THE RULE OF LAW, by Geoffrey de Q Walker, Melbourne University Press, 1988, xxiii + 475pp. $62.95.

When judges (and lawyers) discovered that the law was not the fixed entity that positivistic teachers had told them about, the common law entered dangerous waters. The discovery of a creative power was indeed a heady one: if we make the law (philosophical revelation) then why not do so (political determination)? Recent activity in the common law courts, and notably in the Australian High Court, is testimony to this determination. Geoffrey De Q Walker's book, *The Rule of Law*, draws attention to this state of affairs, which it is fair to call a crisis both of understanding and determination. Whatever else is to be said about it, his is a timely book.

The discovery of the judicial creative power had quite ambivalent implications for legal positivism: the matter was much more complex than it seemed. First, if there was no fixed entity to be "found" (as the old common lawyers conceived it) there was no common law positive law (no posited entity). But then if the judges "made" the law was it not necessarily positive law that they made (make = posit)? Thus each judicial decision looked in itself like positivism in action; but the notion receded with any next decision when the next court (at least one of equal authority) looking back could no more see a posited fixed entity than could the previous court—just the same mass of authority with any part of it open to be taken at any level of generality and to be applied or distinguished (occasionally overruled) as it had always been. Positive common law (made common law) was a mirage constantly promising but constantly receding (like that related incoherent idea, which some common law courts occasionally contemplate, prospective not-following (misnamed overruling)).

But judges did have a creative function which the crudeness of the making/finding distinction obscured. And the creativeness of the judicial role connected to its responsibility. Here we get to the heart of legal positivism. What, fundamentally, was wrong with legal positivism was that it denied the responsibility of judges. If a hard decision was to be made a judge was by positivism given the power (the psychological support) to face the defendant as the embodiment of some distant thing (some posited entity) greater than either of them ('It is not I doing this to you; it is the law'). This primitive brutality had a certain utility, of course. But we have seen through it, and the time for law as a humane discipline in its own right has come. Under legal positivism law could never be a discipline in its own right, for posited law could be anything at all (that is the meaning of positive law: anything is law if it is posited). But now the deep human need for law which determines both its core and its limits can be the foundation of a real discipline; not something so trivially conceived that it might be anything at all. The waters are dangerous, but the prospect immense.

Responsibility entails creativeness: if I have not created my decision (any sort of decision) I cannot be responsible for it. So adjudication, every common law decision, is creative. Now, legislation is creative, too. Ergo, judges legislate. When it is set out like this a child can see that the reasoning is fallacious (Socrates is mortal, dogs are mortal, therefore Socrates is a dog!). But it is not often set out. It has lain implicit in much of our practices of the last decade or so (judicial practices, academic writing, our methods of law reform); and it is certainly a merit of Walker's book that it resolutely seeks out to destroy these practices. His method can best be described as swingeing: world-views are encompassed in a single bound; whole philosophies demolished at a stroke. He obviously reads voraciously and his book is able to marshall a most eclectic range of support. The result is often exciting; but I think something more subtle was required.

Before I discuss Walker's attack on those whom he thinks are perverting their creative licence (whom he calls the Clerisy) there are two rather prominent aspects of the book which give me cause for concern.

The first is so prominent an aspect that it stands as the book's title: the rule of law. It is not at all clear what Walker means by this term.

On his first page, two polar opposites are defined: power and law. And the rule of law is a thing that reconciles the two in the way of creating a dynamic equilibrium between them. Now this is immediately odd. How can the reconciliation between two polar things be the rule of one of them? Sometimes Walker capitalises Rule of Law so that it might be Law (not law) that makes the reconciliation between law and power. But this doesn't do anything. Walker's twelve principles or definition-points (laws against private and governmental coercion, legal certainty, equality as between citizens in similar positions, some method of keeping law generally congruent with social values, practicable methods of enforcing laws against private and governmental coercion, an independent judiciary and legal profession, impartial and accessible courts, honest and impartial enforcement, and an attitude of legality) are perfectly conventional requirements for securing respect for law in a community. The only one that could possibly be thought to hold a position somewhat independent of law such as to reconcile it and something else is the fourth: general congruence of law with social values. But the point here is that 'otherwise there may be widespread disrespect for the law'.[1] So what is sought by this fourth principle is the enhancement of respect for law, not the reconciliation of respect for law and respect for power.

What is the reason for this? Walker is much too sharp a thinker to be so wildly confused as he seems to be. I think what it boils down to is this: the reconciliation between law and power is that there be a

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[1] P. 27.

certain amount of law, but not too much. So the Rule of Law is that which secures a certain amount of law but not too much; and then there is a balance between law and power.

The trouble with this is that the balance might just as well be expressed as the Rule of Power: the securing of a certain amount of power, but not too much. The balance would be the same whether we had the Rule of Law or the Rule of Power. Power and law, therefore, appear in Walker's view to have an equal basic legitimacy, and the sense in which there is a rule of law is not at all clear.[2] Is this just a confusion on Walker's part or is there something at the bottom of it? Now the reader starts to worry. One adult human has no legitimate power over another except as it is authorised by law or the other's consent. This is the moral separateness of persons. Of course, you might think that such a moral notion is irrelevant, that power is in some way naturally legitimate. You might think that the powerful are literally their own power; that the moral separateness of persons is broken by the very fact of power; that the legitimacy of the powerful shines from them as brightness does from the sun (I think here of an especially odious image from one of Ayn Rand's novels: the hero stands poised on a cliff-top naked and gleaming). Does Walker think that? If so he is not the friend of freedom that his book proclaims. It would be unreasonable for us to extract a positive answer from a perception of confusion about a concept so notoriously vague as the rule of law except that the answer is consistent with a second, otherwise distinct, confusion.

Walker perpetrates an outrageous version of the naturalistic fallacy. He has perceived that natural science, post-Einstein, is undergoing a revolution whereby the world is seen as more holistic than (Newtonian) mechanistic. And he presents this as a ground for seeing moral relations, too, as holistic. Now, it is true that physics and other sciences are changing in this way. And it is also true that there are pressing upon us urgent moral question relating to our (holistic) interconnectedness as against separateness. But, except at the edge of the connection between the natural and the moral (which edge is what philosophers have usually referred to as the body/mind distinction), to reason from one to the other is simply fallacious. Why has Walker done it? It might be that he thinks naked power is naturally legitimate (nothing is quite so holistic as power), and then his argument is not so much a perpetration of the naturalistic fallacy of reasoning from the natural to the moral as a denial of the existence of the moral. Or it might be that this is a second major and independent confusion. If the former he is no friend of freedom. Either way it is a pity, for Walker does in the rest of the book have important things to say about our abuse of the element of creativeness in the law.

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[2] I should say that I do myself think that the rule of law has a clear meaning, the rule of law over power (which I have attempted to expound in *Courts and Administrators*, London, 1989), but whilst it is almost pardonable for a reviewer to mention his own work it is quite unpardonable to discuss it.

Judges make the law: let them get on and make it then! And it is of course not just judges who have found this possibility inspiring. If law is so trivially conceived that it might be made and unmade (by judges) then let any of us get on and make it as best we can! We see this at many levels. Do it in the law schools: academic legal writing has become, much of it, not the work of deep scholarship but thoroughly superficial scholarship (which is all it could be if that which is studied is made and unmade) as a base for what are called policy recommendations for reform. Do it in the law reform commissions; for they are universally constituted so that the conclusion of their endeavours is a statute, rather than, say, advice to judges (the depth of the common law is thereby equated to the flat spread of a statute). Do it in the outer offices of government; for government papers may now override statutes; and though this is said to be done in the name of interpretation it is not (if the interpretation is significant it overrides what would otherwise hold).[3] And do it all over again in on itself: statutes might be analogies from which to reason,[4] and therefore courts might be persuaded to apply not the statute but the policy behind the statute (Why not? Its hard to get things through Parliament. If you can only get half your policy through, keep at it).[5]

Walker shows considerable insight in relating our recent creative aberrations to the modern so-called schools of legal philosophy. The sociological school discovered that law was deep within the workings (the engineering) of society; from which it is but a small step to the undertaking of a little creative social engineering. The realists discovered that judges make the law; with the results stated. And the third school, legal positivism, was a catalyst for disaster. For it made it all so easy. All law was positive law, and therefore all law was statable in the way that statutes are statable. Never mind that the sociological school had shown that law was deep within us and our social relations; let us do a little social engineering and all we have to do is state it!

It is true that law is deep within us: the creativity of common law judges is therefore more like that of the philosopher searching deeper into the moral nature of humans and their relationships than it is like the creativity of a legislature. I mean here not just the simple practical business of adjudicating disputes, but also that part of the judicial practice of the higher courts which seeks creatively to improve the reasoning of the law. Sometimes this means make better decisions, but most often it means to make more comprehensible, because more deeply principled, decisions. Sometimes it involves the expansion of a fundamental notion to embrace new things. But at least as often it involves its contraction

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[3] For example, the (Victorian) Interpretation of Legislation Act, 1984, s. 35.

[4] D. St. L. Kelly, *The Osmond Case: Common Law and Statute Law*, (1986) 60 A.L.J. 513.

[5] The idea of statutory analogy is not just objectionable on this constitutional ground. It is fundamentally incoherent: a case has many analogies, a norm (set of words) has none.

by the cutting off of a false track. And often simplification is itself expansion not contraction, by virtue just of the augmented power of a simplified idea. Despite his reputation for so-called regressive legalism, Owen Dixon is still both our greatest judge and our most creative.

I find much to commend in Walker's support of the common law against our recent aberrations; but I am still troubled by the question where the common law's deep, necessarily moral, things stand for him. Indeed he might actually be the natural ally of those he is attacking. If power is its own legitimacy, let the hero stand in his power naked and gleaming; and let him also stride into the law reform commissions (though in a decent suit) and enact what he will! The deep moral commitment of common lawyers leads to our resisting both forms of power. And it leads also to the appreciation that there are other large questions of freedom and the legitimacy of power that the common law has not encompassed and may not be able to. The most important of these at this time are the freedom of women and the freedom of the poor. Walker is unpardonably trivial in his treatment of feminism. Whilst his treatment of property shows no conception that there is an issue of freedom and legitimacy in its distribution. The hero takes and it is his; with the rest left to live their lives, and create the new lives of their children, in deadening, perpetuating poverty. The common law is overtly, and truly, Lockean in its conception of the relation of property to freedom (Pollock said rightly that no one outside the common law has contributed as much to it as Locke); but has so far avoided the Lockean proviso (without which Locke's conception of property as freedom makes no sense) that there be enough and as good left for the others. Freedom as a serious moral idea is human freedom, not your freedom or my freedom taken by themselves (it is thus necessarily one variation or another on Kantian purity). It is not easy to see how common lawyers can embrace the full issue of justice since the scale of these fundamental questions may be too large (though, as the successors of Holt and Mansfield, we should not stop thinking too soon). In which case we have to look to the legitimate power of our Parliaments. In defending the common law against the Clerisy (Walker's term) we should emphasize two things. First many of them understand better than Walker the relations between oppression, poverty and freedom. And second, that a common law defence is not in any way committed to diminishing the significance of Parliament. It is the confusions, the various fudgings of the distinction of constitutional functions, which are objectionable; and these we must get rid of if we are to progress. Walker's book serves the valuable function of bringing these issues into the open. No-one can read it and just dismiss it. But in the end I have to say that I don't find his set of confusions (or the philosophy lurking behind them) an improvement on those he refutes.

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