is possible that this is not really a family obligation, and I would owe anyone with whom I found myself in that situation an obligation to shield them with my umbrella. It doesn't matter a great deal for present purposes – replace 'family obligation' with 'interpersonal obligation' in what follows if you wish. I am inclined to think, though, that if I were standing next to my mother and a stranger in the rain, and the umbrella would only cover one of them, that I would be obliged to hold it over my mother rather than the stranger. This suggests that the family-reason exerts some pull here.

<sup>310</sup> George Letsas, 'How to Argue for Law's Full-Blooded Normativity' in Plunkett, Shapiro and Toh (eds) *Dimensions of Normativity: New Essays on Metaethics and Jurisprudence* (OUP 2019) 172.

obligations in virtue of the *valuable* nature of those relationships.<sup>311</sup> Parent-child, doctor-patient, and employer-employee relationships are all valuable, according to Gardner, and so they all generate 'strictly relational' obligations.<sup>312</sup> Gardner is interested in the morality of private relations, but we can extend his method of categorisation here to include *practices* as well as relationships. That is, we might say that if a practice is morally valuable, specific obligations might obtain in virtue of that value. For example, perhaps the practice of promising is valuable because it allows us to form intimate relations with others, and this value grounds a normative power to create rights and obligations through promising.<sup>313</sup>

These are not, however, the only sorts of obligations out there. We might also have what Gardner calls 'loosely relational' duties.<sup>314</sup> These are obligations that you owe to another in virtue not of some valuable relationship between you, but because you are in a position to affect the other person's life in some way. If you spot that a person's car has broken down on a rarely used side road, then you may have a loosely relational duty to help them, because you are in a position where your actions will affect their life in some way. Again, we can expand this to include practices as well as relationships. There are practices that place participants in positions of *vulnerability*, and certain

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<sup>311</sup> John Gardner, *From Personal Life to Private Law* (OUP 2018).

<sup>312</sup> *ibid* chapter 2.

<sup>313</sup> Shiffrin, 'Promising, Intimate Relationships and Conventionalism' (n 188); Seana Shiffrin, 'Are Contracts Promises?' in Andrei Marmor (ed), *The Routledge Companion to the Philosophy of Law* (Routledge 2012).

<sup>314</sup> Gardner, *From Personal Life to Private Law* (n 311). Gardner also believes that we can have duties 'to no one', such as a duty to preserve a pristine landscape. HLA Hart also argued that such duties exist. HLA Hart, *Essays on Bentham: Jurisprudence and Political Theory* (OUP 1982) 185.

rights and obligations flow from this position of vulnerability. Suppose that a primary school has a practice of inviting parents along on school outings, to help keep an eye on the children. It seems reasonable to say that the adults helping on the trip owe obligations to the children (and perhaps to the school), that arise because the children are in a vulnerable position, and the adults are uniquely placed to help them. They are uniquely placed, importantly, *because of the practice*. They are given a role - call it 'helper' – and as part of this role they have specific duties, whose content is shaped by the position of vulnerability in which the children find themselves.<sup>315</sup> Other adults who have not signed up do not owe the same duties. Certain relationships, roles or practices, then, give rise to duties that obtain in virtue of a specific vulnerability that comes with the relationship, role or practice.

It seems to me that there are strong reasons for thinking that several of the relationships Gardner categorises as 'strictly relational' fall more naturally within the 'loosely relational' category. Some might doubt, for instance, that there is really any value in the landlord-tenant relationship. What is morally relevant about that relationship, we might think, is that one party is placed in a position of vulnerability to the other. Or, perhaps, both parties place *each other* in vulnerable positions, since landlords stand to lose financially if tenants fail to fulfil their obligations. Even if a relationship is valuable, it might still be that the morally relevant, reason-generating aspect of the relationship is not the value, but some position of vulnerability. Parents for instance, have

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<sup>315</sup> If we wish to avoid confusion with overlapping parental duties, we can stipulate that some parents go along on these trips even when their own child's class is not involved, since the school is short of volunteers.

obligations towards their children. Is this because parenthood is valuable, or because children are in a morally vulnerable position which parents are uniquely able to attend to? We don't need to give a definitive answer here. But what is important is that a position of vulnerability brought about by a certain relationship, role or practice is capable of grounding obligations.

We might also conceive of a *mixed* theory. That is, we might say that some practice is morally valuable, and that this value explains how the practice is capable of generating obligations. We might add, however, that some position of vulnerability inherent in the practice shapes the content of the rights and obligations involved. We might think, for example, that the practice of promising is a valuable one, and that this quality explains how it can generate obligations. The fact that you stand to lose out in some way if I break a promise to you, however, even if only through hurt feelings, surely strengthens and shapes my obligation to keep that promise. Value and vulnerability can then work in tandem. I signal this now since I argue in section 4 that Dworkin's theory can be read as such a *mixed* theory. That this theory takes seriously both the *value* of a legal system and the *vulnerability* to which it subjects citizens is ground, I argue, for favouring it.

These strategies provide a useful starting point for thinking about legal obligations as genuine moral obligations. We have some features that can usefully categorise some of the obligations in our moral universe. First, we have certain fact patterns that, under the right circumstances, generate obligations. These fact patterns might be facts about a certain relationship, or the fact that a certain practice exists, or that we were born into some

institutional role, or voluntarily adopted some institutional role. Then we have stories about the conditions under which these facts generate obligations. Perhaps special relationships are valuable, and this value is capable of generating obligations. Perhaps some variation of hypothetical acceptance can explain how non-contractual roles generate obligations.<sup>316</sup> Or perhaps some special sort of vulnerability might generate obligations, as when I drive by the person whose car has broken down.

This is the sort of story that a non-positivist account of legal obligation seeks to tell. First, we want some distinct pattern of facts that applies to situations in which ‘legal’ obligations obtain, in the same way as facts of parenthood apply to parental obligations.<sup>317</sup> Secondly, we need some reasons that explain why these facts ground obligations, reasons that do not apply to other fact patterns.<sup>318</sup> We might, drawing on, Gardner, posit some special legal relationship that is *valuable*, and so gives rise to obligations. Or we might view law as an institution that creates a role with attached obligations.<sup>319</sup> Or perhaps law creates some morally significant vulnerability, and that is what can do the theoretical spadework. Or, we might adopt a combination of these approaches. That is, it may be that value and vulnerability both feature in explaining the legal domain of morality. These

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<sup>316</sup> Michael Hardimon, ‘Role Obligations’ (1994) 91 (7) *The Journal of Philosophy* 333, 348.

<sup>317</sup> This pattern of facts is not necessarily simply that fact that two people had a child. Facts about adoption, for instance, might ground parental obligations.

<sup>318</sup> As noted in the previous chapter, I am assuming from the outset that the relevant metaphysical relationship between legal facts and the determinants of legal facts is *grounding*. See Samuele Chilovi and George Pavlakos, ‘Law-Determination as Grounding: A Common Grounding Framework for Jurisprudence’ (2019) 25 *Legal Theory* 53.

<sup>319</sup> Letsas, ‘How to Argue for Law’s Full-Blooded Normativity’ (n 310).

options are certainly not exhaustive of the anti-positivist arguments, but they are in the ballpark of what we are looking for.<sup>320</sup>

It is worth reinforcing that these are not just abstract, theoretical questions. The answers to these debates have a direct bearing on adjudication. In order to determine the correct interpretation of a statute – that is, the obligations that obtain in virtue of that statute’s enactment – judges must be able to say what moral principles determine the impact of those statutes.

## 2. Law’s Value: Improving the Moral Situation

### A. *The Moral Impact Theory*

The sorts of fact patterns that ground legal obligations are familiar enough. Legislatures pass enactments, members of the executive pass secondary legislation, and judges make decisions in common law cases. Mark Greenberg, in an influential piece, posits that legal obligations are those genuine moral obligations that obtain in virtue of the actions of legal institutions.<sup>321</sup> The Road Traffic Regulation Act 1984 provides that the speed

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<sup>320</sup> Nor are these options, it should be noted, mutually exclusive in regards to sensibly divvying up moral domains. Our moral world may be made up of special relationships whose obligations are grounded in the value of the relationship, and by obligations of role, and by ‘loosely relational’ obligations, and by universal deontic rules etc. When we speak of legal obligations as one sort of domain, we do not close off the possibility of other sorts of domains existing.

<sup>321</sup> Greenberg, ‘MIT’ (n 205).

limit on roads designated as ‘restricted roads’ is 30mph.<sup>322</sup> The Act also provides that a ‘restricted road’ is one with street lighting provided by lamps not more than 200 yards apart.<sup>323</sup> By taking certain actions – gathering in Westminster, voting in favour of the 1984 Act etc. – Parliament changed our moral obligations. If I find myself driving on a road lit by street lamps 100 yards apart, then I am morally forbidden from driving faster than 30mph.<sup>324</sup>

The Act also provides that a Minister may pass an order to raise or lower the speed limit.<sup>325</sup> Assuming that morality has run its usual course here, we can say that the actions of Parliament in enacting the original parent act also made it the case that certain *further* legal actions (in the form of ministerial orders) could alter our moral profile further. More precisely, the parent Act determines that subsequent secondary legislation can count towards altering our moral profile *in some way that it would not have done absent the parent Act*. Any fact about the world can change our moral profile. The reason that secondary legislation is interesting, on this account, is that it brings about a change in our moral profile that is different to the one that would have been brought about absent the parent Act. A Minister declaring that the speed limit is now 15mph would have no effect on our moral profile

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<sup>322</sup> Road Traffic Regulation Act (‘RTR Act’) 1984, s 81.

<sup>323</sup> RTR Act, s 82.

<sup>324</sup> What if I must break the speed limit in order to rescue an elderly relative? On Greenberg’s account, assuming that my all things considered obligation is to carry out this rescue, then I have no legal obligation to obey the speed limit here. This is a consequence of Greenberg’s stipulation that legal obligations are ‘all things considered’ obligations. We can avoid the problem by saying instead that legal obligations are simply *pro tanto*, rather than all things considered. Greenberg acknowledges that this would also work with the Moral Impact Theory. The choice is not terribly important here, so I will remain agnostic.

<sup>325</sup> RTR Act, s 81(2).

had the parent act not said that it can have an effect. And the fact that the parent Act said that it would have an effect is *itself* a fact that is only relevant because morality makes it so.

The principle of legality, on this view, is a mechanism that judges use to work out the moral impact of parent legislation: both what impact it has directly on our rights and obligations, and what further changes it allows a member of the executive to make. Or more accurately, what further changes it *causes* the further actions of a member of the executive to have. In *Privacy International*, for instance, the Court's task is to ask whether the moral effect of the enactment of s 67(8) of the Investigatory Powers Act 2000 was that individuals could not seek judicial review of decisions of the Investigatory Powers Tribunal.<sup>326</sup> The Court held that s 67(8) did *not* have this impact on our moral profile, notwithstanding the wording of the provision.

Importantly, these changes in our moral situation do not come about because Parliament has some special normative power to change my moral situation. There is nothing morally privileged about the communicative or linguistic content of a statute, and the creation of legal obligation does not come about because of any institution's will.<sup>327</sup> Indeed, members of a legislature might fail entirely to bring about the moral effect that they foresaw. We saw in the previous chapter that if parliamentary intention is important, then it is important because morality makes it so. Morality determines which facts about the world are relevant in determining our obligations. The fact that

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<sup>326</sup> [2019] UKSC 22.

<sup>327</sup> Greenberg, 'SP' (n 162); Nicos Stavropoulos, 'The Relevance of Coercion: Some Preliminaries' (2009) 22(3) *Ratio Juris* 339.

Parliament acted in a certain way, and the fact that the enactments that it passes bear certain words, are just facts like any others. Morality determines what weight they have in determining our obligations. Typically, we will say that moral facts about democratic governance make it the case that parliamentary enactments generate obligations that more or less correspond to their communicative content. But this is just shorthand for a complex moral argument.

One issue that the Moral Impact Theory must confront is the intuition that we would not describe every obligation that results from the actions of legal institutions as a 'legal' obligation. The enactment of a statute stating that a certain minority group is to be persecuted would not only fail to generate genuine obligations to persecute this minority group; it would also generate obligations to *resist* that statute and help the group. This obligation to resist results from the actions of legal institutions, but it would be counter-intuitive to call it a 'legal' obligation.<sup>328</sup> What this points towards is that there is something particular about law as a moral domain. There is something that makes legal obligations distinctly *legal*, such that not all obligations that result from the actions of legal institutions fall within this domain.

*B. The Value in Legal Practice*

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<sup>328</sup> That it would be counter-intuitive is not necessarily decisive in determining that this is not a legal obligation. One could accept the Moral Impact Theory and choose to bite this particular bullet, and claim that the category of 'legal' obligations is much wider than we had previously thought. To my knowledge no non-positivist theorist has publicly committed to this position, and I do not do so here, but it is on the table.

For Greenberg, there is something about the nature of legal institutions, and the process through which legal obligations come about, that makes legal obligations special. According to him, the reason why an obligation to resist the communicative content of a statute (what he calls a ‘paradoxical’ change to our moral profile) does not count as a legal obligation is that it has not come about in the ‘legally proper way’ (‘LPW’).<sup>329</sup> Greenberg does not give a full account of the LPW, but he does give one important feature. This is that the LPW is tied to what he views as the *purpose* of the law. He states: ‘We have an intuitive understanding of the legally proper way for a legal system to generate obligations, and we can articulate it theoretically by appealing to what legal systems are *for* or are supposed to do.’<sup>330</sup> What is the purpose of law? According to Greenberg:

[I]t is part of the nature of law that a legal system is supposed to change our moral obligations in order to improve our moral situation – not of course, that legal systems always improve our moral situation, but that they are defective as legal systems to the extent that they do not.<sup>331</sup>

And again:

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<sup>329</sup> Greenberg, 'Moral Impact Theory' (n 205) 1321.

<sup>330</sup> *ibid.*

<sup>331</sup> *ibid* 1294.

If a legal system is, by its nature, supposed to change moral obligations, it is not surprising that the central feature of law – its content – is made up of the moral obligations that the legal system brings about. Moreover, the view that a legal system is supposed, not merely to change moral obligations, but to do so in a way that *improves* the moral situation will, as we will see, play an important role in determining which of the moral obligations that result from actions of legal institutions are legal obligations.<sup>332</sup>

It seems that what counts as a moral change made in the LPW will depend on whether that moral change was made by an institution whose purpose is to improve the moral situation overall.

Here then is one way of explaining what is distinct about legal obligations as a domain of morality. Legal obligations are special because they come about as a result of institutions whose purpose is to improve the moral situation overall. This sounds similar to Gardner's idea that the *value* in certain relationships explains how they give rise to obligations. Legal obligations obtain in virtue of law's nature as a morally valuable practice. The actions of legal institutions, we can infer, create obligations *because* legal institutions are the sorts of institutions whose purpose is to improve the moral situation overall. Or, more precisely, legal institutions create lots of obligations, but a subset of these obligations come about *because* of the nature of legal institutions as institutions that improve the moral situation

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<sup>332</sup> *ibid.*

overall. The obligations that make up this particular subset are legal obligations.

When judges use the principle of legality, on this view, they are attempting to work out the moral impact of the statute before them. In Part I of this thesis, I set out several questions that a theory of legality should be able to answer. Included was: 'what rights and principles trigger legality's application?' On the Moral Impact Theory, any principles are on the table. It directs us to answer this question through straightforward moral philosophy. This seems like the sort of story non-positivism is after, since it can account easily for the pervasive reliance among judges on arguments of political morality. This account would, however, require some further explanation. There are three issues that I would like to highlight here. Each has consequences for developing a non-positivist theory of legality.

First, while we might posit some value in legal practice, some might be sceptical of whether the idea of 'improving the moral situation overall' is a precise enough way of articulating this value. It is easy to see how friendship is valuable in a way that improves our lives, though some might doubt this sort of perfectionist explanation of friendship as well. It would be odd, however, to say that we are *morally* better off if we have friends, or if we form deeper friendships with the friends we do have. Certainly we will likely be happier, or more fulfilled, but does our moral situation improve? Is it similarly strange to talk about law making our lives *morally* better? The scepticism here is not around the idea that law *can be* valuable. Affording citizens protection from violence, putting in place solutions to coordination problems, regulating

commerce etc. are all valuable aspects of legal practice, and are all capable of improving our lives. Rather, the question is: if law is valuable, is this value best expressed through *moral* improvement?

Secondly, we might worry that the idea that legal institutions are *supposed* to improve the moral situation is tasked with too heavy a theoretical burden in this account. We know that we may sometimes have legal obligations that do not improve the moral situation overall. No legal system gets it right all the time, morally speaking. There are numerous examples of legal systems in which legal institutions do *not* improve the moral situation overall, but in which we nevertheless believe that legal obligations obtain. One could also conceive of a situation in which a territory is controlled by a mafia gang that *does* improve the moral situation within that territory in certain ways. We would be unlikely to describe any moral obligations that arose from this situation as 'legal'. On Greenberg's account, we might say that this is because legal institutions, unlike mafia gangs are the sorts of institutions *whose purpose it is* to improve the moral situation overall. Therefore, we can say that an action comes about in the legally proper way when it comes about in a way that is connected to the purpose of improving the moral situation overall. Mafia obligations never come about in the legally proper way, because they can never be connected to the purpose of improving the moral situation overall.

In this case, we would require a further account of what it means for an obligation to come about in a way that *relates to the purpose* of improving the moral situation overall. If Greenberg wishes to show that the value of legal

practice is the reason for legal obligations, and that the purpose of law in improving the moral situation constitutes this value, then he must elaborate further on what exactly it means for a legal system to have the *purpose* of improving the moral situation overall. Presumably a very wicked legislature, that consistently fails to pass morally acceptable legislation, could still be the sort of institution whose *purpose* it is to make the moral situation better. In that case, it would seem like its obligations come about in the legally proper way just by dint of having come about as a result of their actions. Any account of a practice that seeks to locate the value of the practice in its purpose owes us an explanation of when failure to fulfil that purpose dilutes or does away with the value of the practice, and therefore the obligations that result from it.<sup>333</sup>

Again, if legality is about determining the moral impact of legislative action, it matters that we have a clear picture of how judges are to determine the *legally relevant* moral consequences of legislative enactments. The concern here is that the Moral Impact Theory offers too nebulous a conception of the value involved in legal practice to be of use in answering the difficult questions about legality posed in Chapter 1.

Thirdly, and finally, we might doubt whether law's value (whether we articulate this in terms of moral improvement or in other terms) is the most relevant aspect of legal practice in shaping legal obligations. In the case of parenthood obligations, some might argue that these obligations come about not because of the value in the parent-child relationship, but because children

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<sup>333</sup> For another account that ties legal obligation to the purpose of law, see Mark Murphy, 'Natural Law Theory' in Martin Golding and William Edmundson (eds), *The Blackwell Guide to the Philosophy of Law and Legal Theory* (Blackwell 2005).

are vulnerable and parents are uniquely placed to help them. These people would still recognise that parenthood is valuable. They would simply argue that this value is not the most morally relevant aspect of the practice. The value is not the reason for the obligation.<sup>334</sup> Perhaps they think that the value is too abstract to ground concrete obligations, and that the vulnerability is thus more morally salient. Similarly, if it is difficult to properly articulate the value of legal practice, we might wonder whether it is this value that is doing the moral work in grounding legal obligations. Specifically, if law subjects citizens to some morally relevant vulnerability, we might wonder whether that is not significant in determining the shape of our legal obligations.

### **3. Vulnerability: Coercive Enforcement**

There are other explanations we could give that would explain what is morally distinct about legal obligations that might avoid some of these objections. We saw in section 1 that one common way of talking about a particular domain of morality was to identify some special vulnerability, and offer corresponding reasons why particular people had obligations on foot of those vulnerabilities. Gardner discussed 'loosely relational' obligations that might arise in this way, such as when I pass a stranger whose car has broken down. Might we think of legal obligations as occurring in similar circumstances?

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<sup>334</sup> I take no position here on whether parenthood obligations are grounded in value or vulnerability. I use the two alternative conceptions here simply by way of example.

How exactly does our legal practice generate moral vulnerability? One way is through the coercive enforcement of our legal rights and obligations.<sup>335</sup> When we win in court, we are entitled to call on the State to use its monopoly on coercive force against our fellow citizens. It is true that in almost all of our daily interactions with law, coercion does not seem to feature. We regularly stop at red lights, carry out employment obligations that we have contracted into, and pay for goods that we want to own, all without any threats against us if we fail to do these things in the right way. But we should note that the threat of coercion is always present, even when no coercion is necessary. If I don't stop at red lights or if I shoplift, the police are permitted by law to arrest me. A court can lawfully order my employer to hand over money to me if she has failed to do so on her own. Coercive enforcement is a central feature of our legal practice.<sup>336</sup> If coercion does feature centrally in legal practice in a way in which it does not in other domains, then that may help us to delimit the legal domain of morality. Different facts about the world affect our moral profile in different ways. If a special form of coercion is unique to law, then this might trigger specific rights and principles, which in turn determine the moral impact of legislation.

The next step in the argument is to work out precisely how the presence of coercion affects the impact of legal actions on our obligations. On one account, the coercive nature of legal practice presents a moral

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<sup>335</sup> Nicos Stavropoulos, 'The Relevance of Coercion (n 327).

<sup>336</sup> See generally Frederick Schauer, *The Force of Law* (HUP 2015).

problem.<sup>337</sup> Any coercion, we generally think, must be justified against a background moral presumption in favour of liberty.<sup>338</sup> For Dworkin, justifying this coercive practice is at the heart of any concept of law:

Law insists that force not be used or withheld, no matter how useful that would be to ends in view, no matter how beneficial or noble these ends, except as licensed or required by individual rights and responsibilities flowing from past political decisions about when collective force is justified.<sup>339</sup>

This is often taken as meaning that for Dworkin, the *purpose* of law *just is* to justify state coercion. But this is not exactly the point. Law is not a tool for justifying state coercion; law *is* state coercion. Any legal right is accompanied by a right *to have the state coerce others*. To be under a legal obligation is to be made morally vulnerable to coercion.

This, then, is a candidate distinguishing feature of our legal practice that we can add to what we have learned from the Moral Impact Theory. Legal institutions take actions that change our moral profile. But they do not just change our moral profile in any old way. Rather, they generate rights and obligations that we are entitled to have enforced through state *coercion*. The

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<sup>337</sup> The story that I draw out here is based on Dworkin's theory, as expounded by Stavropoulos. I do not think that either subscribe to the bare version I set out here. The more complete version in the next section would, I think, more closely approximate to the views of both.

<sup>338</sup> A John Simmons, 'Justification and Legitimacy' (1999) 109 *Ethics* 739, 740.

<sup>339</sup> Dworkin, *Law's Empire* (n 10) 93.

fact that this practice makes citizens vulnerable to coercive enforcement, on this view is what characterises the legal domain.

This account has several questions to answer. For one, it demands an account of what would make coercive enforcement justifiable. There is, however, a prior question that we might ask at this point. One might fairly ask why we choose a system of coercive enforcement at all. If coercion raises a moral problem, why bring this problem into existence? We need some way to motivate the coercion thesis. The presence of coercion might explain the shape that our obligations take, but we need an account of how legal obligations get off the ground to begin with.

The Moral Impact Theory had an explanation for this. According to it, legal institutions are supposed to improve our moral situation overall. This explanation seems capable of explaining how legal obligations get off the ground. But we worried that this explanation lacked precision. The coercion thesis offers a sharper way of delimiting the legal domain, but in the bare form in which I have presented it so far, cannot explain how legal obligations get off the ground.

In section 4, I show how Dworkin's political virtue of 'integrity' can help us to pursue both of these lines of inquiry – what could justify coercion and why have coercion – at once. On this story, the value in constituting a specific type of community of equals explains how legal obligations can obtain to begin with, and then the vulnerability to coercion that this sort of community relies on explains the specific shape of the obligations. This account, then,

combines explanations built on value and vulnerability to delimit the legal domain of morality.

#### **4. Value and Vulnerability**

Our question now is this: how do obligations that come with coercion attached get off the ground to begin with? It seems odd to say that we need to justify the existence of obligations. If obligations exist, we generally think, then they are justified. It follows that we need an account of why a system of coercively enforcing rights is desirable. In this section I consider two explanations. The first draws on Kant's postulate of public law. While this provides a plausible route for non-positivism, it also suffers from some of the same lack of precision as the Moral Impact Theory's notion of 'improving the moral situation overall'. I then consider Dworkin's account of the principle of integrity and the idea of a true political community. This, I believe, gives us the sort of explanation we need.

Some may accuse me of cooking the books in Dworkin's favour here. His account of integrity, after all, goes hand in hand with the conception of coercion described above. My aim in examining the Kantian explanation is not, however, to set up a straw man. Rather, it is to show that there are multiple routes for non-positivism to take, even if I choose not to take them here. Each explanation is likely to result in different downstream answers to our questions about legality: particularly what rights trigger its application, and how much weight need be given to statutory language. Competing accounts

of legal doctrine are on the table when we approach questions about the law as questions of political morality whose answer is to be found only in moral argument. Moreover, Dworkin was heavily influenced by Kant's work. A discussion of the Kantian position, then, provides valuable context for the Dworkinian one.

#### A. *Kantian Freedom*

The question of how to justify public coercion is central to a great deal of classical political philosophy. In *The Doctrine of Right*, Kant postulates an 'original right to external freedom', from which he builds the concept of the juridical state. In essence, every person has the right to independence in making their choices; they have the right that others not decide on their behalf. This is a purely negative right; a right to non-interference. Thus, it would not make sense to say that someone marooned on an otherwise uninhabited island is either free or unfree. It is only in a world in which we interact with others, a world of limited physical space, that the original right to freedom obtains.<sup>340</sup> This innate right is 'the only original right belonging to every human being by virtue of his humanity'.<sup>341</sup> This right is formulated into the principle: 'Any action is right if it can coexist with everyone's freedom in accordance with a universal law, or if on its maxim the freedom of choice of

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<sup>340</sup> B Sharon Byrd and Joachim Hruschka, *Kant's Doctrine of Right: A Commentary* (CUP 2010).

<sup>341</sup> Immanuel Kant, *The Metaphysics of Morals* (Lara Denis ed, Mary McGregor tr, rev edn, CUP 2017) 34.

each can coexist with everyone's freedom in accordance with a universal law'.<sup>342</sup>

That the original right to freedom obtains is proved, for Kant, by considering the contrary. If we did not have external freedom, we would live in a state where 'the right of the fittest' reigned: 'A condition that is not rightful, that is, a condition in which there is no distributive justice, is called a state of nature (*status naturalis*)'.<sup>343</sup> No one could will this to be a universal law, which for Kant demonstrates the axiom of original freedom.<sup>344</sup> In order to leave a state in which the strongest reign, and guarantee external freedom, we require a system of laws: '[i]t can be said of a *rightful* condition that all human beings who could (even involuntarily) come into relations of rights with one another *ought to enter this condition*'.<sup>345</sup>

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<sup>342</sup> *ibid.* For a more detailed unpacking of this principle, and its relation to the three interrelated aspects of the right to freedom – namely, 'externality', 'choice' and 'freedom', see Jacob Weinrib, 'Kant on Citizenship and Universal Independence' (2008) 33 *Australian Journal of Legal Philosophy* 1.

<sup>343</sup> Kant (n 341) 92. According to Byrd and Hrsuchka, Kant adopts the phrase 'distributive justice' here from Hobbes' sixteenth principle of natural law: 'And therefore it is of the law of nature, that they are at controversy submit their right to the judgment of an arbitrator'. Thomas Hobbes, *Leviathan* (Wordsworth 2014) 120. Kant extends Hobbes' principle to say that we must submit to an institution ('distributive justice') which decides what our rights are in cases where that is in dispute. Byrd and Hruschka (n 340) 72-73.

<sup>344</sup> Ripstein elaborates on the precise defects of the state of nature in his magisterial treatment of Kant's juridical theory. Arthur Ripstein, *Force and Freedom: Kant's Legal and Political Philosophy* (HUP 2009) chapter 6.

<sup>345</sup> Kant (n 341) 93. From the right to external freedom Kant draws out four specific rights: From this right to external freedom follow four other rights: (1) equal treatment under the law; (2) legal independence; (3) presumption of innocence; and (4) freedom of expression. For a discussion of why these rights follow from the right to freedom, see Byrd and Hruschka (n 340) 81; Ripstein, *ibid.*

The moral obligation to move into the juridical state is thus the positive aspect of our negative right to freedom.<sup>346</sup> Everyone's innate right to self-mastery can only be consistent with everyone else's enjoyment of the same right in a juridical state. This Kantian story can serve as one explanation of why we would adopt a system of coercive enforcement. We adopt such a system, on this view, because to fail to do so would violate a moral obligation to leave the state of nature, and move towards a system where everyone's equal right to external freedom is guaranteed. This requirement that we move towards a juridical state is called the 'postulate of public law'.<sup>347</sup>

Here then is one story that we can tell to explain how it is that obligations to which coercion attaches can get off the ground to begin with.<sup>348</sup> A system of coercive enforcement is morally required in order to guarantee each citizen's right to external freedom. This explains why the actions of legal institutions have an effect on our moral profile that is unique to the legal domain of morality. On this story, the legal domain is unique in its concern with fulfilling the obligation to guarantee everyone's right to freedom.

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<sup>346</sup> Byrd and Hruschka (n 340) 87-90.

<sup>347</sup> Sometimes 'postulate of public *right*' rather than 'public *law*'. The interpretation of Kant's use of the German word 'recht', which can be translated as 'law' or 'right' has proved troublesome for translators of his work. Mary McGregor, 'Translator's note on the text', in Kant (n \_\_\_) xli-xlii.

<sup>348</sup> Positivists might also accept a variation of this story, even though they disagree that the obligations that flow from the actions of legal institutions are genuine moral obligations. For Kant, the postulate of public law is satisfied by the creation of certain offices and institutional roles. We leave the state of nature by instantiating institutions that create, apply, and enforce laws. Positivists might agree that this justifies our system of laws as a wholesale matter, while pointing out that the existence of each individual law is simply a matter of social fact. Ripstein (n 344) 198.

Some might think that Kant's postulate of public law tries to show too much. When we discussed the Moral Impact Theory's reliance on the notion of 'improving the moral situation overall', we saw that it is difficult to show that we do better, morally speaking, with a legal system than without one. The Kantian story has an even higher threshold to make out this argument. On this account, not only do we do morally better by moving towards a system of laws, but we are morally obligated to do so. A full analysis of the success of the Kantian explanation would require its own project. The motivation in introducing the focus on coercion in this chapter, however, was to avoid problems caused by the difficulties in making out this sort of argument. This is not to say that such an argument is implausible. If we can put forward an argument that does not run into those difficulties, however, then that is to be favoured for present purposes. In the next section I consider one such argument.

*B. Integrity and a True Political Community*

*(i) Value: Associative Obligations*

Dworkin was aware of the need to explain how obligations that come with coercion get off the ground: 'How can *anything* provide even that general form of justification for coercion in ordinary politics?'<sup>349</sup> Dworkin's answer is to posit that legal practice is capable of constituting a special form of political

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<sup>349</sup> Dworkin, *Law's Empire* (n 10) 191.

community in which ‘associative obligations’ obtain. These are the ‘special responsibilities social practice attaches to membership in some biological or social group’.<sup>350</sup>

Dworkin’s strategy is to examine the character of ‘associative obligations’ in other domains, and then try to show that political obligations share these features. There are, then, two separate points that must be made out here. First, under what conditions can genuine associative obligations obtain? And secondly, what conditions must a political community abide by in order for its legal practice to produce these sorts of obligations?

The first key feature of associative obligations, for Dworkin, is that they are ‘special’, i.e. holding only between members of the association.<sup>351</sup> Secondly, they are ‘personal’, in the sense that they run from each individual to each of the other individuals within the group.<sup>352</sup> An academic may owe certain obligations to her university as a corporate entity. When we speak of obligations of friendship, however, we mean obligations that hold among individual friends. Even in a group of friends, the obligations run from each and to all (though they may differ in strength depending on the particular history of each friendship within the group). Finally, associative obligations only obtain where members of a group suppose that their obligations derive from a responsibility of equal concern for the wellbeing of the other members

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<sup>350</sup> *ibid* 196.

<sup>351</sup> *ibid* 199.

<sup>352</sup> *ibid*.

of the group.<sup>353</sup> That is, the group must suppose that each person's role and life are equally valuable and important.

Characterising legal obligations as associative, on the Dworkinian story, is key to explaining how genuine moral obligations can obtain in virtue of legal practice. A political society in which associative obligations obtain becomes a special type of community, which he calls a 'true political community'; one committed to the equal standing of all members.<sup>354</sup> This sort of community is morally valuable, because it treats members as enjoying equal standing within it, and so expresses a special ideal of political equality. If legal obligations meet the four characteristics described above, then a group becomes a true political community whose members owe genuine moral obligations to each other in virtue of membership of the group. This is not a matter of a community simply *feeling* some loyalty or patriotism. Rather, the group's practices of asserting obligations 'must be practices that people with the right level of concern would adopt'.<sup>355</sup> Where political and legal practices are of a certain moral character, then, they generate a specific sort of associative obligation.

Note how this story is different to the Kantian one. The Dworkinian account does not posit an obligation to move from a pre-legal state of affairs to a legal one. Rather, it asks, 'What must politics be like for a bare political society to become a true fraternal mode of association?'<sup>356</sup> The fact that a political community is of a certain character provides the reason for certain

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<sup>353</sup> *ibid* 200.

<sup>354</sup> *ibid* 201

<sup>355</sup> *ibid.*

<sup>356</sup> *ibid* 208.

obligations obtaining, on this account, even if we do not have any prior obligation to 'trigger' these associative obligations. In both accounts, morality calls the shots from the outset, but the role it plays is different in each. In Kant's account, an original right to external freedom grounds obligations to bring about specific institutions that can guarantee that right and the further rights that flow from it. In Dworkin's account, morality makes it the case that certain practices, if they are imbued with a certain moral character, are capable of generating genuine obligations, even if our participation in these practices is non-voluntary. These obligations are special, personal, and grounded in an attitude of equal concern.

This takes us to the second question: what standards must a political community meet in order to generate associative obligations through its legal practice? The answer that Dworkin gives to this question doubles as an answer to the inquiry with which we started, which sought to explain why we employ coercive enforcement at all.

*(ii) Vulnerability: Integrity*

What moral character must imbue our political practice? This is how Dworkin motivates his principle of integrity. A political community becomes a 'true community' when it decides what its members owe one another by drawing on a coherent scheme of principle that governs all members in the same way. Collective force can be justified, in such a community, only when licensed by principles drawn from past decisions about when such force is justified. In this

way, members affirm an ideal of equal concern for one another. A community that enforces rights and obligations by asking what principles of justice underpinned similar cases has the four characteristics of associative obligations.<sup>357</sup> In particular, it embodies the requirement of equal concern: 'integrity assumes that each person is as worthy as any other, that each must be treated with equal concern according to some coherent conception of what that means'.<sup>358</sup> Integrity is thus constitutive of a special, morally valuable type of political community, one that ensures that citizens are treated equally in the coercive enforcement of rights and responsibilities. In this way 'collective decisions are matters of obligation and not bare power' in a political community that practices integrity.<sup>359</sup>

On this view, a system of coercively enforceable obligations is only justifiable if that coercion is exercised in a way in which every person subject to it is treated with equal concern and respect. This is possible, according to Dworkin, only when coercion is exercised in the same way in relevantly similar cases. If a person in one situation has a legal right that can be coercively enforced, then other people in relevantly similar situations are entitled to have the same right enforced. This explains why legal obligations might depart from the moral obligations that feature in their grounding. We have lots of moral obligations. But not all of them are obligations that could justifiably be

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<sup>357</sup> *ibid* 213-214.

<sup>358</sup> *ibid* 213.

<sup>359</sup> *ibid* 214.

enforced in a way that treats me in the same way as others have been treated.<sup>360</sup>

We have an answer, then, to the question of why a political community would exercise coercion to begin with. Taking collective decisions about when force is justified, when done in line with a moral principle that expresses the equal standing of all, is constitutive of a morally valuable political community of equal citizens, each of whom owe associative obligations to all of the others. This does not mean that we are morally required to form such communities. It does, however, explain how genuine moral obligations can result from non-voluntary political associations. The fact that coercion is on the cards, however, makes it the case that a special standard needs to be met in order for this sort of community to be constituted. Specifically, coercion makes institutional history relevant in a way that it might not be were we simply asking what justice requires, for example.<sup>361</sup> To assert that I am entitled to have a right enforced through coercion is to claim that some of the same moral principles that underpinned a previous decision to exercise coercion apply in my case too. For this reason, I am entitled to have the State's coercive power used on my behalf.

We see then that Dworkin's theory adopts a combination of the two strategies for delimiting a moral domain that we earlier identified: value and

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<sup>360</sup> According to Stavropoulos, what counts as relevantly similar is a moral question. Judges are bound by principles of substantive justice to identify what aspects of their previous decision are relevant to the present one. Nicos Stavropoulos, 'Why Principles?' (2007) Oxford Legal Studies Research Paper, available at: <<http://www.ssrn.com/abstract=1023758>>. See also Gerald Postema, 'Integrity: Justice in Workclothes' (1997) 82 *Iowa Law Review* 821.

<sup>361</sup> Stavropoulos, 'The Relevance of Coercion' (n 327) 350.

vulnerability. The value in constituting a true political community explains how genuine obligations can get off the ground.<sup>362</sup> These obligations are associative: owed from each citizen to every other citizen, and expressing a conception of equal concern for all. These sorts of obligations obtain in a political community that enforces rights and obligations in a way that respects the equal standing of all. The vulnerability to which this coercion subjects members, however, shapes the contours of the obligations within the domain. It determines what conditions must be met to say that we are part of this valuable, true community. Specifically, it determines that a scheme of principled consistency must underpin our use of collective force. Integrity, then, determines the moral impact of our legal practices.

(iii) *Legal and Legislative Rights*

The picture sketched above also motivates a distinction in Dworkin's later work that has caused some confusion: that between legal rights and obligations and other political rights and obligations. It merits pausing very briefly on this here, since it may help clear some ground in non-positivism, making future debates on non-positivism's application to public law easier. In *Justice for Hedgehogs*, Dworkin states that he views legal rights as a subset of moral rights, and that he now believes that legal rights are 'those that

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<sup>362</sup> If one wanted to move Dworkin and Greenberg's theories closer together, one might argue that the value in constituting a community wherein participants are treated with equal concern is how legal institutions 'improve the moral situation overall'.

people are entitled to enforce on demand' in courts.<sup>363</sup> Law, then, is the branch of morality concerned with the rights and obligations that can justifiably be enforced by legal institutions. On one reading, Dworkin is adopting an entirely new view to the view he held in previous work.<sup>364</sup> He views legal obligations as moral obligations, when previously he did not, and in an effort to avoid overinclusivity, he stipulates that legal rights are those rights that can be enforced in court.

There are at least two sources of controversy here. First, some claim that in previous work Dworkin adopted a 'two systems view' of law and morality, according to which legal rights belong to some non-moral domain of normativity.<sup>365</sup> The assertion in *Justice for Hedgehogs* that legal rights are genuine moral rights, then, is something of an about-face. I make no claims here about what Dworkin himself thought on this question. I hope it should be clear from my characterisation above that the account of law as a branch of morality animated by the principle of integrity *can* be viewed as a 'single system view', however Dworkin originally intended it. Whether this is an accurate reading of Dworkin's work or a reconstruction of it does not matter here. We can consider the view on its merits.

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<sup>363</sup> Ronald Dworkin, *Justice for Hedgehogs* (Belknap Press 2011) 406. He makes similar claims in Ronald Dworkin, 'A New Philosophy for International Law' (2013) 41 *Philosophy & Public Affairs* 2.

<sup>364</sup> Mark Greenberg, 'The Moral Impact Theory, The Dependence View, and Natural Law' in George Duke and Robert George (eds), *The Cambridge Companion to Natural Law Jurisprudence* (Cambridge University Press 2017); Lawrence Sager, 'Material Rights, Underenforcement, and the Adjudication Thesis' (2010) 90(2) *Boston University Law Review* 579.

<sup>365</sup> Scott Hershovitz, 'The End of Jurisprudence' (2014) 124 *Yale Law Journal* 1160.

The second source of controversy is the argument that legal rights are those that can be enforced *in court*. Some find this stipulation unsatisfactory. Greenberg, for instance, says that he views this ‘very different’ position as a ‘version of the Moral Impact Theory that restricts legal rights and obligations to those that should be enforced by courts’.<sup>366</sup> He seems to view the means by which Dworkin draws these boundaries, however, as *ad hoc*. Greenberg claims that the enforcement condition is circular, since an account of law should explain *why* legal norms are judicially enforceable, not simply define them according to that enforceability.<sup>367</sup>

When we consider the enforcement condition in light of the story of integrity laid out in the previous section, however, we see that this criticism is uncharitable. It fails to consider the moral explanation underpinning the decision. Rights and obligations that can be enforced in court are morally distinct from other political rights because the attachment of coercion to these rights gives rise to the moral demand for integrity. These sorts of rights obtain for a special reason, a reason that is unique to true political communities. This motivates Dworkin’s separation of enforceable and non-enforceable rights. We might disagree on substantive grounds with this thesis. That is, we might think that the *moral* difference between this and other types of political right is not great enough to merit the distinction. But that argument requires substantive engagement with the moral explanation underpinning the distinction. Otherwise the complaint that we misuse the label ‘legal’ by

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<sup>366</sup> Greenberg, ‘Moral Impact Theory’ (n 205) 1300 (fn 28).

<sup>367</sup> Greenberg, *The Moral Impact Theory, The Dependence View, and Natural Law* (n 364) 7.

applying it only to enforceable rights is just a semantic claim. We could use something like 'judicial rights' and 'legislative rights' instead, under an umbrella of 'legal rights'. The labels are unimportant. What matters is that rights that are enforceable in court are morally distinct from those that are not.

## 5. Integrity and Public Law

I will now briefly explain how the non-positivist account of legal obligation set out here helps us make sense of the principle of legality. I will go into this in more detail in the next two chapters. At the outset of Chapter 1, I said that a method of interpretation is justifiable if it does a good job of telling us what our legal rights and obligations are. In order to know whether a method of interpretation is correct, then, we need some idea of what it means to say that legal rights and obligations obtain. The non-positivist story above furnishes us with such an account. Legal obligations, on this view, are genuine moral obligations that obtain in virtue of the actions of legal institutions. The precise content of those obligations – the legal *effect* of, for example, the enactment of a statute – is determined by principles of political morality drawn from past political decisions about when coercive enforcement is justified. All of this is premised on a theory of political legitimacy. These moral principles ground legal obligations because in doing so, they constitute a community whose participants are treated with equal concern. Judges are required to decide how coercive force can be used in line with this more abstract demand for equal concern.

In Chapter 1, I signalled briefly to a wider conception of legality that might make sense of some of the case law. On this wider conception, legality is neither a *presumption* that Parliament intended to legislate a certain way, nor a demand that interference with rights be justified against a standard like necessity or proportionality. Rather, legality could be understood as a tool for working out the content of the law, given that that content is *partly determined by the principles and values to which we are committed as a community*. This view of legality can now be understood against the backdrop set out here. When courts use legality, they are attempting to work out what moral effect the enactment of a statute has had, by appealing to principles of justice to which we as a community are committed.

This offers us a way to answer some of the difficult questions surrounding legality. What rights trigger legality's application? The answer to this is determined by integrity. Law is a morally valuable practice, but it also subjects citizens to the threat of coercion. As such, we are entitled to certain outcomes in court only if those outcomes are mandated by principles of justice drawn from past decisions. In asking whether a particular right triggers legality's application, then, the judge must ask whether that right is picked out by the demand for principled consistency.

This also explains the lingering role of legislative supremacy. This principle can itself be understood in moral terms. It is not a 'political fact', or a 'rule of recognition' that shifts over time. It is a democratic principle; an expression of the fact that we take seriously the democratic mandate afforded the legislature. This democratic principle is one of the principles that

determines the impact of legislative enactments. This could be framed as a moral case for intentionalism. We might say that for moral reasons, the legal effect of a statute matches its linguistic content. While this would be coherent, the moral case for absolute parliamentary sovereignty in the orthodox sense is a non-starter. This is what legality's application tells us. Other rights and principles determine the impact of Parliament's actions as well. The role of the courts is to work out what effect a statute has on our legal obligations, given *all* these principles. Once we recognise this, we can move away from efforts to cast legality as an attempt to 'reconcile' the rule of law and parliamentary sovereignty, or as an embarrassed clandestine effort to move past the latter. There is nothing to reconcile: parliamentary sovereignty and the rule of law are moral principles which, along with other principles, determine our legal rights and obligations. In the next two chapters, I flesh out this view in greater detail.

To close, it is worth noting that this view fits neatly with the more sophisticated variants classical common law thought, in particular the work of Matthew Hale. Postema, in his magisterial study on common law thought, notes that Hale rejected the arguments of Coke and the Levellers that the legitimacy of the common law was to be located simply in its origins, which were impossible to trace. Rather:

[T]he present acceptance and practice rests on a shared sense of the *continuity* of the law with the past. This requires that it be possible to show, not that the laws are exactly the same as in some distant

historical past, but rather that the present laws fit into a public conception of the nation's identity as a people shaped by its collective history.<sup>368</sup>

The precise meaning of 'the nation's identity' here is important. According to Postema:

Hale clearly rejects the idea that the identity of the law is guaranteed by the identity of the *people* whose law it is, because the people, considered apart from the law, are far from homogenous... Indeed, the identity of the people depends more on the identity of the law than the identity of the law depends on the identity of the people.<sup>369</sup>

This seems to me to be of a piece with the basis of a legal system's legitimacy in the Dworkinian account. 'The identity of the people depends... on the identity of the law.' The enforcement of legal obligations in accordance with the demands of principled consistency constitutes a special kind of community. This is one way of understanding the notion of 'a public conception of the nation's identity as a people shaped by its collective history'. National identity here is not a patriotic notion but a moral one, referring to a community whose members treat each other with equal concern.

Hale was speaking here of common law specifically, but the same view applies to judicial interpretation of statutes. On the non-positivist view, the

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<sup>368</sup> Postema, *Bentham and the Common Law Tradition* (n 27) 21.

<sup>369</sup> *ibid.*

source of this or that obligation is of secondary importance. The precise shape and content of any legal obligation is determined by principles of political morality drawn from relevantly similar past political decisions. This account, then, offers a way of integrating certain strands of classical common law thought into a contemporary jurisprudential framework.

## **Conclusion**

In this chapter I have set out the strategies that non-positivist theories use to delimit the legal domain of morality. On one strategy, legal obligations are those that come about as the result of the actions of an institution whose purpose is to improve the moral situation overall. Legal practice, on this account, plays a distinct morally valuable function that sets the obligations that it generates apart from other sorts of obligations. We saw, however, that this function is difficult to pin down. This serves as shaky theoretical ground for explaining how legal obligations differ from other forms of moral obligation.

Another strategy focuses on the fact that legal practice characteristically makes citizens vulnerable to coercive enforcement of its rights and obligations. The presence of coercion gives rise to special moral demands that are unique to legal practice. It ensures that law is governed by principles that might not govern other moral domains, where coercion is not as central. While this strategy explains how specific principles might shape legal obligations once the moral practice is up and running, it struggles to

explain how these obligations get off the ground to begin with. If coercion requires moral justification, why introduce it at all?

One answer to this question invokes Kant's postulate of public law. On this account, we have a moral obligation to move into a juridical state, since this is the state of affairs in which everyone's right to non-interference in their choices can be equally protected. This could serve as a sound strategy, however it runs into some of the same difficulties as the notion of 'improving the moral situation overall'.

Rather than pursue this strategy, I considered Dworkin's account of legal obligations as associative obligations that obtain in a 'true political community'. On this account, members of a political community owe each other genuine obligations when collective decisions about the coercive enforcement of rights and obligations are underpinned by a coherent scheme of principle. The argument here is not that we have a moral obligation to move towards a state in which obligations are coercively enforced. Rather, the claim is that political communities whose practice of enforcing rights and obligations is of a certain moral character is capable of generating special sorts of obligations, similar to those that obtain among family members. The fact that coercion is on the cards in enforcing this system means that the content of our rights and obligations is influenced by institutional history in a way that it would not be were coercion not present. This account weaves together a story about the moral value of law and the vulnerability that its members must be subject to if they wish to live in a community of equals.

This account provides a sound theoretical basis for a non-positivist theory of the principle of legality. Law is distinguished from other domains of morality by the constitutive role that the principle of integrity plays in determining the moral impact of specific actions within the legal domain. Integrity governs law in a way that it does not govern other domains.<sup>370</sup> We can make sense of the judicial practice of legality as an effort to work out our legal obligations against this complex moral background.

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<sup>370</sup> It may be that integrity is at play in other domains. One could conceivably argue that parents the duties parents owe to their children are determined by demands of principled consistency. We can still distinguish *political integrity* in the legal domain, however, by pointing to its role in constituting a true political community. The family domain is analogous but distinct.

## Chapter 5. Orthodox and Interpretivist Conceptions of the Rule of Law

### Introduction

In this chapter, I flesh out what a conception of legality looks like when premised on a non-positivist theory of general jurisprudence, through an analysis of the relationship between the constitutional principles of the rule of law and parliamentary sovereignty. As we saw in Chapter 1, UK judges regularly invoke the rule of law as justification for applying the principle of legality. The question of how to reconcile this practice with the traditional principle of parliamentary sovereignty has been the source of much controversy in public law theory. In this chapter, I show how the approach to this question differs greatly when we adopt a non-positivist theory of general jurisprudence.

The structure for the present chapter is as follows. In section 1, I begin by outlining what have traditionally been viewed as the requirements of the rule of law in UK public law, and how these have developed in recent years. I distinguish between the rule of law as a political ideal and the rule of law as a package of legal principles that flows from that broader ideal. The difficulty for theories of public law has been how to offer a satisfactory account of the relationship between these legal principles and the constitutional principle of parliamentary sovereignty. The challenge, in short, is to construct a satisfactory account of the legal principles that flow from the political ideal of

the rule of law, and to explain how these principles interact with the principle of parliamentary sovereignty.

I then distinguish between two frameworks for discussing the relationship between the rule of law and parliamentary sovereignty. In section 2, I set out the 'Orthodox Framework'. According to the family of theories that implicitly adopt this framework, the rule of law and the commands of Parliament represent separate *sources* of law. Parliament contributes 'institutional norms' that are valid because Parliament enjoys the authority to enact them. The content of these enactments depends on the intentions of Parliament. The rule of law is a separate, non-institutional source of law. What theories within the Orthodox Framework disagree on is whether the rule of law principles should be considered *legal* principles, and if so, how they interact with the institutional norms contributed by Parliament. I show that traditional, ultra vires theories of judicial review can be understood in this way, as can theories based on the 'hybrid' non-positivist theories of Gustav Radbruch and Robert Alexy.

In section 3, I set out the second framework, which I call the 'Interpretivist Framework'. This views the rule of law and parliamentary sovereignty through the lens of the non-positivist theories discussed in the previous chapter. Under this framework, theories of the rule of law are hypotheses about the relationship between a bundle of moral principles, the actions of legal institutions, and our legal obligations. Parliamentary sovereignty is itself understood as a moral principle, rooted in a particular conception of democracy. The rule of law is understood as another package

of moral principles, working in tandem with the sovereignty principle to determine the impact of a statute. When judges use the principle of legality on this view, they are interpreting the moral impact of a statute by working out what impact on our legal obligations particular principles (the rule of law and parliamentary sovereignty) cause the statute to have.

In section 4, I set out what the relationship between the rule of law and parliamentary sovereignty looks like on the view of law as integrity, and then analyse the principle of legality against this background. The rule of law, on this view, plays a much wider law-determining role than it does in orthodox theories. I also show that this view allows us to connect the rule of law as an adjudicatory principle much more closely to the wider thought on the rule of law in political philosophy. The principle of legality, on this view, is not a 'presumption' about Parliament's intentions. That is just shorthand for a more complex process of moral reasoning. Rather, judges invoking the principle of legality are attempting to work out the legal impact of the statute before them by engaging with the principles of political morality picked out by integrity. In the next chapter, I will show that this theory makes good sense of our public law practice, and leads to satisfactory answers to the hard questions about legality set out in Chapter 1.

## **1. The Rule of Law and the UK Constitution: A Brief Outline**

### *A. The Rule of Law as Political Ideal and as Constitutional Principle*

The rule of law, in the UK constitutional context, has been variously described as ‘a fundamental principle of the constitution’,<sup>371</sup> an ‘overarching constitutional principle’,<sup>372</sup> and ‘the ultimate controlling factor on which our constitution is based’.<sup>373</sup> These descriptions get at the importance of the rule of law, but they leave much to be explained. What, for instance, does it mean to be a ‘controlling factor’ in the constitution, let alone *the* controlling factor?

As a preliminary matter, it may be useful to distinguish two senses in which the ‘rule of law’ is used. First, it refers to a political ideal; the notion that there is some value in a society being governed through law, rather than through the arbitrary whims of the powerful. Secondly, the term is used in the context of UK public law to refer to an adjudicative principle; that is, a legal principle that judges use to make concrete determinations about the correct resolution of cases. More accurately, it refers to a *set* of legal principles that play such a law-determining role. UK courts now regularly invoke the rule of law when determining whether public power has been lawfully used. When the principle of legality is employed, it is typically justified by reference to need to uphold the rule of law. The rule of law, in this sense, refers not just to a political ideal, but to concrete principles of constitutional *law*. Legality is a method of working out what the law is, and the rule of law is a package of

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<sup>371</sup> AV Dicey, *An Introduction to the Study of the Law of the Constitution* (Liberty/Classics 1982) 120.

<sup>372</sup> Johan Steyn, *Democracy through Law: Selected Speeches and Judgments* (Routledge 2004).

<sup>373</sup> [2005] UKHL 56 [107] (Lord Hope).

principles that play some role in fixing the correct outcome of legal proceedings.<sup>374</sup>

It is the second sense of 'rule of law' in which I am interested here. I wish to determine what legal principles feature in making the law what it is, such that we can ask whether legality is an appropriate tool for working out what the law is. If a package of principles under the umbrella term 'rule of law' partly determines what the law is, then we need a good sense of what this means. Intuitively, however, it seems like such an account should share a connection with the broader political ideal of the rule of law. In the literature on the rule of law as a principle of the UK constitution, the constitutional principle is closely connected to an account of the value of law itself.<sup>375</sup>

The political ideal of the rule of law is the subject of deep disagreement. Jeremy Waldron has gone as far as to label it an 'essentially contested concept', in the sense meant by WB Gallie, i.e. a deeply complex evaluative concept that will inevitably remain the subject of deep disagreement.<sup>376</sup> Paul Craig, in an influential article, distinguished between

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<sup>374</sup> To avoid begging any jurisprudential questions, I should specify that at this point that I am using 'legal principle' to refer to a principle that judges use to decide cases. Whether such a principle should properly be called 'legal' is one of the questions at issue. Similarly, I am being deliberately vague here in saying that rule of law principles are 'part of the law'. What it means for rule of law principles to form part of UK law is precisely the topic to be addressed later in this chapter.

<sup>375</sup> Allan, *The Sovereignty of Law* (n 15) 88.

<sup>376</sup> Jeremy Waldron, 'Is the Rule of Law as an Essentially Contested Concept (in Florida)?' (2002) 21 *Law and Philosophy* 137; W.B. Gallie, 'Essentially Contested Concepts' (1955-1956) 56 *Proceedings of the Aristotelian Society* 167.

‘formal’ and ‘substantive’ conceptions of the rule of law.<sup>377</sup> Formal conceptions, according to Craig, are concerned only with ‘how law was promulgated... the clarity of the ensuing norm... and the temporal dimension of the enacted norm (was it prospective or retrospective, etc.)’, while substantive conceptions hold that the rule of law includes a demand that the law include specific content, *particularly* the protection of fundamental rights.<sup>378</sup>

According to proponents of the ‘formal’ view, including respect for specific rights in the rule of law’s demands dilutes and diminishes the unique significance of the concept. Joseph Raz, in the most well known contemporary defence of a ‘formal’ conception, warns against collapsing the rule of law into a ‘complete social philosophy’.<sup>379</sup> According to Raz, the rule of law exists to curb the potential evils of law itself. It is in this sense a ‘negative virtue’.<sup>380</sup> For instance, the concentration of legal power in official hands creates the danger that such power might be used in a way that would impact individual freedom and dignity, and so the rule of law demands that laws must be clear, open, non-retrospective etc. in order to mitigate this danger. Specific legal content, such as adequate protection for human rights, might be demanded by other ideals of political morality, but not by the rule of law.

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<sup>377</sup> Paul Craig, ‘Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework’ (1997) *Public Law* 467.

<sup>378</sup> *ibid* 467.

<sup>379</sup> Joseph Raz, ‘The Rule of Law and Its Virtue’ in *The Authority of Law: Essays in Law and Morality* (Clarendon Press 1979).

<sup>380</sup> *ibid*. Raz elaborates on this further in Joseph Raz, ‘The Law’s Own Virtue’ (2019) 39 *Oxford Journal of Legal Studies* 1.

Proponents of the substantive conception argue that the rule of law demands adequate protection of human rights, compliance with international obligations, and other specific legal constraints on official power.<sup>381</sup> The important point for now is that proponents of the substantive conception take much the same approach as proponents of the formal conception. That is, they produce a list of desirable criteria for a legal system that they claim follows from the broader ideal of the rule of law. The dispute turns on the content of the list, rather than on any deeper jurisprudential debate.

Jeff King prefers a different classification to ‘formal’ and ‘substantive’ conceptions of the rule of law. He distinguishes between two traditions in rule of law thought: the ‘limited government’ tradition and the ‘essence of legality’ tradition.<sup>382</sup> The former group of theories, which encompasses much of the central canon in liberal political philosophy, views the rule of law as essentially concerned with curbing arbitrary state power.<sup>383</sup> The ‘essence of legality’ tradition, on the other hand, views the rule of law in essentially instrumental terms, as a set of features without which a legal system could not function. On this view, the rule of law can be defined without discussing law’s normative ends. The rule of law is precisely the set of features that a legal system must have to achieve its ends, *whatever those ends are*.<sup>384</sup>

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<sup>381</sup> Tom Bingham, *The Rule of Law* (reprint ed, Penguin 2011).

<sup>382</sup> Jeff King, ‘The Rule of Law’ in Richard Bellamy and Jeff King (eds) *Cambridge Handbook of Constitutional Theory* (forthcoming 2021)

<sup>383</sup> He includes in this tradition the work Hobbes and Locke, as well as Kant’s conception of the rechtsstaat. King’s own view is that the rule of law’s central concern with arbitrary power means that the State must regulate arbitrary uses of *private*, as well as public, power.

<sup>384</sup> Raz, ‘The Rule of Law and Its Virtue’ (n 379).

The task for theorists of the UK constitution is essentially to explain what specific legal principles flow from a broader conception of the rule of law as a political ideal. Dicey, for instance, was deeply concerned with the law's antipathy to arbitrary power. He set out that the rule of law meant that no one should be punished or made to suffer unless it was justified by law, that all persons must be held equally before the law.<sup>385</sup> The value in a legal system, for Dicey, lay in carving out a space of freedom from State interference. On one reading, this conception of the rule of law does not demand any specific legal principles at all. The State, on this reading, may still interfere with individuals in odious ways, so long as it does so through law. Citizens enjoy formal equality with officials before the law, in the sense that officials are subject to the same private and criminal law rules as citizens, but the rule of law does not demand that the law pursue any vision of substantive equality, nor does it demand specific *public law* constraints on State action.

Of course, 'arbitrariness' is itself a normative concept, the precise meaning of which is contested. For some, 'non-arbitrariness' might simply involve forewarning. If we are told in advance that power will be used in manner X under circumstance Y, on this view, then that power is not used arbitrarily.<sup>386</sup> We might also, however, have a much richer conception of

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<sup>385</sup> Sir Ivor Jennings also emphasised the principle of equality before the law, though disagreed with Dicey's aversion to discretionary administrative decision-making. Ivor Jennings, *The Law and the Constitution* (5<sup>th</sup> edn, University of London Press 1959) 51-53

<sup>386</sup> Kristen Rundle, for example, argues that many victims of persecution in Nazi Germany at least *felt* better off when their oppression was carried out in accordance with stated rules. Kristen Rundle, 'The Impossibility of an Exterminatory Legality: Law and the Holocaust' (2009) 59(1) *University of Toronto Law Journal* 65, 90-98.

arbitrariness. We might think that non-arbitrariness demands that power only be used in line with particularly good reasons, for example. King, discussing the concept, refers to 'being under the controlling, uncertain and unaccountable will of another'.<sup>387</sup> 'Controlling' and 'unaccountable' do as much work here as 'uncertain'. Any conception of arbitrariness, then, needs to be fleshed out through normative argument.

Trevor Allan argues that it would be a mistake to read Dicey's concern with non-arbitrariness in a narrow fashion. Dicey's sub-principles, according to Allan, express a vision of law as essentially concerned with preventing State interference that is not justified by reference to posited rules and that fail to treat citizens with equal concern. Prevention of arbitrary exercises of power, Allan points out, 'depends on the existence of ascertainable limits to the scope of governmental powers'.<sup>388</sup> Dicey's admiration of the writ of habeas corpus, his view of the ordinary courts as effective guarantors of liberty, and his general antipathy to wide, discretionary governmental powers, Allan suggests, points to a deeper conception of the rule of law:

What, then, seems superficially an identification of the rule of law with mere legality, in the sense that everyone (including every official) is subject to law, is actually an attempt to defend a richer and deeper

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<sup>387</sup> King (n 382) 12. King is here discussing the work of Julian Sempill, who has elaborated on the notion of arbitrariness in rule of law thought at great length. Julian Sempill, 'Ruler's Sword, Citizen's Shield: The Rule of Law and the Constitution of Power' (2016) 31 *Journal of Law & Politics* 333.

<sup>388</sup> Allan, *The Sovereignty of Law* (n 15) 102.

account – to identify and endorse the ‘spirit of legality’, rooted in a conception of the state as servant of a free people.<sup>389</sup>

Allan identifies this deeper value as a conception of freedom as non-interference. On this view, the answer to the question of what rights trigger legality’s application is much broader than Diceyan proponents might initially think. The rule of law, on this view, yields substantive rights flowing from this broader conception of freedom. Dicey’s view, understood in the terms Allan suggests, moves that view closer to the conception of the rule of law put forward by Lord Bingham, which includes both the requirement that the State upholds fundamental rights and that it abides by its international agreements.<sup>390</sup>

The connection between the rule of law as a political ideal and as a set of legal principles is seen perhaps most clearly in Lon Fuller’s work.<sup>391</sup> Underpinning Fuller’s account is a particular conception of the legal subject as a moral agent. The value in the rule of law lies in the creation of a fiduciary relationship between citizen and State.<sup>392</sup> Citizens, within this relationship, are obliged to obey the law, and the State is obliged to respect the status of

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<sup>389</sup> *ibid* 104.

<sup>390</sup> Bingham (n 381). A recent report of the House of Lords Constitutional Committee specifically invokes this conception of the rule of law in arguing against the recent Internal Market Bill, which, the Justice Secretary conceded, would involve the UK violating international law. Select Committee on the Constitution, *United Kingdom Internal Market Bill* (HL 2019-21, 151).

<sup>391</sup> Fuller (n 69).

<sup>392</sup> This aspect of Fuller’s work is brought out by a number of theorists. See Kristen Rundle, *Forms Liberate: Reclaiming the Jurisprudence of Lon L Fuller* (Hart Publishing 2012) 100; Evan Fox-Decent, ‘Is the Rule of Law Really Indifferent to Human Rights?’ (2008) 27 *Law and Philosophy* 533, 542.

citizens as autonomous agents, capable of purposive action.<sup>393</sup> From this conception flows the view that law-making actions which fail to satisfy Fuller's desiderata in serious enough ways will fail to make law at all. The rule of law as a political ideal, in other words, contributes specific principles (law must be clear, open, non-retrospective etc.) that determine whether the act of lawmaking creates any legal obligations at all.<sup>394</sup>

What should be clear from the foregoing discussion is that our conception of the rule of law as a *political ideal* will influence our conception of the rule of law as a package of more concrete legal principles. If the rule of law as a political ideal is concerned primarily with curtailing arbitrary power, then the rule of law as a package of legal principles will include the principle that exercises of state power not explicitly provided for by law are unlawful.<sup>395</sup> If the rule of law as political ideal demands *certainty*, such that citizens can plan their lives, then the rule of law as a legal package includes a principle

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<sup>393</sup> This relationship of mutual responsibility is also at the heart of Gerald Postema's account of the rule of law. See Gerald Postema, 'Law's Rule: Reflexivity, Mutual Accountability, and the Rule of Law' in Xiaobo Zhai and Michael Quinn (eds) *Bentham's Theory of Law and Public Opinion* (CUP 2014).

<sup>394</sup> Hart, in a well-known response, points out that even legal systems that satisfy all of Fuller's criteria would be capable of great evil. Fuller's desiderata, according to Hart, were merely instrumental principles of effective legislation. HLA Hart, 'Book Review: The Morality of Law by Lon Fuller' (1965) 78(6) *Harvard Law Review* 1281, 1287. Fuller responded, in the second edition of his book, by stressing the point I have just elaborated: that the requirements of the 'inner morality of law' make possible a special sort of relationship between State and citizen that takes seriously ordinary human agency. Fuller (n 69) 213-216. The value of the rule of law, then, is not necessarily that it will bring about perfect justice.

<sup>395</sup> *Entick v Carrington* [1765] EWHC KB J98 is the *locus classicus* of this aspect of the rule of law.

prohibiting retrospective criminal laws.<sup>396</sup> This much is clear from influential accounts of the rule of law as a principle of the Constitution. The more difficult question, and the source of a great deal of confusion, has been how this package of principles interacts with the principle of parliamentary sovereignty.

*B. The Rule of Law as a Principle of the UK Constitution*

As we saw in Chapter 1, UK courts speak of the rule of law when invoking a variety of more concrete principles. They have decided, for instance, that the rule of law means that people enjoy rights to peaceful enjoyment of property and access to courts,<sup>397</sup> to freedom of expression,<sup>398</sup> and that prisoners are entitled in certain circumstances to oral parole hearings.<sup>399</sup> The rule of law also triggers the principle of legality, such that statutes must be read consistently with these specific principles, where possible. The rights that flow from the rule of law, then, influence the interpretation of statutes and condition the ambit of lawful executive action. Because the rule of law includes the right of access to courts, for instance, the Court in *R (UNISON) v Lord Chancellor* determined that the Tribunals, Courts and Enforcement Act did not empower the Lord

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<sup>396</sup> As Sajó and Utiz point out, there are several contexts in which retrospective laws are allowed outside of the criminal context. One example is the changing of environmental license conditions in order to require building developers to retrofit buildings that were built using asbestos before the dangers of that material were known. András Sajó and Renáta Utiz, *The Constitution of Freedom: An Introduction to Legal Constitutionalism* (OUP 2017) 313.

<sup>397</sup> [2010] UKSC 2 [75]-[81].

<sup>398</sup> [2000] 2 AC 115.

<sup>399</sup> [2013] UKSC 61.

Chancellor to set tribunal fees at a rate that would see people excluded from tribunal access.<sup>400</sup>

Analysis of the courts' use of the rule of law takes us back to our difficult questions about legality. What rights trigger legality's application? Clearly, the courts believe that the package of rights and principles included in the 'rule of law' do, so we need to establish what this means. How much weight do we need to give to statutory wording? Can judges 'strike down' legislation? This will depend on what principles are included in the rule of law, and how they interact with other fundamental constitutional principles, notably parliamentary sovereignty. How we understand legality as a method of interpretation is inextricably tied up with our understanding of the rule of law as a package of constitutional principles.

Theorists of public law have struggled to explain the increasing large role of the rule of law as a package of legal principles. The difficulty, in essence, is that theorists have tried to produce a satisfactory account of the rule of law that can be reconciled with prevailing accounts of the principle of parliamentary supremacy. Prior to the developments outlined in Chapter 1, public law scholars had an easier task. Dicey, for instance, believed that a sovereign Parliament was the most conducive constitutional arrangement for *upholding* the rule of law. On his view, the rule of law was concerned primarily with preventing State interference in the lives of individuals. The threat of arbitrary power came from the State. English law, he thought, upheld the rule of law through the upholding of private law rights against the State. The rule of

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<sup>400</sup> [2017] UKSC 51.

law, Dicey claimed, *necessitated* parliamentary supremacy, because a sovereign Parliament provided the best guarantee against the sort of administrative discretion that was anathema to his conception of the rule of law.<sup>401</sup> Dicey did not conceive of the rule of law as a package of legal principles that seemed, on their face, to constrain the lawmaking power of Parliament. Rather, the rule of law was a political ideal realised through private law adjudication, and supported by parliamentary supremacy.

Dicey's chief antagonist was the French system of *droit administratif*. His conceptions of parliamentary sovereignty and the rule of law are complimentary because they both respond to a concern with *executive* power, which is viewed as unaccountable, and therefore a danger to individual liberty.<sup>402</sup> The lack of nuance in Dicey's understanding of such systems is well documented.<sup>403</sup> It is also notable that he takes seemingly no account of the extent to which the executive dominates the UK's lawmaking process. Depending on the proportion of seats held by a governing party, and the prevailing dynamics of internal party discipline, Parliament can often seem to act as a rubber stamp for the executive's whims. The development of the rule of law as a package of adjudicative principles has seemed to respond as much to *legislative* efforts to interfere with important rights and principles as

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<sup>401</sup> Dicey (n 371) 271-273.

<sup>402</sup> I am drawing here on Allan's charitable reconstruction of Dicey. Allan, *The Sovereignty of Law* (n 15) 101-110.

<sup>403</sup> William Robson, 'Dicey's Law of the Constitution: A Review' (1939) 38(2) *Michigan Law Review* 205, 205-206.

executive efforts. Moreover, it is clear from the wider rule of law literature that that political ideal is broader than merely a concern with executive power.<sup>404</sup>

It is true that the courts, when articulating legal limits on executive power, have articulated those limits in terms of Parliament's will. This again is the view of the principle of legality as a 'presumption'. This would seem to support the Diceyan view of parliamentary sovereignty as a principle that is complimentary to the rule of law. However, as we saw in Part II of the thesis, it seems equally clear that the courts are not interested in Parliament's will in any literal sense. Rather, they engage in first order moral arguments to establish *constraints* on Parliament's will.

Dicey's own account of the rule of law is unsatisfactory because it fails to explain too much of contemporary practice. He claims that the rule of law is consistent with an orthodox conception of parliamentary sovereignty, which we can understand in the intentionalist terms discussed in Part II. It is plain, however, that whatever judges say they are doing, the rule of law is not treated as consistent with such an orthodox conception. We are left with two possibilities. Either judges are engaging in a subterfuge by invoking Parliament's will, or they mean something else when they discuss the interplay between the rule of law and the sovereignty of Parliament.

The theoretical challenge, then, is to construct a satisfactory account of the legal principles that flow from the political ideal of the rule of law, and to explain how these principles function in a legal system with a 'sovereign'

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<sup>404</sup> King, for instance, argues convincingly that the threat of arbitrary power is felt most pressingly in particular sorts of private social relationships. It follows, on his view, that the rule of law demands legal regulation of such relationships. King (n 382).

Parliament. This package of principles derives from the broader political ideal of the rule of law. But what role does this package of principles play in determining the correct interpretation of statutes? It seems, from the cases discussed in Chapter 1, that it plays a meaningful role. But how can this be reconciled with the supremacy of Parliament? While Dicey's approach may be unsatisfactory, he does approach the question in the right way. Adjudicative principles flow from a broader understanding of the political ideal, and he attempts to reconcile this ideal with other constitutional principles like parliamentary sovereignty. In what follows, I set out two frameworks for analysing this question in greater depth. The first is influenced by the intentionalist theories discussed and rejected in Part II of the thesis. The second is based on the non-positivist theories outlined and argued for in the previous chapter.

## 2. The Orthodox Framework

The first framework for thinking about the rule of law and parliamentary supremacy I will call 'the Orthodox Framework'. On this view, Parliament contributes norms to the legal system through its enactments. Call these 'institutional norms'. The rule of law is then conceived of as a package of *non-institutional*, moral norms, and the debate turns on how these different sorts of norms interact.<sup>405</sup> The 'rule of law' is the name that we give to the package of

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<sup>405</sup> These principles are 'non-institutional' because they are valid not in virtue of institutional recognition, but because of their content. This maps onto Dworkin's distinction between 'rules' and 'principles'. Ronald Dworkin, 'The

non-institutionally sourced principles that may or may not obtain in our legal system.

The intentionalist theories considered in Part II of the thesis adopt this framework, and much of public law theory implicitly adopts it. We can understand much of contemporary debate about the rule of law and parliamentary sovereignty in this way. Some claim that the rule of law must give way to parliamentary sovereignty when the two principles clash.<sup>406</sup> Others claim that the rule of law's importance now dwarfs that of parliamentary sovereignty, such that the latter can no longer be understood in absolute terms. This is one way of understanding the judicial claim that the rule of law is now the 'controlling factor' in the constitution<sup>407</sup> Fundamentally, the debate is framed around the interaction between two 'sources' of law: the institutional source (Parliament) and the moral source (the rule of law).

Several influential public law theories adopt the Orthodox Framework when discussing the relationship between the rule of law and parliamentary supremacy. Some of these theories argue either that the rule of law clashes with parliamentary sovereignty, such that one must give way. Alternatively, they argue that the rule of law and parliamentary sovereignty can be reconciled, but only because Parliament *intends* to legislate consistently with parliamentary supremacy. Either way, these arguments only make sense if we begin with the position that Parliament contributes some institutional norms

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Model of Rules I' in *Taking Rights Seriously* (Duckworth 1977) 26. I follow Nicos Stavropoulos in using 'non-institutional' here. Nicos Stavropoulos, 'The Debate That Never Was' (2018) 130 *Harvard Law Review* 2082, 2090.

<sup>406</sup> Mark Elliott, 'The Ultra Vires Doctrine in Constitutional Setting: Still the Central Pillar of Administrative Law' (1999) 58(1) *Cambridge Law Journal* 129.

<sup>407</sup> [2005] UKHL 56 [107].

whose validity depends only on Parliament's say-so. The debate is then defined in relation to this intention. Is the rule of law just an external standard against which we measure the justifiability of legal norms (whose content is fixed by Parliament's intention)? Or is the rule of law a second source of law that may contribute some non-institutional norms that compliment or compete with the institutional norms of Parliament?

A. *Intentionalism and Ultra Vires*

There are several ways that we can analyse the relationship between the rule of law and parliamentary sovereignty if we begin with the assumption that Parliament generates institutional norms. We saw several of these strategies in Chapters 2 and 3, when we considered intentionalism. Consider again *UNISON*.<sup>408</sup> Here the Court had to decide whether statute empowered the Lord Chancellor to enact secondary legislation setting tribunal fees at such a level that people would not in practice be able to access the tribunal system and enforce their employment rights. The Court held unanimously that the fees were unlawful because they prevented access to justice, the right to which is 'inherent in the rule of law'.<sup>409</sup>

If we begin by assuming that the Tribunals, Courts and Enforcement Act 2007 ('the 2007 Act') provides legal norms whose content is determined by Parliament's intention, then the most obvious move may be to argue that the Court simply decided wrongly. If section 42(1) of the 2007 Act empowered

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<sup>408</sup> [2017] UKSC 51.

<sup>409</sup> *ibid* [66].

the Lord Chancellor to set tribunal fees however high he pleased, then it was fanciful of the Court to think that any moral principle might take away this power. The rule of law, on this view, is just an external standard that we use to judge the merits of legislation. The 2007 Act may not satisfy the rule of law, but the powers that it grants to the Lord Chancellor are determined by the communicative content of the Act alone.

Proponents of the traditional, *ultra vires* model of judicial review would likely take such a view.<sup>410</sup> According to that theory, judicial review is a process of determining whether a member of the executive or an administrative body acted within the powers allocated to them by statute.<sup>411</sup> Paul Craig, who criticises the view, offers a neat summary of it:

The *ultra vires* principle is based on the assumption that judicial review is legitimated on the ground that the courts are applying the intent of the legislature. Parliament has found it necessary to accord power to ministers, administrative agencies, local authorities and the like. Such power will always be subject to certain conditions contained in the enabling legislation. The courts' function is to police the boundaries stipulated by Parliament.<sup>412</sup>

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<sup>410</sup> William Wade and Christopher Forsythe, *Administrative law* (7<sup>th</sup> ed, OUP 1994), 41.

<sup>411</sup> For a defence of the *ultra vires* conception of judicial review, see Christopher Forsythe, 'Of Fig Leaves and Fairytales: The Ultra Vires Doctrine, The Sovereignty of Parliament, and Judicial Review' (1996) 55 *Cambridge Law Journal* 122.

<sup>412</sup> Paul Craig, 'Ultra Vires and the Foundations of Judicial Review' (1998) 57(1) *Cambridge Law Journal* 63, 64-65.

This view is inextricably linked with an orthodox conception of parliamentary sovereignty, and the intentionalism that underpins it.<sup>413</sup> The lawful ambit of executive action is determined by Parliament through the deliberate creation of institutional norms, and judicial review is justifiable only to the extent that judges engage in the factual exercise of determining what norms Parliament intended to create.

Another way to explain the judgment in *UNISON* might be to assert that Parliament, in enacting the 2007 Act, intended that the scope of any power conferred on the Lord Chancellor would be constrained by the rule of law. They delegated responsibility to the courts, on this view, for determining what the scope of this power was. This is the story we might tell about this case if we view it through the lens of Mark Elliott's contemporary variation of the ultra vires theory. Elliott offers a defence of the ultra vires theory, in which he makes the intentionalist moves discussed in Part II in order to answer some of the critics of the ultra vires theory.<sup>414</sup> Elliott seems to agree that the rule of law is best understood as a package of principles, but views it as at most a useful heuristic for determining the content of legislative directives. He argues: 'It is entirely reasonable to assume that, in the absence of clear contrary enactment, Parliament intends to legislate in conformity with the rule of law'.<sup>415</sup> Parliament, on this view, delegates to the judiciary the responsibility for determining the rule of law's demands in particular cases. Elliott appeals to the sorts of 'meta intentions' or 'standing orders' discussed in Chapter 2.

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<sup>413</sup> As Forsythe notes, 'to abandon ultra vires is to challenge the supremacy of Parliament'. Forsythe (n 411).

<sup>414</sup> Mark Elliott, 'The Ultra Vires Doctrine in Constitutional Setting' (n 406).

<sup>415</sup> *ibid* 143.

This argument is heavily influenced by the legal positivist claim about judicial 'discretion' in the event that institutional norms do not cover a particular concrete circumstance.<sup>416</sup> The rule of law, on this view, is a package of moral principles that judges may call upon when institutional norms do not cover a specific case, in much the same way that judges might look to foreign jurisdictions for inspiration. Judges might be under an obligation to apply these principles when institutional norms run out, but it would be a mistake to call them legal principles if they lack the relevant pedigree.<sup>417</sup>

A variation on this argument is that in this instance the institutional norms generated by Parliament are vague, and judges must exercise discretion to clarify their requirements. In so doing, they call upon moral standards. Perhaps when judges invoke the rule of law in constitutional adjudication, they are calling upon specific moral principles in this way. With *UNISON*, they may argue that the 2007 Act was vague in the powers it afforded to the Lord Chancellor. The judges used their discretion to clarify the law, drawing on the non-legal principles of the rule of law to do so. Again, however, the rule of law acts only as a supplement to the main, institutional source of law.

In both the traditional and contemporary variations of the ultra vires theory, we can see the origins of the view of the principle of legality as a *presumption* about the intentions of Parliament. Legal obligations, on this view, are ultimately determined solely by parliamentary enactments. Judges, however, are entitled to *presume* that Parliament did not intend to legislate

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<sup>416</sup> Hart, *The Concept of Law* (n 147) chapter 7.

<sup>417</sup> Joseph Raz, 'Legal Principles and the Limits of the Law' (1971) 81 *Yale Law Journal* 823, 844-845.

contrary to the rule of law. If statutory wording is vague, judges must engage with moral debates about the rule of law as a political ideal, because they presume that Parliament did not intend to legislate contrary to that ideal. If, however, statutory wording is clear, then Parliament can, as a matter of law, violate the rule of law. The sole source of law is ultimately still the will of Parliament.

It is difficult to see how this line of argument can account for those cases, discussed in Chapter 1, in which judges seem to depart from the linguistic meaning of those statutes whose wording is not particularly vague. *Evans v Attorney General* was one such example.<sup>418</sup> In *UNISON* too, it is difficult to see much ambiguity in the wording of the statute: ‘The Lord Chancellor may by order prescribe fees payable in respect of’ employment tribunals.<sup>419</sup>

Perhaps what is meant is not that the statutory language itself is vague. Rather, what is vague is whether Parliament would have intended to bring about such a legal effect, notwithstanding the language it used. To bring back the distinction used in Part II of the thesis, what is ‘vague’ is the statute’s legal meaning, not its linguistic meaning. In cases like *UNISON*, it appears that judges are appealing to arguments of political morality concerning the rule of law’s demands, notwithstanding the ‘clear’ linguistic meaning of the statute. That is, they are coming to normative judgments about the sort of intention that Parliament *should have*, and then *attributing* such an intention to it. As I indicated in Chapter 3, I believe this to be a sound strategy. But it involves

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<sup>418</sup> [2015] UKSC 21.

<sup>419</sup> Tribunals, Courts and Enforcement Act 2007, s 42(1).

abandoning orthodox thinking about the nature of legislative intention, and in this particular context it would involve abandoning the thesis that judges engage with rule of law thinking only when the linguistic content of a statute is unclear.

Of course, *ultra vires* theorists might argue that the Court in *UNISON* was either mistaken or deceitful. Perhaps the judges, knowing full well that Parliament intended to license interference with an important right, found vagueness where there was none, in order to come to the result they wanted. If this is the case, then it must be admitted that an embarrassingly large proportion of legal practice must be explained in this way. It is difficult to see the motivation for maintaining this argument against the mounting number of cases in which judicial engagement with the rule of law plainly bears little connection with the vagueness or clarity of the statute before them.

Alternatively, we might conceive of the rule of law *as itself an institutional source of law*, by arguing that the moral principles included in the rule of law are legal standards, but only because they emanate from some relevant source.<sup>420</sup> This strategy may follow the common story about the authority of Parliament in the UK emanating from a 'rule of recognition', whose existence is determined by the attitudes of legal officials.<sup>421</sup> Perhaps influenced by Hart's own assertion that the rule of recognition in the UK is that 'what the Queen in Parliament enacts is law',<sup>422</sup> theorists have argued that

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<sup>420</sup> As noted above (n 263), this 'inclusive positivism' is associated with Jules Coleman. See Coleman (n 263). This approach was endorsed by Hart in the postscript to *The Concept of Law* (n 147) 250-254.

<sup>421</sup> Hart (n 147).

<sup>422</sup> *ibid* 107. I discuss this point in Chapter 3, section 2.

legal officials in the UK recognise the sovereignty of Parliament in legislative matters, and that this pattern of recognition grounds the lawmaking authority of Parliament. They might then argue that the rule of recognition in the UK has changed, such that legal officials now recognise consistency with the rule of law as a criterion of legal validity. This approach, rather than identifying the rule of law as a non-institutional source of law, views the rule of law as part of the law *because of* its recognition by legal officials. The scope of the role to be played by the rule of law, on this approach, is settled by the convergent attitude of legal officials.<sup>423</sup>

The principle of legality, on this family of views, is a method of interpretation according to which judges presume that Parliament did not intend to legislate in violation of these principles, but ultimately if the statutory wording is clear enough, the rule of law must give way. Legality is a means of reconciling two fundamentally oppositional principles: parliamentary supremacy and the rule of law. The role of the judge is still ultimately one of archaeologist of parliamentary intention. This leads to a curious account of the

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<sup>423</sup> Precisely for this reason, the view is untenable. Disagreement among legal officials on precisely this question is pervasive. Coleman, in an attempt to answer this criticism, distinguishes between the 'content' of a convention and its 'application'. Judges, he says, agree about the content of legal rules, but they disagree about whether such a rule applies in a given case. The strategy is to maintain that the existence of legal rules is a matter of convention, by abstracting the convention on which judges purportedly degree. Any judicial disagreement over a rule is recast as disagreement over the application of a more abstract rule. Coleman (n 263) 126. As Dworkin persuasively argues, however, the sort of 'agreement' among judges that Coleman identifies is too abstract to be called 'agreement' in anything but a trivial sense. Ronald Dworkin, *Justice In Robes* (HUP 2007) 193. Applied to our current discussion, the argument would be that there is a convention that the content of a law depends on the rule of law, but there is disagreement over the application of this convention (i.e. over what the rule of law demands). But this is no agreement at all.

rule of law: Parliament cannot violate the rule of law unless it does so clearly and explicitly.

*B. The Rule of Law as a 'Filter' on Institutional Norms*

A final approach that works within the Orthodox Framework might view the rule of law as a package of moral principles that 'filters' particularly morally objectionable institutional content from the law. This view maintains the distinction between institutional and non-institutional norms, and begins from the position that Parliament contributes institutional norms. The role for the rule of law, however, is still conditioned by reference to the institutional norms of the legislature. I have in mind here the work of Robert Alexy, who argues:

No serious non-positivist is... excluding from the concept of law... the element of authoritative guidance or the element of social efficacy. Rather, what distinguishes the non-positivist from the positivist is the view that the concept of law is to be defined such that, alongside these fact-oriented properties, moral elements are also included.<sup>424</sup>

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<sup>424</sup> Robert Alexy, *The Argument from Injustice: A Reply to Legal Positivism* (BL Paulson and SL Paulson trs, OUP 2002) 4. Alexy was not of course, offering a theory of UK public law. I am imagining here a way of conceiving of the rule of law based on his general framework of the relationship between law and morality.

On this view, the rule of law plays what Stavropoulos describes as a ‘filtering’ role.<sup>425</sup> This view accepts the validity of institutional norms, but posits that morality may filter out the most objectionable of those norms.<sup>426</sup> Parliament, each time it passes a statute, contributes institutionally valid content to the law. The rule of law inputs a set of moral norms to the law, and any institutional norms that conflict with the norms contributed by the rule of law are filtered out of the system or adjusted in some way.

Viewing *UNISON* from this ‘hybrid’ perspective, one who agreed with the decision would argue that the rule of law contributes to the law the right to access a court, and this principle filters any part of the 2007 Act that conflicts with it.<sup>427</sup> Those who adopt this theoretical approach, but disagree with the

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<sup>425</sup> Stavropoulos, ‘Why Principles?’ (n 360); Nicos Stavropoulos, ‘The Grounds of Law: Morality and History’ (2015) Oxford Legal Studies Research Paper 43/2015 <<https://ssrn.com/abstract=2638033>> accessed 30 November 2018. Stavropoulos calls this formulation ‘hybrid interpretivism’. See also Nicos Stavropoulos, ‘Legal Interpretivism’ (n 307). Liam Murphy also recognises the distinction between ‘filtering’ versions of anti-positivism and what he calls the ‘moral reading’ version of anti-positivism. Liam Murphy, *What Makes Law* (CUP 2014) 46-47.

<sup>426</sup> Alexy (n 424) 40. This is perhaps best captured in Gustav Radbruch’s famous formula (which Alexy develops in his own theory), which reads:

The positive law, secured by legislation and power, takes precedence even when its content is unjust and fails to benefit *the people*, unless the conflict between statute and justice reaches such an intolerable degree that the statute, as ‘flawed law’, must yield to justice.

Gustav Radbruch, ‘Statutory Lawlessness and Supra-Statutory Law’ reprinted in (2006) 26(1) *OJLS* 1 (originally published in *Süddeutsche Juristen-Zeitung* 1 (1946)). For an explanatory account of Radbruch’s formula and its place in Alexy’s more developed theory, see B Bix, ‘Robert Alexy, Radbruch’s Formula, and the Nature of Legal Theory’ (2006) 37 *Rechtstheorie* 139. Hart famously discussed Radbruch’s formula in HLA Hart, ‘Positivism and the Separation of Law and Morals’ (1958) 71(4) *HLR* 593.

<sup>427</sup> Stavropoulos describes Alexy’s approach as a ‘hybrid’ one in general jurisprudential terms. It is neither positivist, since it posits that the validity of

Court's decision, would argue that the rule of law does not contribute this precise legal content to the law, or that the institutional content contributed by Parliament outweighs it in this case.

Claims that the rule of law is a 'fundamental constitutional principle', or 'the controlling factor' of the Constitution, then, can be understood not just as empty appeals to a political ideal (which is how they would need to be understood on the ultra vires theory), but as claims that a subset of the law of the UK has its source in a moral principle, and that this content filters out content that conflicts with it. What proponents of this sort of theory must debate is what sort of content the rule of law inputs into the legal order, and how strong the 'filter' applied is. One could, for instance, argue that the rule of law would 'filter' any legislative effort to remove the right to judicial review, thus giving a theoretical basis for the obiter statements in *Jackson* and *AXA*.

The important point about this theory for present purposes is that the rule of law plays a subsidiary role to parliamentary sovereignty. The latter constitutional principle is still taken to represent the idea that legal obligations are ordinarily determined by the intentions of Parliament. It is only when Parliament intends to legislate in a particularly wicked way that the rule of law enters the picture.

### **3. The Interpretivist Framework**

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some law can depend on its merits rather than its source. However, it is not a fully fledged antipositivist theory in the sense meant by Dworkin, Greenberg and others, in which legal obligations are genuine moral obligations. Stavropoulos, 'Legal Interpretivism' (n 307).

If we accept the theories of general jurisprudence discussed in Chapter 4, then we must reject the approaches to the rule of law outlined in the previous section. Non-positivist theories reject the notion that legislatures contribute ‘institutional norms’. Instead, they view legal obligations as a subset of the genuine moral obligations that obtain in virtue of the actions of legal institutions. On this set of views, morality determines how institutional history affects our legal rights and obligations.<sup>428</sup> Rather than ask whether morality is part of law, they posit that law is part of morality. Legal obligations are those moral obligations that obtain in light of institutional action; action that is made relevant by some moral principles in play in the legal domain. Legal obligations are ‘because claims’.<sup>429</sup> We do not simply say ‘a legal obligation obtains if X occurs’. Rather, we say ‘a legal obligation obtains if X occurs *because* Y’.<sup>430</sup> The fact that I am under a legal obligation in the UK is immediately explained by the fact that Parliament passed a statute that identifies such an obligation. But more is required to explain what sort of obligation this is, and why the fact that Parliament identified that obligation means that I actually am under an obligation. For example, one who wished to argue that Parliament enjoys absolute sovereignty might say that the principle of democracy makes it the case that the actions of Parliament generate binding legal obligations.

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<sup>428</sup> Greenberg, ‘MIT’ (n 205).

<sup>429</sup> Nicos Stavropoulos, ‘Climbing the Mountain’ (manuscript on file with the author).

<sup>430</sup> Greenberg, in earlier work, expresses this as a requirement that theories of law explain how it is that facts about the actions of legal institutions *rationaly determine* legal facts. Greenberg, ‘HFML’ (n 19).

Such theories produce a very different conception of the relationship between the rule of law and parliamentary sovereignty. Call this the 'Interpretivist Framework'. On this view, the rule of law is not a separate source of law whose role is to be assessed by reference to institutional norms. Rather, the rule of law is a set of principles that *determines the legal impact of statutory enactments*. In *UNISON*, the statute provided that the Lord Chancellor 'may by order prescribe fees payable in respect of' various tiers of tribunal. Parliament passed this statute, and presumably in passing it changed our legal obligations in some way. According to the Lord Chancellor, this provision had the effect of empowering him to set tribunal fees as high as he wished. The Court, however, held that the right of access to a court, which is included in the rule of law, determined that the 2007 Act did not have the effect of permitting the Lord Chancellor to set tribunal fees at an unacceptably high level. The fact that the right of access to a court was relevant in this case made a moral difference to the effect that the institutional action (the 2007 Act's enactment) had on our legal obligations.

This story does not assume that Parliament changed our obligations in whatever way it intended, and does not assume that our obligations changed *because* Parliament intended that they change. Rather, it asks what moral principles are in play, and how those principles determined the moral impact of parliamentary action. We can think of the right of access to justice here as one sub-principle of a package of principles - called the 'rule of law' – which obtains in the domain of UK public law. Where a relevant sub-principle of the

rule of law is identified, it will partly determine what impact a statute has on our legal obligations.

Seen through the lens of the theory of general jurisprudence outlined in the previous chapter, there is no distinction between ‘institutional’ norms created by Parliament, and ‘non-institutional’ norms like the rule of law. Instead, the enactment of a statute is viewed as a political action that affects our legal obligations, and we work out what those obligations are by interpreting that action in line with specific principles. ‘Parliamentary sovereignty’ and ‘the rule of law’, on this view, *both* refer to moral principles that interact with each other and constrain each other’s precise content in specific contexts.

‘Parliamentary sovereignty’ refers to a particular moral principle, connected to the democratic credentials of the legislature. This is the best way of understanding the rather vague judicial claim that parliamentary sovereignty *just is* a doctrine of the common law.<sup>431</sup> We should understand such statements not as meaning that parliamentary sovereignty obtains simply because judges have recognised it. Rather, parliamentary sovereignty owes its place in the constitutional order to morality. It is a principle of political morality that obtains for the same reason that any other legal principle obtains: because it is picked out by the more abstract principle of integrity.

I should be clear here that I do not mean that the value of democracy means that we must attach weight to *anything* that Parliament has to say. My promise to murder you does not generate any promissory obligation to carry

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<sup>431</sup> See for example the judgment of Lord Bingham in *R (Jackson) v Attorney General* [2005] UKHL 56 [102].

out my threat. We can still say that moral weight will generally be attached to promises. Similarly, the value of democracy will generally make it the case that the actions of an elected legislature matter morally, but this doesn't mean that anything they do will count towards the generation of legal obligations. Further, I argued in section 4 of Chapter 3 that we should understand parliamentary intention as itself a moralised or interpretive concept. Parliament's intention, on this view, is something that we attribute to it, and that attribution is constrained by other moral principles. All of this is to say that when I speak below of parliamentary sovereignty as the expression of a 'democratic principle', my meaning is not that democracy points towards *absolute* parliamentary sovereignty, and that this is then balanced against other values. My claim is a weaker one: that democracy will often or *generally* make the actions of Parliament legally relevant.

'The rule of law', on this view, refers to another package of moral principles, derived from the broader political ideal discussed earlier. These principles do not conflict. Rather, they operate in tandem, each with a different 'weight' dependent on the particular context, in determining the legal impact of a statute in specific circumstances before a court. On this view, the rule of law is a package of legal principles that directly figures in fixing the legal impact of statutory enactments.

It is worth pausing to clarify the sense in which I speak of the 'weight' assigned to law-determining principles, since I will use this term frequently in this chapter and the next. Dworkin speaks of the fluctuating dimension of

weight that principles have.<sup>432</sup> The word may, however, invite confusion. I should not be understood as claiming that certain law-determining principles are incommensurate, such that one principle may ‘outweigh’ or ‘defeat’ another in a particular context. Rather, I take a *specificationist* view of such principles.<sup>433</sup> The basic idea with specificationism is that the content of a right is not fixed, but rather depends on the context in which that right operates.<sup>434</sup> For example, while the right to life affords normative protection against being killed in most circumstances, specificationism holds that that right affords no such protection to an attacker who is threatening the life of another.<sup>435</sup>

In the public law context, when I speak of the fluctuating weight of rule of law principles, or the democratic principle, I mean that the *content* of those principles changes depending on the context in which they operate. I said above that the democratic principle is not absolute. That is, Parliament’s actions will not always result in corresponding legal obligations, where for instance that would interfere with rule of law principles in some egregious way. What I mean by this is that the content of the democratic principle is conditioned and constrained by the context in which it operates. There is nothing to be regretted if the democratic principle, or any other principle, has

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<sup>432</sup> Dworkin, ‘The Model of Rules I’ (n 405).

<sup>433</sup> Russ Shafer-Landau, ‘Specifying Absolute Rights’ (1995) 37 *Arizona Law Review* 209.

<sup>434</sup> John Oberdiek, ‘Specifying Rights Out of Necessity’ (2008) 28(1) *OJLS* 127, 128.

<sup>435</sup> *ibid.* Rather than claiming, for example, that killing the attacker in self-defence is all-things-considered justified *despite* that action violating the attacker’s right to life. For this sort of generalist theory, see for example Judith Jarvis Thomson, *The Realm of Rights* (Harvard University Press 1990). Raz’s interest-based theory of rights also stands in opposition to specificationism. Joseph Raz, *The Morality of Freedom* (n 232).

less weight in this or that context. If we agree that Parliament cannot do away with the legal right to access judicial review, for example, we do not on the view I put forward mean that the democratic principle conflicts with the rule of law, and the rule of law wins out. Rather, we mean that the content of the democratic principle does not include the power to abolish the right to access judicial review. The content of the democratic principle (and all other legal principles) depends on the particular context in which they operate. When I speak, throughout this chapter, of the fluctuating ‘weight’ assigned to principles, I am using that term to describe the context-dependent changes to the content of such principles.<sup>436</sup>

When judges employ the principle of legality, on this view, they should not be understood as exercising a presumption that Parliament intended to legislate in this or that way. Judges are not engaged solely in attempting to work out the Parliament’s intention. Rather, they are interpreting the moral impact of the statute that Parliament enacted. Parliament’s intentions on this matter may matter morally, and so may feature in this interpretation. But so will other principles, including the package of principles derived from the political ideal of the rule of law.

#### **4. Legality as Integrity: Beyond a Presumption**

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<sup>436</sup> This is also, in my view, the only understanding of Dworkin’s use of the term in his early work that is consistent with the broader unity of value thesis set out in Ronald Dworkin, *Justice for Hedgehogs* (n 363).

I have focussed in this chapter on showing how any non-positivist theory produces a very different conception of the relationship between the rule of law and parliamentary supremacy than a theory that gives a privileged position to 'institutional norms' produced by statute. I will now consider what these principles look like when viewed through the specific non-positivist theory of law as integrity.

At the beginning of this chapter, I said that the content of the rule of law as an adjudicative principle should flow from a theory of the rule of law as a political ideal. A good theory of the rule of law as a constitutional principle should explain its connection with the broader political ideal. The theory of law as integrity outlined in Chapter 4 allows us to make precisely such a move. On that view, the value in law lies in its constituting a morally valuable type of political community. Such a community can only be constituted through centralised State enforcement of rights and obligations. This theory, then, is firmly rooted in the tradition of theories of the rule of law as a political ideal.

A theory of the rule of law, on this account, doubles as a theory of political legitimacy. Unlike many theories in the 'limited government' tradition, however, law as integrity is not primarily concerned with *limiting* the power of the state. Rather, it begins with the value in constituting a community in which citizens are treated with equal concern. It then determines the rights and obligations of members of that community against the moral concern generated by the coercion that is a central feature of such a community. The political community, on this view, is required to enforce specific rights and obligations: those that flow from the more abstract principle of integrity, or

principled consistency. The rule of law, then, requires the community to act according to the demands of principled consistency. This is what the legitimacy of the legal system depends on. This account is consistent with the view that the rule of law is concerned primarily with curtailing arbitrary power (whether public or private). Law's value, on this view, is precisely in constituting a system of non-arbitrary power, but it goes further in tying this aim to a substantive conception of political equality.

Here we see the transition from the rule of law as a political ideal to the rule of law as a package of concrete legal principles. The rule of law as a political ideal makes it the case that the legal impact of statutory enactments is determined by principles of political morality; specifically those drawn from relevantly similar past decisions. When judges invoke the rule of law when employing the principle of legality, this is precisely what they are doing. They are attempting to work out what legal obligations we have in virtue of a statute's enactment, by working out the moral impact of that statute. That moral impact is determined by principles of political morality picked out by integrity.

We can understand traditional rule of law requirements, such as those in Fuller's desiderata, through this lens. The rule of law demands that laws not be retrospective, for instance, because the enforcement of retrospective laws violates the requirement that obligations only be enforced if their enforcement is licensed by principles of justice drawn from relevant similar decisions about when coercive enforcement is justified. The rule of law, then, might include a

list of features that any legal system must have in order to function well, but such a list flows from the broader value of the rule of law.

This account has the advantage of leaving room for reasonable disagreement about the rule of law's precise demands, while giving a structure to the debate. Whether or not specific rights are part of the rule of law, for instance, can be understood as a debate over whether integrity demands the enforcement of that right. Alternatively, we might understand the rule of law as a subset of principles that is required in any legal system if citizens are to be treated with equal concern, regardless of what past decisions about that principle have been made. For example, we do not live in a community in which all are treated with equal concern if the state licenses torture. This is true regardless of whether the state has since its inception permitted torture. Other rights, however, may not attract coercive enforcement unless integrity demands it. Which rights form part of this essential subset is where debates on the rule of law would then take place. On this view, to ask whether the rule of law demands regulation of arbitrary uses of private power, for example, is to ask whether such regulation is morally required in a political community whose citizens are treated with equal respect.<sup>437</sup>

This framework also allows us to move beyond the distinction between 'formal' and 'substantive' conceptions of the rule of law. Such a distinction is itself a positivistic one. The 'substantive' conception, while set up as a more moralised alternative to its 'formal' counterpart, is itself little more than a

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<sup>437</sup> I refer to 'citizens' here in a moral, interpretive sense too. Citizenship is not, on this view, just a matter of legal status in the positivist sense.

shopping list of desirable characteristics for a legal system.<sup>438</sup> Debates turn on what principles are important enough to merit their place on the list, and then the same debate proceeds on how such principles interact with their antagonist: parliamentary sovereignty.

The interpretivist framework allows us to proceed with greater nuance. The criteria demanded by both formal and substantive conceptions can certainly be understood as candidate law-determining principles. So, however, can any number of other principles. We work out the impact of a statute, on this view, not by positing a list of moral principles that interact with the institutional norms contributed by Parliament. Rather, we reflect on the normative foundations of law itself in order to determine what moral principles are relevant in determining the impact of legal actions in this or that case. Producing a list of rights and principles to be included in a conception of the rule of law might be a useful starting point, but it should be understood only as a starting point, or as shorthand for a more complex moral phenomenon.

This conception of the relationship between the rule of law and parliamentary sovereignty brings us back to the principle of legality. In Chapter 1, I signalled to a wider conception of legality that might make sense of some of the case law. On this wider conception, legality is neither a presumption that Parliament intended to legislate a certain way, nor a demand that interference with rights be justified against a standard like necessity or proportionality. Rather, legality is best understood as a tool for working out the content of our legal obligations, given that those obligations are determined by

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<sup>438</sup> Such as those, for instance, set out by Bingham (n 381).

the principles and values to which we as a community are committed. This view of legality can now be understood against this backdrop. When courts use legality, they are attempting to work out what moral effect the enactment of a statute has had, by appealing to principles of political morality to which we as a community are committed.

The conception of legality as a *presumption* about Parliament's intentions might seem a natural reading of the statements of the judges themselves. In *Pierson*, Lord Steyn stated:

A broader principle applies. Parliament does not legislate in a vacuum. Parliament legislates for a European liberal democracy founded on the principles and traditions of the common law. And the courts may approach legislation on this initial assumption. But this assumption only has prima facie force. It can be displaced by a clear and specific provision to the contrary.<sup>439</sup>

Similarly, in *Simms*, Lord Steyn once again stated: 'In these circumstances even in the absence of an ambiguity there comes into play a *presumption* of general application operating as a constitutional principle.'<sup>440</sup>

On its face, it seems that there is a tension at play in these statements. It is odd to invoke the traditions and principles of liberal democracy while holding that such principles can be set aside if parliamentary language is clear enough. If that is what we mean then Parliament really does legislate in a

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<sup>439</sup> [1998] AC 539.

<sup>440</sup> [2000] 2 AC 115, 130 (my emphasis).

vacuum. This tension underpins the ultra vires conceptions of judicial review, in which parliamentary sovereignty and the rule of law (or, as here, the principles of liberal democracy) are viewed as fundamentally antagonistic.

This tension dissipates, however, when we take the Interpretivist Framework. On this view, both the democratic principles that make Parliament's actions legally relevant and the broader principles drawn from the liberal democratic tradition determine a statute's impact on our legal rights and obligations. The role of the courts is to work out what this impact is. The courts' 'presumption' that these principles are not in tension (because Parliament does not intend to violate the other principles) reflects the great weight that has been assigned to the democratic principle underpinning the role of Parliament.

'Parliamentary sovereignty', I have argued, reflects a democratic principle to which we as a political community have committed. The principle of integrity gives weight to tradition. Were we to begin again from behind the veil of ignorance, we might give more weight to the other principles of liberal democracy referred to by Lord Steyn, and less to the democratic principle that makes statutory wording relevant. The operation of integrity in the legal domain, however, means that the demands of justice are not the same as they would be behind the veil of ignorance. Integrity is, to use Gerald Postema's phrase, 'justice in workclothes'.<sup>441</sup> That a given principle occupies an incumbent place in the constitutional order counts in its favour. Because of this, the weight given by judges to statutory language when exercising the

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<sup>441</sup> Gerald Postema, 'Integrity: Justice in Workclothes' (n 360).

principle of legality is so strong that we can sensibly refer to it as a 'presumption'. We can understand, however, that it is not a 'presumption' in a real sense. Rather, it is shorthand for a more complex process of moral reasoning, wherein judges try to work out our legal obligations by interpreting statutes in line with these various principles.

At the end of Chapter 3, I set out a view of legislative intention wherein such intentions can *themselves* only be uncovered through moral reflection on the sort of institution Parliament is and the sort of intentions that it *should* have. Such a view was supported, I argued, by the nature of the Westminster Parliament as a corporate body that simulates a single, unified intention.<sup>442</sup> This view, it seems to me, also finds support in the principle of legality. The 'presumption' that Parliament intended to act in this or that way makes sense if Parliament's intention is something that we *construct*. This does not mean that we simply assign to Parliament the intention we wish it had. Judges, plainly, view themselves as bound in some way by statutory language. This language is evidence they cannot ignore. What it means, however, is that judges interpret Parliament's intention by giving an account of that intention that fits the language used, but that can also be justified by reference to the sort of intention that Parliament should have. When it comes to discerning the 'intention' of a large, incorporated entity, there is little other choice.<sup>443</sup> The interpretation of statute, on this view, is a moralised process all the way down. Judges must engage in moral reflection to interpret the intention of

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<sup>442</sup> Pettit (n 278) 62.

<sup>443</sup> I argued, in Chapter 3, that this account made more coherent sense of judicial treatment of intention than the account of Richard Ekins, which tries and fails to make largely the same point without reliance on moral argument.

Parliament, and then to determine what role that intention plays in fixing the legal impact of a statute. On this view, legal principles determine the content of legislative intention, not the other way around.

Some might object, at this point, that I am guilty of ignoring what judges plainly say about what they are doing. In making sense of legal doctrines, however, we should not be reticent of looking beyond the terms in which judges themselves frame these doctrines. Judges often make use of shorthand like this in articulating judicial doctrines, and we should not always be tied to the labels they use in analysing the deeper theoretical foundations of the doctrines.<sup>444</sup> Often, courts may not fully articulate the full theoretical consequences of their own judgments. For example, the judges in *Anisminic* asserted that their judgment preserved the distinction between errors on the basis of jurisdiction and errors of law.<sup>445</sup> Later, Lord Diplock acknowledged that the *Anisminic* judgment did in fact abolish this distinction.<sup>446</sup> Recently, this was affirmed in *Privacy International*.<sup>447</sup>

Viewing the ‘presumption’ of legality in this way allows us to better explain cases in which the interpretation given by courts seems to depart from the linguistic meaning of the statute. In *Privacy International*, for instance, 67(8) of the Investigatory Powers Act 2000 read: ‘[Except as provided by

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<sup>444</sup> To give one example, George Letsas argues that it is a mistake to view the doctrine of proportionality as an exercise in ‘balancing’ competing interests, notwithstanding the prevalence of such language in the case law. George Letsas, ‘Rescuing Proportionality’ in Rowan Cruft, S Matthew Liao and Massimo Renzo (eds) *Philosophical Foundations of Human Rights* (OUP 2014).

<sup>445</sup> [1969] 2 AC 147

<sup>446</sup> *In re Racal Communications Ltd* [1981] AC 374, [14]-[15], and again in *O’Reilly v Mackman* [1983] 2 AC 237, 278.

<sup>447</sup> [2019] UKSC 22, [136].

virtue of s 67A], award, orders and other decisions of the Tribunal (including decisions as to whether they have jurisdiction) shall not be subject to appeal or be liable to be questioned in any court'.<sup>448</sup> Despite the fairly unambiguous wording, the majority held that if the Investigatory Power Tribunal was legally mistaken in determining that it had jurisdiction, then that determination was merely a 'purported' one and was not covered by s 67(8).<sup>449</sup>

On an orthodox view, this case would be seen as evidence of widening constitutional crevices; the realisation of the underlying tension between parliamentary sovereignty and the rule of law. When we accept that the linguistic meaning of a statute underdetermines its legal meaning, however, and that principles of political morality play a law determining role, the majority's interpretation of the 2000 Act is perfectly legitimate. The majority emphasised that principles of political morality concerning the right of access to courts played a role in determining the legal effect of the 2000 Act.<sup>450</sup> It is not that these principles 'outweighed' parliamentary sovereignty in this case. Rather, the right of individuals to petition the Court, and the democratic principle underpinning the authority of Parliament are each principles of political morality to which the community is committed, and they each work together to determine the correct interpretation of the statute. The correct

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<sup>448</sup> *ibid.*

<sup>449</sup> As I noted in Chapter 1, the clause in parenthesis seemed to have been inserted specifically to distinguish this provision from the ouster clause at issue in *Anisminic*.

<sup>450</sup> In the next chapter, I explain why I do not think that we should cast cases like this, concerning the role of the courts, in terms of the separation of powers.

interpretation on this view, need not match the linguistic meaning of the statute.

Importantly, this view does a much better job than orthodox theories of explaining the pervasive disagreement among judges as to the correct interpretation of such statutes. It is plain that such disagreements do not concern the wording of the statute. I argued in previous chapters that it is also implausible to cast them as disagreements about Parliament's intentions. Rather, they disagreed about the weight to be assigned to these intentions, and the weight to be assigned to other relevant principles. Lord Carnwath emphasised the 'critical importance of the common law presumption against ouster',<sup>451</sup> and the principle that 'it is ultimately for the courts, not the legislature, to determine the limits set by the rule of law to the power to exclude review'.<sup>452</sup> Lord Sumption and Lord Reed, dissenting, took the view that 'the rule of law is sufficiently vindicated by the judicial character [of the Investigatory Powers Tribunal]'.<sup>453</sup> The judicial status afforded to the IPT by statute, on their view, distinguished it from administrative bodies, such as the Foreign Compensation Commission in *Anisminic*.<sup>454</sup>

The disagreement here turns on competing conceptions of the right of access to the courts, and competing accounts of the weight to be afforded to the principles that flow from those conceptions. For Lord Sumption and Lord

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<sup>451</sup> [2019] UKSC 22 [107].

<sup>452</sup> *ibid* [131].

<sup>453</sup> *ibid* [172].

<sup>454</sup> *ibid* [197]. Robert Craig, writing in advance of the Supreme Court's judgment, supported this distinction. Robert Craig, 'Ouster Clauses, Separation of Powers and the Intention of Parliament: From *Anisminic* to *Privacy International*' (2018) *Public Law* 570.

Reed, the interference with this principle is not serious because of their view of the judicial nature of the IPT. The statute, on their view, did ‘no more than exclude review by the High Court of the merits of decisions made by a tribunal performing, within its prescribed area of competence, the same functions as the High Court’.<sup>455</sup> They also noted that the statute was drafted in a way that seemed designed to distinguish it from the ouster clause in *Anisminic*.<sup>456</sup> Given that the interference with the separation of powers was not, on their view, very pressing, and precise wording of the statute, the effect of the provision was to exclude judicial review of the IPT’s decisions.

For the plurality, led by Lord Carnwath, Lords Sumption and Reed miscalculated the weight to be assigned to the important separation of powers principles at stake. That the 2000 Act, unlike the statute in *Anisminic*, purported to exclude ‘decisions as to whether they have jurisdiction’ made no difference, since, following *Anisminic* and subsequent case law, a mistaken decision as to whether the Tribunal had jurisdiction was not to be treated as a ‘decision’ at all.<sup>457</sup> The greater weight afforded to the separation of powers principles diminished the weight of the democratic principle (parliamentary sovereignty) in determining the legal effect of the provision.

Lord Carnwath also relied on the principle that the law must develop such that it is applied consistently across legal bodies. Shielding a tribunal from review, he argued, could lead to the development of ‘local law’, i.e. legal

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<sup>455</sup> [2019] UKSC 22 [211].

<sup>456</sup> *ibid* [201].

<sup>457</sup> *ibid* [108].

doctrine that developed out of step with the interpretations of the ordinary courts.<sup>458</sup> He emphasised:

The legal issue decided by the IPT is not only one of general public importance, but also has possible implications for legal rights and remedies going beyond the scope of the IPT's remit. Consistent application of the rule of law requires such an issue to be susceptible in appropriate cases to review by ordinary courts.<sup>459</sup>

The important rule of law sub-principle of consistent application, then, played a role in determining the correct interpretation of the statute as well. This aspect of the judgment, it merits noting, is consistent with the spirit of integrity more generally. The development of 'local law' gives rise to the possibility that litigants in relevantly similar positions might have the enforcement of their legal obligations decided in accordance with different principles. This possibility is antithetical to the demands of principled consistency.

The point I wish to emphasise is that the disagreement among the judges in this case is a disagreement of principle. They are not disagreeing about what Parliament in fact intended. They are disagreeing about the weight to be afforded to various law-determining principles. Their disagreement is deeper than that. They offer competing interpretations of the moral impact of section 67(8) of the Investigatory Powers Act 2000. Such disagreement is perfectly understandable, given the fluctuating weight afforded to principles

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<sup>458</sup> *ibid* [139].

<sup>459</sup> *ibid*.

depending on the particular context of the case. The addition of the words 'decisions as to whether they have jurisdiction' seemed intended to distinguish the statute from the one in *Anisminic*. The legal relevance of this intention, however, will depend on how we weigh the democratic principle with the other principles picked out by integrity.

Disagreement over whether the IPT should be distinguished from the Foreign Compensation Commission was particularly significant, since the answer to this question is important in determining whether the principles of political morality underpinning *Anisminic* apply here too. It is important to see that the disagreement over this question is a moral disagreement too. Whether the IPT should be considered an extension of the High Court or an entirely separate sort of entity depends on our conception of the right of access to courts, and our understanding of the proper institutional role of such institutions.

The view that the impact of a statute on our legal obligations is determined by principles of political morality picked out by integrity, then, helps us make sense of the principle of legality. When judges invoke the 'presumption' that Parliament did not intend to violate fundamental rights, they use that term as shorthand for a more complex process of moral reasoning. In this process, great weight is afforded to the democratic nature of the legislature. The intention of Parliament, itself understood in a moralised way, will play a significant role, so significant that it might almost be thought of as a 'presumption'.

Other principles of political morality, however, will play a role too. We see this in the various judicial invocations of the rule of law. The weight afforded to each principle will depend on the particular context of the case. In cases in which the weight afforded to these principles is very great, because the interference with them is particularly great, for example, less weight is given to the democratic principle. This does not mean that the courts decide that rule of law principles take precedence over democracy, or override democratic principles. Rather, it means that the conception of democracy that they express is not a simple majoritarian one; but rather one in which effect is given to specific rights and principles.<sup>460</sup>

That the principle of legality has developed to afford more protection to these rights and principles, and offer a more refined understanding of the democratic principle, reflects the turn towards individual rights protection that has characterised European liberal democracies since the end of the Second World War. It is in this sense that 'Parliament does not legislate in a vacuum'. Parliament legislates in a State committed to a particular scheme of justice that has evolved over time. The principles that make up this scheme, including the democratic principle that makes Parliament's actions relevant, determine the legal impact of statutory enactments. Judges, when they invoke the principle of legality, are engaged in the process of working out those obligations against the background of this complex, evolving scheme of political morality.

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<sup>460</sup> For an argument against simple majoritarian conceptions of democracy, see Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (OUP 1996) chapter 1.

## Conclusion

Much of the debate around the changing nature of the UK constitution has grappled with a shifting distinction between ‘legal’ and ‘constitutional’ restrictions on the sovereignty of Parliament.<sup>461</sup> Oftentimes it seems that the functioning of the constitution is reliant on our *not* being able to make sense of these debates. If Parliament is not sure whether judges can declare that a statute so violated a principle of the rule of law that it had no legal effect, the thinking goes, then Parliament is unlikely in practice to pass a statute that violates such a principle. A sort of mutually assured constitutional destruction hangs over proceedings, and we settle for ‘theoretical pragmatism’ in constitutional matters.<sup>462</sup> This uneasy theoretical *détente*, which is at the heart of the Orthodox Framework, cannot last forever. The rule of law plays a role in determining the limits of the power wielded by the State. We must have a clear framework for working out precisely what legal limits flow from the rule of law as a political ideal.

I have tried here to set out clear frameworks for how we might begin to bring some clarity to debates around the role of the rule of law, and to point to some theoretically interesting consequences of each. On the Orthodox Framework, the rule of law is conceived of as a set of moral principles that

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<sup>461</sup> Mark Elliott, ‘Parliamentary Sovereignty’ in Jeffrey Jowell, Dawn Oliver and Colm O’Cinneide (eds), *The Changing Constitution* (8<sup>th</sup> ed, OUP 2015).

<sup>462</sup> Mark Elliott, ‘Sovereignty, Primacy and the Common Law Constitution: What Has EU Membership Taught Us?’ in Mark Elliott, Jack Williams and Allison Young (eds), *The UK Constitution After Miller: Brexit and Beyond* (Hart Publishing 2018).

interacts with the institutional norms created by Parliament. This view is dependent on the intentionalist theories rejected in Part II of this thesis.

On the Interpretivist Framework, no distinction between institutional and non-institutional norms is made. The rule of law, on this view, is a package of principles that determines the moral impact of statutory enactments. This view leaves the potential for a wider role for the rule of law in constitutional adjudication. Decisions such as that in the majority judgment in *Evans v Attorney General* can be reached on an Interpretivist understanding of the rule of law, but not on an Orthodox understanding. Further, on the Interpretivist Framework, judicial ‘strike down’ of legislation becomes a constitutional possibility, and rule of law principles determine the legal impact of uses of the prerogative power in the same way they do the legal impact of statutory enactments.<sup>463</sup>

Not every non-positivist theory will view the rule of law in this expansive way. Some will argue that for moral reasons, legislative supremacy outweighs these other principles in almost all cases. The theory of law as integrity, however, does lead to an expansive view of the rule of law, rooted in a particular conception of the rule of law as a political ideal. In the final chapter, I argue that this theory makes the best sense of judicial use of the principle of legality, and show that this view can help us guide the future development of public law.

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<sup>463</sup> I discuss both ‘strike down’ of legislation and the use of the principle of legality in relation to the prerogative in greater detail in the next chapter.

## Chapter 6. The Moralised Conception of Legality

### Introduction

It is worth briefly summarising the argument to this point. In Chapter 1, I highlighted several difficult questions emerging from case law in which judges have made use of the principle of legality. These were:

1. Is legality simply a statutory presumption, or does it include a 'justificatory' aspect, such as a requirement that any interference with a common law right be necessary or proportionate?
2. Should we conceive of a broader conception of legality than either a statutory presumption or a justificatory standard? How clear does statutory language need to be in order to license interference with a right or principle?
3. What rights and principles trigger legality's application?
4. What is the relationship between the rights engaged and the language of the statute being interpreted?
5. Is legality a method that should be limited to the interpretation of statute, or might it apply to the interpretation of the prerogative as well?
6. Does a proper understanding of legality entail that judges can 'strike down' legislation in extreme circumstances?

The first two questions concern can be taken together as the question: ‘what exactly are judges doing when they invoke the principle of legality?’ We need to answer this question before proceeding to questions 3-6. These concern the scope of the practice. Once we have a clear idea of what the method of interpretation involves, we can ask whether it is justifiable to use it when this or that right is involved, how much weight must be afforded to statutory language under it, whether it can be used in the context of the prerogative, and whether it can be used to ‘strike down’ legislation.

At the end of the previous chapter, I set out a view of the principle of legality that answered these first two questions. I argued that speaking of legality as a ‘presumption’ should be viewed as shorthand for a more complex process of moral reasoning. When judges exercise the principle of legality, they are attempting to work out the legal impact of the statute before them by reflecting on the principles of political morality underpinning it.<sup>464</sup> What principles feature in determining the impact of a statute is determined by the more abstract principle of integrity. One of these law-determining principles, which I call the ‘democratic principle’, assigns a weighty role to statutory language in determining the legal meaning of a statute. This principle’s place in the legal order is itself determined by integrity. The law-determining weight assigned to this principle is so great that it makes sense to refer to a ‘presumption’ in its favour. But this is not a presumption in any real sense.

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<sup>464</sup> To reiterate, I speak of a statute’s legal ‘impact’ on the law, following Greenberg, to refer to the legal rights and obligations that obtain in virtue of a ‘law-determining’ action, such as the enactment of a statute or use of the prerogative. Greenberg, ‘HFML’ (n 19) 165.

It perhaps merits repeating the clarification that I made in the previous chapter in relation to the dimension of ‘weight’ that principles have, since I use that phrase a number of times in this chapter. When I speak of principles having fluctuating weight, I mean that the *content* of those principles depends on the particular context in which they operate.<sup>465</sup> By way of example, consider again the judicial dicta indicating that courts may decline to recognise the legal effect of a statute that tried to abolish judicial review.<sup>466</sup> I argued in the previous chapter that such cases are explained by noting that the weight assigned to what I have called the ‘democratic principle’ is conditioned by other principles picked out by the demand for principled consistency. I do not mean to say that the democratic principle and the rule of law are incommensurable. Rather, my point is that the content of the democratic principle, and any other legal principle, is not fixed, but is context dependent. The content of the ‘democratic principle’, then, is that the actions of Parliament will create legal obligations that are consistent with all the other law-determining principles in play. The content of each principle is conditioned and constrained by the others, and by the particular context in which they operate.

Questions 3-6 were related to the broader question of whether legality is a justifiable method of interpretation at all. Whether a method of interpretation is justifiable turns on whether it does a good job of telling us what our legal rights and obligations are. For this reason, in order to know

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<sup>465</sup> As I set out in Chapter 5, I follow the specificationist position of Shafer-Landau, Oberdiek and others. Shafer-Landau (n 433); Oberdiek (n 434).

<sup>466</sup> [2005] UKHL 56; [2011] UKSC 46.

whether a method of interpretation is correct we need some idea of what it means to say that legal rights and obligations obtain. The theory of law as integrity furnishes us with such a view. Legal obligations, on this view, are genuine moral obligations that obtain in virtue of the actions of legal institutions. The precise content of those obligations – the legal *effect* of, for instance, the enactment of a statute – is determined by principles of political morality drawn from past political decisions about when coercive enforcement is justified.

In this chapter, I argue that this view of general jurisprudence makes the best sense of judicial application of the principle of legality. I argue that the view of legality as a method of working out the legal impact of a statute against the background of interpretivist view of general jurisprudence offers satisfying answers to the difficult questions above.

The argument proceeds as follows. In section 1, I show that this view of legality makes good sense of the early legality cases and the canonical statements of that principle, as well as contemporary cases. I argue that through these cases, we can see that Dworkin's principle of integrity allows us to answer the question of what rights trigger legality's application and what role statutory language plays. In section 2, I analyse the relationship between the principle of legality and the separation of powers. I focus here both on contemporary cases in which the courts have focussed on protecting their own role, and cases that have turned on a conception of the respective roles of Parliament and the government, such as *Miller v Secretary of State for*

*Exiting the European Union.*<sup>467</sup> I argue that these sorts of cases – those concerning the role of the courts on the one hand and those concerning the roles of Parliament and the government on the other – should be distinguished. I argue that the separation of powers is best conceived of as a package of principles governing the relationship between Parliament and the government, rather than a principle speaking to a triadic relationship between all three institutions.

In section 3, I turn to the prerogative. I argue that the court's analysis of the prerogative in *R (Miller) v Prime Minister and Cherry v Lord Advocate* is underpinned by the same sort of analysis underpinning cases in which the principle of legality is used to interpret statute.<sup>468</sup> The principle of legality, properly understood, applies to the interpretation of the prerogative as much as statute. The only distinction to be drawn is between the principles that apply to each law-determining action, to use Greenberg's term. The democratic principle, for example, will not apply to the prerogative in the same way as it does to statute.

Finally, in section 4, I consider the issue of judicial 'strike down' of legislation. I argue that the distinction between 'refusing to apply' a statute and interpreting it in accordance with the principle of legality is illusory. Judges, when interpreting a statute, attempt to work out the legal effect of that statute by assessing the law-determining effect of certain principles of political

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<sup>467</sup> [2017] UKSC 5.

<sup>468</sup> [2019] UKSC 41.

morality.<sup>469</sup> To ‘strike down’ legislation, on this view, is to offer the interpretation that the linguistic content of a statute has little or no bearing on the legal rights that obtain in virtue of a statute, just as the linguistic content of my promise to murder someone has no bearing on whether I in fact have a promissory obligation to carry out that threat. I have already argued, in Part II of the thesis, that a statute’s linguistic meaning underdetermines its legal meaning. Courts already need to work out what weight to assign linguistic meaning in *any* instance of statutory language. Sometimes this weight will be very great and sometimes it will not, depending on the other law-determining principles in play. ‘Strike down’ simply refers to cases in which the weight to be assigned to statutory wording is negligible. This may in practice occur only in extreme circumstances, but that the conceptual space for it exists is, on the view I propose, uncontroversial.

## 1. Integrity and Rights

This offers us a way to answer some of the difficult questions surrounding legality. What rights trigger legality’s application? The answer to this is determined by integrity. Law subjects citizens to the threat of coercion. As such, we are entitled to certain outcomes in court only if those outcomes are mandated by principles of justice drawn from past decisions. In asking

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<sup>469</sup> When I refer to ‘principles of political morality’, I do not mean that these are principles that apply only in the sphere of politics. Rather, I take ‘political’ to signify the zone of application of particular moral principles, such as justice, fairness etc. Legal principles, on the view I put forward in Chapter 4, make up a particular subset of political principles. Legal principles are those principles of political morality whose coercive enforcement by courts we are entitled to.

whether a particular right triggers legality's application, the judge must ask whether that right is picked out by the demand for principled consistency. In *R v Secretary of State for the Home Department, ex p Pierson*, for instance, the Court recognised the principle that punishment should not be retroactively increased as one to which the political community has committed.<sup>470</sup> This principle, in combination with the democratic principle, determined the legal impact of the Criminal Justice Act 1967 in this particular context.

In this section, I return to the courts' treatment of two important rights, previously considered in Chapter 1: access to justice and the right against deprivation of liberty. The importance of each of these rights, and their close connection with the vision of a true political community underpinning integrity, explain why the development of the principle of legality has centred on these rights. I then examine the courts' recent treatment of 'closed material procedures'. I argue that the courts have misinterpreted the principles that apply in these cases in important ways.

#### *A. Access to Justice*

One of the main threads running through the early cases in which legality was employed is the prominent place afforded to the right of access to justice. This principle has played a significant role in determining the legal impact of statutes before the court in a variety of different contexts. In *R v Secretary of State for the Home Department, ex p Leech*, for instance, Lord Steyn

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<sup>470</sup> [1998] AC 539.

emphasised the importance of this ‘constitutional right’ in holding that the statute in question did not authorise the creation of secondary legislation licensing the interception and reading of a prisoner’s legal correspondence by legal officials.<sup>471</sup> The right to confidential correspondence with one’s solicitor, on Lord Steyn’s view, flowed directly from the broader right of access to justice.

The same conclusion was reached in *R v Secretary of State for the Home Department, ex p Daly*, concerning the blanket ban on prisoners being present while their legal correspondence was read.<sup>472</sup> These prisoners were similarly situated to those in *Leech*, and so the same principles of justice underpinning the earlier decision determined the impact of the statute here too.

It is interesting to note that this same principle was at work in *R v Secretary of State for the Home Department, ex p Simms*, despite that case concerning the right of prisoners to conduct interviews with journalists, rather than any direct denial of access to a legal institution. Lord Steyn in that case emphasised that the free speech rights of the prisoners, which were interfered with by the refusal to allow them to speak to journalists if the journalists were to publish the interviews, was particularly weighty in this case because of the

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<sup>471</sup> [1994] QB 198. Lord Steyn also identified other rights that played a role in fixing the legal impact of the statute in this context. First, there is the rule in the law of confidentiality protecting the confidentiality of letters sent to an individual. Secondly, there is an equitable rule requiring that solicitors keep legal correspondence confidential. Lord Steyn emphasised the much greater role played by the right of access to a court, but we see that principles with various weightings can each play a role in fixing the correct interpretation of statute.

<sup>472</sup> [2001] UKHL 26.

access to justice concerns.<sup>473</sup> The prisoners wished to speak to journalists in order to persuade them to investigate their convictions, with a view to gaining 'credible access to the Criminal Cases Review Commission'.<sup>474</sup>

This conclusion seems to me to be a correct application of the principle of legality understood as an application of integrity. Lord Steyn correctly identified that the litigants in *Simms* were positioned in a relevantly similar way to those in *Leech* and earlier cases concerning the right of access to justice, notwithstanding the different fact patterns. Relevant similarity, recall, is itself a moral question.<sup>475</sup> Lord Steyn determined that the same principles of justice that underpinned *Leech* were implicated in *Simms*. He then applied those principles to the new fact pattern. The right of access to justice added weight to the free speech concerns of the prisoners, and together these principles (along with parliamentary sovereignty, understood in the terms set out in the previous chapter) determined the legal impact of the statutory scheme.<sup>476</sup>

This same principle, as we saw in chapter 1, has underpinned cases outside of the prison context in which the executive has erected financial

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<sup>473</sup> [2000] 2 AC 115.

<sup>474</sup> *ibid* 125.

<sup>475</sup> Stavropoulos, 'Why Principles?' (n 360).

<sup>476</sup> That these cases occurred in the particular institutional context of *prisons* is also likely to have played a role in determining that the litigants were similarly situated in the relevant sense. I do not mean this in the facile sense that they were each in prison. I mean, rather, that particular principles of justice are implicated in cases involving the powers held by the State over prisoners, and the obligations owed by the State to prisoners. This was emphasised in *Leech*: 'It is an axiom of our law that a convicted prisoner, in spite of his imprisonment, retains all civil rights which are not taken away expressly or by necessary implication'. Here he cited the judgment of Lord Wilberforce in *Raymond v Honey* [1983] AC 1, 10.

barriers to the courts. First, in *R v Lord Chancellor, ex p Witham*, in the course holding that secondary legislation introducing new court fees were unlawful, Laws LJ noted that ‘the common law has clearly given special weight to the citizen's right of access to the courts’.<sup>477</sup> Laws LJ emphasised here that interference with the right could not be licensed by ‘necessary implication’ from a statute, but only through explicit words. He stated:

In the unwritten legal order of the British State, at a time when the common law continues to accord a legislative supremacy to Parliament, the notion of a constitutional right can in my judgment inhere only in this proposition, that the right in question cannot be abrogated by the State save by specific provision in an Act of Parliament, or by regulations whose vires in main legislation specifically confers the power to abrogate. General words will not suffice.<sup>478</sup>

On orthodox views, Laws LJ is expressing a tension between parliamentary supremacy and other important principles. The principle of legality, on this view, is just a tool to let us do what we can in the face of the unfortunate reality of parliamentary sovereignty. On the non-positivist view I have set out, we can come to a more nuanced understanding of this judgment. Laws LJ is here assigning various weights to the right of access to courts and the democratic principle underpinning parliamentary sovereignty,

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<sup>477</sup> [1998] QB 575.

<sup>478</sup> *ibid* [12]-[13].

each of which are picked out by the more abstract principle of integrity, in order to determine the statute's impact. The right of access to justice itself, in part determines the intention of Parliament, understood as a moralised concept. This right features in helping us make the best sense of the intention to be attributed to Parliament.

The court in *R (UNISON) v Lord Chancellor* considered that the applicants there were similarly situated, in the moralised sense, to those in *Witham*.<sup>479</sup> The increase in employment tribunal fees introduced by the Lord Chancellor threatened to exclude individuals from those tribunals in the same way that the fees in *Witham* threatened to exclude individuals from the ordinary courts. The applicants in *UNISON*, therefore, had the right to have their case settled according to the same principles of justice that underpinned *Witham*.<sup>480</sup> It did not matter that an employment tribunal was at issue rather than the ordinary courts, because relevant similarity is a matter of the principles that apply to each situation.<sup>481</sup>

It is evident from these cases that the right of access to a court is a principle to which we as a political community are committed. This right has underpinned innumerable political decisions about the acceptability of State coercion. Because of this, the principle, when implicated, determines the legal impact of statutes. In the foregoing cases, judges have sought to work out what legal obligations we hold in virtue of certain statutory schemes, where

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<sup>479</sup> [2017] UKSC 51.

<sup>480</sup> They also relied on *R (Hillingdon London Borough Council) v Lord Chancellor (Law Society intervening)* [2008] EWHC 2683 (Admin).

<sup>481</sup> For an argument that the principle of integrity offers the best explanation of the doctrine of *stare decisis*, see Scott Hershovitz, 'Integrity and Stare Decisis' in Scott Hershovitz (ed) *Exploring Law's Empire* (OUP 2006).

the impact of those schemes is determined by the right of access to justice, and the democratic principles underpinning parliamentary sovereignty. They are using a 'presumption' only in a heuristic sense. What is really at work is a complex process of moral reasoning.

It is in some ways unsurprising that the development of the principle of legality occurred largely around the right of access to justice. That right is of paramount importance to the view of law as integrity. Legal rights, on that view, are those rights whose coercive enforcement in court we are entitled to. A community whose members cannot access courts, on this view, is one whose members are not treated with equal concern. Lord Reed gives expression to this connection in *UNISON*, in discussing the role of the courts in upholding the rule of law:

That role includes ensuring that the executive branch of government carries out its functions in accordance with the law. In order for the courts to perform that role, people must in principle have unimpeded access to them. Without such access, laws are liable to become a dead letter, the work done by Parliament may be rendered nugatory, and the democratic election of Members of Parliament may become a meaningless charade.<sup>482</sup>

It is entirely appropriate, then, that courts should recognise that this right plays a prominent role in determining the legal impact of statutes in these cases.

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<sup>482</sup> [2017] UKSC 51 [68].

## *B. Deprivation of Liberty*

The idea that the impact of a statute is governed by principles flowing from the broader ideal of principled consistency also makes sense of the cases concerning deprivation of liberty discussed in Chapter 1. In *B (Algeria) v Secretary of State for the Home Department (No 2)*, the Court was asked to decide whether the Special Immigration Appeals Commission could attach bail conditions to the release of a person whose continuing detention would be unlawful.<sup>483</sup> Then, in both *Secretary of State for Justice v MM*<sup>484</sup> and *Welsh Ministers v PJ*,<sup>485</sup> the Court was asked to review the lawfulness of restrictive conditions attached to the release of patients detained under the Mental Health Act. In each of these cases, it was held that the statutes in question did not have the legal effect of licensing release conditions that amounted to a deprivation of liberty.

In *B (Algeria)*, the Court applied the limitations on the Home Secretary's power to detain migrants originally laid down in *R (Singh) v Governor of Durham Prison* (commonly known as the 'Hardial Singh Principles').<sup>486</sup> According to these principles, the Home Secretary may only exercise their power to detain migrants if the Home Secretary intends to

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<sup>483</sup> [2018] UKSC 5.

<sup>484</sup> [2018] UKSC 60.

<sup>485</sup> [2018] UKSC 66.

<sup>486</sup> *R (Singh) v Governor of Durham Prison* [1983] EWHC 1 (QB).

deport them.<sup>487</sup> The principles of justice underpinning these common law limitations on the detention of migrants are not difficult to articulate. Immigration detention is not supposed to be a means of punishment. Rather it is to facilitate deportation.<sup>488</sup> The wrong in continuing detention with no prospect of deportation is perhaps best expressed in terms of Lon Fuller's eighth desiderata of a legal system: congruence between official action and declared rule.<sup>489</sup> The Home Secretary's decision to continue detention was plainly out of step with the purported justification offered.

Once it had been established that continuing detention would be unlawful, further principles made it the case that the imposition of bail conditions would also be unlawful. We might here cite Dicey's first principle of the rule of law: the prohibition on the imposition of punishment or suffering except in accordance with law.<sup>490</sup> Bail conditions are a burden imposed by the State and demand justification. Once the purported legality of continuing detention dropped away, there could be no legal basis for bail conditions either.<sup>491</sup>

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<sup>487</sup> The principles were refined in a number of cases. See in particular *R (I) v Secretary of State for the Home Department* [2003] INLR 196 [46]; *R (WL (Congo)) v Secretary of State for the Home Department* [2011] UKSC 12 [22].

<sup>488</sup> I make no effort here to justify deportation itself. It may well be that modern immigration and deportation regimes generally are highly unjust. My point here relates to the justification for detention on the assumption that the deportation is justified.

<sup>489</sup> Fuller (n 69) 81.

<sup>490</sup> Dicey (n 371) 110.

<sup>491</sup> [2018] UKSC 5 [29]. We might equally couch the principles involved here in terms of various conceptions of freedom as non-interference. For the application of such a Hayekian conception of freedom to UK public law, see Allan, *Constitutional Justice* (n 15).

When Lord Lloyd-Jones says, ‘It is a fundamental principle of the common law that in enacting legislation Parliament is presumed not to intend to interfere with the liberty of the subject without making such an intention clear’, this is again best understood as a statement about the varying weight of different law-determining principles.<sup>492</sup> Weight must be attached to Parliament’s intention; that is itself demanded by a principle of political morality that has a historic basis in the constitutional order. That intention, however, is itself a moral concept whose content is partly determined by other principles of justice to which we are committed. Here, those other principles are particularly weighty, and so the Court emphasised that it would interpret the provisions ‘strictly and restrictively’.<sup>493</sup>

The restrictive approach to what would count as a ‘deprivation of liberty’ also underpinned the interpretation of the Mental Health Act in both *MM* and *Welsh Ministers*. In both cases, it was held that attaching restrictive conditions to the release of patients could only be licensed by extremely specific statutory language.<sup>494</sup> In *MM*, Lord Hughes dissented on the question of whether this amounted to a deprivation of liberty. On his view, the patients here had already been deprived of their liberty, and so release under restrictive conditions was not a ‘deprivation’ in the relevant sense.<sup>495</sup>

This disagreement is once again one that is easily understandable on the non-positivist view. The majority put particular weight on their particular

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<sup>492</sup> Allan, *ibid.*

<sup>493</sup> *ibid.*

<sup>494</sup> This was emphasised even more strongly in *Welsh Ministers*, since the conditions there would have amounted to a deprivation of liberty under Article 5 ECHR.

<sup>495</sup> [2018] UKSC 5 [45]-[46].

conception of liberty. We might understand their judgment in terms of the republican tradition of freedom as non-domination.<sup>496</sup> On this view, a person enjoys freedom to the extent that no one can interfere with their affairs on an arbitrary basis. Release from detention alone, then, does not make a person free, so long as the state still exercises the capacity to control their affairs and choices. We might justify this reading by saying that this conception of freedom finds expression in *B (Algeria)* and other cases, and principled consistency demands that similarly situated litigants have their rights enforced according to the same conception.

We should read Lord Hughes, however, not as making an argument against this conception of freedom. Rather, his point is that the applicants in *MM* are not similarly situated to those in *B (Algeria)*.<sup>497</sup> *B (Algeria)* concerned restrictive conditions attached to a release from *unlawful* detention. *MM* concerned loosening of lawful restrictions at the discretion of the Justice Secretary. The same principles, therefore, do not apply in both cases. The disagreement is a paradigmatic example of disagreement grounded in different interpretations of the demands of integrity. The judges engage in moral reflection on the principles of political morality that underpin past political decisions about the use of coercive force, and then decide which principles apply to the case before them. The judges each come to different conclusions on the principles that apply to this case, and therefore different conclusions about the proper interpretation of the statute.

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<sup>496</sup> Philip Pettit, *Republicanism: A Theory of Freedom and Government* (OUP 2001).

<sup>497</sup> He does not mention that case, but the distinction he makes between the facts in *MM* and those in other cases are readily applicable to *B (Algeria)*.

### *C. Closed Material Procedures*

Against the backdrop of the cases discussed in the previous two sections, the Supreme Court's developing jurisprudence on closed material procedures begins to look like an unprincipled outlier. Two points are relevant here. First, the principle of access to the courts has played a fundamental role in determining the rights that are appropriate for coercive enforcement, and so should be afforded particular weight where statutory language is ambiguous. Secondly, the cases on deprivation of liberty demonstrate a rejection of a particular strand of reasoning that seems to underpin the closed material procedures cases. The rejection of this reasoning is of a piece with the broader European turn away from consequentialism.<sup>498</sup> It is well established that the common law is sensitive to external influence. That the common law has developed in line with a broader, international scheme of principle is to be welcomed. A turn away from this demands justification, and this is not found in the closed material procedures cases.

In *Bank Mellat* the majority recognised that the rights to 'open justice' and 'natural justice' featured in determining the correct outcome, but took the view that these principles *mandated* the use of closed material procedures, since any possible alternative to such procedures would be even worse.<sup>499</sup> Therefore, closed material procedures were required to give effect to the

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<sup>498</sup> See generally Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (n 128).

<sup>499</sup> [2013] UKSC 38.

applicants' right to appeal to the Supreme Court. On their view, the purpose of the statutory provision in question was to provide for appeal to the Supreme Court, and closed material procedures facilitated that in this case. Call this the 'facilitative argument'.

It is notable that the facilitative argument accepted in *Bank Mellat* is almost identical to the argument regarding release under restrictive conditions rejected in *MM* and *Welsh Ministers*.<sup>500</sup> In those cases, it was argued that release under such conditions was justified because the alternative was no release at all. This seems to be the same logic underlying the claim that an imperfect appeal to the Supreme Court is better than no appeal at all. Lady Hale's reasons for rejecting this argument in *Welsh Ministers* are instructive:

With the greatest of respect to the Court of Appeal, this approach puts the cart before the horse. It takes the assumed purpose of a [community treatment order] - the gradual reintegration of the patient into the community - and works back from that to imply powers into the [Mental Health Act] which are simply not there. We have to start from the simple proposition that to deprive a person of his liberty is to interfere with a fundamental right - the right to liberty of the person. It is a fundamental principle of statutory construction that a power

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<sup>500</sup> *Bank Mellat* occurred before these cases. My argument is not that the Court in *Bank Mellat* failed to follow precedent. Rather it is that the Court in *MM* and *Welsh Ministers* offered a better interpretation of the law than the Court in *Bank Mellat*. This is relevant because the reasoning in *Bank Mellat* has been picked up more recently in *R (Haralambous) v Crown Court at St Albans* [2018] UKSC 1.

contained in general words is not to be construed so as to interfere with fundamental rights.<sup>501</sup>

It seems to me that the majority in *Bank Mellat* (of which Lady Hale was part) made precisely this error. That is, they worked backwards from the general purpose of closed material procedures (to facilitate legal proceedings in which there are national security risks associated with making evidence public) and from that implied into the Constitutional Reform Act a provision that was simply not there. Rather, they should have begun with the principle that any interference with principles of open or natural justice cannot be licensed by general or ambiguous words.

The cases on access to justice outlined above make clear that a statute cannot licence interference with that right through necessary implication. It is axiomatic that the right of access to a court includes the principle that an individual has the right to know the evidence used against them. To hold a trial using closed material procedures is to decide on the enforcement of a litigant's rights and responsibilities in accordance with a scheme of principle that is different to those who have come before them. The later cases of *MM* and *Welsh Ministers* make clear that the common law has always rejected the sort of 'facilitative' reasoning on which the Court in *Bank Mellat* relied. This is because when judges interpret statutes, they are attempting to work out what legal effect particular principles cause that statute to have. What all of the legality cases make clear is that it is an established

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<sup>501</sup> [2018] UKSC 66 [24].

part of public law practice the law-determining weight of important rights is only diminished where what I have called the democratic principle is particularly weighty (as indicated by precise statutory language). Lord Hope was correct in his dissenting judgment, then, when he stated:

If the procedure is to be used in this court, the issues of principle require that its use should always be carefully provided for and defined by Parliament and never be left to implication. Only then can one be confident that Parliament really has squarely confronted what it is doing. Otherwise, as Lord Hoffmann said in *R v Secretary of State for the Home Department, ex p Simms* [2000] 2 AC 115, 132, there is too great a risk that the full implications may have passed unnoticed in the democratic process.<sup>502</sup>

The majority judgment in *Bank Mellat* is out of step with these decisions, and so by the lights of integrity, it is pro tanto wrongly decided.<sup>503</sup>

The facilitative argument in favour of closed material procedures seems to have been picked up once again recently, in *R (Haralambous) v Crown*

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<sup>502</sup> [2013] UKSC 38 [85].

<sup>503</sup> I say 'pro tanto' because there may be important reasons regarding the deference owed to the executive in national security cases at play as well. I am unconvinced by these claims, but I do not have space to explore them here, so I remain agnostic on this question. For an examination of the doctrine of deference generally, see Jeff King, 'Institutional Approaches to Judicial Restraint' (2008) 28(3) *OJLS* 409; Allison Young, 'In Defence of Due Deference' (2009) 72(4) *Modern Law Review* 554; Kyritsis, *Where Our Protection Lies* (n 18) chapter 7.

*Court at St Albans*.<sup>504</sup> This is unfortunate, given that *B (Algeria)*, *MM* and *Welsh Ministers* all occurred in the years between *Bank Mellat* and *Haralambous*. The Court in *Haralambous* failed to recognise the relevance of the reasoning in *MM* and *Welsh Ministers*, neither of which was mentioned. Principled consistency demands that the same principles of justice underpin the treatment of similarly situated litigants. Whether the rights that flow from the broader right of access to justice play a role in determining the impact of a statute in a given case is determined by the more abstract principle of integrity. Where those rights would be interfered with, it is an established part of legal practice that they play a large role in determining the impact of the statute in question. This role can only be diminished if the democratic principle is itself particularly weighty. Because these principles have been taken to operate together in this way in so much of public law practice, integrity makes it the case that the legal rights of litigants now are determined by the same process of principle. The facilitative argument inverts this process, by reducing the law-determining role of an important right *without* a corresponding enhancement of the role of the democratic principle. It is hoped that this argument will be subjected to greater scrutiny by the courts in future cases.

## 2. Legality and the Separation of Powers

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<sup>504</sup> [2018] UKSC 1. For a critique of this reasoning, see Lock (n 73).

In Chapter 1, I laid out several cases in which it seemed that the courts had begun to use the principle of legality to interpret statutes consistently with a conception of the separation of powers. These cases were notable because it seemed that the courts were showing an increasing reluctance to hold that enacting legislation licensed interference with what could broadly be called separation of powers principles, even where the statutory wording is fairly unambiguous. In that chapter, I said that theory of legality should tell us whether this more searching standard is justifiable in this context. We are now in a position to analyse the idea of the separation of powers in more detail.

As with parliamentary sovereignty and the rule of law, we should think of the separation of powers as shorthand for a *package* of principles. These particular principles concern the proper powers of legal institutions. On the view I set out, however, it is not the case that separation of powers refers to a triadic principle governing the relationship between courts, legislature and executive. Rather, I wish to distinguish between principles governing the role of the court, on the one hand, and those concerning the governing powers of the legislature and executive on the other. Only the latter package of principles I will refer to as the ‘separation of powers’.<sup>505</sup>

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<sup>505</sup> For a different conception of the separation of powers that is also based on an interpretivist theory of jurisprudence, see Kyritsis, *Where Our Protection Lies* (n 18). Kyritsis posits that separation of powers is the characteristic value of what he calls ‘polyphonic legal systems’: those systems in which different State institutions play a role in the project of governance. Institutional arrangements are legitimate, on this view, to the extent that they reliably track the demands of justice. On the view I put forward here, courts do not ‘govern’ in the same way that the legislature and executive do. I prefer to distinguish between the principles governing the role of the courts and those governing the powers of the executive and legislature, for the reasons set out below.

The reason that I make this distinction is that it is redundant, on the view I have set out, to speak of specific principles governing the powers of the courts. On the broader conception of legality set out in this chapter, courts have a particular morally assigned role. Political legitimacy is promoted within a community in which citizens are entitled to call on the coercive force of the State to enforce their rights in court. The enforcement of rights in accordance with integrity is dependent on the protection of specific institutional roles. It would be redundant, however, to say that there is a specific separation of powers principle assigning a certain role to the courts. This is because on the view I have set out, legal rights *just are* those rights that we are entitled to have enforced by courts. Courts are not strictly ‘empowered’ to do anything on this view. They are not responsible for ‘governing’ in the same way as the legislature and the executive. Rather, they are *required* to enforce specific rights and obligations. We can say, however, that integrity is a principle of political morality that demands specific institutional structures.

This is why the courts have so vigorously defended their own institutional role when invoking the principle of legality.<sup>506</sup> Ouster clauses, for example, are anathema to a legal order whose participants are treated with equal concern. It is not, however, that ouster clauses violate a principle that assigns specific powers to courts. Ouster clauses are repugnant because they violate all of the rights that we are entitled to have enforced by removing the possibility of that enforcement. Ouster clauses violate whatever right would otherwise have been enforced but for the ouster clause. The courts are

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<sup>506</sup> Varuhas, ‘The Principle of Legality’ (n 43) 606.

entirely justified, then, in reading such clauses in extremely restrictive terms, because courts are required to enforce the rights whose enforcement ouster clauses purport to deny. But the wrong in ouster clauses consists not in their taking away a power that rightfully belongs to courts, but in denying citizens the opportunity to demand the enforcement they are entitled to. In section 2A below, I consider a number of cases in which the courts have defended their own institutional role in this way.

Cases concerning the respective powers of Parliament and the government, and the relationship between the two, turn on different moral considerations. *Miller* is a paradigm example. In section 2.B, I consider this case in detail. Cases like this concern the separation of powers in a much stronger and more specific way than cases concerning the role of the courts. *Miller* and cases like it do involve specific principles that determine the ambit of the powers that Parliament and the government respectively have. What I have called the 'democratic principle' (a particular understanding of parliamentary sovereignty) is one such principle. We as a political community have committed to the principle that our legal obligations are determined, in large part, by statutory enactments. Attempts to undermine this process through executive encroachments, therefore, should be treated with suspicion.<sup>507</sup>

Principles governing the use of the prerogative are themselves separation of powers principles in this strong sense. Like all legal principles,

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<sup>507</sup> This is something of an idealised picture, which does not take into account the fluctuating control that the executive already exerts over Parliament due to the nature of the UK political system.

the content of these separation of powers principles are context dependent. The courts, in cases concerning the prerogative, are attempting to work out what all of these principles, considered together, demand. We can understand both *Miller* and *Cherry/Miller* through this lens. We should not, however, interpret this development as a 'turn towards' the separation of powers. Parliamentary sovereignty, understood as a principle of political morality, is itself a principle of institutional power assignation. So are the principles concerning the proper use of the prerogative. The Courts did not turn away from one constitutional principle and towards another. Rather, they considered a package of constitutional principles concerning the institutional functions of the legislature and the executive, and applied these principles in slightly new contexts.

#### A. *The Role of Courts*

In several cases in which the principle of legality is employed, the courts have seemed to give more weight to specific principles where its own institutional role is threatened. This makes good sense when we view legal rights as rights that we are morally entitled to have enforced in court. Attempts to dilute or diminish the institutional role of the courts, reducing or removing the opportunity of enforcement to which citizens are morally entitled, are attacks on the sort of political community that the principle of integrity constitutes.

In *Anisminic Ltd v Foreign Compensation Commission*, for example, the Court had to decide whether a statutory provision precluded judicial review

of decisions by a commission set up to distribute compensation paid by Egypt for the seizure of British-owned properties in Suez.<sup>508</sup> The provision stated, 'The determination by the commission of any application made to them under this Act shall not be called in question in any court of law'.<sup>509</sup> The respondents claimed that 'determination' referred to any decision made by the Commission. The appellants argued that 'if you seek to show that a determination is a nullity you are not questioning the purported determination — you are maintaining that it does not exist as a determination'.<sup>510</sup> In other words, they argued that there was no determination to be questioned. The Court accepted this argument.

If we begin with the notion that section 4(4) of the 1950 Act contributes an institutional norm whose content is worked out through a factual excavation of Parliament's intentions, this judgment seems difficult to justify. The meaning attached to the word 'determination' by the Court seems a deeply unnatural one. We are forced, on this view, to cast this decision as a sort of political manoeuvre. The Court, faced with the 'unthinkable' of a clause excluding judicial review, deliberately misread the statute.<sup>511</sup>

When we take the view that the legal impact of a statute is determined by principles of political morality, we do not need to view this as an instance of judicial sophistry. The principle of integrity makes it the case that we are entitled to have specific rights and obligations enforced in court. Any effort to shield legislation from review is in effect an attack on this broader scheme of

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<sup>508</sup> [1968] 2 AC 147.

<sup>509</sup> Foreign Compensation Act 1950 (FC Act 1950) s 4(4).

<sup>510</sup> [1968] 2 AC 147, 170.

<sup>511</sup> Harry Woolf, 'Droit Public – English Style' [1995] *Public Law* 57, 69.

principle. This explains why the Court is justified in departing from the obvious linguistic meaning of a statute. The content of any legal principle, I have said, is context dependent and dependent on the other principles in force. In this particular context, the content of the democratic principle simply does not carry a great deal of weight, because of the weight assigned to the right of members of the community to access the courts in order to enforce their legal rights and obligations.

Viewing *Anisminic* in this light also allows us to make sense of the court's treatment of the ouster clause in *R (Privacy International Ltd) v Investigatory Powers Tribunal*, where the statutory language seemed to even less ambiguously license the ousting of judicial review.<sup>512</sup> Put simply, any increased weight added to the democratic principle by the more precise wording was negligible because of the law-determining role of the broad right of citizens to have their rights and obligations enforced. This latter principle played a far greater role in determining the impact of the statute in question. After *Privacy International*, it seems even more plausible that no statutory wording could have the legal effect of ousting judicial review. Such a conclusion is not a radical one, when we recognise the fluctuating weight and context-dependent nature of law-determining principles. It is the perfectly coherent result of a moral argument about the proper understanding of the democratic principle, whose content depends on the other legal principles in play.

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<sup>512</sup> [2019] UKSC 22.

Similarly, the majority's judgment in *Evans v Attorney General*, while couched in terms of the rule of law, clearly has the broad right of citizens to have their rights and obligations enforced at its heart. This principle played the key role in fixing the impact of the statute.<sup>513</sup> Lord Neuberger relied here on two principles that he identified as two sub-principles of the rule of law: first, that the decision of a court is binding, and secondly, that executive decisions be reviewable by the court.<sup>514</sup>

When we move beyond what in the previous chapter I referred to as the Orthodox Framework, we can see that some of the criticisms of Lord Neuberger's judgment are misguided. Mark Elliott, for instance, memorably refers to it as 'radical interpretive surgery'.<sup>515</sup> Ekins and Forsythe accuse the majority of striking section 53 of the Freedom of Information Act from the statute book.<sup>516</sup> Such criticisms misconceive of the relationship between the statute book and our legal obligations. A bill's enshrinement in the statute book is a political act, the legal impact of which the courts must interpret. Various principles, including the democratic principle, play a role in determining the proper interpretation of that act. But it begs the question to say that the judgment is wrong *because* it seems to depart from statutory language. A fuller moral argument is needed to reach that conclusion.<sup>517</sup>

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<sup>513</sup> [2015] UKSC 21. Masterman and Wheatle, 'Unity, Disunity and Vacuity' (n 90) 140. They note that Lord Wilson's dissent is the only one in which the phrase 'separation of powers' appears, at [171].

<sup>514</sup> [2015] UKSC 21 [52].

<sup>515</sup> Elliott, 'A Tangled Constitutional Web' (n 88) 546.

<sup>516</sup> Richard Ekins and Craig Forsyth, *Judging the Public Interest: The Rule of Law vs the Rule of Courts* (Policy Exchange 2015) 11.

<sup>517</sup> Masterman and Wheatle do offer a more nuanced engagement with the judgment. They do not argue that Lord Neuberger's judgment was wrong

*Evans* is undoubtedly a harder case than those in which more traditional ouster clauses are at issue. As I pointed out in the last chapter, the threat to the courts' role in *Evans* might be viewed as less pressing, and the statutory wording in the Freedom of Information Act 2000 was arguably fairly clear. One might argue that the court weighed up the law-determining principles here incorrectly, affording too much to the principles protecting the enforceability of legal rights and too little to the democratic principle, given the particular context. This would be an internal argument within the non-positivist framework I have outlined.

These cases could be viewed as 'separation of powers' cases in a weak sense, in that they involve efforts to reduce the grounds on which people can access courts. Judgments about the institutional role of the courts, however, are really just judgments about legal rights more generally. Legal rights are those rights that we are entitled to have enforced by courts. Attacks on the role of the courts, then, are attacks on our legal rights and obligations more broadly. Such judgments do not really concern any *power* held by the courts.

#### *B. The Roles of Parliament and the Executive*

Cases involving conceptions of the proper roles of the Parliament and the government, by contrast to those involving the role of courts, do turn on

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because it strayed from the linguistic meaning of the statute. They do, however, argue that Lord Neuberger's elucidation of the constitutional principles themselves lacked some clarity. Masterman and Wheatle (n 90) 140-143.

principles that specifically speak to the powers of the legislature and executive, and the relationship between them. These are ‘separation of powers’ in a much stronger sense. In recent years, the courts have given judgments in several controversial cases that address this strong sense of the separation of powers. Some commentators view this as a ‘return’ to the principle of parliamentary sovereignty. In my view, this is a mistake. Rather, we can see it as a further development of the courts’ conception of the law-determining role of separation of powers principles. In this way the courts are fleshing out a more nuanced conception of the animating principles of the Constitution.

In *Ahmed v HM Treasury*, for example, an order in council freezing assets was found unlawful not only because it interfered with the litigant’s peaceful enjoyment of their property, but because, as Lord Hope put it, ‘If the rule of law is to mean anything, decisions as to what is necessary or expedient in this context cannot be left to the uncontrolled judgment of the executive’.<sup>518</sup> The rule of law is here taken to include principles of political morality governing the proper role of legal institutions. These separation of powers principles, together with the right of enjoyment of one’s property, determine the legal impact of the 1946 Act, and therefore the legality of the asset-freezing orders.

*Miller* is perhaps the separation of powers case that has attracted the greatest controversy. In this case the Court invoked the principle of legality in

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<sup>518</sup> [2010] UKSC 2 [45].

interpreting the European Communities Act 1972.<sup>519</sup> The majority held that the 1972 Act did not permit the government to trigger Article 50 of the Treaty on the European Union without an Act of the Parliament. The majority stated:

Had the Bill which became the 1972 Act spelled out that ministers would be free to withdraw the United Kingdom from the EU Treaties, the implications of what Parliament was being asked to endorse would have been clear, and the courts would have so decided. But we must take the legislation as it is, and we cannot accept that, in Part I of the 1972 Act, Parliament “squarely confront[ed]” the notion that it was clothing ministers with the far-reaching and anomalous right to use a treaty-making power to remove an important source of domestic law and important domestic rights.

It seems to me that a particular conception of the constitutional role of Parliament is at the heart of this judgment. The notion of parliamentary sovereignty, I have argued, is best understood as a principle of political morality that gives expression to a particular conception of democracy. Central to this conception is the idea that it is the actions of the legislature, and not the executive, that feature most prominently in determining our legal rights and obligations. This principle features prominently in the *Miller* court’s interpretation of the 1972 Act.

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<sup>519</sup> [2017] UKSC 5 [87], [108].

It would not be true to say that *only* Parliament can change our legal obligations. Treaty making, for example, is a prerogative function used by the executive to change our legal rights and obligations in certain ways. This is itself a separation of powers principle to which we as a community have committed. Call this the ‘treaty making principle’. The content of the treaty making principle, like all legal principles, is context-dependent, and is constrained by the operation of other principles. The relevant context here is that the legal change effected would have been sudden, radical and importantly, irrevocable by Parliament. Other principles, including the democratic principle, condition and constrain the treaty making principle. The content of the treaty making principle, for all of these reasons, did not include a power to trigger from Article 50 *in this particular context*.

Mark Elliott argues that the judgment in *Miller* should be viewed as an assertion of traditional constitutional principles; principles which, on his view, do not entirely support the majority’s judgment.<sup>520</sup> He states:

In *Miller*, the key question, for present purposes, was whether the ECA should be construed as leaving open the possibility of prerogative-initiated withdrawal from the EU. To suggest that the doctrine of parliamentary sovereignty assists in reaching the conclusion that the ECA should be construed as foreclosing that possibility (because withdrawal is too great a constitutional matter for the prerogative) does no more than beg the question. The sovereignty principle is affronted

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<sup>520</sup> Mark Elliott, ‘The Supreme Court’s Judgment in *Miller*. In Search of Constitutional Principle’ (2017) *Cambridge Law Journal* 257.

by the use of the prerogative only if, in the first place, the statute leaves no room for the prerogative to be exercised, raising the question: “What does the statute mean?”<sup>521</sup>

Elliott’s essential point is that the use of the prerogative to withdraw from the EU would be problematic, from the perspective of parliamentary sovereignty, only if the ECA 1972 was explicit in forbidding this. This may be the case if we conceive of parliamentary sovereignty as the principle that a statute contributes institutional norms to the law, norms whose content matches the linguistic content of the statute. When we view parliamentary sovereignty as a principle of political morality however, the picture changes.

On the Interpretive Framework set out in the last chapter, parliamentary sovereignty expresses the principle that the question of what legal rights and obligations we are entitled to have enforced in Court is to be determined in large part by legislative enactments. This is a principle to which we as a community have committed, and is one of the principles most firmly embedded in our legal tradition. The 1972 Act is read as foreclosing the possibility of withdrawal through prerogative not because such an action is explicitly prohibited by the linguistic meaning of the statute. Rather, it is because the removal of legal rights and obligations through the prerogative interferes with the fundamental principle that our legal rights are determined in the main by legislation, whose impact is determined by other principles. It is the deeper understanding of parliamentary sovereignty with which withdrawal

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<sup>521</sup> *ibid* 267.

through prerogative would interfere. This principle in turn determines the content of the principle that assigns certain legal powers to the executive. It is a mistake, then, to read the judgment in light of an orthodox understanding of that principle.

Elliott also considers and rejects the possibility that the separation of powers might underpin the judgment:

For one thing, the separation of powers is mentioned nowhere in the majority's judgment. And even if the majority's constitutional scale argument channels without name-checking the separation of powers (in that it reflects that certain, i.e. "major", matters are allocated to the legislative rather than the executive branch) we must once again confront the question of how such matters are to be identified. Just as parliamentary sovereignty cannot assist in that inquiry, neither, arguably, can the separation of powers.<sup>522</sup>

This seems to me to overstate the difficulty in identifying what matters are allocated to the legislature in this instance. We do not need to become embroiled in debates over what counts as a 'major' constitutional change, such that it should remain in the province of the legislature. The majority makes clear that the central consideration is that withdrawal from the European Union alters the legal rights and obligations of UK citizens. This sort of sudden, radical and irrevocable change is not usual.

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<sup>522</sup> *ibid.*

More importantly, Elliott seems to assume that parliamentary sovereignty and the separation of powers offer *competing* rationales. As I have argued, we need not conceive of constitutional principles in this way. The content of both parliamentary sovereignty and the separation of powers are context-dependent, and the weight of each principle will fluctuate depending on that context. The separation of powers is best understood as a package of principles concerning the proper institutional roles of Parliament and the government. Parliamentary sovereignty, I have argued, expresses a principle concerning the democratic legitimacy of Parliament. As such, it just *is* a separation of powers principle, as is the executive powers principle. These are simply a subset of the legal principles picked out by integrity. Whether the ‘separation of powers’ remains a useful label is on this view an open question. Substantively, however, we can say that the judgment is best explained by a specific conception of the principles of political morality that constrain and limit the lawmaking powers of both Parliament and the executive.<sup>523</sup>

Elliott may be correct to say that the Court deliberately uses language that could be interpreted in fairly ‘traditional’ constitutional terms. This may have been designed to quell objections in the context of a politically fraught case. Closer examination, however, shows that the majority judgment in *Miller* is underpinned not by an orthodox conception of parliamentary sovereignty, but by a specific conception of the proper ambit of both legislative and

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<sup>523</sup> We need not dwell on Elliott’s first point, that the Court does not mention the term ‘separation of powers’. Parliamentary sovereignty, understood in moralised terms as a democratic principle, itself expresses a conception of the separation of powers.

executive power. The majority relies on a conception of the separation of powers that determines the legal impact of the 1972 Act in this particular context.

This is best explained as flowing from the broader theory of general jurisprudence set out in chapter 4. On that view, our legal rights and obligations are determined by principles of political morality to which we as a political community are committed. Parliamentary sovereignty, I argued, is best understood as one of these principles. Specifically, it is best understood as the principle that a statute's linguistic meaning will, for democratic reasons, carry particular weight in determining the statute's legal meaning. We have seen that this does not mean that a statute's legal meaning matches its linguistic meaning, because other principles will also feature, and may carry greater weight than this democratic principle. But this understanding of parliamentary sovereignty is premised on the idea that a political community within which legal obligations depend in part on the actions of a democratically elected legislature is a political community whose members are treated with equal concern. Or, at least, it is closer to being such a community than one in which the legislature's actions bear no relation to the circumstances in which coercive force is licensed by courts. The removal of legal rights and obligations through the prerogative was unlawful, on a correct reading of the 1972 Act, precisely because it undermined this deep political commitment.

### **3. Beyond Statutes: Legality, Separation of Powers, and the Royal Prerogative**

What recent focus on the separation of powers has made clear is that the principle of legality is not simply a device for the interpretation of statute. Rather, judges engage in much the same process when they interpret the legal limits of executive power as well. *Miller* showed this to an extent, though the ECA 1972 played a central role. *Cherry/Miller*, however, offers us a far less ambiguous example.

A. *Cherry/Miller*

The unanimous judgment in *Cherry/Miller* further emphasises the law-determining role of separation of powers principles in the strong sense.<sup>524</sup> Some might take the view that this case is irrelevant to an analysis of the principle of legality, since it does not involve the interpretation of statute. This, however, would be a mistake. If the judgment in *Cherry/Miller* is underpinned by the same principles as those that underpin other cases in which the principle of legality is employed, then this tells us something about that method of interpretation. Specifically, it tells us that the legal impact of different law-determining actions (statute or prerogative) are interpreted in the same way: through reflection on the principles that determine the moral impact of those actions. Different principles might apply to statute and prerogative. The democratic principle will not play the same role in determining the impact of the prerogative in the same way as it does with statute, for instance. But the courts will still try to interpret the obligations that

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<sup>524</sup> [2019] UKSC 41.

obtain in virtue of these actions by appealing to the principles to which the political community is committed.

The Court in *Cherry/Miller* emphasised both the role of the Court and that of Parliament. First, in considering whether the Court had jurisdiction to decide on the matter, the Court once again emphasised its own institutional role.<sup>525</sup> The judgment noted, ‘It is [the courts’] particular responsibility to determine the legal limits of the powers conferred on each branch of government, and to decide whether any exercise of power has transgressed those limits’.<sup>526</sup> I have argued above that such statements about the institutional role of the courts are best understood as statements about the nature of legal rights and obligations more generally. Legal rights are those whose enforcement in court we are entitled to. In this instance, the relevant point is that we as members of the legal community are entitled to call upon the coercive power of the state to demand that governmental power not be exercised in a particular way. This is why the Court emphasised its own responsibility in determining the legal limits of the powers of other branches of government. This reading is consistent with the treatment of the role of the courts in *Anisminic*, *Privacy International*, *Evans* and *Miller*. As I have argued, this conception is justifiable by the lights of law as integrity.

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<sup>525</sup> Just as the absence of the term ‘separation of powers’ was notable in *Evans* and *Miller 1*, Simon Lee notes that the absence of discussion of ‘the rule of law’ in this case was notable. Simon Lee, ‘The Supremes’ Seventh: Dominant or Diminished?’, *UK Constitutional Law Association Blog* (26th September 2019), available at: <<https://ukconstitutionallaw.org/2019/09/26/simon-lee-the-supremes-seventh-dominant-or-diminished/>>.

<sup>526</sup> [2019] UKSC 41 [40].

Secondly, the Court relied on what I have called separation of powers principles in the strong sense: principles that set out and constrain the powers of Parliament and the government. More specifically, when determining whether the prerogative power could lawfully be used to prorogue Parliament, the Court emphasised the principle of governmental accountability to Parliament. They held that prorogation would be unlawful if it frustrated Parliament's ability to hold the government to account without reasonable justification.<sup>527</sup> In articulating the importance of the principle of accountability, the Court appealed directly to principles of political morality underpinning the proper role of each institution:

We live in a representative democracy. The House of Commons exists because the people have elected its members. The Government is not directly elected by the people (unlike the position in some other democracies). The Government exists because it has the confidence of the House of Commons. It has no democratic legitimacy other than that. This means that it is accountable to the House of Commons - and indeed to the House of Lords - for its actions, remembering always that the actual task of governing is for the executive and not for Parliament or the courts.<sup>528</sup>

The Court's analysis seems to me to take the precise form as their analysis of other cases in which the principle of legality has been used. The

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<sup>527</sup> *ibid* [50].

<sup>528</sup> *ibid* [55].

use of the prerogative power, like the enactment of a statute, is generally recognised as a political act that results in legal rights and obligations. The precise impact that it has on our legal obligations, however, is determined by the principles of political morality to which the community is committed, including principles concerning the proper separation of powers. The Prime Minister's purported use of the power to prorogue Parliament had no legal impact, because the principle of accountability (understood as shorthand for a complex conception of the separation of powers) outweighed any principle that would normally weigh in favour of the prorogation having the impact the Prime Minister wanted it to have.

In considering the distinction between prerogative and statute, the Court said:

A prerogative power is, of course, different from a statutory power: since it is not derived from statute, its limitations cannot be derived from a process of statutory interpretation. However, a prerogative power is only effective to the extent that it is recognised by the common law... A prerogative power is therefore limited by statute and the common law, including, in the present context, the constitutional principles with which it would otherwise conflict.<sup>529</sup>

When we view the principle of legality as a process of moral reasoning designed to work out what our legal obligations are, this distinction breaks

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<sup>529</sup> *ibid* [49]. The Court here explicitly drew a parallel with the exercise of the principle of legality in *UNISON*.

down, as the Court indicates here. In both instances, courts attempt to work out the moral impact of law-determining actions, by appealing to principles of political morality to which the political community is committed. The distinction between each type of law-determining action is a moral one, concerning the weight of principles that apply to each. This is how we should interpret the above extract.

*B. Elgizouli*

Given the Court's explicit interpretation of the prerogative in line with constitutional principles in *Cherry/Miller*, its recent judgment in *Elgizouli v Secretary of State for the Home Department* is disappointing.<sup>530</sup> This case, by way of reminder, concerned the question of whether the Home Secretary could use the prerogative power of 'mutual legal assistance' to aid the US in prosecuting an individual without obtaining an assurance that the death penalty would not be imposed. Lord Kerr, in dissent, argued that the common law prohibited the use of the prerogative under such circumstances. The reason for this conclusion, he argued, was that the common law is sensitive to external influence. In this case, it was influenced by the prohibition of 'cruel and unusual' punishment in Article 10 of the Bill of Rights 1688, and the consensus among the UK public, in Strasbourg and EU jurisprudence, and

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<sup>530</sup> [2020] UKSC 10.

shared generally in European democracies, that the death penalty constituted such a punishment.<sup>531</sup>

We can best understand Lord Kerr's judgment as appealing to the principle of integrity to determine the scope of the prerogative. He identifies principles of justice surrounding the proper value attached to human life, and the prohibition of certain punishments by the State in various parts of UK legal practices. In particular, Article 10 of the Bill of Rights signals a general commitment to a particular moral standard: the prohibition of cruel and unusual punishment. Rather than prohibit specific punishments, that provision directs us to make a moral judgment about what constitutes 'cruel and unusual'. It is, to use language I used in Chapter 3, an abstract rather than concrete provision. It is entirely proper, then, that Lord Kerr relied on an evolving public consensus to interpret the influence of this provision on the common law.

Lord Carnwath and Lord Reed, by contrast, viewed this interpretation as a development of the common law that strayed too far from what the institutional record licensed. Dworkin's distinction between 'inclusive' and 'pure' integrity is useful here. The latter refers to the outcome that justice alone would demand, discounting institutional considerations (such as the weight to be afforded to the legislative process).<sup>532</sup> Inclusive integrity refers to the outcome that integrity demands when these principles are included as well.<sup>533</sup> In this case, the institutional constraint in question, for Lords Carnwath

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<sup>531</sup> *ibid* [102], [107], [111], [142].

<sup>532</sup> Dworkin. *Law's Empire* (n 10) 405.

<sup>533</sup> *ibid* 404.

and Reed, is the perceived absence of any common law recognition of the principle specified, and the absence of any legislation specifically prohibiting the use of the mutual legal assistance power under such circumstances. While principles of justice militate against facilitating the death penalty, on this view, coercively enforcing such a principle would itself violate integrity, understood in the inclusive sense.

The question, then, is whether the principles identified prohibited not only the State's carrying out the death penalty, but sharing information that might lead to the death penalty. Relying again on Strasbourg jurisprudence, Lord Kerr noted that the death penalty was prohibited under Convention law *in all circumstances*.<sup>534</sup> This seems to me the crucial point. Past decisions at the European level are underpinned, on this evidence, by an *absolute* principle. The common law is sensitive to this European jurisprudence. The Bill of Rights, which influences the common law's development, prohibits cruel and unusual punishment, and this European consensus should influence the interpretation of the concrete demands of that abstract requirement. On this absolute view, there seems to me little justification for distinguishing between directly imposing the death penalty and indirectly bringing it about. Lord Kerr recognises this when he states:

The person who is extradited to face the death penalty is in precisely the same position as he whose execution has been facilitated by the provision of mutual legal assistance. In both instances there is in play

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<sup>534</sup> [2020] UKSC 10 [113].

an underlying principle that it is inconsistent with a fundamental common law principle of justice for the government to facilitate the imposition of a cruel and inhuman punishment in a foreign state.<sup>535</sup>

He presents an argument that the legal community, integrated within a broader international community, has reformed its thinking and practice on this subject in line with a vision of social and political justice, such that that vision now informs the interpretation of law.

Lord Carnwath relies on a distinction between extraditing a person who is under sentence of death already, on the one hand, and providing evidence which *may* be used to secure a death sentence on the other.<sup>536</sup> This is unpersuasive. The principles underpinning such cases – an aversion to lethal force from the State in criminal proceedings – are sufficiently similar to invite principled consistency in their adjudication. He is wrong, then, to say ‘there is as yet no established principle... which prohibits the sharing of information relevant to a criminal prosecution in a non-abolitionist country merely because it carries a risk of leading to the death penalty in that country’.<sup>537</sup> Such a conclusion is based on a moral miscalculation; a failure to properly interpret the principles of justice underpinning the legal record.

Similarly, Lord Reed’s dismissal of the relevance of the Article 10 of the Bill of Rights is based on an overly restrictive reading of the principles underpinning that statute. He said, ‘[Article 10’s] prohibition of cruel and

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<sup>535</sup> *ibid* [71].

<sup>536</sup> *ibid* [201]-[202].

<sup>537</sup> *ibid* [191].

unusual punishments concerns the infliction of punishment by the Crown. That is not the subject matter of the present case'.<sup>538</sup> On this basis, he characterises the right to life under common law as 'a value to which the courts attach great significance when exercising their supervisory jurisdiction', and determines that the only role played by the principle is as an aid in determining whether the Home Secretary's decision was irrational.<sup>539</sup>

This, however, is premised on an overly narrow view of Article 10. That provision is best understood not as concerned specifically with protecting subjects from the Crown, but with protecting individuals from the State. The prerogative power contains the vestiges of monarchical power. Using that power in a way that risks the death penalty's imposition is a paradigmatic example of the use of such power to inflict violence on an individual. Lord Reed's justification for relying on ordinary principles of substantive judicial review is that the Bill of Rights, a constitutional statute, does not imbue the common law with any constitutionally significant right to life. This, however, is an unjustifiably conservative interpretation of that statute and its influence on the common law.

The Court in *Cherry/Miller* was correct to apply the same reasoning that underpinned other cases involving the principle of legality to the question of whether the prorogation could be used to prorogue Parliament. The litigants in *Elgizouli* were entitled to have their cases decided under the same scheme of principle. The majority missed an opportunity to clarify the applicability of the principle of legality to the prerogative.

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<sup>538</sup> *ibid* [171].

<sup>539</sup> *ibid* [175].

It is important to note that none of the judges disagreed that principles of justice concerning the right to life and the prohibition of cruel punishments ran through the legal system, or that they determined the scope of the common law. The point of disagreement, rather, was whether these principles grounded a legal prohibition on the sharing of information that might lead to the death penalty, as well as simply a prohibition on the death penalty itself. The disagreement, in other words, was a moral one, about the proper understanding of the demands of justice in a particular context, and the institutional constraints that must be considered alongside such principles. Each judge offers a competing moral interpretation of the legal record.

It may seem that I have strayed a long way from traditional legality cases like *Simms* and *Pierson*. When viewed against the backdrop of law as integrity, however, the distinction between such cases breaks down. Legality is a method of interpretation designed to work out what the law is, and the law is determined by moral principles drawn from past relevant decisions. On this view, legality is best understood not as a literal presumption about Parliament's intention, or as a demand for a particular sort of justification. Rather, judges are engaged in working out what the law is by interpreting the principles of justice that integrity makes legally relevant. They do so in interpreting both statute and the prerogative. The importance of different sources of law, on this view, breaks down. Legal obligations are grounded in moral principles that underpin various sources operating in tandem. In *Simms*, principles of justice concerning free speech determined the legal impact of the statute in question. In *Elgizouli*, Article 10 of the Bill of Rights partly

determines the scope of the common law, and the common law determines the scope of the prerogative power. In both cases, moral principles picked out by integrity determine the law. Prerogative, statute and common law are tied together by the principles of justice that animate the legal system.

#### 4. Strike Down?

In my analysis of the judgment in *Cherry/Miller*, I said that the Court found that the Prime Minister's use of the prerogative had no legal impact, because that impact is determined by principles of political morality. This brings us back to another of our difficult questions. If the court, in interpreting the prerogative, is engaging in the same sort of analysis it does when interpreting statute, and if it is open to it to find that the prerogative had no legal effect, does it follow that it is also open to it to hold that a *statute* has no legal effect? That is, can courts, using the moral reasoning that underpins the principle of legality, strike down statutes?<sup>540</sup>

On the view that I have set out, the short answer is yes. On the broader conception of legality, principles of political morality determine the impact of a statute. It is conceptually possible, on this view, that a statute has no legal impact whatsoever. It is perhaps misleading to think of this in terms of 'striking down' or 'refusing to apply' a statute. In such circumstances there is nothing to 'apply', because no obligation has been generated. Judges are simply exercising the ordinary function of working out what legal obligations we hold in virtue of a statute's enactment.

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<sup>540</sup> The more accurate way of putting this question is not '*can* courts strike down statutes?' but '*must* courts strike down statutes?'

This allows us to make sense of the judicial dicta that have caused so much trouble in public law theory.<sup>541</sup> Lord Steyn's statement on this point in *Jackson v Attorney General* is worth quoting at length:

[The UK constitution] is a legal order in which the United Kingdom assumes obligations to protect fundamental rights, not in relation to other states, but towards all individuals within its jurisdiction. The classic account given by Dicey of the doctrine of the supremacy of Parliament, pure and absolute as it was, can now be seen to be out of place in the modern United Kingdom. Nevertheless, the supremacy of Parliament is still the *general* principle of our constitution. It is a construct of the common law. The judges created this principle. If that is so, it is not unthinkable that circumstances could arise where the courts may have to qualify a principle established on a different hypothesis of constitutionalism. In exceptional circumstances involving an attempt to abolish judicial review or the ordinary role of the courts, the Appellate Committee of the House of Lords or a new Supreme Court may have to consider whether this is a constitutional fundamental which even a sovereign Parliament acting at the behest of a complaisant House of Commons cannot abolish.<sup>542</sup>

We can now understand this as a statement about the competing weight of different law-determining principles. Parliamentary sovereignty is the '*general*

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<sup>541</sup> [2005] UKHL 56; [2011] UKSC 46; [2019] UKSC 22.

<sup>542</sup> [2005] UKHL 56 [102] (emphasis in original).

principle' of the Constitution in the sense in which I have argued in this chapter and the previous one. That is, it is best understood as a democratic principle which, in virtue of the more abstract principle of integrity, carries great weight in the UK legal order. It is, however, not the only law-determining principle. This is why the courts 'may have to qualify' it. Finally, Lord Steyn points to the possibility of cases in which this democratic principle would bear *no* law-determining weight, because of the corresponding weight of other 'constitutional fundamentals' playing a law-determining role in the particular case.

This is also how we can understand Lord Hope's statement that the courts 'have a part to play in defining the limits of Parliament's legislative sovereignty',<sup>543</sup> and Lady Hale's statement that the courts 'will treat with particular suspicion (and might even reject) any attempt to subvert the rule of law by removing governmental action affecting the rights of the individual from all judicial scrutiny'.<sup>544</sup> Each of the judges views parliamentary sovereignty as an important law-determining principle, but recognises that it is not the only principle at work. Its content in particular cases is determined by the context in which it operates, and by the weight of other relevant principles. In certain instances, it may carry no weight at all. Lord Hope's statement in *AXA v Lord Advocate* offers perhaps the clearest statement to this effect: 'The rule of law requires that the judges must retain the power to insist that legislation of that extreme kind is not law which the courts will recognise'.<sup>545</sup>

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<sup>543</sup> *ibid* [107].

<sup>544</sup> *ibid* [159].

<sup>545</sup> [2011] UKSC 46 [51].

Allison Young argues that the principle of legality and ‘strike down’ of legislation perform different functions, and so should be conceptually distinguished.<sup>546</sup> Legality, she claims, is a tool for (i) protecting fundamental common law rights, and (ii) protecting a conception of the proper separation of powers.<sup>547</sup> A strike down power, on the other hand, should be understood as a tool for ‘preserving the constitutionally hierarchical relationship between the legislature and the executive and upholding the constitutional role of the judiciary’.<sup>548</sup>

This distinction overstates the difference between the normative foundations of each interpretive mechanism. As we have seen, the separation of powers interacts with other important rights and principles in determining a statute’s impact. We cannot silo one particular law-determining principle from the others. Each law-determining principle determines the content of the others in any particular context. Young may be right to think that cases in which the constitutional role of the court is at issue are cases in which the democratic principle will have a particularly negligible weight. These cases will then look like ‘striking down’. But this is still just an example of the ordinary judicial function: determining the legal impact of a statute.

*Privacy International* offers support for the view that the principle of legality and the possibility of ‘strike down’ do not occupy separate conceptual spaces, but rather are part of the same continuum. Here the Court applied the principle of legality to read the ouster clause in terms that seemed to depart

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<sup>546</sup> Alison Young, ‘Fundamental Common Law Rights and Legislation’  
Fundamental Common Law Rights and Legislation’ (n 20) 246.

<sup>547</sup> *ibid.*

<sup>548</sup> *ibid.*

from the linguistic wording of the statute. I argued above that this was because such clauses deny individuals the enforcement of their rights to which integrity makes them morally entitled. The Court also gave the example of an ouster clause that sought to exclude the jurisdiction of the High Court as one that would have no legal effect even if the statutory wording were extremely clear.<sup>549</sup> The concerns underpinning both statements – the application of legality and the possible ‘strike down’ – are the same; namely, a concern that individuals not be prevented from being able to have their legal rights and obligations enforced. In both instances the Court is making more or less the same argument: that the statute’s legal impact in these circumstances, because the content of the democratic principle depends on other principles at play in this particular context. To think of an interpretation as a ‘strike down’ is simply to think that the other principles bore much greater weight than the democratic principle in a given context, even where statutory language was clear.

It should be noted that I am not here calling for judges to exercise the power to ‘strike down’ legislation any more frequently than they have so far done. My argument is that the distinction between ‘striking down’ legislation and interpreting legislation in a way that departs from its linguistic meaning is not a stable one. The legal impact of legislation is underdetermined by its linguistic meaning, and is partly determined by principles of political morality. Each principle will have fluctuating weight, depending on the other principles in play and the particular factual circumstances of the case. In some

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<sup>549</sup> [2019] UKSC 22 [144].

instances, the weight of the democratic principle that makes statutory wording relevant will be drastically diminished by the importance of other principles at stake. In these instances, the linguistic meaning of the statute will have a negligible role in determining its legal impact. If this is what it means to ‘strike down’ legislation, then that is an ordinary part of the judicial function.

Some might still express concern at the prospect of US-style ‘strike down’ of legislation in UK courts. There is, however, an important distinction between the US system and the sort of strike down I am envisaging. Judicial invalidation of legislation in the US is accompanied by specific institutional consequences that do not apply in the UK context. In the UK, I have argued that it is open to judges to hold that a particular political action (the enactment of a piece of legislation) had no legal effect. In the US, judges go further than this. The effect of a successful facial challenge to the constitutionality of legislation is that future courts are directed to treat the offending legislation as though it never existed. The political act is in effect erased, and the government is pre-empted from being able to use the same legislation again in a different context. There is nothing for future courts to interpret.

In the UK context, it may be held that the political action of enacting primary legislation had no legal effect, but the political action remains as an event in the world whose consequences for our legal rights and obligations may be interpreted again in a different context.<sup>550</sup> Political concern about the development of ‘strong-form’ judicial review in UK courts, then, is overblown. UK courts can already hold that a statute had no legal effect in the particular

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<sup>550</sup> This is not the case, of course, with secondary legislation, the ‘strike down’ of which is analogous with the US mechanism.

context before them, but the institutional consequences that would follow such an interpretation in the US do not apply in the UK. It is in this sense much more akin to an ‘as applied’ constitutional challenge than a facial one.

Finally, one could argue that the democratic principle is of such vital importance that its weight can never be so diminished. If this is what is meant by the claim that judges *cannot* ‘strike down’ legislation, then we are having the right sort of argument. We can move away from arguments about whether such judicial action would constitute a change to the ‘rule of recognition’ in the UK’s constitution, or arguments that rely on an unstable distinction between ‘legal’ and ‘political’ actions. Rather, we accept that what rights and obligations that obtain in virtue of a statute is a moral question, one that requires us to engage with the principles of political morality that underpin our legal practice. This is precisely the enterprise in which judges are engaged when they invoke the principle of legality.

## Conclusion

At the beginning of this thesis, I said that whether a method of interpretation is justifiable depends on whether it helps us to work out what legal obligations obtain in virtue of a statute’s enactment. The justifiability of a method of interpretation, it follows, depends on prior questions about the nature of legal obligations, and their relationship with statutory enactments. On the theory of general jurisprudence put forward in Chapter 4, principles of political morality picked out by the more abstract principle of integrity determine a statute’s

legal impact. Against this backdrop, the principle of legality is a justifiable method of interpretation, once we look past the surface level terminology surrounding it. If the principle of legality is merely a presumption about the intentions of legislative actors, then it is not justifiable, since the intentions of legislative actors alone underdetermine a statute's legal impact. If we view the 'presumption' of legality as shorthand for a more complex process of moral reasoning, then the principle of legality is justified as a method of working out what the law is.

Judges, on this view, are interpreting the moral underpinnings of statutes. They are asking what impact a statute has had on our moral obligations, and to answer this question they are considering the applicable principles of political morality to which we as a community are committed. The principle of legality is thus a method of interpretation that is connected to the broader value of integrity. It is a method that aids in the constitution of a political community whose citizens are treated with equal concern.

## Thesis Conclusion

In this thesis, I set out to demonstrate that the principle of legality is a more complex aspect of public law practice than is typically thought. Accounts of this method of interpretation typically cast it as a 'presumption' about the good intentions of the legislature. I have argued that this is a distortion, one that holds back both theoretical analysis of the principle of legality and practical guidance on its application. The labelling of legality as a 'presumption', I have argued, is best understood as shorthand for a more sophisticated process of moral reasoning. The role of the judge, on this view, is not simply to act as an archaeologist of legislative intentions. Rather, they are required to consider the moral principles that underpin our public law practice in order to work out what rights and obligations the litigants before them have. When judges employ the principle of legality, I argue, they are attempting to interpret statutes by asking what specific principles of political morality apply to the case before them, and how those principles interact with the statute that they are interpreting.

This theory has profound consequences for how we think about the principle of legality. To take one consequence of the theory, the principle of legality, on the view I set out here, applies as much to interpretation of prerogative powers as to statute. In both instances, judges attempt to work out what rights and obligations obtain in virtue of specific political actions. The only difference is that different moral principles will apply to the prerogative and to statute respectively, and so the moral calculation will not be the same.

But this is as true of the interpretation of two different statutes: what moral principles apply, and the content of those moral principles, will change and fluctuate depending on context.

A particularly striking consequence of this theory is that judicial ‘strike down’ of legislation should be considered both a legitimate and fairly mundane part of legal practice. The linguistic meaning of a statute, I have argued, underdetermines its legal meaning. It is open to judges to hold that the linguistic meaning of a statute plays no role in determining the rights and obligations that follow from that statute, because of other principles in play. This makes sense of judicial dicta in which strike down of legislation has been mooted, and offers a coherent framework for adjudicating such matters that has so far eluded theories of public law.

More generally, this theory offers a more nuanced picture of the relationship between statute and common law. Too often, debates on that subject turn on what list of rights can be ‘found’ in common law, and on whether such rights are really ‘legal’ rights at all. These debates, in other words, are beholden to a positivist view of law, according to which the existence of this or that legal obligation is a matter of social fact.

One of the central themes of this thesis is that public law, like law generally, is a moral practice. Legal rights are a particular subset of our moral rights, and we work out their content through a process of moral engagement. In order to work out what rights obtain in virtue of a statute’s enactment, we do not only look to the wording of that statute or the intention of those who worded it. Similarly, in order to work out the content of ‘common law rights’,

we do not just look to what rights this or that judge said we have. Rather, in both instances, we morally interpret the legal record, and work out what rights and obligations we have *in virtue of* that record. The principle of legality is a method of interpretation that follows from the moralised nature of law as a whole.

If this seems to call for a radical rethinking among theorists of the philosophical underpinnings of the principle of legality, the good news is that it calls for judges to do relatively little differently as a practical matter. Indeed, one upshot of the claims made in this thesis is that judicial use of the principle of legality is, in general, morally justified. There are cases in which judges come to the wrong decision, but the practice as a whole is a justifiable aspect of our public law practice. If the thesis calls for anything from judges, is that only they approach the application of the principle of legality with greater awareness of what they are doing, and abandon the distorting fiction that they are excavating the intention of the legislature. They need not dismiss the relevance of legislative intentions entirely. They need only put such intentions in their place, as one relevant element in a moral argument. Any exercise in moral reasoning will be improved if approached self-consciously. I hope that by acknowledging a richer conception of what the principle of legality involves, judges will be able to abandon even lip service to the notion that legality requires them to make a presumption about the legislature's intention. They will then be able to participate in a more open, intellectually candid way in the sorts of moral arguments that already underpin their decisions. This can only improve the quality and coherence of public law decisions.

I began in Chapter 1 with a doctrinal analysis of the principle of legality. I attempted to identify key aspects of this part of public law practice that any theory of the principle must explain. From this I drew out six difficult questions about legality; theoretical uncertainties that a theory should help us resolve. These included questions about what rights triggered legality's application, how much weight was to be afforded to the wording of the statute being interpreted, whether legality applied to the prerogative as well as statute, and whether legality implied that judges could 'strike down' legislation in extreme circumstances. Crucially, a theory of the principle of legality must also be able to explain how it is that judges disagree on all of these questions.

In Part II of the thesis, I considered one influential theory of statutory interpretation, called 'intentionalism'. On this view, when judges invoke the principle of legality, they make a presumption about the intentions of the legislature. This is premised on a wider theory of legal obligation, according to which the content of obligations is determined solely by legislative intentions. I argued that this view is wrong, because it misunderstands both the nature of legislative intentions and the relationship between such intentions and our legal obligations.

In Chapter 2, I tried to clarify important ambiguities in intentionalist theories. I argued that intentionalism conflates a statute's 'linguistic meaning' (the communicative content of the statute) and its 'legal meaning' (the legal rights and obligations we hold in virtue of that statute's enactment). Intentionalism is coherent only if understood as a theory of a statute's linguistic meaning. In this case, however, its claims would be trivial, and it

would have little to say about any method of statutory interpretation, since such methods are designed to work out a statute's legal meaning. This leaves intentionalism unable to explain key parts of public law practice.

One way of moving from a theory of linguistic meaning to legal meaning would be to show that intentionalism is supported by a theory of general jurisprudence. In Chapter 3, I consider such arguments. I show that intentionalism is unsupported by the positivist theories on which it traditionally relies. The only theory that offers a coherent role for legislative intentions is interpretivism. On this view, however, the intention held by the legislative intention is not a social fact waiting to be uncovered. Rather, legislative intention is something that can only be attributed to a legal institution through normative reflection on the sort of institution that it is, and the sorts of intentions that it *should* have.

In Part III of the thesis, I set out a non-positivist, or interpretivist theory of the principle of legality. This theory offers explanations of key aspects of the practice that intentionalist theories fail to explain. In particular, it is capable of accounting for the deep disagreements among judges that surround legality's application.

I began in Chapter 4 by distinguishing between different versions of non-positivism, and clearing the ground of debate between such theories. Non-positivist theories agree that moral principles make it the case that certain political actions (such as the enactment of statutes) result in moral obligations, and that a subset of these moral obligations are what we call 'legal obligations'. What they disagree on is what moral principles operate in

the legal 'domain' of morality. I endorsed Ronald Dworkin's theory of law as integrity. According to this theory, in short, legal obligations are those moral obligations whose enforcement in court we are entitled to. What these obligations are is determined by principles of political morality drawn from relevantly similar decisions about when such enforcement is justified. When a judge interprets a statute, then, she asks what principles apply in the specific case before her by appealing to the more abstract principle of integrity, and then attempts to work out what moral effect these principles cause the statute to have.

In Chapter 5, I argue that this theory of general jurisprudence can help us build a theory of UK public law that provides a more satisfactory and nuanced account of key aspects of public law practice. In particular, I show that it helps us move past discussions of the constitutional principles of parliamentary sovereignty and the rule of law that views these principles as in tension. On the view I put forward, these constitutional principles are each packages of moral principles that play a role in determining the legal impact of a statute. The precise content of these principles changes depending on the particular context in which they apply, and the other principles that are in play. When judges invoke the principle of legality, on this view, they are attempting to work out what legal obligations follow from the statute before them, by engaging with these moral principles.

In Chapter 6, I show that this view of the principle of legality explains key aspects of the practice, and offers answers to the difficult questions outlined in Chapter 1. The question of what rights trigger legality's application,

for instance, is not answered by providing a shopping list of rights that are included as part of the 'rule of law', but rather by asking what moral principles are in play in determining a statute's legal impact. The question of how much weight must be afforded to statutory language, similarly, is a moral one. Statutory wording is made relevant to legal obligation by moral principles. The content of these moral principles will change depending on the particular context in which they operate and the other principles in play. Judges, then, when they invoke legality, do not make presumptions about what Parliament as a matter of fact intended. Rather, they engage in a complex process of moral reasoning about the contextual content of specific moral principles, including principles that make statutory wording relevant.

It is hoped that this theory brings clarity to an important aspect of our public law practice. A lack of theoretical clarity around the principle of legality to this point may have been of little practical significance, given the role of the Human Rights Act 1998. We could afford to avoid difficult questions about legality's application, and the more difficult questions about its nature that precede them, and focus instead on section 3 of the HRA. Recent developments mean that that strategy is no longer sound. The HRA's repeal and the UK's withdrawal from the ECHR have both been mooted. More pressingly, legislative amendments have sought to undermine the HRA in important ways. In the face of such developments, clarity about the nature of common law rights and obligations, and their interaction with statute, is vital.

By clarifying the nature of the principle of legality, within a theory of public law and a broader theory of general jurisprudence, I hope to have

contributed a framework to guide the development of public law, whether in times of political challenge or stability. Whatever statute remains or does not remain on the books, and whatever international agreement we remain or do not remain part of, we are the bearers of moral rights and obligations whose enforcement we are entitled to demand, rights that are tied to the community of equals of which we are each a part.

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