MACCABAEAN LECTURE IN JURISPRUDENCE

POLITICAL JUDGES AND THE RULE OF LAW

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1. *Two questions and two ideals*

THIS lecture is about two questions, and the connections between them. The first is a practical question about how judges do and should decide hard cases. Do judges in the United States and Great Britain make political decisions? Should their decisions be political? Of course the decisions that judges make *must* be political in one sense. In many cases a judge's decision will be approved by one political group and disliked by others, because these cases have consequences for political controversies. In the United States, for example, the Supreme Court must decide important constitutional issues that are also political issues, like the issue whether accused criminals have procedural rights that make law enforcement more difficult. In Britain the courts must decide cases that demand an interpretation of labour legislation, like cases about the legality of secondary picketing, when the TUC favours one interpretation and the CBI another. I want to ask, however, whether judges should decide cases on political *grounds*, so that the decision is not only the decision that certain political groups would wish, but is taken on the ground that certain principles of political morality are right. A judge who decides on political grounds, of course, is not deciding on grounds of party politics. He does not decide in favour of the interpretation sought by the unions because he is (or was) a member of the Labour party, for example. But the political principles in which he believes, like, for example, the belief that equality is an important political aim, may be more characteristic of some political parties than others.

There is a conventional answer to my question, at least in Britain. Judges should not reach their decisions on political grounds. That is the view of almost all judges and barristers and solicitors and academic lawyers. Some academic lawyers,

however, who count themselves critics of British judicial practice, say that British judges do in fact make political decisions, in spite of the established view that they should not. Professor Griffiths of the London School of Economics, for example, in a recent polemical book called *The Politics of the Judiciary*,[1] argued that several recent decisions of the House of Lords were in fact political decisions, even though that court was at pains to make it appear that the decisions were reached on technical legal rather than political grounds. It will be helpful briefly to describe some of these decisions.

In *Charter*[2] and *Dockers*[3] the House of Lords interpreted the Race Relations Act so that political clubs, like the West Ham Conservative Club, were not obliged by the Act not to discriminate against coloured people. In *Tameside*[4] the House overruled a Labour minister's order reversing a local Conservative council's decision not to change its school system to the comprehensive plan favoured by the Labour government. In the notorious *Shaw's Case*,[5] the House of Lords sustained the conviction of the publisher of a directory of prostitutes. It held that he was guilty of what it called the common law crime of 'conspiracy to corrupt public morals', even though it conceded that no statute declared such a conspiracy to be a crime. In an older case, *Liversidge* v. *Anderson*,[6] the House upheld the decision of a minister who, in the Second World War, ordered someone detained without trial. Professor Griffiths believes that in each of these cases (and in a great many other cases he discusses) the House acted out of a particular political attitude, which is defensive of established values or social structures and opposed to reform. He does not say that the judges who took these decisions were aware that, contrary to the official view of their function, they were enforcing a political position. But he believes that that was nevertheless what they were doing.

So there are those who think that British judges do make political decisions. But that is not to say that they should. Professor Griffiths thinks it inevitable, as I understand him, that the judiciary will play a political role in a capitalist or semi-capitalist state, But he does not count this as a virtue of capitalism; on the contrary he treats the political role of judges as deplorable. It may be that some few judges and academics—including perhaps Lord Justice Denning—do think that judges ought to be more political than the conventional view recommends. But that remains very much an eccentric—some would say dangerous—minority view.

Professional opinion about the political role of judges is more divided in the United States. A great party of academic lawyers and law students, and even some of the judges in the prestigious courts, hold that judicial decisions are inescapably and rightly political. They have in mind not only the grand constitutional decisions of the Supreme Court but also the more ordinary civil decisions of state courts developing the common law of contracts and tort and commercial law. They think that judges do and should act like legislators, though only within what they call the 'interstices' of decisions already made by the legislature. That is not a unanimous view even among sophisticated American lawyers, nor is it a view that the public at large has fully accepted. On the contrary, politicians sometimes campaign for office promising to curb judges who have wrongly seized political power. But a much greater part of the public accepts political jurisprudence now than did, say, twenty-five years ago.

My own view is that the vocabulary of this debate about judicial politics is too crude, and that both the official British view and the 'progressive' American view are mistaken. The debate neglects an important distinction between two kinds of political arguments on which judges might rely in reaching their decisions. This is the distinction (which I have tried to explain and defend elsewhere)[1] between arguments of political principle that appeal to the political rights of individual citizens, and arguments of political policy that claim that a particular decision will work to promote some conception of the general welfare or public interest. The correct view, I believe, is that judges do and should rest their judgments on controversial cases on arguments of political principle, but not in arguments of political policy. My view is therefore more restrictive than the progressive American view but less restrictive than the official British one.

The second question I put in this lecture is, at least at first sight, less practical. What is the rule of law? Lawyers (and almost everyone else) think that there is a distinct and important political ideal called the rule of law. But they disagree about what that ideal is. There are, in fact, two very different conceptions of the rule of law, each of which has its partisans. The first I shall call the 'rule-book' conception. It insists that, so far as is possible, the power of the state should never be exercised against individual citizens except in accordance with rules explicitly set out in a public rule book available to all. The government as well as ordinary citizens must play by these

public rules until they are changed, in accordance with further rules about how they are to be changed, which are also set out in the rule book. The rule-book conception is, in one sense, very narrow, because it does not stipulate anything about the content of the rules that may be put in the rule book. It insists only that whatever rules are put in the book must be followed until changed. Of course, those who have this conception of the rule of law do care about the content of the rules in the rule book, but they say that this is a matter of substantive justice, and that substantive justice is an independant ideal, in no sense part of the ideal of the rule of law.

I shall call the second conception of the rule of law the 'rights' conception. It is in several ways more ambitious than the rule-book conception. It assumes that citizens have moral rights and duties with respect to one another, and political rights against the state as a whole. It insists that these moral and political rights be recognized in positive law, so that they may be enforced *upon the demand of individual citizens* through courts or other judicial institutions of the familiar type, so far as this is practicable. The rule of law on this conception is the ideal of rule by an accurate public conception of individual rights. It does not distinguish, as the rule-book conception does, between the rule of law and substantive justice; on the contrary it requires, as part of the ideal of law, that the rules in the rule book capture and enforce moral rights.

That is a complex ideal. The rule-book conception of the rule of law has only one dimension along which a political community might fall short. It might use its police power over individual citizens otherwise than as the rule book specifies. But the rights conception has at least three dimensions of failure. A state might fail in the *scope* of the individual rights it purports to enforce. It might decline to enforce rights against itself, for example, though it concedes citizens have such rights. It might fail in the *accuracy* of the rights it recognizes: it might provide for rights against the state, but through official mistake fail to recognize important rights. Or it might fail in the *fairness* of its enforcement of rights: it might adopt rules that put the poor or some disfavoured race at a disadvantage in securing the rights the state acknowledges they have.

The rights conception is therefore more complex than the rule-book conception. There are other important contrasts between the two conceptions; some of these can be identified by considering the different places they occupy in a general

theory of justice. Though the two conceptions compete as ideals of the legal process (because as we shall see they recommend different theories of adjudication) they are nevertheless compatible as more general ideals for a just society. Any political community is better, all else equal, if its courts take no action other than is specified in rules published in advance, and also better, all else equal, if its legal institutions enforce whatever rights individual citizens have. Even as general political ideals, however, the two conceptions differ in the following way. Some high degree of compliance with the rule-book conception seems necessary to a just society. Any government that acts contrary to its own rule book very often—at least in matters important to particular citizens—cannot be just, no matter how wise or fair its institutions otherwise are. But compliance with the rule book is plainly not sufficient for justice; full compliance will achieve very great injustice if the rules are unjust. The opposite holds for the rights conception. A society that achieves a high rating on each of the dimensions of the rights conception is almost certainly a just society, even though it may be mismanaged or lack other qualities of a desirable society. But it is widely thought, at least, that the rights conception is not necessary to a just society, because it is not necessary, in order that the rights of citizens be protected, that citizens be able to demand adjudication and enforcement of these rights as individuals. A government of wise and just officers will protect rights (so the argument runs) on its own initiative, without procedures whereby citizens can dispute, as individuals, what these rights are. Indeed, the rights conception of the rule of law, which insists on the importance of that opportunity, is often dismissed as legalistic, as encouraging a mean and selfish concern with individual property and title.

The two conceptions also differ in what might be called their philosophical neutrality. The rights conception seems more vulnerable to philosophical objections. It supposes that citizens have moral rights—that is, rights other than and prior to those given by positive enactment—so that a society can sensibly be criticized on the ground that its enactments do not recognize the rights people have. But many philosophers doubt that people have any rights that are not bestowed on them by enactments or other official decisions; or, indeed, that the idea of such rights make sense. They doubt particularly that it is sensible to say that people have moral rights when (as the rights conception must concede is often the case) it is controversial

within the community what moral rights they have. The rights conception must suppose, that is, that a state may fail along the dimension of accuracy even when it is controversial whether it has failed; but that is just what philosophers doubt makes sense. The rights conception therefore seems open to the objection that it presupposes a philosophical point of view which is itself controversial, and which will therefore not be accepted by all members of the community.

The last contrast I shall mention will join the two issues of the lecture. For the two conceptions of the rule of law offer very different advice on the question of whether judges should make political decisions in hard cases—that is, cases in which no explicit rule in the rule book firmly decides the case either way. Though the two conceptions, as general political ideals, may both have a place in a full political theory it makes a great difference which is taken to be the ideal of *law* because it is that ideal which governs our attitudes about adjudication. The rule-book conception has both negative and positive advice about hard cases. It argues, positively, that judges should decide hard cases by trying to discover what is 'really' in the rule book, in one or another sense of that claim. It argues, negatively, that judges should never decide such cases on the ground of their own political judgment, because a political decision is not a decision about what is, in any sense, in the rule book, but rather a decision about what ought to be there. The rule-book conception supports the conventional British view about political judges.

I must now pause to explain the idea this positive advice uses: the idea that it makes sense to ask, in a hard case, about what is 'really' in the rule book. In a modern legal system, hard cases typically arise, not because there is nothing in the rule book that bears on the dispute, but because the rules that are in the book speak in an uncertain voice. *Charter*, for example, was a hard case because it was unclear whether the rule Parliament put in the rule book—the rule that organizations that serve 'a section of the public' must not discriminate—forbade a political club to deny membership to blacks. It is, in that sense, 'unclear' what the rule book really, properly understood, provides. A lawyer who speaks this way treats the rule book as an attempt at communication, and supposes that an unclear rule can be better understood by applying techniques that we use to improve our understanding of other sorts of communication.

Different generations of rule-book lawyers—and different lawyers within each generation—advocate different techniques for this purpose. Some prefer semantic questions. They argue in the following way. 'The legislature uses words when it enacts a rule, and the meaning of these words fix what rules it has enacted. So any theory about the meaning of the phrase "a section of the public" is a theory that makes the Race Relations Act more precise. The rule-book conception therefore directs judges to try to form semantic theories. They should ask, for example, what the phrase "a section of the public" would be taken to mean in a similar context in ordinary discourse. Or what the most natural meaning of some component of the phrase, like the word "public", is. Or what similar phrases were taken to mean in other statutes. It is understood, of course, that different judges will give different answers to these semantic questions; no one answer will be so plainly right that everyone will agree. Nevertheless each judge will be trying, in good faith, to follow the rule-book ideal of the rule of law, because he will be trying, in good faith, to discover what the words in the rule book really mean.'

These semantic questions are very popular in Britain. A different set of questions—group-psychological questions—are now more popular in America. Those who favour group-psychological questions rather than semantic questions take decisions rather than words to be the heart of the matter. 'Why are the particular rules that a legislature enacts (rather than, for example, the rules that law professors prefer) the rules that form the rule book for law? Because legislators have been given authority by the community as a whole to *decide* what rules shall govern. The words they choose are normally the best evidence of what they have decided, because it is assumed that legislators use words in their standard meanings to report their decisions. But if, for some reason, the words used do not uniquely report a particular decision, then it is necessary to turn to whatever other evidence of what they intended to do we can find. Did the legislators—or some important group of them—suppose that their Race Relations Act would apply to political clubs so as to forbid racial discrimination there? If so, then the Act represents that decision, and it is that decision that is embedded in the rule book properly understood. But if they supposed that the Act would not apply to political clubs, then the rule book, properly understood, contains that decision instead.'

Once again there is no assumption here that all reasonable

lawyers will agree about what the legislators intended. On the contrary, defenders of the rule-book model know that even skilled lawyers will disagree over inferences of legislative intention drawn from the same evidence. They insist that the question of intention is nevertheless the right question to ask, because each judge who asks it is at least doing his best to follow the rule-book model and therefore (on this conception) to serve the rule of law.

The semantic and psychological questions these different groups propose are historical rather than political. A third (and more sophisticated) set of historical questions has recently gained in popularity. 'Suppose a hard case cannot be decided on semantic grounds. Perhaps the phrase "a section of the public" might just as properly be used to include as to exclude associations like political clubs. Suppose it cannot be decided by asking what the legislators who enacted that statute intended to accomplish. Perhaps very few legislators had even thought of the question whether political clubs should be included. We must then ask a question different from either the semantic or the psychological question, which is this. What would the legislature had decided if, contrary to fact, it *had* decided whether or not political clubs were to be included.' Lawyers who want to answer this counterfactual question might consider, for example, other decisions the same legislators reached in other areas of law. Or they might consider more broadly the pattern of legislation about race relations or freedom of association in recent years. They might use such evidence to argue, for example, that if Parliament had for some reason been forced to debate a clause explicitly extending the acts to political clubs it would have approved that clause.

It is even more obvious in the case of this counterfactual historical question than in the case of the semantic or psychological question that reasonable lawyers will disagree about the conclusions to be drawn from the same evidence. But once again the rule-book conception deems it better that they try to answer this question, even though they disagree, than that they ask the different and political question, about which they will surely disagree, of what Parliament *should* have done. For the counterfactual question, like the semantic and psychological questions, but unlike the political question, is supported by a theory that also supports and explains the rule-book conception itself. We follow the rule book, on this theory, because we assign to a political institution the responsibility and the power

to decide how the police power of the state shall be used. If, on some occasion, that institution has in fact not decided that question (because it did not realize that a decision was necessary) but would have decided one way rather than the other if it had, then it is more in keeping with the rationale of the rule book that the power be used that way than the contrary way. If neither of the two decisions that a court might reach is actually recorded in the rule book, it is fairer, on this argument, to take the decision that would have been in the rule book but for a historical accident.

This argument for the counterfactual question concedes that the rule that is to be applied is not in the actual rule book. In this respect the counterfactual question is different from the semantic and psychological questions, each of which can more plausibly be said to reveal what is in the actual rule book 'properly understood'. But the three sorts of questions have a more fundamental unity. Each aims at developing what might be called a 'rectified' rule book in which the collection of sentences is improved so as more faithfully to record the will of the various institutions whose decisions put those sentences into the rule book. The questions are all, in themselves, politically neutral questions, because they seek to bring to the surface a historical fact—the will of responsible law-makers—rather than to impose a distinct and contemporary political judgment upon that will. It is perfectly true—and conceded, as I said, by the rule-book model—that any particular judge's answer to these political neutral questions may well be different from another judge's answer. It is the virtue of the different historical questions, not the certainty or predictability of the answer, that recommends these questions to the rule-book model. That conception of the rule of law opposes political questions, like the question of what the legislators should have done, not because these questions admit of different answers, but because they are simply the wrong questions to ask.

The rights conception, on the other hand, will insist that at least one kind of political question is precisely the question that judges faced with hard cases must ask. For the ultimate question *it* asks in a hard case is the question of whether the plaintiff has the moral right to receive, in court, what he or she or it demands. The rule book, of course, is *relevant* to that ultimate question. In a democracy, people have at least a strong *prima facie* moral right that courts enforce the rights that a representative legislature has enacted. That is why some cases are easy

cases on the rights model as well as on the rule-book model. If it is clear what the legislature has granted them, then it is also clear what they have a moral right to receive in court. (That statement must, of course, be qualified in a democracy whose constitution limits legislative power. It must also be qualified (though it is a complex question how it must be qualified) in a democracy whose laws are fundamentally unjust.

But though the rights model concedes that the rule book is in this way a source of moral rights in court, it denies that the rule book is the exclusive source of such rights. If, therefore, some case arises as to which the rule book is silent, or if the words in the rule book are subject to competing interpretations, then it is right to ask which of the two possible decisions in the case best fits the background moral rights of the parties. For the ideal of adjudication, under the rights model, is that, so far as is practicable, the moral rights that citizens actually have should be available to them in court. So a decision that takes background rights into account will be superior, from the point of view of that ideal, to a decision that instead speculates on, for example, what the legislation would have done if it had done anything.

It is important to notice, however, that the rule book continues to exert an influence on the question of what rights the parties have, under the rights model, even when background moral rights also exert an influence. I have tried to show why the rule book influences hard cases, even on the rights conception, and to describe the force of that influence, elsewhere. I cannot repeat much of that description here, but it might nevertheless be helpful to provide this summary.

A judge who follows the rights conception of the rule of law will try, in a hard case, to frame some principle that strikes him as capturing, at the appropriate level of abstraction, the moral rights of the parties that are pertinent to the issues raised by the case. But he cannot apply such a principle unless it is, as a principle, consistent with the rule book, in the following sense. The principle must not conflict with other principles that must be presupposed in order to justify the rule he is enforcing, or any considerable part of the other rules. Suppose a judge himself approves what might be called a radical Christian principle: that each citizen is morally entitled that those who have more wealth than he does make available to him the surplus. He might wish to apply that principle to hard cases in tort or contract so as to refuse damages against a poor defendant, on the ground that the richer plaintiff's right to damages must be

set off against the defendant's right to charity. But he cannot do so, because (for better or for worse) that principle is inconsistent with the vast bulk of the rules in the rule book. No adequate justification of what is in the rule book could be given, that is, without presupposing that the radical Christian principle has been rejected. The rights conception supposes that the rule book represents the community's efforts to capture moral rights, and requires that any principle rejected in those efforts has no role in adjudication.

So a judge following the rights conception must not decide a hard case by appealing to any principle that is in that way incompatible with the rule book of his jurisdiction. But he must still decide many cases on political grounds, because in these cases contrary moral principles directly in point are each compatible with the rule book. Two judges will decide such a hard case differently because they hold different views about the background moral rights of citizens. Suppose a case applying a commercial statute requires a choice between a moral principle enforcing *caveat emptor* and a competing principle stressing the moral rights of contractual partners against each other, as members of a co-operative enterprise. It may well be—at a given stage of development of commercial law—that neither answer is in the sense described plainly incompatible with the British rule book taken as a whole. Each judge deciding that issue of principle decides as he does, not because all alternatives are excluded by what is already in the rule book, but because he believes his principle to be correct, or at least closer to correct than other principles that are also not excluded. So his decision is a political decision in the sense described. It is precisely that sort of political decision that the rule-book conception steadily condemns.

The two topics of this lecture are in that way joined. The practical question, which asks whether judges should make political decisions in hard cases, is joined to the theoretical question of which of two conceptions of the rule of law is superior. Indeed, it might now seem to many of you that this connection offers the most powerful argument against the rights conception. For you are convinced that it is wrong for judges to make political decisions and you will find, in that conviction, an important reason for rejecting any theory about the ideals of law that seems to require that they do. So I shall pursue the two topics, now joined, by asking whether your conviction is sound.

2. *The Argument from Democracy*

Why is it wrong for judges to make political decisions of the sort I say the rights conception requires them to make? One argument will seem to many of you decisive against judicial political decisions. Political decisions, according to this argument, should be made by officials elected by the community as a whole, who can be replaced, from time to time, in the same way. That principle applies to all political decisions, including the decision what rights individuals have, and which of these should be enforceable in court. Judges are not elected or re-elected, and that is wise because the decisions they make *applying* the rule book as it stands to particular cases are decisions that should be immune from popular control. But it follows that they should not make independent decisions about changing or expanding the rule book, because these decisions should be made in no way *other* than under popular control.

That is the familiar argument from democracy. There is a short answer to that argument, at least in Britain. If Parliament, which is elected by the people, is dissatisfied with a particular political decision made by judges, then Parliament can override that decision by appropriate legislation. Unfortunately that short answer is too short. Legislative time is a scarce resource, to be allocated with some sense of political priorities, and it may well be that a judicial decision would be overruled if Parliament had time to pass every law it would like to pass, but will not be overruled because Parliament does not. In some cases there is a further difficulty in the short answer. When an issue is the subject of great controversy, then Parliament may be disabled from changing a judicial decision, for practical political reasons, because any change would infuriate some powerful section of the community, or alienate some parts of a governing coalition. It may be that the issue of whether the Race Relations Act should apply to certain sorts of clubs is an issue like that. Either decision would provoke such effective political opposition that Parliament is effectively saddled with whatever decision the courts reach.

So we cannot be content with the short answer to the argument from democracy. But there are more serious defects in that argument. It assumes, in the first place, that the rule-book solution to hard cases—which urges judges to ask historical questions of the sort I described rather than political questions—does serve democracy in some way that the rights conception does not. It assumes that these historical questions do bring to

the surface decisions that an elected legislature has actually made. But if we look more closely at the questions we shall find that the assumption has no basis.

Suppose a statute can be interpreted in two ways, one of which requires one decision in a hard case and the other of which requires the other. The phrase 'a section of the public', for example, may be interpreted so that the statute includes only facilities open to anyone who can afford them, in which case a political club which is not open to members of other parties does not fall within the statute. Or it may be interpreted so as to exclude only intimate or domestic occasions, like private parties, in which case a political club is covered by the statute. The semantic and group-psychological questions assume that Parliament decided to adopt one or the other of these two different statutes; they aim to provide techniques for deciding which of the two decisions it (probably) took.

The semantic questions argue that if the critical words of the statute are words more likely to be used by someone who has taken one of these decisions than someone who has taken the other, then that is evidence, at least, that the legislature has taken that decision. So if the words 'the public or a section of the public' are more likely to be used by someone who had decided to exclude political clubs from the Act than by someone who has decided to include them, then Parliament probably took the former decision. But this is fallacious. For, though it is sensible to argue that if the legislature has taken one or other of these decisions, it is more likely to have taken the one more naturally expressed by the words it used, it is not sensible to argue in the other direction, that because it used these words it must have taken one or the other of these decisions. For it may have taken neither. Indeed the fact that the words used are compatible with either decision makes it more likely that it has not taken either decision, unless there is some independent evidence that it has.

The group-psychological questions do not supply that independent evidence, except in very rare cases, because the strategy they recommend also presupposes, rather than shows, that the individuals whose intentions are in play had any pertinent intention at all. The rare exceptions are cases in which the legislative history contains some explicit statement that the statute being enacted had one rather than the other consequence, a statement made under circumstances such that those who voted for the statute must have shared that understanding.

In most cases the legislative history contains nothing so explicit. The group-psychological questions then fix on peripheral statements made in legislative hearings, or on the floor of the legislature, or on other provisions of the statute in question, or on provisions of statutes in related areas, attempting to show that these statements or provisions are inconsistent with an intention to create a statute under one interpretation of the unclear phrase, though consistent with an intention to create a statute under the other interpretation. That is not an argument in favour of the claim that key legislators intended to adopt that second statute, unless it is assumed that these legislators must have intended to enact one or the other. But they may not have intended to enact either; and the fact that they did not enact their statute in words that clearly put either intention into effect is a very strong argument that they did not.

We must be careful to avoid a trap here. We may be tempted to say, of any particular legislator, that he either intended to enact a particular statute (that is, a particular interpretation of the words that form the bill he votes for) or intended not to enact that statute. If that were so, then evidence that suggests that he did not intend to enact a statute that would include political clubs would suggest that he did intend to enact a statute that did not include them. But of course it is not so. A legislator may vote with great enthusiasm for a bill because he knows that it will force hotels and restaurants to cease discrimination without thereby having either the intention that the same prohibition should apply to semi-public institutions like political clubs or the intention that it should not. He may simply have failed to consider the issue of whether it should. Or he may positively have intended that the statute be inconclusive on whether such institutions should be covered, because either decision, if explicit, would anger an important section of the public or otherwise prove impolitic.

In either case, the argument that it would be more consistent for him to have had the intention to exclude political clubs than to include them—more consistent with what he had voted for elsewhere in the present statute or in other statutes, or more consistent with the arguments given in hearings or on the legislative floor—is beside the point. That may be an argument about what he *should* have intended on the question of political clubs. It is no argument that he *did* so intend, because he may have been ignorant of, or had good reason for ignoring, what consistency required.

The counterfactual questions I mentioned are not open to the same objection. They do not assume that particular members of the legislature took a decision or had an intention one way or the other. They concede that no one may even have thought of the relevant issue. They ask what legislators would have decided or intended if, contrary to fact, they had been forced to attend to the issue. They insist that that question admits of an answer in principle even though in particular cases it might be hard to discover what the answer is, and even though any particular judge's answer will be controversial. The argument that counterfactual historical questions respect democracy is therefore different from the argument that semantic and psychological questions do. It runs as follows. 'Suppose we decide that it is likely, on the balance of probabilities, that Parliament would have brought political clubs within the statute if, for some reason, it had been forced to decide whether they were to be within or without. Then it is just an accident that Parliament did not actually decide to include them. It is (we might say) the latent will of Parliament that they be within, and even though a latent will is not an actual will, it is nevertheless closer to the spirit of democracy to enforce the latent will of Parliament than to encourage judges to impose their own will on the issue.'

But this argument is unsound, for a number of reasons. First, it is at least arguable that in many cases there is simply no answer, even in principle, to a counterfactual historical question. Philosophers divide on whether it is necessarily true that if Parliament had been forced to vote on the issue of political clubs it would either have voted to include them or not voted to include them. But let us set that philosophical point aside, and assume that, in at least enough cases to support the argument from democracy, counterfactual historical questions have a right answer even when it is controversial what that right answer is. It is nevertheless true that a great number of *different* counterfactual questions can be asked about any particular legislative decision, and the answers to these different questions will be different, because how Parliament would have decided if it had been forced to decide will depend on the way in which it was forced to decide.

It may be, for example, that if the Parliamentary draftsman had put a clause including political clubs into the first draft of the bill, that clause would have survived, because no amendment would have been proposed that would have succeeded;

but also true that if the draftsman had included a clause excluding political clubs *that* clause would have survived, again because no amendment would have been proposed that would have succeeded. What is the latent Parliamentary will then, assuming that neither clause was in fact put into the bill at any stage? The counterfactual technique cannot work unless it stipulates some canonical form of the counterfactual question. But why should one form of the question—one hypothesis about the conditions in which Parliament might have been forced to decide—be superior to another from the standpoint of the argument from democracy?

But there is a further objection. *No* canonical form of the counterfactual question that makes that question genuinely historical would be acceptable to lawyers and judges in practice. For though counterfactual questions have in fact found their way into legal practice, they are used as political rather than historical questions. The answer they would receive if they were really historical questions would be rejected by lawyers as irrelevant to adjudication. Consider the following (arbitrary) form for the counterfactual question: Suppose that just before the Race Relations Act had its final hearing one member of the Cabinet convinced his colleagues that the Act must take a position, one way or the other, on political clubs, and that in consequence Parliament finally took a position. What position would it have taken? If a historian were asked that question, he would of course reject any *a priori* restrictions on the kind of evidence that would be relevant. Suppose he discovered that a Minister of the day had written a letter to his mistress on the subject of political clubs, describing the special vulnerability of one or the other of his colleagues to pressure from such clubs. Suppose he discovered that the party had commissioned a secret political poll on the public's attitudes on this or related issues. He would of course insist on seeing that letter or the results of that poll, if at all possible, and if he were fortunate enough to see these, he would insist that they were of dramatic relevance to the historical counterfactual question he had been asked. He would be right, if the question were in fact a historical one, because it is less likely that the Cabinet would have proposed including political clubs if some member were vulnerable or if the public strongly opposed their inclusion.

But a judge asking the question of what Parliament would have done had it attended to the problem of political clubs is distinctly not interested in letters to mistresses or in secret

political polls. His argument is, not that Parliament would in fact have taken the decision in question if it had taken any decision on the matter, but rather that Parliament would have taken that decision if it were acting consistently with some assumed justification for what it did do. That is, of course, a very different matter, and history has little to do with it. The argument I composed in favour of the counterfactual question insisted that, if Parliament would have included political clubs had it been forced to choose, then it is only an accident, from the standpoint of democracy, that political clubs are not explicitly included. But it does not follow, from the different claim that Parliament out of consistency should have included political clubs, that it is only an accident that it did not explicitly include them. Suppose it is true that Parliament should have included them out of consistency, but also true that for political reasons it would *in fact* have excluded them if it had done anything. Then the supposed theory of democracy, that decisions on political matters should be made by Parliament, hardly argues that political clubs should be included.

It might now be said, however, that a different theory of democracy does make relevant the question of what Parliament, in consistency, should have done. The legislature elected by the people does more (according to this theory) than simply enacting particular provisions that make up the statute books. Through enacting these particular provisions it chooses the general policies the state is to pursue and the general principles it is to respect. If, in a hard case, one decision follows more naturally from the principles that the legislature served in enacting a statute, then the judges should take that decision, even though it is true that, as a matter of historical fact, the legislature itself would have taken the other one if it had taken either. The legislature endorses principles by enacting legislation these principles justify. The spirit of democracy is served by respecting these principles. It is not served by speculating whether the legislature itself, on some particular occasion, would have kept that faith.

This argument is meant to defend the counterfactual questions as they are used in practice. It concedes that these questions are evaluative, at least in the sense described, rather than simply historical, but argues that questions that are evaluative in that sense do serve democracy. Perhaps a similar argument could be made to justify the group-psychological questions. It might be said that these questions do not really suppose that individual

legislators have an intention that the statute be construed one way rather than another. Instead they ask what principles a legislator who voted for the statute would be presumed to have thereby endorsed, so that the decision in a hard case may be governed by those principles. If the group-psychological questions are understood and defended in this way, then they are not after all different from the counterfactual questions. When a judge asks what the legislators must have intended to accomplish, he means to ask what policies or principles most naturally fit the statute they approved. When he asks what they would have done if required to answer the question before him, he means to ask what answer flows from policies or principles that most naturally fit the statute they approved. Neither question is really psychological or historical; they ask the same basic question in either a psychological or a historical disguise.

But if the psychological and counterfactual questions are understood in this way then it is no longer plausible to suppose that a judge who puts these questions in order to decide a hard case is not making a political decision. For the evaluations these questions, so understood, require are not different in character from the evaluations recommended by the rights conception of the rule of law. If only one set of principles is consistent with a statute then a judge following the rights conception will be required to apply these principles. If more than one is consistent the question of which interpretation more 'naturally' flows from the statute as a whole requires a choice among ways to characterize the statute that must reflect the judge's own political morality. That is the source of the complaint I mentioned at the outset of this lecture, which is that British judges really make political judgments according to their own lights disguised as judgments about legislative intentions or history. This is true; though the suggestion of hypocrisy is, for the most part, unfair. If psychological or counterfactual questions are put as genuine historical questions, then they will supply no useful answers. If they are to be useful then they must be understood as questions that call for the sort of political judgment that they, in practice, force from the judges who use them. Judges may not acknowledge these judgments, but that is a failure of recognition not a failure of integrity.

3. *Rights and Democracy*

The argument from democracy therefore does not provide an argument in favour of the rule-book conception of adjudi-

cation. So far I have not contested the root assumption of that argument, that it is offensive to democracy if matters of political principle are decided by courts rather than elected officials. We must now ask whether that assumption is sound. Do judicial decisions on matters of principle (as distinct from policy) offend any plausible theory of democracy?

The argument that they do supposes that the decision of a legislature elected by the majority of the public is, in the last analysis, the best way of deciding questions about the rights that individual citizens have against each other and against the society as a whole. But this might be so for two different kinds of reasons, or some combination of the two. Legislation might be a more accurate procedure for deciding what people's rights are than alternative procedures, or it might be a better procedure for reasons other than accuracy. We rely, to some degree, on both sorts of justifications for other institutional theories, like the theory that a jury trial is a good method for testing accusations of crime. We think that trial by jury is a reasonably accurate method, but we also think that it is a good method for reasons that are not reasons of accuracy.

So we must consider the argument for democracy, as a strategy for deciding questions about rights, under two aspects. Are there, first, institutional reasons why a legislative decision about rights is likely to be more accurate than a judicial decision? It is difficult to assess the question of accuracy in the abstract, that is, apart from some particular theory of rights. But I cannot imagine what argument might be thought to show that legislative decisions about rights are inherently more likely to be correct than judicial decisions. On any theory of rights, of course, decisions about rights are better if they are based on more rather than less information about a variety of facts. But I know of no reason why a legislator is more likely to have accurate beliefs about the sort of facts that, under any plausible conception of rights, would be relevant to determining what people's rights are. On any plausible theory of rights, moreover, questions of speculative consistency—questions that test a theory of rights by imagining circumstances in which that theory would produce unacceptable results—are likely to be of importance in an argument about particular rights, because no claim of right is sound if it cannot stand the test of hypothetical counter-example. But the technique of examining a claim of right for speculative consistency is a technique far more developed in judges than in legislators or in the bulk of the citizens who elect legislators.

In some cases, moreover, the public that elects legislators will be in effect a party to the argument whether someone has a right to something, because that public's own interests oppose the concession of a right. That will typically be true when the argument lies in a politically sensitive area, like that of race relations. Politically powerful groups may prefer that political clubs discriminate, and no countervailing force, except the politically impotent minority itself, may very much care. Of course it would be wrong to assume that in such circumstances the legislators will lack the independent judgment to identify the right at stake or the courage to enforce it. But it is nevertheless true that in such cases legislators are subject to pressures that judges are not, and this must count as a reason for supposing that, at least in such cases, judges are more likely to reach sound conclusions about rights. I am now arguing only that legislators are not institutionally better placed to decide questions about rights than judges are. Someone might object that as things are, in Britain for example, judges will do a worse job because they hold worse theories about rights. They are drawn from a particular class, educated in a particular way, and members of a particular profession such that they are very likely not to appreciate the rights of people from very different classes. Nothing I have so far said meets that argument. I shall consider its force later.

Second, are there other reasons of fairness, apart from reasons of accuracy, why legislation should be the exclusive strategy for deciding what right people have? We must consider a familiar argument that appeals to the importance of respect for the law, and other aspects of political stability. 'Legislatures are unlikely to reach a decision about rights that will offend some powerful section of the community so much that it will shake the political order. If the legislature does make this mistake, the government will fall, and the orderly process of democracy will replace the foolish legislature with another. Courts have no similar built-in defence against very unpopular decisions, because judges have no direct fear of popular dissatisfaction with their performance. On the contrary, some judges may take pleasure in their freedom to disregard popular views. So if judges reach a political decision that is outrageous, the public will not be able to vindicate itself by replacing them. Instead it will lose a measure of its respect, not only for them, but for the institution and processes of the law itself, and the community will be less cohesive and less stable as a result. Surely that has been the

consequence of the ill-judged experiment that brought courts into the political process through the Industrial Relations Act.'

This argument urges that judges should not make political judgments, including political judgments about rights, because the effect of their being seen to make such judgments will lessen respect for the law. This particular argument, unlike the others I discuss, does not assume that the 'historical' questions a judge might ask in lieu of political questions are non-political. It assumes only that they will be *seen* to be non-political. But that assumption is in fact equally dubious. For in all but a few of the cases in which a judicial decision has been widely and publically criticized for being political, the judges set out historical rather than political grounds in their opinions. The law was brought into disrespect (whatever that means) by the content of the decision, not the character of the arguments provided. Political stability may argue against legislation that either deliberately or inadvertently leaves politically sensitive issues open for judges to decide. It is not an argument that, if judges are in fact forced to decide such issues, they should decide them on historical rather than political grounds.

Moreover the factual basis of the argument is at best unproved. Of course groups of citizens who intensely dislike a judicial decision will complain, not only about the decision but also about the nature of the institution that produced it. They may even be moved to disobey the decision, particularly if they have the political power to do so with impunity. But there is so far no evidence that the inclination to disobey will be general rather than local. There were grave predictions, for example, that political hostility to the American war in Vietnam, and the disobedience to laws pursuing that war, would lead to a general breakdown of law and order. That danger was seen, by different groups both as an argument against the war and an argument in favour of prosecuting dissidents. But though crime continues to rise in the United States at a depressingly orderly rate, there is no evidence whatsoever that these political events were in any way contributory.

In any case, if the argument is taken to be an argument specifically against frankly political decisions by courts, it fails for a reason I have so far not mentioned. For it assumes that the public discriminates between political decisions taken by legislatures and those taken by courts, and that the public believes that the former are legitimate and the latter are not. But even if this is so now, the public sense of illegitimacy would

presumably disappear if it were recognized by lawyers and other officials that such decisions are consistent with democracy and recommended by an attractive conception of the rule of law. So the present argument begs the question whether lawyers and officials should embrace that conclusion. It provides only an argument that any professional endorsement of such decisions should be followed—as inevitably it would be followed—by a change in the public's attitudes to the law as well.

I recognize that there are many differences between Britain and the United States (I shall speak of some of these later) that make any quick comparison between public attitudes in the two countries suspect. But it is worth noticing that a shift in the Supreme Court's attitude towards constitutional interpretation a few decades ago—a shift from reliance on historical arguments towards political arguments—was not followed by any sharp loss in the public's respect for that Court's decisions, as measured by the public's disposition to comply. On the contrary the Warren Court achieved almost miraculous compliance with extremely unpopular decisions when popular understanding of the Court's role still insisted on historical rather than political interpretation of the Constitution, certainly to a greater degree than it does now. Popular opinion, in this case, has followed the Court.

Political stability, however, is not the main reason—apart from reasons of accuracy—why most of you want decisions about rights to be made by legislatures. Your reason is a reason of fairness. Democracy supposes equality of political power, and if genuine political decisions are taken from the legislature and given to courts, then the political power of individual citizens, who elect legislators but not judges, is weakened, which is unfair. Learned Hand gave this reason, in his famous Holmes lectures, for resisting political decisions by the Supreme Court. He said that he would not want to be ruled by 'a bevy of Platonic Guardians' even if he knew how to choose them, which he did not.

Of course, if all political power were transferred to judges, democracy and equality of political power would be destroyed. But we are now considering only a small and special class of political decisions. It is not easy to see how we are to test whether and how much individual citizens lose, in political power, if courts are assigned some of these decisions. It seems plausible, in fact, that however gains or losses in political power are measured, some citizens gain more than they lose.

It is no doubt true, as a very general description, that in a democracy power is in the hands of the people. But it is all too plain that no democracy provides genuine equality of political power. Many citizens are for one reason or another disenfranchised entirely. The economic power of large business guarantees special political power for its managers. Interest groups, like unions and professional organizations, elect officers who also have special power. Members of entrenched minorities have, as individuals, less power than individual members of other groups that are, as groups, more powerful. These defects in the egalitarian character of democracy are well known and perhaps in part irremedial. We must take them into account in judging how much individual citizens lose in political power whenever an issue about individual rights is taken from the legislature and given to courts. Some lose more than others only because they have more to lose. We must also remember that some individuals gain in political power by that transfer in institutional assignment. For individuals have powers under the rights conception of the rule of law that they do not have under the rule-book conception. They have the power to demand, as individuals, a fresh adjudication of their rights. If their rights are recognized by a court, these rights will be enforced in spite of the fact that no Parliament had the time or the will to enforce them.

It may be a nice question whether any particular individual gains in power more than he loses when courts undertake to decide what political rights he has. Access to courts may be expensive, so that the right of access is in that way more valuable to the rich than the poor. But since, all else equal, the rich have more power over the legislature than the poor, at least in the long run, transferring some decisions from the legislature may for that reason be more valuable to the poor. Members of entrenched minorities have in theory most to gain from the transfer, for the majoritarian bias of the legislature works most harshly against them, and it is their rights that are for that reason most likely to be ignored in that forum. If courts take the protection of individual rights as their special responsibility, then minorities will gain in political power to the extent that access to the courts is in fact available to them, and to the extent to which the courts' decisions about their rights are in fact sound. The gain to minorities, under these conditions, would be greatest under a system of judicial review of legislative decisions, such as holds in the United States and would hold in

Britain under some versions of the proposed constitutional Bill of Rights. But it may nevertheless be substantial even if the court's power to adjudicate political rights is limited to cases, like *Charter*, in which the legislature has not plainly settled the issue of what rights they shall be deemed to have. I assume, of course, favourable conditions that may not hold. But there is no reason to think, in the abstract, that the transfer of decisions about rights from the legislatures to courts will retard the democratic ideal of equality of political power. It may well advance that ideal.

4. *Conservative Judges*

My argument thus far has been, as I warned, theoretical and institutional. Many of you will believe that it has therefore been unrealistic, because you think that the main arguments against encouraging judges to take political decisions are practical and personal. You will insist that whatever might be the case in the United States or in other countries, the legal profession in Britain, and the judges that are drawn from that profession, are intensely conservative and protective of established forms of authority. 'Perhaps that is simply an accident of history, or perhaps it is the inevitable consequence of other institutional arrangements and traditions. But it is in any case a fact; and it would be perverse to ignore that fact in considering, for example, whether minorities and the poor would in fact gain if judges were more explicitly political, or whether these judges are likely to do a better or worse job than Parliament in identifying genuine political rights.'

I will not dispute that characterization of the present generation of judges in this country. With some distinguished exceptions, it seems to me correct. But it does not follow that judges, however conservative, will reach less attractive decisions under a regime that encourages them to make political decisions about individual rights than a regime that obliges them to make 'neutral' decisions by posing the 'historical' questions I described. The various decisions cited by Professor Griffiths and others to show the conservative character of British judges were all ostensively justified on these 'historical' grounds. Though critics suppose, for example, that the *Tameside* decision reflects the judge's disapproval of comprehensive education, and *Shaw's Case* shows their conviction that sexual license should be discouraged, each of these decisions reads as if the judges were obliged by neutral considerations of statutory construction

and the interpretation of precedent to reach the conclusions they did. It is therefore hard to see how the explicit direction to judges, to make decisions about rights on political grounds, would produce more 'conservative' decisions. The point is not (to repeat an earlier discussion) that judges deliberately ignore their duty to reach decisions on historical rather than political grounds. It is rather that 'historical' decisions must in the nature of the case be political.

If the explicit direction had any effect on the decisions produced by conservative judges it might well be to make these decisions *less* rather than more conservative. The obligation to show the political character of the decision as a decision about individual rights *rather than the general welfare* must act as a general liberal influence. In Shaw's case, for example, the House held itself obliged, by its view of the precedents, to consider whether the publication of Shaw's Ladies Directory tended to corrupt public morals. That is a question, considered in itself, about the character of the general welfare (Viscount Simonds called it the 'moral welfare') of society, and conservative judges may naturally be expected to take a conservative view of the public's welfare. Suppose, however, that reigning legal theory required the House to ask itself first whether the precedents unambiguously required them to enforce such a crime, and, if not, whether the theory that such a crime existed was more consistent with Shaw's rights as an individual than the theory that it did not. It would then have been strenuously argued that individuals have a moral right, at least in principle, not to be punished except for committing a crime clearly published in advance, and that in virtue of that right it would be unjust to punish Shaw. I very much doubt that even 'conservative' judges would wish to deny the inherent appeal of such a right or that any competent judge would argue that it would be incompatible with British legal and political practice to recognize it. But a judge asked to take the decision on grounds of political principle could not have jailed Shaw unless he rejected the right as a matter of moral principle, or argued that British practice denied it.

The Charter case, which I have been using as my leading example, was decided in what might be called a conservative way and that is why it is taken, by critics, to be a political decision. Certainly the opinions of the Law Lords do not describe their decision as political: these opinions apply semantic questions to the phrase 'a section of the public'. But it is no

doubt a fair comment that less conservative judges might have assigned a more powerful meaning to that phrase, because they would have had a different opinion on the question whether it is in the public interest that semi-public institutions lose a measure of control over the character of their membership. Suppose, however, that their Lordships had put to themselves, instead of the semantic question that invites the influence of that judgment about the general welfare, an explicitly political question about the competing rights of members of minorities not to suffer from discrimination and of club members to choose their own associates on criteria reasonable to them. The Race Relations Act embodies a compromise between those two rights: it holds that the right to be free from discrimination is sufficiently strong so that fully public institutions may not discriminate, but not so strong as to annihilate the competing right to choose associates in fully private settings like domestic entertainment or exclusive clubs. How should the balance be struck in intermediate cases not explicitly settled by the Act, like non-exclusive societies open in general to everyone with a particular political affiliation?

It is not inconceivable that a conservative judge would disagree with the initial judgment of the Act. He might think the Act undervalues freedom of association, or that it is bad policy to legislate morality in race relations (though it is sound to do so in sex). But if he is told he must decide a case like Charter on principles of political morality, compatible with the principles of the Act, he would be forced to set aside these convictions, because they are *not* compatible. He cannot hold that there is a morally relevant difference between the degree to which freedom of association is constrained by requiring Claridges not to discriminate and the degree to which that freedom is constrained by similar requirements on the West Ham Conservative Club. Even though he disapproves the way the balance was struck in the Act, he cannot plausibly suppose that a different political principle, striking the balance so as to couple the Conservative Club with private homes, is compatible with that Act. The more frankly political the subject-matter of a case—the more that case is like *Charter* rather than the commercial case discussed abstractly earlier—then the more the explicitly political character of the statute or precedent in question will constrain the judge's own political morality in the way just described.

Here again the supposedly neutral semantic questions the

House in fact used permitted a decision that gave more effect to the judge's personal convictions than a frankly political jurisprudence would have allowed. The semantic questions, precisely because they are not political in form, do not discriminate amongst the kinds of political judgments that will, inevitably, influence the answers judges give them. They attract hidden political judgments that may be inconsistent in principle with the legislation supposedly being enforced. The political questions the rights model recommends, however, require that the political answers they receive be both explicit and principled, so that their appeal and their compatibility with principles more generally endorsed can be tested.

So even those who think that the political principles of the present judges are unsound do not have, in that belief, good reason to oppose the rights model and the style of adjudication it recommends. That model is likely to decrease the number of decisions they deplore. There is, however, a further and perhaps more important reason why we should reject the argument that appeals to the conservative character of the present judges. For the character of judges is a consequence of the theory of adjudication in force, and therefore cannot reasonably be urged as a reason for not changing that theory. If the rights conception of the rule of law were to become more popular in this country than it has been, legal education would almost certainly become broader and more interesting than it is now, and men and women who would never think of a legal career, because they want a career that will make a difference to social justice, will begin to think differently. The profession would change, as it did dramatically in the United States earlier in this century, and the lawyers whom that profession values and sends to the bench would be different. The argument that political jurisprudence would be a misfortune in Britain because judges are too firmly welded to established order simply begs the question. If law had a different place here, different people would have a place in the law.

5. *Two Ideals and Two Countries*

Many of you will resist the comparison I just made between Britain and the United States. You will say that the role of law is so different in the two countries as to make comparisons unreliable. I agree with the spirit of the objection; but the differences do not touch the present point. I do not argue that it is likely that Britain will move towards a more openly

political jurisprudence, but only that its judges and lawyers would be different if it did. I concede that the differences in legal culture reflect more fundamental differences that make the United States more fertile ground for the rights conception. Americans are still fascinated by the idea of individual rights, which is the zodiac sign under which America was born. Some of you will think, rightly, that the performance of American society in identifying and protecting these rights is lamentable. But I doubt you will deny that public debate there is dominated, to a degree the British find surprising, by discussion of what rights people have.

Here political debate centres on the different idea I have several times mentioned, though not discussed, which is the nineteenth-century idea of the general welfare or collective good. When political debate here talks of fairness, it is generally fairness to classes or groups within the society (like the working class or the poor), which is a matter of the collective welfare of these groups. American debate has insisted that rights belong to individuals rather than groups and has resisted measuring fairness by classes rather than people.

This difference in the vocabulary of political debate both reflects and contributes to a difference in the general attitude towards lawyers and judges and their place in government. In America lawyers have often been scoundrels, and Americans give them no public honour, as they do give doctors and even some teachers. But America assigns lawyers, as a group, power and influence in a wide variety of matters, notably including government. In Britain you treat your lawyers very well. You dress them up in costumes—though principally middle-aged drag—and when they become judges you give them very wide powers of contempt to protect their dignity. But you give them, or in any case wish to give them, very little real power.

But this is a digression, and I must return to the argument of the lecture if only to end it. I cannot hope to have persuaded you that the rights conception of the rule of law is superior to the rule-book conception, or that judges should sometimes make their arguments explicitly arguments of political principle. I hope only to have shown that the arguments against these suggestions are not as strong as is generally supposed. I have so far said very little directly in support of the rights conception as a political ideal. I have been too occupied with its defence. The positive case for that conception seems to me straightforward. I conceded that a society devoted to that

conception of the rule of law may pay a price, certainly in efficiency and possibly in the communitarian spirit that too much concern with law is supposed to cripple. But that society makes an important promise to each individual, and the value of that promise seems to me worth the cost. It encourages each individual to suppose that his relations with other citizens and with his government are matters of justice and it encourages him and his fellow citizens to discuss as a community what justice requires these relationships to be. It promises a forum in which his claims about what he is entitled to have will be steadily and seriously considered at his demand. It cannot promise him that the decision will suit him, or even that it will be right. But that is not necessary to make the promise and the sense of justice that it creates valuable. I have sometimes spoken this evening as if democracy and the rule of law were at war. That is not so; on the contrary both of these important political values are rooted in a more fundamental ideal, which is that any acceptable government must treat people as equals. The rule of law, in the conception I support, enriches democracy by adding an independent forum of principle, and that is important not simply because justice may be done there, but because the forum confirms that justice is in the end a matter of individual right, and not independently a matter of the public good.[8]

REFERENCES

1. Manchester University Press (1977); paperback edition, Fontana Books (1977).

2. *Charter* v. *Race Relations Board* (1973), A.C. 868.

3. *Dockers' Labour Club* v. *Race Relations Board* (1975), A.C. 259.

4. *Secretary of State for Education and Science* v. *Tameside Metropolitan Borough Council* (1976), 3 W.L.R. 641.

5. *Shaw* v. *D.P.P.* (1961), 2 W.L.R. 897.

6. *Liversidge* v. *Anderson* (1942), A.C. 206.

7. *Taking Rights Seriously*, Duckworth (Second impression, 1978).

8. Some of the issues discussed in this lecture—in particular the group-psychological theory of statutory construction—are developed in my article, *How to Read the Civil Rights Act*, New York Review of Books, December 1979.