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UNCONSTITUTIONAL INTERPRETATION

JAMES GRANT*

INTRODUCTION

Judges are sometimes accused of disobeying statutes under the guise of interpreting the law. When this claim of judicial disobedience is fair, the interpretation of the law may be said to be unconstitutional. By "unconstitutional", I do not mean contrary to the standards of a written Constitution, but unconstitutional in the sense of contrary to the most fundamental, unwritten constitutional rules of a legal system—what H.L.A. Hart called "rules of recognition", which validate all other rules in the legal system.[1] My focus in this article is on unconstitutional interpretation of statutes in the United Kingdom, where the rule of recognition accords legal supremacy to Acts of Parliament. But it is worth noting that all legal systems contain unwritten rules of recognition, and even in legal systems with a written Constitution, some interpretations of statutes (or, indeed, some interpretations of the written Constitution itself) can also be unconstitutional in this sense.

One example of alleged unconstitutional interpretation is the lead judgment by Lord Neuberger of Abbotsbury in *R. (on the application of Evans) v Attorney General*,[2] critics of which have claimed was an "unconstitutional departure from the terms of the

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[1] H.L.A. Hart, *The Concept of Law*, 3rd edn (Oxford: Clarendon Press, 2012).

[2] *R. (on the application of Evans) v Attorney General* [2015] UKSC 21; [2015] A.C. 1787.

Act".[3] *Evans*, which I will use as a case study throughout this article, concerned the interpretation of s.53 of the Freedom of Information Act 2000, which empowered a member of the executive to override a decision of the Information Commissioner or the Upper Tribunal on the disclosure of information. Purporting to exercise this power, the then Attorney General, Dominic Grieve Q.C., issued a certificate to override a decision by the Upper Tribunal, a judicial body with the status of the High Court, which had ordered the disclosure of Prince Charles's correspondence with government ministers on matters of public policy, the so-called "black-spider memos". Rob Evans, a *Guardian* journalist, sought judicial review of the Attorney General's use of the veto power to prevent disclosure.

The Supreme Court was divided in *Evans*. According to Lord Neuberger, with whom Lord Kerr and Lord Reed agreed, an executive power to override a judicial decision, merely because the executive disagrees with it, would be contrary to two "fundamental components of the rule of law".[4] For this reason, Lord Neuberger interpreted s.53 in a way that drastically limited its scope and denied the Attorney General the power to override the Upper Tribunal's decision in *Evans*.[5] According to the two dissentients, Lords Hughes and Wilson, the majority's interpretation was "simply too highly strained a construction of the section"; indeed, it did not really interpret the provision at all, but "re-wrote it", contrary to the overriding constitutional principle of parliamentary sovereignty.[6]

However, any claim of unconstitutional interpretation faces significant challenges. Three main challenges to the claim of unconstitutional interpretation are examined in this article. First, Hart's theory that the existence and content of a legal system's rule of recognition is determined by a convergent practice among the legal system's officials seems to be vulnerable to Ronald Dworkin's

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[3] R. Ekins and C. Forsyth, "Judging the Public Interest: The rule of law vs. the rule of courts" (Policy Exchange, 2015), at p.13. See also M. Elliott, "A Tangled Constitutional Web: The Black-Spider Memos and the British Constitution's Relational Architecture" [2015] P.L. 539 at 549.

[4] *Evans* [2015] A.C. 1787 at [51]–[52] (Lord Neuberger).

[5] Lord Mance, with whom Lady Hale agreed, rejected Lord Neuberger's interpretation but agreed with the outcome for different reasons, namely, that the Attorney General did not satisfy s.53's requirement that he have reasonable grounds.

[6] *Evans* [2015] A.C. 1787 at [155] (Lord Hughes), [168] (Lord Wilson).

challenge that it ignores pervasive disagreement among officials about the criteria of legal validity (what Dworkin called "theoretical disagreement").[7] What some may claim is an unconstitutional interpretation is, according to Dworkin, actually reasonable disagreement over how to identify the law—reasonable because there is no convergent practice, and hence no rule of recognition, that could resolve the disagreement.

The second challenge to the claim of unconstitutional interpretation is the argument that statutes do not have a fixed meaning that can be determined without evaluating all the relevant considerations, including the relevant moral considerations, in the context of its application. For example, T.R.S. Allan, defending his understanding of the common law constitution and its consequences for statutory interpretation, argues that in cases such as *Evans* "there is no such 'disobedience', merely legitimate interpretative disagreement."[8] At its most extreme, this challenge suggests that the breadth of the range of reasonable interpretations entails that there will almost never be judicial disobedience under the guise of interpretation. This second challenge, though related to the first, is distinct because reasonable disagreement over the best interpretation of a statute is consistent with the existence of a rule of recognition that requires the law to be identified with the meaning of the statute.

If we can adequately respond to these two challenges, a third challenge enters the scene: if there are rules of recognition, and if judges sometimes identify as law norms that are inconsistent with the meaning of a statute, then, according to this third challenge, one of two things follow: either the rule of recognition does not require the law to be identified with the content of the statute, or the rule of recognition is indeterminate on this point. In either case, disobedience to the statute under the guise of interpretation would be consistent with the rule of recognition, and hence not unconstitutional. Disobedience to the statute would not entail disobedience to the law.

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[7] R. Dworkin, *Law's Empire* (Cambridge, Mass.: Belknap Press, 1986), Ch.1. Dworkin calls this theoretical disagreement over the "grounds of law".

[8] T.R.S. Allan, "Statutory Interpretation: Why Complaints of Judicial Disobedience Make No Sense" (2016) University of Cambridge Faculty of Law Research Paper No. 46/2016, at 4 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2839854> accessed 27 April 2017. See also T.R.S. Allan, "Law, Democracy, and Constitutionalism: Reflections on *Evans v Attorney General*" [2016] C.L.J. 38.

These three challenges all contain some important truths, but they also contain errors. Disentangling the errors from the truths is the aim of this article. Responding to these challenges matters because of what it tells us about how to identify correctly the standards of a legal system, standards that include the criteria of legal validity and the valid laws that are identified by those criteria. The identification of the law is distinct from the question of whether the law thus identified should be applied and enforced, which is ultimately a moral question—for judges as much as for everyone else—to which I can only allude in this article.[9] The separation between questions of identification and questions of application or enforcement has the consequence, which I briefly consider at the end, that disobedience under the guise of interpretation may be morally legitimate despite its unconstitutionality.

RULES OF RECOGNITION AND THEORETICAL DISAGREEMENTS

The constitutional foundations of any legal system, according to H.L.A. Hart, consist "in an ultimate rule of recognition providing authoritative criteria for the identification of valid rules of the system".[10] The rule of recognition is a social rule: that is, it exists because it is practised. More precisely, there is a pattern of convergent behaviour and the participants in the practice have a normative attitude towards that behaviour, treating it as something that they are required to do, and criticising deviations from the practice. One crucial feature of the rule of recognition is that it is *presupposed* by officials in identifying the law. The content of the rule of recognition depends on what criteria the officials use—and tacitly presuppose without stating—in identifying the law. The rule of recognition is not what officials say it is. Rather, its existence "is manifested in the general practice of identifying the rules by such criteria."[11] Statements such as "It is the law that..." are statements

[9] The claim that these questions are distinct is controversial, as the second challenge suggests. See e.g., T.R.S. Allan, "Law, Justice and Integrity: The Paradox of Wicked Laws" (2009) 29 O.J.L.S. 705; T.R.S. Allan, "Interpretation, Injustice, and Integrity" (2016) 36 O.J.L.S. 58 at 59, arguing that "legal and moral obligation perfectly coincide".

[10] Hart, *The Concept of Law* (2012), at p.245; see also at p.100.

[11] Hart, *The Concept of Law* (2012), at p.101; see also at pp.292–93: "normally, when a lawyer operating within the system asserts that some particular rule is valid he does not *explicitly state* but *tacitly presupposes* the fact that the rule of

from the internal point of view of someone who uses (and, in that sense, accepts or presupposes the existence of) the rule of recognition. On the other hand, statements about the existence the rule of recognition are not internal statements of legal validity, but external statements of fact, the truth of which depends on evidence of official practice.[12]

But what if there is no convergent behaviour among officials that could determine the criteria of legal validity? In *Law's Empire*, Dworkin built an entire theory on the claim that legal philosophers such as Hart had provided "no plausible theory of theoretical disagreement in law", by which he meant disagreement about the criteria of legal validity.[13] What he saw as the pervasiveness of theoretical disagreement could not be reconciled with Hart's claim that there is widespread acceptance, at least among officials, of a rule of recognition. Dworkin was not concerned with disagreement about the application of agreed criteria of legal validity, such as "empirical" disagreements or "borderline cases", where the disputants disagree about the application of the agreed criteria to cases that they acknowledge are non-standard examples.[14] Rather, Dworkin's concern was with "pivotal" cases, where the disputants disagree about the criteria of legal validity. The pervasiveness of disagreement is open to question. Undoubtedly, there is pervasive *agreement* about the criteria of legal validity.[15] This is true even if the reason for the agreement is the result of an overlap or convergence between rival views about the criteria of legal validity. The truth is that disagreement manifests itself relatively infrequently. But that is not to deny that such disagreement does occur and is important.

Disagreement about the criteria of legal validity may arise in various ways. It may be disagreement about what the sources of law are (e.g., do statutes and precedents exhaust the sources or is moral soundness a criterion of legal validity?). But more often it is disagreement about how to determine the meaning of the sources and

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recognition … exists as the accepted rule of recognition of the system" (emphasis in original).

[12] Hart, *The Concept of Law* (2012), at pp.107–8.

[13] Dworkin, *Law's Empire* (1986), at p.11.

[14] Dworkin, *Law's Empire* (1986), at p.5 and pp.41–42.

[15] See B. Leiter, "Explaining Theoretical Disagreement" (2009) 76 U. Chicago L. Rev. 1215.

the effect that the sources have on the content of the law (e.g., is the meaning of the law determined by the plain meaning of the text, or the legislators' intention, or moral considerations among others?). In both cases, there can also be disagreement about how to settle these disagreements.[16]

One of Dworkin's favourite examples for thinking about theoretical disagreement was the judgment of the New York Court of Appeals in *Riggs v Palmer*.[17] In that case, the question was whether Elmer Palmer could inherit under the valid will of his grandfather, whom he had murdered before the will could be changed. The majority held that the grandson had no right to inherit. Judge Earl, writing for the majority, argued that the court had a power to depart from the letter of the statute in favour of the presumed or hypothetical intention of the legislators, justified by the moral principle that no one shall profit from their own wrongdoing—a universal principle that Judge Earl suggested was not only a ground of interpretation, but could even trump the statute regardless of the legislators' intentions.[18] Judge Gray, in his dissent, argued that the court had no power to depart from the letter of the statute: the statute's clarity "left no room for the exercise of an equitable jurisdiction by courts over such matters."[19] Gray and Earl therefore disagreed about the ultimate criteria of legal validity: for the former, it was the plain meaning of the statute; for the latter, it was the hypothetical intention of the legislators or the morally required result.[20]

Disagreements about the criteria of legal validity can be resolved, according to Hart, only by reference to facts about the actual practice of the courts and the way in which they identify what

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[16] On the different types of theoretical disagreement, see D. Smith, "Theoretical Disagreement and the Semantic Sting" (2010) 30 O.J.L.S. 635 at 641–42.

[17] *Riggs v Palmer* 22 NE 188 (1889).

[18] *Riggs v Palmer* 22 NE 188 (1889), at p.190 (Earl J). See also Leiter, "Explaining Theoretical Disagreement" (2009) 76 U. Chicago L. Rev. 1215 at 1233.

[19] *Riggs v Palmer* 22 NE 188 (1889), at p.191 (Gray J).

[20] According to Brian Leiter, this disagreement was "opportunistic", with Judge Earl and Judge Grey in other cases changing their preferred interpretative method on the basis of their preferred outcome. See Leiter, "Explaining Theoretical Disagreement" (2009) 76 U. Chicago L. Rev. 1215 at 1229 and 1242–47.

counts as law.[21] In the face of such disagreement, one of two possibilities follow. The first possibility is that, despite the divergent behaviour of a small minority of officials, there is a general convergence among most officials, and this convergent behaviour provides a uniquely right answer as to the criteria of legal validity. It is no part of Hart's argument that there must be unanimous agreement about the content of the rule of recognition; it requires only that there is "*general* acceptance" among officials,[22] in the sense that *most* officials identify the law in the same way,[23] and they criticise any deviation from this shared practice.

The second possibility is that the rule of recognition is indeterminate to the extent of disagreement, with no correct answer either way. Dworkin rejected this possibility: "[w]e cannot say that the social rule is uncertain when all the relevant facts about social behaviour are known … because that would violate the thesis that social rules are constituted by behaviour"; if there is no convergent behaviour, "no social rule exists on the issue … at all".[24] But social rules can be uncertain, if they can extend beyond the convergent behaviour. As with any social rule, the rule of recognition involves the regularity of behaviour being used as a rule for guiding behaviour. But is the behaviour required by the rule limited to the behaviour that is already regularly practised? From an internal viewpoint, the rule is not limited to the convergent behaviour: it extends further if the regularity of behaviour that gives rise to a norm in one case is taken to give rise to a norm in a new case that is different but similar—and there may be disagreement and uncertainty about whether it does, disagreement and uncertainty

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[21] Hart, *The Concept of Law* (2012), at p.108. Kevin Toh argues for alternative understanding of Hart's theory: see e.g., K. Toh, "Jurisprudential Theories and First-Order Legal Judgments" (2013) 8 Philosophy Compass 475. For a persuasive rejection of Toh's interpretation, see B. Leiter, "Theoretical Disagreements in Law: Another Look" in D. Plunkett, S. Shapiro, and K. Toh (eds), *Ethical Norms, Legal Norms: New Essays in Metaethics and Jurisprudence* (Oxford: Oxford University Press, 2017).

[22] Hart, *The Concept of Law* (2012), at p.108 (emphasis added).

[23] Hart, *The Concept of Law* (2012), at p.56: "the statement that a group has a certain rule is compatible with the existence of a minority who not only break the rule but refuse to look upon it as a standard either for themselves or others."

[24] R. Dworkin, *Taking Rights Seriously* (Cambridge, Mass.: Harvard University Press, 1977), at pp.54–55 and p.62.

which may require recourse to moral reasoning.[25] But from the external viewpoint, the rule of recognition does not extend to the new case, and hence those who take the rule as extending, or not extending, are mistaken.[26] Whatever answer is given would become required by the rule of recognition only if official behaviour converges in a way that presupposes that answer to be correct. As Hart put it, "[h]ere all that succeeds is success."[27]

But why should we accept these two Hartian explanations of the implications of theoretical disagreement? After all, as intimated earlier, there is also disagreement about how to settle disagreements about the criteria of legal validity. Why should we accept Hart's claim that disputes about the criteria of legal validity are settled by appeal to facts about the actual practice of officials? Dworkin disagreed with that claim, and *that* disagreement cannot be settled by the actual practice of officials. It can only be settled by considering the persuasiveness of Hart's argument that the rule of recognition is the best way to understand the nature of law, a full defence of which is of course beyond the scope of one article.

In developing an alternative to Hart's theory, Dworkin argued that theoretical disagreement in the law should be settled by "constructive interpretation". That is not to say that Dworkin thought that the actual practice of officials was irrelevant. Far from it. He thought that interpretation requires "a very great degree of consensus" in identifying the object of interpretation, and so there must be "enough initial agreement about what practices are legal practices".[28] He thought that an interpretation, in order to be an eligible interpretation, must meet a "rough threshold requirement" of fit with the paradigm instances of law that are found in the "preinterpretive" material, namely, the "brute facts of legal history".[29] Only when that threshold leaves two or more eligible interpretations does a judge face a hard case, requiring a moral judgment as to which interpretation presents the community's legal

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[25] See T. Endicott, "Are There Any Rules?" (2001) 5 Journal of Ethics 199 at 217–18. Cf. A. Tucker, "Uncertainty in the Rule of Recognition and in the Doctrine of Parliamentary Sovereignty" (2011) 31 O.J.L.S, 61 at 78–88.

[26] See also J. Gardner, "Some Types of Law" in D.E. Edlin (ed.), *Common Law Theory* (Cambridge: Cambridge University Press, 2007), at p.64.

[27] Hart, *The Concept of Law* (2012), at p.153.

[28] Dworkin, *Law's Empire* (1986), at pp.65–66.

[29] Dworkin, *Law's Empire* (1986), at p.255.

history in its best light.[30] Thus, Dworkin's notion of preinterpretive agreement among officials is a fundamental constraint on constructive interpretation—so much so that Hart thought, with some justification, that it was 'substantially the same' as his account of the rule of recognition.[31]

But Dworkin did not think that the initial agreement about the object of interpretation is determinative. He thought that what counts as law is ultimately determined by the moral principles that figure in the interpretation that provides the best justification of the preinterpretive materials. Although the rough threshold requirement of fit requires an eligible interpretation to be anchored in some proportion of preinterpretive paradigm cases, "no paradigm is secure from challenge by a new interpretation that accounts for other paradigms and leaves that one isolated as a mistake."[32] On this view, everyone may be wrong about what the law is, because they may be wrong about what morality requires. Dworkin's is therefore a "protestant" theory of law: it entails that everyone should act on their own reasonable interpretation of the law.[33]

Yet, contrary to Dworkin's theory, it seems that there are paradigm instances of law that are indisputable, in the sense that no one could seriously deny that they are law.[34] An interpretation that disputed an indisputable paradigm of law would not count as an interpretation of the law. If we accept Dworkin's own claim that we should adopt the lawyer's perspective in explaining the nature of law, his theory fails, for it is not how lawyers, including judges, understand the law.[35] For example, if there is pervasive agreement that determining the content of the law is a matter of determining the meaning of a statute, then any purported interpretation of the law that

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[30] Dworkin, *Law's Empire* (1986), at pp.255–56.

[31] Hart, *The Concept of Law* (2012), at p.267.

[32] Dworkin, *Law's Empire* (1986), at p.72.

[33] Dworkin, *Law's Empire* (1986), at p.190; R. Dworkin, "Civil Disobedience" in his *Taking Rights Seriously* (1977), at p.214. Cf. G.J. Postema, '"Protestant' Interpretation and Social Practices" (1987) 6 Law and Philosophy 283.

[34] T. Endicott, "Herbert Hart and the Semantic Sting" (1998) 4 Legal Theory 283 at 294–300.

[35] That is not to say that we should treat the lawyer's perspective as the starting point in philosophy of law. See further J. Raz, "The Problem about the Nature of Law" in his *Ethics in the Public Domain: Essays in the Morality of Law and Politics*, rev. edn (Oxford: Clarendon Press, 1994).

departs from the meaning of the statute would not count as an eligible interpretation of the law.

A legal system need not contain a rule of recognition that identifies the content of the law with the meaning of a legal source, such as a statute.[36] But where it does, any interpretative disagreement—which causes the rule of recognition to be indeterminate on the correct method of interpretation of the statute—need not affect the determinacy of the rule of recognition's requirement that the content of the law is to be identified with the meaning of the statute. The point is that, where the settled practice involves officials identifying the content of the law with the meaning of a statute, no interpretation that is inconsistent with the meaning of the statute could count as an interpretation of the law—even if there is disagreement about how to interpret the source.

That last claim may seem paradoxical: if there is disagreement about how to interpret a statute, the rule of recognition is indeterminate to that extent; but if the rule of recognition is indeterminate to that extent, how can an interpretation of the statute fail to satisfy the rule of recognition and so fail to count as an interpretation of the law? Part of the answer is that the conventional rules of recognition, which vary from legal system to legal system, do not exhaust the criteria for determining the meaning of a legal source. There are also universal features that an interpretation of a statute cannot fail to have if it is to count as an interpretation of that statute.[37] The rule of recognition may tell us that the content of the law is identified with the meaning of a statute, but other universal features—including linguistic, systematic, teleological, and moral considerations—help to determine the meaning of the statute, and to distinguish interpretation from disobedience.

INTERPRETATION AND DISOBEDIENCE

[36] The acknowledgment of this point among at least "inclusive legal positivists" is largely overlooked or downplayed in Mark Greenberg's objections to the view that the content of the law is the meaning of a legal text, which he describes as the "standard picture" accepted by most legal theorists, and which he believes faces serious theoretical problems: see M. Greenberg, "The Standard Picture and Its Discontents" in L. Green and B. Leiter (eds), *Oxford Studies in Philosophy of Law: Volume I* (Oxford: Oxford University Press, 2011); see also M. Greenberg, "How Facts Make Law" (2004) 10 Legal Theory 157.

[37] J. Raz, "Intention in Interpretation" in R.P. George, *The Autonomy of Law: Essays on Legal Positivism* (Oxford: Oxford University Press, 1996), at p.249 and p.280.

Interpretation requires an evaluative judgment about which meaning should be ascribed to an object. This need for evaluative judgment forms the basis of what I referred to at the outset as the second challenge to claims of unconstitutional interpretation. According to this challenge, the range of reasonable interpretations is broader than is often believed, so that what may look like disobedience is often better seen as a reasonable interpretation of the rule. As Allan puts it, "there is no such 'disobedience', merely legitimate interpretative disagreement."[38]

To consider this challenge more closely, let us return to the case of *Evans*. Section 53 of the Freedom of Information Act 2000 gave the "accountable person" (a government minister or the Attorney General) the power to override a notice requiring disclosure of information, if "he has on reasonable grounds formed the opinion" that there was no failure to comply with the duty arising under s.1(1) to disclose the information. There would be no failure to comply with that duty if the information is exempt and, in the case of "qualified" exemptions, "in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information."[39] The question was: did section 53 also give the executive a power to override a *judicial* decision (that is, the decision of the Upper Tribunal on appeal from the Commissioner's decision) merely because the executive took a different view about the balance of public interests? The Supreme Court was divided on the extent to which statutory interpretation could be used to achieve the morally desired outcome.

Allan's challenge to critics of Lord Neuberger's interpretation seems to gain added force in view of the implausibility of Lord Hughes's contention that "the plain words of the statute" settled the matter.[40] There was room for doubt over the meaning of s.53, which did not specifically state that the executive had the power to override a judicial decision on the same basis as it could override the Information Commissioner's decision. That is not to deny that

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[38] Allan, "Statutory Interpretation: Why Complaints of Judicial Disobedience Make No Sense" (2016) University of Cambridge Faculty of Law Research Paper No. 46/2016, at 4.

[39] Freedom of Information Act 2000, s.2(2)(b).

[40] *Evans* [2015] A.C. 1787 at [155] (Lord Hughes). See also Lord Wilson, at [168], arguing that Lord Neuberger had not interpreted but "re-wrote" s.53.

statutes can have a plain meaning; statutes can have a plain meaning because, and to the extent that, there is no doubt or disagreement about how to apply them.[41] But in *Evans*, the application of s.53 was open to doubt; there were decent arguments for competing interpretations, in part because a decent argument could be made that the executive's purported power could have unreasonable consequences for (one interpretation of) the rule of law, as Lord Neuberger argued.[42] All this ought to be conceded. But although Lord Hughes may therefore have mistakenly thought he had identified a plain meaning in s.53, nonetheless there were, as we shall see, good reasons supporting his interpretation.

Even if s.53 did not have a plain meaning, it may have a determinate meaning. Interpretation involves the evaluation of competing reasons for different conclusions about which meaning ought to be ascribed to the object of interpretation. When the weight of the reasons favours one meaning over the other, that is the meaning the object has—the meaning is determinate. If, on the other hand, the reasons for the different meanings are finely balanced or incommensurable, then the meaning is indeterminate: different meanings are permissible, but none is required. Indeterminacy does not give rise to the need for interpretation; on the contrary, interpretation tells us whether the meaning is determinate or indeterminate.[43] But whatever conclusion is reached, it is reached through an evaluative judgment, including moral evaluation.

In his challenge, Allan argues not only that moral judgment is a necessary part of statutory interpretation, but that statutes can always, or almost always, be interpreted in a way that achieves a morally justified judicial decision.[44] That is, if Lord Neuberger's limits to the scope of the veto power were morally justified, all things considered, it would be the correct interpretation of the statute.

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[41] See Dworkin's distinction between clear and unclear meanings in Dworkin, *Law's Empire* (1986), at p.352, arguing that a statute is unclear only when "there are decent arguments for each of two competing interpretations of it."

[42] *Evans* [2015] A.C. 1787 at [51]–[52] and [58] (Lord Neuberger).

[43] T. Endicott, "Legal Interpretation" in A. Marmor (ed.), *The Routledge Companion to Philosophy of Law* (London: Routledge, 2012), at p.112; T. Endicott, "Interpretation and Indeterminacy: Comments on Andrei Marmor's *Philosophy of Law*" (2014) 10 Jerusalem Rev. Leg. Stud. 46. Cf. A. Marmor, *Philosophy of Law* (Princeton: Princeton University Press, 2011) 145.

[44] T.R.S. Allan, *The Sovereignty of Law: Freedom, Constitution and Common Law* (Oxford: Oxford University Press, 2013), Chs 4–5.

To respond to this challenge, we must show that it exaggerates the extent to which statutes can be interpreted to achieve a morally justified outcome. But in doing so we should not deny the role of moral judgment in statutory interpretation. Rather, moral reasons have a limited role in interpretation, for, as I will now explain, facts about the statutory text and the conventions of interpretation prevailing at the time of its enactment must constrain and override moral reasons.

The reason for restricting the scope of moral judgment in legal interpretation arises from the authoritative nature of law. Law cannot fully fulfil its function to authoritatively guide its subjects to the extent that moral evaluation is necessary for determining the content of the law. The authoritative nature of law supports what Joseph Raz calls "the sources thesis", which is the thesis that: "All law is source-based. … A law is source-based if its existence and content can be identified by reference to social facts alone, without resort to any evaluative argument."[45] Sources include all the social facts about customary meanings and understandings.[46] On Raz's view, the reason why law must be source-based is that, to be an authority, an institution must be capable of settling matters for its subjects and guiding their conduct. No one could be guided by an institution's decision on a moral question if, to work out what that decision was, they had to engage in moral reasoning and answer the moral question that the authority was meant to settle. Thus, the identification of an authority's decision must be made on factual considerations about what the institution said, not on moral considerations about what it should have said.[47] As Raz puts it,

> The only point which is essential to the sources thesis is that the character of the rules of interpretation prevailing in any legal system, i.e. the character of the rules for imputing intentions and directives to the legal authorities, is a matter of fact and not a moral issue. It is a matter of fact because it has to sustain

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[45] J. Raz, "Authority, Law and Morality" in his *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (1994), at pp.210–11.

[46] J. Raz, *The Authority of Law: Essays on Law and Morality*, 2nd edn (Oxford: Oxford University Press, 1979), at pp.47–48 and p.63.

[47] Raz, "Authority, Law and Morality" in his *Ethics in the Public Domain* (1994), at p.231.

> conclusions of the kind: "That is in fact the view held by these institutions on the moral issues in question."[48]

If a rule is created by an institution with authority to create the rule, respect for that authority requires the rule to be interpreted in the way it would have been interpreted at the time it was created. This claim is liable to mislead. It is commonly thought that statutory interpretation involves retrieving the intention of the legislature, and respect for authority seems to support this thought. After all, the very idea of legislative institutions is that of authorities that can deliberately decide how things will be done, making the law they intend to make.[49] But by itself legislative intention cannot provide a guide to interpretation. All we can say is that legislators intend to legislate, and they intend the enacted statute to be given whatever meaning it has according to the conventions of interpretation prevailing at the time of enactment.[50] Any further alleged intentions of the legislators, such as those derived from recordings of legislative proceedings such as *Hansard*, are irrelevant, unless made relevant by those conventions of interpretation. If the legislators have authority, we respect that authority (and the legislators' relevant intentions) by interpreting the statute using the conventions prevailing at the time.[51]

Raz calls such interpretation, involving the conventions prevailing at the time, a form of "conserving" interpretation,[52] which

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[48] Raz, "Authority, Law and Morality" in his *Ethics in the Public Domain* (1994), at p.233.

[49] J. Raz, "Why Interpret?" (1996) 9 Ratio Juris 349 at 359–60; J. Raz, "Intention in Interpretation" in R.P. George (ed.), *The Autonomy of Law* (Oxford: Oxford University Press, 1996), at p.259.

[50] Those who doubt whether institutions such as a legislature can have intentions claim that we cannot say even this much. For such claims, see Dworkin, *Law's Empire* (1986), at p.336; J. Waldron, "Legislators in Legal Philosophy" in his *Law and Disagreement* (Oxford: Oxford University Press, 1999), at p.43.

[51] Raz, "Intention in Interpretation" in George (ed.), *The Autonomy of Law* (1996), at p.280: "Intention legitimates, but conventions interpret." For a similar conclusion, see R. Ekins, *The Nature of Legislative Intent* (Oxford: Oxford University Press, 2012), Ch.9.

[52] Note that conserving interpretations are not necessarily about respecting the author's intention and retrieving an interpretation from the time of enactment. For a defence of this point, see J. Waldron, "Legislative Intent and Unintentional Legislation" in his *Law and Disagreement* (Oxford: Oxford University Press, 1999). For criticisms, see A. Marmor, "Authority and Authorship" in his *Positive*

he distinguishes from "innovative" interpretations. In a sense, all interpretations purport to be both conserving (they aim to be faithful to the object being interpreted) and innovative (they aim to resolve doubts as to the meaning of the object).[53] Raz's claim is that interpretations can vary in the degree to which they are conserving and innovative: sometimes a more conserving interpretation is called for; at other times, a more innovative interpretation is called for. Conserving interpretation is not about conserving the object of interpretation, but about conserving a previous interpretation; and innovative interpretation is not about departing from the object, but is novel and may depart from a previous interpretation.

But if the authoritative nature of law calls for conserving interpretation—using conventions of interpretation prevailing at the time of enactment—what role can there be for innovative interpretation in law? It seems that only a conserving interpretation can determine a legal rule's meaning because only a conserving interpretation will respect its authority, and respect for its authority is necessary to avoid disobedience. How can we interpret a legal rule in a way that is novel and yet remain faithful to the rule's authoritative nature?

The answer is that the authoritative nature of law provides a constraint on innovative interpretation, but does not rule it out completely. Innovative interpretation is required when the conventions of interpretation leave the meaning of the statute indeterminate. In such instances, judges interpret the statute in a way that gives it a new meaning, and in that sense they make the statute more determinate.[54] There was a time when, if a judge proclaimed his role in statutory interpretation to involve "filling in the gaps" by "supplement[ing] the written word",[55] he would be criticised for his

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Law and Objective Values (Oxford: Oxford University Press, 2001); see also Raz, "Why Interpret?" (1996) 9 Ratio Juris 349 at 359.

[53] Cf. J. Goldsworthy, "Implications in Language, Law and the Constitution" in G. Lindell (ed.), *Future Directions in Australian Constitutional Law: Essays in Honour of Professor Leslie Zines* (Sydney: Federation Press, 1994) 162, distinguishing between "genuine" and "creative" interpretations.

[54] See J. Raz, "Interpretation without Retrieval" in A. Marmor (ed.), *Interpretation in Law* (Oxford: Oxford University Press, 1995). See also Raz, "Authority, Law and Morality" in his *Ethics in the Public Domain* (1994), at p.233.

[55] *Magor and St Mellons Rural District Council v Newport Corporation* [1950] 2 All E.R. 1226 at 1236 (Denning L.J.); *Seaford Court Estates Ltd v Asher* [1949] 2 K.B. 481 at 499; [1949] 2 All E.R. 155 (Denning L.J.).

"naked usurpation of the legislative function under the thin disguise of interpretation."[56] But when the source-based considerations for interpreting a statute leave the statute's meaning unspecified, there is nothing wrong with the courts turning to merits-based moral considerations to fill in the gap and make the statute's meaning more determinate. By rendering more determinate a previously indeterminate rule, innovative interpretations change the object of interpretation: the rule is changed to include a meaning that is attributable not to the original creator, but to the author of the later interpretation.[57] In this way, judges interpreting the law innovatively, do not apply the law, but develop it.[58] There is nothing wrong with that when it is consistent with the statute's indeterminate meaning. The problem arises—and the judge may fairly be accused of usurping the legislative function—when a purported interpretation is *inconsistent* with what the conventions of interpretation determine is the correct meaning of a statute.

To return to the example of *Evans*, Lord Neuberger's interpretation of s.53 was innovative—it did not retrieve an existing meaning, but developed and so changed it—and can be justified, therefore, only if the conventions of interpretation prevailing at the time of the statute's enactment leave the meaning indeterminate, and the innovative interpretation is consistent with those source-based considerations. But it may seem as if Lord Neuberger did develop the law inconsistently with the meaning of the statute by reading in an exception to s.53 and thereby significantly narrowing the scope of its application. In cases such as these, involving reading in an exception—or what used to be called "equitable interpretation"—it *seems* as if statutory interpretation involves neither applying the statute, nor developing its meaning faithfully, but departing from its meaning and therefore disobeying the statutory rule.

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[56] *Magor and St Mellons Rural District Council v Newport Corporation* [1952] A.C. 189 at 191; [1951] 2 All E.R. 839 (Lord Simonds).

[57] This claim may seem counterintuitive. For the view that interpretation leaves the statute's meaning unchanged, see *In re Spectrum Plus Ltd* [2005] UKHL 41; [2005] 2 A.C. 680 at [38] (Lord Nicholls): "when your Lordships' House rules that a previous decision on the interpretation of a statutory provision was wrong, there is no question of the House changing the law." Cf. Gardner, "Some Types of Law" in Edlin (ed.), *Common Law Theory* (2007), at pp.58–59.

[58] Raz, "Authority, Law and Morality" in his *Ethics in the Public Domain* (1994), at p.230. See also J. Gardner, "Legal Positivism: 5½ Myths" (2001) 46 Am J. Juris. 199 at 221–22.

To see whether this description is apposite, it is useful to compare the *Evans* case with an instance of equitable interpretation that seems to me to involve no disobedience to the statute, namely, the Court of Appeal's judgment in the case of *R. v Registrar General, ex parte Smith*.[59] Section 51(1) of the Adoption Act 1976 provided that the Registrar General was under a duty to supply an adopted person with information to obtain his birth certificate. The Registrar General refused to give the applicant this information "on public policy grounds", in light of the medical reports available, which highlighted the risk that the applicant would use the information to kill his natural mother.[60] The text of s.51 of the 1976 Act suggested that, if certain conditions were fulfilled, the Register General had an absolute duty to supply the information. It did not contain any exception on public policy grounds.[61] But with echoes of *Riggs v Palmer*, the Court of Appeal in *Smith* interpreted the 1976 Act as if it included an exception. Statutory interpretation contains all sorts of presumptions to avoid statutes being over-inclusive by being read literally, such as the "golden rule", according to which statutes should be given their ordinary meaning unless it would lead to absurdity or repugnance.[62] The Court of Appeal's decision does not necessarily involve a departure from, and hence disobedience to, the duty in the statute.

In *Smith*, the appearance of disobedience to the statutory duty is just that: an appearance. The reality, in my view, is that, although the interpretation develops, or adds to, the statute's meaning—for it cannot be said to be implicit in the statute itself—it does so in a way that is consistent with the meaning of the statute. The absence of exceptions in the Adoption Act 1976 did not entail that there was an absolute duty to provide the information "come what may".[63] If it

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[59] *R. v Registrar General, ex parte Smith* [1991] 2 Q.B. 393; [1991] 2 All E.R. 88. See J. Evans, "A Brief History of Equitable Interpretation in the Common Law System" in T. Campbell and J. Goldsworthy (eds), *Legal Interpretation in Democratic States* (Aldershot: Ashgate, 2002).

[60] *Smith* [1991] 2 Q.B. 393 at 398–99.

[61] The statutory duty has now been amended to explicitly provide for exceptional circumstances: see the Adoption and Children Act 2002, as amended, s.60(2)(a) and s.60(3).

[62] F. Bennion, *Statutory Interpretation*, 2nd edn (London: Butterworths, 1992), at p.407.

[63] *Smith* [1991] 2 Q.B. 393 at 401 (Sir Stephen Brown P.).

had, the court's interpretation would have been a disobedient one. But instead the plain meaning of the statute (to simplify, that an adopted person has a right to obtain his birth certificate) was unspecific in the sense that it did not state whether there was or was not an exception in these circumstances. That plain meaning is therefore consistent with the meaning that the Court of Appeal attributed to the statute (in effect, that an adopted person has a right to obtain his birth certificate, unless there are public policy grounds for refusing to give the information).

The appearance of disobedience in cases such as *Smith* is readily understandable, because the justification for recognising the exception comes not from something about the object (the statute is silent on whether there should or should not be an exception), but from the reasons for departing from the statute.[64] But equally it would be wrong to conclude that, when a statute imposes a duty without qualification, the statutory duty is absolute in the sense that it excludes all considerations that are not legally recognised as non-excluded.[65] This conclusion was suggested by Raz. He wrote:

> It is not that the law claims that one ought to obey the law come what may. There are many legal doctrines specifically designed to allow exceptions to legal requirements, doctrines such as self-defence, necessity, public policy, and the like. The point is that *the law demands the right to define the permissible exceptions*.[66]

This passage does not suggest that a court is precluded from reading an exception into an unqualified statutory rule, for the court's judgment would be an instance of the law defining the permissible exceptions. But Raz did suggest that the law's claim (by which he meant the claim made by the law's officials) to have the right to define the permissible exceptions entails that a legal rule excludes

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[64] Endicott, "Legal Interpretation" in Marmor (ed.), *The Routledge Companion to Philosophy of Law* (2012), at pp.119–20.

[65] T. Endicott, "Interpretation, Jurisdiction, and the Authority of Law" (2007) 6 American Philosophical Association Newsletter 14 at 16 and 18.

[66] J. Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986), at p.77 (emphasis added).

acting on all other reasons that are not legally recognised.[67] Prior to the *Smith* decision, the common law had recognised an exception to a statutory rule on public policy grounds if application of the rule would enable someone to benefit from their own serious crime in the past. But no rule of law had previously recognised an exception where there was a risk of a *future* serious crime being committed. Thus, on Raz's reasoning, the risk that a future serious crime would be committed was not a consideration that was legally recognised to be non-excluded—that is, it was not a legally permissible exception—and so the Court of Appeal's decision in *Smith* was an instance of judicial disobedience to the statute, though this disobedience may have been morally legitimate.

The better conclusion to draw, in my view, is that, when the law imposes a duty without qualification, it leaves the permissible exceptions undefined or unspecified. It is for the interpreter to work out whether a reason is non-excluded and can therefore justify an exception to the rule. This is a question about the limits of the law's legitimate authority: its jurisdiction. As Timothy Endicott puts it, "[a] limit on jurisdiction is a ground of interpretation of an unspecific directive."[68] The law has legitimate authority to settle some matters, and the scope of those matters partly determines which reasons are legitimately excluded. The point is that there cannot be an exception to the rule simply because we disagree with the rule's application. The exception must be for a reason that we judge to be non-excluded. One way in which non-excluded reasons arise is in unforeseen or unforeseeable cases, though it can often be difficult to establish what was unforeseen or unforeseeable.[69] Given that it is not reasonable to expect the legislature to foresee all possible circumstances, the lack of an explicit exception in the enacted rule does not necessarily—although, as we shall see, it may—present a barrier to attributing to the rule a meaning that incorporates the exception.

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[67] Raz, *The Authority of Law* (1979), at p.33: "what is excluded by a rule of law is not all other reasons, but merely those other reasons which are themselves not legally recognised."

[68] Endicott, "Interpretation, Jurisdiction, and the Authority of Law" (2007) 6 American Philosophical Association Newsletter 14 at 16.

[69] Cf. Ekins, *The Nature of Legislative Intent* (2012), at pp.275–76, arguing that only "in exceptional, unforeseen cases" is it possible to give a rule an equitable interpretation that recognises an exception to "the letter of the rule".

An important feature of this analysis is that the considerations involved in determining whether to interpret the statute in a way that incorporates an exception are the same considerations involved in determining whether the legislature has acted outside the scope of its legitimate authority (its jurisdiction) and so whether it should be disobeyed. What distinguishes an interpretation of the statute from disobedience is, in part, the specificity of the statute. When the statute is unspecific, the aim of the interpreter is not to uncover what the authority would have intended in these circumstances; rather, to the extent that the legislature would have acted outside its legitimate authority if it specifically prohibited an exception, the interpreter is free to deviate from the intended meaning and offer an innovative interpretation.[70] If the rule had specifically excluded an exception in this context, however, the correct interpretation would have been different: there would have been an overwhelming reason against attributing to the rule a meaning that includes the exception. But by specifically denying what ought to have been an exception, the authority may be said to have lost its legitimacy, and we may be morally justified in disobeying the rule.[71]

But that does not entail that unspecific rules can always be given an equitable interpretation. And it is here that we see the difference between *Smith* and *Evans*. The difference is that in *Smith* there was nothing in the statute to suggest that the legislature had foreseen the circumstances that arose, whereas the same cannot be said for *Evans*. In the latter case, as Lord Neuberger acknowledged, s.53(4)(b) extended the executive's veto power to after the tribunal's decision, demonstrating that Parliament, in the text of the statute, had foreseen the circumstances in which a member of the executive would override a judicial decision. Applying the principle of legality, which means that Parliament cannot override fundamental rights or the rule of law by general or ambiguous words,[72] Lord Neuberger

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[70] Raz, "Intention in Interpretation" in George (ed.), *The Autonomy of Law* (1996), at p.294. Cf. Ekins, *The Nature of Legislative Intent* (2012), at p.276.

[71] Cf. Allan, *The Sovereignty of Law* (2013), at pp.195–96. While Allan concedes that the statute's literal meaning "limits our scope for interpretative ingenuity" and that "the context may show that alternative and otherwise preferable meanings are excluded", he nonetheless insists that the legislature, which is presumed to be reasonable, "is incapable of enacting measures wholly *contrary* to justice or the common good".

[72] See e.g., *R. v Secretary of State for the Home Department, ex parte Pierson* [1998] A.C. 539 at 575; [1997] 3 All E.R. 577 (Lord Browne-Wilkinson); *R. v Secretary of State for the Home Department, ex parte Simms* [2000] 2 AC 115 at

argued that s.53(4)(b) was "a very long way indeed" from making it "crystal clear" that the section enables a member of the executive to overrule a judicial decision "simply because he does not agree with it."[73] Lord Neuberger thought that a decision of the tribunal, which was better placed to make the right decision, could be vetoed by the executive only if there was a material change of circumstances since the decision or if its decision was demonstrably flawed in fact or in law.[74] That interpretation gives the veto power an extremely narrow scope.

The flaw in this reasoning is to accept the claim that statutes can only override fundamental rights or the rule of law when Parliament clearly specifies that that is what the statute is doing. The text of s.53 may have been unspecific on the issue in dispute. But since s.53(4)(b) expressly provides for an executive override of a judicial decision, Parliament clearly foresaw—that is, expressly provided for—this scenario. If it had wanted to qualify this power in the way that Lord Neuberger suggested—that is, by limiting the power to very narrow circumstances—it could have done so. The fact that it foresaw an executive veto of a judicial decision, and did not enact Lord Neuberger's qualifications, is an overwhelming reason for rejecting his interpretation. There are other reasons for doing so,[75] but that is the most significant. By ignoring these limits to the interpretation of unspecific directives, Lord Neuberger's judgment did not interpret s.53; he "re-wrote it", as Lord Wilson said in his dissent.[76]

131; [1999] 3 All E.R. 400 (Lord Hoffmann); *AXA General Insurance Ltd v HM Advocate* [2011] UKSC 46; [2012] 1 A.C. 868 at [152] (Lord Reed).

[73] *Evans* [2015] A.C. 1787 at [58] (Lord Neuberger). Lord Hughes, in dissent, conceded that "only the clearest language" will suffice for the court to infer that Parliament has empowered a member of the executive to override a judicial decision, but he thought that Parliament "has plainly shown such an intention in the present instance": *Evans* [2015] A.C. 1787 at [159] (Lord Hughes).

[74] *Evans* [2015] A.C. 1787 at [71] (Lord Neuberger).

[75] See Lord Neuberger's discussion of the 'anomaly' in his interpretation: *Evans* [2015] A.C. 1787 at [79]–[84] (Lord Neuberger). Suppose, contrary to the facts of *Evans*, the Information Commissioner had ordered disclosure. The Attorney General would have had an incentive to use the veto at that stage, thus preventing an appeal to the Upper Tribunal. There is no statutory right of appeal against the Attorney General's decision to issue the certificate, although of course the decision could be subject to judicial review.

[76] *Evans* [2015] A.C. 1787 at [168] (Lord Wilson).

Lord Neuberger's reasons for his interpretation are reasons for not enacting the provision at all.[77] There were also good reasons why Parliament did enact it, namely to give the final word on whether disclosure is in the public interest to a politician accountable to Parliament.[78] There was nothing absurd or repugnant about this interpretation (as there was in the plain meaning of the statute in *Smith*); and even if it were thought to be repugnant, the context of the statute (particularly s.53(4)(b), as mentioned in the preceding paragraph) was sufficient to rebut the presumption in the so-called golden rule. In any case, in interpreting statutes, the point is not to work out whether there are good reasons for or against enacting the statute, but to work out whether there are good reasons *for ascribing this meaning to the statute*.[79] Lord Neuberger's reasons were reasons for disobeying s.53, with no compelling reason for why this was the best meaning to be ascribed to the statute. But maybe he was right to disobey the statute. An interpretation of a statute answers the question: what does the statute mean in this case? There is always a further question: should we apply or depart from the statute in this case?

THE UNCONSTITUTIONALITY OF DISOBEDIENT 'INTERPRETATIONS'

The third and final challenge that I want to consider is the argument that disobedience to statutes, under the guise of interpretation, can be constitutional in the sense of consistent with fundamental rules such as the rule of recognition. If the rule of recognition is, to put it crudely, determined by whatever judges generally do in identifying the law, perhaps the fact that judges identify the law using disobedient "interpretations" of statutes—that is, amending statutes while purporting to interpret them—is evidence of a rule of

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[77] See Ekins and Forsyth, "Judging the Public Interest" (2015), at p.15: "The first majority judgment reads much more like an argument for not enacting section 53 than an argument about what Parliament intended to convey in enacting section 53."

[78] Cf. Allan, "Law, Democracy, and Constitutionalism" [2016] C.L.J. 38 at 55–58; Allan, "Statutory Interpretation: Why Complaints of Judicial Disobedience Make No Sense" (2016) University of Cambridge Faculty of Law Research Paper No. 46/2016, at 8–11.

[79] On the need for "textual integrity", see Dworkin, *Law's Empire* (1986), pp.338–40.

recognition that treats the meaning of the statute as inconclusive in determining the content of law.

First, is it possible for a legal system to have a rule of recognition along these lines? If you accept Raz's sources thesis—a central tenet of exclusive, or hard, legal positivism—you may be unconvinced that this is possible. One consequence of the sources thesis is that legal interpretation is not interpretation of the law, but of its sources.[80] Indeed, it may be said with considerable force that the reason why interpretation is central to legal reasoning, whereas it is not central to moral reasoning, is that law has sources, whereas morality does not. This is not the place to assess the merits of the sources thesis. Instead, I will assume the correctness of Hart's thesis—sometimes described as inclusive, or soft, legal positivism—that it is possible for the law to include non-source-based criteria of legal validity. Put differently, I will assume that it can be contingently true that the meaning of a statute does not determine the content of the law.[81]

With this assumption, let's consider the question whether instances of disobedience to statute, such as the one in *Evans*, are evidence of this kind of rule of recognition. My main response to the third challenge is this: the fact that judges have a practice of *saying* that they are interpreting and applying the statute to identify the law, even when they are effectively disobeying or amending the statute, is itself evidence of a normative attitude—a tacit presupposition among judges—that there is a rule of recognition that requires valid law to be identified with the meaning of a statute. As Jeffrey Goldsworthy puts it, if judges lie and conceal their disobedience of a statute under the guise of an interpretation of it, "the fact that they felt it necessary to do so—rather than to boldly claim authority to rewrite statutes—indicates that they themselves realised that their disobedience was, legally speaking, illicit."[82] We do not need to suspect bad faith to

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[80] See Raz, 'Why Interpret?' (1996) 9 Ratio Juris 349.

[81] Cf. M. Greenberg, "Legislation as Communication? Legal Interpretation and the Study of Linguistic Communication" in A. Marmor and S. Soames (eds), *Philosophical Foundations of Language in the Law* (Oxford: Oxford University Press, 2011), at p.224, arguing that this is necessarily, and not merely contingently, true.

[82] J. Goldsworthy, "Unwritten Constitutional Principles" in G. Huscroft (ed.), *Expounding the Constitution: Essays in Constitutional Theory* (Cambridge: Cambridge University Press, 2008), at p.303; see also J. Goldsworthy, *The*

reach this conclusion. Interpreters who are mistaken, whether in good or bad faith, would presumably cease to defend their interpretations, and would accept criticism, if they were shown to be mistaken.

This response to the third challenge faces two further objections. First, you may say, it ignores the fact that judges do sometimes claim the constitutional authority to depart from an ultimate source of law. Judges at the highest level in the United Kingdom have suggested, albeit always in obiter dicta, that there may be circumstances in which they would be constitutionally required to refuse to recognise a statute as valid law.[83] Lord Hope, for example, said that, if legislation seeks to "diminish the role of the courts in protecting the interests of the individual", the ideal of the rule of law "requires that judges must retain the power to insist that legislation of that extreme kind is not law which the courts will recognise."[84] The rule of recognition, however, is not determined by what judges *say about the rule of recognition*, but by the fact that they *use* it (and in doing so tacitly presuppose it without stating it) in the process of identifying the law. Claims such as Lord Hope's, and some like-minded judicial colleagues, do not change the rule of recognition. Unless there is an established customary practice to support such claims, the best that can be said about them is that they highlight indeterminacy in the rule of recognition on this point. Or they are simply mistaken. In any case, the question addressed in this article is not concerned with the refusal to recognise a statute as valid law, but the consequences of judges acting inconsistently with a statute when they say they are interpreting it.

The Human Rights Act 1998 may be thought to provide clearer evidence that it can be constitutional for UK courts to depart from the meaning of the statute. Section 3 of that Act states: "So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is

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Sovereignty of Parliament: History and Philosophy (Oxford: Clarendon Press, 1999), at p.252.

[83] See e.g., *Jackson v Attorney General* [2005] UKHL 56; [2006] 1 A.C. 252 at [102] (Lord Steyn), arguing that there are "constitutional fundamental[s] which even a sovereign Parliament … cannot abolish". See also at [104]–[107] (Lord Hope of Craighead) and [159] (Baroness Hale of Richmond). Cf. Lord Bingham, "The Rule of Law and the Sovereignty of Parliament" (2008) 19 K.L.J. 223.

[84] *AXA General Insurance v Lord Advocate* [2011] UKSC 46; [2012] 1 A.C. 868 at [51] (Lord Hope).

compatible with the Convention rights." This provision has been interpreted as requiring the courts, in some cases, to depart from parliamentary intent and amend the statute.[85] That is, s.3 is alleged to extend the ordinary range of eligible interpretations open to the court. But whether that is really what this provision does is controversial, and space precludes consideration of this issue in this article. Suffice it to say that, even if the Human Rights Act does render judicial disobedience to statutes, under the guise of interpretation, constitutional—and I do not think it does—the judicial power to adjudicate in this way, like the judicial power to review the validity of legislation in jurisdictions with an entrenched constitution, does not prevent the possibility of unconstitutional interpretation in other contexts, where the s.3 power is not applicable.

A second potential objection to my response to the third challenge is that it is inconsistent with an aspect of customary rules of recognition that I have just described. The rule of recognition, I said, is not what judges *say* it is, but what they do in using it. But I also said that the fact that judges *say* they are interpreting the statute to identify the law is evidence of a rule of recognition requiring the law to be identified in that way. It might be objected that these two statements are contradictory. But that objection is based on a misunderstanding. The statements are not contradictory, because when judges say they are interpreting a statute to identify the law—just as when they say "It is the law that…"—they do not state the rule of recognition; rather, they use (and thereby manifest their acceptance of) an unstated rule of recognition requiring the law to be identified with the meaning of a statute.[86]

Thus far, we have been concerned with the interpretation of ordinary legislation. But it is sometimes claimed that more creative interpretation, departing from the clear meaning of the text, can be constitutionally appropriate when the text being interpreted itself has a constitutional function. In the United Kingdom, one striking instance of this kind of creative interpretation, justified on the basis of the statute's constitutional status, is *Robinson v Secretary of State for Northern Ireland*, in which the House of Lords, by a three-to-two majority, arguably departed from the clear wording of the Northern

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[85] See e.g., A. Kavanagh, *Constitutional Review under the UK Human Rights Act* (Cambridge: Cambridge University Press, 2009), Ch.3.

[86] Hart, *The Concept of Law* (2012), at p.102.

Ireland Act 1998.[87] Section 16(1) of that Act provided that the Northern Ireland Assembly "shall, within a period of six weeks beginning with its first meeting, elect from its members the First Minister and the Deputy First Minister". If that period expired without any members being elected to those offices, then, as required by s.32(3), "the Secretary of State shall propose a date for the poll for the election of the next Assembly." Notwithstanding these provisions, the majority in *Robinson* held that an election to fill the offices after the expiry of the six-week period, without a fresh election of the Assembly, was valid.

In reaching that conclusion, Lord Bingham claimed that the Northern Ireland Act is "in effect a constitution" and so "should, consistently with the language used, be interpreted generously and purposively, bearing in mind the values which the constitutional provisions are intended to embody."[88] This statement is ambiguous. On the one hand, it does not appear to suggest anything unusual: it acknowledges the limits to interpretative creativity ("consistently with the language used"); and the idea that the provisions should be interpreted "purposively", in the context of the statute as a whole, is merely part of the ordinary approach to statutory interpretation.[89] On the other hand, the majority's interpretation *is* inconsistent with the text of the 1998 Act (as the dissentients to my mind persuasively argued),[90] and the fact that Lord Bingham justified this interpretation by highlighting the statute's constitutional status, to be interpreted in a special way ("generously"), suggests an acknowledgment that the interpretation went beyond the ordinary limits of statutory interpretation. The argument that constitutional texts ought to be interpreted in a special way, which is more innovative than would otherwise be appropriate, is a familiar one and may even be persuasive in some contexts.[91] But the fact that Lord Bingham

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[87] *Robinson v Secretary of State for Northern Ireland* [2002] UKHL 32; [2002] N.I. 390.

[88] *Robinson* [2002] UKHL 32 at [11] (Lord Bingham of Cornhill).

[89] See e.g., *R. (Quintaville) v Secretary of State for Health* [2003] UKHL 13; [2003] 2 AC 687 at [8] (Lord Bingham of Cornhill). See further D. Feldman, "Statutory Interpretation and Constitutional Legislation" (2014) 130 L.Q.R. 473.

[90] See *Robinson* [2002] UKHL 32 at [59]–[61] (Lord Hutton).

[91] For a classic statement of this approach to constitutional interpretation, see A. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*, 2nd edn (New Haven: Yale University Press, 1986). See also J. Raz, "On the Authority and Interpretation of Constitutions: Some Preliminaries" in L. Alexander

acknowledged the ordinary limits on interpretative creativity, combined with the fact that a special approach to the interpretation of constitutional texts has been rejected in subsequent cases,[92] undermines any argument that the rule of recognition has come to embrace departures from the meaning of the statute in cases of constitutional significance.

Yet even if disobedient interpretations are incompatible with a legal system's rule of recognition, it might be thought that they can nonetheless be constitutional. For rules of recognition are not the only secondary rules that form the constitutional foundations of a legal system. As Hart explained, there are also rules of change and rules of adjudication. Perhaps there is a rule of change that confers the power on the judiciary to change the law, including the law that has its source in statute. On the other hand, it may seem that a legal system's rule of change cannot conflict with its rule of recognition. Whether we say that the rule of recognition is indistinct from the rule of change,[93] or, alternatively, that the two rules are distinct but "presuppose each other's existence",[94] it may seem that a rule of recognition will necessarily track a rule of change and vice versa.

Yet there are reasons for thinking that the judiciary may have the power to change the law in the face of a conflicting rule of recognition. Contrary to what Hart appears to have thought, a legal system may contain several rules of recognition, which may conflict, and there may be no ranking among them.[95] If so, it is possible that a

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(ed.), *Constitutionalism: Philosophical Foundations* (Cambridge: Cambridge University Press, 1998).

[92] See e.g., *Imperial Tobacco Ltd v Lord Advocate* [2012] UKSC 61; [2013] S.C. 153 at [15] (Lord Hope of Craighead): "the description of the Act as a constitutional statute cannot be taken, in itself, to be a guide to its interpretation. The statute must be interpreted like any other statute." See also *Attorney General v National Assembly for Wales Commission* [2012] UKSC 53; [2013] 1 A.C. 792 at [80].

[93] J. Waldron, "Who Needs Rules of Recognition?" in M. Adler and K.E. Himma (eds), *The Rule of Recognition and the US Constitution* (Oxford: Oxford University Press, 2009).

[94] J. Gardner, "Can There Be a Written Constitution?" in his *Law as a Leap of Faith: Essays on Law in General* (Oxford: Oxford University Press, 2012), at p.105. Cf. Hart, *The Concept of Law* (2012), at p.96.

[95] J. Raz, *Practical Reason and Norms*, new edn (Oxford: Oxford University Press, 1999), at p.147; Raz, *The Authority of Law* (1979), at pp.95–96. For Hart's suggestion that a legal system has just one rule of recognition, see Hart, *The Concept of Law* (2012), at p.95 and p.105. See also H.L.A. Hart, "Lon Fuller: *The*

legal system may contain *both* a rule of recognition requiring the court to identify the law with the meaning of a statute (with a corresponding rule of change empowering the legislature to change the law), *and* a rule of change empowering the court to change the law in a way that is inconsistent with a statute (with a corresponding rule of recognition requiring later courts to identify its misinterpretation as law).

That sort of conflict among constitutional rules is possible, but it might be objected that the criteria of legal validity *are* ranked in a hierarchical relationship: aside from occasional *obiter dicta* and extra-judicial writings, it is generally accepted that the common law is subordinate to statute law. Yet it may be more nuanced than this simple picture allows. It could be argued that, when a court acts inconsistently with a statute while purporting to interpret the statute, the resulting misinterpretation changes the law, unless and until it is subsequently overruled by a court of concurrent or higher jurisdiction. If courts have the constitutional authority to make mistakes in this way, it seems plausible that a rule of recognition identifying the law with the meaning of a statute may conflict with a rule of recognition identifying the law with whatever the court deems the law to be, even if this is a departure from the meaning of the statute.

This way of thinking about rules of recognition and change is more at home in the context of the common law than statute law. The difference is instructive.[96] We can think of the common law as founded on two different rules of recognition. Others have spoken of law having a "double life",[97] or of there being "two conceptions of

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Morality of Law" in his *Essays in Jurisprudence and Philosophy* (Oxford: Clarendon Press, 1983), at p.360. Matthew Kramer defends Hart against Raz's claim in M.H. Kramer, *Where Law and Morality Meet* (Oxford: Oxford University Press, 2004), at pp.106–10.

[96] Cf. Allan, *The Sovereignty of Law* (2013), at p.84: "There are no helpful distinctions … between cases about common law principle and cases about statutory meaning".

[97] J. Finnis, "The Fairy Tale's Moral" (1999) 115 L.Q.R. 170 at 170, arguing that, on the one hand, we can say (descriptively) that a supposed rule of common law existed, due to facts about precedents and prevailing views, and on the other hand, we can say (normatively) that on the basis of objective standards the supposed rule was not, and never was, a part of our law, because it was "an error awaiting correction by better legal reasoning and sound adjudication". Neil MacCormick makes a similar point: see N. MacCormick, *Rhetoric and the Rule of Law: A Theory of Legal Reasoning* (Oxford: Oxford University Press, 2005), at pp.277–80.

law".[98] But describing the common law as founded on two rules of recognition is a better understanding of the practice of the courts. As we shall see, when judges, at least in higher courts, depart from existing precedent and are said to have changed the law, sometimes they say that they are declaring what the law is and *has always been*, identifying the law by principled reasoning that views the precedent as mistaken about the law. This is the declaratory theory of law, which has been much criticised, but which should not be lightly dismissed.[99] We all know that the common law is made and changed by judicial decisions, and this feature may seem fatal to the declaratory theory. But we can rescue the declaratory theory by explaining the common law as containing two rules of recognition: one identifying the law with the source of precedent, changing as a result of judicial decisions, including judicial mistakes about what the law was; the other identifying the law with objective standards that remain unchanged despite judicial decisions to the contrary. Let us consider this feature of the common law more closely, and then contrast it with statute law.

The courts' constitutional authority to change the common law, even by misinterpreting the precedents, is generally acknowledged. A good example is the recent case of *R. v Jogee*,[100] in which the UK Supreme Court unanimously held that, for over thirty years, courts had been misinterpreting the common-law doctrine of secondary liability relating to so-called joint enterprises. The common law had taken what the Supreme Court described as a "wrong turn" in 1984,[101] when in the case of *Chan Wing-Siu* the Privy Council held that, if accomplices venturing out with the shared purpose to commit a criminal offence could foresee that one of them might commit a second, different offence, then, in the event that one

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[98] J. Eekelaar, "Judges and Citizens: Two Conceptions of Law" (2002) 22 O.J.L.S. 497, arguing that there is a judge's conception and a citizen's conception of law. Aspects of Hart's argument suggest that he may have been drawn to a similar conclusion: see Hart, *The Concept of Law* (2012), at pp.146–47 and p.254.

[99] For a classic statement of the declaratory theory, see W. Blackstone, *Commentaries on the Laws of England* (1765), Vol.1, at pp.69–70. This declaratory theory has long been unpopular: see Lord Reid, "The Judge as Law Maker" (1972) 12 J.S.P.T.L. 22, describing the declaratory theory as a "fairy tale". For a recent defence of the declaratory theory, see A. Beever, "The Declaratory Theory of Law" (2013) 33 O.J.L.S. 421.

[100] *R. v Jogee* [2016] UKSC 8; [2017] A.C. 387.

[101] *Jogee* [2016] UKSC 8 at [82], [85], and [87].

accomplice commits the second offence, all other accomplices could also be guilty of that offence.[102] In *Jogee*, the Supreme Court concluded that, on a correct interpretation of the doctrine established by decisions before 1984, the other parties would only be criminally liable for the second offence if they intended to encourage or assist the principal to commit it; foresight was not sufficient. In 1984, the Privy Council, due to "an incomplete, and in some respects erroneous, reading of the previous case law, coupled with generalised and questionable policy arguments",[103] had wrongly substituted foreseeability for intention, resulting in "the striking anomaly of requiring a lower mental threshold for guilt in the case of the accessory than in the case of the principal."[104] The Supreme Court in 2016 corrected that mistake.[105]

When the common law develops in this way, there are two ways of explaining what happens, corresponding, in my view, to two rules of recognition. One explanation is that the Supreme Court in *Jogee* declared what the law had been all along, despite the mistake in the earlier case. It might be thought that convictions based on a precedent, faithfully applied at the time of conviction, should not become unsafe when the precedent is overturned, just as they do not become unsafe when the *legislature* changes the law by enacting a statute without retrospective effect. But the English courts, in determining the applicable law in appeals against convictions, have decided to act as if the common law were the same all along, just as it is when a court corrects a previous judicial misinterpretation of a statute.[106] The approach highlights the continuing relevance of the declaratory theory.

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[102] *Chan Wing-Siu and Others v The Queen* [1985] A.C. 168 at 175; [1984] 3 All E.R. 877 (Sir Robin Cooke): "a secondary party is criminally liable for acts by the primary offender of a type which the former foresees but does not necessarily intend." This statement of principle was approved by the House of Lords in *R. v Powell* [1999] 1 A.C. 1; [1997] 4 All E.R. 545.

[103] *Jogee* [2016] UKSC 8 at [79].

[104] *Jogee* [2016] UKSC 8 at [84].

[105] I am taking the Supreme Court's account of the history at face value, but there is disagreement about this account. Cf. F. Stark, "The Demise of 'Parasitic Accessorial Liability': Substantive Judicial Law Reform, Not Common Law Housekeeping" (2016) 75 C.L.J. 550.

[106] See *R. v Bentley (Deceased)* [2001] 1 Cr. App. R. 21 at [5] (Lord Bingham C.J.): "Where, between conviction and appeal, there have been significant changes in the common law (as opposed to changes effected by statute) or in standards of

Another explanation is that the Supreme Court in *Jogee* in 2016 changed the law, just as *Chan Wing-Siu* was said to have changed the law in 1984. Both changes were constitutional, which is to say, in accordance with a rule of change (and a corresponding rule of recognition) in that legal system—even though, in the earlier case, the change was unintended, a consequence of the court's misinterpretation of previous decisions. As the Supreme Court acknowledged in *Jogee*, "[i]t was, of course, within the jurisdiction of the courts in *Chan Wing-Siu* and *Powell and English* to change the common law in a way which made it more severe".[107] Since the common-law doctrine of secondary liability had been "unduly widened by the courts, it is proper for the courts to correct the error."[108] This phenomenon of higher courts misinterpreting and reinterpreting the common law, and changing it in the process, is not uncommon.[109]

But this phenomenon is very different from what happens when a court misinterprets a statute. In another criminal law case, *R. v Mitchell*, concerning the effect of correcting previous judicial misinterpretations of a statute, Geoffrey Lane L.J. said:

> the fact that there has been an *apparent* change in the law or, *to put it more precisely*, that previous misconceptions about the meaning of a statute have been put right, does not afford a proper ground for allowing an extension of time in which to appeal against conviction.[110]

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fairness, the approach indicated requires the Court to apply legal rules … which were not and could not reasonably have been applied at the time." See also *Jogee* [2016] UKSC 8 at [100].

[107] *Jogee* [2016] UKSC 8 at [74].

[108] *Jogee* [2016] UKSC 8 at [85].

[109] Commenting on the extent of this phenomenon, combined with an approach to appeals according to which the court must apply the common law as it was at the time of the appeal rather than the time of conviction (see *Bentley (Deceased)* [2001] 1 Cr. App. R. 21), John Smith noted that it is "rather a depressing thought that so many, perhaps a majority of the convictions in our courts are 'unsafe'—*i.e.* wrong in law": J.C. Smith, "Case Comment" [1999] Crim. L.R. 330 at 332.

[110] *R. v Mitchell* [1977] 1 W.L.R. 753 at 757; [1977] 65 Cr. App. R. 185 at 189 (Geoffrey Lane L.J.) (emphasis added).

Unless there is a constitutional rule of change that confers power on the courts to change statute law, the law does not change (it only *seems* to change) when courts misinterpret statutes or correct misinterpretations of statutes.[111] If a legislature exercises its constitutional power to change the law without retrospective effect, this constitutionally recognised change in the law would be irrelevant to an appeal against a conviction, because the old law, valid at the time of conviction, would remain the applicable law. However, a judicial misinterpretation of a statute does not change the law, rather it is a mistake of law. The mistake provides a good ground for an appeal against a conviction, not relevantly different from an appeal on the ground that new evidence has been found.

We can draw a rough analogy between the effect of judges misinterpreting a statute and the effect that an unconstitutional statute has on the law, in legal systems in which statutes can be invalid.[112] An unconstitutional statute is invalid and does not change the law.[113] To some extent, the same is true of a judicial misinterpretation of a statute. The analogy is not exact, because lower courts may be bound by a rule of adjudication to follow the decisions of higher courts even if they are mistaken, with a corresponding rule of recognition identifying those decisions as valid law. In this way, judicial misinterpretations of statutes can create valid law, authoritatively binding on lower courts. But once the mistake is corrected by the higher court, the overturned judicial decision ought to be recognised as having been invalid all along. A statute cannot have contradictory meanings at different times, and,

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[111] Cf. *R. v R. (Amer)* [2006] EWCA Crim 1974; [2007] 1 Cr. App. R. 10 at [30] (Hughes L.J.), suggesting that a conviction based on a misinterpretation of a statute "was entirely proper under the law as it stood at the time of trial".

[112] The analogy between the effects of the unconstitutionality of a statute and a misinterpretation of a statute was drawn in *R v Cottrell* [2007] EWCA Crim 2016; [2007] 1 W.L.R. 3262 at [43]–[44] (Sir Igor Judge P.).

[113] It may seem otherwise. For example, after the Supreme Court of Ireland declared that s.1(1) of the Criminal Law Amendment Act 1935 was inconsistent with the Constitution of Ireland, the Court held that decisions to convict based on s.1(1) "must be *deemed to be* and to remain lawful notwithstanding any subsequent ruling that the statute, or a provision of it, is unconstitutional" (emphasis added). *A v Governor of Arbour Hill Prison* [2006] 4 I.R. 88 at 143 (Murray C.J.). The decision to treat the statute *as if* it were valid law was taken for questionable pragmatic reasons: rendering previous convictions unsafe due to the unconstitutionality of a statute would have "dysfunctional effects in the administration of justice": ibid 130 (Murray C.J.).

after the correction, the earlier judicial misinterpretation cannot henceforth be recognised as having created valid law, because that would entail that the common law is superior to statute law. In contrast, due to the common law's source in judicial precedent, a misinterpretation of the common law does change the law (under one rule of recognition), even though judges sometimes act as if the law does not change as a result of their decisions (under another rule of recognition).

The failure to understand the difference between common law and statute law can be seen in the minority's, and arguably also the majority's, speeches in *Kleinwort Benson Ltd v Lincoln City Council*, a case which contains an interesting discussion of the declaratory theory and the question of what counts as a mistake of law.[114] The parties in that case had acted on a settled view of the law, which was corrected by the House of Lords in *Hazell v Hammersmith and Fulham LBC* interpreting a statutory provision.[115] Assuming that the court's decision in *Hazell* ascribed the correct meaning to the statute, the majority in *Kleinwort Benson* reached the right conclusion: prior to the *Hazell* decision, the parties had been acting under a mistake of law, because the meaning that the court correctly ascribed to the statutory provision in *Hazell* was the meaning it had always had.

But Lord Browne-Wilkinson and Lord Lloyd, dissenting in *Kleinwort Benson*, argued that the court's interpretation in *Hazell* had changed the law, and so the parties had made no mistake of law.[116] They reached this conclusion by drawing an analogy with the development of the common law, where a judicial decision overrules an earlier judicial decision. They rejected the declaratory theory of

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[114] *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 A.C. 349; [1998] 4 All E.R. 513, overruling the old rule precluding recovery in restitution of money paid under a mistake of law.

[115] *Hazell v Hammersmith and Fulham London Borough Council* [1992] 2 AC 1; [1991] 1 All E.R. 545, concerning the interpretation of s.111(1) of the Local Government Act 1972.

[116] *Kleinwort Benson* [1999] 2 A.C. 349 at 358–59 (Lord Browne-Wilkinson) and 393–94 (Lord Lloyd of Berwick). See also P. Birks, "Mistakes of Law" (2000) 53 C.L.P. 205 at 228, arguing that the parties in *Kleinwort Benson* could not have acted under a mistake of law because their view of the law was "incapable of being falsified at the time it was acted upon."

the common law, which the majority had defended.[117] But in doing so they failed to recognise the difference between the development of the common law and statutory interpretation. The former is determined by judicial decisions; the latter is determined by the meaning of a statute. Only if a statute is indeterminate can a judicial interpretation of a statute be said to change the law.[118]

The point is also well illustrated by the *Brockhill Prison* case, in which a prisoner applied for a writ of habeas corpus and sought damages in the tort of false imprisonment, because the prison governor had calculated her release date according to an interpretation of s.67(1) of the Criminal Justice Act 1967 that at the time was supported by decisions of the Divisional Court, but that the Divisional Court later held had been mistaken. Counsel for the prison governor argued that he had a defence to an action for damages because the detention was "lawful at the time", according to the Divisional Court's earlier interpretation of the statute, and the Court's decision to overrule its earlier interpretation should not have retrospective effect. If it had been successful, that argument—that the law changed—would have entailed that the content of the law is not determined by the meaning of the statute, for, as Lord Hope noted, it cannot sensibly be argued that s.67(1) meant different things at different times.[119]

Unless the statute's meaning is indeterminate, statutory interpretation involves ascribing to a statute a meaning that it has always had, and so declares what the law has always been since the statute came into force. One consequence is that, for subjects trying to work out the meaning of a statute, "any legal decision is no more than evidence of the law".[120] Oddly, the judges in *Brockhill Prison* discussed the idea of prospective overruling without any consideration of the fact that it was an interpretation of a statute,

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[117] For the majority's defence of this theory, see *Kleinwort Benson* [1999] 2 A.C. 349 at 378 (Lord Goff of Chieveley); see also at 399–401 (Lord Hoffmann) and 410–11 (Lord Hope).

[118] Cf. *In re Spectrum Ltd* [2005] UKHL 45; Gardner, "Some Types of Law" in Edlin (ed.), *Common Law Theory* (2007), at pp.58–59.

[119] *R. v Governor of Brockhill Prison, ex parte Evans (No. 2)* [2001] 2 A.C. 19 at 37; [2000] 4 All E.R. 15 (Lord Hope).

[120] *Brockhill Prison* [2001] 2 A.C. 19 at 45 (Lord Hobhouse of Woodborough). See also *Kleinwort Benson* [1999] 2 A.C. 349 at 377 (Lord Goff of Chievekey): "the decisions of the courts do not constitute the law properly so called, but are evidence of the law".

rather than the common law, that had been overruled. Lord Slynn thought that prospective overruling in some cases may be "desirable, and in no way unjust",[121] whereas Lord Hobhouse described prospective overruling as "a denial of the constitutional role of the courts".[122] But prospective overruling is problematic in the context of statutory interpretation, not (or perhaps not only) because, as Lord Hobhouse believed, judges should not adopt this legislative role, but because judges have no power to change statute law, or to put it another way, because the rule of recognition identifies the law with the meaning that the statute actually has, as distinct from the meaning that a court erroneously ascribes to it.

It might be objected that, although inconsistent with the rules of recognition and change, judicial disobedience to statute, under the guise of interpretation, can be rendered constitutional by the legal system's rules of adjudication. While it may be impermissible for judges to change statute law, a rule of adjudication confers on them the constitutional authority "to make authoritative determinations of the questions whether, on a particular occasion, a primary rule has been broken."[123] That authority must entail the right to make mistakes, and the judicial determination, even if mistaken, is binding on the parties and on lower courts. Moreover, Hart wrote that this rule of adjudication will entail a certain kind of rule of recognition, for the court's decision "cannot avoid being taken as authoritative determinations of what the rules are."[124] But a rule of adjudication and recognition that makes judicial decisions a source of law cannot be viewed in isolation from other ultimate criteria of legal validity in the legal system.[125] Although it is primarily judicial practice that determines the content of the rule of recognition, judges are under a duty to act consistently with the rule of recognition. A court breaches that duty, and so acts unconstitutionally, if the rule of recognition

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[121] *Brockhill Prison* [2001] 2 A.C. 19 at 26 (Lord Slynn). On prospective overruling, see e.g., M. Arden, "Prospective Overruling" (2004) 120 L.Q.R. 7.

[122] *Brockhill Prison* [2001] 2 A.C. 19 at 48 (Lord Hobhouse of Woodborough).

[123] Hart, *The Concept of Law* (2012), at p.96.

[124] Hart, *The Concept of Law* (2012), at p.97.

[125] N. MacCormick, *H.L.A. Hart* (Stanford: Stanford University Press, 1981), at p.119: "the rules of recognition, changes and adjudication are indeed necessarily interlocking and interacting, so that change in or redefinition of one must be mirrored by change in or redefinition of another."

gives legal supremacy to statute and the court acts inconsistently with the meaning of a statute.

CAN UNCONSTITUTIONAL INTERPRETATION BE LEGITIMATE?

One final question arises, which can only be raised briefly here by way of conclusion. It concerns the relationship between constitutionality and moral legitimacy. The description of judicial disobedience to statute as unconstitutional has the sound of moral disapproval. But since the rule of recognition is a matter of what actually happens, it cannot answer the moral question of what judges should do. Thus, unconstitutional interpretation may be morally legitimate. As Raz acknowledges, judges who follow his views on interpretation "may find themselves morally obliged to disobey the law of their country."[126] The question of what judges should do is a moral question that ultimately depends on the legitimate authority of the institutions concerned, namely the court and the legislature.

Often, the scope of the legislature's legitimate authority can help to determine the meaning of an unspecific statutory provision. But when the statute cannot be given an interpretation that would be within the legislature's legitimate authority, the court may be morally justified in acting unconstitutionally and departing from the statute. We can disagree about the extent to which judges are morally justified in doing so.[127] But if the argument in this article is sound, it is unlikely that disobedience would never be justified.

If judges cease to disguise their disobedience as an interpretation of the statute, that change in judicial practice may, over time, bring about a change in the rule of recognition, and hence make the disobedience constitutional. That possibility serves to highlight that the important question is the moral one, not the constitutional one. But clarifying what counts as disobedience and what counts as unconstitutional helps to clarify the moral question.

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[126] J. Raz, "On the Authority and Interpretation of Constitutions: Some Preliminaries" in L. Alexander (ed.), *Constitutionalism: Philosophical Foundations* (Cambridge: Cambridge University Press, 2001), at pp.178–79.

[127] For an argument that disobedience is justified to prevent even moderate, and not just extreme, injustice, see J. Brand-Ballard, *Limits of Legality: The Ethics of Lawless Judging* (Oxford: Oxford University Press, 2010). Cf. J. Goldsworthy, "Should Judges Covertly Disobey the Law to Prevent Injustice?" (2001) 47 Tulsa L. Rev. 133.