TENTH WILFRED FULLAGAR MEMORIAL LECTURE: THE PAST AND THE FUTURE OF JUDGE-MADE LAW*

S. F. C. MILSOM**

Many years ago an English student law society was addressed by a much-respected judge on the merits of judge-made law; and at the end questions were invited. There followed one of those silences in which the students are gripped by shyness and the senior members rack empty brains. This time it was broken by a student: did the speaker not agree, he asked, that for judges to make law was very undemocratic. It is the faces that I chiefly remember; the embarrassment of most of the company; the unthinking confidence of the questioner; the hunted look of the speaker as he wondered how to explain, without unkindness, that democracy had nothing to do with the matter. Perhaps the scene really lodged in the mind of a legal historian as a kind of *tableau* of changing assumptions. Almost the first thing an English law student is taught is that the law springs from two comparable sources, that judges make it in somehow the same sense, though not at all the same way, as Parliament. What he is not told is how recent that understanding of things is.

The largest legal changes are precisely in the understanding of things, in the assumptions upon which the system rests. And since it is the point of assumptions that one does not think about them, it follows that the largest changes are never visible until they are all over. The legal historian is generally tolerated by lawyers on a false basis: he is thought somehow to testify that all the wisdom of the ages is behind the present arrangements. But in fact the only distinctive service he can do for his own day is to raise doubts. And my aim in this lecture is to say something of the different mechanisms by which, as a matter of history, law has been in some sense "made" in legal proceedings, and then to wonder whether some ancient and beneficent process is indeed continuing.

The starting-point is a distinction which has been resisting formulation in speculative literature for centuries, and which today is lost for practical men behind jurisprudential dispute about the basis of any law. But in the framework within which the common law first grew, it was practical enough. There were two kinds of legal question: questions about the arrangements

* Delivered at Monash University on Wednesday 5th August 1981.
** Professor of Law and Fellow of St. John's College, Cambridge; Visiting Professor of Law, Monash University.

of life, which might require human adjustment, and questions about right and wrong which were beyond human reach.[1]

Let us begin with the arrangements of life. Battles must be won and food harvested; and if fighting men and ploughmen held land of their lords in return for their service, then questions presented themselves to lords' courts not in the terms of ownership of property but in those of management; and the customs of such a court were more like good managerial practices than rules of law. They were of course understood to have some more authoritative basis; and at least at the higher levels of society, the customs were largely seen as general and as resting upon the obligations of good faith imported by the almost sacramental act of homage. You could, for example, get rid of the tenant who failed in his obligation of loyal service, and take back the land which you had allocated to him by way of pay. But by custom he had tenure in the modern sense, so that you could do this only by due process, by the judgment of your court which consisted of all his peers, his equals as tenant. Again the custom was that when your tenant died you gave the place—land and job—to his eldest son. But suppose the eldest son was incapable; perhaps your court decided to pass him over as though he did not exist, and give the place to his younger brother; or perhaps it agreed to give it to the younger brother immediately, but upon the terms that when he came to die it would go to the issue (if any) of the incapable elder brother. In all this the court was in ultimate control, dealing as best it could with the situations that life threw up. The customs might give rise to confident expectations: but there were no rights and no law beyond what the court actually decided. Jurists of the realist school would have felt at home; and so perhaps, since these were decisions of all those affected, would the student of my recollection who worried about democracy.

But all this was transmuted into something very different by economic and jurisdictional changes. Instead of buying men with land, you bought land with money. To the tenant, his holding ceased to appear as an income conditional upon his performing a real service, and became instead a capital which was unconditionally his; and managerial discretions in the lord fell away—or in some cases were pushed. The power to get rid of a tenant, for example, finally disappeared because the King's courts would interfere at his instance to enforce upon lords' courts their own ancient customs of due process; and the enforcement was so rigorous that lords contented themselves with lesser means of securing what were now just fixed economic rights in the nature of servitudes. Nor was such control the end of the jurisdictional change: from holding lords' courts to their own customs, the King's courts took to deciding all disputes themselves. And the customs,

1 For the historical matter which follows see S. F. C. Milsom, *Historical Foundations of the Common Law* (2nd ed., London, Butterworths, 1981).

which had been criteria for decisions of a managerial nature, had then to work in a world in which there was no management. They worked very differently. What had been a custom whereby on the death of a tenant the lord would ordinarily give the place to his eldest son now became an inflexible rule conferring a direct legal right. Not only must the eldest son always inherit, capable or not: it became an automatic event transacting itself in some juristic sky, and the lord had not even a formal part to play.

The change cuts deeper yet. Managerial questions are about what to do now, but law is not confined to the present tense. That automatic event must have happened in the sky to give something to the eldest son a century ago, although some mishap on the ground had given the land itself to his younger brother. Lawyers were driven to think of some sort of ownership and of its devolution; and such concepts can raise new puzzles affecting the future as well as the past. Consider the kind of arrangement mentioned in connection with the incapable elder son, which had become common in many situations: land was to go to A for life and then (say) to the heir of B. It had been in the nature of an agreement, something that the management now agreed that it would implement in the future. There is nothing arcane about that; and it raised no intellectual problems. But in its new habitat there was no management: if the arrangement was to survive, as unfortunately it did, it could only be as a present grant reaching into the future. That was magic enough, but even magic can make difficulties: if the grant was to A for life and then to the heir of B, where was that ownership now, if B was still alive and his heir unknown? Was it still lurking in the grantor, or could it subsist in the clouds?

Of course I have chosen a particularly absurd question to make my point. But I did not invent it. The King's judges really worried about it, and others like it: and it is largely to worrying of that nature that we owe our earliest considerable body of "judge-made law". What had happened—although of course nobody at the time could see it in the way I am describing it—was that the judges found themselves in charge of a great many rules which were not of their own making; and the only terms on which they could treat them were those of intellectual coherence. They were making sense, not of people's lives, but of rules and concepts. And so the practical arrangements of a feudal society were embalmed in logic, having only the kind of flexibility that tax planners exemplify today: the law could be manipulated, but it could not directly respond to changing needs. Landowners were indeed forced to provide for many of their needs by withdrawing land from these rules altogether, and to reintroduce a managerial capability for themselves by handing it over to friends whom they could trust to carry out their instructions. Much of the future lay there—and a weird future some of it was. But that underlying logical structure was to last until now. I like to think that a splendid denunciation

by the greatest of legal historians had something to do with the final abolition of the heir-at-law.[2] But that was done as recently as 1925; and far too much of the ancient apparatus survives in many common law jurisdictions today. I have an uncomfortable theory that once any body of law can be written out in a text-book, it is incapable of true response; and there was what can be regarded as a text-book of the land law as early as the fifteenth century.[3]

For text-books of contract, tort and crime, however, you have to wait until the nineteenth century; and we now turn back to that other kind of legal question, questions about right and wrong. Such law-suits also moved, more gradually, from communal to royal courts; but, though some damaging oddities resulted from the move, there was no transformation such as that from feudal custom to instant law. There were indeed no substantive customs to transform, only customs about proof. Law-suits worked at first in the King's courts as they had been working for centuries in community meetings. The plaintiff made his claim in set terms, the defendant denied it at large, and this general issue was put to proof—not evidence to convince somebody, but an oath on the one side or the other to be submitted to supernatural test. If he had killed by accident, perhaps the ordeal would declare him Not Guilty: but accident was not a question for the court. There were no degrees of homicide or laws about *mens rea.* There was just a claim for unlawful killing, perhaps understood to rest upon some clause in a code like "Thou shalt not kill"; and lawyers had nothing to do with that.

The critical happening here was independent of jurisdiction, and may have happened at other times to trigger development in other systems of law. The supernatural tests were replaced by human deciding mechanisms, in England by juries; and jurors can be puzzled or misled. Should they say "Guilty" or "Not Guilty" if their man had killed by accident? The single rules that would in the nineteenth century be assembled into text-books mostly came into being slowly and piecemeal in consequence of that second Fall of Man. Questions about right and wrong were asked, and somebody had to answer them. But who, and how? Was this law really made by judges, and if so where did they get it from?

A realistic answer would require separate examination of each of the procedural contexts in which questions could arise; and it is important to remember that even in those in which the historian can see the judges as most clearly "making law", the judges themselves were thinking in procedural rather than in substantive terms. Here it will be possible only to mention the most important. In principle it would be for the judges alone to decide any questions arising on the pleadings, that is to say about the

[2] F. W. Maitland, "The Law of Real Property" (1879) *Westminster Review*, reprinted *Collected Papers*, Vol. I, p. 162.
[3] Littleton's *Tenures.*

formal propriety of the plaintiff's claim or the defendant's defence. In the Middle Ages it was rare for any but the established claims to be made. The first questions, those reflected in the earliest law reports known as the year books, were about novel kinds of defence; and they were being put up precisely because jurors could be misled. The defendant sued for battery by the trespasser he had ejected would be in obvious danger if he pleaded that previously invariable Not Guilty; and he sought to confess the battery and avoid liability by express reliance upon his justification. It was the chance that jurors would say Guilty just because he had done the deed that induced judges to allow such departures from the old general denial, and it was that rather than "the law" that they were worrying about. But still in sanctioning such pleas they were writing little sentences—few and easy ones—that would centuries later find their place in a text-book of torts; and their answers seem essentially to have been those of common sense.

The converse process, the appearance in substantial numbers of novel claims, was brought about in the sixteenth century by changes having in themselves little to do with jury trial. On the one hand the allocation of work as between the King's central courts and local jurisdictions now depended largely upon a fixed monetary limit; and the falling value of money brought in a flood of small claims, some of which were put in ways new at least to the King's courts. And on the other hand, to an extent that is only now becoming apparent, the events surrounding the Reformation brought in claims of a nature previously at home in the church courts. But there was no preliminary filter: personal actions could by this time generally be commenced without a writ; and anyway the Chancery would now seal almost any writ presented to it, leaving the defendant to contest its validity in court if he chose. In the common sequence of events, a defendant would first plead the general issue and try his luck with a jury; and the jury, as we shall see, might exercise hidden influence on these new claims. But the defendant who lost with the jury could still take advantage of a procedural relaxation which was then relatively new. He could by "motion in arrest of judgment" make what was in effect an *ex post facto* objection to the intrinsic validity of the claim. To that question, the verdict actually obtained was irrelevant: it was for the judges alone to decide whether the plaintiff had a good cause of action on the facts as he had formally stated them in the document initiating his case. They were not concerned with truth or—and the importance of this will appear in a moment—with untruth. Nor of course were they often deciding upon right and wrong in the abstract. Most of the wrongs alleged were in principle familiar in other jurisdictions; and the question was often not whether this was a wrong, but whether it was a wrong the King's court should remedy in this way. But substantial bodies of the common law were indeed "made"

by this mechanism, most obviously the tort of defamation and the doctrine of consideration in contract; and though both were later forced into more or less systematic frameworks, both exhibit some of the catalogue-like quality which, as this lecture will later suggest, may be associated with judges making law directly out of raw facts.

Consideration in contract, however, introduces another and more startling aspect of this flood of novel claims, and another dimension to "judge-made law". These new claims did more than establish themselves in areas with which the common law had not previously dealt: they came to supplant the old remedies of the common law itself, and the process appears to involve the most extraordinary formal dishonesty. One example must serve for all. In the old action which a creditor would bring against his debtor, one of the ancient tests still survived: the debtor could in effect swear himself out of liability; and the end of the story is that that action was replaced by another which had to go to jury trial. But that end was not imagined, let alone intended, when the new action was first used. One version can best be seen in the context of the new actions for defamation, among which injury to mercantile credit played a part. Suppose a debtor to be in default; and when his creditor threatens to sue he makes the kind of specific promise for payment on a future date that hard-pressed debtors often do make. And now suppose that the creditor, relying on that promise, contracts to purchase other goods from a third party, which he intends to pay for with the money he will have from his debtor. The debtor lets the creditor down; the creditor has to let the third party down; the third party goes about telling others not to trust the creditor; and the creditor sues the debtor for that injury to his mercantile standing. It is a genuine cause of action in something like the modern tort of deceit; and it has nothing to do with the action to recover the original debt itself. But by the end of the century it (with many variants) is being used for just that purpose, and the promise to pay and the third party have receded into fiction. It was a development bitterly opposed by the conservatives—who are always the good lawyers. But they were defeated, as I believe, in this and in all the parallel developments, by jurors out to do justice. Until the eighteenth century—for the most part, indeed, until the nineteenth—damages were entirely for the jury's decision. Not only were there no rules about measure: there was no way of discovering how a jury had made their measurement. But the juridical difference between my two claims can only manifest itself in figures: so much is the amount of the debt, and so much for the injury to the plaintiff's credit. In a claim for the second, the plaintiff should not recover the first. But juries gave it to him, and everybody knew it. And so "the plaintiff in this action on the case . . . should not recover only damages for the special loss (if any be) which he had, but also for the whole debt". Those are the words in which Coke recorded the victory of

the newer action; and they enabled the judges to remove what had become the obvious anomaly by ruling that the one action would bar the other.[4] But who had brought about the change? Clever lawyers? Not really. Once it became clear that juries were reckoning the debt in their award of damages, lawyers were almost under a duty to their clients to put the claim in this way. The judges were concerned only with the propriety of the claim on the facts as stated, not with the truth of those statements. If they were not true, all the defendant could do was to deny liability, and throw the matter to the jury. And the jurors probably had no idea that they were spoiling the symmetry of the law by finding as they did; but they knew very well that they were doing justice between the parties.

And that brings me to the last and most fruitful of the mechanisms by which law became explicit, namely the direction to the jury. Our very language betrays our own assumption about the relationship. The judge "directs" or "instructs" the jury; and sometimes we speak of jury "nullification", by which we generally mean the acquittal of a man who did the act charged because the jury, however carefully "directed" on the law, do not think it is fair. Our vision assumes, as it were, a text-book on the judge's desk. But that book was the end product of this process; and that cannot have been the relationship before there was any book.

Of even the elementary historical facts we know too little. For administrative reasons, the trial of an issue of fact by a jury did not take place before the full court which had presided over the pleadings and which would, when the verdict was reported to it, give judgment. The trial was delegated to a single judge and separated in time and place; and it was of no interest to reporters. It is the point that whatever happened at that stage was not "law". For centuries all that we have is the clerk's enrolment of the bare verdict. Nor did the full court itself have anything more: there was reported to it just the answer "Guilty, to the plaintiff's damage of so much" or "Not Guilty"; and that was all it needed to give judgment.

Common sense suggests that the trial judge must sometimes have been asked for guidance if, for example, the defendant had done the deed while drunk. But the most such dialogues can have done was to contribute to professional tradition among lawyers. They could not create law until they could formally be made the basis of a judgment by the full court; and it was not until the seventeenth century that it became regularly possible, at the stage at which the verdict was reported to the full court, to raise any questions about the basis upon which it had been reached. Various mechanisms then came into being, of which the simplest was the "motion for a new trial" on the ground that the judge had misdirected the jury: the defendant, for example, had produced evidence that the harm was accidental and the judge had told the jury that that was legally irrelevant.

[4] *Slade's* case (1602) 4 Co. Rep. 92b, 94b; 76 E.R. 1074, 1077.

Nor is the previous blankness of the verdict just a small fact about the history of the common law. There could be no law about all those questions which had been left to the jury within the general issue. The opportunities for departing from it, for making a special plea, had been remarkably limited; and the guiding principle had been the risk of confusing jurors, and not what modern lawyers would regard as the intrinsic importance of the question. Why is it, for example, that questions of fault in the law of torts are not discussed in law reports until the seventeenth century—and mostly much later? Is it really that civilisation was only then dawning, dispelling some primitive darkness of "absolute liability"? Of course not. The questions had always been there, among all the other questions left to juries in the general issue. But it was only now that they were becoming questions of law.

This basic fact about the late emergence of so large a proportion of the possible legal questions is, I hope, by now familiar to legal historians. I have been boring them about it for some time.[5] But consider its implications for our assumption that the answers to all those questions became "judge-made law". It is true that the full courts made them into law when they articulated the answers in judgments concerning, for example, the propriety of the single judge's direction. But where did they get the answers from? Were they, and was the single judge, evolving them by some process of introspection? Had they suddenly annexed right and wrong to themselves? Surely not. The answers were not first given by judges at all. So long as the questions were understood to be for the jury, he was not telling them: he was helping them to focus their own ideas of right and wrong. There are still traces in the law today. The reasonable man, for example, first lived in directions to juries, where he was indeed an aid to focussing their minds. Nor did he begin as a sort of Mr Average: in legal English the word "reason" was slow to lose its French connotations, and the reasonable man began as the rightful man. What lawyers first articulated, and then appropriated, had begun as something more than the decent instincts of society: it had been the same right and wrong that had once been brought to bear within ordeals, then found by jurors searching their conscience.

The appropriation of right and wrong by lawyers led into another process. As enough individual propositions of law became, as it were, explicit, there was the intellectual impulse to fit them together into a system; and as with the land law four centuries earlier, the end of that was the exposition of substantive rules of law as an object of study for their own sake in textbooks. The whole of the law was becoming seen as a discipline akin to mathematics, in which answers could often be worked out; and for better or worse intellectual coherence was now a criterion in its own right. There

[5] See also S. F. C. Milsom, "Law and Fact in Legal Development" (1967) 17 *Uni. Toronto L.J.* 1.

followed, culminating in the late nineteenth century, a kind of golden age. Propositions were being made explicit and fitted into a framework; and there must have been that wonderful sense of finding right answers that comes to those who do crossword puzzles, and sometimes even to scholars. In today's climate, perhaps it is only an insistently literal mind like mine that can believe in the sincerity of all those judges who used to say they were not making law, only finding it. But I believe in it, and believe also that our modern view of judge-made law is possible only in a society which understands itself to have grown out of ideas like right and wrong. But I anticipate.

That golden age can itself be seen as the end of a cycle of legal development. Right and wrong had been captured and written down in books. The logical thing to do then, as some lawyers at the time thought, was to write them down in a code, so that ordinary people could see and understand at least the basic principles of the law. But most lawyers supposed that development would go on; and for them there was a different logical thing to do, as some thought in England and many more in the United States. Text-books could hardly be banned, but they could be treated as without authority, no more than slightly disreputable cramming aids for students facing examinations.[6] English judges for a time clung to the whimsical barrier that living authors could not be cited to them; but in England, and I think in the whole common law world, though least of all in the United States, text-books have been allowed to get the upper hand. And in England, at any rate, we have the worst of both worlds. The text-books do nothing to make the law accessible to ordinary people; but the systems they perpetuate are as constricting as any code.

I shall leave my golden age with one last observation. It is about the texture of the law, the strength and simplicity of its judgments. Consider *Rylands* v. *Fletcher* just over a century ago. A new problem had arisen about fault in the law of torts; and of course I have chosen it as one aspect of a wider problem to which this lecture will return. If a large-scale operation is carried on with all due care, but is such that accident may bring large-scale disaster to outsiders, who should bear the loss if such accident befalls? For the particular kind of situation before them, the Court of Exchequer Chamber gave a clear answer in a judgment occupying ten printed pages, and the House of Lords affirmed it in six, citing three cases.[7]

Comparisons are odious, and I hope I shall not be understood just as saying that there were giants in those days. But compare reports since, say, the Second World War. Decisions of that order of magnitude are not found. Longer judgments cite more cases to settle smaller questions less clearly. Sometimes indeed the reader (or at least one reader) finishes without

[6] See for example Sir Frederick Pollock, *A First Book of Jurisprudence for Students of the Common Law* (2nd ed., London, Macmillan 1904) p. 312 fn. 1.
[7] (1866) L.R. 1 Exch. 265; (1868) L.R. 3 H.L. 330.

knowing quite what has been settled, sure only that the intention was not to be "wrong" in the sense of being inconsistent with the numerous authorities discussed. It is an intellectual process, and a very expensive one. And just as the growing mass of authority adds to the running expense of the process, so does the expense add a moralistic force to authority: since litigation is ruinous, it is argued, the worst thing a judge can do is to introduce any uncertainty about what is already settled. The abdication of responsibility for adjustment to change would perhaps be a price worth paying if one could be sure of what seems to be the underlying hypothesis, namely that each point decided reduces the number of possible legal disputes. But if, as I fear, the process is essentially one of descent into lower levels of detail, then each detail settled will allow yet smaller details to come into question, and the benefit is largely illusory.

But the historian should stick to his past; and my aim is to enquire whether this change in the texture of judge-made law can be related to other changes. Firstly there is a series of mechanical changes all intended only to make the system cheaper and more efficient. One of them is too obvious to need much discussion. Reorganization of our courts in the later nineteenth century produced for the first time a single hierarchy; and authority has not since been kept in check as in most other great common law countries by a multiplicity of jurisdictions. The same reorganization made a change which is less obviously relevant. The old full courts were abolished, their effective place being taken by the Court of Appeal; and the single judge, who previously had just presided over the jury trial, became in his sole person a sitting of the court. Before this change a few reporters had begun to interest themselves in his doings; but such reports were understood to be of little authority. It is otherwise now: judge-made law is the product of many individuals working separately, and not just of more or less stable groups; and the number of reportable decisions is of course greatly increased.

Nor is it just that the single judge decides without colleagues on the bench. He now also decides civil cases without a jury; and I believe this to be a far more important change. Of course nobody had anything in mind except to make law-suits cheaper. After all, the law was now written out in books, and it seemed wasteful to make the judge explain it to the jury so that they could apply it to the facts that they would find, when judges could find the facts just as well for themselves. But the consequence, I believe, was that the common law broke, without noticing, through a natural boundary between law and fact, and began that descent into ever lower levels of detail. The boundary had been the need to explain to laymen all the law possibly involved in a dispute within a reasonable compass, and on the basis that it was then for the laymen to decide what the facts actually were and to apply to them the law so explained. Roman

lawyers will see an analogy with the formulary system. It was the need to comprehend all the factual possibilities within a direction which the laymen could understand and remember that kept the law at a certain level of abstraction, and made for simplicity and strength. But today's judge finds his own facts and finds them first; and then he can pick upon any detail and make it legally relevant to his decision.

In one sense of course, it makes no difference to the realities of deciding the individual dispute. Somebody must apply his mind to the details. But under the old system the law itself was stated in terms which left the details to the discretion of the jury; for them, the question might be whether the defendant had behaved as a reasonable man. The weight given to the details was confined to the jury room, and not stated in the verdict or fed back into the system to make new law. Today's judge, however, has a book which lists all the things that his predecessors have decided the reasonable man does or does not do, and the details upon which he now picks will add to the list, add another little rule to the law. The question is whether society or justice is served by this particularisation.

One mechanism of adjustment to the times must surely be lost. Rules stated in terms which left details to discretion were, so to speak, "index-linked". The jury's reasonable man, for example, was a standard which changed automatically with the times. But if you write down all the things he should and should not do, you have rules that can be changed only by legislation. Detailed statement makes for rigidity. But there is a more important aspect of this, one which introduces another change in the texture of judge-made law; and this change has nothing to do with procedure. The law that had to be reducible to directions to laymen had to be law which they could understand and respect, which laymen could feel under some moral duty to obey. But can we really think today that ordinary people go about trying to obey the law of torts? On the contrary, if there is an accident followed by a law-suit, the loser commonly regards the law-suit as a blow of fate as capricious as the accident itself. The judge, talking only to other lawyers, does not have to and does not state the law in terms acceptable to laymen. Nor is this just a matter of inadvertence, a lapse from simple statement because it was the discipline of formulating directions that kept statements simple. There is an independent change in quality. To an increasing extent the law is indeed no longer about how people should behave, but about whose insurance company should pay.

I am not quite changing the subject in turning to another possible loss suffered by the law with the disappearance of jury trial. It carried an inherent ability to adjust only so far as the law was stated in terms which, like the "reasonable man", left juries to apply their own standards. But it was also a means by which ordinary people could at least signal to lawyers their sense that adjustment was needed. In the last days of civil juries in

England, judges and other lawyers kept grumbling that tort actions were going wrong: there was no evidence of such fault in the defendants as would make them liable according to the law in the books, but the verdict had gone against them apparently because they were a rich corporation or because the jury had somehow learnt that they were insured. It was a form of "nullification". But instead of grumbling, perhaps those lawyers should have wondered about the law in the books. Perhaps the message of those juries was essentially the same as one that in England we are now picking up at second-hand from across the oceans, and considering whether to embody in legislation. Modern technology has made fault hard to locate, and capable of causing damage out of all proportion to the fault itself; and the law of torts everywhere is moving away from fault and towards utilitarian considerations like who can be expected to insure. The particular changes which have followed in other common law jurisdictions, and which may follow in England, would hardly be possible without legislation. Even vision and strength like that behind *Rylands* v. *Fletcher*[8] could hardly have overcome *Donoghue* v. *Stevenson*[9] to reach to "product liability" and other recent manifestations of the "no-fault" idea. But still those juries might have made us think.

My present concern, however, is not so much with legal adjustment as with the change in the nature of the law shown by these developments. Even in those areas of the law which were "judge-made" in the usually accepted sense, we seem indeed to have grown out of right and wrong. Instead of justice between man and man in the single case, we think in utilitarian terms or those of social good. But it has been a thesis of this lecture that nobody saw judges as making right and wrong: they were articulating, or in their own language "finding", something absolute. And to that kind of "judge-made law", the worry of my student questioner about democracy was irrelevant indeed. But utilitarian considerations and those of social good belong to that other kind of legal question from which this lecture started, and to which the whole body of the law is now returning: questions are about the arrangements of life, and they require a response which is partly managerial. What is the place of judge-made law with such questions? One possible answer is for judges to accept the responsibility in full: to treat authority as no more than an argument, and openly to take account of other arguments based upon policy considerations. We know it can be done, but perhaps only on the basis of a constitution which is understood to commit a new absolute right and wrong to the care of the judiciary. The logical alternative is to accept the student's dogma in full, and to see judges as applying but not making law. The practical consequence would be a measure of codification, followed no doubt by the growth of a

[8] Ibid.
[9] [1932] A.C. 562.

new but less cumbersome case law about the interpretation of the code. But again we seem in England to have the worst of both worlds by carrying on upon the old assumptions. It is understood that judges do make law; but they almost always bow to that student of mine and say that its adjustment is not their business. Legislative resources, in time and otherwise, are insufficient. And the great apparatus of case law remains in being although it can do little more than refine authority into yet further detail.

But the serious harm is not just in ineffective adjustment to change. It is in the loss of moral authority suggested by the student's question, a loss which I have mostly discussed in terms of the disappearance of the civil jury, although of course the shift from a moral basis for the law itself had its own separate causes. English judges are now confronted by a task incomparably more important than any further development of their traditional areas, precisely because of the changed basis and texture of the law. Most legislation today does not adjust the law in the traditional sense. It withdraws matters from it, and hands them over to managerial bodies. The logical end of the "no-fault" movement in torts has already been demonstrated: you can simply abolish much of your law of torts, and have the job done by a system of national insurance. Or consider what is happening in England to that law of real property which crystallised out so early. Nobody now really thinks of bringing it up to date: but it is beginning to slip into irrelevance. The real economic interests in a piece of land depend increasingly not upon the formal legal rights, but upon the decisions of the planning committee, the rent control officer, and similar authorities. And that itself is only a part of the process by which the traditional forms of property are losing importance to the institutions by which people really live, the national health service, social insurance benefits and the like. At different speeds, much of the Western world is moving back to dependent structures of which the feudal unit was a simple model. In such a structure the obligations of society are not between man and equal man: they are, as it were, in the vertical dimension, between manager and managed, between those with the power to allocate and those with some entitlement to allocation. So long as the legislature casts those entitlements in terms of definite rules and rights, of course, there is no problem about judicial control. But one of the pressures behind the whole shift is that which has pushed the law itself off principles and into details. Complexity defies specification. There are too many details, too many possible factors; and in the end you have to leave it to somebody's discretion. In this respect, too, the fevered imagination of the historian can see history running backwards: but now the discretion is that of administrators, not juries. But juries were generally thought to do justice in a way which may be beyond the most detailed rule of law. Let me make my point in terms of a dreadful heresy. The more you refine your law of

taxation to stop avoidance, the more you catch situations which might more justly have been left alone, and the more economic distortion you produce as people arrange their affairs with an eye to the revenue rather than the natural market. But you do not stop avoidance, or produce among people at large the belief that justice is being done. Society pays a great price for its rule of law in this area, not least in disrespect for the law itself. Perhaps even in so central a citadel it would be wiser and more just to accept guidelines for a discretion rather than a capricious multitude of rules, and to concentrate the law upon ensuring that the discretion is properly exercised.

It is in such control that the important future lies for judge-made law. A historian who has in his time tried to teach more law than he ever knew, remembers wondering what it was about administrative law that made it more absorbing than any of the traditional subjects. It is today's legal history. Such control can of course only be procedural, exactly the kind of due process by which, as I believe, the King's courts first imposed control upon feudal courts more than eight centuries ago. But history was on their side then. And the due process which they used as their instrument, the judgment of peers, was not their creation: it was universally accepted in feudal custom. Our judges, beginning from slender materials and to that extent unconstrained by authority, have already worked elementary ideas of fairness up into an impressive body of law. The question is whether, in a secular world and without the external authority of a fundamental document, they will be understood as articulating a new right and wrong for the new relationships of society.