Purpose in Law and in Interpretation

F.A. Mann Lecture
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1 Introduction

It is an honour to be asked to give this year's F.A. Mann lecture. Francis Mann was highly respected as a jurist and was very influential. One example of this is relevant to my theme this evening. In the seminal case of *Oppenheimer v Cattermole*[1] the House of Lords considered whether the English courts should recognise a Nazi nationality law depriving Jews of their German citizenship.[2] The Law Lords had already heard the argument and were preparing to give judgment when they learnt that Francis Mann had published an article on the case.[3] The article criticised the lower courts for failing to acknowledge that the post-war Federal Supreme Court had consistently held Nazi nationality laws as void – indeed as not law at all – due to their being arbitrary and lacking the necessary qualities of law.[4] The House convened a new hearing to consider the article and it changed the course of the appeal, with the majority relying heavily on his analysis.[5]

The difficult moral and legal problems posed by the laws of Nazi Germany also preoccupied Lon Fuller, whose work I will draw upon in this lecture. In the famous 1958 'Hart-Fuller' debate, Fuller argued against H.L.A. Hart that Nazi laws were not law at all. Fuller's argument was based on his view of the purposive nature of law. It is the importance of purpose, in law and in interpretation, that is my topic this evening.

The concept of 'purpose' is frequently used in many different areas of the law. In administrative law, public authorities must exercise their powers for a proper purpose.[6] In contract law, the courts seek to identify

* I am grateful to my Judicial Assistant, Monty Fynn, for his excellent assistance in the preparation of this lecture.
[1] [1976] AC 249.
[2] See Lawrence Collins, 'The Influence of FA Mann on English Case Law' in Jason Grant Allen and Gerhard Dannemann (eds), *FA Mann: The Lawyer and His Legacy* (Oxford University Press 2024).
[3] FA Mann, 'The Present Validity of Nazi Nationality Laws' (1973) 89 Law Quarterly Review 194.
[4] ibid 198–200.
[5] *Oppenheimer* 268E-F (Lord Cross).
[6] *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997.

the purpose of the contracting parties.[7] Most familiar of all is the central role of purpose in statutory interpretation, where, as Lord Bingham said, the court's task "is to give effect to Parliament's purpose".[8] I will argue that this ubiquitous recourse to the idea of purpose in different legal areas derives from the fundamentally purposive nature of law and the legal system as a whole.

Law is a human institution comprising a set of normative propositions. A legal rule lays down a particular state of affairs which *should* exist, which may be different from a state of affairs which *does* exist, and requires action to be taken to change things to conform to the rule. The rule is a principle requiring human intervention in the world. That intervention is oriented to achieving some purpose, which is to be derived from the rule itself and the system of which it forms part. I therefore take Fuller's philosophy of law as my starting point for this lecture. Laws reflect and are designed to advance human purposes.

This perspective has implications for how we interpret laws across the whole spectrum. As examples I will examine the role that purpose plays in the common law of contract and tort, in statutory interpretation and in the law of human rights under the European Convention. Some idea of purpose is inevitable in interpreting law in all these areas. But it also gives rise to puzzles.

In modern societies laws are given expression in language. It is often perceived that there is a tension between the natural meaning of the words used and the purpose underlying the particular law. On this view, recourse to purpose in the interpretive exercise involves changing what would otherwise be the meaning of the words to arrive at the true meaning of the law. If purpose is going to have this powerful and potentially determinative effect when there is a dispute about that meaning, we need to try to understand how to identify that purpose and to specify what its effect should be.

However, I will also argue that this picture of a conflict between natural meaning and purpose is itself exaggerated and rather distorted. The use of language is a practice which is itself based on human purposes, and its meaning can only be understood in light of the purposes which the language user has, or is taken to have, in the particular context in which it is used. So recourse to purpose to derive meaning is inevitable for this

[7] *Arnold v Britton* [2015] UKSC 36, [2015] AC 1619, [15] (Lord Neuberger).
[8] R *(Quintavalle) v Secretary of State for Health* [2003] UKHL 13, [2003] 2 AC 687, [8].

reason as well. The fact that meaning is purpose-driven in language runs in tandem with the fact that law serves, or is taken to serve, the purposes of the law-giver and of the legal system as a whole. The purpose of a law informs the understanding to be given to - that is the meaning of - the language used to express that law. But this modification of the slightly crude purpose versus natural meaning picture which is often invoked serves to emphasise still more the need to identify the purpose of the law, as expressed through the medium of language, and to understand what its effects might be in understanding the language used in order to derive its meaning as it falls to be applied in a particular case. This perspective suggests that disputes about meaning tend to resolve into disputes about purpose.

But language generally and laws in particular are not usually accompanied by declarations of purpose, and even when they are such a declaration itself requires interpretation and may not be complete. The person to whom the language or the law is addressed has to interpret it by inferring the purpose or purposes which they take the person using the words to have had in choosing them in the particular context. Recourse to the concept of purpose in order to understand meaning is both inevitable and helpful, but it is also problematic.

This brings me to a third preliminary point. Law is expressed in language because it involves an act of communication. A law tells a person subject to that law how they should behave. That is true even for laws in the form of custom which has not been written down. A person wishing to know how they should behave in order to conform with the law, so as to allow the law to operate as a guide for their action, has to infer the relevant normative proposition from observation of how others behave in conformity with the custom. It has to be possible to formulate the customary rule in language, and in doing that one gives expression to its purpose. Sometimes the purpose or *telos* of the customary rule has been identified by the heuristic of positing an ancient lawgiver, such as Solon in Athens, and conceiving of the purpose of the law, which is really the purpose of the legal system itself, in personalised terms which make it easier to understand that purpose.[9]

Something similar happens in modern societies which depend on positive laws promulgated by multi-member legislatures, rather than

[9] Melissa Lane, Lecture II, 'Functions of Lawgivers from Solon to Fuller', The Isaiah Berlin Lectures 2024, Oxford, 5 November 2024.

pronounced by a single person such as a king, who acts for simple human purposes like any individual and whose use of language is to be understood in that way. When a legislature legislates it speaks to the persons who are subject to its laws, and it is appreciated that they will have to make sense of them in order to understand how their actions should be guided by them. The legislature is an artificial person which speaks by means of a process involving voting to adopt legislative texts. It exercises its own agency in the political system in this way and is understood by those subject to the law to be exercising agency as a person speaking to them. Therefore, I maintain that it is legitimate when interpreting legislation to do so by reference to the purposes to be ascribed to the legislature as a speaker using particular language in a particular context. It is correct to use the concept of legislative intention as much for the legislature as for an individual law-giver. I hope to answer criticisms of the notion of Parliamentary or legislative intention in statutory interpretation by showing how the concepts of intent and purpose are indispensable throughout the law.

2 Philosophy: the purposive nature of law

2.1 Purpose in law

The purposive nature of law was central to the legal philosophy of Lon Fuller. For Fuller, the legal system is the product of a "sustained purposive effort".[10] In his work *The Morality of Law*, Fuller described the purpose of law as "the enterprise of subjecting human conduct to the governance of rules".[11] From this view of law's purpose, Fuller derived eight principles that he argued were constitutive of a legal system.[12] There must be general rules, rather than ad hoc decisions or commands. The rules must be publicised and available to those who are expected to observe them. They must be of prospective, rather than retrospective, effect. The rules must be clear and intelligible. They must not be contradictory. They must not require the impossible. The rules must be relatively stable across time. And finally, the implementation of the rules by officials must accord with the rules as they have been published.

[10] Lon Fuller, *The Morality of Law* (Yale University Press 1969) 106.
[11] ibid.
[12] ibid 38–39.

Fuller saw these principles as the foundation of a reciprocal relationship between the creator of the laws (the lawgiver) and the responsible agents subject to them (the legal subjects). A lawgiver must follow these principles if they are successfully to guide the conduct of those subject to their laws. If a legal system departs too drastically from any of one of these principles, then it will fail to guide human conduct and therefore fail in the purpose for which it exists; it will fail to be law at all.[13]

Fuller was at pains to emphasise that, unlike some natural law theories, his eight principles are not derived from an external source, such as a divine creator.[14] Instead, the principles are what is required of the law if it is to achieve its purpose.[15] Fuller emphasised that the eight principles are neutral between a variety of substantive aims of the law. He called the eight principles the 'inner morality of law' in order to contrast them with the 'external' moral aims that the law may pursue.[16] For example, the internal morality of law tells us nothing about whether the lawgiver should raise income tax or legalise assisted dying.[17] This explains why, when Fuller argued that Nazi laws were not law at all, this was not due to their substantive content. Rather, it was because Nazi 'laws' violated the inner morality of law: they were passed in secret, retroactively approved wholesale murder, and Nazi judges paid no attention to the laws when deciding cases.[18]

There is a deep connection between Fuller's conception of law and the value of human agency.[19] As Fuller put it:

> *To embark on the enterprise of subjecting human conduct to the governance of rules involves of necessity a commitment to the view that man is, or can become, a responsible agent, capable understanding and following rules, and answerable for his defaults. Every departure from the principles of the law's inner morality is an affront to man's dignity as a responsible agent.*[20]

[13] Fuller illustrates this through the allegory of the hapless lawgiver 'Rex': ibid 33–38.
[14] ibid 96.
[15] ibid.
[16] ibid 153.
[17] ibid 96.
[18] Kristen Rundle, *Forms Liberate: Reclaiming the Jurisprudence of Lon L Fuller* (Hart Publishing 2012) 72.
[19] ibid esp. 2, 9-11, 97-101.
[20] Fuller (n 10) 162, and see Rundle (n 18) 10.

2.2 Purpose in interpretation

I turn to consider the role purpose plays in legal interpretation generally, due to the close relationship between purpose, words and meaning.[21] Whether it is in statutes, contracts or principles articulated in judicial decisions, the law is expressed in words. Courts interpret these words to ascertain their proper meaning. But words are not simple building blocks constituted of fixed and unalterable datums of sense which are put together like Lego bricks to reveal a clear and perspicuous meaning of composite sentences. Words have shades of meaning, which become determinate when used in specific contexts for specific purposes.

This picture of how meaning is conveyed by language was explained in the later work of Ludwig Wittgenstein.[22] Wittgenstein argued that language is not representational, and words do not have a simple correspondence with objects in the world. Instead, sense or meaning is given by the use to which a word is put in a particular context and as part of a public, rule-governed activity carried on by a linguistic community.[23] Communication is therefore enabled by the objective nature of language, in that the meaning is independent of the subjective intention of the individual speaker. It is only through the speaker's participation in the wider linguistic community that they are able to achieve meaning at all.[24] They are tools which are put to use by the speaker.[25]

This view of language explains why courts find it necessary to refer to context in order to explain the meaning of words used in legal rules. A word derives its meaning not just from the specific purpose for which a speaker uses it, but from its use in the context of the wider set of linguistic practices informed by the purposes of the community as a whole.[26] This helps to explain the modern approach to statutory and contractual interpretation, where a particular provision is construed not just by

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[21] In this section I draw on Philip Sales, 'Contractual Interpretation: Antinomies and Boundaries' in Edwin Peel and Rebecca Probert (eds), *Shaping the Law of Obligations* (Oxford University Press 2023).
[22] In particular, in Ludwig Wittgenstein, *Philosophical Investigations*, tr GEM Anscombe (3rd ed, 1968), and writers drawing on his work. See also HP Grice, *Studies in the Way of Words* (1989).
[23] See GP Baker and PMS Hacker, *Wittgenstein: Understanding and Meaning* (2005 edn), 15, and in particular ch VIII ('Meaning and use'), ch XI ('Family resemblance'), ch XVII ('Understanding and Ability').
[24] Fuller was well-attuned to this feature of language. The emphasis on purpose in his jurisprudence was influenced by Wittgenstein: see eg Lon Fuller, 'Human Purpose and Natural Law' (1958) 3 The American Journal of Jurisprudence 68, 71 and Fuller (n 10) 186.
[25] Wittgenstein, *Philosophical Investigations* (n 22), §11, and Baker and Hacker (n 23) ch 1 ('The Augustinian conception of language').
[26] John F Manning, 'What Divides Textualists from Purposivists?' (2006) 106 Columbia Law Review 70, 78.

reference to the specific object at which the statute or contract is aimed, but also by reference to the wider purposes served by the general common law. I will consider this idea first in the context of contract law.

3 Contract law: identifying the purpose of the parties

By forming a contract, parties create a shared legal world. That shared world comprises a set of legal rights and obligations which frame the way in which they are entitled to behave towards each other.[27] In creating this world, the parties act as lawgivers by legislating for themselves and, in the words of Fuller, engage in the enterprise of subjecting their conduct to the governance of rules. Fuller's emphasis on law's respect for human agency finds expression in the related principle that the court will not readily interfere with the bargain consensually entered into by the parties.[28]

This principle reflects the value the law places on predictability and a party's ability to plan their affairs with a reasonable appreciation of the boundaries of what is permissible. However, the specific purpose of the parties does not completely displace the wider purposes of the legal system as a whole. Just as "*Parliament does not legislate in a vacuum*"[29], nor do contracting parties. Their actions are situated in the wider legal system.

Similarly, the parties' subjective consent does not control the meaning of contractual terms. Instead, the courts ask what a reasonable person, placed in the position of the parties, would understand the contract to mean.[30] This serves a dual function. The concept of a reasonable person reflects the objective nature of meaning: the words of a contract only derive their meaning from their use in the wider linguistic community of which the parties are part. Also, the need to place the reasonable person in the position of the parties derives from the fact that an understanding of the specific purposes of the parties is necessary to determine what meaning, out of the range of meanings it might convey, a word is intended to have.

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[27] Sales, 'Contractual Interpretation' (n 21) 153.
[28] See e.g. *ParkingEye Ltd v Beavis* [2015] UKSC 67, [2016] AC 1172, [13] (Lord Neuberger and Lord Sumption) ("Leaving aside challenges going to the reality of consent, such as those based on fraud, duress or undue influence, the courts do not review the fairness of men's bargains either at law or in equity").
[29] R *v Secretary of State for the Home Department ex parte Pierson* [1998] AC 539, 573G (Lord Browne-Wilkinson), 587C (Lord Steyn).
[30] *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50, [2011] 1 W.L.R. 2900, [14] (Lord Clarke).

4 Purpose in tort

Regarding the role of purpose in tort, I will mention two main categories of case.

The first is where tort regulates the relationship of two parties who voluntarily engage with one another. This can be seen in the development of assumption of responsibility as a basis for a duty of care for pure economic loss in the tort of negligence. The general rule is that pure economic loss – loss that is purely monetary in nature without any physical damage – is not recoverable in negligence.

The most common rationale offered for this principle, as explained by Lord Denning in the *Spartan Steel* case[31] is that imposing a duty of care for pure economic loss would expose parties to a disproportionate liability. To impose liability for pure economic loss suffered in such circumstances would mean that the ambit of liability would pull apart from the forms of relationship which might justify imposing liability in the first place. The contractor in *Spartan Steel* who dug up the public highway and cut a power cable supplying power to the claimant's factory could not meaningfully incorporate the indeterminate risk associated with the harm caused to everyone taking power from that cable into the price charged for its services, nor realistically could it obtain insurance to protect itself. It was not in a position to be able to bargain around the risk it took on, so that without a rule against the recovery for pure economic loss it would in fact bear all of the risk. By contrast, where the defendant carries out a task given to it by the claimant and through dealing with them has an opportunity to negotiate over the extent of the obligations it takes on, the law is justified in imposing a duty. The ambit of the duty is informed by the purpose of the arrangement they make.

An example of this is the decision of the Supreme Court in *Manchester Building Society v Grant Thornton.*[32] In that case, the defendant accountancy firm had negligently advised the society that its accounts could be prepared using a particular accounting principle in relation to interest rate swap contracts, which led the society to think that the regulatory regime to which it was subject allowed it to enter into long-term swap contracts as a hedge against the cost of borrowing money to fund its mortgage lending. The 2008 financial crisis led to an unexpected fall in interest rates, with

[31] *Spartan Steel v Martin & Co* [1973] QB 27.
[32] [2021] UKSC 20, [2022] AC 783.

the result that the value of the swaps became severely negative. The society also belatedly realised that hedge accounting could not in fact be used in stating its financial position. The society had to restate its accounts with the result that to comply with its regulatory obligations it had to close out the swaps early at substantial loss. The accountants admitted negligence but argued that the losses were not within the scope of their duty of care. Reversing the lower courts, the Supreme Court held that it was. The scope of the duty of care assumed by a professional adviser was governed by the purpose of the duty, judged on an objective basis by reference to the purpose for which the advice was given.[33] As the accountants knew that their advice was sought in order to be used by the society to decide whether to enter into the swap transactions, it was liable for the losses arising from action in accordance with that advice.

The second category of case in tort involves situations where the parties do not deal with each other and therefore have no opportunity to bargain about the scope of their engagement. Here the duty is imposed by law independently of the will of the claimant and the defendant. It cannot be said that the duty of care owed by one road user to another is based on a purpose jointly chosen by them. Instead, the duty is imposed to give effect to the wider purposes of the general law, such as providing just compensation and a fair distribution of risk.[34]

5 Statutory interpretation: the indispensability of Parliamentary intent

Turning to interpretation of statutes, purpose has a role analogous to that in contract. Whereas the parties to a contract act as joint lawgivers in relation to their own relationship, Parliament acts as a lawgiver for the legal system as a whole. It is central to the enterprise of subjecting human conduct generally to the governance of rules. However, whilst the breadth of Parliament's lawmaking powers may be wider, the interpretive task for the court is the same: that is, to identify the meaning Parliament intended to convey to those subject to a new law by its purpose in introducing that law expressed in the words it has chosen to use. This approach is settled law and has been reaffirmed by the Supreme Court on multiple

[33] ibid [4] (Lord Hodge and Lord Sales).
[34] *Tomlinson v Congleton BC* [2003] UKHL 47, [2004] 1 AC 46, [45]-[47] (Lord Hoffman).

occasions.[35] Back in 1877 Lord Blackburn said in the *River Wear Commissioners* case[36] that the principles applicable to construing a statute were the same as those for construing any other instrument in writing: namely, to identify the intention of the author in using the words chosen.[37]

Despite the acceptance of this approach in case law, the use of Parliamentary purpose and intention in statutory interpretation has been subjected to criticism. Some judges and jurists deny that the concept of Parliament's intention should play any role in interpretation. In a lecture in 2017 Sir John Laws argued that we should abandon the concept and instead employ the idea of statutory purpose as something inherent in and to be discerned from the statute itself. In the US, John Manning argues that the courts should engage in legislative interpretation "without the pretense of legislative intent".[38]

The main reason for this scepticism about the concept is that Parliament is a multi-member legislative body, and the intentions of individual members when passing legislation are likely to be various and will not correspond with each other. Members voting for the legislation may have completely different purposes in mind. Therefore, it is argued that it is a fiction to refer to Parliament's intention: there is no such thing, just a multitude of intentions of individual human agents.

One response to this criticism is offered by John Gardner.[39] Gardner draws an analogy between a legislator and an orchestra. In an orchestra, members achieve co-ordination by following the conductor, with each playing his own instrument; but only the orchestra, as a group agent, plays the symphony. The individual musician intends to play their instrument, but they also intend that, by all together playing their parts, the orchestra as a whole will play the symphony. Gardner argues that, in the same way, every member of the legislator will have the shared intention of legislating to change the law. Even those who vote against a certain piece of legislation intend for it to become law if a majority supports it. Parliament

[35] See e.g. *R (O) v Secretary of State for the Home Department* [2022] UKSC 3, [2023] AC 255, [29]-[31] (Lord Hodge).
[36] *River Wear Commissioners v Adamson* (1877) 2 App Cas, 743, 763-764.
[37] Philip Sales, 'In Defence of Legislative Intention' (2019) 48 Australian Bar Review 6.
[38] John F Manning, 'Without the Pretense of Legislative Intent' (2017) 130 Harvard Law Review 2397. For others taking a similar position, see Richard Ekins, *The Nature of Legislative Intent* (Oxford University Press 2016) esp. pp 3-4 and ch 2.
[39] John Gardner, 'Some Types of Law' in Douglas E Edlin (ed), *Common Law Theory* (1st edn, Cambridge University Press 2007) 57–60.

is therefore a group agent in the same way as an orchestra.[40] However, Timothy Endicott, who is kindly chairing this lecture, makes a persuasive critique of this view.[41] A legislature is not structured by co-operation in the way an orchestra is, but by party competition. There is no overarching teamwork and when a member votes against a Bill they intend and hope that it falls and is not passed into law. Instead, Parliament acts on the basis of a rule which sets out conditions for the valid exercise of legislative power. The rule is a device to enable a legislature to exercise agency by choosing whether to approve a proposal. Parliament is therefore an artificial person or agent that acts by means of this procedure.

However, my view is that whilst Parliament may best be conceptualised as an artificial person who acts by means of such a power-conferring rule, it does not follow that there is no role in interpretation of a statute for Parliamentary intention or purpose, taking that word to mean the same thing. In promulgating a law Parliament is a speaker, who acts by using the tools of language in a deliberated and deliberative manner in order to convey meaning, and so has to be understood as such by its audience. It speaks in a general context in which it exercises a legal power given to it in order to further the purposes of a particular political community. If it is to convey meaning, then for reasons to do with the nature of language it has to be understood as an agent seeking to pursue particular purposes by choosing those words. And to understand what sort of agent it is, and hence what particular purposes it should be understood to be promoting, its audience has to take account of the range of meanings of the words it uses, the particular purposes that appear from the use of those words in the context of the legislative measure of which they form part, and more generally the nature and role of the legislature itself in the political community.

Our political community takes the form of a Western liberal democracy subject to the rule of law. Parliament is constituted to serve the ends of such a community. It exercises its legislative power by means of the power-conferring rule, which in turn depends upon the exercise of agency by the members who constitute it, who deploy the votes given to them by that rule. In order to be able to exercise that agency, they have to be able to understand the meaning of the legislative text that they vote

[40] I was previously attracted by this view: see Sales, 'In Defence of Legislative Intention' (n 38); but whilst a form of group agency is exercised by Parliament, this particular metaphor is inexact.
[41] This is from a work in progress kindly shared by Timothy Endicott, his forthcoming book, *Words and Rules*.

upon just as much as the subjects of the law.[42] In fact they too are subjects of the law and for that reason also should be taken to understand it in the same way as a subject of the law will do: they are legislating for themselves, as well as everyone else. They must be taken to intend to do so reasonably, and not randomly or capriciously.

To use the well-known formulation of Henry Hart and Albert Sacks, judges and others subject to the laws passed by Parliament should understand it by presuming that legislators are "reasonable men pursuing reasonable purposes reasonably".[43] It is readily possible to posit the legislature as a single unified person exercising its own agency, and to look for clues in the properly available evidence as to how that person would have been likely to have intended to resolve the particular case in which a dispute arises. Similarly, the court constructs the recipient of the legal rules promulgated by the legislature and asks what a reasonable legal subject would understand those rules to mean.

I find it difficult to conceive of a sensible alternative approach. The legislation has to convey meaning as chosen by the legislature, since that is what the legislature exists to do. And the legislation could not be understood if the words used were a random assemblage, rather than understood as being employed by a person engaging in rational action.[44] But it may be objected that it is not straightforward for the court to posit a reasonable legislature or legal subject in the way I propose. Three points can be made in response.

First, Wittgenstein's analysis of the nature of language means that resort to a conception of Parliament's purpose in using it is not just viable, but necessary. The idea that legislation requires meaning to be conveyed by a speech act by an agent, and since Parliament is an artificial person who is the relevant agent which speaks, seems to me to commit us to determining that meaning by inferring the intention of the legislature in the same way we would infer the intention of a natural person. Moreover, words are "irreducibly open-textured", meaning that they can be used in multiple different situations.[45] The open texture nature of language means

[42] Philip Sales, 'Legislative Intention, Interpretation and the Principle of Legality' (2019) 40 Statute Law Review 53, 59.
[43] Henry M Hart Jr and Albert M Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* (William N Eskridge Jr and Philip P Frickey eds, West Academic 1994) 1124–1125.
[44] Ekins (n 39) 113–117, and ch. 5.
[45] HLA Hart, *The Concept of Law* (Third edition, Oxford University Press 2012) 128.

that law and legal rules also have an open texture, and Parliament's purpose is necessary to give an open-textured word a specific meaning.[46]

This view is supported by the second and third points.[47] The second is that we regularly derive meaning from speech acts by natural persons. The notion of a simple will of an individual is itself contested, yet we have no difficulty in using the language and concept of intention in relation to what can be seen as the complex construction of an individual's will.[48] Thirdly, judges, lawyers, and others do in fact happily and coherently employ the concept of legislative intention and purpose, assessed in an objective way, when addressing the interpretation of statutes. As mentioned, intention is used in an analogous way in contract law with far less criticism.[49] From a Wittgensteinian perspective, there is nothing in this use of language which is erroneous or requires to be fixed.

In addition to these reasons, there are constitutional reasons why Parliament's purpose should be the focus of a court's interpretive exercise.[50] Democracy is rule of the demos/people, which expresses its collective will through Parliament's legislative processes. Legislation is a deliberate collective act by a legislature authorized to issue new law, chosen and voted upon by individual parliamentarians in light of their views about what the public in fact want or what parliamentarians take to be their collective interests. The legislative will is the will of the people, in refined and concretized form. To deny that Parliament can be imputed with an intention or a purpose is to deny the possibility of democratic lawmaking. It also potentially opens the door too wide for judicial law-making, by removing the focus from where it should be, on the will of Parliament, reflecting the will of the people. If Parliament's intention is not taken to be the object of inquiry where disputed issues of statutory interpretation arise, the exercise of interpretation becomes unmoored and the way appears clear for the courts to import normative content of which they approve, even if it is not plausible to think that the legislating Parliament would have accepted it.

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[46] Hart, *The Concept of Law* (n 46) 124–136.
[47] See on these Sales, 'Legislative Intention, Interpretation and the Principle of Legality' (n 43), 59-60.e
[48] F Nietzsche, *Beyond Good and Evil* ([1886] W Kaufmann (tr) 1966) para 19: willing is a complex activity and 'something that is a unit only as a word'; Stuart Hampshire, *Justice is Conflict* (Princeton 1999) ch I, 'The Soul and the City', discussing the Platonic analogy between conflict in the divided minds of individuals and in the polis; Harry Frankfurt, *The Importance of What We Care About* (Cambridge University Press, 1998).
[49] I accept that it is not entirely free from criticism, see e.g. Peter Benson, *Justice in Transactions: A Theory of Contract Law* (The Belknap Press of Harvard University Press 2019) 117–121.
[50] Sales, 'Legislative Intention, Interpretation, and the Principle of Legality' (n 43) 59–60.

Sometimes a move is made to replace talk of Parliament's intention or purpose with the purpose of a statute.[51] In my opinion, this move fails to sidestep the issue of legislative purpose. To refer to the purpose of a document is to refer to the purpose of the agent or agents who brought it into existence (or, sometimes, to the purpose of the agent or agents who put an existing text to a new use of their own; but in the UK's system which emphasises the political authority of Parliament the emphasis is on the purpose of those who brought it into existence). Documents do not have agency and do not have purposes of their own. So the concept of legislative purpose is a fiction in the same way as legislative intention is a fiction—and indeed means much the same thing on the Wittgensteinian conception that language is a tool and meaning arises from its use.

In my view, these arguments show that the concepts of Parliamentary purpose and intent are both viable and indispensable in statutory interpretation. However, establishing Parliamentary purpose as a legitimate concept raises further problems as to how it should be applied in practice. I will refer to four of these: (i) what evidence as to purpose is properly admissible?, (ii) to what extent can courts inject normative content by an assumption that Parliament has legislated to accommodate particular background constitutional or human rights objectives ("the principle of legality")?, (iii) how should the courts react where there are multiple (and potentially conflicting) purposes?, and (iv) what should courts do where there is a compromise involving a deliberate obfuscation, limitation or non-implementation of conflicting purposes?

One of the reasons these problems arise in relation to statutes is because they have authoritative effect across time and in relation to situations potentially far removed from those to which the legislature directed its attention. Legislation from the 1800s continues to apply today regulating modern forms of life that were unimaginable then. Similarly, a statute can never anticipate all of the novel circumstances in which it may be applied. In these circumstances, there is no simple mechanism for recourse back to the legislature: you cannot call it up and ask, 'what did you really mean?'. This uncertainty is reduced by the fact that legislators will frame a statute by focusing on what is most directly important to them, using precise language. This provides a paradigm case as a point of reference. The potential extent of legitimate disagreement about linguistic

[51] Andrew Burrows, *Thinking about Statutes: Interpretation, Interaction, Improvement* (Cambridge University Press 2018) 19–20.

meaning can also be reduced further by the specification of an accepted methodology by the courts to resolve cases of uncertainty at the margins of linguistic meaning. These include the linguistic canons of construction such as the *expressio unius* principle (expressing one thing indicates an intention to exclude another). However, such a methodology cannot wholly eliminate the uncertainty which might arise and in the ultimate analysis difficult cases can only be resolved by an exercise of judgment.

As I will explain in relation to each of the four problems, the court is called upon to make such a judgment, and the process of statutory interpretation becomes analogous to the common law method, whereby competing considerations are weighed and balanced to determine the precise content of the rule to be applied.[52] The legislature's reasons for action constitute its purpose, and there may be a combination of reasons, some in tension with each other, which should be ascribed to it as a presumed rational agent in choosing the particular text it does. The formulation of a particular rule may, for example, represent a compromise between ends and means. Formulation as a more or less bright line, for clarity of message and ease of application, may be in tension with the rule's underlying rationale in more marginal cases.[53] The interpreter may have to make a judgment regarding where the legislature intended to strike that balance.

In statutory interpretation, the exercise of weighing reasons to identify the precise form of the rule to be applied in the particular case is subject to the discipline of having to be accommodated within the linguistic constraints of what the text is capable of meaning. Reasoning in the common law is not subject to that, but it is subject to the slightly looser, but similar, discipline of having to accommodate the precise rule which is identified to address the case in hand within existing common law principles as formulated in or derived from case law.

5.1 What evidence as to purpose is properly admissible?

Taking the first problem of what evidence is admissible to determine a statute's purpose, as Lord Hodge stated in *R (Project for the Registration of Children as British Citizens) v Secretary of State for the Home Department*[54] the primary starting point for statutory interpretation is the language Parliament has chosen to enact as an expression of the purpose of the

[52] P Sales, 'Modern Statutory Interpretation' (2017) 38 Statute Law Review 125.
[53] See Frederick Schauer, *Playing by the Rules* (Oxford University Press 1993).
[54] [2022] UKSC 3, [29].

legislation. This evidence internal to the statute itself takes three forms: (a) the language of the particular section to be construed; (b) its place in the scheme of the particular part of the statute in which it appears; and (c) its place in the scheme of the statute as a whole.

There may also be evidence of purpose which is extrinsic to the statute: (a) background reports, white papers and Law Commission reports which operate as the spur for the particular legislative activity (as explored, in particular, in the leading *Black-Clawson* decision[55]); (b) statements made in Parliament by the promoter of a Bill; and (c) Explanatory Notes published in relation to the Bill.

It was only in *Pepper v Hart*[56] that the House of Lords accepted that statements in Parliament could be treated as admissible evidence of Parliament's intention. Three conditions were laid down: (a) the legislation is ambiguous or obscure or leads to an absurdity; (b) the material relied upon consists of statements by a minister or promoter of the Bill; (c) the statements relied upon clearly show the meaning.

The relevance of explanatory notes has been addressed in several cases. In the recent *PACCAR* case[57] the legislature created a problem by adopting concepts which were the subject of specific definitions in one statutory context as the building block concepts in a different statutory context. It was common ground that the definitions used were so specific that the inference was that Parliament intended them to have the meaning they had in the earlier legislation. After referring to authority I said: "The purpose and scheme of an Act of Parliament provide the basic frame of orientation for the use of the language employed in it"[58], and continued (para 42):

> *"It is legitimate to refer to explanatory notes which accompanied a Bill in its passage through Parliament and which, under current practice, are reproduced for ease of reference when the Act is promulgated; but external aids to interpretation such as these play a secondary role, as it is the words of the provision itself read in the context of the section as a whole and in the wider context of a group of sections of which it forms part and of the statute as a whole which are the primary means by which Parliament's meaning is to be ascertained:* R *(Project for the Registration of Children as British Citizens) v Secretary of State for the Home Department*

[55] [1975] AC 591, 613 (Lord Reid).
[56] [1993] AC 593.
[57] [2023] UKSC 28, [2023] 1 WLR 2594.
[58] ibid [41].

[2022] UKSC 3; [2023] AC 255, paras 29-30 (Lord Hodge). Reference to the explanatory notes may inform the assessment of the overall purpose of the legislation and may also provide assistance to resolve any specific ambiguity in the words used in a provision in that legislation. Whether and to what extent they do so very much depends on the circumstances and the nature of the issue of interpretation which has arisen."[59]

This illustrates the common law method in statutory interpretation as the Court must weigh the different sources of a statute's purpose to determine which should take precedence in an individual case.

5.2 To what extent can courts inject normative content by an assumption that Parliament has legislated to accommodate particular background constitutional or human rights objectives ("the principle of legality")?

The nature of language helps to shed light on the extent to which courts can inject normative content into a statute. Just as the meaning of a word is dependent on the wider set of linguistic practices of the community as a whole, so too is the meaning of a statute dependent on certain well-recognised understandings inherent in the rules of the common law system into which Parliament introduces its legislation. Also, to understand legislation, one has to posit Parliament as the speaking agent and that requires an understanding of its nature as a person. This in turn requires an appreciation of its constitutional position, its role within the legal system and the general purposes of the legal system which it exists to serve and implement. Wittgenstein's picture of language and Fuller's picture of the purposive nature of law run in tandem.

Statutes are legal instructions transmitted into an existing, highly developed framework of legal values and expectations. The existing law, modes of reasoning, and established localized value systems provide the interpretive context in which a statute is read. Upon receipt of a statutory text, lawyers and the judiciary seek to knit it into the fabric of the law. The statute may represent a radical departure from what has gone before, in which case the existing law still provides the context for assessing how radical Parliament intended the change to be. On the other hand, the values inherent in the existing law—as recognized by judges and lawyers—may be assessed to be so strong as to exert a gravitational force on the text, pulling its meaning in their direction.[60]

[59] ibid [42].
[60] Sales, 'Modern Statutory Interpretation' (n 53) 128.

Turning to Fuller's picture of law, Parliament exists and is given its powers for the purpose of promoting a legal, political and social system characterised as a liberal democracy subject to the rule of law. That is the basic disposition to be ascribed to Parliament as a fictional person, in the light of which its use of language is to be understood. With due adjustment for the UK's specific constitutional traditions and principles, this indicates that an assessment of Parliament's intentions in enacting legislation should be informed by what Adrian Vermeule calls common good constitutionalism in the mode of the classical legal tradition.[61]

This calls for a union of well-ordered reason, directed to certain objectives, with public authority. Vermeule explains that 'law is ordered to the common good … it is law's nature to be so ordered … and … the positive law based on the will of the civil lawmaker, while worthy of great respect in its sphere, is contained within a larger objective order of legal principles and can only be interpreted in accordance with those principles'.[62] This provides a view of the purpose of legislation at a higher level than that given by consideration of the more localised purposes to be inferred from legislative text and its immediate legislative context. As Vermeule explains, the specific expectations embodied in a legal text may provide no criterion for resolving new cases over time that differ from the paradigm case, in terms of identifying which features of the expected application of the statute are legally relevant: 'The moment that one begins to generalize, one needs a theory, and that theory will inevitably be normative, a theory about the *point* of creating the category in the first place'.[63] 'Those who apply the law must inevitably, in some domain of cases, have recourse to general background principles of law and to the natural law in order to decide how texts should best be read'.[64]

Against this background, we can understand the legitimacy of what lawyers in the UK call "the principle of legality". This is an approach to legislative interpretation which proceeds from a background assumption that Parliament intends by its legislation to respect certain existing rights and principles and to further certain general social objectives as part of the legislative package: "a principled presumptive commitment by the

[61] Adrian Vermeule, *Common Good Constitutionalism: Recovering the Classical Legal Tradition* (Polity 2022).
[62] ibid, 2. In this regard Vermeule aligns himself with Ronald Dworkin's theory of interpretation.
[63] ibid, 96 (emphasis in original). See generally ch 3, "Originalism as Illusion". Cf the doctrine of a statute as "always speaking" to cover new situations identified as falling within the policy of the law as originally enacted, as explained in *Quintavalle*.
[64] ibid, 111.

legislators to certain basic principles which can be viewed as underpinning a liberal democracy committed to the rule of law."[65]

The principle of legality is concerned to ensure that legislation that overrides fundamental common law principles or rights can clearly be appreciated as such at the time of its passage, so that Parliament's intention to achieve that result is properly established.[66] A paradigm example is the presumption against retrospective effect of laws, in particular in relation to imposition of criminal liability. The role for the principle of legality is not to inject normative content into legislative texts purely on the authority of the judges, but to exercise a checking or editorial function to see that the legislature and the executive, which has the prime role in promoting legislation, have sufficiently held in mind the longer term principles, rights and freedoms which support the moral claims of democratic rule, when legislating to adopt a particular statutory text.[67]

The principle of legality thus functions as a third order form of purposive reasoning, sitting behind the text of the statute itself and the specific types of evidence of statutory purpose, but capable of providing guidance in relation to the meaning of both of those. Again, there is no simple test which determines which form of evidence should predominate as guidance as to meaning. Judgment is called for to assess the relative weight of text, explanatory materials and background constitutional principles.

In the *Spath Holme* case[68] the exercise of an open-ended statutory power enabling a Minister to make an order restricting rents chargeable for residential property was challenged by property owners, who argued that it could only be exercised for the purpose of countering inflation and not (as it had been) for the purpose of achieving greater fairness between landlords and tenants. The argument succeeded in the Court of Appeal but failed in the House of Lords. In support of their argument the property owners sought to rely on a presumption that Parliament does not legislate to take away property rights without compensation. However, in the House of Lords this was treated as a factor which was outweighed by

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[65] Sales, 'Legislative Intention, Interpretation, and the Principle of Legality' (n 43) 62; and see Philip Sales, 'A Comparison of the Principle of Legality and Section 3 of the Human Rights Act 1998' (2009) 125 LQR 598. See, eg, *R v Secretary of State for the Home Department, ex p. Pierson* [1998] AC 539, 573G-575D (Lord Browne-Wilkinson), 587C-590A (Lord Steyn). See also *Maxwell on the Interpretation of Statutes*, 12th ed. by P. St. J. Langan, pp. 251ff ('Statutes Encroaching on Rights or Imposing Burdens').
[66] See *R v. Secretary of State for the Home Department, ex p Simms* [2000] 2 AC 115 at 131E-G (Lord Hoffmann).
[67] Sales, 'Legislative Intention, Interpretation, and the Principle of Legality' (n 43) 62.
[68] *R v Secretary of State for the Environment, Transport and the Regions, ex p Spath Holme Ltd* [2001] 2 AC 349.

other circumstantial evidence regarding the context in which the relevant legislation had been enacted. Lord Nicholls also pointed out that a *Pepper v Hart* statement in Parliament might conflict with background constitutional principles, the respective weights of which would have to be assessed.[69] This illustrates how modern statutory interpretation has become closer to the common law method, albeit constrained in important ways by the statutory text. This is the familiar process of extrapolation of underlying principles, values and reasons for action from disparate sources, with a view to weighing each of these against others in order to identify the particular rule to apply to the case in hand.[70]

5.3 How should the courts react where there are multiple (and potentially conflicting) purposes?

There are circumstances where the courts recognise that Parliament had multiple and, in some cases, competing purposes in passing legislation.

In *Medical Board of Australia v Kemp*[71] the Court of Appeal of Victoria considered a statute with multiple competing purposes. The case concerned the extent to which medical confidence could be overridden in order to obtain evidence for use in civil proceedings. The court explained the conflict of interests:[72]

> *"[The statutory provision] operates at the intersection of various interests but in a specific context. First, there is the interest of the patient in protecting medical confidence. Second, there are the interests of the parties to the suit, action or proceeding who will be denied access to the material that, it must be assumed, would otherwise be obtainable and probative of some issue in dispute. Third, there is the public interest that the administration of justice shall not be frustrated by the withholding of documents or evidence which must be produced if justice is to be done."*

The Court observed: "Having identified the various interests in play, it is apparent from its terms that [the provision] does not operate to favour only a single interest."[73] In such cases, the interpretive task involves assessing how the statute or provision balances those purposes. It held:[74]

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[69] ibid 366.
[70] Sales, 'Modern Statutory Interpretation' (n 53) 125.
[71] (2018) 56 VR 51.
[72] ibid [108].
[73] ibid [116].
[74] ibid [126]-[127].

"there is a balance between competing private interests in the context of the broader public interest in ensuring that the court has access to all relevant material. However, the essential balance that is struck is between competing private interests. [The provision] is intended to provide a rule of evidence or procedure that is limited in scope and mediates between those competing private interests.

This is another illustration of the common law method in statutory interpretation, whereby competing interests are weighed up and balanced to determine the precise content of the rule to be applied.

5.4 ***What should courts do where there is a compromise involving a deliberate obfuscation or non-implementation of conflicting purposes, or simply opacity in terms of identifying the purpose of a statutory provision?***

In certain situations, evidence regarding the purpose pursued by the legislature may be lacking or obscure. This may be due to legislative oversight, but may also reflect that legislation is the result of negotiation between members in Parliament. What might appear as unprincipled compromise in legislative drafting may reflect a deeper principle, the desirability of seeking compromise as a way of balancing competing views in a viable *modus vivdendi*, which seeks to optimize the practical realization of competing values.[75]

Where the evidence regarding purpose is thin the courts do not abandon the search but have to do the best they can to reconstruct it, bearing in mind that the legislative text might simply have been a compromise. More exiguous indicators assume more importance, as they did in *Spath Holme*. The courts also tend to be driven back to the simple grammatical meaning of the text, because there is an absence of evidence of more specific purpose to qualify or limit this - as again occurred in *Spath Holme*. They also tend to be driven back to reliance on general indicators of meaning, under the principle of legality.

If a legislative text is regarded as a form of compromise, a court may recognise that the legislature enacted it with several purposes in view, but which are not clearly ranked. This makes the situation into a variant of that addressed under Problem (3). The court then has to infer how the identified purposes are to be balanced. Here again, the reasoning is similar to that involved in the common law method.

[75] Sales, 'Legislative Intention, Interpretation, and the Principle of Legality' (n 43) 61.

6 Convention rights and the Human Rights Act 1998: legitimate aims

Finally this evening, I want to consider the distinct role for purpose-oriented reasoning which is required in the application of the rights under the European Convention on Human Rights, implemented in domestic law by the Human Rights Act. The European Convention establishes a template external to statute and the common law against which they can be measured and assessed. Purpose is important at two levels here.

First, the Convention is framed for the purpose of protecting individual human rights within a democratic framework, and that general purpose informs the interpretation of the rights it sets out in the same way as legislative purpose informs the interpretation of rights set out in domestic legislation.

Secondly, the formulation of the Convention rights imposes a normative requirement that domestic law should be structured to pursue particular purposes which are identified as legitimate. This is an important feature of the justification required to be given for laws which interfere with the primary rights set out in the Convention. I will take article 8 as an example. Any interference with the right to respect for private and family life has to be justified under article 8(2) as being:

> *"in accordance with the law and … necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."*

The other qualified rights have a similar structure, although there is variation as to the aims which may provide justification for interference with them.

The case law of the European Court of Human Rights has interpreted the concept of "law" here to impose substantive requirements which reflect Fuller's inner morality of law. The law relied upon to justify the interference must be accessible and formulated with sufficient precision to enable an individual to regulate their conduct and protect against arbitrariness. The law has to serve the purpose of protecting certain human interests.

The measure interfering with the right also has to be necessary to achieve one of the legitimate aims referred to. This is the basis for the

now familiar proportionality assessment which forms the core of review pursuant to the Convention rights. It involves a four-stage inquiry:[76]

(i) Is the objective of the measure sufficiently important to justify the limitation of a fundamental right?
(ii) Is it rationally connected to the objective?
(iii) Could a less intrusive measure have been used without unacceptably compromising the objective? and
(iv) Having regard to these matters and to the severity of the consequences, has a fair balance has been struck between the rights of the individual and the interests of the community?

It can be seen that identification of the purpose of the measure is central to this analysis. The purpose has to pass muster as legitimate in itself.[77] Also, the framing of the purpose is critical to the application of the other parts of the assessment. If the legitimate purpose is broad, a wider range of interfering measures will be proportionate to achieving it. If the aim pursued is to promote a weighty public interest, it will be easier for the state to show that the interfering measure strikes a fair balance.[78]

Despite the centrality of the legitimate aim in this analysis, the methodology for identifying it has received little attention in case law and academic commentary.[79]

The material bearing on the aim pursued by the legislature may be diffuse, as it was in *R (Countryside Alliance) v Attorney General*,[80] concerning the Hunting Act 2004 to restrict fox-hunting. To assess the compatibility of the Act with the European Convention, the Divisional Court reviewed a comparatively wide range of materials in order to infer that the objective of the Act was to prevent or reduce unnecessary suffering to wild animals, rather than to disparage a section of society. The interference with the rights of the hunting community to respect for private life was

[76] *Bank Mellat* [2013] UKSC 39, [2014] 1 AC 700, [74] (Lord Sumption).
[77] This is illustrated by *Ghaidan v Godin-Mendoza* [2004] 2 AC 557, where the House of Lords found that there was no legitimate aim pursued by legislation which excluded homosexual couples from benefitting from provisions providing for an assured shorthold tenancy to pass to a person's partner after they died. The legislation therefore breached the claimant's article 8 rights.
[78] See, eg, the state's interest in maintaining the economic health interests of the country in relation to the adoption of social welfare legislation: *R (SC) v Secretary of State for Work and Pensions* [2021] UKSC 26, [2022] AC 223, [130] (Lord Reed).
[79] As remarked upon in Richard Gordon, 'Legitimate Aim: A Dimly Lit Road' [2002] European Human Rights Law Review 421. For discussion of the case law see Janneke Gerards, *General Principles of the European Convention on Human Rights*, 2nd ed. (2023), ch 10.
[80] [2007] UKHL 52.

proportionate to that aim. The House of Lords accepted that analysis. Lord Bingham observed:[81]

> "The evidential derivation for this legitimate aim comprises the terms of the legislation and the admissible contextual background. This background includes the Burns Report, the Portcullis House hearings, the ministerial basis for and the terms of the original Michael Bill, the obvious inference that the majority of the House of Commons considered the original Michael Bill inadequate, and the well-known opposing points of view in the prolonged and much publicised hunting controversy."

Two observations may be made. First, as in relation to the interpretation of a statute the identification of a legitimate aim also involves reference to Parliament's purpose, but in this case assessed at a higher level of generality from a viewpoint external to the statute itself and the specific meaning to be given to it. For example, in the *SC* decision[82] the purpose of the legislation in question, according to ordinary statutory interpretation, was to restrict child tax credits so that they were only payable for two children in a family. However, for the purposes of Convention rights assessment, the general aim of the legislation was identified as the economic well-being of the country.[83]

Secondly, the identification of Parliament's purpose can give rise to evidential issues associated with the prohibition on questioning proceedings in Parliament set out in Article IX of the Bill of Rights. This was discussed in *Wilson v First County Trust Ltd*[84], where it was said that recourse to Hansard in proportionality assessments should be limited to where the court required enlightenment on the nature and extent of the social problem (the mischief) at which the legislation was aimed. Assessment of the adequacy of reasoning in Parliamentary debates would be illegitimate.[85]

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[81] ibid [40].
[82] *SC* (n 79).
[83] ibid [192].
[84] [2003] UKHL 40, [2004] 1 AC 816, [51]-[67] (Lord Wilson).
[85] ibid [67]. See also the discussion in *SC* (n 79) [163]-[185].

7 Conclusion

The common law tradition has always been sceptical of philosophy, prioritising the importance of practical experience in real world cases over abstract general ideas.[86] However, I hope that in this lecture I have showed how the ideas of two philosophers – Fuller and Wittgenstein – help to explain the widespread use of the notion of purpose in real world case law. Fuller's conception of law as the enterprise of subjecting human conduct to the governance of rules illuminates the common law's respect for the agency of legal subjects, whether that be respecting parties' purposes in making a contractual bargain or using purpose as a basis for limiting liability in tort. Similarly, Wittgenstein's conception of language demonstrates the necessity of resort to purpose in interpretation, as the open-textured nature of words means that legal rules only become determinate when used in specific contexts for specific purposes.

Thank you.

[86] Arthur L Goodhart, 'English Contributions to the Philosophy of Law' (1948) 48 Columbia Law Review 671.