

I *Introduction*

Although much has been written about judicial review under the Canadian Charter of Rights and Freedoms as a dialogue between courts and legislatures, much less has been written about judge-made common law as an earlier and still relevant form of dialogue. My focus here will be on what John Willis identified as common law bills of rights that existed in Canada and Britain long before the enactment of formal bills of rights. In particular, I will examine judge-made presumptions of legislative intent, such as presumptions against the imposition of punishment without proof of fault. I will suggest that such common law presumptions were important precursors to the type of rights protection found in the Charter and other modern bills of rights that contemplate legitimate legislative limitation on and even derogation from rights as they have been interpreted by the courts. I will then examine how the Charter may improve on the vision of dialogic constitutionalism inherent in the common law presumptions. I will also suggest that the Supreme Court of Canada has undermined the dialogic structure of the Charter by attempting to disguise some of its acts of constitutional interpretation as mere statutory interpretation and by precluding the possibility of the government justifying limits on s. 7 rights under s. 1 of the Charter.¹ This development may also help explain why the Supreme Court has been reluctant to constitutionalize several important common law presumptions as they relate to the criminal law.

An examination of common law presumptions of legislative intent as a form of dialogue between courts and legislatures is also appropriate because it provides us with insight into what Willis might have thought about the Charter.² In his justly famous article 'Statute Interpretation in

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1 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

2 Willis addressed the issue of an entrenched bill of rights on at least one occasion, and, as will be discussed more fully below, he opposed a bill of rights on the basis that it departed from British traditions, was unnecessary, and would increase the powers of judges. John Willis, 'Foreign Borrowings' (1970) 20 U.T.L.J. 274 at 279ff.

a Nutshell,³ published in 1938, Willis concluded that the common law presumptions of statutory interpretation formed ‘a sort of common law “Bill of Rights.”’ Although ‘English and Canadian judges have no power to declare Acts unconstitutional merely because they depart from the good old ways of thought; they can, however, use the presumptions to mould legislative innovation into some accord with the old notions. The presumptions are in short “an ideal constitution” for England and Canada.’⁴ A year later, writing in the *Harvard Law Review*, Willis made the same point, concluding that although English and Canadian courts ‘cannot declare the provisions of an act to be contrary to a due process clause they can still bring about much the same result by a process of spurious interpretation.’⁵ He added that a common law presumption is, ‘in substance, a rule of constitutional law masquerading as a rule of construction.’⁶ These statements reveal Willis’s astute awareness of the connection between common law presumptions, rights protection, and constitutionalism – a connection that has only been more fully developed by others in recent years.

Willis’s insight about the common law presumptions, of course, did not mean that he was enthusiastic about the protection of rights or that he welcomed the procedures of constitutionalism. Willis was sceptical about most individual rights, and he was impatient with the need for legislative intervention after court decisions. He seemed to think it was best for courts to anticipate what the legislature and the civil service would want. Willis’s views on these matters beg the question of what conceptions of rights and democracy motivate those who, unlike Willis, are champions of the judicial use of presumptions to require legislatures to make clear statements about the effect of state action on rights. The answers to such questions will also be relevant to the understandings of rights and democracy that may be implicit in modern bills of rights, which, like the common law presumptions, contemplate explicit limitation and derogation of rights by ordinary legislation.

Willis was critical of common law presumptions in part because he saw them as a means by which lawyers and judges imposed their values over the more modern and realistic values of legislators and civil servants. I will suggest that the Charter provides a partial answer to Willis’s charge because it lays down a democratic foundation for the judiciary to enforce concerns about entrenched rights. For example, those who agreed to the

3 John Willis, ‘Statutory Interpretation in a Nutshell’ (1938) 16 *Can.Bar Rev.* 1 [‘Nutshell’].

4 *Ibid.* at 17.

5 John Willis, ‘Administrative Law and the British North America Act’ (1939) 53 *Harv.L.Rev.* 251 at 275 [‘Admin Law and BNA’].

6 *Ibid.* at 276.

Charter made a deliberate decision in formulating s. 7 to ensure that the state must observe the principles of fundamental justice when it deprives people of life, liberty, or security of the person but not when it deprives them of property. This point cannot be pushed too far, however, because the judiciary retains much power in determining the ambit of life, liberty, and security of the person and what constitutes the principles of fundamental justice. Willis would likely have enjoyed pointing out – with as much bite as contemporary critics of the Charter, if not more – how the values of judges affect their decisions about the content of s. 7 of the Charter. The continued power of the judiciary and the possibility that the judiciary will saddle society with ancient or otherwise inappropriate presumptions explains why their controversial interpretations of rights should be subject to justified limitation and even extraordinary derogation through ordinary legislation.

Willis was also aware of how the use of common law presumptions increased the power of judges. He argued that while these ‘ancient presumptions’ may once have stood as accurate predictors of a *laissez-faire* legislature’s intent, they could no longer be described as such in the modern regulatory state: ‘If, in 1937, a court resorts to these old presumptions, it is doing something very different from attempting to ascertain the probable intention of the legislature, it is flying in the face of the legislature.’⁷ I will suggest that the Charter incorporates Willis’s important realist insight about the active role of judiciary, but that interpretative bills of rights such as those in New Zealand⁸ and the United Kingdom⁹ run the risk of perpetuating what Willis correctly recognized as the fiction that the court is not departing from the words and intent of the legislature when it applies a presumption that the legislature intends to respect rights. Willis was not keen on judicial enforcement of individual rights, but he did believe in candour. He would not have appreciated the use of a ‘spurious technique of statutory interpretation’¹⁰ to disguise the constitutional judgement of the judges. I will also argue that attempts by the judiciary under the Charter to fix laws through creative and strained interpretations and by robust reading-down remedies also fail the Willis test of judicial candour. They also make the Charter more like the interpretative bills of rights found in New Zealand and the United Kingdom. Finally, interpretative remedies may, in practice, fail to provoke the full democratic debate and dialogue about the treatment of rights that can follow a more forthright judicial invalidation of laws that violate rights.

7 Willis, ‘Nutshell,’ *supra* note 3 at 17.

8 *Bill of Rights Act 1990* (N.Z.), 1990/109, s.6.

9 *Human Rights Act 1998* (U.K.), 1998, s.3.

10 Willis ‘Admin Law and BNA,’ *supra* note 5 at 252.

Willis argued in 1938 that four common law presumptions of statutory intent – those against taking away a common law right, against taking away property without compensation, against barring access to the courts, and against interfering with the subject's liberty – 'go some distance to establishing a sort of fourteenth amendment to the British North America Act.'¹¹ At the end of the *Lochner* era, this was no small claim to make. I will suggest that Willis was mistaken in equating the common law presumptions to the US Bill of Rights because he discounted the possibility of a successful legislative reply to the court's decision. I am supported in this conclusion by the fact that Willis subsequently seemed to recognize that his 1938 conclusions about common law presumptions amounting to a Fourteenth Amendment were something of an overstatement. In comments about the criminal law written in the early 1950s,¹² Willis demonstrates a realistic appreciation of the ability of Parliament to undo much of the damage that the Supreme Court had done in applying strong presumptions regarding crimes. But Willis's error in conflating democratic common law constitutionalism that invites legislative replies with a more absolutist and liberal form of constitutionalism, based on judicial supremacy and represented by the US Bill of Rights,¹³ was an influential one that has been repeated by many contemporary critics of judicial activism in Canada. I will suggest that these critics fail to appreciate the dialogic nature of limitation and derogation clauses in modern bills of rights, as well as the important role of the legislature under such a bill of rights.

The failure to appreciate the role of the legislature either under the common law or under modern bills of rights is partly addressed by legal process scholarship, which refuses to limit its analysis to judicial opinions. Although Willis's 1938 article on statutory interpretation ignores the possibility of legislative replies to judicial decisions, much of his other scholarship does not. Although Willis is best known as an administrative law scholar, he also taught and wrote about other subjects, notably income tax and criminal law.¹⁴ In this article, I will focus on examples

11 *Ibid.* at 23.

12 John Willis, Case Comment (1950) 28 *Can.Bar Rev.* 1023 [Case Comment 1950]; John Willis, Case Comment (1951) 29 *Can.Bar Rev.* 784 [Case Comment 1951].

13 On the contrast between democratic and common law constitutionalism and liberal constitutionalism based on judicial supremacy, see David Dyzenhaus, 'Law as Justification: Etienne Mureinik's Conception of Legal Culture' (1998) 14 *S.A.J.H.R.* 11 at 32ff.

14 Willis saw much of tax law as a dialogue between courts prepared to give the taxpayer the benefit of the doubt in the interpretation of tax laws and Parliament, which responded to such decisions with 'anti-avoidance sections of a highly drastic and arbitrary kind.' John Willis, 'Recent Trends in Canadian Income Tax Law' (1951) 9 *U.T.L.J.* 42 at 44.

taken from the criminal law and Willis's writing on this subject. In his writings about the criminal law, Willis demonstrated an awareness of the dialogue that has always occurred between Canadian courts and legislatures.¹⁵ Moreover, Willis did not fall into the trap of viewing all legislative replies to court decisions as unqualified goods. Indeed, present proponents of dialogue theory can learn much from the way he judged legislative replies. Willis persuasively criticized a 1947 amendment to the *Criminal Code* expanding the law of murder to include accidental deaths caused by a firearm, enacted in part as a response to a 1942 Supreme Court decision restricting the offence, on compelling procedural and substantive grounds. Procedurally, the expanded murder offence had been enacted without a line of discussion in Parliament; substantively, it imposed the ultimate punishment on those who were not at fault for the harm caused.¹⁶ His criticisms suggest that some vision of democracy and rights may have been implicit in his thought. They also underline the need for theories of dialogue between courts and legislatures to be supplemented by substantive theories of both democracy and justice by which the process and output of democratic dialogue between courts and legislatures can be judged.

Given Willis's likely antipathy to the Charter and the power it gives judges, it is an interesting irony that although Willis called in 1951 for the repeal of Canada's harsh constructive or felony murder law, this result was not achieved until the Supreme Court struck the offence down under the Charter in 1987 and 1990.¹⁷ In the last part of this article, I will speculate about Willis's likely reaction to these decisions, as well as his likely views on whether common law presumptions concerning the criminal law should be constitutionalized under the Charter. As we will see, the Supreme Court, especially after its constructive murder decisions, has been surprisingly reluctant to constitutionalize common law presumptions about the need for restraint and fault in the criminal law. The Court's reluctance in this matter has contributed to a process in which much of the vigour has been sapped from those presumptions, even under the common law. I suspect that Willis would have supported the Supreme Court's refusal to constitutionalize most of the 'ancient presumptions,' but I will nevertheless argue that the Court should still honour these presumptions, provided it leaves itself open to the possibility of accepting a considered and just legislative reply to its decisions applying the presumptions under either the common law or the Charter. I will suggest that the Court has retreated, in part, because of its reluc-

15 See Kent Roach, 'Constitutional and Common Law Dialogues Between the Supreme Court and Canadian Legislatures' (2001) 80 *Can.Bar Rev.* 481.

16 Willis, Case Comment 1951, *supra* note 12.

17 *R. v. Vaillancourt*, [1987] 2 S.C.R. 636; *R. v. Martineau*, [1990] 2 S.C.R. 633.

tance to accept that presumptions recognized under s. 7 of the Charter could still be limited, in appropriate cases, under s. 1 of the Charter. The reading out of s. 1 from s. 7 departs from the dialogic nature of both the Charter and the common law presumptions.

II *Common law constitutionalism and presumptions of statutory interpretation*

One of John Willis's most famous articles was his twenty-seven-page masterpiece 'Statute Interpretation in a Nutshell,' published in 1938 in the *Canadian Bar Review*. The article is a cheeky and intelligent statement of a legal realist approach to statutory interpretation. It is probably best known for its demonstration of the contradictory nature of the major rules of statutory interpretation. Willis's devastating critique was made thirteen years before the legal realist Karl Llewellyn published his even more famous article setting out the contradictory nature of the canons of statutory construction.¹⁸ As many contributors to this collection have remarked, Willis was a scholar who was truly ahead of his time and whose insights remain relevant today.

Most significant for our purposes are the concluding ten pages of 'Statute Interpretation in a Nutshell,' where Willis explores the constitutional significance of various common law presumptions of legislative intent. As discussed above, he declares the array of presumptions the equivalent of a common law bill of rights and even of the addition of a Fourteenth Amendment to the Canadian and British Constitutions. Willis had a valid point in pronouncing the common law presumptions as something of a common law bill of rights. The presumptions were the product of judge-made common law, and they articulated principles – such as respect for property rights, fairness, and access to the court – that would still exist even if the legislature clearly displaced them by legislation. Judges would often apply the presumptions even at the risk of frustrating the intent and purpose of the legislature and straining statutory language.

Willis was adept at demonstrating that the presumptions would not always be applied consistently by judges. For example, he noted that the doctrine of strict construction of the criminal law was weakening because it was designed for 'a time when the typical penal Act was an Act which added a new offence, punishable by death or transportation, to a system of criminal law already harsh enough.' In the 1930s, as today, however, the typical penal law was a regulatory offence 'which is not felt to be of any moral significance and is enforced by fine only.'¹⁹ Willis was correct,

18 Karl Llewellyn, 'Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes Are to Be Construed' (1950) 3 Vand.L.Rev. 395.

19 Willis, 'Nutshell' supra note 3 at 24.

and the doctrine of strict construction has continued to wither even when the courts interpret offences such as murder.²⁰ Willis also noted that presumptions in favour of the individual could be displaced if judges were sympathetic to the social purposes of legislation. In this way he predicted how the purposive approach to statutory interpretation could take over even in areas, such as the criminal law, where doctrines of strict construction had traditionally been used.

What is striking today about Willis's analysis is the ease with which it relates the various common law presumptions of statutory interpretation to issues of larger civic and constitutional significance. He observes that the presumption against expropriation without compensation had its origins as a presumption of legislative intent in a time when 'legislatures were composed of wealthy men who had a very healthy respect for property – for nobody but they and their friends owned any.'²¹ Unlike the doctrine of strict construction, which was on the decline because of the advent of regulatory offences, the compensation presumption was thriving. Willis argued that courts used it as a way to curb and disapprove of redistributive legislation, even though redistribution was the norm of modern social legislation. Willis's ultimate message was that the judges retained power, but his analysis was sophisticated in its ability to discern the historical origins of that power and in differentiating the contexts in which the judges exercised their power to curb the legislature and when they respected the purposes of the legislature.

The enduring power of Willis's brief analysis of the constitutional significance of the common law presumptions of statutory interpretation²² can be seen by comparing it to some contemporary work on the

20 In 1987, the Supreme Court did not apply the doctrine of strict construction when interpreting the offence of first-degree murder on the basis that the courts had an obligation to interpret even the criminal law in a purposive fashion and that it would violate the purpose of the offence to hold a person not guilty of murder because the killing was not committed at the same time as the underlying crime of sexual assault. The Court, quite sensibly in my view, held that the purpose of the law was to punish more severely killings that occurred while the victim was being illegally dominated. *R. v. Paré*, [1987] 2 S.C.R. 618. In 2001, however, the Supreme Court expanded the law of first-degree murder to apply when the underlying offence was committed against another person even though the deceased victim was not subject to continued unlawful domination. *R. v. Russell*, [2001] 2 S.C.R. 804. The Court rejected the limiting principle of domination of the victim articulated in *Paré* and held that the commission of the underlying offence against another person was sufficient to make the murder of the victim first-degree murder. This decision, in my view, goes beyond purposive construction and seems motivated more by a 'bad man' theory of the criminal law than by any legal principle.

21 Willis, 'Nutshell,' supra note 3 at 21.

22 See also his similar discussion of the issue and his conclusion that common law presumptions constituted a 'Pseudo Bill of Rights' in Willis, 'Admin Law and BNA,' supra note 10 at 281.

presumptions by leading commentators and judges. William Eskridge's justly praised work on statutory interpretation culminated in his 1994 book *Dynamic Statutory Interpretation*.²³ In that book, Eskridge, like Willis, outlines the wide variety of often contradictory canons and presumptions that courts have used when interpreting statutes. Like Willis, Eskridge recognizes that the presumptions or canons 'are plastic' and contradictory and that their 'overall balance can fluctuate over time.'²⁴ Moreover, Eskridge follows Willis by relating the technical doctrines of statutory interpretation to large issues of constitutionalism. Eskridge relies upon constitutional theory because of his conclusion that much of the prior writing on statutory interpretation was theoretically impoverished. He concludes that

the evolution of the substantive canons is an expression of the Court's constitutional values, a way for the Court to conduct an illuminating discourse with the legislature about our nation's public values, but without seriously obstructing or intruding into the political system.²⁵

In short, Eskridge builds on Willis's recognition of the constitutional significance of the common law presumptions.

Eskridge departs from Willis in his recognition that the court's applications of the canons of statutory interpretation could be, and frequently were, met with an effective amendment of the statute to achieve the result desired, but not clearly stated, by the legislature. In this Eskridge draws on a legal process tradition that examined the interactions between courts and legislatures and a prior article cataloguing the large number of times that Congress reversed the Supreme Court's interpretation of its statutes.²⁶ In the end, Eskridge concludes that judicial applications of the presumptions are 'not seriously undemocratic, since Congress can override the norm through a statutory clear statement.'²⁷ Willis, for all his realistic concern about what was actually happening on the ground, did not undertake similar empirical work and, in his theoretical work on statutory interpretation, discounted the possibility of successful legislative replies to the court's imposition of common law presumptions. As we will see, however, Willis was more aware of the power of Parliament to override common law presumptions when he wrote more specific comments about the development of the criminal law in Canada.

23 William N. Eskridge, Jr., *Dynamic Statutory Interpretation* (Cambridge, MA: Harvard University Press, 1994).

24 *Ibid.* at 283.

25 *Ibid.* at 273.

26 William Eskridge, 'Overriding Supreme Court Statutory Interpretation Decisions' (1991) 101 *Yale L.J.* 331.

27 Eskridge, *Dynamic Statutory Interpretation*, *supra* note 23 at 286.

The constitutional significance of clear statement rules was also recognized by the House of Lords in a series of cases predating the coming into force of the UK's Human Rights Act 1998.²⁸ These decisions arose in the criminal law context. In the first decision, the House of Lords interpreted ministerial discretion to alter sentences subject to a common law presumption against the retroactive imposition of punishment. Lord Steyn recognized that the relevant law granted the Home Secretary a broad discretion so that 'the presumption that in the event of ambiguity legislation is presumed not to invade common law rights is inapplicable.' Despite this, he found that 'a broader principle applies,' namely that

Parliament legislates for a European liberal democracy founded on the principles and traditions of the common law and the courts may approach legislation on this initial assumption. But this assumption only has prima facie force. It can be displaced by a clear and specific provision to the contrary.²⁹

Applying this super-clear statement rule, Lord Steyn then ruled that while Parliament had granted the Home Secretary a very wide power, it had

left untouched the fundamental principle that a sentence lawfully passed should not retrospectively be increased. Parliament must therefore be presumed to have enacted legislation wide enough to enable the Home Secretary to make decisions on punishment on the basis that he would observe the normal constraint governing that function.³⁰

In this way, Lord Steyn was candid that he was protecting rights with constitutional significance while at the same time allowing Parliament an opportunity to make a subsequent clear statement that it wished to limit or displace the right against retroactive punishment.

Another of the cases involved the power to make rules for prisons. The House of Lords held that this power did not include the power to restrict media access to prisoners claiming to be victims of miscarriages of justice because of the absence of a clear statement and authorization from Parliament that it wished to restrict freedom of expression. Lord Hoffmann described the vision of common law constitutionalism inherent in the common law presumptions in the following terms:

Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights. The Human Rights Act 1998 will not change this power. The constraints upon it exercised by Parliament are ultimately political, not legal. But the principle of legality means that

²⁸ *Supra* note 9.

²⁹ *R. v. Secretary of State for the Home Department ex parte Pierson*, [1996] 3 W.L.R. 547 at 587.

³⁰ *Ibid.* at 591.

Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual.³¹

This statement follows Willis's insights about the constitutional significance of the common law presumptions. It relates the common law presumption both to an understanding of 'fundamental principles of human rights' and to an understanding of democracy that requires Parliament to 'accept the political cost' for taking away rights. Lord Hoffmann placed more emphasis than Willis on the ability of the legislature to overcome the common law presumption by clearly worded legislation.

Lords Steyn and Hoffmann saw the presumptions as part of the traditional way in which courts protected rights such as the right against retroactive punishment and the right to freedom of expression and required legislatures to make clear statements and accept political responsibility when they wished to limit such rights. They related the presumptions to both rights and democracy and, in particular, to the desire that incursions on rights not go 'unnoticed in the democratic process.' Eskridge similarly praises canons that would focus legislative 'attention onto underenforced constitutional norms'; would encourage 'policymaking by officials who are most accountable to the people'; and 'would ameliorate systemic disfunctions in the legislative process.'³² He relates the democracy-enhancing function of various clear statement rules to his preference for vigorous republican government.

Although there is much in common between Willis's analysis of the common law presumptions and contemporary recognition of their constitutional significance, it must not be forgotten that Willis shared none of the enthusiasm for the presumptions demonstrated by Eskridge or by Lords Steyn and Hoffmann. Willis's more critical take on the common law presumptions is related to his views about rights and democracy, though they are not as explicit as those of Eskridge and Lords Steyn and Hoffmann. Willis was critical of the presumptions in part because he was sceptical about the rights that they protected. He questioned the value of property rights, and, in the criminal law context, he recognized that respecting the rights of the accused could harm the interests of society.

31 *R. v. Secretary of State for the Home Department ex parte Simms*, [2000] 2 A.C. 115 at 131 (H.L.).

32 Eskridge, *Dynamic Statutory Interpretation*, supra note 23 at 286

Willis was also sceptical about democracy. He was not a true believer in deliberative democracy, in part because he applied the same cold realist view to the legislative process as to the judicial process. In contrast, it is possible that judges who enforce the clear statements rule have an optimistic view about the legislative process, one that is sceptical about whether legislatures will be prepared to make clear and conscious decisions to derogate from rights.

In times of emergency, the optimism about democracy that underlines theories of dialogic constitutionalism will be put to the test. The British Parliament, for example, did not hesitate to derogate from the fair trial rights of non-citizens when it enacted the Anti-Terrorism, Crime and Security Act, 2001.³³ The clear derogation, however, generated subsequent political and judicial debate, with a review committee of Privy Councillors finding that the derogation was unnecessary and the House of Lords ruling that it was disproportionate and discriminatory.³⁴ The Law Lords' declaration at the end of 2004 that the law was incompatible with rights placed the ball back in Parliament's court. Parliament responded in 2005 by repealing that part of the 2001 legislation that was held by the court to be incompatible with rights but enacting controversial new legislation to impose both non-derogating and derogating control orders on terrorist suspects. This legislation, the Prevention of Terrorism Act, 2005, however, will expire in a year's time and is subject to special reporting and review requirements. An explicit derogation from basic rights at least has the virtue of candour, which can facilitate further judicial and legislative debate. It compares favourably to an approach that dilutes the content of such basic rights in the name of security concerns and, by doing so, often dulls subsequent judicial and legislative debate.³⁵

It is possible to defend common law constitutionalism even if one does not have an optimistic view about what the legislature will do once the judiciary has defined the issue as one that involves issues of principle.

33 (U.K.), 2001, c. 24, Part 4.

34 *A (F.C.) and others (F.C.) v. Secretary of State for the Home Department*, [2004] U.K.H.L. 56. In response to this decision the *Prevention of Terrorism Act, 2005* (U.K.), c. 2, was enacted.

35 For an argument that a derogation approach is preferable to one in which courts dilute the content of basic rights in the name of national security, see Kent Roach, 'Constitutional, Remedial and International Dialogues About Rights: The Canadian Experience' *Texas Int.L.J.* [forthcoming in 2005]. In Canada, there has been no formal derogation from rights, but the courts have compromised the right against torture by suggesting that deportation to face torture may in some cases not violate s. 7 of the Charter: *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3. The courts have also diluted the right to fair proceedings by holding that security certificates do not violate s. 7 of the Charter: *Charhaoui v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 421.

Eskridge, for example, follows Willis in recognizing that the legislative process can often be unseemly, but he seeks to rescue a vision of deliberative democracy from the cynical view of politics promoted by public choice theories of the legislative process. Eskridge's advocacy of democracy-enhancing presumptions is attractive because it encourages legislative bodies to more consciously debate and deliberate over the effect of their laws on rights. Eskridge follows in the tradition of Alexander Bickel, who tried to promote dialogue between courts and legislatures over the treatment of rights through the use of sub-constitutional law such as presumptions of statutory interpretation.³⁶ Both Eskridge and Bickel seek to create space for courts to remind legislatures and society about rights without necessarily giving the court the final word.³⁷

Eskridge was particularly attracted to the use of common law presumptions as a means to give vulnerable minorities a leg up in the legislative process. He advocates a 'meta-canon' of statutory interpretation: namely, to 'decide close cases against politically salient interests and in favour of interests that have been subordinated in the political process.'³⁸ In this, Eskridge was influenced by an anti-majoritarian understanding of the judicial role articulated in the famous *Carolene Products* footnote³⁹ and later championed by scholars such as Bickel and John Hart Ely. One Canadian example of the type of anti-majoritarian presumption that Eskridge champions would be the presumptions articulated by Chief Justice Brian Dickson in the 1980s that ambiguities in statutes and treaties should be resolved in favour of Aboriginal peoples and that the clearest of statements were required to achieve the extinguishment of Aboriginal rights.⁴⁰ Ely's work is also relevant in the criminal law context because he saw the criminally accused, often members of disadvantaged groups, as a vulnerable minority in the legislative process and because he was sensitive to the civil rights dimensions of the Warren Court's fairness revolution in criminal procedure.⁴¹

Willis would likely not have been attracted to such a meta-canon because of his scepticism about rights in general. Willis often saw claims of individual rights as a means by which the advantaged people who

36 Alexander Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (New Haven, CT: Yale University Press, 1986).

37 Eskridge is part of a group of contemporary American scholars that I have described elsewhere as 'new Bickellians.' See Kent Roach, 'American Constitutional Theory for Canadians (and the Rest of the World)' (2002) 52 U.T.L.J. 503.

38 Eskridge, *Dynamic Statutory Interpretation*, supra note 23 at 294.

39 *United States v. Carolene Products*, 304 U.S. 144 (1938) at n. 4.

40 *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29 at 36; *Simon v. The Queen*, [1985] 2 S.C.R. 387 at 392-3.

41 John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge, MA: Harvard University Press, 1980).

could resort to the courts could disrupt attempts by the state to assist the less advantaged.⁴² He also did not seem to fear that governments would violate the rights of minorities. Although *Carolene Products* was decided in the same year that Willis published 'Statute Interpretation in a Nutshell,' it did not feature in his thought. In many ways, the idea that independent courts should play a role in protecting minorities took root only after the horrors of the Holocaust and the American Civil Rights era, in which the courts attempted to dismantle American apartheid. Willis's thought, including his enduring faith in the expertise of civil servants, was formulated before these times and does not seem to have been shaken by these events. The House of Lords' decision in *Simms* to allow media access to prisoners claiming to be victims of miscarriages of justice was in part influenced by a recognition of the reality of miscarriages of justice in the criminal justice system. It is unlikely that such a decision would have been issued before complacency about the criminal justice system was shattered in Britain by the revelation, in the late 1980s, of miscarriages of justice in high-profile terrorism cases. Willis's faith in civil servants and experts would have produced a much greater faith in the system and the ability of police and prosecutors to correct any errors. Indeed, it is even possible that Willis would have dismissed the prisoners as troublemakers attempting to disrupt the smooth running of the prison by expert administrators.

In short, Willis brilliantly and presciently pointed out the constitutional significance of the presumptions of statutory interpretation. He recognized that even in a system of parliamentary supremacy, these presumptions could constitute a type of bill of rights. A comparison of Willis's work on statutory presumptions with that of leading contemporary thinkers such as William Eskridge and Lords Steyn and Hoffmann reveals that Willis was well ahead of his time. At the same time, Willis failed to relate the presumptions to theories of democracy or the rights of minorities, as these contemporary proponents of common law presumptions of respect for rights have done. This failure may be related to Willis's scepticism about both democracy and rights. In other words, Willis was sceptical that there were any rights worth protecting, and he was cynical about what the legislature would do even after the courts redefined and highlighted an issue as one involving rights and principles. Willis's work on the common law presumptions, as continued and enriched by Eskridge, Lords Steyn and Hoffmann, and others, underlines the importance of common law constitutionalism and the continued

42 For an early and influential critic of the Charter who similarly stressed the distributional context of Charter litigation, see Andrew Petter, 'The Politics of the Charter' (1986) 8 S.C.L.R. 473. This benevolent view of the state still has some appeal to Canadian courts. See, e.g., *R. v. Edwards Books*, [1986] 2 S.C.R. 713; *Lovelace v. Ontario*, [2000] 1 S.C.R. 950.

need to articulate the theoretical foundations of rights and democracy that underpin a vision of constitutionalism that allows independent courts to protect rights while allowing elected legislatures to enact legislation that either limits or overrides rights as interpreted by the courts.

III *A democratic foundation for common law constitutionalism?*

One of Willis's main complaints against the common law presumptions is that they were 'ancient' and anachronistic in the age of the modern regulatory state. For example, the presumption against expropriation without compensation reflected old *laissez-faire* values that Willis believed had been abandoned by most, but which lived on in the minds of judges. In 1939, Willis commented that 'every one' of the statements that judges had used to set up a presumption of fairness 'reeks of the "natural law" of which the American Bill of Rights is the constitutional expression.'⁴³ These criticisms of the common law presumptions have considerable bite. Why was access to the courts preferred in the presumptions over access to more easily affordable tribunals? Why was property given preferred treatment under the presumptions when so much modern legislation was redistributive in nature? Why did the courts apply presumptions of strict construction to benefit not only the criminally accused but the well-off who were trying to evade taxes? Willis raised these questions in his discussion of presumptions in 'Statute Interpretation in a Nutshell.' They were not easy questions to answer in 1938, and they remain so today.

A perhaps easier question to answer today is whether presumptions such as Eskridge's 'meta-canon' favouring vulnerable minorities are more legitimate because they are grounded in the Charter and other constitutional provisions relating to the rights of minorities. Although courts have been rightly cautious not to let the presumption that statutes will respect the constitution eclipse the whole machinery of Charter adjudication and, in particular, the ability of governments to justify reasonable limits on Charter rights,⁴⁴ the presumption of respect for Charter values is emerging as something of the meta-canon proposed by Eskridge.⁴⁵ This

43 Willis, 'Admin Law and BNA,' supra note 5 at 279.

44 *Bell Express Vu Partnership Ltd. v. Rex*, [2002] 2 S.C.R. 599.

45 For example, the Supreme Court started a recent decision on the constitutionality of investigative hearings by discussing its approach to statutory interpretation. It noted that central to its approach was 'the presumption that legislation is enacted to comply with constitutional norms, including the rights and freedoms enshrined in the Charter: Ruth Sullivan, Sullivan and Driedger on the Construction of Statutes (4th ed. 2002), at p. 367. This presumption acknowledges the centrality of constitutional values in the legislative process, and more broadly, in the political and legal culture of Canada.

raises the question of whether the entrenchment of the Charter provides some of the legitimacy for the presumptions that Willis saw was lacking.

In my previous defences of judicial review under the Charter,⁴⁶ I have been reluctant to place too much reliance on the democratic enactment of the Charter as a justification for judicial review, even though it has figured prominently in several judicial defences of judicial review.⁴⁷ In large part, it has seemed like too easy a point to make, and one that begs the question of how those who agreed to the Charter would have reacted to unanticipated developments under the Charter such as the striking down of the abortion law. Nevertheless, the enactment of the Charter must hold some weight in the legitimacy debate, if only because it provided a democratic foundation for rights protection that is, as Willis observed, absent for the common law presumptions. For example, the failure to protect property under s. 7 of the Charter was a deliberate decision that has largely been effective in keeping Charter adjudication away from the protection of property rights per se. Property rights, of course, continue to be protected under the common law presumption and the statutory Canadian Bill of Rights,⁴⁸ but the Supreme Court has, for better or worse, largely respected the decision of the framers not to include property in s. 7.⁴⁹ Indeed, the issue of including such rights, as well as socio-economic rights, was an important feature of debates in the early 1990s about whether the constitution should be amended. Similarly, the decision of the framers to affirm the legitimacy of affirmative action under s. 15(2) of the Charter has largely been respected, even if the actual provision has not figured prominently in judicial decisions. Leaving aside the thorny issue of Quebec's refusal to agree to the enactment of the Charter, the agreement of ten other legislatures to the Charter is a legitimating fact that cannot be ignored. In the subsequent years, Canadians have learned from hard experience how difficult it is to gain consent to constitutional change.

Common law presumptions that reflect Charter values, such as the need for fairness before liberty is taken away and the presumption of respect for Canada's international commitments to human rights, have arguably received increased legitimacy since Willis's time. Other common law presumptions, such as respect for property rights, that are not reflect-

Accordingly, where two readings of a provision are equally plausible, the interpretation which accords with Charter values should be adopted.' *Application under Section 83.28 of the Criminal Code*, [2004] 2 S.C.R. 248, 2004 SCC 42 at para. 35.

46 See, e.g., Kent Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (Toronto: Irwin Law, 2001) [*Supreme Court on Trial*].

47 *Reference re Section 94(2) of the Motor Vehicle Act (B.C.)*, [1985] 2 S.C.R. 486 at 497; *Vriend v. Alberta*, [1998] 1 S.C.R. 493 at paras. 131–2.

48 *Canadian Bill of Rights*, S.C. 1960, c. 44, reprinted in R.S.C. 1985, App. III.

49 *Irwin Toy Ltd. v. A.G. Quebec*, [1989] 1 S.C.R. 927 at 1003.

ed in the Charter have arguably lost some legitimacy as a result of the new focus on Charter values. Willis and other critics of the courts would likely not be persuaded by this argument. They would point out the considerable indeterminacy in judicial interpretation of open-ended concepts such as the principles of fundamental justice and equality and the inevitable role of judicial values in determining the content of such principles. There is much force to these arguments, and I do not believe that the democratic enactment of the Charter concludes the legitimacy debate. Nevertheless, some allowance should be made for the restraining influence that some textual choices in the Charter have had on the development of the law and of the democratic significance of the enactment of the Charter. Even if, as Willis would have undoubtedly argued, the judges may often make it up under the Charter, they do not make it up out of thin air, or even out of the common law. What Willis characterized as the reek of the natural law in the common law presumptions has dissipated, to some degree, with the enactment of the Charter.

*IV The fiction of legislative intent, the debilitation of democracy,
and interpretative bills of rights*

One of the many strengths of Willis's discussion of the common law presumptions is his recognition that they functioned less as true presumptions of legislative intent and more as values that would be protected by the judiciary. Willis's insight remains important today, with respect to both debates about the appropriate nature of Charter interpretation and debates in the United Kingdom about whether courts should rely on interpretative remedies to cure rights violations or whether they should declare that legislation is incompatible with the rights protected in the Human Rights Act 1998 and invite a legislative remedy. The contemporary debate is concerned both with whether courts that engage in creative and strained interpretations of statutes in order to preserve rights rely on the fiction of legislative intent and with whether they also sap democracy by making difficult decisions that should be made during the legislative process.

In the early years of the Charter, the Supreme Court was reluctant to cure unconstitutional legislation by creative interpretative remedies. In cases such as *Hunter v. Southam*,⁵⁰ *R. v. Morgentaler*,⁵¹ and *R. v. Seaboyer*,⁵² the Court struck legislation down and indicated that the task of reformulating the law in accordance with Charter standards was one for Parliament. Undoubtedly, the Court's determination to make something out of

50 [1984] 2 S.C.R. 145.

51 [1988] 1 S.C.R. 30.

52 [1991] 2 S.C.R. 577.

the Charter contributed to this process, but its understanding of appropriate institutional roles was also important. It believed that the legislature should be able to make important choices in reformulating legislation in order to comply with the Charter. One interesting case that may represent something of a last stand for this type of approach was the Court's 5:4 decision in the 1994 case of *R. v. Heywood*.⁵³ The case dealt with an obscure and literally forgotten vagrancy offence that applied to all convicted sexual offenders who loitered in public parks and playgrounds. The police resurrected the offence and alleged that it applied to the activities of a retired schoolteacher who was photographing the crotch areas of young girls in a Victoria park. A five-judge majority of the Supreme Court held that the offence should be struck down because it was overly broad and was applied without notice to the offender. Four judges would have saved the offence by reading in a requirement that the state prove that the loitering person had a malevolent intent related to the underlying offences.

Although the minority's approach was attractive in order to catch accused who were up to no good, the majority's approach was preferable, in my view, both because of its articulation of values concerning restraint and notice and because it allowed Parliament an opportunity to revise the law in accordance with these values. As might be expected, Parliament acted quickly to respond to the decision; indeed, new provisions were enacted in response to the Court of Appeal's invalidation of the old vagrancy offence, and they were in place before the Supreme Court even made its decision. The result of this dialogue between the courts and Parliament was a more modern and better-tailored law that applied only to those convicted of sexual offences with children and provided these people with notice. The new legislation not only treated the accused in a fairer fashion, it also increased social protection by also prohibiting child molesters from gaining access to children through employment or volunteer work.⁵⁴ The dialogue that the Court provoked with Parliament benefited both the accused and society.

If *Heywood* was decided today, the Supreme Court would likely opt for the approach taken by the minority in that case. In cases such as *R. v. Butler*,⁵⁵ *R. v. Sharpe*,⁵⁶ and *Foundation for Children*,⁵⁷ the Court has demonstrated an increased willingness to save possibly unconstitutional laws through creative and limiting acts of interpretation. In the *Foundation for*

53 [1994] 3 S.C.R. 761.

54 *Criminal Code*, R.S.C. 1985, c. C-46, s.161.

55 [1992] 1 S.C.R. 452.

56 [2001] 1 S.C.R. 45.

57 *Canadian Foundation for Children, Youth and the Law v. Canada (A.G.)*, [2004] 1 S.C.R. 76 [*Foundation for Children*].

Children case, a majority of the Court imposed new and quasi-legislative restrictions on the authorization of reasonable corrective force against children under s. 43 of the Criminal Code. These restrictions included prohibiting corporal punishment against those under two or over twelve years of age, the use of objects such as belts, and blows to the head. These restrictions may strike many as sensible, but they avoided the type of widespread debate in Parliament and society that would have occurred had the Court, as the minority was prepared to do, struck down the statutory authorization of reasonable corrective force as unduly vague and insufficiently protective of the physical integrity and equality of children.

Although it may be the most dramatic example of saving legislation through a strained reading, there was precedent for the approach taken in the *Foundation for Children* case. In *Butler*, the Court upheld the obscenity law as a reasonable limit on freedom of expression, but only after reinterpreting that limit so that it would not apply to explicit depictions of sex that did not involve violence, degradation, or children. In *Sharpe*, the Court upheld child pornography provisions only by employing an explicit reading-down remedy. In all of these cases, the Court avoided the controversy that would have accompanied striking down the impugned law but also avoided the democratic debate that would have occurred had such a result effectively required Parliament to revisit the matters in question. Although it is true that Parliament could still enact new legislation after the decisions in *Butler*, *Sharpe*, and *Foundation for Children*, it is hardly surprising that this has not occurred. The idea that the Court has 'fixed' controversial legislation and made it Charter-proof may very well ensure that the issue is not placed on an already crowded legislative agenda. In contrast, the invalidation of legislation under the Charter may frequently operate so as to put questions of principle on the legislative agenda, literally forcing our representatives to vote on how they wish to treat rights.⁵⁸ Interpretative remedies that fix unconstitutional legislation can let the legislature off easy.

The debate in Canada about whether courts should make legislation constitutional through creative interpretation or send the legislature back to the drawing board is also played out, in a somewhat different form, under the United Kingdom's Human Rights Act 1998 (HRA). That bill of rights contemplates a two-track strategy that gives the judiciary the

⁵⁸ For an analysis of the same-sex marriage issue that suggests that the courts have effectively forced Parliament to say yes or no to gay marriage, see Kent Roach, 'Dialogic Judicial Review and Its Critics' (2004) 23 S.C.L.R. (2d) 49 at 77–89. See *Reference re Same Sex Marriage*, [2004] 3 S.C.R. 698, 2004 SCC 79, where the Court refused even to answer the question of whether a proposed law recognizing same-sex marriages was required by the Charter.

power, under s. 3, 'so far as it is possible to do so,' to ensure that legislation 'must be read and given effect in a way which is compatible with the Convention rights' guaranteed in the rest of the document. A s. 3 remedy authorizes creative and perhaps even strained interpretations, albeit only 'so far as it is possible to do so.' The alternative strategy is not, as under the Charter, to strike the legislation down and effectively force the legislature back to the drawing board. Rather, the alternative is for the court, under s. 4 of the HRA, to exercise its discretion to declare that legislation is incompatible with a Convention right 'if it is satisfied that the provision is incompatible.' In contrast to the situation under the Charter, such a declaration does not render the legislation of no force and effect, but it does provide an opportunity for fast-track legislative reform. Alternatively, the legislature may do nothing. In any event, the legislation is still applied in the case in hand, even though the court has found it to be incompatible with the right. Thus, in the *Heywood* case, British courts would have the choice of either reading in a requirement of malevolent intent under s. 3 or declaring the offence to be incompatible with rights but also applying it and, if necessary, convicting the accused under an incompatible offence. The more difficult choice faced by the courts under the HRA may help explain why those most concerned about rights might opt for the interpretative remedy.

In *R. v. A.*, one of the first cases decided under the act, the House of Lords asserted that it had very broad powers to reformulate legislation under s. 3, even if the interpretation given by the court 'may appear strained.'⁵⁹ At the same time, the House of Lords marginalized the s. 4 declaration of incompatibility by declaring it to be 'a measure of last resort. It must be avoided unless it is plainly impossible to do so.'⁶⁰ In the result, the House of Lords reinterpreted seemingly categorical restrictions that Parliament had placed on the admissibility of a complainant's prior sexual activity in a sexual assault trial. For critics such as Willis, this case would be an example of the court imposing its own values over Parliament's in the guise of statutory interpretation and the vague reference in the Human Rights Act to achieving compatibility with rights 'so far as it is possible to do so.' Willis might be concerned about the judges imposing old views about sexuality and sexual assault that are out of touch with the more modern views represented in the legislation. He might also be concerned that the courts rode roughshod over Parliament's intent to protect complainants from being cross-examined by the accused about their prior sexual history.

The British experience can be contrasted with the Canadian case of *Seaboyer*, in which the Supreme Court similarly held that categorical 'rape

59 *R. v. A.*, [2002] 1 A.C. 45 at para. 44, *per* Lord Steyn.

60 *Ibid.*

shield' restrictions on the admissibility of a complainant's prior sexual conduct could violate the accused's right to a fair trial. The Supreme Court of Canada rejected the fix-it approach of reinterpreting the clear law to allow evidence necessary to preserve the accused's right to a fair trial or of crafting constitutional exemptions from the overbroad law when necessary. Instead, the Court struck the law down. The result was not only front-page news but a comprehensive reform of sexual assault law that addressed not only the issue of the admissibility of prior sexual contact but also the substantive definition of sexual assault law in the famous 'no-means-no amendments.'⁶¹ As I have explained elsewhere, Parliament accepted the Supreme Court's ruling but expanded the dialogue beyond the parameters of the case.⁶² The Canadian approach seems preferable, both because the judges clearly assumed responsibility for altering Parliament's intent and because their remedy provoked Parliament to reopen the matter and formulate reply legislation in a more comprehensive and creative manner than would have been possible for the court. Of course, it is possible that the British Parliament could revisit the matter in *R. v. A.*, but it does not appear likely that this will occur, given that the House of Lords has indicated that it has already given effect to Parliament's preferred policy to the extent that it is consistent with the accused's rights.

An interpretative bill of rights such as those found in New Zealand and the United Kingdom, as well as the Supreme Court of Canada's present fondness for saving unconstitutional laws through creative interpretation, runs the risk of continuing what Willis correctly identified as the common law fiction that the court is following the intent of the legislature and not thwarting it when it interprets legislation so as to respect rights. Willis was critical of the use of a 'spurious technique of statutory interpretation' to achieve compliance with rights, and he felt that judges were hiding the ball when their rules of constitutional law were 'masquerading as a rule of construction.'⁶³ It may be that, in these days of domesticated realism, most observers would easily recognize that courts that employ interpretative remedies are in fact altering legislation in accordance with their own values. The more important lesson from cases such as *R. v. A.* and *Foundation for Children* may be that creative reinterpretations of laws by the courts run the risk of debilitating democracy by taking away much of the practical impetus for the legislature and civil society to revisit the matter in light of the court's ruling. Dialogic constitutionalism has the potential for courts to clearly inject their views about rights into political debates while allowing legislatures to continue

61 *An Act to amend the Criminal Code*, S.C. 1992, c. 38.

62 See Roach, *Supreme Court on Trial*, supra note 46 at 268–73.

63 John Willis, 'Administrative Law in Canada,' (1961) 39 *Can.Bar Rev.* 251 at 252, 276.

to participate and take responsibility for the limitation or overriding of the rights that the courts have brought to their attention.

*V The fiction of judicial supremacy, the denigration of ordinary legislation,
and the American Bill of Rights*

In his attempt to underline their significance, Willis drew an analogy between a common law bill of rights, as represented by the presumptions of statutory intent, and the Fifth and Fourteenth Amendments of the American Bill of Rights. As I have suggested above, Willis was on firm ground in pointing out the constitutional significance of the presumptions and their ability to provide some protection for the rights that judges chose to protect. Willis's analogy to the American Bill of Rights, on the other hand, is much more shaky. Willis did not try to substantiate this analogy at any length, and it can probably be explained as understandable and exuberant hyperbole in the service of driving the point home. Like many Canadian commentators, Willis was driven to using American analogies in part because of the large intellectual and political shadow of the United States. Around the same time, F.R. Scott and others were criticizing the Privy Council for its decisions invalidating a Canadian New Deal in terms not dissimilar to those used by progressive American critics of the *Lochner* era.⁶⁴ It was in this charged context that Willis equated the common law bill of rights with the American Bill of Rights.

Willis's hyperbole is significant, however, because it mirrors a tendency of many Canadian critics of judicial review, both in Willis's time and today, to draw on American critiques of judicial review without adequate attention to the structural differences between the Canadian and American constitutions. As I have discussed elsewhere, critics of judicial activism under the Charter on both the left and the right have mirrored the criticisms of judicial activism made at various times in the United States.⁶⁵ They have often assumed that the Charter has produced a regime of judicial supremacy and have not paid adequate attention to the ability of Canadian legislatures to alter Charter decisions with ordinary legislation limiting or overriding rights. They also have not given sufficient consideration to the relative ease and speed with which a determined Canadian government with a majority in the legislature can implement its legislative agenda, as compared to the divided system of US congressional government.⁶⁶

64 Frank Scott, 'The Consequences of the Privy Council's Decisions' (1937) 15 Can.Bar Rev. 485.

65 Roach, *Supreme Court on Trial*, supra note 46 at c. 5.

66 As will be discussed below, the ability of Canadian legislatures to engage in dialogue may decrease with electoral reforms that increase the incidence of minority or coalition governments.

The fact that even Willis himself probably did not believe that the common law presumptions were really the equivalent of the American Bill of Rights can be seen in his more detailed work in administrative, tax,⁶⁷ and criminal law. A good example of Willis's more detailed work is his 1950 case comment on the Supreme Court's famous decision in *Frey v. Fedoruk*.⁶⁸ The case involved a civil action for false imprisonment by a person who had been detained by a homeowner and arrested by a police officer after having peered into a window of the homeowner's house, where the latter's mother was standing in her nightdress. The Supreme Court held that the detention and arrest of the peeping Tom were not authorized by law because he had committed no offence in the *Criminal Code* or established in the common law. Cartwright C.J. rejected the idea that courts can create new crimes at will because such an approach

would introduce great uncertainty into the administration of the criminal law, leaving it to the judicial officer trying any particular charge to decide that the acts proved constituted a crime or otherwise, not by reference to any defined standard to be found in the Code or in reported decisions, but according to his individual view as to whether such acts were a disturbance to the tranquility of people tending to provoke physical restraint.⁶⁹

Cartwright C.J., who was the leading advocate on the Court at the time for the need for restraint and fault in the criminal law, concluded that 'if any course of conduct is now to be declared criminal, which has not up to the present time been so regarded, such declaration should be made by Parliament and not by the Courts.'⁷⁰

Frey v. Fedoruk is widely accepted and taught as the leading Canadian decision on the principle of legality and the rationale for the codification of the *Criminal Code*. Its principles of legality and codification were embraced by Parliament a few years later when it decided to abolish common law crimes, with the exception of the common law crime of contempt of court.⁷¹ The iconoclast John Willis was not, however, impressed by the Court's decision. He criticized the decision for articulating 'in ringing tones the grand old slogan that Canadians are not at the mercy of the whims of officials' and for closing a door Parliament had at the time deliberately left open for the creation of new common law crimes.⁷² As in his 1938 article, Willis was offended by the way judges allowed their own values prevail over those of Parliament or the sensibil-

67 See note 14 supra.

68 [1950] S.C.R. 517.

69 Ibid. at para. 37.

70 Ibid. at para. 40.

71 *Criminal Code*, supra note 54 at s. 9(a).

72 Willis, Case Comment 1950, supra note 12 at 1025-6, 1029.

ity of the ordinary person. Willis admitted that he had not intended 'to write a sermon on the way the courts ... get all the credit for defending the ultimate values and leave to the legislature – and the civil servants – the dirty job of seeing that our twentieth century society runs the more or less comfortable course we demand of it despite those values,'⁷³ even though that was exactly what he had done.

Willis's criticisms of *Frey v. Fedoruk* demonstrates his lack of sympathy for judge-made presumptions that made the jobs of civil servants and legislators more difficult. What is noteworthy in light of his prior comments about the presumptions amounting to a Fifth or Fourteenth Amendment, however, is that Willis had no doubt that Parliament could repair the damage done by a court that insisted on compliance with principles of legality and codification. Although he vented by stating that homeowners might, after the Court's decision, want to resort to self-help if they discovered peeping Toms, Willis acknowledged that 'if Parliament doesn't like the law as laid down by the Supreme Court, it can, of course, change it.'⁷⁴ Anticipating the decision that Parliament would soon make to follow *Frey* by abolishing common law offences, Willis shrewdly advised Parliament to adopt 'new sections prohibiting in express words those specific types of conduct which are now covered only by the common law of crimes but should continue to be punishable.'⁷⁵ Parliament responded to the Court's decision in just that fashion by enacting a new crime of loitering or prowling at night near another's house, an offence that remains part of the *Criminal Code* to this day.⁷⁶ Willis may have resented the fact that Parliament had to perform this sort of 'dirty work,' but he did not doubt that Parliament could have the last word over the Court about whether being a peeping Tom should be a crime.

One of the reasons that Willis fell into error in 1938 by pronouncing the common law presumptions the equivalent of the American Bill of Rights was that, in 'Statute Interpretation in a Nutshell,' he focused only on decisions of the courts applying the presumptions and not on the 'dirty work' of examining legislative replies to those decisions. In his writings in the 1950s on the criminal law, however, Willis paid attention to the entire legal process, including legislative replies to the Court's work. Like most good criminal lawyers, Willis was a knowledgeable spectator of the ping-pong matches that frequently occur between courts concerned with fundamental principles of criminal liability and the rights of the accused and Parliament, which is concerned with public and media pressure to do something about crime. Once Willis got into the

⁷³ *Ibid.* at 1028.

⁷⁴ *Ibid.* at 1024.

⁷⁵ *Ibid.* at 1029.

⁷⁶ *Criminal Code*, *supra* note 54 at s. 177.

depths of an area of law, he found himself commenting on the dialogue that occurs between courts and legislatures.

It is also tempting to conclude that Willis's work on the criminal law in the 1950s took on board the insights of the legal process movement during that time. The legal process approach to scholarship has been revitalized in the 1990s by scholars such as William Eskridge and Cass Sunstein.⁷⁷ In part because the American Bill of Rights has no formal limitation or derogation clause, however, these scholars focus their energies on ways of avoiding or limiting constitutional decisions in order to allow replies by ordinary legislation.

The legal process approach is also represented in contemporary constitutional scholarship, in Canada and elsewhere, by work on dialogic judicial review, which often focuses on the ability of legislatures to craft replies to decisions under limitation or derogation clauses.⁷⁸ As Guido Calabresi and others have suggested, these structural features of the Charter and other modern bills of rights bring them closer to the common law tradition of courts protecting rights with legislatures taking responsibility for limiting or derogating from such rights.⁷⁹ Willis's own opposition to an entrenched bill of rights suggests that he did not contemplate the possibility that the common law method could be transplanted into a bill of rights. Thus in 1970 he wrote approvingly of arguments that the 'root objection to a national entrenched bill of rights' is that judges should not

'have the last word' – as they do in the United States ... it is shocking in a democratic country that 'nine old men' and appointed ones at that should be allowed to overrule the elected representatives of the people ... when the judges come up with a 'wrong' decision, and this is bound to happen sometimes in the fast-changing world of today, you are stuck with it unless you can get a constitutional amendment, which you rarely can.⁸⁰

These arguments, of course, all presume that, absent a constitutional amendment, the constitutional decisions of courts constitute the final last word. In short, they presume judicial supremacy and ignore the dialogic logic of both common law and modern bills of rights, which allow ordinary legislation to limit and even derogate from rights as articulated by the court.

⁷⁷ See Kent Roach, 'What's Old and New about the Legal Process' (1997) 47 U.T.L.J. 363.

⁷⁸ The leading article is Peter Hogg & Allison Bushell, 'The Charter Dialogue between Courts and Legislatures' (1997) 35 Osgoode Hall L.J. 75.

⁷⁹ Guido Calabresi, 'Foreword: Antidiscrimination and Constitutional Accountability: What the Bork–Brennan Debate Avoids' (1991) 105 Harv.L.Rev. 80 at 124; Stephen Gardbaum, 'The New Commonwealth Model of Constitutionalism' (2001) 49 Am.J..Comp.L. 707.

⁸⁰ Willis, 'Foreign Borrowings,' *supra* note 2 at 281.

Writings on judicial activism, whether under the common law or the constitution, that neglect the possibility of legislative replies tend towards the type of hyperbole that characterizes Willis's 1938 claim that the common law presumptions amounted to a Fourteenth Amendment. To be sure, Willis's later writings that contemplate the possibility of legislative replies are also, at times, highly critical of the court's contribution to the dialogue, but they at least recognize the possibility of legislative replies. It is interesting that some of the leading books in Canada that are critical of judicial activism largely neglect the role of Parliament in contributing to that activism. For example, neither Parliament nor the legislature emerges as a name in the index of Michael Mandel's *The Charter of Rights and the Legalization of Politics in Canada*⁸¹ or F.L. Morton and Rainer Knopff's *The Charter Revolution and the Court Party*.⁸² Although too much should perhaps not be made of indexing practices,⁸³ it is striking that these two leading works, one a critique of judicial activism from the left and another a critique from the right, seem unwilling to assign the legislature the same prominence as the Court as a constitutional actor. The Court fills the critical bull's-eyes of these commentators, and much of the 'dirty work' that the legislature does or neglects to do escapes from view. In contrast, dialogic approaches under either the common law or the Charter study Parliament as a central constitutional actor and one that often has the last word in its dialogue with the courts.

VI *Are all legislative replies acceptable? Procedural and substantive requirements of democracy and justice*

One of the challenges facing scholars in the legal process tradition and theorists of dialogue between courts and legislatures is to develop criteria by which to evaluate the work of legislatures as well as courts. As mentioned above, there is a long tradition of criticisms of the logic and assumptions made by judges. In contrast, the standards for evaluating legislation are less clear. New legal process thinkers such as Eskridge have been attracted to public choice theories in part because they provide a model of the legislative process largely based on economic insights about the role of interest groups and agenda setting in the process. At the same time, public choice can go only so far in evaluating the legislative product

81 Michael Mandel, *The Charter of Rights and the Legalization of Politics in Canada* (Toronto: Thompson, 1994).

82 F.L. Morton & Rainer Knopff, *The Charter Revolution and the Court Party* (Peterborough, ON: Broadview Press, 2000).

83 Mandel, for example, notes that his index is of names and cases, and he does at times note legislative replies. Morton and Knopff document the connections between the Court Party and the state and briefly examine and dismiss the dialogue thesis at the end of their book.

because of its nature as a positive or empirical discipline that, by and large, avoids most normative questions.⁸⁴

As discussed in Part V above, Willis criticized the Court's decision in *Frey v. Fedoruk* and offered some cogent advice to Parliament about possible responses to that decision. Although he was critical of the decision, Willis recognized that Parliament might very well follow the principles articulated in that judgment and enact 'a section declaring, as do many of the criminal codes in the United States, that all common law offences not embodied in some statute are repealed.'⁸⁵ Less than four years later, Parliament did exactly this, with the minister of justice explaining that 'it is desirable that we should be in a position to say to all Canadians. "Here is an exhaustive list of Canadian crimes. Unless the offence can be found in this code it cannot be charged."⁸⁶ Critics of judicial activism might be quick to argue that such legislative acceptance of a judicial decision indicates that dialogue under the common law, as well as under the Charter, is a 'monologue'⁸⁷ or is not 'positive dialogue.'⁸⁸ Such conclusions, however, beg some of the most interesting questions concerning why legislatures may at times agree with court decisions. Students of dialogue under the common law or the Charter should attempt to identify and explain the conditions that may lead courts and legislatures to agree on the treatment of matters that, without the court's decision, might not have arrived on the legislative agenda. Empirical accounts will likely focus on limits on the legislature's agenda and political capital, while normative accounts, notwithstanding pervasive cynicism about politics, will have to contemplate that legislatures may, at times, be persuaded to do the right thing.

Parliament's decision to accept *Frey v. Fedoruk* by subsequently abolishing common law crimes tells only half the story. At the same time, Parliament made a specific exemption for the common law crime of contempt of court and introduced a new codified offence of 'trespassing at night' that would catch peeping Toms who benefited from *Frey*.⁸⁹ There was some discussion in Parliament about whether the new offence was sufficient to catch all peeping Toms, but the offence was defended by the minister of justice as carefully constructed to catch only blameworthy

84 Elli Elhauge, 'Does Interest Group Theory Justify More Intrusive Judicial Review?' (1991) 101 Yale L.J. 31; Kent Roach, 'The Problems of Public Choice' (1993) 31 Osgoode Hall L.J. 721.

85 Willis, Case Comment 1950, *supra* note 12 at 1029.

86 *House of Commons Debates* (18 January 1954) at 1253 (Mr Garson).

87 Ted Morton, 'Monologue or Dialogue?' in Paul Howe & Peter Russell, eds., *Judicial Power and Canadian Democracy* (Montreal: McGill-Queen's University Press, 2001)

88 Christopher Manfredi & James Kelly 'Six Degrees of Dialogue: A Response to Hogg and Bushell' (1999) 37 Osgoode Hall L.J. 513.

89 *Criminal Code*, *supra* note 54 at s. 177.

behaviour. The care taken in constructing the new offence, as well as the value of democratic debate in the legislature about what behaviour should be criminalized, is in no small part attributable to the Court's prior decision announcing 'in ringing tones' the need for certainty and restraint in the criminal law. This raises the possibility that dialogic judicial review, whether under the common law or under the Charter, may improve and sharpen legislative debate.

At the same time, the new offence enacted in response to *Frey* contained a reverse onus that required the accused to prove any lawful excuse for being on the property. The only question raised about this feature was by long-time parliamentarian and opposition member Stanley Knowles, who correctly noted that the reverse onus was 'contrary to the usual practice' and questioned whether it was necessary.⁹⁰ Today, the reverse onus would be found to violate the presumption of innocence under the Charter and would have to be justified by the government under s. 1 of the Charter. It is not clear that the justice minister's defence of the reverse onus, namely that it gave the accused a defence that would not otherwise exist and that it applied to matters within the accused's knowledge, would be sufficient to justify the violation of the presumption of innocence. Regardless, the exchange underlines the importance of expertise and vigilance in the legislature to ensure the justness of legislative replies.

Although Willis correctly predicted the legislative reply to *Frey v. Fedoruk*, he did not evaluate it, because his case comment was written before Parliament had had a chance to respond to the Court's decision. This again points out some of the difficulties of dialogic analysis of judicial review, as much media and even scholarly attention in our fast-paced world is focused on the dramatic moment of judicial decision and not on the more mundane 'dirty work' entailed by legislative replies. Willis did not have an opportunity to evaluate this legislative reply, but this raises the question of what standards of evaluation should be brought to bear, either by citizens or by judges, in assessing legislative replies to Court decisions.

In 1951, Willis wrote a very interesting case comment that was strongly critical of Parliament's 1947 legislative reply to the Supreme Court's 1942 decision restricting the law of murder so that it did not apply to accidental deaths resulting from the use of a firearm during the commission of a serious crime. The case comment is noteworthy because it reveals how Willis could train his deadly critical sights on Parliament as well as on the Court. In so doing, it outlines a possible approach for dialogic theorists who are interested in developing criteria by which to evaluate legislative replies to court decisions.

⁹⁰ *House of Commons Debates* (12 February 1954) at 2062.

Willis criticized the 1947 amendment on procedural grounds relating to the way it was passed through Parliament and on substantive grounds relating to the injustice that it could cause. Procedurally, Willis applied his realist approach to the legislative process by noting that the amendment had been introduced in the unelected Senate, was only agreed to by the House of Commons to break a political logjam, and passed through Parliament without 'a line of public discussion.'⁹¹ Willis's criticism of the legislative process used to reply to the Court's decision points out the need for dialogue theorists to engage in a critical assessment of the legislative process. Indeed, one of the challenges for dialogue theorists in the near future will be to assess the impact of changes in party discipline and electoral reforms (*i.e.*, proportional representation, single transferable vote, etc.) on the dialogue between courts and legislatures. Electoral reforms may increase the likelihood of minority and coalition governments, and relaxed party discipline may undermine and diffuse governmental and party responsibility for some controversial measures. Much of the dialogic structure of the Charter seems to be presume that governments, as opposed to *ad hoc* coalitions of parliamentarians, will take responsibility for measures that place limits or overrides on rights as articulated by the courts.⁹²

Willis did not limit his criticism of the parliamentary reply to procedural grounds. He criticized the parliamentary amendment that expanded the offence of murder to cover all killings when the offender had or used a gun during the commission of another serious offence on the substantive basis that it was a 'savage doctrine'⁹³ that threatened to execute a person for an accidental death. In analysis that contains the guts of subsequent s. 1 analysis of the question, he surveyed comparative law on the subject and concluded that neither the United Kingdom nor the United States had found it necessary to pass similar laws. He also discussed the claim that the law would deter the use of force or firearms during the commission of crimes such as robberies, concluding 'Maybe, but I'm from Missouri'⁹⁴ – the show-me state. In both 1987 and 1990, the Supreme Court, without much more analysis, similarly concluded that the deterrent value of the harsh murder law did not justify it. The Court concluded that tough sentences for the use of firearms during crimes

91 Willis, Case Comment 1951, *supra* note 12 at 793.

92 For example, s. 33 of the Charter, which allows certain Charter rights to be overridden for renewable five-year periods, seems to presume that the override will be a matter of governmental and party policy and that the government and the party must stand for re-election before the override is renewed. In a system of loose party discipline or one in which the government is a coalition of political parties, there may be less accountability at the next election for the use of the override.

93 Willis, Case Comment 1951, *supra* note 12 at 794.

94 *Ibid.* at 795.

and for accidental killings during crimes could as effectively deter both crime and the use of firearms without violating the accused's rights.⁹⁵

Willis concluded that the 1947 amendment to the *Criminal Code* that made it murder if death resulted from the possession of a weapon during a serious offence was 'more than drastic,' it was 'savage.' He explained,

It is savage because it is solemnly proposing to hang an armed robber whose only connection with the death is that he pulled the gun out of his pocket and the gun happened to go off and kill someone while he was at the scene of the crime or departing from it.⁹⁶

Convicting the faultless killer of murder – an offence punishable by death at that time – was, for Willis, unjust and 'a surrender to the primitive desire to see the other fellow "get a taste of his own medicine," the desire to beat up the table which banged against us in the dark.'⁹⁷ Willis's evocative and brilliant criticisms of the law demonstrate that he was just as capable of criticizing the legislatures as of criticizing the court. They point out the need for scholars and citizens alike to recognize that judicial review under either the common law or the Charter is not necessarily the final word and for them to apply critical insights about procedural fairness and substantive justice to the work of courts and legislatures alike.

VII *The fate of the common law presumptions under the Charter*

Willis's eloquent plea for Parliament to repeal the ill-considered and unjust rule that treated accidental killings during serious crimes as murders fell on deaf ears. Even if some parliamentarians, and even some ministers of justice, believed that Willis was right, there simply was never enough time or political capital to be spent on a legislative reform that would make the elected representatives appear to be soft on crime and soft on criminals. The failure of legislative reform of the unjust murder law underlines the need for judicial review, including Eskridge's proposed meta-canon of statutory interpretation to favour minorities and those, such as the criminally accused, who are vulnerable in majoritarian legislative processes.

Before the enactment of the Charter, the Supreme Court whittled some of the harsh edges from the constructive murder rule through a

95 In 1995, Parliament responded with minimum four-year sentences for a variety of crimes committed with a firearm. The Supreme Court subsequently held that such a sentence was not cruel and unusual punishment in a case in which a drunken accused accidentally killed his friend with a firearm: *R. v. Morrisey*, [2000] 2 S.C.R. 90.

96 Willis, Case Comment 1951, supra note 12 at 794.

97 Ibid. at 796.

series of cases that resorted to creative and strained interpretations of the provision in an attempt to minimize its injustice.⁹⁸ The result may have mitigated some of the injustice of the law, but it also created considerable confusion about the law of murder and made it unnecessarily complex. Judges such as Brian Dickson, who later admitted having long agreed with Willis that the rule was unjust and cruel, confessed that there were limits to what they could do to mitigate the harshness of the rule in a system of parliamentary supremacy. Parliament had clearly stated its desire to punish people for murder regardless of whether they were at fault for causing a death.⁹⁹

The unjust felony murder rule that anyone who used or possessed a gun during a serious crime was guilty of murder if death resulted was not repealed by Parliament as Willis had urged. It was, however, struck down by the Supreme Court in a 1987 decision on the basis that it violated s. 7 of the Charter to impose the harsh stigma and punishment of a murderer for a killing that might only be accidental and not even negligent.¹⁰⁰ Three years later, the Court expanded on this holding and struck down the rest of the constructive murder rule on the basis that s. 7 constitutionalized subjective fault in relation to the prohibited act for the offence of murder.¹⁰¹ The Court's holdings in these and related cases were seen as unexpected, and even radical, because many believed that s. 7 of the Charter was restricted to matters of procedural fairness. Nevertheless, in both cases, the Court acknowledged that the new rights they had recognized could be limited under s. 1 if the government were able to establish that constructive murder was a proportionate limit on the rights of the accused. In addition, Parliament could have re-enacted the old murder law using the s. 33 override.

It is intriguing to speculate about what Willis would have thought about these decisions. The decisions in both cases drew dissents on the basis that s. 7 of the Charter does not empower the judiciary to ensure the substantive fairness of criminal offences and on the basis that Parliament was justified in using the threat of a murder conviction in an attempt to deter violence and the use of firearms during the commission of serious offences such as robbery and sexual assault. Willis might well have supported these criticisms because of his scepticism about judicial power. He might have concluded that the dangers of constitutionalizing the ancient doctrine of *mens rea* and allowing a judicial rewriting of many criminal laws outweighed the benefits of striking down even such a savage doctrine.

98 *R. v. Swietlinski*, [1980] 2 S.C.R. 956; *R. v. Vasil*, [1980] 1 S.C.R. 469.

99 *R. v. Farrant*, [1983] 1 S.C.R. 24. See Robert J. Sharpe & Kent Roach, *Brian Dickson: A Judge's Journey* (Toronto: University of Toronto Press, 2003) at 344–6.

100 *Vaillancourt*, supra note 17.

101 *Martineau*, supra note 17.

Even in his 1951 case comment Willis could not resist undermining his own critique of the law by arguing that the administrators of justice would use their common sense and expertise to mitigate the injustice of the law. Even in the area of criminal law, Willis reposed most of his trust on administrators as opposed to either judges or legislators. He expressed confidence that jurors would not impose a murder sentence on accidental killers and that, in any event, Cabinet would commute any death sentence.¹⁰² In this respect, Willis would likely have approved of the Supreme Court's decision in *Latimer*¹⁰³ to uphold a mandatory life sentence for murder while noting that Cabinet maintains discretion to grant the royal prerogative of mercy. Willis consistently placed his ultimate faith in civil servants rather than in judges or legislators. Few today would have the same faith in or deference to experts. Although the Court struck down the felony murder rule, neither the courts¹⁰⁴ nor the executive¹⁰⁵ came to the rescue of those who had already been convicted and remained in prison because of the unjust offence. Mr Latimer also remains in prison. Indeed, the deep divisions in Canadian society over whether or not he should receive mercy suggest that the world today is more complicated than Willis imagined.

The Supreme Court's activism in striking down the constructive murder offences that Willis believed were unjust marked the high water mark of the Court's activism with respect to the substantive criminal law. After some initial skirmishes in which Wilson J., joined by Dickson C.J. and La Forest J., applied the common law presumption in favour of subjective fault¹⁰⁶ – a presumption that, incidentally, had also been eloquently championed by Cartwright C.J. of *Frey v. Fedoruk* fame¹⁰⁷ – the Court now accepts the use of negligence as a sufficient form of fault for most offences other than murder. Moreover, the Court now cheerfully accepts constructive liability tied to harm, as opposed to fault, for all crimes except murder, attempted murder, and war crimes.¹⁰⁸ In doing so, the Court has drawn a distinction between 'criminal law theory,' as represented by the old common law presumptions, and the minimal 'require-

102 Willis speculated that the law 'will never be more than "law in books." Would a jury acquiesce in convicting in a case where they were satisfied that the killing was really and truly accidental? And even if it did would the Government leave the offender to his fate?' He added that although judges and lawyers might impose a murder sentence, 'in the criminal law, the Government has the last word.' Willis, Case Comment 1951, *supra* note 12 at 795.

103 *R. v. Latimer*, [2001] 1 S.C.R. 3.

104 *R. v. Sarson*, [1996] 2 S.C.R. 223.

105 Gary Trotter, 'Justice, Politics and the Royal Prerogative of Mercy' (2001) 26 *Queen's L.J.* 339.

106 *R. v. Tutton*, [1989] 1 S.C.R. 1392.

107 *Beaver v. The Queen*, [1957] S.C.R. 531.

108 *R. v. DeSousa*, [1992] 2 S.C.R. 944; *R. v. Creighton*, [1993] 3 S.C.R. 3.

ments of the Charter.¹⁰⁹ Although absolute liability violates the fundamental principles under both the common law and the Charter, it has been accepted and legitimated under the Charter, even in the absence of a clear legislative statement, so long as imprisonment is not used as a penalty.¹¹⁰ The refusal to constitutionalize common law presumptions against absolute liability and in favour of subjective fault has led to a state of affairs in which the Charter arguably provides less protection for fault than the common law presumptions that could always be overridden by clear legislative statements.¹¹¹

Common law presumptions in favour of codification and restraint in the criminal law as articulated in cases such as *Frey v. Fedoruk* have fared just as badly under the Charter as have the common law presumptions in favour in fault. In 1992, a union argued that the one remaining common law offence of contempt of court violated s. 7 of the Charter and that the principles of codification and legality articulated in *Frey v. Fedoruk* had been constitutionalized as principles of fundamental justice under s. 7. McLachlin J. for a unanimous Supreme Court dismissed this argument, largely on the circular and positivistic basis that the common law crime had long been exempted from the statutory ban on common law crimes. Although Willis might have applauded the judicial deference in this decision, even he would have recognized that a constitutional requirement of codification would have advanced constitutional principles and not prevented Parliament from enacting broad crimes in an attempt to protect society.

One possible explanation for the Supreme Court's refusal to constitutionalize common law presumptions under the Charter is that the Court has largely read the ability of the government to limit Charter rights out of s. 7 of the Charter. Since 1985, the Supreme Court has indicated, with varying degrees of consistency and emphasis, that a violation of s. 7 of the Charter could be justified under s. 1 of the Charter only in the rarest of circumstances, akin to an emergency.¹¹² This holding has meant that any decision to constitutionalize presumptions of subjective fault or codification under s. 7 would be exempt not only from clear statutory exceptions, as allowed by the common law, but also from s. 1 justifications. The Court has effectively altered the dialogic structure of

109 *Creighton*, *ibid.* at 53.

110 *R. v. Pontes*, [1995] 3 S.C.R. 44.

111 *Beaver*, *supra* note 107; *R. v. Sault Ste. Marie (City of)*, [1978] 2 S.C.R. 1299. See Alan Brudner, 'Guilt under the Charter: The Lure of Parliamentary Supremacy' (1998) 40 *Crim.L.Q.* 287; Kent Roach, *Criminal Law*, 3d ed. (Toronto: Irwin Law, 2004) at 146–53.

112 *Reference re B.C. Motor Vehicles*, [1985] 2 S.C.R. 486; *R. v. Ruzic*, [2001] 1 S.C.R. 687; *United States v. Burns and Rafay*, [2001] 1 S.C.R. 283. The idea that s. 7 rights can be limited under s. 1 only in times of emergency is also at odds with the fact that no emergency is required for legislatures to invoke the s. 33 override.

the Charter, as inspired by the common law, for one and only one Charter right: s. 7 of the Charter. The result, in the criminal law field and elsewhere,¹¹³ has been that courts operating under the burden of judicial supremacy have quickly retreated from their initial bold decisions and have hesitated to constitutionalize even some of the most 'ancient presumptions' recognized by the common law.

Those who share Willis's fears of the judiciary may well applaud the restraint of the Court in interpreting s. 7 of the Charter. Indeed, this restraint may well be justified, given the Court's reluctance to allow s. 1 limitations on s. 7 rights and the difficulty of overriding s. 7 under s. 33 of the Charter. Nevertheless, the result is far from satisfactory. In theory, the courts could still apply the common law presumptions in advance of the Charter argument, but the court's refusal to recognize the common law presumptions as principles of fundamental justice seems to have drained these presumptions of much of their vitality. The courts today give short shrift to the common law presumptions of fault for all offences and of subjective fault for criminal offences.¹¹⁴ They also do not hesitate to interpret both offences and defences in ways that effectively expand the ambit of crimes in a manner that challenges the restriction on the creation of common law crimes.¹¹⁵

Courts today rarely stand up for 'ancient principles' such as the presumption of subjective fault for criminal liability, the presumption of fault for regulatory liability, the principle against judicial creation of crimes or police powers, or the doctrine of strict construction of the criminal law.

Willis would likely have approved of these results, because he was no fan of the common law bill of rights enforced by the courts. But, as Willis's subsequent work reveals, his early fear of the common law was exaggerated, since it ignored the possibility of clear legislative statements that would displace the presumptions. Should the Supreme Court re-evaluate the reading out of s. 1 from s. 7 of the Charter, it should be easier for courts both to recognize the ancient presumptions of respect for rights and create new ones under the Charter. Judges could do so with some confidence that the new presumptions would have to be grounded not simply in their own ideal constitution but in the admittedly

113 For an account of how the reading out of s. 1 from s. 7 contributed to the Court's retreat on standards of procedural fairness in the immigration context since *Singh v. Canada (Minister of Immigration)*, [1985] 1 S.C.R. 177, see Rayner Thwaites, *Review of Ministerial Decisions to Deport on Grounds of National Security in Canada and the UK* (LLM thesis, University of Toronto, 2004) [unpublished].

114 *R. v. 1260448 Ontario Inc.* (2003), 68 O.R. (3d) 51 (C.A.); *R. v. Gingrich and McLean* (1991), 65 C.C.C. (3d) 188 (Ont. C.A.)

115 *R. v. Jobidon*, [1991] 2 S.C.R. 714; *Foundation for Children*, supra note 57; *R. v. Mann*, [2004] 3 S.C.R. 59, 2004 SCC 52.

elastic text of a constitution that was agreed to by the majority of Canadian legislatures. Judges could also recognize these new presumptions in a candid fashion, creating no illusion that they were based on the intent of the legislature. Finally, judges could create new presumptions that the government intended to respect rights, secure in the knowledge that the legislature would retain the ability to justify reasonable limits on such rights through ordinary legislation and without having to resort to the drastic dialogue of the override or to the American practice of changing the Court or the Constitution.

John Willis would likely not have welcomed a robust dialogue between courts and legislatures about rights because of his scepticism both about rights and democracy and about what both judges and legislators could contribute to such a dialogue. Nevertheless, the dialogue between courts and legislatures that Willis recognized, which started with the common law and has now been continued and sharpened under the Charter and other modern bills of rights, can be improved if we are capable of bringing even a half measure of the critical insight and candour that Willis brought to bear when evaluating both judicial and legislative contributions to our ongoing dialogues about the treatment of rights.