THE CONCEPT OF LAW

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VII

FORMALISM AND RULE-SCEPTICISM

1. THE OPEN TEXTURE OF LAW

In any large group general rules, standards, and principles must be the main instrument of social control, and not particular directions given to each individual separately. If it were not possible to communicate general standards of conduct, which multitudes of individuals could understand, without further direction, as requiring from them certain conduct when occasion arose, nothing that we now recognize as law could exist. Hence the law must predominantly, but by no means exclusively, refer to *classes* of person, and to *classes* of acts, things, and circumstances; and its successful operation over vast areas of social life depends on a widely diffused capacity to recognize particular acts, things, and circumstances as instances of the general classifications which the law makes.

Two principal devices, at first sight very different from each other, have been used for the communication of such general standards of conduct in advance of the successive occasions on which they are to be applied. One of them makes a maximal and the other a minimal use of general classifying words. The first is typified by what we call legislation and the second by precedent. We can see the distinguishing features of these in the following simple non-legal cases. One father before going to church says to his son, 'Every man and boy must take off his hat on entering a church.' Another baring his head as he enters the church says, 'Look: this is the right way to behave on such occasions.'

The communication or teaching of standards of conduct by example may take different forms, far more sophisticated than our simple case. Our case would more closely resemble the legal use of precedent, if instead of the child being told on the particular occasion to regard what his father did on entering the church as an example of the right thing to do, the father

assumed that the child would regard him as an authority on proper behaviour, and would watch him in order to learn the way to behave. To approach further the legal use of precedent, we must suppose that the father is conceived by himself and others to subscribe to traditional standards of behaviour and not to be introducing new ones.

Communication by example in all its forms, though accompanied by some general verbal directions such as 'Do as I do', may leave open ranges of possibilities, and hence of doubt, as to what is intended even as to matters which the person seeking to communicate has himself clearly envisaged. How much of the performance must be imitated? Does it matter if the left hand is used, instead of the right, to remove the hat? That it is done slowly or smartly? That the hat is put under the seat? That it is not replaced on the head inside the church? These are all variants of general questions which the child might ask himself: 'In what ways must my conduct resemble his to be right?' 'What precisely is it about his conduct that is to be my guide?' In understanding the example, the child attends to some of its aspects rather than others. In so doing he is guided by common sense and knowledge of the general kind of things and purposes which adults think important, and by his appreciation of the general character of the occasion (going to church) and the kind of behaviour appropriate to it.

In contrast with the indeterminacies of examples, the communication of general standards by explicit general forms of language ('Every man must take off his hat on entering a church') seems clear, dependable, and certain. The features to be taken as general guides to conduct are here identified in words; they are verbally extricated, not left embedded with others in a concrete example. In order to know what to do on other occasions the child has no longer to guess what is intended, or what will be approved; he is not left to speculate as to the way in which his conduct must resemble the example if it is to be right. Instead, he has a verbal description which he can use to pick out what he must do in future and when he must do it. He has only to recognize instances of clear verbal terms, to 'subsume' particular facts under general classificatory heads and draw a simple syllogistic conclusion.

He is not faced with the alternative of choosing at his peril or seeking further authoritative guidance. He has a rule which he can apply by himself to himself.

Much of the jurisprudence of this century has consisted of the progressive realization (and sometimes the exaggeration) of the important fact that the distinction between the uncertainties of communication by authoritative example (precedent), and the certainties of communication by authoritative general language (legislation) is far less firm than this naïve contrast suggests. Even when verbally formulated general rules are used, uncertainties as to the form of behaviour required by them may break out in particular concrete cases. Particular fact-situations do not await us already marked off from each other, and labelled as instances of the general rule, the application of which is in question; nor can the rule itself step forward to claim its own instances. In all fields of experience, not only that of rules, there is a limit, inherent in the nature of language, to the guidance which general language can provide. There will indeed be plain cases constantly recurring in similar contexts to which general expressions are clearly applicable ('If anything is a vehicle a motor-car is one') but there will also be cases where it is not clear whether they apply or not. ('Does "vehicle" used here include bicycles, airplanes, roller skates?') The latter are fact-situations, continually thrown up by nature or human invention, which possess only some of the features of the plain cases but others which they lack. Canons of 'interpretation' cannot eliminate, though they can diminish, these uncertainties; for these canons are themselves general rules for the use of language, and make use of general terms which themselves require interpretation. They cannot, any more than other rules, provide for their own interpretation. The plain case, where the general terms seem to need no interpretation and where the recognition of instances seems unproblematic or 'automatic', are only the familiar ones, constantly recurring in similar contexts, where there is general agreement in judgments as to the applicability of the classifying terms.

General terms would be useless to us as a medium of communication unless there were such familiar, generally unchallenged cases. But the variants on the familiar also call for

classification under the general terms which at any given moment constitute part of our linguistic resources. Here something in the nature of a crisis in communication is precipitated: there are reasons both for and against our use of a general term, and no firm convention or general agreement dictates its use, or, on the other hand, its rejection by the person concerned to classify. If in such cases doubts are to be resolved, something in the nature of a choice between open alternatives must be made by whoever is to resolve them.

At this point, the authoritative general language in which a rule is expressed may guide only in an uncertain way much as an authoritative example does. The sense that the language of the rule will enable us simply to pick out easily recognizable instances, at this point gives way; subsumption and the drawing of a syllogistic conclusion no longer characterize the nerve of the reasoning involved in determining what is the right thing to do. Instead, the language of the rule seems now only to mark out an authoritative example, namely that constituted by the plain case. This may be used in much the same way as a precedent, though the language of the rule will limit the features demanding attention both more permanently and more closely than precedent does. Faced with the question whether the rule prohibiting the use of vehicles in the park is applicable to some combination of circumstances in which it appears indeterminate, all that the person called upon to answer can do is to consider (as does one who makes use of a precedent) whether the present case resembles the plain case 'sufficiently' in 'relevant' respects. The discretion thus left to him by language may be very wide; so that if he applies the rule, the conclusion, even though it may not be arbitrary or irrational, is in effect a choice. He chooses to add to a line of cases a new case because of resemblances which can reasonably be defended as both legally relevant and sufficiently close. In the case of legal rules, the criteria of relevance and closeness of resemblance depend on many complex factors running through the legal system and on the aims or purpose which may be attributed to the rule. To characterize these would be to characterize whatever is specific or peculiar in legal reasoning.

Whichever device, precedent or legislation, is chosen for

the communication of standards of behaviour, these, however smoothly they work over the great mass of ordinary cases, will, at some point where their application is in question, prove indeterminate; they will have what has been termed an *open texture*. So far we have presented this, in the case of legislation, as a general feature of human language; uncertainty at the borderline is the price to be paid for the use of general classifying terms in any form of communication concerning matters of fact. Natural languages like English are when so used irreducibly open-textured. It is, however, important to appreciate why, apart from this dependence on language as it actually is, with its characteristics of open texture, we should not cherish, even as an ideal, the conception of a rule so detailed that the question whether it applied or not to a particular case was always settled in advance, and never involved, at the point of actual application, a fresh choice between open alternatives. Put shortly, the reason is that the necessity for such choice is thrust upon us because we are men, not gods. It is a feature of the human predicament (and so of the legislative one) that we labour under two connected handicaps whenever we seek to regulate, unambiguously and in advance, some sphere of conduct by means of general standards to be used without further official direction on particular occasions. The first handicap is our relative ignorance of fact: the second is our relative indeterminacy of aim. If the world in which we live were characterized only by a finite number of features, and these together with all the modes in which they could combine were known to us, then provision could be made in advance for every possibility. We could make rules, the application of which to particular cases never called for a further choice. Everything could be known, and for everything, since it could be known, something could be done and specified in advance by rule. This would be a world fit for 'mechanical' jurisprudence.

Plainly this world is not our world; human legislators can have no such knowledge of all the possible combinations of circumstances which the future may bring. This inability to anticipate brings with it a relative indeterminacy of aim. When we are bold enough to frame some general rule of conduct (e.g. a rule that no vehicle may be taken into the park), the

language used in this context fixes necessary conditions which anything must satisfy if it is to be within its scope, and certain clear examples of what is certainly within its scope may be present to our minds. They are the paradigm, clear cases (the motor-car, the bus, the motor-cycle); and our aim in legislating is so far determinate because we have made a certain choice. We have initially settled the question that peace and quiet in the park is to be maintained at the cost, at any rate, of the exclusion of these things. On the other hand, until we have put the general aim of peace in the park into conjunction with those cases which we did not, or perhaps could not, initially envisage (perhaps a toy motor-car electrically propelled) our aim is, in this direction, indeterminate. We have not settled, because we have not anticipated, the question which will be raised by the unenvisaged case when it occurs: whether some degree of peace in the park is to be sacrificed to, or defended against, those children whose pleasure or interest it is to use these things. When the unenvisaged case does arise, we confront the issues at stake and can then settle the question by choosing between the competing interests in the way which best satisfies us. In doing so we shall have rendered more determinate our initial aim, and shall incidentally have settled a question as to the meaning, for the purposes of this rule, of a general word.

Different legal systems, or the same system at different times, may either ignore or acknowledge more or less explicitly such a need for the further exercise of choice in the application of general rules to particular cases. The vice known to legal theory as formalism or conceptualism consists in an attitude to verbally formulated rules which both seeks to disguise and to minimize the need for such choice, once the general rule has been laid down. One way of doing this is to freeze the meaning of the rule so that its general terms must have the same meaning in every case where its application is in question. To secure this we may fasten on certain features present in the plain case and insist that these are both necessary and sufficient to bring anything which has them within the scope of the rule, whatever other features it may have or lack, and whatever may be the social consequences of applying the rule in this way. To do this is to secure a measure of certainty or

predictability at the cost of blindly prejudging what is to be done in a range of future cases, about whose composition we are ignorant. We shall thus indeed succeed in settling in advance, but also in the dark, issues which can only reasonably be settled when they arise and are identified. We shall be forced by this technique to include in the scope of a rule cases which we would wish to exclude in order to give effect to reasonable social aims, and which the open-textured terms of our language would have allowed us to exclude, had we left them less rigidly defined. The rigidity of our classifications will thus war with our aims in having or maintaining the rule.

The consummation of this process is the jurists' 'heaven of concepts'; this is reached when a general term is given the same meaning not only in every application of a single rule, but whenever it appears in any rule in the legal system. No effort is then ever required or made to interpret the term in the light of the different issues at stake in its various recurrences.

In fact all systems, in different ways, compromise between two social needs: the need for certain rules which can, over great areas of conduct, safely be applied by private individuals to themselves without fresh official guidance or weighing up of social issues, and the need to leave open, for later settlement by an informed, official choice, issues which can only be properly appreciated and settled when they arise in a concrete case. In some legal systems at some periods it may be that too much is sacrificed to certainty, and that judicial interpretation of statutes or of precedent is too formal and so fails to respond to the similarities and differences between cases which are visible only when they are considered in the light of social aims. In other systems or at other periods it may seem that too much is treated by courts as perennially open or revisable in precedents, and too little respect paid to such limits as legislative language, despite its open texture, does after all provide. Legal theory has in this matter a curious history; for it is apt either to ignore or to exaggerate the indeterminacies of legal rules. To escape this oscillation between extremes we need to remind ourselves that human inability to anticipate the future, which is at the root of this

indeterminacy, varies in degree in different fields of conduct, and that legal systems cater for this inability by a corresponding variety of techniques.

Sometimes the sphere to be legally controlled is recognized from the start as one in which the features of individual cases will vary so much in socially important but unpredictable respects, that uniform rules to be applied from case to case without further official direction cannot usefully be framed by the legislature in advance. Accordingly, to regulate such a sphere the legislature sets up very general standards and then delegates to an administrative, rule-making body acquainted with the varying types of case, the task of fashioning rules adapted to their special needs. Thus the legislature may require an industry to maintain certain standards: to charge only a *fair rate* or to provide *safe systems* of work. Instead of leaving the different enterprises to apply these vague standards to themselves, at the risk of being found to have violated them *ex post facto*, it may be found best to defer the use of sanctions for violations until the administrative body has by regulation specified what, for a given industry, is to count as a 'fair rate' or a 'safe system'. This rule-making power may be exercisable only after something like a judicial inquiry into the facts about the particular industry, and a hearing of arguments pro and con a given form of regulation.

Of course even with very general standards there will be plain indisputable examples of what does, or does not, satisfy them. Some extreme cases of what is, or is not, a 'fair rate' or a 'safe system' will always be identifiable *ab initio*. Thus at one end of the infinitely varied range of cases there will be a rate so high that it would hold the public up to ransom for a vital service, while yielding the entrepreneurs vast profits; at the other end there will be a rate so low that it fails to provide an incentive for running the enterprise. Both these in different ways would defeat any possible aim we could have in regulating rates. But these are only the extremes of a range of different factors and are not likely to be met in practice; between them fall the difficult real cases requiring attention. The anticipatable combinations of relevant factors are few, and this entails a relative indeterminacy in our initial aim of a fair rate or a safe system, and a need for further official

choice. In these cases it is clear that the rule-making authority must exercise a discretion, and there is no possibility of treating the question raised by the various cases as if there were one uniquely correct answer to be found, as distinct from an answer which is a reasonable compromise between many conflicting interests.

A second similar technique is used where the sphere to be controlled is such that it is impossible to identify a class of specific actions to be uniformly done or forborne and to make them the subject of a simple rule, yet the range of circumstances, though very varied, covers familiar features of common experience. Here common judgments of what is 'reasonable' can be used by the law. This technique leaves to individuals, subject to correction by a court, the task of weighing up and striking a reasonable balance between the social claims which arise in various unanticipatable forms. In this case they are required to conform to a variable standard *before* it has been officially defined, and they may learn from a court only *ex post facto* when they have violated it, what, in terms of specific actions or forbearances, is the standard required of them. Where the decisions of the court on such matters are regarded as precedents, their specification of the variable standard is very like the exercise of delegated rule-making power by an administrative body, though there are also obvious differences.

The most famous example of this technique in Anglo-American law is the use of the standard of due care in cases of negligence. Civil, and less frequently criminal, sanctions may be applied to those who fail to take reasonable care to avoid inflicting physical injuries on others. But what is reasonable or due care in a concrete situation? We can, of course, cite typical examples of due care: doing such things as stopping, looking, and listening where traffic is to be expected. But we are all well aware that the situations where care is demanded are hugely various and that many other actions are now required besides, or in place of, 'stop, look, and listen'; indeed these may not be enough and might be quite useless if looking would not help to avert the danger. What we are striving for in the application of standards of reasonable care is to ensure (1) that precautions will be taken which

will avert substantial harm, yet (2) that the precautions are such that the burden of proper precautions does not involve too great a sacrifice of other respectable interests. Nothing much is sacrificed by stopping, looking, and listening unless of course a man bleeding to death is being driven to the hospital. But owing to the immense variety of possible cases where care is called for, we cannot *ab initio* foresee what combinations of circumstances will arise nor foresee what interests will have to be sacrificed or to what extent, if precaution against harm is to be taken. Hence it is that we are unable to consider, before particular cases arise, precisely what sacrifice or compromise of interests or values we wish to make in order to reduce the risk of harm. Again, our aim of securing people against harm is indeterminate till we put it in conjunction with, or test it against, possibilities which only experience will bring before us; when it does, then we have to face a decision which will, when made, render our aim *pro tanto* determinate.

Consideration of these two techniques throws into relief the characteristics of those wide areas of conduct which are successfully controlled *ab initio* by rule, requiring specific actions, with only a fringe of open texture, instead of a variable standard. They are characterized by the fact that certain distinguishable actions, events, or states of affairs are of such practical importance to us, as things either to avert or bring about, that very few concomitant circumstances incline us to regard them differently. The crudest example of this is the killing of a human being. We are in a position to make a rule against killing instead of laying down a variable standard ('due respect for human life'), although the circumstances in which human beings kill others are very various: this is so because very few factors appear to us to outweigh or make us revise our estimate of the importance of protecting life. Almost always killing, as it were, *dominates* the other factors by which it is accompanied, so when we rule it out in advance as 'killing', we are not blindly prejudging issues which require to be weighed against each other. Of course there are exceptions, factors which override this usually dominant one. There is killing in self-defence and other forms of justifiable homicide. But these are few and identifiable in relatively simple terms; they are admitted as exceptions to a general rule.

It is important to notice that the dominant status of some easily identifiable action, event, or state of affairs may be, in a sense, conventional or artificial, and not due to its 'natural' or 'intrinsic' importance to us as human beings. It does not matter which side of the road is prescribed by the rule of the road, nor (within limits) what formalities are prescribed for the execution of a conveyance; but it does matter very much that there should be an easily identifiable and uniform procedure, and so a clear right and wrong on these matters. When this has been introduced by law the importance of adhering to it is, with few exceptions, paramount; for relatively few attendant circumstances could outweigh it and those that do may be easily identifiable as exceptions and reduced to rule. The English law of real property very clearly illustrates this aspect of rules.

The communication of general rules by authoritative examples brings with it, as we have seen, indeterminacies of a more complex kind. The acknowledgement of precedent as a criterion of legal validity means different things in different systems, and in the same system at different times. Descriptions of the English 'theory' of precedent are, on certain points, still highly contentious: indeed even the key terms used in the theory, '*ratio decidendi*', 'material facts', 'interpretation', have their own penumbra of uncertainty. We shall not offer any fresh general description, but merely attempt to characterize briefly, as we have in the case of statute, the area of open texture and the creative judicial activity within it.

Any honest description of the use of precedent in English law must allow a place for the following pairs of contrasting facts. *First*, there is no single method of determining the rule for which a given authoritative precedent is an authority. Notwithstanding this, in the vast majority of decided cases there is very little doubt. The head-note is usually correct enough. *Secondly*, there is no authoritative or uniquely correct formulation of any rule to be extracted from cases. On the other hand, there is often very general agreement, when the bearing of a precedent on a later case is in issue, that a given formulation is adequate. *Thirdly*, whatever authoritative status a rule extracted from precedent may have, it is compatible with the exercise by courts that are bound by it of the

following two types of creative or legislative activity. On the one hand, courts deciding a later case may reach an opposite decision to that in a precedent by narrowing the rule extracted from the precedent, and admitting some exception to it not before considered, or, if considered, left open. This process of 'distinguishing' the earlier case involves finding some legally relevant difference between it and the present case, and the class of such differences can never be exhaustively determined. On the other hand, in following an earlier precedent the courts may discard a restriction found in the rule as formulated from the earlier case, on the ground that it is not required by any rule established by statute or earlier precedent. To do this is to widen the rule. Notwithstanding these two forms of legislative activity, left open by the binding force of precedent, the result of the English system of precedent has been to produce, by its use, a body of rules of which a vast number, of both major and minor importance, are as determinate as any statutory rule. They can now only be altered by statute, as the courts themselves often declare in cases where the 'merits' seem to run counter to the requirements of the established precedents.

The open texture of law means that there are, indeed, areas of conduct where much must be left to be developed by courts or officials striking a balance, in the light of circumstances, between competing interests which vary in weight from case to case. None the less, the life of the law consists to a very large extent in the guidance both of officials and private individuals by determinate rules which, unlike the applications of variable standards, do *not* require from them a fresh judgment from case to case. This salient fact of social life remains true, even though uncertainties may break out as to the applicability of any rule (whether written or communicated by precedent) to a concrete case. Here at the margin of rules and in the fields left open by the theory of precedents, the courts perform a rule-producing function which administrative bodies perform centrally in the elaboration of variable standards. In a system where *stare decisis* is firmly acknowledged, this function of the courts is very like the exercise of delegated rule-making powers by an administrative body. In England this fact is often obscured by forms: for the courts

often disclaim any such creative function and insist that the proper task of statutory interpretation and the use of precedent is, respectively, to search for the 'intention of the legislature' and the law that already exists.

2. VARIETIES OF RULE-SCEPTICISM

We have discussed at some length the open texture of law because it is important to see this feature in a just perspective. Failure to do justice to it will always provoke exaggerations which will obscure other features of law. In every legal system a large and important field is left open for the exercise of discretion by courts and other officials in rendering initially vague standards determinate, in resolving the uncertainties of statutes, or in developing and qualifying rules only broadly communicated by authoritative precedents. None the less these activities, important and insufficiently studied though they are, must not disguise the fact that both the framework within which they take place and their chief end-product is one of general rules. These are rules the application of which individuals can see for themselves in case after case, without further recourse to official direction or discretion.

It may seem strange that the contention that rules have a central place in the structure of a legal system could ever be seriously doubted. Yet 'rule-scepticism', or the claim that talk of rules is a myth, cloaking the truth that law consists simply of the decisions of courts and the prediction of them, can make a powerful appeal to a lawyer's candour. Stated in an unqualified general form, so as to embrace both secondary and primary rules, it is indeed quite incoherent; for the assertion that there are decisions of courts cannot consistently be combined with the denial that there are any rules at all. This is so because, as we have seen, the existence of a court entails the existence of secondary rules conferring jurisdiction on a changing succession of individuals and so making their decisions authoritative. In a community of people who understood the notions of a decision and a prediction of a decision, but not the notion of a rule, the idea of an *authoritative* decision would be lacking and with it the idea of a court. There would be nothing to distinguish the decision of a private person from that of a court. We might try to eke out, with the notion

of 'habitual obedience', the deficiencies of predictability of decision as a foundation for the authoritative jurisdiction required in a court. But if we do this we shall find that the notion of a habit suffers, for this purpose, from all the inadequacies which came to light when in Chapter IV we considered it as a substitute for a rule conferring legislative powers.

In some more moderate versions of the theory it may be conceded that if there are to be courts there must be legal rules which constitute them, and these themselves cannot therefore be simply predictions of the decisions of courts. Little headway can, however, in fact be made with this concession alone. For it is an assertion characteristic of this type of theory that statutes are not law until applied by courts but only sources of law, and this is inconsistent with the assertion that the only rules that exist are those required to constitute courts. There must also be secondary rules conferring legislative powers on changing successions of individuals. For the theory does not deny that there are statutes; indeed it cites them as mere 'sources' of law, and only denies that statutes are law until applied by courts.

These objections though important and, against an incautious form of the theory, well taken, do not apply to it in all forms. It may well be that rule-scepticism was never intended as a denial of the existence of secondary rules conferring judicial or legislative power, and was never committed to the claim that these could be shown to be nothing more than decisions or predictions of decisions. Certainly, the examples on which this type of theory has most often relied are drawn from rules imposing duties or conferring rights or powers on private individuals. Yet, even if we suppose the denial that there are rules and the assertion that what are called rules are merely predictions of the decisions of courts to be limited in this way, there is one sense, at least, in which it is obviously false. For it cannot be doubted that at any rate in relation to some spheres of conduct in a modern state individuals do exhibit the whole range of conduct and attitudes which we have called the internal point of view. Laws function in their lives not merely as habits or the basis for predicting the decisions of courts or the actions of other officials, but as accepted legal standards of behaviour. That is, they not only do

with tolerable regularity what the law requires of them, but they look upon it as a legal standard of conduct, refer to it in criticizing others, or in justifying demands, and in admitting criticism and demands made by others. In using legal rules in this normative way they no doubt assume that the courts and other officials will continue to decide and behave in certain regular and hence predictable ways, in accordance with the rules of the system; but it is surely an observable fact of social life that individuals do not confine themselves to the external point of view, recording and predicting the decisions of courts or the probable incidence of sanctions. Instead they continuously express in normative terms their shared acceptance of the law as a guide to conduct. We have considered at length in Chapter III the claim that nothing more is meant by normative terms such as 'obligation' than a prediction of official behaviour. If, as we have argued, that claim is false, legal rules function as such in social life: they are *used* as rules not as descriptions of habits or predictions. No doubt they are rules with an open texture and at the points where the texture is open, individuals can only predict how courts will decide and adjust their behaviour accordingly.

Rule-scepticism has a serious claim on our attention, but only as a theory of the function of rules in judicial decision. In this form, while conceding all the objections to which we have drawn attention, it amounts to the contention that, so far as the courts are concerned, there is nothing to circumscribe the area of open texture: so that it is false, if not senseless, to regard judges as themselves subject to rules or 'bound' to decide cases as they do. They may act with sufficient predictable regularity and uniformity to enable others, over long periods, to live by courts' decisions as rules. Judges may even experience feelings of compulsion when they decide as they do, and these feelings may be predictable too; but beyond this there is nothing which can be characterized as a rule which they observe. There is nothing which courts treat as standards of correct judicial behaviour, and so nothing in that behaviour which manifests the internal point of view characteristic of the acceptance of rules.

The theory in this form draws support from a variety of considerations of very different weight. The rule-sceptic is

sometimes a disappointed absolutist; he has found that rules are not all they would be in a formalist's heaven, or in a world where men were like gods and could anticipate all possible combinations of fact, so that open texture was not a necessary feature of rules. The sceptic's conception of what it is for a rule to exist, may thus be an unattainable ideal, and when he discovers that it is not attained by what are called rules, he expresses his disappointment by the denial that there are, or can be, any rules. Thus the fact that the rules, which judges claim bind them in deciding a case, have an open texture, or have exceptions not exhaustively specifiable in advance, and the fact that deviation from the rules will not draw down on the judge a physical sanction are often used to establish the sceptic's case. These facts are stressed to show that 'rules are important so far as they help you to predict what judges will do. That is all their importance except as pretty playthings.'[1]

To argue in this way is to ignore what rules actually are in any sphere of real life. It suggests that we are faced with the dilemma: 'Either rules are what they would be in the formalist's heaven and they bind as fetters bind; or there are no rules, only predictable decisions or patterns of behaviour.' Yet surely this is a false dilemma. We promise to visit a friend the next day. When the day comes it turns out that keeping the promise would involve neglecting someone dangerously ill. The fact that this is accepted as an adequate reason for not keeping the promise surely does not mean that there is no rule requiring promises to be kept, only a certain regularity in keeping them. It does not follow from the fact that such rules have exceptions incapable of exhaustive statement, that in every situation we are left to our discretion and are never bound to keep a promise. A rule that ends with the word 'unless . . .' is still a rule.

Sometimes the existence of rules binding on courts is denied, because the question whether a person, in acting in a certain way, thereby manifested his acceptance of a rule requiring him so to act, is confused with psychological questions as to the processes of thought through which the person

[1] Llewellyn, *The Bramble Bush* (2nd edn.), p. 9.

went before or in acting. Very often when a person accepts a rule as binding and as something he and others are not free to change, he may see what it requires in a given situation quite intuitively, and do that without first thinking of the rule and what it requires. When we move a piece in chess in accordance with the rules, or stop at a traffic light when it is red, our rule-complying behaviour is often a direct response to the situation, unmediated by calculation in terms of the rules. The evidence that such actions are genuine applications of the rule is their setting in certain circumstances. Some of these precede the particular action and others follow it: and some of them are stateable only in general and hypothetical terms. The most important of these factors which show that in acting we have applied a rule is that *if* our behaviour is challenged we are disposed to justify it by reference to the rule: and the genuineness of our acceptance of the rule may be manifested not only in our past and subsequent general acknowledgements of it and conformity to it, but in our criticism of our own and others' deviation from it. On such or similar evidence we may indeed conclude that if, before our 'unthinking' compliance with the rule, we had been asked to say what the right thing to do was and why, we would, if honest, have cited the rule in reply. It is this setting of our behaviour among such circumstances, and not its accompaniment by explicit thought of the rule, that is necessary to distinguish an action which is genuinely an observance of a rule from one that merely happens to coincide with it. It is thus that we would distinguish, as a compliance with an accepted rule, the adult chess-player's move from the action of the baby who merely pushed the piece into the right place.

This is not to say that pretence or 'window dressing' is not possible and sometimes successful. Tests for whether a person has merely pretended *ex post facto* that he acted on a rule are, like all empirical tests, inherently fallible but they are not inveterately so. It is possible that, in a given society, judges might always first reach their decisions intuitively or 'by hunches', and then merely choose from a catalogue of legal rules one which, they pretended, resembled the case in hand; they might then claim that this was the rule which they regarded as requiring their decision, although nothing else

in their actions or words suggested that they regarded it as a rule binding on them. Some judicial decisions may be like this, but it is surely evident that for the most part decisions, like the chess-player's moves, are reached either by genuine effort to conform to rules consciously taken as guiding standards of decision or, if intuitively reached, are justified by rules which the judge was antecedently disposed to observe and whose relevance to the case in hand would generally be acknowledged.

The last but most interesting form of rule-scepticism does not rest either on the open character of legal rules or on the intuitive character of many decisions; but on the fact that the decision of a court has a unique position as something authoritative, and in the case of supreme tribunals, final. This form of the theory, to which we shall devote the next section, is implicit in Bishop Hoadly's famous phrase echoed so often by Gray in *The Nature and Sources of Law*, 'Nay whoever hath an absolute authority to interpret any written or spoken laws it is he who is the lawgiver to all intents and purposes and not the person who first wrote or spake them.'

3. FINALITY AND INFALLIBILITY IN JUDICIAL DECISION

A supreme tribunal has the last word in saying what the law is and, when it has said it, the statement that the court was 'wrong' has no consequences within the system: no one's rights or duties are thereby altered. The decision may, of course, be deprived of legal effect by legislation, but the very fact that resort to this is necessary demonstrates the empty character, so far as the law is concerned, of the statement that the court's decision was wrong. Consideration of these facts makes it seem pedantic to distinguish, in the case of a supreme tribunal's decisions, between their finality and infallibility. This leads to another form of the denial that courts in deciding are ever bound by rules: 'The law (or the constitution) is what the courts say it is.'

The most interesting and instructive feature of this form of the theory is its exploitation of the ambiguity of such statements as 'the law (or the constitution) is what the courts say it is', and the account which the theory must, to be consistent,

give of the relation of non-official statements of law to the official statements of a court. To understand this ambiguity, we shall turn aside to consider its analogue in the case of a game. Many competitive games are played without an official scorer: notwithstanding their competing interests, the players succeed tolerably well in applying the scoring rule to particular cases; they usually agree in their judgments, and unresolved disputes may be few. Before the institution of an official scorer, a statement of the score made by a player represents, if he is honest, an effort to assess the progress of the game by reference to the particular scoring rule accepted in that game. Such statements of the score are internal statements applying the scoring rule, which though they presuppose that the players will, in general, abide by the rules and will object to their violation, are not statements or predictions of these facts.

Like the changes from a regime of custom to a mature system of law, the addition to the game of secondary rules providing for the institution of a scorer whose rulings are final, brings into the system a new kind of internal statement; for unlike the players' statements as to the score, the scorer's determinations are given, by secondary rules, a status which renders them unchallengeable. In *this* sense it is true that for the purposes of the game 'the score is what the scorer says it is'. But it is important to see that the scoring *rule* remains what it was before and it is the scorer's duty to apply it as best he can. 'The score is what the scorer says it is' would be false if it meant that there was no rule for scoring save what the scorer in his discretion chose to apply. There might indeed be a game with such a rule, and some amusement might be found in playing it if the scorer's discretion were exercised with some regularity; but it would be a different game. We may call such a game the game of 'scorer's discretion'.

It is plain that the advantages of quick and final settlement of disputes, which a scorer brings, are purchased at a price. The institution of a scorer may face the players with a predicament: the wish that the game should be regulated, as before, by the scoring rule and the wish for final authoritative decisions as to its application, where it is doubtful, may turn out to be conflicting aims. The scorer may make honest

mistakes, be drunk or may wantonly violate his duty to apply the scoring rule to the best of his ability. He may for any of these reasons record a 'run' when the batsman has never moved. Provision may be made for correcting his rulings by appeal to a higher authority: but this must end somewhere in a final, authoritative judgment, which will be made by fallible human beings and so will carry with it the same risk of honest mistake, abuse, or violation. It is impossible to provide by rule for the correction of the breach of every rule.

The risk inherent in setting up an authority to make final authoritative applications of rules may materialize in any sphere. Those that might materialize in the humble sphere of a game are worth consideration, since they show, in a particularly clear fashion, that some of the inferences drawn by the rule-sceptic ignore certain distinctions which are necessary for the understanding of this form of authority wherever it is used. When an official scorer is established and his determinations of the score are made final, statements as to the score made by the players or other non-officials have no status within the game; they are irrelevant to its result. If they happen to coincide with the scorer's statement, well and good; if they conflict, they must be neglected in computing the result. But these very obvious facts would be distorted if the players' statements were classified as predictions of the scorer's rulings, and it would be absurd to explain the neglect of these statements, when they conflicted with the scorer's rulings, by saying that they were predictions of those rulings which had turned out to be false. The player, in making his own statements as to the score after the introduction of an official scorer, is doing what he did before: namely, assessing the progress of the game, as best he can, by reference to the scoring rule. This, too, is what the scorer himself, so long as he fulfils the duties of his position, is also doing. The difference between them is not that one is predicting what the other will say, but that the players' statements are unofficial applications of the scoring rule and hence have no significance in computing the result; whereas the scorer's statements are authoritative and final. It is important to observe that if the game played were 'scorer's discretion' then the relationship between unofficial and official statements would

necessarily be different: the players' statements not only *would* be a prediction of the scorer's rulings but *could* be nothing else. For in that case 'the score is what the scorer says it is' would itself be the scoring *rule*; there would be no possibility of the players' statements being merely unofficial versions of what the scorer does officially. Then the scorer's rulings would be both final and infallible—or rather the question whether they were fallible or infallible would be meaningless; for there would be nothing for him to get 'right' or 'wrong'. But in an ordinary game 'the score is what the scorer says it is' is not the scoring rule: it is a rule providing for the authority and finality of his application of the scoring rule in particular cases.

The second lesson to be learnt from this example of authoritative decision touches more fundamental matters. We are able to distinguish a normal game from the game of 'scorer's discretion' simply because the scoring rule, though it has, like other rules, its area of open texture where the scorer has to exercise a choice, yet has a core of settled meaning. It is this which the scorer is not free to depart from, and which, so far as it goes, constitutes the standard of correct and incorrect scoring, both for the player, in making his unofficial statements as to the score, and for the scorer in his official rulings. It is this that makes it true to say that the scorer's rulings are, though final, not infallible. The same is true in law.

Up to a certain point, the fact that some rulings given by a scorer are plainly wrong is not inconsistent with the game continuing: they count as much as rulings which are obviously correct; but there is a limit to the extent to which tolerance of incorrect decisions is compatible with the continued existence of the same game, and this has an important legal analogue. The fact that isolated or exceptional official aberrations are tolerated does not mean that the game of cricket or baseball is no longer being played. On the other hand, if these aberrations are frequent, or if the scorer repudiates the scoring rule, there must come a point when either the players no longer accept the scorer's aberrant rulings or, if they do, the game has changed. It is no longer cricket or baseball but 'scorer's discretion'; for it is a defining feature of these other games that, in general, their results should be assessed in the way demanded by the plain meaning of the rule, whatever

latitude its open texture may leave to the scorer. In some imaginable condition we should say that in truth the game being played was 'scorer's discretion' but the fact that in all games the scorer's rulings are final does not mean that that is what all games are.

These distinctions should be borne in mind when we are appraising the form of rule-scepticism that rests on the unique status of a court's decision as a final, authoritative statement of what the law is in a particular case. The open texture of law leaves to courts a law-creating power far wider and more important than that left to scorers, whose decisions are not used as law-making precedents. Whatever courts decide, both on matters lying within that part of the rule which seems plain to all, and those lying on its debatable border, stands till altered by legislation; and over the interpretation of that, courts will again have the same last authoritative voice. None the less there still remains a distinction between a constitution which, after setting up a system of courts, provides that the law shall be whatever the supreme court thinks fit, and the actual Constitution of the United States—or for that matter the constitution of any modern State. 'The constitution (or the law) is whatever the judges say it is', if interpreted as denying this distinction, is false. At any given moment judges, even those of a supreme court, are parts of a system the rules of which are determinate enough at the centre to supply standards of correct judicial decision. These are regarded by the courts as something which they are not free to disregard in the exercise of the authority to make those decisions which cannot be challenged within the system. Any individual judge coming to his office, like any scorer coming to his, finds a rule, such as the rule that the enactments of the Queen in Parliament are law, established as a tradition and accepted as the standard for the conduct of that office. This circumscribes, while allowing, the creative activity of its occupants. Such standards could not indeed continue to exist unless most of the judges of the time adhered to them, for their existence at any given time consists simply in the acceptance and use of them as standards of correct adjudication. But this does not make the judge who uses them the author of these standards, or in Hoadly's language the 'lawgiver' competent to

decide as he pleases. The adherence of the judge is required to maintain the standards, but the judge does not make them.

It is, of course, possible that behind the shield of the rules which make judicial decisions final and authoritative, judges might combine in rejecting the existing rules and cease to regard even the clearest Acts of Parliament as imposing any limits on their decisions. If the majority of their rulings were of this character and were accepted this would amount to a transformation of the system parallel to the conversion of a game from cricket to 'scorer's discretion'. But the standing possibility of such transformations does not show that the system now is what it would be if the transformation took place. No rules can be guaranteed against breach or repudiation; for it is never psychologically or physically impossible for human beings to break or repudiate them; and if enough do so for long enough, then the rules will cease to exist. But the existence of rules at any given time does not require that there should be these impossible guarantees against destruction. To say that at a given time there is a rule requiring judges to accept as law Acts of Parliament or Acts of Congress entails first, that there is general compliance with this requirement and that deviation or repudiation on the part of individual judges is rare; secondly, that when or if it occurs it is or would be treated by a preponderant majority as a subject of serious criticism and as wrong, even though the result of the consequent decision in a particular case cannot, because of the rule as to the finality of decisions, be counteracted except by legislation which concedes its validity though not its correctness. It is logically possible that human beings might break all their promises: at first, perhaps, with the sense that this was the wrong thing to do, and then with no such sense. Then the rule which makes it obligatory to keep promises would cease to exist; this would, however, be a poor support for the view that no such rule exists at present and that promises are not really binding. The parallel argument in the case of judges, based on the possibility of their engineering the destruction of the present system, is no stronger.

Before we leave the topic of rule-scepticism we must say a last word about its positive contention that rules are the predictions of courts' decisions. It is plain and has often been

remarked that whatever truth there may be in this, it can at best apply to the statements of law ventured by private individuals or their advisers. It cannot apply to the courts' own statements of a legal rule. These must either be, as some extremer 'Realists' claimed, a verbal covering for the exercise of an unfettered discretion, or they must be the formulation of rules genuinely regarded by the courts from the internal point of view as a standard of correct decision. On the other hand, predictions of judicial decisions have undeniably an important place in the law. When the area of open texture is reached, very often all we can profitably offer in answer to the question: 'What is the law on this matter?' is a guarded prediction of what the courts will do. Moreover, even where what the rules require is clear to all, the statement of it may often be made in the form of a prediction of the courts' decision. But it is important to notice that predominantly in the latter case, and to a varying degree in the former, the basis for such prediction is the knowledge that the courts regard legal rules not as predictions, but as standards to be followed in decision, determinate enough, in spite of their open texture, to limit, though not to exclude, their discretion. Hence, in many cases, predictions of what a court will do are like the prediction we might make that chess-players will move the bishop diagonally: they rest ultimately on an appreciation of the non-predictive aspect of rules, and of the internal point of view of the rules as standards accepted by those to whom the predictions relate. This is only a further aspect of the fact already stressed in Chapter V that, though the existence of rules in any social group renders predictions possible and often reliable, it cannot be identified with them.

4. UNCERTAINTY IN THE RULE OF RECOGNITION

Formalism and rule-scepticism are the Scylla and Charybdis of juristic theory; they are great exaggerations, salutary where they correct each other, and the truth lies between them. Much indeed that cannot be attempted here needs to be done to characterize in informative detail this middle path, and to show the varied types of reasoning which courts characteristically use in exercising the creative function left to them by the open texture of law in statute or precedent. But we have

said enough in this chapter to enable us to resume, with profit, the important topic deferred at the end of Chapter VI. This concerned the uncertainty, not of particular legal rules but of the rule of recognition and so of the ultimate criteria used by courts in identifying valid rules of law. The distinction between the uncertainty of a particular rule, and the uncertainty of the criterion used in identifying it as a rule of the system, is not itself, in all cases, a clear one. But it is clearest where the rules are statutory enactments with an authoritative text. The words of a statute and what it requires in a particular case may be perfectly plain; yet there may be doubts as to whether the legislature has power to legislate in this way. Sometimes the resolution of these doubts requires only the interpretation of another rule of law which conferred the legislative power, and the validity of this may not be in doubt. This will be the case, for example, where the validity of an enactment made by a subordinate authority is in question, because doubts arise as to the meaning of the parent Act of Parliament defining the subordinate authority's legislative powers. This is merely a case of the uncertainty or open texture of a particular statute and raises no fundamental question.

To be distinguished from such ordinary questions are those concerning the legal competence of the supreme legislature itself. These concern the ultimate criteria of legal validity; and they can arise even in a legal system like our own, in which there is no written constitution specifying the competence of the supreme legislature. In the overwhelming majority of cases the formula 'Whatever the Queen in Parliament enacts is law' is an adequate expression of the rule as to the legal competence of Parliament, and is accepted as an ultimate criterion for the identification of law, however open the rules thus identified may be at their periphery. But doubts can arise as to its meaning or scope; we can ask what is meant by 'enacted by Parliament' and when doubts arise they may be settled by the courts. What inference is to be drawn as to the place of courts within a legal system from the fact that the ultimate rule of a legal system may thus be in doubt and that courts may resolve the doubt? Does it require some qualification of the thesis that the foundation of a legal system is an accepted rule of recognition specifying the criteria of legal validity?

To answer these questions we shall consider here some aspects of the English doctrine of the sovereignty of Parliament, though, of course, similar doubts can arise in relation to ultimate criteria of legal validity in any system. Under the influence of the Austinian doctrine that law is essentially the product of a legally untrammelled will, older constitutional theorists wrote as if it was a logical necessity that there should be a legislature which was sovereign, in the sense that it is free, at every moment of its existence as a continuing body, not only from legal limitations imposed *ab extra*, but also from its own prior legislation. That Parliament is sovereign in this sense may now be regarded as established, and the principle that no earlier Parliament can preclude its 'successors' from repealing its legislation constitutes part of the ultimate rule of recognition used by the courts in identifying valid rules of law. It is, however, important to see that no necessity of logic, still less of nature, dictates that there should be such a Parliament; it is only one arrangement among others, equally conceivable, which has come to be accepted with us as the criterion of legal validity. Among these others is another principle which might equally well, perhaps better, deserve the name of 'sovereignty'. This is the principle that Parliament should *not* be incapable of limiting irrevocably the legislative competence of its successors but, on the contrary, should have this wider self-limiting power. Parliament would then at least once in its history be capable of exercising an even larger sphere of legislative competence than the accepted established doctrine allows to it. The requirement that at every moment of its existence Parliament should be free from legal limitations including even those imposed by itself is, after all, only one interpretation of the ambiguous idea of legal omnipotence. It in effect makes a choice between a *continuing* omnipotence in all matters not affecting the legislative competence of successive parliaments, and an unrestricted *self-embracing* omnipotence the exercise of which can only be enjoyed once. These two conceptions of omnipotence have their parallel in two conceptions of an omnipotent God: on the one hand, a God who at every moment of his existence enjoys the same powers and so is incapable of cutting down those powers, and, on the other, a God whose powers include the power

to destroy for the future his omnipotence. Which form of omnipotence—continuing or self-embracing—our Parliament enjoys is an empirical question concerning the form of rule which is accepted as the ultimate criterion in identifying the law. Though it is a question about a rule lying at the base of a legal system, it is still a question of fact to which at any given moment of time, on some points at least, there may be a quite determinate answer. Thus it is clear that the presently accepted rule is one of continuing sovereignty, so that Parliament cannot protect its statutes from repeal.

Yet, as with every other rule, the fact that the rule of parliamentary sovereignty is determinate at this point does not mean that it is so at all points. Questions can be raised about it to which at present there is no answer which is clearly right or wrong. These can be settled only by a choice, made by someone to whose choices in this matter authority is eventually accorded. Such indeterminacies in the rule of parliamentary sovereignty present themselves in the following way. It is conceded under the present rule that Parliament cannot by statute irrevocably withdraw any topic from the scope of future legislation by Parliament; but a distinction may be drawn between an enactment simply purporting to do that and one which, while leaving it still open to Parliament to legislate on any topic, purports to alter the 'manner and form' of legislation. The latter may, for example, require that on certain issues no legislation shall be effective unless it is passed by a majority of the two Houses sitting together, or unless it is confirmed by a plebiscite. It may 'entrench' such a provision by the stipulation that the provision itself can be repealed only by the same special process. Such a partial alteration in the legislative process may well be consistent with the present rule that Parliament cannot irrevocably bind its successors; for what it does is not so much to *bind* successors, as to eliminate them *quoad* certain issues and transfer their legislative powers over these issues to the new special body. So it may be said that, in relation to these special issues, Parliament has not 'bound' or 'fettered' Parliament or diminished its continuing omnipotence, but has 'redefined' Parliament and what must be done to legislate.

Plainly, if this device were valid, Parliament could achieve

by its use very much the same results as those which the accepted doctrine, that Parliament cannot bind its successors, seems to put beyond its power. For though, indeed, the difference between circumscribing the area over which Parliament can legislate, and merely changing the manner and form of legislation, is clear enough in some cases, in effect these categories shade into each other. A statute which, after fixing a minimum wage for engineers, provided that no bill concerning engineers' pay should have effect as law unless confirmed by resolution of the Engineers' Union and went on to entrench this provision, might indeed secure all that, in practice, could be done by a statue which fixed the wage 'for ever', and then crudely prohibited its repeal altogether. Yet an argument, which lawyers would recognize as having some force, can be made to show that although the latter would be ineffective under the present rule of continuing parliamentary sovereignty, the former would not. The steps of the argument consist of a succession of contentions as to what Parliament can do, each of which would command less assent than its predecessor though having some analogy with it. None of them can be ruled out as wrong or accepted with confidence as right; for we are in the area of open texture of the system's most fundamental rule. Here at any moment a question may arise to which there is no answer—only answers.

Thus it might be conceded that Parliament might irrevocably alter the present constitution of Parliament by abolishing the House of Lords altogether, and so going beyond the Parliament Acts of 1911 and 1949 which dispensed with its consent to certain legislation and which some authorities prefer to interpret as a mere revocable delegation of some of Parliament's powers to the Queen and Commons. It might also be conceded, as Dicey asserted,[1] that Parliament could destroy itself totally, by an Act declaring its powers at an end and repealing the legislation providing for the election of future Parliaments. If so, Parliament might validly accompany this legislative suicide by an Act transferring all its powers to some other body, say the Manchester Corporation. If it can do this, cannot it effectually do something less? Can it not put

[1] *The Law of the Constitution* (10th edn.), p. 68 n.

an end to its powers to legislate on certain matters and transfer these to a new composite entity which includes itself and some further body? On this footing may not section 4 of the Statute of Westminster, providing for the consent of a Dominion to any legislation affecting it, actually have done this in relation to Parliament's powers to legislate for a Dominion? The contention that this can effectively be repealed without the consent of the Dominion may not only, as Lord Sankey said, be 'theory' which 'has no relation to realities'. It may be bad theory—or at least no better than the opposite one. Finally, if Parliament can be reconstituted in these ways by its own action, why cannot it reconstitute itself by providing that the Engineers' Union shall be a necessary consenting element in certain types of legislation?

It is quite possible that some of the questionable propositions which constitute the doubtful, but not obviously mistaken, steps in this argument, will one day be endorsed or rejected by a court called on to decide the matter. Then we shall have an answer to the questions which they raise, and that answer, so long as the system exists, will have a unique authoritative status among the answers which might be given. The courts will have made determinate at this point the ultimate rule by which valid law is identified. Here 'the constitution is what the judges say it is' does *not* mean merely that particular decisions of supreme tribunals cannot be challenged. At first sight the spectacle seems paradoxical: here are courts exercising creative powers which settle the ultimate criteria by which the validity of the very laws, which confer upon them jurisdiction as judges, must itself be tested. How can a constitution confer authority to say what the constitution is? But the paradox vanishes if we remember that though every rule may be doubtful at some points, it is indeed a necessary condition of a legal system existing, that not every rule is open to doubt on all points. The possibility of courts having authority at any given time to decide these limiting questions concerning the ultimate criteria of validity, depends merely on the fact that, at that time, the application of those criteria to a vast area of law, including the rules which confer that authority, raises no doubts, though their precise scope and ambit do.

This answer, however, may to some seem too short a way with the question. It may appear to characterize very inadequately the activity of courts on the fringes of the fundamental rules which specify the criteria of legal validity; this may be because it assimilates the activity too closely to ordinary cases where courts exercise a creative choice in interpreting a particular statute which has proved indeterminate. It is clear that such ordinary cases must arise in any system, and so it seems obviously to be part, even if only an implied part, of the rules on which courts act that courts have jurisdiction to settle them by choosing between the alternatives which the statute leaves open, even if they prefer to disguise this choice as a discovery. But, at least in the absence of a written constitution, questions concerning the fundamental criteria of validity often seem *not* to have this previously envisageable quality, which makes it natural to say that, when they arise, the courts already have, under the existing rules, a clear authority to settle questions of this sort.

One form of 'formalist' error may perhaps just be that of thinking that every step taken by a court is covered by some general rule conferring in advance the authority to take it, so that its creative powers are *always* a form of delegated legislative power. The truth may be that, when courts settle previously unenvisaged questions concerning the most fundamental constitutional rules, they *get* their authority to decide them accepted after the questions have arisen and the decision has been given. Here all that succeeds is success. It is conceivable that the constitutional question at issue may divide society too fundamentally to permit of its disposition by a judicial decision. The issues in South Africa concerning the entrenched clauses of the South Africa Act, 1909, at one time threatened to be too divisive for legal settlement. But where less vital social issues are concerned, a very surprising piece of judicial law-making concerning the very sources of law may be calmly 'swallowed'. Where this is so, it will often in *retrospect* be said, and may genuinely appear, that there always was an 'inherent' power in the courts to do what they have done. Yet this may be a pious fiction, if the only evidence for it is the success of what has been done.

The manipulation by English courts of the rules concerning

the binding force of precedent is perhaps most honestly described in this last way as a successful bid to take powers and use them. Here power acquires authority *ex post facto* from success. Thus before the decision of the Court of Criminal Appeal in *Rex* v. *Taylor*[1] the question whether that court had authority to rule that it was not bound by its own precedents on matters concerning the liberty of the subject might have appeared entirely open. But the ruling was made and is now followed as law. The statement that the court always had an inherent power to rule in this way would surely only be a way of making the situation look more tidy than it really is. Here, at the fringe of these very fundamental things, we should welcome the rule-sceptic, as long as he does not forget that it is at the fringe that he is welcome; and does not blind us to the fact that what makes possible these striking developments by courts of the most fundamental rules is, in great measure, the prestige gathered by courts from their unquestionably rule-governed operations over the vast, central areas of the law.

[1] [1950] 2 KB 368.