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## The Rule of Law

For all the power the government has, being only for the good of the society, as it ought not to be arbitrary and at pleasure, so it ought to be exercised by established and promulgated laws, that both the people may know their duty, and be safe and secure within the limits of the law, and the rulers, too, kept within their due bounds . . .

John Locke, *Two Treatises of Government*, ii, para. 137.

Contrary to orthodox opinion, A. V. Dicey was wise to seek an interpretation of the rule of law which reflected the traditions and peculiarities of English common law.<sup>1</sup> Whatever its faults, Dicey's work recognized the importance of expounding a constitutional philosophy, which could serve as a basis for the systematic exposition and consistent development of legal principle. More recent efforts to give analytical precision to the concept of the rule of law have not always been wholly successful; and constitutional law—at least in Britain—has perhaps been weakened in consequence, because its foundations have come to seem uncertain and insecure. Many public lawyers have apparently abandoned even the attempt to understand and restate the rule of law doctrine, thinking it futile and unrewarding.<sup>2</sup>

At the heart of the problem lies the difficulty of articulating a coherent doctrine which resists a purely formal conception of legality—according to which even brutal decrees of a dictator, if formally 'valid', meet the requirements of the rule of law—without instead propounding a complete political and social philosophy.<sup>3</sup> The formal conception, which serves only to distinguish the commands of the government in power (whatever their content) from those of anyone else, offers little of value to the constitutional theorist. And the richer seams of political theory—ideal versions of justice in the liberal, constitutional state—are inevitably

too ambitious (because too controversial) to provide a secure basis for practical analysis. The constitutional theorist who wishes to offer an interpretation of legal and political practice must necessarily focus on existing institutions; and the contribution of ideal theory, which may recommend quite different arrangements, is therefore likely to be limited.<sup>4</sup>

It seems very doubtful whether it is possible to formulate a theory of the rule of law of universal validity—which might serve as a model for all legal systems (or even all the Western democracies) and at the same time escape the opposite extremes of formal legality and substantive interpretations of justice.<sup>5</sup> But it does not follow that we cannot seek to elaborate the meaning and content of the rule of law within the context of the British polity—exploring the legal foundations of constitutionalism in the setting of contingent political institutions.<sup>6</sup> That was, of course, Dicey's purpose in *The Law of the Constitution*; and—though on a grander, more abstract scale—also Ronald Dworkin's, whose work largely eschews ideal theory in favour of analysis based on existing legal institutions and grounded in established political principle.<sup>7</sup>

In the mouth of a British constitutional lawyer, the term 'rule of law' seems to mean primarily a corpus of basic principles and values, which together lend some stability and coherence to the legal order. It expresses his commitment to a scheme of ideas regarded as legally fundamental. They help to define the nature of the constitution, reflecting constitutional history and generating expectations about the conduct and character of modern government. The rule of law is an amalgam of standards, expectations, and aspirations: it encompasses traditional ideas about individual liberty and natural justice, and, more generally, ideas about the requirements of justice and fairness in the relations between government and governed. Nor can substantive and procedural fairness be easily distinguished: each is premised on respect for the dignity of the individual person; and the content of justice or fairness (procedure and substance) is inevitably dependent—to a degree—on the circumstances of the particular case. Allegiance to the rule of law is not, therefore, a technical (or even 'lawyerly') commitment: it is necess-

<sup>4</sup> But see discussion of the general concept of the rule of law below.

<sup>5</sup> See, however, the instructive discussion by Geoffrey de Q. Walker, *The Rule of Law, Foundation of Constitutional Democracy* (Melbourne, 1988), esp. ch. 1.

<sup>6</sup> For a useful discussion, see Jeffrey Jowell, 'The Rule of Law Today', in Jeffrey Jowell and Dawn Oliver (eds.), *The Changing Constitution*, 2nd edn. (Oxford, 1989), 3. See also Ian Hadden and Norman Lewis, *The Noble Lie: The British Constitution and the Rule of Law* (London, 1986).

<sup>7</sup> Ronald Dworkin, *Taking Rights Seriously* (London, 1977); *A Matter of Principle* (Oxford, 1985); *Law's Empire* (London, 1986). For previous comparison between Dworkin and Dicey, see Neil MacCormick, 'Jurisprudence and the Constitution' [1983] *Current Legal Problems* 13; T. R. S. Allan, 'Dworkin and Dicey: The Rule of Law as Integrity' (1988) 8 OJLS 266.

<sup>1</sup> *The Law of the Constitution*, 10th edn. (London, 1959).

<sup>2</sup> Cf. R. W. Blackburn, 'Dicey and the Teaching of Public Law' [1985] PL 679 at 692–3.

<sup>3</sup> Cf. Joseph Raz, 'The Rule of Law and its Virtue' (1977) 93 LQR 195 at 195–6. The final resolution of the Delhi Congress of the International Commission of Jurists (1959) declared the rule of law to be a dynamic concept 'which should be employed not only to safeguard and advance the civil and political rights of the individual in a free society, but also to establish social, economic, educational and cultural conditions under which his legitimate aspirations and dignity may be realised'. See generally Norman S. Marsh, 'The Rule of Law as a Supra-National Concept', in A. G. Guest (ed.), *Oxford Essays in Jurisprudence*, first series (Oxford, 1961), 223.

arily allegiance to a political philosophy—albeit a practical philosophy grounded in existing constitutional tradition.

The idea of the rule of law is also inextricably linked with certain basic institutional arrangements. The fundamental notion of equality, which lies close to the heart of our convictions about justice and fairness, demands an equal voice for all adult citizens in the legislative process: universal suffrage may today be taken to be a central strand of the rule of law. There is also a commitment implied to some form of the principle of separation of powers. A legal order constructed on British constitutional lines necessitates a division of institutional competence between legislature, executive, and judiciary. A government which could make laws at its own pleasure, and determine the extent of its own infractions of the laws, would not be a government under the rule of law.<sup>8</sup>

#### *Political ideal and juridical principle*

We shall, then, seek an interpretation of the rule of law which reflects the idea of constitutional government as it pertains (primarily) to the British polity. However, we can learn much about its content by examining the concept in its more abstract guise—as a general political ideal—and noticing some of the strengths and weaknesses of contemporary discussion. Even the most formal, and perhaps least controversial, interpretation may be seen to contain the seeds of a richer account, whose expanded meaning must be sought, concretely, in the basic principles of a particular legal system.

The idea of the rule of law, in contradistinction to rule by men, is an ancient one.<sup>9</sup> At its core is the conviction that law provides the means of protecting each citizen from the arbitrary will of others—including the most powerful. By being constrained to govern by means of general laws, the political rulers of society cannot single out particular persons for special treatment. The law is to constitute a bulwark between governors and governed, shielding the individual from hostile discrimination on the part of those with political power. The idea is that 'when we obey laws, in the sense of general abstract rules laid down irrespective of their application to us, we are not subject to another man's will and are therefore free'.<sup>10</sup> In this most general form the doctrine expresses a political ideal, and the extent to which any political society

<sup>8</sup> See generally Ch. 3, below.

<sup>9</sup> See e.g. Aristotle, *Politics*, III (trans. Jowett, ed. Davis), 16: 'The rule of law is preferable to that of any individual.' The idea finds its clearest expression in medieval political theory. See A. P. d'Entreves, *The Notion of the State* (Oxford, 1967), Part 2.

<sup>10</sup> F. A. Hayek, *The Constitution of Liberty* (London, 1960), 153. Cf. J. R. Lucas, *The Principles of Politics* (Oxford, 1966), 113.

can claim conformity to it must inevitably be a matter of degree. In particular, the greater the extent of government involvement in social affairs and economic management, the greater correspondingly is the need for discrimination between individuals and groups by means of more particular rules.<sup>11</sup>

Joseph Raz explains that the ideal of government by law and not by men makes sense only if 'law' means general, open, and relatively stable law.<sup>12</sup> We cannot escape the necessity for more particular laws and regulations, but the making of such laws should be guided by relatively stable, published, general rules. On Raz's account, however, the doctrine is only a formal one: its various precepts derive from the basic idea that the law must be capable of guiding the behaviour of its subjects. The rule of law, on this view, plays an essentially procedural role, governing the *manner* in which government may pursue its ends. It does not place substantive limits on the content of the law. None the less, there is at least an indirect connection with ideas of generality and neutrality. Even the formal doctrine imposes important constraints on arbitrary power. The government is prevented from changing the law retrospectively or abruptly or secretly whenever that would suit its purposes; and possibilities for abuse of power are greatly reduced if executive powers must be exercised within the limits of general rules.

But since the rule of law, in Raz's view, is only one virtue which a legal system might possess, its importance should not be exaggerated. Like a sharp knife, the rule of law is morally neutral—an efficient instrument for good purposes, or wicked:

It is not to be confused with democracy, justice, equality (before the law or otherwise), human rights of any kind or respect for persons or for the dignity of man. A non-democratic legal system, based on the denial of human rights, on extensive poverty, on racial segregation, sexual inequalities and religious persecution may, in principle, conform to the requirements of the Rule of Law better than any of the legal systems of the more enlightened western democracies.<sup>13</sup>

Lon Fuller had attempted a rather more ambitious interpretation, seeking to show a necessary connection between legality and justice. He expounded eight canons of legality, which were essential features of what he termed the 'inner morality of law': a total failure to respect any one of these canons would result in failure to achieve anything that could properly be called a legal system.<sup>14</sup> The enterprise of govern-

<sup>11</sup> For a powerful defence of the political ideal, and comment on the perceived dangers of government social and economic management, see esp. F. A. Hayek, *The Road to Serfdom* (London, 1944).

<sup>12</sup> 'The Rule of Law and its Virtue' (1977) 93 LQR 195 at 197.

<sup>13</sup> *Ibid.* 196.

<sup>14</sup> Lon F. Fuller, *The Morality of Law*, revised edn. (New Haven, Conn., 1969), ch. 2.

ment according to law was intimately associated with a moral view of the relation between citizen and state. With a drastic failure of legality, government by law inevitably degenerated into the exercise of a 'lawless unlimited power'—expressing a brutal disregard for human rights.

The first requirement was generality: there must be general rules, as opposed to deciding every issue on an *ad hoc* basis. The rules must be published; they must be clear and comprehensible; the rules should not be contradictory; nor should they require the impossible—laws creating a strict criminal liability were the gravest infringement, serving the convenience of the prosecutor at the expense of justice. Laws should be prospective: retrospective laws must be exceptional, employed to correct lapses in other requirements of the law's internal morality. The precept *nulla poena sine lege* was generally respected by civilized nations: 'It is the retroactive criminal statute that calls most directly to mind the brutal absurdity of commanding a man today to do something yesterday.'<sup>15</sup> There must be constancy of law through time, in the sense that too frequent changes in the rules render obedience impossible. Finally, there must be congruence between official action and the law: there should be no discrepancy between the law as declared and as actually administered. The law concerning, *inter alia*, procedural due process, habeas corpus, rights of appeal and standing dealt with the requirements of this principle of legality.<sup>16</sup>

Like Raz, many philosophers have questioned the connection between legality and justice, insisting that the rule of law merely enhances the ability of law to achieve its purposes, whatever these are. There is, however, an implicit assumption here that the law consists only in rules directed at the attainment of particular purposes—essentially governmental purposes. Raz's denial of the overriding importance of the rule of law,<sup>17</sup> and his attempt to sever its content from the values of justice and equality, alike reflect the serious limitations of legal positivism, which views every law as a species of 'command'. If the law were largely a mechanism for the execution of government objectives, it would be right to accept his contention that the rule of law was only a 'negative' virtue,<sup>18</sup> restraining government from certain kinds of arbitrary rule.

But this perspective overlooks the fundamental role of law as constituting a stable *framework* of rules, which enables everyone to pursue his own aims in reasonable confidence about the likely conduct of others. In ensuring the regular and consistent application of the ordinary private law, including the criminal law, the rule of law makes possible a free society in which each person, while respecting the constraints

<sup>15</sup> Ibid. 59. <sup>16</sup> Ibid. 81.

<sup>17</sup> 'The Rule of Law', 195. <sup>18</sup> Ibid. 206.

which the rules impose on all, has equal opportunity—in so far as the law can provide it—to further his own ends. The rule of law therefore serves to promote and protect legitimate expectations, which in turn provide a basis for individual planning and action.

Hayek explained that *the law*, as it features in the idea of the rule of law or government under law, as well as in the real meaning of the separation of powers, should be understood as those abstract rules which derive from the articulation of previously existing practices and understandings.<sup>19</sup> In particular, the English common law was not *commanded* by anyone: it evolved from custom and was adapted in response to changing circumstances, requiring the judges to announce 'new' rules which sought merely to resolve ambiguities and inconsistencies within the existing law. These abstract rules are not, then, primarily the product of deliberate legislation and do not serve the purposes of government, but rather form a basis for the successful pursuit of countless purposes of different individuals: 'The law will consist of purpose-independent rules which govern the conduct of individuals towards each other, are intended to apply to an unknown number of further instances, and by defining a protected domain of each, enable an order of actions to form itself wherein the individuals can make feasible plans.'<sup>20</sup>

The rule of law ensures equality in the fundamental sense that it is only the consistent application of the ordinary law to every person—including public officials, in the absence of special powers, specifically conferred—which preserves the functioning legal order necessary for everyone to act freely in his own interests, while respecting the same freedom in others. Hayek's work establishes an important connection between legality and justice. Justice may be understood primarily as entitlement to the benefits conferred by the application of those general rules which constitute a functioning legal order. Of course, those rules should broadly reflect people's expectations about the sort of conduct which is generally appropriate in different circumstances. And they must be abstract and general, applying equally to everyone in the same situation. Understood in this way, justice is secured by adherence to the rule of law.<sup>21</sup>

A similar connection is made by John Rawls, who identifies the failure of judges and other officials to apply the appropriate rules, or to interpret them correctly, as a form of injustice.<sup>22</sup> The regular and impartial administration of public rules provides a basis for both individual liberty and social co-operation:

<sup>19</sup> F. A. Hayek, *Law, Legislation and Liberty* (London, 1982), i, chs. 4, 5.

<sup>20</sup> Ibid. 85–6; see also esp. 112–22.

<sup>21</sup> Ibid., ch. 8.

<sup>22</sup> *A Theory of Justice* (Oxford, 1972).

A legal system is a coercive order of public rules addressed to rational persons for the purpose of regulating their conduct and providing the framework for social co-operation. When these rules are just they establish a basis for legitimate expectations. They constitute grounds upon which persons can rely on one another and rightly object when their expectations are not fulfilled.<sup>23</sup>

Rawls proceeds to derive the precepts of 'formal' justice—or canons of legality—from this conception of a legal system. As these precepts are weakened, so the system degenerates into a 'collection of particular orders designed to advance the interests of a dictator or the ideal of a benevolent despot'.<sup>24</sup> The rule of law implies the precept that similar cases be treated similarly. Even if the criteria of similarity are provided by the legal rules themselves, the precept is not vacuous. It significantly limits the discretion of judges and officials, forcing them to justify the distinctions made between persons by reference to the relevant rules and principles.<sup>25</sup>

Inevitably, constitutional lawyers are more concerned with the exercise of governmental authority, in the sense of political power, than with the administration of the ordinary private law. And it may be thought that Raz's conception of the rule of law is an adequate model for the purposes of public law. However, the continuing controversy over Fuller's claims seems to reflect different assumptions about the purposes of political philosophy, and about the nature of the connection between legal theory and legal practice. Fuller's discussion contained a powerful critique of positivism, which he thought was preoccupied with matters of labelling and accurate definition, at the expense of the practical elaboration of morality and justice. He complained that positivism sought a 'conceptual model' of law-making in artificial abstraction from social reality. Analytical legal positivism lacked a social dimension. Perceptively, Fuller insisted on placing enquiries about the definition of law within a purposive context, reflecting the underlying point of the rule of law.<sup>26</sup>

Raz's formal conception achieves precision and coherence at the price of a somewhat impractical detachment. It describes an ideal to which any particular legal system should aspire, and by which it may be broadly evaluated. The constitutional theorist, however, needs a more practical conception which can serve as a truly *juridical* doctrine, providing a basis for adjudication as well as a model for legislation. A judge could not easily adopt Raz's view that conformity to the rule of law was merely a 'matter of degree', and that a lesser conformity is

<sup>23</sup> Ibid. 235. <sup>24</sup> Ibid. 236. <sup>25</sup> Ibid. 237.

<sup>26</sup> Hayek also condemned as unrealistic the notion of a 'science of norms': the compatibility of different norms could not be ascertained in isolation from facts because abstract rules of conduct determine particular actions only in the light of factual circumstances: *Law, Legislation and Liberty*, i. 105–6.

often preferable to the failure of conflicting social goals.<sup>27</sup> The public lawyer needs a broader and richer theory which explains the widely accepted view that, for the judge, there can be no compromise with the rule of law.

Even if the formal conception has advantages of definitional certainty and clarity for the political philosopher, it is too jejune to inform the practice of adjudication. A judge is bound to have constant regard to its underlying rationale, and the values which that rationale implies. These values, in turn, will have important implications for the substantive content of law. Although Raz denies that it has any bearing on political freedom, in the sense of freedom from governmental interference, he observes that the rule of law provides the foundation for the legal respect for human dignity. Respecting human dignity entails treating people as persons capable of planning and plotting their future. A legal system which observes the rule of law meets this requirement in the sense of attempting to guide people's behaviour by affecting their deliberations about what to do, thereby respecting their rationality and autonomy.

Here Raz seems to follow Fuller, who argued that every departure from the rule of law was an affront to man's dignity as a responsible agent: 'To judge his actions by unpublished or retrospective laws, or to order him to do an act that is impossible, is to convey to him your indifference to his powers of self-determination'.<sup>28</sup> And in defence of Fuller, John Finnis, while warning that the rule of law does not guarantee every aspect of the 'common good', has denied that it should be viewed as morally neutral. Fuller's discussion should be understood as asserting a connection between the inner morality of law and substantive justice, in the sense that a tyrant holds in contempt the very values of reciprocity, fairness, and respect for persons which constitute the rational point of the rule of law:

The idea of the rule of law is based on the notion that a certain quality of interaction between ruler and ruled, involving reciprocity and procedural fairness, is very *valuable for its own sake*; it is not merely a means to other social ends, and they may not lightly be sacrificed for such other ends.<sup>29</sup>

Now, a judge who seeks to uphold the rule of law—like the constitutional theorist who wishes to explore its implications—cannot rest content with a purely descriptive analysis. Necessarily he must interpret its demands in particular cases, determining the practical content of each of the precepts of formal justice, and seeking to resolve conflicts between them in the manner which best respects the underlying point

<sup>27</sup> 'The Rule of Law', 210–11.

<sup>28</sup> *The Morality of Law*, 162.

<sup>29</sup> *Natural Law and Natural Rights* (Oxford, 1980), 273–4 (emphasis added).

of the rule of law. Fuller denied the possibility of a utopia of legality in which all his desiderata were fully satisfied. In practice, they would sometimes conflict, requiring a resolution sensitive to the fundamental idea of reciprocity—akin to a contract between citizen and State. Even in seeking to reconcile conflicting requirements of the formal doctrine, then, we must have resort to underlying substantive values, and these will be rightly considered themselves part of the rule of law by constitutional lawyers. They will indicate what a court *should* decide in a case where the formal doctrine provides no answer.

The judge is therefore driven by the nature of his office, as the constitutional theorist is directed by the nature of *his* enterprise, to seek the full meaning of the rule of law in those fundamental legal values of personal dignity and autonomy, which explain our adherence to the precepts of formal justice. We are, then, bound to move beyond the purely formal conception of legality, to seek a broader political theory, which explains the legitimacy of judicial activity in defence of the rule of law, understood as embracing both form and substance.

The limitations of the formal interpretation of the rule of law reflect a more pervasive problem with legal positivism itself. As a theoretical, descriptive philosophy, legal positivism can give no account of the practical activity of adjudication. It draws arbitrary lines between legal rules and underlying principles—as though in deciding between competing interpretations of the law, in the event of dispute, the judge is not in any significant sense constrained by law at all. Such distortions of legal analysis are reflected, as we shall see, in those untenable doctrines (propounded by Dicey) which place an artificial barrier between law and convention, and insist on the absolute sovereignty of Parliament. The formal interpretation of the rule of law, resisting a substantive dimension, is ultimately consonant only with that irredeemably theoretical perspective.<sup>30</sup>

#### *Legality and equity*

The principles of natural justice find a place even within a formal doctrine of the rule of law: the requirements of a fair and open hearing and the absence of bias are recognized as essential for the correct application of the law. 'These are guidelines intended to preserve the integrity of the judicial process . . . The precepts of natural justice are to insure that the legal order will be impartially and regularly maintained.'<sup>31</sup> The modern law of procedural fairness, however, demonstrates the

practical necessity of developing the rule of law more broadly. Where discretionary powers are granted to public authorities, the correct application of the law involves more than the efficient operation of legal rules. It requires an exercise of discretion which is sensitive to the particular circumstances of those directly affected.

The rules of natural justice have accordingly been extended to apply to 'quasi-judicial' and administrative decisions; and the content of procedural fairness has become more flexible, dependent on all the circumstances of the particular case. Inevitably, the court's perception of the significance of the substantive interests at stake will colour its assessment of the requirements of fairness. Administrative decisions which impinge on important individual rights or established expectations may be expected to meet more demanding procedural standards than those which are more routine in character. Indeed, the doctrine of legitimate expectations has now been developed, in response to such considerations, to the point where a line between procedural and substantive fairness can no longer be clearly drawn.<sup>32</sup>

A formal or 'instrumentalist' theory of natural justice overlooks its grounding in recognition of the moral status of the person affected by a decision. It is a legitimate expansion of the rule of law, which extends the scope of natural justice from judicial proceedings to a broader range of administrative decisions, because the purposes of granting a fair hearing are not limited to those of the efficient administration of law or policy. Granting a fair hearing helps to address to that person the reasons for applying general rules to him in his particular circumstances. It enables him to play a role in the process of decision, thereby acknowledging his autonomy and individuality. Quite apart from the desire to reach a correct decision, 'we think we owe it to a man as a human being to engage in argument with him, and allow him to engage in argument with us, rather than take decisions about him behind his back, completely disregarding, as it were, his status as a rational agent, able to appreciate the rationale of our decisions about him, possibly willing to co-operate in carrying them out'.<sup>33</sup>

From this perspective, we can also appreciate the reason for insisting that justice must not only be done, but be manifestly seen to be done.<sup>34</sup> The appearance of bias offends the rule of law as much as its actuality; and where the decision-maker has a pecuniary interest in the decision, the court will quash or overturn it without investigating the real likelihood of bias.<sup>35</sup> The correct application of legal rules to the actual facts of a case by a judge with an interest in the outcome, however unbiased

<sup>30</sup> See Chs. 10 and 11, below. For the theoretical nature of legal positivism, see M. J. Detmold, *The Australian Commonwealth* (Sydney, 1985), ch. 14.

<sup>31</sup> Rawls, *A Theory of Justice*, 238–9. Cf. Raz, 'The Rule of Law', 201.

<sup>32</sup> Ch. 8, below.

<sup>33</sup> Lucas, *The Principles of Politics*, 132.

<sup>34</sup> Cf. *R. v. Sussex JJ.*, ex p. *McCarthy* [1924] 1 KB 256, 259 (Lord Hewart).

<sup>35</sup> *Dimes v. Grand Junction Canal* (1852) 3 HLC 759.

in practice, violates the requirement of respect for the parties affected.<sup>36</sup> The suspicion of bias insults their dignity, even if the outcome is in accordance with the law, correctly understood.

The development of the principle of fairness, as a requirement of administrative decisions, though a rational extension of traditional rules of natural justice, nevertheless complicates our understanding of the rule of law. It demonstrates that the principles of generality and neutrality, which are secured by general rules, consistently applied, must be supplemented by moral principles whose impact is closely tailored to the circumstances of particular cases. Executive powers must be confined in their purposes and scope by general rules, preventing arbitrary discrimination; but their exercise in individual cases—inevitably with very different consequences—should be sensitive to the particular circumstances. There is no contradiction here, only a recognition that the rule of law encompasses conflicting ideals of legality and equity, and cannot be reduced without distortion to either.

J. R. Lucas has distinguished helpfully between these ideals.<sup>37</sup> A decision in accord with legality is purely deductive, based on a finite number of features antecedently specified as relevant. It has the merits of certainty and predictability. Legality should not, however, be equated with the rule of law. It is not identical with rationality, and is less just than equity. Equity is more truly rational: it attempts to reach the right decision in all the circumstances, leaving the judge with wide discretion, subject only to treating like cases alike. Common law adjudication, Lucas suggests, is characteristic of equity—involving a limited number of persons, but an indefinite number of possibly relevant factors, justification for those selected being given *ex post facto*.

We shall see that the difference between these two ideals is indeed reflected in the important distinction between statutory rules and common law principles. Obtaining their moral force from the fact of enactment, statutory rules must be faithfully applied by the courts according to their terms. Common law rules, however, are only convenient distillations of underlying principle, and therefore vulnerable to continual reformulation in the light of better knowledge or changing perceptions of justice. Their moral force is more directly dependent on the dictates of reason.<sup>38</sup>

These different faces of the rule of law none the less transcend the division between common law and legislation. The common law encompasses both ideals: the requirements of legality are everywhere

<sup>36</sup> Cf. Gerry Maher, 'Natural Justice as Fairness', in Neil MacCormick and Peter Birks (eds.), *The Legal Mind: Essays for Tony Honoré* (Oxford, 1986), 103.

<sup>37</sup> *The Principles of Politics*, 133–5; see also J. R. Lucas, *On Justice* (Oxford, 1980), 76–9.

<sup>38</sup> Chs. 4–6, below. Cf. Lon L. Fuller, *Anatomy of the Law* (New York, 1968), 84–112.

tempered by those of equity. In the criminal law, the principle of legality is of special importance. No one should be convicted of an offence whose constituents were not clearly determined before he acted: *nulla crimen sine lege*. That principle places important limitations on the possibilities for judicial creativity in interpreting both common law and statute.<sup>39</sup> On the other hand, equity plays a central role in the administration of the criminal law. In particular, the rules of procedure and evidence are adjusted to meet the overriding requirement that the defendant should be fairly tried. Even probative and admissible evidence may be excluded in the judge's discretion, where its reception would undermine the fairness of the trial. The exclusionary discretion is not confined to incriminating evidence to which the jury might attach an exaggerated weight, but extends to evidence unfairly obtained in breach of the rules governing the manner in which evidence is obtained from the accused, by search or interrogation.<sup>40</sup>

An important consequence of the interplay between legality and equity, in the context of the criminal trial, is that the common law repudiates a notion of 'fair trial' based solely on formal procedures. The judge's duty to ensure a fair trial commits him to determining the justice of the defendant's treatment prior to arraignment, where the conduct of police or prosecution is impugned. The defendant's privilege against self-incrimination affords him protection: he enjoys a qualified right of silence both before and during the trial. Although controversial, the privilege serves to ensure that the adversarial nature of the criminal trial does not leave the accused at too great a disadvantage; and the exclusionary discretion exists to preserve the integrity of the trial by providing an effective remedy against abuse.<sup>41</sup> The principle *nemo debet prodere se ipsum* applies, not merely to confessions, but to other evidence obtained from the defendant in circumstances where a confession, similarly obtained, might be excluded.<sup>42</sup> A formal account of the rule of law would emphasize the importance of conformity to settled rules. But it would be a distorted account of the doctrine, as it applies to the English (and Scottish) criminal trial, if it omitted the influence of equity.<sup>43</sup>

<sup>39</sup> Cf. A. T. H. Smith, 'Judicial Law Making in the Criminal Law' (1984) 100 LQR 46.

<sup>40</sup> See *Sang* [1979] 2 All ER 1222; cf. Police & Crim. Evid. Act 1984 s. 78.

<sup>41</sup> See generally T. R. S. Allan, 'Fairness, Truth and Silence: The Criminal Trial and the Judge's Exclusionary Discretion', in Hyman Gross and Ross Harrison (eds.), *Jurisprudence: Cambridge Essays* (Oxford, 1992). For a very strong application of the privilege, see *Brophy* [1982] AC 476. The right of silence is qualified chiefly because judicial comment may sometimes be made on the defendant's failure to testify; and adverse inferences may sometimes be drawn from failure to provide evidence (e.g. *Smith* (1985) 81 Cr. App. R. 286).

<sup>42</sup> *Sang*, n. 40 above.

<sup>43</sup> Cf. *Lawrie v. Muir* 1950 SLT 37.

Notwithstanding the contrary strictures in *Sang*,<sup>44</sup> for example, the exclusionary discretion seems likely to outflank the rule that entrapment constitutes no defence to a criminal trial. Equity—or fairness—is inherently antagonistic to general rules, whose application is (necessarily) unable to accommodate all the details of particular instances.<sup>45</sup> In some cases, the circumstances of entrapment may render a subsequent trial so unfair as to demand an exercise of the exclusionary discretion.<sup>46</sup> Moreover, the ordinary separation of powers between judge and prosecutor also seems vulnerable to the impact of equity in exceptional cases. The courts' careful denials of any jurisdiction to review the propriety of decisions to prosecute are invariably accompanied by reservations of the right to prevent an abuse of process. Although the court does not, as a general rule, direct the institution or discontinuance of criminal proceedings, ultimately it cannot escape responsibility for the fairness of the trial, considered as the consummation of a lengthy process including police investigation and the preparation of charges.<sup>47</sup>

In *Sang*,<sup>48</sup> Lord Scarman was anxious to set clear boundaries to the judge's exclusionary discretion. Admissible evidence could be excluded only in defence of settled principles: the character of the trial was determined by law, rather than 'subjective' judicial choice. He was right to recognize that there must be a balance of interests between prosecution and defence: the prosecution had rights, which the judge could not override. Legality imposes genuine constraints on exercise of the judge's discretion—constraints which justify Lord Scarman's determination to 'emerge from that last refuge of legal thought—that each case depends on its facts', and to attempt an analysis of principle.<sup>49</sup>

A full understanding of the rule of law, however, must acknowledge the value of that last refuge. The principle of fairness is ultimately irreducible: each case is, in some respects, unique and the requirements of justice can never be fully ascertained in advance. There is a continuing interaction between legality and equity—conflicting, but complementary, ideals whose relationship must—to a degree—be renegotiated in every instance. Like the principle of fairness which applies to administrative decisions affecting rights and expectations, the principle of fairness in the criminal trial acknowledges the defendant's dignity and autonomy as a moral agent. In the sense that the right to a fair trial secures a quality of treatment which suitably reflects the defendant's

<sup>44</sup> The House of Lords denied that evidence could be excluded because the crime was instigated by an *agent provocateur* because it would amount to recognizing entrapment as a defence, but available only at the court's discretion: see [1979] 2 All ER 1227 (Lord Diplock).

<sup>45</sup> For the distinction between rules and principles, see Chs. 4 and 6 below.

<sup>46</sup> Cf. *Harwood* [1989] Crim. LR 285; *Gill & Ranauna*, *ibid.* 358.

<sup>47</sup> See Ch. 9, below. <sup>48</sup> [1979] 2 All ER 1222, 1242–8. <sup>49</sup> *Ibid.* 1244.

dignity and autonomy, it is an absolute right which constitutes one of the primary ingredients of the rule of law.<sup>50</sup>

### Nulla poena sine lege

An interesting conflict of formal values was occasioned by the House of Lords' notorious decision in *Shaw v. DPP*,<sup>51</sup> which resurrected the common law offence of conspiracy to corrupt public morals, and invoked Lord Mansfield's authority for the residual power of the King's Bench, as *custos morum* of the people, to superintend offences prejudicial to the public welfare. H. L. A. Hart compared the decision to German statutes of the Nazi period, which condemned whatever was deserving of punishment according to 'the fundamental conceptions of a penal law and sound popular feeling'.<sup>52</sup> It flouted the principle of legality by opening a wide field of uncertainty: the citizen could no longer regulate his conduct so as to avoid specifically prohibited offences, free from the risk of punishment for what his fellow citizens might consider immoral. It seemed that almost any conduct which conflicted with widely held prejudices about what was immoral or indecent, where at least two people were involved, might *ex post facto* be pronounced a crime.<sup>53</sup>

Although the House of Lords subsequently disclaimed any residual power in the courts to create new crimes or to widen existing offences, a majority declined to overrule *Shaw*.<sup>54</sup> A conflict had evidently arisen between the various canons of legality. While Lord Diplock argued that *Shaw* had made the law uncertain, in the sense that its prescriptions could only be ascertained in retrospect, the majority resisted a departure from *Shaw* on the ground that that would undermine the requirement of stability or constancy. *Shaw* had established with certainty that the offence of conspiracy to corrupt public morals formed part of English criminal law. Lord Reid refused to reconsider the earlier decision even though he thought it wrong and anomalous.<sup>55</sup>

No doubt the demands of legal certainty, in the sense of constancy, must be partly judged over a range of judicial decisions. Each decision to overturn existing law, as previously declared, however justified in the particular case, serves to undermine the stability of law as a whole. It becomes harder to keep abreast of newly stated rules and so plan one's affairs with any confidence in the content of the law. There must inevitably be a balance, however, between longer-term systemic considerations and the requirements of justice in the particular case. Does

<sup>50</sup> Cf. Allan, 'Fairness, Truth and Silence'; see also Ch. 6, below.

<sup>51</sup> [1962] AC 220.

<sup>52</sup> Statute of 28 June 1935; H. L. A. Hart, *Law Liberty and Morality* (Oxford, 1962), 12.

<sup>53</sup> Cf. *Knulier* [1973] AC 435, 480 (Lord Diplock).

<sup>54</sup> *Knulier*, n. 53 above. Cf. *Withers* [1975] AC 842. <sup>55</sup> *Ibid.* 455.

the court not deny justice to the particular defendant if it sustains his conviction under a rule which it concedes is wrong or anomalous? A court which is truly committed to the administration of *justice* according to law must surely confront the substantive values which support the ideal of legality—if only to balance the detriment to these against the systemic gains from leaving bad rules unchanged.

Lord Diplock's proposal to overrule *Shaw* did not itself threaten the precept *nulla poena*. No one would be cheated by acting in reliance on the previous criminal law, in the sense of being trapped by new restrictions. Stability in law is valuable because it serves the interests of personal autonomy and dignity; and the idea of autonomy is closely linked with that of liberty: if the rule of law protects a person's ability to make intelligent decisions about how to act, it also entails the freedom of choice which makes that ability worthwhile. It recommends the maximum personal freedom compatible with public order and decency and similar freedom for others. John Rawls observes that 'if the precept of no crime without a law is violated, say by statutes being vague and imprecise, what we are at liberty to do is likewise vague and imprecise. The boundaries of our liberty are uncertain.' The citizens of a well-ordered society would want the rule of law maintained to safeguard basic civil and political liberties: it enjoyed a 'firm foundation... in the agreement of rational persons to establish for themselves the greatest equal liberty'.<sup>56</sup>

From this perspective, the reasons for repudiating *Shaw* seem almost overwhelming. It becomes hard to dissent from Lord Diplock's view that 'the courts should be the vigilant guardians of the liberty of the citizen'. He thought that if that liberty had been mistakenly curtailed by judicial decision, it was 'self-evident' that the court should correct its mistakes unless there were 'compelling reasons to the contrary'.<sup>57</sup> Admittedly, there is a sense in which a decision in favour of stability or constancy favoured equality. The majority noted that there had probably been many convictions of conspiracy to corrupt public morals since *Shaw* was decided; and it may be inferred that they were conscious of the injustice done to those convicted if the law were changed. Justice requires that like cases should be decided alike: equality between past and present litigants, it may be argued, forms a principal justification for the doctrine of precedent. However, in criminal cases the doctrine of precedent is usually relaxed because it is widely considered that the interests of liberty should prevail, and that no one should be punished for conduct which has been wrongly held illegal.<sup>58</sup>

<sup>56</sup> *A Theory of Justice*, 239–40.

<sup>57</sup> [1973] AC 435, 479.

<sup>58</sup> The Criminal Div. of the Court of Appeal may depart from an earlier decision in the interests of the liberty of the accused: *Taylor* (1950) 2 KB 368, 371 (Lord Goddard CJ).

Moreover, in the present context, equality was more truly protected by Lord Diplock's approach, notwithstanding the differences in treatment between defendants. *Shaw* permitted, in effect, the delegation of power to a jury to administer what amounts to an *ex post facto* criminal sanction for immoral conduct. Permitting the state to impose penalties for harmful or immoral conduct which is not clearly within the ambit of existing laws, defined with reasonable precision, violates equality fundamentally. It constitutes an essentially *extralegal* determination of the issues of criminality and punishment, placing the accused at the mercy of an *ex post facto* 'law' tailored to his personal circumstances, and leaving him vulnerable to the whims of passion and prejudice:

It is more safe that punishment should be ordained by general laws, formed upon deliberation, under the influence of no resentments, and without knowing on whom they are to operate, than that it should be inflicted under the influence of those passions which a trial seldom fails to excite, and which a flexible definition of the crime, or a construction that would render it flexible, might bring into operation.<sup>59</sup>

Similar considerations support the common law principle that penal statutes should be strictly construed. No one should be entrapped by ambiguous laws, even if that principle demands some restraint on judicial co-operation with apparent statutory purposes: 'A man is not to be put in peril upon an ambiguity, however much or little the purpose of the Act appeals to the predilection of the court.'<sup>60</sup> Of course, a statute cannot plausibly be interpreted independently of its perceived objective: its manifest purpose will rightly and necessarily colour its meaning. There is a tension apparent here between competing requirements of consistency and coherence of *law*, on the one hand, and clarity and prospectivity of *laws*, on the other: 'Counterbalancing the public interest in clear laws and political liberty is the public interest that the law shall be applied intelligently in accordance with its purpose, and not in such a way as to reduce it to a mere series of arbitrary and irrational prescriptions.'<sup>61</sup> If, however, it is also a requirement of the rule of law that a statute should be construed in conformity with the expectations of those whose conduct it regulates, its underlying purpose must be confined by the ordinary or well-established meaning of the enacted words.

The content of the principle of legality must, then, be stated with some care: 'its intention is not the neglect of the policy of a statute but the limitation of the range of that policy by the actual meaning of the

<sup>59</sup> *Ex p. Bollman* (1807) 4 Cranch 127 (Marshall CJ, American Sup. Ct.).

<sup>60</sup> *LSNER v. Berriman* [1946] AC 278, 313 (Lord Simonds). See also *Bloxham* [1983] 1 AC 109, 114 (Lord Bridge).

<sup>61</sup> Glanville Williams, *Criminal Law: The General Part*, 2nd edn. (London, 1961), 589.



words...'.<sup>62</sup> In so far as the meaning of the words depends on the preconceptions and assumptions of author or audience—and these may differ—we should, so far as possible, take the latter as decisive.<sup>63</sup> It is an important aspect of the rule of law that all legislation should be construed in the light of constitutional standards and principles; and it is a theme of this book that judicial allegiance to more immediate governmental (or legislative) objectives must be qualified to reflect the consequences for individual rights. The principle of legality should, then, be understood to require strict construction of penal provisions, where there is genuine doubt about their scope and effect, and to preclude the analogical extension of such provisions. As Marshall CJ expressed the point:

To determine that a case is within the intention of a statute, its language must authorise us to say so. It would be dangerous, indeed, to carry the principle, that a case which is within the reason or mischief of a statute, is within its provisions, so far as to punish a crime not enumerated in the statute, because it is of equal atrocity, or of kindred character, with those which are enumerated.<sup>64</sup>

The precepts *nulla poena, nulla crimen sine lege* also find common law expression in the presumption against according retrospective force to statutory provisions. It is buttressed by the further presumption that Parliament does not intend to contradict the international obligations of the United Kingdom, which include observance of the principle against retroactive penal laws proclaimed by Article 11(2) of the Universal Declaration of Human Rights, and reasserted by Article 7 of the European Convention on Human Rights.<sup>65</sup> A full account of the rationale of this principle would advance beyond the idea that people should be forewarned of the risk of punishment. Nor is it primarily a matter of how the criminal law should be fashioned to secure obedience.

The presumption against retrospective effect derives fundamentally from the idea of constitutionalism as a safeguard of individual freedom in the face of organized state power: 'The rationale of non-retroactivity... is opposition to the lawless infliction of suffering, aggravated by the fact that this is done by public officials claiming authority to inflict that

<sup>62</sup> Jerome Hall, *General Principles of Criminal Law*, 2nd edn. (New York, 1969), 37.

<sup>63</sup> Cf. *Black-Clawson Internat. v. Papierwerke Waldhof-Aschaffenburg* [1975] AC 591, 638 (Lord Diplock); 645 (Lord Simon); *Maunsell v. Olins* [1975] AC 373, 391 (Lord Simon). See also *Pepper v. Hart* [1993] 1 All ER 42, 52 (Lord Oliver).

<sup>64</sup> *US v. Willberger* 5 Wheat 76, 96 (1820) (Am. Sup. Ct.). For criticism of the English courts' record in regard to the construction of statutes, see A. T. H. Smith, 'Judicial Law Making'; Glanville Williams, 'Statutory Interpretation, Prostitution and the Rule of Law', in C. H. F. Tapper (ed.), *Crime, Proof and Punishment: Essays in Memory of Sir Rupert Cross* (London, 1981), 71. For recent judicial expansion of criminal liability see *R. v. R.* [1991] 4 All ER 481; comment by J. C. Smith [1991] Crim. LR 477; [1992] Crim. LR 208. For discussion of the limits of linguistic analysis, see Andrew Ashworth, 'Interpreting Criminal Statutes: A Crisis of Legality?' (1991) 107 LQR 419.

<sup>65</sup> Cf. *Waddington v. Miah* [1974] 1 WLR 683, 694 (Lord Reid).

"punishment".<sup>66</sup> The liberties of the citizen are especially vulnerable to the encroachment of the criminal law, even where its legitimate purpose is to secure the order and stability necessary for the exercise of the liberties of others. It is because the criminal law embodies the powers of the state at their most coercive, imposing sanctions which inhibit the exercise of basic civil rights, that the courts should not themselves enlarge its compass to meet apparent threats to public order or decency: 'That they might curtail rights ought to be a reason for the courts to interpret the law in favour of the defendant whenever there is any genuine doubt about the scope of the coercive powers that the law represents.'<sup>67</sup>

It is often observed that the common law is inherently retrospective, in the sense that the scope of a common law offence is inevitably clarified after the defendant has acted. In one sense this is true, but equally true of judicial interpretation of statutes or codes: 'Legitimate interpretation passes by imperceptible shades into so-called illegitimate extension.'<sup>68</sup> *Nulla poena* focuses on the quality of adjudication: is a decision retroactive only in the limited sense which is inescapable, or 'is it also unexpected and indefensible by reference to the law which had been expressed prior to the conduct at issue?'<sup>69</sup> In another sense, the common law is not truly retrospective in operation. It attempts to apply previously articulated principles to new instances; and in its earlier development it gave concrete expression to understandings which, though implicit in previous practice or settled understandings, had not before been stated authoritatively.

Since, however, the principle of legality depends on distinguishing clearly between criminal and immoral conduct, any further extensions of criminal liability should today be made by Parliament alone, prospectively and democratically.<sup>70</sup> Nevertheless, the discipline of strict construction applicable to statutes cannot be applied to the common law: in so far as the common law embodies general principles of liability, they cannot be confined by reference to any authoritative definition akin to enacted terms.<sup>71</sup> The language of previous judgments will be influential, but cannot be decisive; and we are obliged to repair to the underlying values of the legal order, as these can be most

<sup>66</sup> Hall, *General Principles*, 63. Hall describes the 'central meaning' of the principle of legality as a 'definite limitation on the power of the state': *ibid.* 27.

<sup>67</sup> A. T. H. Smith, 'Judicial Law Making', 72.

<sup>68</sup> Williams, *Criminal Law*, 604.

<sup>69</sup> Hall, *General Principles*, 61.

<sup>70</sup> Cf. *Kneller* [1973] AC 435, 474 (Lord Diplock): 'Society is now able to express its collective view as to what conduct merits punishment by the state through a legislature now representative of all adult citizens.' See A. T. H. Smith, 'Judicial Law Making', 67-9.

<sup>71</sup> For elaboration of this point see Chs. 4-6, below.

plausibly ascertained. The extension of criminal liability in *Shaw* was abhorrent because it flouted the more fundamental values which the principle of legality serves.

It does not necessarily follow that justice will always indicate the narrowest possible interpretation of common law principle, where the appropriate level of generalization is controversial. It is perhaps surprising, in a criminal context, to find the Divisional Court stressing that, far from being a 'worn out jurisprudence rendered incapable of further development by the ever-increasing incursion of parliamentary legislation', the common law was a 'lively body of law capable of adaptation and expansion to meet fresh needs calling for the exertion of the discipline of law'.<sup>72</sup> In that case, the court denied that common law contempt was confined to the effect of publications on judicial proceedings which were either pending or imminent. It held, in deference to the right of an accused person to a fair trial, that it was unlawful actively to assist in the institution of a private prosecution while interfering with the course of justice by publishing material intended to prejudice the trial.<sup>73</sup>

Since common law principles are not susceptible of scientific, or wholly objective, means of interpretation in doubtful cases, the rule of law requires wise judgment, sensitive to all the constitutional implications of a decision. The court relied on earlier statements of the distinction between applying in novel circumstances a broad principle against interference with the administration of justice, on the one hand, and *widening* its application, on the other.<sup>74</sup> It is, inevitably, in practice a distinction of degree. But while it is generally right to adopt a narrower, rather than broader, interpretation of common law offences—leaving Parliament to expand the field of criminal liability if it be thought desirable—the demands of such basic rights as the right to a fair trial, free from adverse publicity which might affect its outcome, can hardly be ignored in fixing the boundaries of existing offences.<sup>75</sup>

It is part, at least, of the objection to the retrospective or ambiguous criminal law that a person cannot conform his actions to it and so be sure of escaping punishment. He cannot form and execute his plans in the confidence that, provided he observe a reasonably certain and

<sup>72</sup> *A.-G. v. News Group Newspapers* [1988] 2 All ER 906, 920 (Watkins LJ).

<sup>73</sup> There would be no liability in the absence of intent to prejudice the course of justice, but that intent could be inferred from the circumstances of publication: *ibid.* 914–17. (The court also considered that the proceedings could properly be described as imminent.)

<sup>74</sup> *A.-G. v. Newspaper Publishing* [1987] 3 All ER 276, 299 (Sir John Donaldson MR). The *News Group Newspapers* case was doubted in *A.-G. v. Sport Newspapers* [1992] 1 All ER 503 (esp. 515 and 536).

<sup>75</sup> For further discussion of conflicts between important rights see Ch. 6, below. The scope of the law of contempt and the requirement of certainty were considered in *Sunday Times v. UK*, Eur. Ct. HR, judgment of 26 Apr. 1979, series A, no. 30.

stable framework of rules, his liberty will remain inviolate. The same objection applies, however, to prospective laws which render him liable to punishment for events whose occurrence he cannot control. The rule of law entails, therefore, the general principle of individual responsibility which insists that punishment cannot justly be inflicted in the absence of fault.

The 'cardinal principle of our law that *mens rea*, an evil intention or a knowledge of the wrongfulness of the act, is in all ordinary cases an essential ingredient of guilt of a criminal offence'<sup>76</sup> is reflected, in the legislative context, in the well-established presumption that, 'in order to give effect to the will of Parliament', the court 'must read in words appropriate to require *mens rea*'.<sup>77</sup> Since the statutory language will often provide no guide, the court is entitled to consider the purpose of the Act and any other relevant circumstances in deciding whether an exception to the general principle should be made.<sup>78</sup> The presumption may be displaced by express words or necessary implication, but the greater the injustice its displacement would cause, the more convincing the arguments for imposing strict liability must be.<sup>79</sup> Its strength 'stems from the principle that it is contrary to a rational and civilised criminal code . . . to penalise one who has performed his duty as a citizen to ascertain what acts are prohibited by law (*ignorantia juris non excusat*) and has taken all proper care to inform himself of any facts which would make his conduct lawful'.<sup>80</sup>

#### *Liberty and equality*

It seems plain that constitutional theory cannot rest content with a narrow, formal conception of the rule of law, neutral between different accounts of justice and fairness. The formal conception directs our attention to matters of individual right and human dignity. We are obliged to confront wider questions of liberty, equality, and autonomy in order to make concrete our commitment to the rule of law in the circumstances of particular cases. Both judge and legal theorist must address substantive questions of political philosophy in seeking justification of legal decisions. The judge must give appropriate weight in his decisions to personal liberty and develop a conception of equality, for these values will inevitably inform the judgments he makes in service of any plausible conception of the rule of law.

In interpreting a criminal statute, the court will not apply the presumption in favour of requiring *mens rea* with the sole objective of

<sup>76</sup> *Sweet v. Parsley* [1970] AC 132, 152 (Lord Morris).

<sup>77</sup> *Ibid.* 148 (Lord Reid).

<sup>78</sup> *R. v. Tolson* (1889) 23 QBD 168, 173–5.

<sup>79</sup> *Ibid.* 182.

<sup>80</sup> *Sweet v. Parsley* [1970] AC 132, 163 (Lord Diplock).

ensuring the efficiency of the criminal law, in the sense of maximizing its capacity for guiding people's behaviour. It will be primarily conscious of the *injustice* of punishing the defendant in the absence of fault, and sensitive to the close association of the presumption with basic freedoms:

*It is of the utmost importance for the protection of the liberty of the subject that a court should always bear in mind that, unless a statute, either clearly or by necessary implication, rules out mens rea as a constituent part of a crime, the court should not find a man guilty of an offence against the criminal law unless he has a guilty mind.*<sup>81</sup>

Understood as a complex tapestry of constitutional principle, the rule of law embodies the traditional bias of the common law in favour of individual liberty. The common law has been generally regarded as providing a bulwark against erosion of the most important civil liberties, even if its capacity to resist encroachments by government and Parliament today seems insufficient.<sup>82</sup> And a special concern for personal liberty has long been a marked characteristic of common law adjudication, even if the courts' modern treatment of coercive powers of arrest and detention has sometimes failed adequately to live up to that underlying tradition.<sup>83</sup>

The principle in *Entick v. Carrington*,<sup>84</sup> that the burden of establishing requisite authority is borne by the official who asserts it, was applied with startling results in *McLorie v. Oxford*.<sup>85</sup> In the former case, the King's messengers were liable for trespass in the absence of authority indicating the legality of general warrants of search and seizure: the 'silence of the books' was held to be authority against them. In the latter instance, police officers were held to have no right to enter premises—with or without a warrant—in order to seize an instrument used to commit a serious crime known to be there. In view of 'the importance attached by the common law to the relative inviolability of a dwelling house', the court could not believe that there was 'a common law right without warrant to enter one either in order to search for instruments of crime, even of serious crime, or in order to seize such an instrument which is known to be there'.<sup>86</sup> If there were such a right, the court 'would expect it to be reflected in the books', which it was not.

The rule of law also entails the conservative construction of statutory provisions which grant powers of arrest and search. Pollock CB expressed

<sup>81</sup> *Brend v. Wood* (1946) 175 LT 306, 307 (Lord Goddard CJ).

<sup>82</sup> See e.g. Sir Leslie Scarman, *English Law—The New Dimension*, Hamlyn Lectures, 26th series (London, 1974); Eric Barendt, 'Dicey and Civil Liberties' [1985] PL 596.

<sup>83</sup> See discussion of *Wills v. Bowley* [1982] 2 All ER 654, below. Compare decisions of House of Lords and Court of Appeal in *IRC v. Rossminster* [1980] AC 952 (exercise of powers of search and seizure under Taxes Management Act 1970).

<sup>84</sup> (1765) 19 State Trials 1030.

<sup>85</sup> [1982] 3 All ER 480.

<sup>86</sup> *Ibid.* 485.

this principle in *Bowditch v. Balchin*: 'In a case in which the liberty of the subject is concerned, we cannot go beyond the natural construction of the statute.'<sup>87</sup> In *Morris v. Beardmore*,<sup>88</sup> in more recent times, Lord Scarman invoked *Entick v. Carrington* in support of his conception of 'the importance attached by the common law to the privacy of the home'. The House of Lords held that a constable could not lawfully require a person to provide a breath specimen, under the Road Traffic Act 1972, section 8, if he were present on that person's property without permission. Police officers had not been acting in the execution of their duty, as was necessary for a valid exercise of the power, because they were trespassers.

The statutory provisions made serious inroads on common law rights and were to be construed accordingly. If Parliament intended to authorize acts which would otherwise amount to torts actionable at common law, there must be express statutory provision: the presumption was that 'in the absence of express provision to the contrary Parliament did not intend to authorise tortious conduct'.<sup>89</sup> Lord Edmund-Davies rejected the view expressed in the Divisional Court that it was sufficient to satisfy the express terms of the statute granting the power to require a breath test: 'A statute does not exist in limbo. It has a background; it rests on an assumption that it will operate only in a certain climate and that circumstances of a certain sort will prevail.'<sup>90</sup> The statute conferred no power on a constable acting 'in circumstances of known illegality' which placed him in a situation where he had 'no business to be at all'.

The speeches in *Wills v. Bowley*<sup>91</sup> reflected sharply contrasting opinions about the application of the 'strong presumption in favour of the liberty of the innocent subject'<sup>92</sup> in the circumstances of that case. The House of Lords held that the power of a constable under the Town Police Clauses Act 1847, section 28, to arrest a person who 'within his view commits' one of a prescribed series of offences, extended to cases where the constable honestly believed on reasonable grounds that an offence had been committed, even though the suspect was subsequently acquitted. The appellant was acquitted of the offence of using obscene language in the street to the annoyance of 'passengers', but was convicted of assaulting three police constables in the course of her attempt to resist arrest. The validity of that conviction depended on whether the constables had been acting in the execution of their duty, which in turn depended on whether the appellant's arrest was lawful. After a lengthy examination of conflicting authority, Lord Bridge held that, since the offender's guilt could only be established subsequently, it must have been intended that an honest belief on reasonable grounds

<sup>87</sup> (1850) 5 Exch 378, 381.

<sup>88</sup> [1980] 2 All ER 753.

<sup>89</sup> *Ibid.* 757 (Lord Diplock).

<sup>90</sup> *Ibid.* 760.

<sup>91</sup> [1982] 2 All ER 654.

<sup>92</sup> *Ibid.* 680 (Lord Bridge).

would suffice to make exercise of a power of arrest in *flagrante delicto* lawful. The statute imposed a duty to arrest; and a constable should not be forced to choose between the risk of making an unlawful arrest and that of committing a criminal neglect of duty.

Lord Lowry's powerful dissenting speech, refusing to embroider the plain language of the statute, made a significant contribution to the common law tradition in favour of personal liberty—even if it perhaps gave exaggerated emphasis to the 'literal meaning'.<sup>93</sup> It is difficult to distinguish a 'literal' meaning of words from their ordinary grammatical meaning, taken in context. The distinction sometimes made between primary and secondary meanings is hard to sustain if (within appropriate limits) a 'purposive' construction is adopted, reading a clause in the light of the apparent legislative purpose.<sup>94</sup>

In *Barnard v. Gorman*,<sup>95</sup> the House of Lords had construed the term 'offender' as including a person suspected on reasonable grounds of having committed an offence. Such a reading was necessary to make sense of a provision that the 'offender' might be proceeded against by summons: a narrower, technical meaning would have reduced the clause to nonsense. Viscount Simon LC had denied that the statutory words could be given a wider meaning merely in order to close a loophole. The court's duty was to give the words 'their true construction, having regard to the language of the whole section, and, as far as relevant, of the whole Act, always preferring the natural meaning of the words involved, but none the less always giving the word its appropriate construction according to the context'.<sup>96</sup> It could certainly be argued, by analogy with that case, that the Town Police Clauses Act should be accorded a similarly contextual meaning.

The force of Lord Lowry's dissent, however, lay in its opposition to the general rule of construction, affording similar scope for reasonable error on the part of the person making the arrest, which Lord Bridge thought must apply to 'all cases where a power of arrest in *flagrante delicto* is coupled with a duty to convey the person arrested "forthwith" . . . before a justice'.<sup>97</sup> In *Barnard*, Lord Simon had stressed the need to examine the particular statute, repudiating 'any supposed general rule of construction'. Lord Lowry firmly asserted the priority of liberty over public order, citing Lord Simonds's remark, in *Christie v.*

<sup>93</sup> Ibid. 659–60, 667.

<sup>94</sup> Cf. E. A. Driedger, 'Statutes: The Mischievous Literal Golden Rule' (1981) 59 Can. Bar Rev. 780; Sir Rupert Cross, *Statutory Interpretation*, 2nd edn. by John Bell and Sir George Engle (London, 1987), 83–96. The appropriate limits must be determined in the light of constitutional considerations.

<sup>95</sup> [1941] AC 378.

<sup>96</sup> Ibid. 384.

<sup>97</sup> [1982] 2 All ER 654, 681. (The rule of construction applied to arrests by private citizens as well as constables.)

*Leachinsky*,<sup>98</sup> that the liberty of the subject and the convenience of executive authority were not to be weighed in the same scales. The principle that "'ambiguous" statutory provisions, not least those dealing with the power of arrest, should be construed in favour of the liberty of the subject' was not a 'mere incantation' to be recited only where its observance could do no possible harm to the cause of public order. It was a 'real and compelling guide . . . hallowed by authority and usage', whose application might properly have inconvenient consequences.<sup>99</sup>

The rule of law protects both liberty and equality. Raz denies a connection between the rule of law and equality on the ground that discrimination of all kinds is compatible with general rules.<sup>100</sup> However, the formal version of the rule of law treats all law as if it were *statute law*, because legislation is composed of discrete legal rules, whose meaning is confined, and scope determined, by their enacted terms. I have suggested that the common law cannot be reduced to rules in this manner, but exists primarily as a *corpus of principles*, whose articulation in new cases enables the rules to be adapted and modified in response to the perceived requirements of justice. Hayek described how the judge must constantly resort to principles, distilled from the *ratio decidendi* of earlier decisions, in order to prevent conflict between existing rules, or to resolve ambiguities, as new situations arise to challenge the existing legal order.<sup>101</sup>

In the sphere of common law, therefore, the rule of law entails a search for equality in the sense of the consistent application of underlying principles. The distinction often drawn between the regular application of the law, on the one hand, and the inequalities which it may impose in substance, on the other, therefore starts to break down. When we see that the common law is primarily a body of principle, awaiting continual elaboration and development, the connection between the rule of law and equality becomes clear. The consistent application of legal principle, required by the ideal of legality, involves a process of moral reasoning in which inequalities in treatment at the hands of the state have to be justified. Rawls observes that the 'requirement of consistency holds . . . for the interpretation of all rules and for justifications at all levels. Eventually reasoned arguments for discriminatory judgments become harder to formulate and the attempt to do so less persuasive'.<sup>102</sup>

<sup>98</sup> [1947] AC 573, 595.

<sup>99</sup> [1982] 2 All ER 670. Lord Elwyn-Jones, also dissenting, rejected any general rule of construction on the ground that where 'the liberty of the subject is concerned, the court should not go beyond the natural construction of the statute and the strict terms of the grant of the power . . .': *ibid.* 658.

<sup>100</sup> 'The Rule of Law', 200.

<sup>101</sup> *Law, Legislation and Liberty*, i. 118–20. Cf. Dworkin, *Taking Rights Seriously*, chs. 2–4.

<sup>102</sup> *A Theory of Justice*, 237.

*Equality and integrity*

The interpretation of the rule of law offered here may be thought to find some support in Ronald Dworkin's *Law's Empire*.<sup>103</sup> He commends the political ideal of 'integrity' for a world of ordinary politics, where the requirements of justice and fairness conflict. Fairness requires a political structure which distributes power correctly. Justice requires a morally acceptable distribution of material resources and the protection of civil liberties. If in practice we disagree about how these ideals should be reconciled, we may none the less require government to display consistency of principle, so that all are treated equally. Integrity assumes an (essentially metaphorical) personification of the state, which is to be treated as a moral agent: 'we insist that the state act on a single, coherent set of principles even when its citizens are divided about what the right principles of justice and fairness really are.'<sup>104</sup>

Dworkin's model of adjudication mirrors his general political theory. It requires a court to interpret all legal material as parts of a seamless, self-consistent unity. Judges should assume that the law is structured by a coherent set of principles about justice and fairness, which must be applied in every case so that each person's situation is fair and just according to the same standards.<sup>105</sup> Integrity is more than merely deciding like cases alike, however: it demands a more thoroughgoing consistency of principle in settling the rights of citizens. A judge's own convictions about justice and fairness may properly play their part in this process, but his decisions are constrained by the actual political history of his community. His conclusions of law, in other words, must respect the 'requirement of fit' with previous judicial decisions and statutory enactments: 'Judges who accept the interpretive ideal of integrity decide hard cases by trying to find, in some coherent set of principles about people's rights and duties, the best constructive interpretation of the political structure and legal doctrine of their community.'<sup>106</sup>

I have suggested that the common law requirement that like cases should be decided alike may be understood to embody a fundamental component of its underlying philosophy—the idea of equality. The importance of equality emerges in Dworkin's discussion of the common law, where he rejects an 'economic' interpretation—based on the principle that people should always act in whatever way will be financially least expensive for the community as a whole—in favour of an egalitarian one. Dworkin argues that if the common law is understood as protecting equality of resources, we can best explain a familiar division of public and private responsibility. We believe that each citizen should be free to use or exchange property lawfully assigned to him as he chooses,

<sup>103</sup> London, 1986.<sup>104</sup> Ibid. 166.<sup>105</sup> Ibid. 243.<sup>106</sup> Ibid. 225.

but that government should adjust the rules of property so as to treat people as equals: government has a duty to treat all members of the community with equal care and concern.<sup>107</sup> That fundamental idea of political morality is violated by laws which treat people differently when their different treatment cannot be justified in principle. Our interpretation of *fairness* depends on the same basic idea. We believe that our legislative institutions should be framed so as to ensure the equal distribution of political power.

It is also the notion of equality which explains our hostility to 'chequerboard laws', embodying compromises which reflect different shades of opinion about questions of justice. Dworkin defends the idea of integrity primarily by appeal to that widely shared attitude; and it seems clear that integrity reflects the demands of equality. Fairness might indicate that Parliament should recognize conflicting views about the morality of abortion by making it 'criminal for pregnant women who were born in even years but not for those born in odd ones'.<sup>108</sup> Dworkin identifies a failure of integrity as the source of our opposition to such chequerboard solutions because they cannot rationally be rejected on grounds of justice. 'For in the circumstances of ordinary politics the chequerboard strategy will prevent instances of injustice that would otherwise occur, and we cannot say that justice requires not eliminating any injustice unless we can eliminate all.'<sup>109</sup>

In some cases the ideal of equality may be overridden by other, more pressing demands of political morality. We will sometimes prefer to sacrifice equality, at least in the short term, in order to avoid a great injustice. Dworkin notes, for example, that people who believe very strongly that abortion is always murder may prefer the chequerboard solution to a wholly permissive law: 'They think that fewer murders are better than more no matter how incoherent the compromise that produces fewer.'<sup>110</sup>

The appeal of integrity, then, lies chiefly in the idea of equality. Hercules—Dworkin's model judge—will generally reject an interpretation of justice which is inconsistent with previous judicial decisions because it would undermine equality; although he will readily accept a novel explanation of those decisions if it better accords with what he conceives to be the litigants' moral rights.<sup>111</sup> In some cases, his convictions about justice will be sufficiently clear and strong to justify repudiating previous decisions altogether, even at the price of damage to equality between past and present litigants. Lord Diplock's unwillingness to be bound by *Shaw's* case reflected the strength of his

<sup>107</sup> Ibid., ch. 8. <sup>108</sup> Ibid. 178. <sup>109</sup> Ibid. 181. <sup>110</sup> Ibid. 183.<sup>111</sup> The identification of legal with moral rights (subject only to inconsistent statute or precedent) is made most clearly in Dworkin, *A Matter of Principle*, ch. 1. Cf. *Taking Rights Seriously*, ch. 4.

objections to that decision on grounds of justice.<sup>112</sup> A judge will sometimes adopt a restrictive approach to previous decisions, when he is formally bound by their *rationes decidendi*, distinguishing them so far as possible. In attempting to reconcile the different results in principle, he will be seeking to reconcile equality and justice.<sup>113</sup>

Significantly, Dworkin makes the connection between integrity and equality explicit in his discussion of the United States Constitution, where he notes that the equal protection clause of the Fourteenth Amendment is understood to forbid internal compromises over matters of principle. It would not permit a state to enact the chequerboard abortion statute: 'This connection between integrity and the rhetoric of equal protection is revealing. We insist on integrity because we believe that internal compromises would deny what is often called "equality before the law" and sometimes "formal equality"'.<sup>114</sup>

Dworkin's theory of law confirms the wisdom of A. V. Dicey's attempt to formulate a substantive doctrine of the rule of law. The notion of 'legal equality'—that 'every man . . . is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals'<sup>115</sup>—should not be understood in a purely formal or procedural sense. The rule of law is not satisfied by the meticulous application of different rules to different persons, according to their terms, when the rules are intrinsically unjust, discriminating between classes of people without good reason. The ideal of equality may instead be a powerful force in the interpretation of the substantive content of the common law.

It would therefore be mistaken too readily to dismiss Dicey's doctrine on the grounds that it cannot provide a safeguard against the systematic abuse of power. It contains the seeds, perhaps, of a political philosophy capable of generating important conclusions about the standards of justice and fairness which government may be expected to meet. An analogy is provided by Dworkin's repudiation of the 'fashionable' tendency to denigrate the idea of equality before the law: 'The equal protection cases show how important formal equality becomes when it is understood to require integrity as well as bare logical consistency, when it demands fidelity not just to rules but to the theories of fairness and justice that these rules presuppose by way of justification.'<sup>116</sup>

For all its lack of philosophical sophistication, Dicey's analysis was an attempt to give content to the rule of law as a body of constitutional

<sup>112</sup> See discussion of *Shaw* [1962] AC 220, above.

<sup>113</sup> The ratio of a decision is not to be equated with the court's explanation, which may—with hindsight—be regarded as incorrect: see A. L. Goodhart, 'Determining the Ratio Decidendi of a Case', in *Essays in Jurisprudence and the Common Law* (Cambridge, 1931); M. J. Detmold, *The Unity of Law and Morality* (London, 1984), 188–92.

<sup>114</sup> *Law's Empire*, 185.

<sup>115</sup> *Law of the Constitution*, 193.

<sup>116</sup> *Law's Empire*, 185.

doctrine. Although it failed to distinguish clearly between constitutional doctrine and contingent features of English legal institutions, his emphasis on general principles has aptly been called the 'abiding merit' of his exposition.<sup>117</sup> Proposing that the rule of law consisted in the application by the courts of the 'general principles of the constitution', instancing the rights to personal liberty and of public meeting,<sup>118</sup> he insisted on the need to study the content of English law, as it applied to civil and political liberties and governmental powers. No doubt Dicey exaggerated the merits of the British version of the doctrine, at the expense of other Western democracies, but he made no fundamental mistake in seeking to ground his analysis in substantive law.

<sup>117</sup> Marsh, 'The Rule of Law as a Supra-National Concept', 241.

<sup>118</sup> *Law of the Constitution*, 195; chs. 5–7.