

Instead of a public law fragmented into discrete departments, we should envisage a unified scheme of constitutional rights and legal standards, expressing a coherent moral theory of the rule of law. That moral theory underpins all legitimate legal orders, properly respectful of human dignity; and common law adjudication is best understood as the working out, according to context, of the practical implications of the theory. An initial focus on more local legal tradition ultimately leads to a broader inquiry about the true demands of human rights and civil liberties, offering the prospect of a larger vision of democratic constitutionalism. While Jeremy Waldron has doubted the similarity between legal analysis and moral reasoning—rejecting an analogy with Rawlsian reflective equilibrium—his view may be contested. A common law judge who attempts to reason morally in the name of the whole society, in the manner suggested by Ronald Dworkin’s theory of integrity, must take account of those legal texts and precedents that political morality makes pertinent. Legal reasoning is simply moral reasoning, attentive to historical and political context.

Keywords: common law adjudication / constitutional rights / rule of law / reflective equilibrium / moral reasoning

I Introduction

In place of the fragmentation and division that may initially seem to characterize our various public law régimes, I wish to defend a more united and coherent vision. Insofar as administrative law is unified by the application of general principles of judicial review, it must be regarded as a central part of constitutional law; and insofar as constitutional law, within the various common law jurisdictions, is unified by general principles of legislative supremacy, the rule of law, and the separation of powers, we can recognize a shared vision of liberal democratic constitutionalism. Beneath and beyond our various constitutional enactments, including our modern charters and bills of rights, lies a *common law constitution*—a set of ideas and assumptions about the nature and conditions of legality, which in turn define the character of legitimate government.

The common law constitution is chiefly characterized by its dependence on legal

principle, which demands a connected and coherent response to all legal questions prompted by the exercise of governmental power. The law applicable to any particular case is always determined, in the last analysis, by reflective engagement with the basic principles that seek to preserve the legitimacy of official decision-making and administrative action. That connection between legality and legitimacy, secured by the consistent application of legal principle—reconsidered and articulated afresh in response to changing events—generates a *moral unity of public law*.¹

Curtailments or redefinitions of constitutional rights, in particular, must withstand the scrutiny provoked by attention to underlying conceptions of general principle. Infringements or violations of rights are identified, and resisted, by a similar recourse to constitutional theory, organized around a persuasive account of the rule of law, informed by both political philosophy and legal tradition. Whether or not such rights are encoded in a formal bill of rights, they are an integral part of any genuine legal order—one properly respectful of human dignity and capable of generating obligations of loyalty and obedience. Fundamental rights are central to the developed common law, necessary constituents of a coherent conception of the rule of law.²

The rule of law embraces both procedure and substance: it imposes standards of *due process* that, by requiring deliberation attuned to the specific context, exclude unfair governmental action—action that gives insufficient weight to constitutional rights and legitimate individual interests. Informed by abstract ideals of freedom and equality, individual rights are ultimately entitlements to an appropriate level of *justification*: governmental action, impinging on rights, must be justified in the light of pressing and

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¹ For further argument, see T. R. S. Allan, *The Sovereignty of Law: Freedom, Constitution, and Common Law* (Oxford: Oxford University Press, 2013).

² See also T. R. S. Allan, 'The Rule of Law' in David Dyzenhaus and Malcolm Thorburn, eds., *Philosophical Foundations of Constitutional Law* (Oxford: Oxford University Press, 2016) 201.

reasonable public needs; and the satisfaction of such needs, however genuine, cannot be allowed to overwhelm basic rights or deny their status as constituents of a coherent conception of human dignity. A disproportionate interference with constitutional rights, having regard to the relative urgency of countervailing public interests, is a denial of the equal status of those affected: it is *unreasonable* (or irrational) in its primary legal sense of failing to accord equal respect to all those persons subject to the jurisdiction of the relevant public authority.³

Unreasonable administrative action is the product of a flawed decision-making process, marred by a focus on irrelevant matters or by an attribution of insufficient or, alternatively, exaggerated weight to relevant ones. What is rightly influential in one context may, having regard to the broader constitutional perspective, be relatively insignificant in another. The separation of powers, moreover, ensures that there is a procedural dimension to the judicial enforcement of all constitutional rights. There is always scope for courts to be instructed in the administrative complexities and consequences of governmental action, necessarily critical to the context in which legality is determined. It is not merely that courts usually depend, to some degree, on the expertise of the public authority, but rather that a judicial decision must reflect the strength of the evidence adduced and the arguments presented (in which the fruits of such expertise, if relevant, must be suitably articulated). The integrity of judicial review is ensured by its central focus on the quality of the administrative process leading to the official action impugned.⁴

While public law doctrine is a necessary tool in the search for consistency and coherence, it is in the end subservient to a deeper, more finely grained response legal principle.⁵ The various heads and standards of review must be adapted to accommodate

³ See generally Allan, *Sovereignty of Law*, supra note 1, c. 3.

⁴ See *ibid*, c. 7.

⁵ This point is acknowledged by Mark Elliott in his argument for a more finely calibrated approach to the degree or intensity of judicial review than the doctrinally bifurcated one advocated by Michael Taggart: see

the myriad forms in which threats to basic justice can materialize in practice. It is the common law method of reasoning, in its characteristic focus on the special features of the particular case, which exemplifies the ultimate moral unity of public law. By forging strong connections between first principles, rooted in basic ideas about human dignity and individual freedom, and the law applicable to every case involving the exercise of power by a public authority, the common law unites constitutional and administrative law and forms a bridge between kindred jurisdictions.⁶

A unified conception of public law, moreover, must encompass both legislative and executive action: just as administrative decisions must satisfy the standards of fairness implicit in their claim to statutory authority, when correctly interpreted, so must statutory commands or prohibitions be treated as compliant with general principles of legality—the principles that reconcile collective and individual interests in a defensible manner, preserving legitimacy. ‘Parliamentary sovereignty’, then, must be understood to connote legislative supremacy, operating in harmony with the rule of law. A statute cannot authorize coercive official action that would, in the circumstances in view, infringe the fundamental rights of persons. Whatever may be its formal *validity*, as regards its vulnerability to judicial review, its *application* must in practice be sensitive to the basic rights that define the conditions governing the legitimate assertion of state coercion.⁷

We may understand the rule of law as the basic requirement that each person should be fairly treated according to the law as a whole—the law interpreted as a coherent set of

Elliott, ‘From Bifurcation to Calibration: Twin-Track Deference and the Culture of Justification’ in Hanna Wilberg and Mark Elliott, eds., *The Scope and Intensity of Substantive Review: Traversing Taggart’s Rainbow* (Oxford: Hart Publishing, 2015) 61; Michael Taggart, ‘Proportionality, Deference, *Wednesbury*’ [2008] N.Z.L.R. 423.

⁶ See also T. R. S. Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford: Oxford University Press, 2001), defending a conception of legality that draws on the constitutional jurisprudence of several common law jurisdictions.

⁷ See further below; see also Allan, *Sovereignty of Law*, *supra* note 1, cs. 4, 5.

standards, amounting to an intelligible and attractive scheme of justice. Fundamental rights, central to that scheme of justice, will colour our understanding of more specific legal rules and requirements, whether statutory or common law. Accordingly, similar cases must be decided alike, where the implications for basic rights provide the primary criteria of similarity. The law's integrity is a value internal to the scheme of justice it represents, making legal evaluation dependent on moral principle.⁸ Legal principles are genuine moral principles, being affirmed not merely within each lawyer's conscience but also (under favourable conditions) by a constitutional tradition that elicits wide and enduring support. Our conceptions of basic rights must converge and overlap, even if we sometimes disagree—perhaps very strongly—about their proper scope or reconciliation in the context of particular cases.⁹

Common law adjudication may be thought to exemplify this mode of thought, judicial precedent serving to unify the law, or at least the pertinent area of law, on the basis of general principles—principles capable of grounding our fidelity to an inherited, but evolutionary, scheme of justice. Common law constitutional rights, such as rights to freedom of conscience, speech, association, and movement form the deep foundations of the overall scheme, uniting legal tradition with the principles of justice that serve as basic standards of legitimacy. We can look to legal practice as itself a source of moral guidance, invoking settled rules or precedents as relatively fixed points within the larger scheme of justice we are striving to articulate. We ascertain the scope and content of basic rights—the concrete implications of our commitment to the abstract ideals they represent—within the specific context of our own tradition. When legal practice is widely accepted as legitimate, consistent with at least a plausible view of the principal requirements of respect for human dignity, it can promote a continuing and critical moral dialogue.¹⁰ We can

⁸ See especially Ronald Dworkin, *Law's Empire* (London: Fontana Press, 1986).

⁹ See further T. R. S. Allan, 'Interpretation, Injustice, and Integrity' (2016) 36 O.J.L.S. 58.

¹⁰ Compare Jeremy Waldron, 'The Rule of Law as a Theatre of Debate' in Justine Burley, ed., *Dworkin and his Critics* (Oxford: Blackwell Publishing, 2004) 319.

sustain a working, if only partial, consensus by reference to shared paradigms, uniting legal and moral authority.¹¹

The various canons of interpretation that guide the construction of statutes in common law practice play an important role in the reconciliation of legislative policy and basic justice. Rather than tools to help identify a factual 'legislative intention' as regards the treatment of particular cases, or categories of case, they are instead the means of seeking an accommodation between statutory objective and constitutional principle. These canons express judicial assumptions about the conditions of legitimate governance, which Parliament can override only at the risk of undermining its own moral (and hence legal) authority. They assist the integration of statute into the broader scheme of justice, ordered and regulated by the ordinary common law. If, for example, it is only in the most exceptional cases that a penal law could properly have retrospective effect, the presumption against such effect enforces the precept *nulla poena sine lege*. Presumptions in favour of the requirement of *mens rea*, or in support of evidential rather than probative burdens being shouldered by the accused, also provide necessary interpretative foundations for a legitimate scheme of criminal justice.¹²

If common law adjudication provides a model of legal reasoning about individual rights, we may draw an analogy with Rawlsian reflective equilibrium.¹³ We move between abstract statements of fundamental rights, on the one hand, and the specific illustrations of them provided by judicial precedent, on the other, seeking harmony

¹¹ For the role of paradigms, see Dworkin, *Law's Empire*, supra note 8, 72-3, 88-92, 138-9. See also Ronald Dworkin, *Taking Rights Seriously* (London: Duckworth, 1978) c. 4.

¹² See further Allan, *Sovereignty of Law*, supra note 1, c. 5. A legal order lacking these protections would be illegitimate; there would be 'law' only in a diminished, sociological sense.

¹³ See John Rawls, *A Theory of Justice* (Oxford: Oxford University Press, 1972) 20-21, 46-51. Rawls seeks a 'description of the initial situation that both expresses reasonable conditions and yields principles which match our considered judgments duly pruned and adjusted' (ibid, 20). The analogy is also drawn in Stephen R. Perry, 'Two Models of Legal Principles' (1997) 82 Iowa L. Rev 787 at 813.

between the two. The constitutional principles we invoke must justify the precedents we take to be correctly decided, supplying cogent moral reasons; and the precedents must have plausibility as examples of legitimate decision-making, consonant with our convictions about the general character of a just legal order. No doubt, some precedents must be rejected as erroneous, incompatible with the principles that justify the rest; but we may hope to find agreed paradigms that constitute a firm foundation for interpretative debate. Such paradigms give reassurance that debate is genuine, focused on particular features of a scheme of justice that, in its broad essentials, is widely accepted as the appropriate basis of reasoning about contentious questions of rights.

Legal theorists are often sceptical of analogies with Rawlsian reflective equilibrium, observing that lawyers must contend with the authoritative results of institutional decision-making—statutes and precedents—rather than with considered moral judgments they are free to surrender in the interests of a greater harmony of principle overall.¹⁴ But the objection is misplaced: it overlooks the critical role of moral judgment in translating the relevant institutional facts into propositions of law. In an interpretative view, statutes and precedent have the legal content that constitutional theory indicates; and constitutional theory is informed by the moral ideals that comprise our conceptions of the rule of law and democracy. Moral judgment does not come into play only when the statutes and precedents are otherwise inconclusive; the point is rather that such recognized sources of law generate the rights, powers and duties that moral judgment, sensitive to legal practice, endorses. Legal judgment is moral judgment in which doctrinal legal argument serves to focus the moral dialogue, making every question of law, in the final analysis, a matter of interpretation of the larger scheme of justice in which it arises.

A legal proposition is correct (I am contending) when it is consistent with an overall interpretation of legal practice that represents the best available integration of the relevant

¹⁴ See for example Larry Alexander and Ken Kress, 'Against Legal Principles' (1997) 82 Iowa L. Rev 739 at 766-67; Jeremy Waldron, 'Judges as Moral Reasoners' (2009) 7 Int'l J. Const L. 2 at 13.

political values. Since the best available integration is a moral judgment, it cannot conflict with the interpreter's moral convictions.¹⁵ The interpreter seeks equilibrium between his convictions about political morality, on the one hand, and on the other his endorsement of the paradigms of legal practice—those elements of doctrine or precedent that could not be repudiated without abandoning the dialogue with other practice-participants. Legal principles are those moral principles that serve to justify all those elements of the practice that the interpreter regards as genuine rather than mistaken. (It may not be possible to justify everything, requiring us to discriminate between the sound and unsound parts of our practice.) They are *correct* moral principles because they do justify those elements; but they are partly to be understood by reference to the practice, which affords illuminating historical detail. The practice is itself a source of moral insight insofar as it provides concrete and tangible examples of the workings of a defensible legal order, respectful of human freedom and dignity.¹⁶

In the sections below, I shall elaborate my understanding of the interpretative approach to public law, as exemplified by common law reasoning and adjudication. In defending that approach, I shall challenge Jeremy Waldron's insistence on a separation of legal from moral reasoning—a separation he invokes in aid of his opposition to judicial review of legislation on human rights grounds.¹⁷ While moral disagreement may be pervasive in liberal societies, we often do better to resolve it piecemeal: common law evolution may sometimes identify a defensible compromise that eludes the statutory draftsman. In emphasizing the central importance of the particular case, as a focus for practical reasoning in the spirit of our own tradition, I shall also briefly confront Wojciech

¹⁵ Dworkin, admittedly, denies this, envisaging possible conflict between legal and moral obligations; but see further Allan, 'Interpretation, Injustice, and Integrity', *supra* note 9.

¹⁶ See also Allan, *Sovereignty of Law*, *supra* note 1, c. 4.

¹⁷ Waldron, 'Judges as Moral Reasoners', *supra* note 14. See also Jeremy Waldron, 'The Core of the Case Against Judicial Review' (2006) 115 Yale L.J. 1346-60.

Sadurski's skepticism.¹⁸ Sadurski's preference for abstract moral theorizing, by contrast with the lawyer's principal focus on the particular case, does little to bolster the argument against judicial review. Neither legal nor moral reasoning—insofar as they may be thought to differ—could make real progress without the integration of the general and the particular that notably characterizes common law thought.

Questions about the legitimacy of judicial review are not wholly separate from questions about the nature and implications of the rule of law; they are *connected* questions, requiring an appropriate fusion of legal and political theory.¹⁹ The debate over judicial review—especially constitutional review, embracing primary legislation—has largely proceeded independently of arguments in legal theory. The meaning or content of a statute, on the one hand, and its compatibility with fundamental rights, on the other, are usually treated as largely separate questions. It is widely supposed that judicial interpretation is confined to resolving ambiguities or filling textual *lacunae*—preferably in a manner that conforms, as far as possible, to constitutional principle. But that view must be challenged. An interpretative approach, seeking a deeper unity of practice and principle, helps us make better sense of our legal and constitutional tradition.

¹⁸ Wojciech Sadurski, 'Rights and Moral Reasoning: An Unstated Assumption—A Comment on Jeremy Waldron's "Judges as Moral Reasoners"' (2009) 7 Int'l J Const L 25.

¹⁹ For an account of the problems courted by the kind of 'constitutional positivism' that, while embracing the judicially enforced standards of legality applicable to administrative action, resists any similar judicial scrutiny of primary legislation on human rights grounds, see David Dyzenhaus, 'The Incoherence of Constitutional Positivism' in Grant Huscroft, ed., *Expounding the Constitution: Essays in Constitutional Theory* (Cambridge: Cambridge University Press, 2008), 138.

An interpretative approach to public law makes the identification of legal rights, powers and obligations sensitive to considerations of legitimacy. Our delineation of rights, powers and obligations must be responsive to our reasons for acknowledging the relevance of institutional history—statutes, precedent and other influential materials—to the present content of the law. If, for example, we accede to a doctrine of legislative supremacy on grounds of democratic authority, its nature and limits will reflect our conception of democracy. When democracy is understood as entailing limits on the power of majorities, in the interests of vulnerable minorities, there will be implications for our interpretation of enactments. Statutes cannot confer powers or impose obligations beyond the reach of the authority we would recognize; and such recognition is not a matter of the conventions adopted by officials but rather (I am contending) an interpreter's understanding of why, and in what circumstances, enactments alter people's rights and obligations.

Dependent on moral reasoning, such rights and obligations are necessarily binding; they cannot be inconsistent with what political morality requires or vulnerable to being *overridden* on moral grounds. While it is true that legal rules and principles are embedded in legal practice, and so tied in complex ways to legal history and constitutional tradition, they nevertheless reflect the moral implications of according our practice legitimacy—treating it as an authoritative source of people's entitlements and obligations within our own jurisdiction. Legal rights and duties are not to be ascertained merely by reference to official practice or preference, identifying sources of valid law according to some consensus among senior officials or influential politicians.²⁰ No one's opinion is any better than the reasons offered for it; in the final analysis each legal interpreter must rely on his

²⁰ From an internal, interpretative viewpoint, law is not to be identified by reference to a 'rule of recognition' accepted by officials; for the rule of recognition, see H. L. A. Hart, *The Concept of Law*, 2nd edn (Oxford: Clarendon Press, 1994).

own moral judgment, informed by close and considered acquaintance with legal practice. Moral judgment is inescapable, even if for practical purposes we must acknowledge a principle of *res judicata* in relation to specific claims.²¹

The moral value of legality provides the link between the justifiability of state coercion, on behalf of rights, powers, and obligations, and past institutional decisions—statutes, regulations, and precedents. Legality is a condition of the permissible enforcement of any demand made against anyone. When legality is equated with integrity, as in Ronald Dworkin's theory of law, governmental action must be consistent in principle, so that citizens are treated with equal concern and respect.²² Integrity is contrasted with 'conventionalism', which finds the basis of legality in the value of certainty, or the protection of expectations. It is also contrasted with 'pragmatism', which denies the legality condition altogether, permitting demands to be enforced whenever doing so appears to be in the public interest. The disagreement characteristic of legal practice can be attributed, in part, to these contrasting interpretative theories: lawyers differ about the 'grounds' of law because they disagree about the moral basis of the connection between legal rights and duties, on the one hand, and institutional practice, on the other. Within the domain of integrity itself, however, disagreement can also be anticipated: lawyers may reach different conclusions about the balance of moral principles that best justifies the relevant paradigms of legal practice.

In certain areas of law, especially criminal law and commercial law, considerations of certainty possess great weight, curtailing the scope for interpretative creativity or purposive construction. The law is readily identified with the pronouncements of authorized officials or the plain (apparent) meanings of enacted texts, when these are available. From the perspective of a substantive conception of the rule of law, embracing

²¹ Dworkin presents political obligation as a 'protestant' idea: 'fidelity to a scheme of principle each citizen has a responsibility to identify, ultimately for himself, as his community's scheme' (*Law's Empire*, supra note 8, 190).

²² *Ibid*, especially cs. 6, 7.

constitutional rights, however, a conventionalist account of law as a whole lacks plausibility. Its range of moral values is too restricted. In acknowledging fundamental rights, we accept that legal certainty, though a valuable moral ideal, must sometimes surrender to countervailing considerations of justice. The plain terms of a statute must be qualified, in its application to particular cases, to avoid infringements of basic rights; and judicial precedent must be interpreted in ways that advance the protection of those rights. It is impossible to draw clear distinctions between public law and political morality: the point of these rights is precisely to bring law closer to justice.²³

If integrity differs from justice, it does so chiefly in the sense that it focuses on the legal record of a specific jurisdiction—the interpreter’s own political community, with its unique historical record and legal tradition—acknowledging that similar ideals of human freedom and dignity may be fostered in other ways elsewhere. While we anticipate a wider convergence, more especially between common law jurisdictions, the initial focus at least is more modest and local. An interpretation of legal doctrine proceeds by reference to shared paradigms—statutory meanings and common law rules, principles, and precedents that can be taken, at least for now, as settled points of departure for legal argument. There is an assumption that all involved acknowledge their allegiance to law, correctly ascertained, as a legitimate basis of social co-operation. If the rules fall short of true justice, in anyone’s opinion, they are nonetheless a reasonable approximation to it, having regard to the scope for reasonable disagreement among equal citizens. A closer harmony between justice and integrity is to be obtained by discussion and debate—a

²³ For Radbruch’s critique of legal positivism on similar grounds, see Gustav Radbruch, ‘Statutory Lawlessness and Supra-Statutory Law’ (1946), translated by Bonnie Litschewski Paulson and Stanley L. Paulson (2006) 26 O.J.L.S. 1. For the more contemporary interpretative approach, see Julian Rivers, ‘The Interpretation and Invalidity of Unjust Laws’ in David Dyzenhaus, ed., *Recrafting the Rule of Law: The Limits of Legal Order* (Oxford: Hart Publishing, 1999) 40.

continuing moral dialogue, challenging apparent inconsistencies between principle and practice.²⁴

Admittedly, Dworkin seemed to envisage a greater divergence between law and justice. He thought that a judge should sometimes resist or evade the law, understood as integrity, in order to forestall a grave injustice or iniquity. He was prepared to accept, at least *arguendo*, that the Fugitive Slave Acts, which directed courts to return escaped slaves to their masters in the southern states before the American Civil War, might have been valid law.²⁵ But it is hard to see how such iniquity could be reconciled with law, correctly interpreted, without undermining integrity altogether—destroying the interpreter’s allegiance to a legal order capable of imposing such requirements. If, as Dworkin maintained, considerations of justice are critical to the deliberations that integrity demands, they must outweigh any contrary arguments of political morality when the threatened injustice is grave. They must do so, at least, in the case of each interpreter who wishes to preserve her allegiance to law without sacrificing her prior commitment to ideals of freedom and justice—a commitment that forms the very ground of that allegiance. To concede that the law sanctions grave injustice, inconsistent with any plausible understanding of equal citizenship, is to become a sceptic. From the sceptic’s

²⁴ Note Dworkin’s defence of the traditional idea of law working itself pure, distinguishing between ‘pure’ and ‘inclusive’ integrity: *Law’s Empire*, supra note 8, c. 11. Compare *Omychund v Barker* (1744) 1 Atk. 21, 33 (argument of Solicitor General Murray, later Lord Mansfield): ‘the common law . . . works itself pure by rules drawn from the fountain of justice’. See also Gerald J. Postema, ‘Integrity: Justice in Workclothes’ (1997) 82 Iowa L. Rev 821, identifying integrity with the ‘justice-approximating principles’ to which we are committed ‘in virtue of our past collective decisions’ (at 835).

²⁵ Dworkin, *Law’s Empire*, supra note 8, 219. But Dworkin argued that the slaveholders’ moral claims were overridden by considerations of justice, treating the ‘question of nomenclature’ largely as a matter of preference: Ronald Dworkin, *Justice for Hedgehogs* (Cambridge, Mass: Belknap Press, 2011), 410-12.

viewpoint— abandoning integrity—there is no genuine law, deserving obedience or enforcement, to be applied.²⁶

On one view of Dworkin's familiar account of interpretation, the requirement of fit (between theory and practice) operates as a threshold constraint, moral appeal or justification determining the selection between alternatives that pass that threshold. Dworkin's account is better understood, however, as affirming the interaction between these requirements at all levels, so that moral principle plays a critical role throughout.²⁷ There are no statutory meanings or common law rules that simply pre-exist our interpretative efforts; we understand them in the light of the broader tradition that our practice as a whole embodies. If, moreover, we follow statutory instructions or precedents we deplore, it is only because the moral reasons to do so outweigh, in our best judgment, the reasons for overriding or revising them. An interpretation of law must respect the scope for reasonable moral disagreement; we must recognize the legitimate demands of legislative and judicial authority. If, however, practice and principle are entwined in this way, there cannot be elements of practice—from an interpretative perspective—that violate the fundamentals of political morality, at least when that practice is correctly understood.

Insofar as the constraint of fit operates to distinguish between genuine interpretation and illicit 'invention', it serves only to identify constructive accounts of legal practice that we think outlandish—implausible candidates for the best moral reading of

²⁶ See further T. R. S. Allan, 'Law, Justice and Integrity: The Paradox of Wicked Laws (2009) 29 O.J.L.S. 705; Allan, 'Interpretation, Injustice, and Integrity', *supra* note 9.

²⁷ Nicos Stavropoulos distinguishes between 'hybrid' and 'pure' interpretivism: see Nicos Stavropoulos, 'Legal Interpretivism', *The Stanford Encyclopedia of Philosophy* (Summer 2014 edn), ed., Edward N Zalta, URL = <<http://plato.stanford.edu/archives/sum2014/entries/law-interpretivist/>>.

the legal record.²⁸ From the interpreter's own perspective, fit and justification merge: an account of law is sought that, while as far as possible endorsing the standard paradigms, also justifies its enforcement. Her legal judgments may—in all good faith—depart as far from orthodoxy as is necessary to preserve her allegiance, affirming the moral obligation to obey the law. Even the paradigms of legal practice are open to challenge if necessary, though of course not all at once. Interpretative success consists in the elucidation of an account of legal practice that not only affirms its legitimacy but also elicits the approval of other practice-participants. Adequacy of fit is finally a judgment that only other lawyers can make in the light of the interpreter's reasoned conclusions about how best to further a common practice.²⁹

An interpretative approach to law, then, aims to show how the facts of institutional practice generate specific legal rights and obligations. It does so by identifying the moral principles that justify attributing those consequences to the pertinent institutional facts, pertinence being determined by reference to the theory of law that provides the most compelling justification of legal practice, viewed as a whole. When, moreover, we embrace the demands of integrity, requiring us to seek coherence throughout the law, we can be assured that the implications of our fundamental principles will be consistently followed through. There will be no pockets of grave injustice or iniquity immune from re-examination and revision, at least at the level of the superior courts. If the legislature is slow to correct such injustice—whether through ignorance or indifference—the courts may fill the breach by responding to legal argument, accepting the challenge to maintain or restore the necessary harmony between legality and legitimacy. Once identified, the citizen's fundamental rights are ineradicable components of any plausible interpretation of the current law: they constitute the bedrock of a stable vision of justice according to law.

²⁸ Compare Dworkin, *Law's Empire*, supra note 8, at 255: 'Any plausible working theory would disqualify an interpretation of our own law that denied legislative competence or supremacy outright or that claimed a general principle of private law requiring the rich to share their wealth with the poor'.

²⁹ See further Allan, 'Interpretation, Injustice, and Integrity', supra note 9, at 68-74.

The ideal of due process is a basic element of the rule of law, alongside the ideal of equality. In the absence of due process in the law's administration, fundamental rights are worthless: there is no guarantee that such rights will be enforced as the circumstances of particular cases require. And the judicial process is thereby corrupted, the courts unable to apply the law as it ought to be applied. Urgent questions about fundamental equality and discrimination are raised, in particular, by restriction of the liberty of persons who, though suspected of planning serious crime, have not been convicted of any offence.³⁰ But the danger to the rule of law is compounded when such persons are denied due process, disclosure of information being withheld for reasons of public interest. A detainee who cannot answer his accusers because their specific allegations are not revealed is only in the most tenuous sense made subject to law: he is the victim (at least in his own eyes) of an arbitrary discretion, which a court can countenance only by abandoning the first principles of legality.

In acknowledging the fundamental character of rights to due process, or natural justice, the House of Lords in *AF* restored the integrity of the common law, even if it did so only in response to the prompt given by the European Court of Human Rights.³¹ No one made subject to a control order under the Prevention of Terrorism Act 2005 could receive a fair judicial hearing if the case against him were based mainly on closed materials, withheld on grounds of national security. In 'reading down' the Act, under the Human Rights Act, section 3, so as to permit disclosure when necessary to ensure a fair trial—contrary to the explicit terms of the Act and regulations—the court achieved the only possible reconciliation of procedural fairness and legislative supremacy compatible with the rule of law, and hence with the legitimacy of judicial proceedings. A similar process of construction was available, in principle, at common law, which articulates the

³⁰ See especially *A v Secretary of State for the Home Dept* [2004] UKHL 56; [2005] 2 A.C. 68; Allan, *Sovereignty of Law*, *supra* note 1, at 114-19.

³¹ *Secretary of State for the Home Dept v AF (no 3)* [2009] UKHL 28; [2010] 2 A.C. 269, accepting the ruling of the European Court of Human Rights in *A v United Kingdom* (2009) 49 EHRR 29.

conditions of legitimate government that our practice as a whole affirms. No absolutist conception of parliamentary sovereignty, which insisted on rigid adherence to the literal terms of the statute in every circumstance, could survive an interpretation of law rooted in basic principles of human freedom and dignity.³²

In *Harkat*, the Supreme Court of Canada adopted an analogous interpretation of the Immigration and Refugee Protection Act 2001, as amended in the light of the general principles of fair procedure affirmed in *Charkaoui*.³³ The role of the designated judge (in reviewing a certificate declaring someone ‘inadmissible to Canada’) was critical in ensuring the fairness of the procedure, upholding in practice the individual’s right to know and meet the case against him and to have the decision made on the relevant facts and law. While section 83(1)(e) apparently precluded the judge from ordering disclosure of any information injurious to national security, that provision was held to be subject to the overriding principle that the individual must receive an ‘incompressible minimum’ of disclosure. In effect, the minister was barred from deporting a person who (for national security reasons) could not be informed of the case against him. Parliament’s intention to comply with the principles of fundamental justice articulated by section 7 of the Charter was rightly presumed; any contrary presumption would have flouted first principles of the rule of law.³⁴

We may regard integrity as the closest approximation to justice we can achieve when we seek it in collaboration with others who, though participants in a common practice, disagree about what justice, ideally conceived, requires. Justice is sought through

³² For further discussion, see Allan, *Sovereignty of Law*, supra note 1, at 184-91.

³³ *Canada (Citizenship and Immigration) v Harkat* 2014 SCC 37, [2014] 2 S.C.R. 33; *Charkaoui v Canada (Citizenship and Immigration)* 2007 SCC 9, [2007] 1 S.C.R. 350.

³⁴ In *Charkaoui* the Court observed that since the rights protected by s 7 are ‘basic to our conception of a free and democratic society’ they are ‘not easily overridden by competing social interests’, and hence infringements are difficult to justify under s 1, requiring ‘extraordinary circumstances’: [2007] 1 S.C.R. 350, 391.

a continuing dialogue, invoking a shared history of struggle against error and injustice; courts must make their legal reasoning responsive to the moral tradition that captures that struggle. Doubtful judgments or opinions must be chiefly impugned by challenging their consistency with principles that illuminate other parts of the law; the greater the apparent injustice, the more pressing the obligation to broaden the scope of inquiry. The higher courts, at least, may seek a more abstract unity of principle, eliminating serious conflict, even when lower courts are necessarily bound by stricter rules of precedent designed to preserve consistency within specific fields. A common law legal order exemplifies this conception of law: adherence to precedent is tempered by recognition of the scope for adaptation and development to meet the needs of justice, enabling a balance to be struck between the respective merits of settled tradition and enlightened reform.³⁵

III *Adjudication and fundamental rights*

Adjudication aims to achieve justice according to law, understood by reference to the moral principles that underpin its legitimacy. Jeremy Waldron rightly observes that the judge engages in ‘the elaborate construction of a moral argument for, and in the name of, a

³⁵ Compare Scott Hershovitz, ‘Integrity and Stare Decisis’ in Hershovitz, ed., *Exploring Law’s Empire: The Jurisprudence of Ronald Dworkin* (Oxford: Oxford University Press, 2006) 103. See also Stephen R. Perry, ‘Judicial Obligation, Precedent and the Common Law’ (1987) 7 O.J.L.S. 215, defending a ‘strong Burkean conception of precedent’, which makes any proposition of common law subject to reconsideration of the underlying principles while according those principles somewhat greater weight than they would otherwise enjoy.

very large group—his whole society’.³⁶ Rather than following his own moral lights in a single-minded way, ‘he tries to reconcile what he is disposed to do about the problem that comes before him with what others have done in society’s name with problems more or less analogous’.³⁷ Because he acts in the name of society at large, the litigants should welcome the judge’s attention to the precedents, not regarding it as ‘an affront to the autonomy of morality or justice’. He attempts to dispose of the case in a way that keeps faith with how other people have been treated in similar circumstances.

Waldron nevertheless insists that legal and moral reasoning are quite distinct. He supposes that the special circumstances of adjudication—the nature of the problems arising and the relevant context—force a separation of law from morality. Even if judges must resort to moral reasoning as an implicit part of their task, they are distracted, nonetheless, by authoritative texts and precedents. Waldron rightly rejects as implausible the view, encouraged by legal positivism, that the judge’s duty to apply the law is wholly separate from—always preceding—the moral reasoning necessary to remedy gaps or indeterminacies. Yet even when we jettison the ‘simple dual-task theory’ of adjudication, we find instead (according to Waldron) ‘a mélange of reasoning’, quite different from both ‘pure moral reasoning’ and pure ‘black-letter legal reasoning’:

Basic premises will be set sometimes by referring to fundamental values, sometimes by referring to texts. Sometimes lines of argument will be followed through, sometimes stopped in their tracks by contrary precedents. The sensibility that informs judgment at every stage will be a hybrid of moral and legal sensibility, quite unfamiliar to moral

³⁶ Jeremy Waldron, ‘Judges as Moral Reasoners’, *supra* note 14, at 18. See also Waldron, *Law and Disagreement* (Oxford: Oxford University Press, 1999) c. 9, explaining the ‘circumstances of integrity’ (by way of analogy with Rawls’s account of the ‘circumstances of justice’).

³⁷ *Ibid*; the judge does not, as Dworkin expressed the point, try ‘to plant the flag of his [own moral] convictions over as large a domain of power or rules as possible’ (quoting Dworkin, *Law’s Empire*, *supra* note 8, at 211).

philosophers. What appear to be moral considerations will vary in their strength depending as much on the use that has been made of them in the past as on their inherent normativity. By the standards that philosophers lay down for moral reasoning, this will seem all very exasperating—technical, at best, and flawed and heteronomous, at worst.³⁸

A ‘mélange’ of reasoning, however, suggests an *ad hoc* mixture of contrasting styles, as if the commands of text or precedent could be ascertained, to some extent, quite independently of moral argument; and this assumption is very dubious. The meaning of an authoritative text is always, finally, a judicial construction—the product of a deliberative process in which eligible alternatives are compared and sifted. And a precedent case is in very large degree what the court, considering partly similar and partly dissimilar circumstances, now makes of it. Its persuasive force is a function of the reasons that support its conclusion on the facts, which are not necessarily the reasons given by the earlier court (even assuming that the judges, in an appellate decision, were themselves agreed). If the earlier reasons are persuasive, they are *morally* persuasive—consonant with justice, or at least with the scheme of justice that illuminates the field of law under scrutiny. Legal reasoning embodies our ideal of moral reasoning as that ideal applies when we try to reason in the name of the whole society.

A line of argument can be ‘stopped in its tracks’ by precedent only insofar as we are alerted to the dangers of inconsistency and incoherence: we must try to avoid conclusions that entail distinctions between persons or situations for which we cannot provide any moral justification. If moral considerations gather greater strength from settled practice, it is so only insofar as we draw on legal tradition for moral guidance—acknowledging the dependence of moral knowledge on our reflection on the experience obtained within our own political community. And an exasperated critic is merely someone who rejects the

³⁸ Waldron, ‘Judges as Moral Reasoners’, *supra* note 14, at 12-13.

whole idea of integrity as Waldron so eloquently defends it. What may superficially appear as a technical distraction from pure moral reasoning is, when properly viewed in the spirit of integrity, rather the painstaking attention to the complexities of history and practice that sound moral reasoning entails.³⁹

As Waldron appears to concede, it is no real affront to the autonomy of moral reason 'when a judge proceeds from a given text rather than from fundamental moral axioms, or when he dresses up a legal doctrine in the garb of moral principle, or when he stops a perfectly good moral argument in its tracks with some contrary precedent, or when he deflects the force of a moral consideration by some move that makes sense in law but little sense in ethics'.⁴⁰ There is no affront, however—any compromise of the integrity of moral argument being apparent only—because this catalogue of mischaracterizations is quite misleading. It is only in the light of 'fundamental moral axioms' that a text acquires a determinate legal meaning; a legal doctrine is already a moral doctrine because it pertains to the legitimate use of state coercion; the contrary precedent deserves respect just insofar as makes a contribution to the moral inquiry; and there is no move that makes sense in law but none in ethics when legal reasoning is governed by the ideal of integrity.

Waldron acknowledges that in Dworkin's theory, correctly understood, questions of fit and appeal are closely intertwined. It follows that there are no legal rules capable of dictating answers to specific questions of law until they have been elaborated by the moral reasoning integrity demands. Just as the authority of statute or precedent itself depends on moral argument—argument appealing to relevant considerations of political morality—so the directions they give as regards the particular case can be ascertained only by reference to the same moral criteria. If reasons of political fairness dictate obedience to

³⁹ The weight properly to be assigned to any given proposition of law, as Stephen Perry explains, will be a function of many different factors, including the number of times it has previously been relied on: see Perry, 'Judicial Obligation', *supra* note 35, at 241-43. These factors plainly reflect the considerations of systematic coherence and judicial caution intrinsic to moral reasoning in the name of the whole society.

⁴⁰ Waldron, 'Judges as Moral Reasoners', *supra* note 14, at 18.

statute, within some reasonable range of legislative discretion, they also require adherence to a version of statutory meaning that legislators could recognize as a fair reflection of legislative purpose. And if reasons of justice limit legislative discretion, as a matter of general principle, they must operate to qualify the plain terms of an Act that would otherwise do injury to people's rights out of all proportion to any intended public benefit. The statutory context *provokes* the relevant moral inquiry; it does not *qualify* an inquiry that would otherwise proceed with indifference to the political context.

Waldron grants that judges regard themselves as bound by statute and precedent and constitutional provisions for reasons, which he concedes are ultimately '*moral*' reasons—reasons of concern for established expectations, reasons of deference to democratic institutions, and reasons associated with integrity and the moral value of treating like cases alike'.⁴¹ Accordingly, engaging 'even in the most technical and legalistic reasoning', Waldron appears to concede, is 'one of the things that morality requires' of judges. It is nonetheless a grudging concession: the pertinent moral reasons are allegedly so complicated 'as to create—in a sense—a normative world of their own, and their distinctiveness may render any operational comparison with our familiar ideals of moral reasoning inapposite'.⁴² But that would be so only if we thought the very idea of a political and public conception of morality—reasoning in the name of the whole society—unattractive or spurious. Sound moral reasoning is necessarily as complex as its subject matter requires.⁴³

Waldron contends that the key 'watershed' issues about human rights—major issues of political philosophy concerning fundamental liberties—should be debated

⁴¹ Ibid, 13-14.

⁴² Ibid, 14.

⁴³ If, moreover, integrity denies (as I argue) any sharp distinction between 'clear statutes' or 'clear precedents obviously on point' (ibid, 13) and more ambiguous or contested statutes or precedents, there is no straightforward distinction between 'technical' or 'legalistic' and other sorts of legal-moral reasoning.

‘freshly, on their merits’.⁴⁴ It is undesirable, he thinks, that moral debate should be ‘skewed’ by such textual formulations as ‘substantive due process’, in the case of abortion, or ‘cruel and unusual’, in the case of capital punishment. But the difference he discerns between what is ‘actually’, rather than merely ‘textually’, at stake is largely a product of his own literalism as regards the interpretation of texts. He overlooks the possibility that, when correctly handled, such familiar doctrinal formulations can help, by their very familiarity, to focus moral debate in a way that acknowledges the importance of constitutional history. We should treat the abstract provisions of a bill of rights in the manner appropriate to such ‘bland and noncommittal formulations’, intended originally to finesse ‘the real disagreements inevitable among a free and opinionated people’.⁴⁵ They invite, not arid literalism, but rather the kind of interrogation of legal tradition implicit in common law practice.

If, then, important issues of rights are ‘mostly not issues of interpretation in a narrow legalistic sense’, as Waldron maintains, they are nonetheless issues of interpretation in a broader legal or constitutional sense. They are interconnected parts of an overall charter of liberty for people who must find ways of reconciling their different interests and aspirations—forging complex legal arrangements that allow as much freedom for everyone as is consistent with a similar liberty for all. There is always scope for political intervention to rescue such arrangements from error or incoherence; but that too will be interpretative in the correct sense. The mistakes or confusion it strives to remedy will express an interpretation of the prevailing constitutional order; and the remedies themselves will ideally be crafted to improve or perfect arrangements that, overall and in general, are widely accepted as legitimate, upholding the rights and freedoms already fought for and secured.

⁴⁴ Waldron, ‘Judges as Moral Reasoners’, *supra* note 14, at 23.

⁴⁵ *Ibid.*

It is true, of course, that legislators are not expected to support their arguments in the debating chamber with detailed reference to legal precedent: legislative debate need not and should not normally mirror legal argument. A Member of Parliament is entitled to defend his own independent moral view on a matter of rights; but his conclusions must still be addressed to fellow citizens, entitled to rely on the security that the established framework of basic rights provides. It is a matter of identifying defects or deficiencies in the existing political order; there is no true sense of painting on a blank canvas.

Moral reasoning here does not, Waldron explains, yield its practical conclusion directly: it is rather ‘orientated toward a process of voting, in which the views of each representative are given equal weight’.⁴⁶ When representatives of the whole society, elected on a fair basis, vote as equals and the majority view prevails, the legislature has done what is necessary to ‘reason morally in the name of the whole society’.⁴⁷ We cannot, however, separate our interpretation of the outcome from our grasp of the problem being addressed. And we cannot look behind the text for intentions, as regards specific outcomes, even when expressed by certain members in debate. Even if such intentions were widely shared, at least within the majority voting in favour of a measure, they do not carry any special authority: they cannot alter the meaning of the text, which alone is the authentic expression of Parliament’s will.⁴⁸

It follows that a judge has to exercise moral acumen in working out what effect, if any, a duly enacted statute has on the case before him. It cannot give him instructions that resist interpretative reflection: the meaning of the text—in particular the difference it makes on the facts currently in view—awaits moral scrutiny, seeking to reconcile apparent legislative aims with constitutional arrangements on which all rely for protection of their

⁴⁶ Ibid, 20.

⁴⁷ Ibid.

⁴⁸ Compare Jeremy Waldron, *Law and Disagreement*, supra note 36, at 142-46, emphasizing that there ‘simply is no fact of the matter concerning a legislature’s intentions apart from the formal specification of the act it has performed’ (ibid, 142).

basic rights. Naturally, a reading that best serves the legislative purpose, as disclosed by the text as a whole, must be preferred to one that qualifies that purpose *all other things being equal*. But in practice they are rarely equal; and the judge must do what the legislators were powerless to do—balance the moral considerations pertinent to a just and defensible decision in the particular case.⁴⁹

IV *The moral significance of the particular case*

An emphasis on precedent, in the common law manner, has the advantage of focusing moral argument on the concrete implications of expressions of general principle. When discussing the epistemic advantages enjoyed by judges with regard to individual rights, by comparison with legislators, Michael Moore observes that ‘judges have moral thought experiments presented to them everyday with the kind of detail and concrete personal involvement needed for moral insight’.⁵⁰ Moral insight is best generated, he argues, at the level of particular cases, although since judicial training is ‘training in principled generality’, even at the abstract level judges may be thought to have the advantage.

Wojciech Sadurski interprets these observations as an argument that, in considering moral dilemmas, we should privilege the perspective of the person affected, trying to

⁴⁹ It follows that in insisting that on ‘watershed’ issues courts ‘should not have the last word in any dispute with the legislature’, Waldron misconceives the issue: the legislature cannot—both practically and constitutionally—decide the particular case. See Waldron, ‘Refining the Question about Judges’ Moral Capacity’ (2009) 7 Int’l J. Const L. 69 at 72. While Waldron makes a powerful case against judicial review, as practised in the United States (see Jeremy Waldron, ‘The Core of the Case Against Judicial Review’ (2006) 115 Yale L.J. 1346), he neglects the possibilities of common law constitutionalism (see further Allan, *Sovereignty of Law*, *supra* note 1, at 323-31).

⁵⁰ Michael S. Moore, ‘Law as a Functional Kind’ in Robert P. George, ed., *Natural Law Theory: Contemporary Essays* (Oxford: Clarendon Press, 1992) 188 at 230.

‘imagine the position of a stakeholder in a given decision’.⁵¹ Sadurski suggests that Moore’s method corresponds to the movement within Rawls’s reflective equilibrium model that proceeds ‘from convictions to principles’. However, he observes that, on a correct understanding of that model, there is no privileging of the inductive over the deductive step, or vice versa. According to Rawls, we can ‘either modify the account of the initial situation or we can revise our existing judgments, for even the judgments we take provisionally as fixed points are liable to revision’.⁵² We go ‘back and forth’ between abstract and particular judgments until we reach an equilibrium: ‘One feature of reflective equilibrium is that it includes our considered convictions at all levels of generality: no one level, say that of abstract principles or that of particular judgments in particular cases, is viewed as foundational.’⁵³

Sadurski would actually give pride of place to deductive (or ‘top down’) reasoning, arguing that conflicts between competing moral principles may not be detectable at the level of particular personal experience: ‘Following the more general model, latent conflicts of principle may appear—in all their complexity—at an interpersonal level of greater abstraction, once we attempt to collect all salient values at stake.’⁵⁴ That conclusion is allegedly supported by further considerations concerning the quest for impartiality, equality and legitimacy. Impartiality—of central importance when reflecting on principles of justice—is ‘fatally endangered if we allow ourselves to become prisoners of our intuitive responses to particular case studies presented to us, with all the bias and prejudice that may likely contaminate our intuitive judgments’.⁵⁵ Equality of treatment demands a high level of abstraction: ‘The abstractness of a right’s articulation is a

⁵¹ Sadurski, ‘Rights and Moral Reasoning: An Unstated Assumption—A Comment on Jeremy Waldron’s “Judges as Moral Reasoners”’ (2009) 7 Int’l J Const L 25 at 34.

⁵² John Rawls, *A Theory of Justice*, supra note 13, at 20.

⁵³ John Rawls, *Political Liberalism* (New York: Columbia University Press 1993) 8, n. 8.

⁵⁴ Sadursky, ‘Rights and Moral Reasoning’, supra note 51, at 39.

⁵⁵ *Ibid*, 40.

prerequisite of its universality, of its applicability to all relevant cases.’ And only by resorting to an abstract level of reasoning can we hope to satisfy the liberal principle of legitimacy, or conform to the demands of what Rawls calls ‘public reason’.⁵⁶

However, the pursuit of reflective equilibrium obliges us to discipline our untutored moral intuitions or sympathetic emotional responses.⁵⁷ The idea is that the particular case provides a sufficiently determinate context in which to reflect on the concrete implications of the general scheme of legal principle. It is only by examining the specific context—comparing it with other instances, with relevant similarities and differences—that we can understand how our more abstract theorizing works out in practice. Our grasp of general principle, delineating individual rights, may be highly dependent on our picture of the typical or central case with which we are familiar.⁵⁸ New cases, diverging in arguably relevant ways from the standard case, force us to re-examine our principles, challenging our confidence that any general rule is a sufficient guide to the balance of conflicting considerations in non-standard cases. We achieve reflective equilibrium when our judgments in particular instances are supported by general principles we find persuasive; and these principles must together forge an intelligible and attractive conception of justice.

The great strength of common law reasoning, correctly understood, is that it privileges neither the facts of the particular case nor abstract general principle. It invokes

⁵⁶ Ibid, 41-42.

⁵⁷ Waldron’s impatience with appeals to reflective equilibrium (see Waldron, ‘Refining the Question’, *supra* note 49, at 81) reflects his enthusiastic endorsement of Sadurski’s very dubious interpretation of the arguments made in defence of the moral expertise of the judiciary.

⁵⁸ Compare with Rawls’s early discussion of the method of ascertaining moral principles in John Rawls, ‘Outline of a Decision Procedure for Ethics’, (1951) *Philosophical Review*, vol. 60, no. 2, 177–97, especially para. 3.3, recommending the attempt ‘to discover and formulate an explication which is satisfactory . . . over the total range of considered judgments of competent moral judges as they are made from day to day in ordinary life, and as they are found embodied in the many dictates of commonsense morality, in various aspects of legal procedure, and so on’.

general principles as a means of ordering and comprehending the facts—deciding which facts are relevant—but makes those facts the focus of judgment, lending a clarity and precision to the analysis that would not otherwise be possible. Common law reasoning is pragmatic, in the sense that the scope of a rule is always sensitive to the consequences of its application to the particular case, but also principled, in the sense that the different treatment of superficially similar cases must be properly justified. Like cases must be treated alike because that is what justice requires; but the principles of justice that determine likeness and difference must be fully articulated and subject to scrutiny. We affirm the universality of our scheme of justice—treating all alike—by our scrupulous attention to the circumstances of the particular case.⁵⁹

It is only by reflection on the details of the particular cases, for example, that we could determine the correct balance between countervailing principles of privacy and freedom of expression. While we can readily classify certain types of information as private rather than public, there may be many considerations pertinent to the resolution of a conflict between rights of privacy and free speech as it arises in particular instances. Much will depend, moreover, on social and political context: moral considerations will evoke an examination, not only of related aspects of law, but also of the likely practical consequences of competing answers for persons most closely affected. An empathetic understanding must temper purely abstract theorizing.⁶⁰ The gradual erosion of the requirement of an initial confidential relationship, extending the cause of action for breach

⁵⁹ For the early-modern antecedents of law-as-integrity, expressed in the common law jurisprudence of renaissance legal humanism, see Mark D. Walters, 'Legal Humanism and Law-as-Integrity' [2008] C.L.J. 352–75. In *The English Lawyer* (1631) for example, Sir John Dodderidge stressed the argumentative nature of law, involving an oscillation between concrete and abstract propositions, seeking an equality and unity of reason (Walters, op cit, especially 371-73).

⁶⁰ Compare *Campbell v MGN Ltd* [2004] UKHL 22; [2004] 2 A.C. 457, where Lord Hope emphasized the need to understand the claimant's predicament: 'The question is what a reasonable person of ordinary sensibilities would feel if she was placed in the same position as the claimant . . .' (para. 99).

of confidence to a broader range of private information, affords a good illustration of common law evolution. The demands of justice, vividly presented in a series of cases, have impelled internal reform, shifting the focus more directly to underlying concerns of human dignity and autonomy—‘the right to control the dissemination of information about one’s private life and the right to the esteem and respect of other people’.⁶¹

A substantive conception of the rule of law demands the integration of statutes into the larger scheme of justice: a statutory rule must be applied with sensitivity to the basic rights embodied in the common law. While an explicit enactment has a specificity that a common law rule usually lacks—there is a canonical form of words to be construed—we should not exaggerate the difference. In each instance, we identify the rule by reference to the standard or typical case that illuminates its underlying purpose; in other cases, where conflicting considerations appear more pressing, we must engage in deeper moral reflection in order to determine the limits of the rule. The acknowledgment of fundamental rights entails the repudiation of rigid hierarchies and classifications of legal sources. If common law rules are subject to statutory modification, as legislative supremacy requires, it is equally true that statutory rules are subject, in the last analysis, to an *interpretation* consonant with basic principles of the common law.

Even if it is right (for example) that Parliament should be empowered to prohibit assisted suicide, as a safeguard for those vulnerable persons who might otherwise be persuaded to end their lives by unscrupulous advisers, it does not follow that an *absolute* rule is morally acceptable. A court may legitimately inquire whether a person of sound and settled mind who wishes to escape from intolerable suffering and humiliation, but who lacks the physical capacity of the ordinary person to take his own life, should not be entitled to consent to such assistance—as a limited exception from the ordinary rule. A rule that would sacrifice the fundamental interests of a few for the supposedly greater

⁶¹ Ibid, para. 51 (Lord Hoffmann). The important influence of the European Convention, art 8, is not of course denied; but these are nonetheless domestic developments, ‘typical of the capacity of the common law to adapt itself to the needs of contemporary life’ (ibid, para. 46).

security of the many is one of doubtful legitimacy; it may be in urgent need of supplementation by the judiciary, recognizing specific and closely circumscribed exceptions. Furthermore, it may be the shocking details of the particular case—the special suffering of individuals far beyond the ordinary experience of either voters or their representatives—that sharpens the moral dilemma, confronting the judge with interrelated questions of legality and legitimacy.⁶²

The judge cannot impose in the name of law a ruling that the litigants have good reason to repudiate as illegitimate. She cannot ignore their moral outrage because (we may suppose) she shares it, concluding with them that since no legislature could properly impose such onerous constraints—having regard to all the circumstances—no construction of the statute that had those consequences could be correct. Such a construction is excluded by the best theory of the current law, one that takes account not only of the demands of democratic authority but also of fundamental rights. The judge's deference to parliamentary enactment—her inclination to accept the plain or *prima facie* or unqualified meaning as conclusive in any particular case—tracks her judgment about the nature and scope of majoritarian democratic authority. The exceptions or qualifications she finds or imposes represent her best view of what the law requires—the law ascertained by reference to integrity.

While our legal conclusions about the permissibility of an absolute prohibition on assisted suicide must reflect our moral conclusions—what we think legitimate government permits or requires—they are also informed by careful attention to our own established practice. If we allow a hospital patient to refuse further medical treatment, even when her doctors think it in her best interests to accept it, we have already

⁶² Consider, for example, the distressing circumstances of the three claimants in *R. (Nicklinson) v Ministry of Justice* [2014] UKSC 38; [2015] A.C. 657, each of whom needed assistance in killing himself in order to escape an intolerable life, perceived as lacking in dignity or self-respect. According to Lady Hale (at para. 313) 'no-one who has read the appellants' accounts of their lives and their feelings can doubt that they experience the law's insistence that they stay alive for the sake of others as a form of cruelty.'

acknowledged the importance of personal autonomy in matters of life and death. Insofar as the law denied a person the right to obtain assistance to die, the Canadian Supreme Court held in *Carter* that it was inconsistent with a person's freedom to request palliative sedation, refuse artificial nutrition and hydration, or require the removal of life-sustaining medical equipment.⁶³ In *Nicklinson*, Lady Hale compared the situation of the claimants, wholly reliant on others to help them bring an end to intolerable suffering, with the applicant in *Re B (Consent to Treatment: Capacity)*.⁶⁴ In *Re B* a paralyzed woman, totally dependent on the staff of an intensive care unit, was held to have the mental capacity to choose to decline artificial ventilation, without which she was almost certain to die. As Lady Hale emphasized, the patient was entitled to refuse treatment: it was for her to decide where her own best interests lay.⁶⁵

Against our belief in the sanctity of life, if we think that argues against the refusal of potentially life-saving treatment, we must set our respect for the freedom of others to make decisions about their own lives—decisions that for many people express their own sense of dignity and personal integrity.⁶⁶ And if we are willing to accept that freedom in the case of an able-bodied person, who chooses to take his own life (confirmed in England and Wales by the Suicide Act, section 1, abrogating the former prohibition on suicide), we should not discriminate unfairly against those who lack that physical independence. Our practice, as regards refusal of medical treatment, confirms the indications of general political principle. A ban on assisted suicide is justified only insofar as it can be squared

⁶³ *Carter v Canada (Attorney General)* 2015 SCC 5; [2015] 1 S.C.R. 331, para. 66. It was held that the Criminal Code, ss 241(b) and s 14 unjustifiably infringed s 7 of the Charter of Rights.

⁶⁴ [2002] EWHC 429 (Fam); [2002] 1 F.L.R. 1090.

⁶⁵ *Nicklinson*, para. 303.

⁶⁶ See *Carter v Canada*, para. 68. We should, more accurately, recognize that euthanasia raises the question of how the sanctity of life should be understood, acknowledging that people honour that value in different ways: see Ronald Dworkin, *Life's Dominion: An Argument about Abortion and Euthanasia* (London: Harper Collins, 1993), especially c. 7.

with the fundamental rights of those who would seek such assistance, which in turn requires that the interference be proportionate to the statutory objective. Moreover, in drawing these conclusions we are making a *common law* judgment, based on settled practice, that does not—in principle—depend on the British Human Rights Act or the Canadian Charter of Rights.⁶⁷

If it is a common law judgment, we can readily accept Waldron's point that our moral reasoning about rights should not be skewed by specific formulations adopted by a bill of rights: the substance is more important than its textual representation. We can confront our moral disagreements directly, as Waldron would prefer; but we must do so on the assumption that we are forging a *system* of justice, in which rights fit together as parts of a larger whole. We must address moral disagreement by appeal to a shared tradition, example and analogy providing instructive guidance. And if the critical question concerns the fairness of the claimant's treatment, having regard to the principles that justify the law as a whole, Waldron's distinction between 'watershed' and other rights questions collapses. Even if a general rule might properly be adopted for the majority of foreseeable cases, its application in specific instances may nonetheless infringe fundamental rights. If there are no *absolute* rules, there can be no final or exclusive

⁶⁷ While in *Nicklinson* the court considered whether the Suicide Act (literally construed) was compatible with the European Convention, art 8, it did so as a matter of *domestic* law, the matter falling within what the Strasbourg court had held was each member state's 'margin of appreciation' (see Lord Neuberger at paras. 67-76). The court declined to give a declaration of incompatibility in all the circumstances. In practice, however, official policy—promulgated by the Director of Public Prosecutions to comply with the ruling in *R. (Purdy) v Director of Public Prosecutions* [2009] UKHL 45; [2010] 1 A.C. 345—ensures that family members wholly motivated by compassion are not prosecuted (see further Allan, *Sovereignty of Law*, supra note 1, 179-84). In requiring the provision of such specific guidance, the court in effect acknowledged that an absolute prohibition would be an indefensible breach of rights of privacy and personal autonomy (as interpreted in *Pretty v United Kingdom* (2002) 35 EHRR 1); see further *Nicklinson*, paras. 133-35 (Lord Neuberger).

legislative determination of rights questions, which are so heavily dependent on particular facts.⁶⁸

V Conclusion

When basic human rights are matched by domestic constitutional rights, which have taken root in the political culture, there will be very few occasions in practice when statutory instructions resist a benign construction, consistent with those rights in specific instances. Even the Fugitive Slave Acts enforced in the United States before the civil war were arguably amenable to a judicial reception averting very grave injustice. As Waldron notes, Robert Cover's study mainly criticized the judges who enforced the Acts as 'insufficiently inventive, legally, less resourceful than they could have been in the ways of the law, neglectful of various sources of law that might have taken them in another direction'; Cover did not simply object that 'they failed to switch from legal reasoning to individual moral reasoning'.⁶⁹ But it follows that Waldron is far too quick to condemn, as 'result-driven jurisprudence', any criticism of the judges for 'hiding behind black-letter law' to avoid the difficult moral choices. The critics are wrong, he insists, to object that moral reasoning should have displaced a focus on constitutional clauses and statutes. But here Waldron simply begs the interpretative question. The judges' personal convictions that

⁶⁸ A similar objection applies to Alison Young's distinction between 'contestable' and 'non-contestable' issues (see Alison L. Young, 'Is Dialogue Working under the Human Rights Act 1998?' [2011] P.L. 773, at 774-78). A question of fair and equal treatment is too dependent on context and circumstance to permit such categorization for the purpose of circumscribing judicial review.

⁶⁹ Waldron, 'Judges as Moral Reasoners', *supra* note 14, at 17, n. 46, discussing Robert M. Cover, *Justice Accused: Antislavery and the Judicial Process* (New Haven: Yale University Press, 1975). See also Ronald Dworkin's review, 'The Law of the Slave-Catchers' *Times Literary Supplement* (London, 5 December 1975) 1437.

slavery was morally abhorrent were not irrelevant—on the contrary, they were highly pertinent—to their bona fide, considered judgments about their legal duties. Their obligations of fidelity to statute depended, in the last analysis, on the grounds of their allegiance to the legal order itself; no statute could be understood to authorize what conscience condemned as illegitimate.⁷⁰

Waldron is willing to contemplate the sort of ‘alert mechanism’ involved in a system of ‘weak’ judicial review, such as that provided by the United Kingdom’s Human Rights Act, permitting judges to make declarations of incompatibility with European Convention rights.⁷¹ It would be harder, he thinks, to make a case for strong review—‘for a strong and final veto exercised pursuant to judicial-style reasoning upon the output of a full and fresh legislative-style consideration of an issue of rights on the merits’.⁷² A focus on the issue of interpretation, however, demonstrates the frailty of any such distinction between strong and weak review.⁷³ A refusal to apply a provision according to its literal terms, or (superficially) apparent meaning, displaces any such judicial ‘veto’: the provision is simply applied to particular facts in a manner that safeguards the basic rights in question. Section 3 of the Human Rights Act, instructing courts to interpret statutes consistently with European Convention rights as far as possible, largely affirms what (on the present argument) can be considered ordinary common law practice. At least insofar

⁷⁰ See further Allan, ‘Interpretation, Injustice, and Integrity’, *supra* note 9, especially 76-78.

⁷¹ Waldron, *supra* note 14, at 24. See Human Rights Act 1998, s. 4; a declaration of incompatibility has no effect on the statute’s validity, and its consequences, if any, are a matter of executive and parliamentary discretion.

⁷² *Ibid.*

⁷³ According to Waldron, ‘strong review’ enables courts ‘to decline to apply a statute in a particular case (even though the statute on its own terms plainly applies in that case) or to modify the effect of a statute to make its application conform with individual rights (in ways that the statute itself does not envisage)’; see Waldron, ‘The Core of the Case Against Judicial Review’ (2006) 115 *Yale L.J.* 1346 at 1354. I am arguing that these references to the statute’s ‘plain terms’ and ‘modification’ of their effect beg the critical interpretative questions. In advance of interpretative construction, there is nothing to ‘apply’ or to ‘modify’.

as European Convention rights track the basic rights already embodied in contemporary British domestic public law—common law constitutional rights—Acts of Parliament are rightly presumed to affirm such rights unless the opposite conclusion is inescapable.⁷⁴

More important, in practice, than formal distinctions between strong and weak review, so called, is the existence of a political culture in which judicial determinations of basic rights are accorded due respect.⁷⁵ Not only should declarations of incompatibility—or, less formally, reasoned expressions of judicial concern—normally stimulate legislative review and reform; but such remedies may in any case be regarded as a last resort, applicable only when, exceptionally, the ordinary interpretative tools prove inadequate.⁷⁶ An independent judiciary, authorized to interpret the law, can fulfil its implicit responsibilities only by striving to construe statutes consistently with fundamental rights, whether or not it is formally instructed by statute or constitutional text to do so.⁷⁷ These are ordinary common law responsibilities in the sense that they are entailed by strict adherence to the rule of law.⁷⁸

⁷⁴ Note Lord Mance's affirmation, in *Nicklinson*, that 'although judges must work within a framework of legal principle, reasoning and precedent, very little, if any, judicial decision-making, especially at an appellate level, is or ought to be separated from a consideration of what is just or fair, and the balancing of interests required under the Human Rights Convention merely underlines this' (para. 191). Lord Mance is responding to Lord Sumption's view that the 'legislative judgment must, in the present social and moral context, necessarily be determinative' (ibid).

⁷⁵ Compare David Dyzenhaus, 'Are Legislatures Good at Morality? Or Better at it than the Courts?' (2009) 7 Int'l J. Const L. 46. See also Dyzenhaus, 'The Incoherence of Constitutional Positivism', supra note 19.

⁷⁶ See further Allan, *Sovereignty of Law*, supra note 1, especially 185-91, 201-202, 317-23.

⁷⁷ Compare Dyzenhaus, 'Are Legislatures Good at Morality?', supra note 75, at 48-49.

⁷⁸ In his reply to Dyzenhaus, Waldron accepts that 'strong' judicial review lies at one end of a continuum of legal orders that honour fundamental rights, while nonetheless insisting on the importance of constitutional form: Waldron, 'Refining the Question', supra note 49, at 76-78. From an internal, interpretative perspective, however, the focus shifts from matters of institutional design or structure towards questions of meaning and application—questions, primarily, of justice, even less amenable to regimentation according to Waldron's schema.

A robust interpretativism—sufficiently robust to maintain the link between legality and legitimacy—renders a judicial power of *invalidation* unnecessary. Interpretation in the spirit of integrity can best reconcile legislative supremacy with the rule of law.⁷⁹ If a statute appears on its face to prohibit the admission of potentially relevant evidence for the defence in a criminal trial, it must be construed as subject to an implicit proviso allowing the reception of evidence necessary for a fair trial. If a general ban on assisted suicide would infringe the rights of severely disabled persons, who might reasonably need such assistance, it must be interpreted in a manner appropriate to their exceptional circumstances. If a statute expressly precludes judicial review of the exercise of powers conferred on a government minister or administrative agency, it must be understood as inapplicable in a case of jurisdictional error—error of a kind or gravity that undermines or contradicts the authority conferred.⁸⁰

The more serious the potential injustice in contemplation, the further it is reasonable to depart from any literal, unqualified reading. The graver the threat, the more confident a court can be that the injustice in question was unforeseen; and the more confident, too, that no such departure from general principle—even if envisaged or intended by certain powerful politicians—could possibly be justified. And while these conclusions may sound unorthodox, rejecting the familiar distinction between statutory meaning and constitutional validity, they are nevertheless the natural implications of genuine common law jurisprudence—a jurisprudence rooted in the ideal of integrity. That fusion of legality and legitimacy, implicit in the requirement of reasoned justification

⁷⁹ A statute purporting to authorize the killing of blue-eyed babies (see A. V. Dicey, *The Law of the Constitution*, ed., J. W. F. Allison, *Oxford Edition of Dicey* (Oxford: Oxford University Press, 2013) vol. 1, 47) would be inapplicable to all reasonably foreseeable instances. If, in ordering the punishment of innocent persons, it amounted to a bill of attainder, it would fail to qualify as *law*, lacking the generality intrinsic to a genuine statute: see Allan, *Sovereignty of Law*, *supra* note 1, 141-42.

⁸⁰ *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 A.C. 147; Allan, *Sovereignty of Law*, *supra* note 1, at 214-15.

for all coercive state action, is simply the consequence of our acknowledgment of fundamental rights. The reconciliation of statutory instructions with these basic rights is a non-negotiable demand of legality—a concomitant of any good faith attempt to apply the law to particular cases.

It would not, of course, be appropriate for a court to fashion a comprehensive scheme, imposing new rules (for example) to qualify a ban on assisted suicide. Even if the court were capable of doing so, it would breach the separation of powers. But it does not follow that the court cannot properly determine that the Suicide Act does not, in all the circumstances, apply to the facts of the particular case. The implications for subsequent cases must be determined, as necessary, by ordinary common law reasoning. The result, admittedly, is to qualify the literal terms of the prohibition by a silent proviso—‘except where a person of settled and independent mind, unwilling to endure further suffering, receives the assistance that his extreme physical disability makes necessary’. But the nature and scope of the proviso must be understood by reference to the facts of a particular case, its extension to other cases—involving different degrees of suffering and disability—entailing analogous considerations of proportionality and fairness. If there is a right of personal autonomy, which precludes an absolute ban on assisted suicide, it must be duly enforced in appropriate cases: the balance of moral considerations is intrinsic to the relevant questions of law; and the court must in each case apply the law.

Even if there are good reasons to refrain from making a declaration of incompatibility—it may be too much to expect Parliament itself to fashion a comprehensive scheme, anticipating all the delicate moral issues likely to arise in future cases—there is no excuse for failing to apply the current law, which includes the claimant’s right to fair treatment in accordance with constitutional principle. Lord Sumption considered that the justifiability of relaxing an absolute ban on assisted suicide was ‘a classic example of the kind of issue which should be decided by Parliament’.⁸¹ But

⁸¹ *Nicklinson*, para. 230.

if that is true, it is so only in the context of wholesale reform. Questions of legal principle, as they arise in the resolution of particular cases, cannot responsibly be evaded; judicial reform is necessarily cautious and incremental, rather the consequence of adjudication than its aim or purpose.⁸²

We should also challenge an objection to the alleged ‘imposition’ of the judges’ personal opinions as regards a choice between ‘mutually inconsistent moral values’ on which there is no current social consensus.⁸³ Our affirmation of basic human rights denies such radical indeterminacy: we suppose that we can reconcile the competing moral demands, or at least temper their antagonism, as we settle the most pressing and urgent cases. There is no *choice* to be made in the sense of a preference between irreconcilable values; judicial deliberation, sensitive to all relevant considerations, is accordingly no more an imposition of personal will than any other good-faith moral judgment. The relevant social consensus is our mutual adherence to the rule of law: public authorities must comply with the fundamental rights of persons that legal practice, correctly interpreted, identifies. And interpretation must be holistic: people are fairly treated as equals only by adherence to a unified scheme of principle, amounting to a coherent moral vision. That conception of the rule of law not only requires the judicial protection of constitutional rights; it underlies and pervades our traditional common law method, affirming the complex but coherent moral unity of public law.⁸⁴

⁸² Lady Hale and Lord Kerr denied that a declaration of incompatibility should be withheld until an alternative scheme could be articulated in principle by the court; but they were wrong to suppose that, in the absence of such a declaration, the court was unable to protect fundamental rights (see *Nicklinson*, paras. 300, 318-21; 352-55).

⁸³ *Nicklinson*, para. 230 (Lord Sumption).

⁸⁴ For a powerful defence of the unity of value, challenging common assumptions about indeterminacy and incommensurability, see Ronald Dworkin, *Justice for Hedgehogs* (Cambridge, Mass: Harvard University Press, 2011). Compare with Rawls, ‘Outline of a Decision Procedure for Ethics’, *supra* note 58, at 186 (especially para. 3.6); and see further Walters, ‘Legal Humanism’, *supra* note 59.

