# II

# THE MORALITY THAT MAKES LAW POSSIBLE

*[A] law which a man cannot obey, nor act according to it, is void and no law: and it is impossible to obey contradictions, or act according to them.*
—Vaughan, C. J. in *Thomas v. Sorrell*, 1677

*It is desired that our learned lawyers would answer these ensuing queries . . . whether ever the Commonwealth, when they chose the Parliament, gave them a lawless unlimited power, and at their pleasure to walk contrary to their own laws and ordinances before they have repealed them?*
—Lilburne, *England's Birth-Right Justified*, 1645

This chapter will begin with a fairly lengthy allegory. It concerns the unhappy reign of a monarch who bore the convenient, but not very imaginative and not even very regal sounding name of Rex.

## *Eight Ways to Fail to Make Law*

Rex came to the throne filled with the zeal of a reformer. He considered that the greatest failure of his predecessors had been in the field of law. For generations the legal system had known nothing like a basic reform. Procedures of trial were cumbersome,

the rules of law spoke in the archaic tongue of another age, justice was expensive, the judges were slovenly and sometimes corrupt. Rex was resolved to remedy all this and to make his name in history as a great lawgiver. It was his unhappy fate to fail in this ambition. Indeed, he failed spectacularly, since not only did he not succeed in introducing the needed reforms, but he never even succeeded in creating any law at all, good or bad.

His first official act was, however, dramatic and propitious. Since he needed a clean slate on which to write, he announced to his subjects the immediate repeal of all existing law, of whatever kind. He then set about drafting a new code. Unfortunately, trained as a lonely prince, his education had been very defective. In particular he found himself incapable of making even the simplest generalizations. Though not lacking in confidence when it came to deciding specific controversies, the effort to give articulate reasons for any conclusion strained his capacities to the breaking point.

Becoming aware of his limitations, Rex gave up the project of a code and announced to his subjects that henceforth he would act as a judge in any disputes that might arise among them. In this way under the stimulus of a variety of cases he hoped that his latent powers of generalization might develop and, proceeding case by case, he would gradually work out a system of rules that could be incorporated in a code. Unfortunately the defects in his education were more deep-seated than he had supposed. The venture failed completely. After he had handed down literally hundreds of decisions neither he nor his subjects could detect in those decisions any pattern whatsoever. Such tentatives toward generalization as were to be found in his opinions only compounded the confusion, for they gave false leads to his subjects and threw his own meager powers of judgment off balance in the decision of later cases.

After this fiasco Rex realized it was necessary to take a fresh start. His first move was to subscribe to a course of lessons in generalization. With his intellectual powers thus fortified, he resumed the project of a code and, after many hours of solitary

labor, succeeded in preparing a fairly lengthy document. He was still not confident, however, that he had fully overcome his previous defects. Accordingly, he announced to his subjects that he had written out a code and would henceforth be governed by it in deciding cases, but that for an indefinite future the contents of the code would remain an official state secret, known only to him and his scrivener. To Rex's surprise this sensible plan was deeply resented by his subjects. They declared it was very unpleasant to have one's case decided by rules when there was no way of knowing what those rules were.

Stunned by this rejection Rex undertook an earnest inventory of his personal strengths and weaknesses. He decided that life had taught him one clear lesson, namely, that it is easier to decide things with the aid of hindsight than it is to attempt to foresee and control the future. Not only did hindsight make it easier to decide cases, but—and this was of supreme importance to Rex—it made it easier to give reasons. Deciding to capitalize on this insight, Rex hit on the following plan. At the beginning of each calendar year he would decide all the controversies that had arisen among his subjects during the preceding year. He would accompany his decisions with a full statement of reasons. Naturally, the reasons thus given would be understood as not controlling decisions in future years, for that would be to defeat the whole purpose of the new arrangement, which was to gain the advantages of hindsight. Rex confidently announced the new plan to his subjects, observing that he was going to publish the full text of his judgments with the rules applied by him, thus meeting the chief objection to the old plan. Rex's subjects received this announcement in silence, then quietly explained through their leaders that when they said they needed to know the rules, they meant they needed to know them *in advance* so they could act on them. Rex muttered something to the effect that they might have made that point a little clearer, but said he would see what could be done.

Rex now realized that there was no escape from a published code declaring the rules to be applied in future disputes. Continuing his lessons in generalization, Rex worked diligently on a

revised code, and finally announced that it would shortly be published. This announcement was received with universal gratification. The dismay of Rex's subjects was all the more intense, therefore, when his code became available and it was discovered that it was truly a masterpiece of obscurity. Legal experts who studied it declared that there was not a single sentence in it that could be understood either by an ordinary citizen or by a trained lawyer. Indignation became general and soon a picket appeared before the royal palace carrying a sign that read, "How can anybody follow a rule that nobody can understand?"

The code was quickly withdrawn. Recognizing for the first time that he needed assistance, Rex put a staff of experts to work on a revision. He instructed them to leave the substance untouched, but to clarify the expression throughout. The resulting code was a model of clarity, but as it was studied it became apparent that its new clarity had merely brought to light that it was honeycombed with contradictions. It was reliably reported that there was not a single provision in the code that was not nullified by another provision inconsistent with it. A picket again appeared before the royal residence carrying a sign that read, "This time the king made himself clear—in both directions."

Once again the code was withdrawn for revision. By now, however, Rex had lost his patience with his subjects and the negative attitude they seemed to adopt toward everything he tried to do for them. He decided to teach them a lesson and put an end to their carping. He instructed his experts to purge the code of contradictions, but at the same time to stiffen drastically every requirement contained in it and to add a long list of new crimes. Thus, where before the citizen summoned to the throne was given ten days in which to report, in the revision the time was cut to ten seconds. It was made a crime, punishable by ten years' imprisonment, to cough, sneeze, hiccough, faint or fall down in the presence of the king. It was made treason not to understand, believe in, and correctly profess the doctrine of evolutionary, democratic redemption.

When the new code was published a near revolution resulted.

Leading citizens declared their intention to flout its provisions. Someone discovered in an ancient author a passage that seemed apt: "To command what cannot be done is not to make law; it is to unmake law, for a command that cannot be obeyed serves no end but confusion, fear and chaos." Soon this passage was being quoted in a hundred petitions to the king.

The code was again withdrawn and a staff of experts charged with the task of revision. Rex's instructions to the experts were that whenever they encountered a rule requiring an impossibility, it should be revised to make compliance possible. It turned out that to accomplish this result every provision in the code had to be substantially rewritten. The final result was, however, a triumph of draftsmanship. It was clear, consistent with itself, and demanded nothing of the subject that did not lie easily within his powers. It was printed and distributed free of charge on every street corner.

However, before the effective date for the new code had arrived, it was discovered that so much time had been spent in successive revisions of Rex's original draft, that the substance of the code had been seriously overtaken by events. Ever since Rex assumed the throne there had been a suspension of ordinary legal processes and this had brought about important economic and institutional changes within the country. Accommodation to these altered conditions required many changes of substance in the law. Accordingly as soon as the new code became legally effective, it was subjected to a daily stream of amendments. Again popular discontent mounted; an anonymous pamphlet appeared on the streets carrying scurrilous cartoons of the king and a leading article with the title: "A law that changes every day is worse than no law at all."

Within a short time this source of discontent began to cure itself as the pace of amendment gradually slackened. Before this had occurred to any noticeable degree, however, Rex announced an important decision. Reflecting on the misadventures of his reign, he concluded that much of the trouble lay in bad advice he had received from experts. He accordingly declared he was reas-

suming the judicial power in his own person. In this way he could directly control the application of the new code and insure his country against another crisis. He began to spend practically all of his time hearing and deciding cases arising under the new code.

As the king proceeded with this task, it seemed to bring to a belated blossoming his long dormant powers of generalization. His opinions began, indeed, to reveal a confident and almost exuberant virtuosity as he deftly distinguished his own previous decisions, exposed the principles on which he acted, and laid down guide lines for the disposition of future controversies. For Rex's subjects a new day seemed about to dawn when they could finally conform their conduct to a coherent body of rules.

This hope was, however, soon shattered. As the bound volumes of Rex's judgments became available and were subjected to closer study, his subjects were appalled to discover that there existed no discernible relation between those judgments and the code they purported to apply. Insofar as it found expression in the actual disposition of controversies, the new code might just as well not have existed at all. Yet in virtually every one of his decisions Rex declared and redeclared the code to be the basic law of his kingdom.

Leading citizens began to hold private meetings to discuss what measures, short of open revolt, could be taken to get the king away from the bench and back on the throne. While these discussions were going on Rex suddenly died, old before his time and deeply disillusioned with his subjects.

The first act of his successor, Rex II, was to announce that he was taking the powers of government away from the lawyers and placing them in the hands of psychiatrists and experts in public relations. This way, he explained, people could be made happy without rules.

### *The Consequences of Failure*

Rex's bungling career as legislator and judge illustrates that the attempt to create and maintain a system of legal rules may mis-

carry in at least eight ways; there are in this enterprise, if you will, eight distinct routes to disaster. The first and most obvious lies in a failure to achieve rules at all, so that every issue must be decided on an ad hoc basis. The other routes are: (2) a failure to publicize, or at least to make available to the affected party, the rules he is expected to observe; (3) the abuse of retroactive legislation, which not only cannot itself guide action, but undercuts the integrity of rules prospective in effect, since it puts them under the threat of retrospective change; (4) a failure to make rules understandable; (5) the enactment of contradictory rules or (6) rules that require conduct beyond the powers of the affected party; (7) introducing such frequent changes in the rules that the subject cannot orient his action by them; and, finally, (8) a failure of congruence between the rules as announced and their actual administration.

A total failure in any one of these eight directions does not simply result in a bad system of law; it results in something that is not properly called a legal system at all, except perhaps in the Pickwickian sense in which a void contract can still be said to be one kind of contract. Certainly there can be no rational ground for asserting that a man can have a moral obligation to obey a legal rule that does not exist, or is kept secret from him, or that came into existence only after he had acted, or was unintelligible, or was contradicted by another rule of the same system, or commanded the impossible, or changed every minute. It may not be impossible for a man to obey a rule that is disregarded by those charged with its administration, but at some point obedience becomes futile—as futile, in fact, as casting a vote that will never be counted. As the sociologist Simmel has observed, there is a kind of reciprocity between government and the citizen with respect to the observance of rules.[1] Government says to the citizen in

1. *The Sociology of Georg Simmel* (1950), trans. Wolff, §4, "Interaction in the Idea of 'Law,' " pp. 186–89; see also Chapter 4, "Subordination under a Principle," pp. 250–67. Simmel's discussion is worthy of study by those concerned with defining the conditions under which the ideal of "the rule of law" can be realized.

effect, "These are the rules we expect you to follow. If you follow them, you have our assurance that they are the rules that will be applied to your conduct." When this bond of reciprocity is finally and completely ruptured by government, nothing is left on which to ground the citizen's duty to observe the rules.

The citizen's predicament becomes more difficult when, though there is no total failure in any direction, there is a general and drastic deterioration in legality, such as occurred in Germany under Hitler.[2] A situation begins to develop, for example, in which though some laws are published, others, including the most important, are not. Though most laws are prospective in effect, so free a use is made of retrospective legislation that no law is immune to change ex post facto if it suits the convenience of those in power. For the trial of criminal cases concerned with loyalty to the regime, special military tribunals are established and these tribunals disregard, whenever it suits their convenience, the rules that are supposed to control their decisions. Increasingly the principal object of government seems to be, not that of giving the citizen rules by which to shape his conduct, but to frighten him into impotence. As such a situation develops, the problem faced by the citizen is not so simple as that of a voter who knows with certainty that his ballot will not be counted. It is more like

2. I have discussed some of the features of this deterioration in my article, "Positivism and Fidelity to Law," 71 *Harvard Law Review* 630, 648–57 (1958). This article makes no attempt at a comprehensive survey of all the postwar judicial decisions in Germany concerned with events occurring during the Hitler regime. Some of the later decisions rested the nullity of judgments rendered by the courts under Hitler not on the ground that the statutes applied were void, but on the ground that the Nazi judges misinterpreted the statutes of their own government. See Pappe, "On the Validity of Judicial Decisions in the Nazi Era," 23 *Modern Law Review* 260–74 (1960). Dr. Pappe makes more of this distinction than seems to me appropriate. After all, the meaning of a statute depends in part on accepted modes of interpretation. Can it be said that the postwar German courts gave full effect to Nazi laws when they interpreted them by their own standards instead of the quite different standards current during the Nazi regime? Moreover, with statutes of the kind involved, filled as they were with vague phrases and unrestricted delegations of power, it seems a little out of place to strain over questions of their proper interpretation.

that of the voter who knows that the odds are against his ballot being counted at all, and that if it is counted, there is a good chance that it will be counted for the side against which he actually voted. A citizen in this predicament has to decide for himself whether to stay with the system and cast his ballot as a kind of symbolic act expressing the hope of a better day. So it was with the German citizen under Hitler faced with deciding whether he had an obligation to obey such portions of the laws as the Nazi terror had left intact.

In situations like these there can be no simple principle by which to test the citizen's obligation of fidelity to law, any more than there can be such a principle for testing his right to engage in a general revolution. One thing is, however, clear. A mere respect for constituted authority must not be confused with fidelity to law. Rex's subjects, for example, remained faithful to him as king throughout his long and inept reign. They were not faithful to his law, for he never made any.

### *The Aspiration toward Perfection in Legality*

So far we have been concerned to trace out eight routes to failure in the enterprise of creating law. Corresponding to these are eight kinds of legal excellence toward which a system of rules may strive. What appear at the lowest level as indispensable conditions for the existence of law at all, become, as we ascend the scale of achievement, increasingly demanding challenges to human capacity. At the height of the ascent we are tempted to imagine a utopia of legality in which all rules are perfectly clear, consistent with one another, known to every citizen, and never retroactive. In this utopia the rules remain constant through time, demand only what is possible, and are scrupulously observed by courts, police, and everyone else charged with their administration. For reasons that I shall advance shortly, this utopia, in which all eight of the principles of legality are realized to perfection, is not actually a useful target for guiding the impulse toward legality; the goal of perfection is much more complex.

Nevertheless it does suggest eight distinct standards by which excellence in legality may be tested.

In expounding in my first chapter the distinction between the morality of duty and that of aspiration, I spoke of an imaginary scale that starts at the bottom with the most obvious and essential moral duties and ascends upward to the highest achievements open to man. I also spoke of an invisible pointer as marking the dividing line where the pressure of duty leaves off and the challenge of excellence begins. The inner morality of law, it should now be clear, presents all of these aspects. It too embraces a morality of duty and a morality of aspiration. It too confronts us with the problem of knowing where to draw the boundary below which men will be condemned for failure, but can expect no praise for success, and above which they will be admired for success and at worst pitied for the lack of it.

In applying the analysis of the first chapter to our present subject, it becomes essential to consider certain distinctive qualities of the inner morality of law. In what may be called the basic morality of social life, duties that run toward other persons generally (as contrasted with those running toward specific individuals) normally require only forbearances, or as we say, are negative in nature: Do not kill, do not injure, do not deceive, do not defame, and the like. Such duties lend themselves with a minimum of difficulty to formalized definition. That is to say, whether we are concerned with legal or moral duties, we are able to develop standards which designate with some precision—though it is never complete—the kind of conduct that is to be avoided.

The demands of the inner morality of the law, however, though they concern a relationship with persons generally, demand more than forbearances; they are, as we loosely say, affirmative in nature: make the law known, make it coherent and clear, see that your decisions as an official are guided by it, etc. To meet these demands human energies must be directed toward specific kinds of achievement and not merely warned away from harmful acts.

Because of the affirmative and creative quality of its demands,

the inner morality of law lends itself badly to realization through duties, whether they be moral or legal. No matter how desirable a direction of human effort may appear to be, if we assert there is a duty to pursue it, we shall confront the responsibility of defining at what point that duty has been violated. It is easy to assert that the legislator has a moral duty to make his laws clear and understandable. But this remains at best an exhortation unless we are prepared to define the degree of clarity he must attain in order to discharge his duty. The notion of subjecting clarity to quantitative measure presents obvious difficulties. We may content ourselves, of course, by saying that the legislator has at least a moral duty to try to be clear. But this only postpones the difficulty, for in some situations nothing can be more baffling than to attempt to measure how vigorously a man intended to do that which he has failed to do. In the morality of law, in any event, good intentions are of little avail, as King Rex amply demonstrated. All of this adds up to the conclusion that the inner morality of law is condemned to remain largely a morality of aspiration and not of duty. Its primary appeal must be to a sense of trusteeship and to the pride of the craftsman.

To these observations there is one important exception. This relates to the desideratum of making the laws known, or at least making them available to those affected by them. Here we have a demand that lends itself with unusual readiness to formalization. A written constitution may prescribe that no statute shall become law until it has been given a specified form of publication. If the courts have power to effectuate this provision, we may speak of a legal requirement for the making of law. But a moral duty with respect to publication is also readily imaginable. A custom, for example, might define what kind of promulgation of laws is expected, at the same time leaving unclear what consequences attend a departure from the accepted mode of publication. A formalization of the desideratum of publicity has obvious advantages over uncanalized efforts, even when they are intelligently and conscientiously pursued. A formalized standard of promulgation not only tells the lawmaker where to publish his

laws; it also lets the subject—or a lawyer representing his interests—know where to go to learn what the law is.

One might suppose that the principle condemning retroactive laws could also be very readily formalized in a simple rule that no such law should ever be passed, or should be valid if enacted. Such a rule would, however, disserve the cause of legality. Curiously, one of the most obvious seeming demands of legality —that a rule passed today should govern what happens tomorrow, not what happened yesterday—turns out to present some of the most difficult problems of the whole internal morality of law.

With respect to the demands of legality other than promulgation, then, the most we can expect of constitutions and courts is that they save us from the abyss; they cannot be expected to lay out very many compulsory steps toward truly significant accomplishment.

### *Legality and Economic Calculation*

In my first chapter I attempted to demonstrate how, as we leave the morality of duty and ascend toward the highest levels of a morality of aspiration, the principle of marginal utility plays an increasing role in our decisions. On the level of duty, anything like economic calculation is out of place. In a morality of aspiration, it is not only in place, but becomes an integral part of the moral decision itself—increasingly so as we reach toward the highest levels of achievement.

It is not difficult to show that something like an economic calculation may become necessary when a conflict arises between the internal and external moralities of law. From the standpoint of the internal morality of law, for example, it is desirable that laws remain stable through time. But it is obvious that changes in circumstances, or changes in men's consciences, may demand changes in the substantive aims of law, and sometimes disturbingly frequent changes. Here we are often condemned to steer a

wavering middle course between too frequent change and no change at all, sustained by the conviction, not that the course chosen is the only right one, but that we must in all events keep clear of the shoals of disaster that lie on either side.

It is much less obvious, I suspect, that antinomies may arise within the internal morality of law itself. Yet it is easy to demonstrate that the various desiderata which go to make up that morality may at times come into opposition with one another. Thus, it is simultaneously desirable that laws should remain stable through time and that they should be such as impose no insurmountable barriers to obedience. Yet rapid changes in circumstances, such as those attending an inflation, may render obedience to a particular law, which was once quite easy, increasingly difficult, to the point of approaching impossibility. Here again it may become necessary to pursue a middle course which involves some impairment of both desiderata.

During a visit to Poland in May of 1961 I had a conversation with a former Minister of Justice that is relevant here. She told how in the early days of the communist regime an earnest and sustained effort was made to draft the laws so clearly that they would be intelligible to the worker and peasant. It was soon discovered, however, that this kind of clarity could be attained only at the cost of those systematic elements in a legal system that shape its rules into a coherent whole and render them capable of consistent application by the courts. It was discovered, in other words, that making the laws readily understandable to the citizen carried a hidden cost in that it rendered their application by the courts more capricious and less predictable. Some retreat to a more balanced view therefore became unavoidable.

These examples and illustrations could be multiplied. Enough has been said, I believe, to show that the utopia of legality cannot be viewed as a situation in which each desideratum of the law's special morality is realized to perfection. This is no special quality—and certainly no peculiar defect—of the internal morality of law. In every human pursuit we shall always encounter the problem of balance at some point as we traverse the long

road that leads from the abyss of total failure to the heights of human excellence.

It is now time to pass in an extended review each of the eight demands of the law's inner morality. This review will deal with certain difficulties hitherto passed over, particularly those touching the relation between the internal and external moralities of law. It will also include some remarks on the ways in which problems of the law's inner morality have actually arisen in history.

### *The Generality of Law*

The first desideratum of a system for subjecting human conduct to the governance of rules is an obvious one: there must be rules. This may be stated as the requirement of generality.

In recent history perhaps the most notable failure to achieve general rules has been that of certain of our regulatory agencies, particularly those charged with allocative functions. Like King Rex they were embarked on their careers in the belief that by proceeding at first case by case they would gradually gain an insight which would enable them to develop general standards of decision. In some cases this hope has been almost completely disappointed; this is notably so in the case of the Civil Aeronautics Board and the Federal Communications Commission. The reason for this failure lies, I believe, in the nature of the tasks assigned to these agencies; they are trying to do through adjudicative forms something that does not lend itself to accomplishment through those forms.[3] But whatever the reason, considered as attempts to create coherent legal systems these agencies have been notably unsuccessful.

3. I have attempted to analyze the limitations of the adjudicative process in two articles: "Adjudication and the Rule of Law," *Proceedings of the American Society of International Law* (1960), pp. 1–8; "Collective Bargaining and the Arbitrator," *Wisconsin Law Review* 3–46 (1963). I plan later to publish a more general analysis to be called *The Forms and Limits of Adjudication*. See also pp. 170–77, infra.

The complaint registered against these agencies is not so much that their rules are unfair, but that they have failed to develop any significant rules at all. This distinction is important because the desideratum of generality is sometimes interpreted to mean that the law must act impersonally, that its rules must apply to general classes and should contain no proper names. Constitutional provisions invalidating "private laws" and "special legislation" express this principle.[4] But the principle protected by these provisions is a principle of fairness, which, in terms of the analysis presented here, belongs to the external morality of the law.

This principle is different from the demand of the law's internal morality that, at the very minimum, there must be rules of some kind, however fair or unfair they may be. One can imagine a system of law directed toward a single named individual, regulating his conduct with other named individuals. Something like this can exist between employer and employee. If the employer wants to avoid the necessity of standing over the employee and directing his every action, he may find it essential to articulate and convey to the employee certain general principles of conduct. In this venture there are open to the employer all the routes to failure traversed by King Rex. He may not succeed in articu-

4. See the entry, "Special, Local or Private Laws," in *Index Digest of State Constitutions* (2d ed. 1959), published by the Legislative Drafting Research Fund of Columbia University. Provisions of this sort have produced much difficulty for courts and legislatures. Sometimes their requirements are met by such apparently disingenuous devices as a provision that a particular statute shall apply "to all cities in the state which according to the last census had a population of more than 165,000 and less than 166,000." Before condemning this apparent evasion we should recall that the one-member class or set is a familiar and essential concept of logic and set theory. Sometimes the prohibition of special laws is directed against rather obvious misuses of legislative power. The California Constitution, for example, prohibits special laws "for the punishment of crimes . . . regulating the practice of courts of justice . . . granting divorces . . . declaring any person of age." (Article VI §25, as amended to Nov. 4, 1952.) The same Article, however, contains a general prohibition of special or local laws "in all cases where a general law can be made applicable." This has produced a veritable donnybrook of litigation.

lating general rules; if he does, he may not succeed in conveying them to the employee, etc. If the employer succeeds in bringing into existence a functioning system of rules, he will discover that this success has been bought at a certain cost to himself. He must not only invest some effort and intelligence in the enterprise, but its very success limits his own freedom of action. If in distributing praise and censure, he habitually disregards his own rules, he may find his system of law disintegrating, and without any open revolt, it may cease to produce for him what he sought to obtain through it.

In actual systems for controlling and directing human conduct a total failure to achieve anything like a general rule is rare. Some generalization is implicit in the act of communicating even a single wish. The command to a dog, "Shake hands," demands some power of generalization in both master and dog. Before he can execute the command the dog has to understand what range of slightly different acts will be accepted as shaking hands. Furthermore, a well-trained dog will come in time to perceive in what kinds of situations he is likely to be asked to shake hands and will often extend his paw in anticipation of a command not yet given. Obviously something like this can and does happen in human affairs, even when those possessing the power to command have no desire to lay down general rules. But if a total failure of generalization requires the special talent for ineptitude of a King Rex, the fact is that many legal systems, large and small, suffer grievously from a lack of general principle.[5]

The problem of generality receives a very inadequate treatment in the literature of jurisprudence. Austin correctly perceived that a legal system is something more than a series of patternless exercises of political power. Yet his attempt to distinguish between general and particular commands was so arbitrary and so unrelated to his system as a whole that the Anglo-American

5. Herbert Wechsler's complaint that some of the recent decisions of the Supreme Court on constitutional issues lack the degree of reasoned generality that will assure the Court's "neutrality" is the latest expression of a plaint that goes back to the beginnings of law itself. See Wechsler, *Principles, Politics, and Fundamental Law* (1961).

literature since his time has scarcely recovered from this original misdirection.[6]

Perhaps the basic defect of Austin's analysis lay in his failure to distinguish two questions: (1) what is essential for the efficacy of a system of legal rules, and (2) what shall we call "a law"? In the analysis presented in these lectures the requirement of generality rests on the truism that to subject human conduct to the control of rules, there must be rules. This in no way asserts that every governmental act possessing "the force of law"—such as a judicial decree directed against a particular defendant—must itself take the form of laying down a general rule. Nor is there any attempt here to rule on such issues of linguistic convenience as deciding whether we should call a statute which establishes a tax collection office in Centerville a law.

### *Promulgation*

Turning now to the promulgation of laws, this is an ancient and recurring problem, going back at least as far as the Secession of the Plebs in Rome.[7] Obvious and urgent as this demand seems, it must be recognized that it is subject to the marginal utility principle. It would in fact be foolish to try to educate every citizen into the full meaning of every law that might conceivably be applied to him, though Bentham was willing to go a long way in that direction.[8]

6. See Austin, *Lectures on Jurisprudence* (1879), Lecture I, pp. 94–98; Gray, *The Nature and Sources of the Law* (2d ed. 1921), pp. 161–62; Brown, *The Austinian Theory of Law* (1906), note on pp. 17–20; cf. Kelsen, *General Theory of Law and State* (1945), pp. 37–39; Somló, *Juristische Grundlehre* (2d ed. 1927), §20, pp. 64–65. The best treatment in English that I have encountered is in Patterson, *Jurisprudence—Men and Ideas of the Law* (1953), ch. 5.

7. Relevant discussions will be found in Austin, *Lectures on Jurisprudence* (1879), pp. 542–44; Gray, *Nature and Sources of the Law* (2d ed., 1921), pp. 162–70. Austin accepts without cavil a view traditional in England according to which an act of Parliament is considered to be effective without publication.

8. See, for example, the educative efforts recommended in *Rationale of Judicial Evidence,* Ch. IV, "Of Preappointed Evidence," *Works,* Bowring's ed., *4,* 508–85.

The need for this education will, of course, depend upon how far the requirements of law depart from generally shared views of right and wrong. Over much of its history the common law has been largely engaged in working out the implications of conceptions that were generally held in the society of the time. This large measure of coincidence between moral and legal demands reduced greatly the force of the objection that the rules of the common law were, in contrast with those of a code, difficult of access.

The problem of promulgation is complicated by the question, "Just what counts as law for purposes of this requirement?" Deciding agencies, especially administrative tribunals, often take the view that, though the rules they apply to controversies ought to be published, a like requirement does not attach to the rules and practices governing their internal procedures. Yet every experienced attorney knows that to predict the outcome of cases it is often essential to know, not only the formal rules governing them, but the internal procedures of deliberation and consultation by which these rules are in fact applied. Perhaps it is in recognition of this that the otherwise bizarre seeming requirement has developed in Switzerland and Mexico that certain courts must hold their deliberations in public.

The man whom Thurman Arnold sometimes calls the "mere realist" (when he is not reserving that role for himself)[9] might be tempted to say something like this of the requirement of promulgation: "After all, we have thousands of laws, only the smallest fraction of which are known, directly or indirectly, to the ordi-

9. Sometimes Judge Arnold seems to be able to combine the roles. In Professor Hart's "Theology," 73 *Harvard Law Review* 1298, at p. 1311 (1960), he rises eloquently above the "mere realist" by declaring, "Without a constant and sincere pursuit of the shining but never completely attainable ideal of the rule of law above men, of 'reason' above 'personal preference,' we would not have a civilized government." But in the same article he castigates Professor Henry M. Hart for suggesting that the Supreme Court ought to spend more time in "the maturing of collective thought." Arnold declares, "There is no such process as this, and there never has been; men of positive views are only hardened in those views by . . . conference" (p. 1312).

nary citizen. Why all this fuss about publishing them? Without reading the criminal code, the citizen knows he shouldn't murder and steal. As for the more esoteric laws, the full text of them might be distributed on every street corner and not one man in a hundred would ever read it." To this a number of responses must be made. Even if only one man in a hundred takes the pains to inform himself concerning, say, the laws applicable to the practice of his calling, this is enough to justify the trouble taken to make the laws generally available. This citizen at least is entitled to know, and he cannot be identified in advance. Furthermore, in many activities men observe the law, not because they know it directly, but because they follow the pattern set by others whom they know to be better informed than themselves. In this way knowledge of the law by a few often influences indirectly the actions of many. The laws should also be given adequate publication so that they may be subject to public criticism, including the criticism that they are the kind of laws that ought not to be enacted unless their content can be effectively conveyed to those subject to them. It is also plain that if the laws are not made readily available, there is no check against a disregard of them by those charged with their application and enforcement. Finally, the great bulk of modern laws relate to specific forms of activity, such as carrying on particular professions or businesses; it is therefore quite immaterial that they are not known to the average citizen. The requirement that laws be published does not rest on any such absurdity as an expectation that the dutiful citizen will sit down and read them all.

### *Retroactive Laws*

In this country the problem of retroactive laws is explicitly dealt with in certain provisions of the United States Constitution[10]

10. The third paragraph of Article I, Section IX, provides, "No bill of attainder or ex post facto law shall be passed" by the Congress. Despite the breadth of its language, the provision concerning ex post facto laws has been construed to apply only to criminal statutes. (See the articles cited in

and in scattered measures in certain state constitutions.[11] Outside the areas covered by these provisions, the validity of retroactive legislation is largely regarded as a problem of due process. I shall not concern myself with the intricacies and uncertainties of this body of constitutional law.[12] Instead I shall deal with certain basic problems concerning the relation between retroactivity and the other elements of legality.[13]

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note 12, infra.) By bills of attainder the Constitution meant primarily punitive legislative acts directed against individuals. The prohibition of such bills was supported not only by the belief that laws ought to be prospective in effect, but also, and perhaps primarily, by a conviction that punitive measures ought to be imposed by rules of general application.

The prohibition of bills of attainder and ex post facto laws is extended to the states by Article I, Section X. This Section adds a provision that no "state shall . . . pass . . . any law impairing the obligation of contract." This last provision is generally regarded as invalidating a particular kind of "retroactive" law. However, as I shall indicate later in the text, there are real difficulties in developing a precise definition of a "retroactive law." These become particularly acute in connection with the "impairment clause."

11. See the entries "Ex Post Facto Laws and Retrospective Laws" in the *Index Digest of State Constitutions* (2d ed. 1959). The spirit of these statutes finds vigorous expression in Part I, Section 23, of the New Hampshire Constitution of 1784: "Retrospective laws are highly injurious, oppressive, and unjust. No such laws, therefore, should be made, either for the decision of civil causes, or the punishment of offenses."

12. See Hale, "The Supreme Court and the Contract Clause," 57 *Harvard Law Review* 512–57, 612–74, 852–92 (1944); Hochman, "The Supreme Court and the Constitutionality of Retroactive Legislation," 73 *Harvard Law Review* 692–727 (1960); "Prospective Overruling and Retroactive Application in the Federal Courts," 71 *Yale Law Journal* 907–51 (1962), (unsigned note).

13. The literature of jurisprudence pays but scant attention to retroactive laws. Gray discusses at considerable length the ex post facto effect of judicial decisions (*The Nature and Sources of the Law* [2d ed. 1921], pp. 89–101, 218–33) but has only this to say of statutes: "The legislature . . . can, in the absence of any Constitutional prohibition, even make the new statute retroactive." (Ibid., p. 187.) Kelsen seems slightly bothered by retroactive laws, but observes that since it is generally recognized that ignorance of law does not excuse, and hence a law may properly be applied to one who did not know of it, the retroactive statute only carries this a bit further by applying a law to one who could not possibly have known of it. *General Theory of Law and State* (1945), pp. 43–44, 73, 146, 149. For

Taken by itself, and in abstraction from its possible function in a system of laws that are largely prospective, a retroactive law is truly a monstrosity. Law has to do with the governance of human conduct by rules. To speak of governing or directing conduct today by rules that will be enacted tomorrow is to talk in blank prose. To ask how we should appraise an imaginary legal system consisting exclusively of laws that are retroactive, and retroactive only, is like asking how much air pressure there is in a perfect vacuum.

If, therefore, we are to appraise retroactive laws intelligently, we must place them in the context of a system of rules that are generally prospective. Curiously, in this context situations can arise in which granting retroactive effect to legal rules not only becomes tolerable, but may actually be essential to advance the cause of legality.

Like every other human undertaking, the effort to meet the often complex demands of the internal morality of law may suffer various kinds of shipwreck. It is when things go wrong that the retroactive statute often becomes indispensable as a curative measure; though the proper movement of law is forward in time, we sometimes have to stop and turn about to pick up the pieces. Suppose a statute declares that after its effective date no marriage shall be valid unless a special stamp, provided by the state, is affixed to the marriage certificate by the person performing the ceremony. A breakdown of the state printing office results in the stamps' not being available when the statute goes into effect.

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Somló the question is one of fairness; there is no intrinsic reason in the nature of law itself why laws cannot be retrospective. *Juristische Grundlehre* (2d ed. 1927), 302–03. Only Austin seems to consider retroactive laws as presenting a serious problem for legal analysis. Regarding law as a command to which a sanction is attached, he observes that "injury or wrong supposes unlawful *intention,* or one of those modes of unlawful *inadvertence* which are styled negligence, heedlessness, and rashness. For unless the party knew that he was violating his duty, or unless he *might* have known that he was violating his duty, the sanction could not operate, at the moment of the wrong, to the end of impelling him" to obey the command. *Lectures on Jurisprudence* (4th ed. 1879), p. 485.

Though the statute is duly promulgated, it is little publicized, and the method by which it would ordinarily become known, by word of mouth among those who perform marriages, fails because the stamps are not distributed. Many marriages take place between persons who know nothing of the law, and often before a minister who also knows nothing of it. This occurs after the legislature has adjourned. When it is called back into session, the legislature enacts a statute conferring validity on marriages which by the terms of the previous statute were declared void. Though taken by itself, the retrospective effect of the second statute impairs the principle of legality, it alleviates the effect of a previous failure to realize two other desiderata of legality: that the laws should be made known to those affected by them and that they should be capable of being obeyed.[14]

One might be tempted to derive from this illustration the lesson that retrospective laws are always justified, or at least are innocent, when their intent is to cure irregularities of form. Before hastening to this conclusion it would be well to recall the Roehm Purge of 1934. Hitler had decided that certain elements in the Nazi party gathered about Roehm were an encumbrance to his regime. The normal procedure for a dictatorship in such a case would be to order sham trials to be followed by conviction and execution. However, time was pressing, so Hitler and his associates took a hurried trip south during which they shot down nearly a hundred persons. Returning to Berlin Hitler promptly arranged to have passed a retroactive statute converting these murders into lawful executions. Afterward Hitler declared that during the affair "the Supreme Court of the German people consisted of myself," thus indicating that to his mind the shoot-

14. Because their draftsmen commonly overlook the occasional need for "curative" laws, flat constitutional prohibitions of retroactive laws have sometimes had to be substantially rewritten by the courts. Thus Article I, §20, of the Tennessee Constitution of 1870 provides that "no retrospective law, or law impairing the obligation of contract, shall be made." This was at an early time interpreted as if it read "no retrospective law, or other law, impairing the obligation of contract, shall be made." The early cases are discussed in *Wynne's Lessee v. Wynne*, 32 Tenn. 405 (1852).

ings were attended by a mere irregularity of form which consisted in the fact that he held in his hand a pistol rather than the staff of justice.[15] And, on this view of the matter, he might even have quoted the language of our Supreme Court in upholding an enactment which it called "a curative statute aptly designed to remedy . . . defects in the administration of government."[16]

A second aspect of retrospective lawmaking relates not so much to any positive contribution it may on occasion make to the internal morality of the law, but rather to the circumstance that it unavoidably attaches in some measure to the office of judge. It is important to note that a system for governing human conduct by formally enacted rules does not of necessity require courts or any other institutional procedure for deciding disputes about the meaning of rules. In a small and friendly society, governed by relatively simple rules, such disputes may not arise. If they do, they may be settled by a voluntary accommodation of interests. Even if they are not so resolved, a certain number of continuing controversies on the periphery may not seriously impair the efficacy of the system as a whole.

I emphasize this point because it is so often taken for granted that courts are simply a reflection of the fundamental purpose of law, which is assumed to be that of settling disputes. The need for rules—so it seems to be thought—arises wholly out of man's selfish, quarrelsome, and disputatious nature. In a society of angels there would be no need for law.

But this depends on the angels. If angels can live together and accomplish their good works without any rules at all, then, of course, they need no law. Nor would they need law if the rules on which they acted were tacit, informal, and intuitively perceived. But if, in order to discharge their celestial functions effectively, angels need "made" rules, rules brought into existence

15. Relevant references will be found in my article in 71 *Harvard Law Review* 650 (1958).

16. *Graham v. Goodcell*, 282 U.S. 409, 429 (1930).

by some explicit decision, then they need law as law is viewed in these essays. A King Rex called in to govern them and to establish rules for their conduct would lose no opportunity to bungle his job simply because his subjects were angels. One might object that at least the problem of maintaining congruence between official action and enacted rule would not arise; but this is not true, for Rex might easily fall into the pit of addressing particular requests to his angelic subjects that conflicted with the general rules he had laid down for their conduct. This practice might produce a state of confusion in which the general rules would lose their directive force.

In a complex and numerous political society courts perform an essential function. No system of law—whether it be judge-made or legislatively enacted—can be so perfectly drafted as to leave no room for dispute. When a dispute arises concerning the meaning of a particular rule, some provision for a resolution of the dispute is necessary. The most apt way to achieve this resolution lies in some form of judicial proceeding.

Suppose, then, a dispute arises between *A* and *B* concerning the meaning of a statutory rule by which their respective rights are determined. Their dispute is submitted to a court. After weighing all the arguments carefully the judge may consider that they are about evenly balanced between the position taken by *A* and that taken by *B*. In that sense the statute really gives him no clear standard for deciding the case. Yet the principles relevant to its decision lie in this statute, the requirements of which would in nine cases out of ten raise no problem at all. If the judge fails to render a decision, he fails in his duty to settle disputes arising out of an existing body of law. If he decides the case, he inevitably engages in an act of retrospective legislation.

Obviously the judge must decide the case. If every time doubt arose as to the meaning of a rule, the judge were to declare the existence of a legal vacuum, the efficacy of the whole system of prospective rules would be seriously impaired. To act on rules confidently, men must not only have a chance to learn what the rules are, but must also be assured that in case of a dispute about

their meaning there is available some method for resolving the dispute.

In the case just supposed the argument for a retrospective decision is very strong. Suppose, however, that the court acts not to clarify a doubt about the law, but to overrule one of its own precedents. Following the case of *A v. B*, for example, the same dispute arises between *C* and *D*. *C* refuses to settle the dispute on the basis of the decision rendered in *A v. B*, and instead takes the case to court. *C* convinces the court that its decision in *A v. B* was mistaken and should be overruled. If this overruling is made retrospective, then *D* loses out though he relied on a legal decision that was clearly in his favor. On the other hand, if the decision in *A v. B* was wrong and ought to have been overruled, then *C* has performed a public service in refusing to accept it and in taking it to court to be reexamined. It is surely ironic if the only reward *C* receives for this service is to have a now admittedly mistaken rule applied against him. If the court were to overrule the precedent prospectively, so that the new rule would apply only to cases arising after the overruling decision, it is difficult to see how a private litigant would ever have any incentive to secure the repeal of a decision that was mistaken or that had lost its justification through a change in circumstances. (It has been pointed out that this argument loses its force in the case of what may be called "the institutional litigant," say, a labor union or a trade association which has a continuing interest in the development of the law that extends beyond specific controversies.)[17]

The situations just discussed concerned civil disputes. Quite different considerations apply to criminal cases. This has come to be recognized in cases involving the overruling of precedents, as for example where a court has construed a criminal statute not to apply to a certain form of activity, then in a later case changes its mind and overrules its previous interpretation.[18] If this over-

17. See the note in the *Yale Law Journal* cited in n. 12, supra.
18. See reference of last note.

ruling decision were projected retrospectively, then men would be branded as criminals who acted in reliance on a judicial interpretation of the law.

It has been supposed that different considerations apply to cases where the court settles previously unresolved uncertainties in the application of a criminal statute and that such cases are to be treated just like the civil case of *A v. B* discussed above. This view is, I believe, mistaken. It is true that there are certain safeguards here that mitigate what appears to be the gross injustice of retrospectively making criminal what was previously not clearly so. If the criminal statute as a whole is uncertain of application it may be declared unconstitutionally vague. Furthermore, it is an accepted principle of interpretation that a criminal statute should be construed strictly, so that acts falling outside its normal meaning are not to be considered criminal simply because they present the same kind of danger as those described by the language of the statute. Yet it is possible that a criminal statute may be so drawn that, though its meaning is reasonably plain in nine cases out of ten, in the tenth case, where some special situation of fact arises, it may be so unclear as to give the particular defendant no real warning that what he was doing was criminal. This is especially likely to be the case where economic regulations are involved. The courts have generally assumed that in this kind of case they have no choice but to resolve the doubt, thus creating retrospective criminal law. The problem is treated, in other words, as if it were just like a civil suit. Yet in a criminal case like that supposed an acquittal leaves no dispute unresolved; it simply means that the defendant goes free.

I suggest that a principle ought to be recognized according to which a defendant should not be held guilty of crime where the statute, as applied to his particular situation, was so unclear that, had it been equally unclear in all applications, it would have been held void for uncertainty. This principle would eliminate the false analogy to civil suits, and would bring the treatment of what may be called specific uncertainty into harmony with the law concerning criminal statutes that are uncertain as a whole.

There remains for examination the most difficult problem of all, that of knowing when an enactment should properly be regarded as retrospective. The easiest case is that of the statute which purports to make criminal an act that was perfectly legal when it was committed. Constitutional provisions prohibiting ex post facto laws are chiefly directed against such statutes. The principle *nulla poena sine lege* is one generally respected by civilized nations. The reason the retrospective criminal statute is so universally condemned does not arise merely from the fact that in criminal litigation the stakes are high. It arises also—and chiefly—because of all branches of law, the criminal law is most obviously and directly concerned with shaping and controlling human conduct. It is the retroactive criminal statute that calls most directly to mind the brutal absurdity of commanding a man today to do something yesterday.

Contrast with the ex post facto criminal statute a tax law first enacted, let us say, in 1963 imposing a tax on financial gains realized in 1960 at a time when such gains were not yet subject to tax. Such a statute may be grossly unjust, but it cannot be said that it is, strictly speaking, retroactive. To be sure, it bases the amount of the tax on something that happened in the past. But the only act it requires of its addressee is a very simple one, namely, that he pay the tax demanded. This requirement operates prospectively. We do not, in other words, enact tax laws today that order a man to have paid taxes yesterday, though we may pass today a tax law that determines the levy to be imposed on the basis of events occurring in the past.

To the ordinary citizen the argument just advanced would probably appear as the merest quibble. He would be likely to say that just as a man may do an act because he knows it to be legal under the existing criminal law, so he may enter a transaction because he knows that under the existing law the gain it yields is not subject to tax. If the ex post facto criminal law is heinous because it attaches a penalty to an act that carried no punishment when it was done, there is an equal injustice in a law that levies a tax on a man because of an activity that was tax-free when he engaged in it.

The answer to this argument would call attention to the consequences that would follow if its implications were fully accepted. Laws of all kinds, and not merely tax laws, enter into men's calculations and decisions. A man may decide to study for a particular profession, to get married, to limit or increase the size of his family, to make a final disposition of his estate—all with reference to an existing body of law, which includes not only tax laws, but the laws of property and contract, and perhaps, even, election laws which bring about a particular distribution of political power. If every time a man relied on existing law in arranging his affairs, he were made secure against any change in legal rules, the whole body of our law would be ossified forever.

To this argument a reply could be made along the following lines: Tax laws are not just like other laws. For one thing, they enter more directly into the planning of one's affairs. Moreover—and much more importantly—their principal object is often not merely to raise revenue, but to shape human conduct in ways thought desirable by the legislator. In this respect they are close cousins to the criminal law. The laws of property and contract neither prescribe nor recommend any particular course of action; their object is merely to protect acquisitions resulting from unspecified activities. Tax laws, on the other hand, coax men into, or dissuade them from, certain kinds of behavior and this is often precisely their objective. When they thus become a kind of surrogate for the criminal law, they lose, as it were, their primitive innocence. In the case with which this discussion began (where the law originally imposed no tax on certain kinds of gains) the purpose of the law may have been to induce men to enter transactions of the kind that would yield these very gains. When a tax is later imposed on gains arising from these transactions, men are in effect penalized for doing what the law itself originally induced them to do.

At this point a replication may be entered to the following effect. Laws of every kind may induce men toward, or deter them from, particular forms of behavior. The whole law of con-

tracts, for example, might be said to have the purpose of inducing men to organize their affairs through "private enterprise." If business operations are planned in part by taking into account the existing law of contracts, is that law to be forever immune from change? Suppose a man unable to read or write becomes a real estate broker at a time when oral brokerage contracts are enforceable. Is he to be protected against a later law that might require such contracts to be evidenced by a signed writing? As for the argument that tax laws often have the explicit purpose of attracting men into, or deterring them from, certain activities, who can say what the precise function of a tax is, except that it raises revenue? One legislator may have favored a tax for one reason, another for a quite different reason. What shall we say of the tax on alcoholic beverages? Was its purpose to discourage drinking or was it to raise revenue by imposing a special levy on those whose habits of life indicate that they are especially able to help defray the costs of government? There can be no clear answer to questions like these.

At this point we must cut short this dialogue and leave its issues unresolved. The purpose of presenting it has been merely to indicate some of the difficulties surrounding the concept of the retroactive law, difficulties that are by no means confined to the law of taxation. In meeting these difficulties the courts have often resorted to the notion of a contract between the government and the citizen. Thus, if a tax exemption is granted in favor of certain activities and then later repealed, the test often applied is to ask whether the state can fairly be considered to have entered a contract to maintain the exemption. It should be observed that this notion of a contract between state and citizen is capable of indefinite extension. As Georg Simmel has shown, the state's position of superior power rests ultimately on a tacit reciprocity.[19] This reciprocity, once made explicit, can be extended to all eight of the principles of legality. If King Rex, instead of being an hereditary monarch, had been elected to office for life on a promise to reform the legal system, his subjects might well have

19. See note 1, supra.

felt they had a right to depose him. The notion that a revolution may be justified by a breach of contract by the government is, of course, an ancient one. It is a concept that is generally thought to lie completely beyond the usual premises of legal reasoning. Yet a milder cousin of it appears within the legal system itself when the validity of retrospective legislation is made to depend upon the state's fidelity to a contract between itself and the citizen.

In this discussion of retrospective laws much stress has been placed on difficulties of analysis. For that reason I should not like to leave the subject without a reminder that not every aspect of it is shrouded with obscurity. As with the other desiderata that make up the internal morality of the law, difficulties and nuances should not blind us to the fact that, while perfection is an elusive goal, it is not hard to recognize blatant indecencies. Nor in seeking examples of obvious abuses do we need to confine our search to Hitlerite Germany or Stalinist Russia. We, too, have legislators who, in their own more modest way, give evidence of believing that the end justifies the means. Take, for example, a federal statute enacted in 1938. This statute made it "unlawful for any person who has been convicted of a crime of violence . . . to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce." The draftsmen of the statute quite justifiably considered that persons falling within its language do not as a whole constitute our most trustworthy citizens. They also quite understandably harbored a wish that they might make their statute retroactive. Realizing, however, that this was impossible they sought to do the next best thing. They wrote into the statute a rule that if any firearm was received in interstate commerce by a person meeting the description of the act, then it should be presumed that the receipt took place after the effective date of the act. This piece of legislative overcleverness was stricken down by the Supreme Court in *Tot v. United States*.[20]

20. *Tot v. United States*, 319 U.S. 463 (1942). The Court also struck down another presumption contained in the Act. This provided that pos-

*The Clarity of Laws*

The desideratum of clarity represents one of the most essential ingredients of legality.[21] Though this proposition is scarcely subject to challenge, I am not certain it is always understood what responsibilities are involved in meeting this demand.

Today there is a strong tendency to identify law, not with rules of conduct, but with a hierarchy of power or command. This view—which confuses fidelity to law with deference for established authority—leads easily to the conclusion that while judges, policemen, and prosecuting attorneys can infringe legality, legislatures cannot, except as they may trespass against explicit constitutional restrictions on their power. Yet it is obvious that obscure and incoherent legislation can make legality unattainable by anyone, or at least unattainable without an unauthorized revision which itself impairs legality. Water from a tainted spring

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session of a firearm or ammunition by a person falling within the description contained in the Act should give rise to a presumption that it had been received after being shipped in interstate or foreign commerce.

21. There is little discussion of this desideratum in the literature of jurisprudence. The short treatment in Bentham's posthumous work, *The Limits of Jurisprudence Defined,* Everett, ed. (1945), p. 195, is entirely devoted to a labored attempt to develop a nomenclature capable of distinguishing various kinds of unclarity. One might have expected Austin to list among "laws improperly so-called" (*Lectures,* pp. 100–01) the wholly unintelligible statute. But it does not appear in his discussion. The neglect of this subject by positivistic writers is, however, quite understandable. A recognition that laws may vary in clarity would entail a further recognition that laws can have varying degrees of efficacy, that the unclear statute is, in a real sense, less a law than the clear one. But this would be to accept a proposition that runs counter to the basic assumptions of positivism.

In this country it has been urged that, quite without reference to any standards impliedly imposed by constitutions, the courts should refuse to make any attempt to apply statutes drastically lacking in clarity. Aigler, "Legislation in Vague or General Terms," 21 *Michigan Law Review* 831–51 (1922). As the law has developed, however, the requirement of clarity has been incorporated in a doctrine of unconstitutional vagueness, the application of this doctrine being almost entirely confined to criminal cases. See the extensive note, "The Void-for-Vagueness Doctrine in the Supreme Court," 109 *University of Pennsylvania Law Review* 67–116 (1960).

can sometimes be purified, but only at the cost of making it something other than it was. Being at the top of the chain of command does not exempt the legislature from its responsibility to respect the demands of the internal morality of law; indeed, it intensifies that responsibility.

To put a high value on legislative clarity is not to condemn out of hand rules that make legal consequences depend on standards such as "good faith" and "due care." Sometimes the best way to achieve clarity is to take advantage of, and to incorporate into the law, common sense standards of judgment that have grown up in the ordinary life lived outside legislative halls. After all, this is something we inevitably do in using ordinary language itself as a vehicle for conveying legislative intent. Nor can we ever, as Aristotle long ago observed, be more exact than the nature of the subject matter with which we are dealing admits. A specious clarity can be more damaging than an honest open-ended vagueness.

On the other hand, it is a serious mistake—and a mistake made constantly—to assume that, though the busy legislative draftsman can find no way of converting his objective into clearly stated rules, he can always safely delegate this task to the courts or to special administrative tribunals. In fact, however, this depends on the nature of the problem with which the delegation is concerned. In commercial law, for example, requirements of "fairness" can take on definiteness of meaning from a body of commercial practice and from the principles of conduct shared by a community of economic traders. But it would be a mistake to conclude from this that all human conflicts can be neatly contained by rules derived, case by case, from the standard of fairness.

There is need, then, to discriminate when we encounter Hayek's sweeping condemnation of legal provisions requiring what is "fair" or "reasonable":

> One could write a history of the decline of the Rule of Law . . . in terms of the progressive introduction of these

vague formulas into legislation and jurisdiction,[22] and of the increasing arbitrariness and uncertainty of, and the consequent disrespect for, the law and the judicature.[23]

A much needed chapter of jurisprudence remains at present largely unwritten. This chapter would devote itself to an analysis of the circumstances under which problems of governmental regulation may safely be assigned to adjudicative decision with a reasonable prospect that fairly clear standards of decision will emerge from a case-by-case treatment of controversies as they arise. In dealing with problems of this fundamental character, a policy of "wait and see" or of "social experimentation" has little to recommend it.

*Contradictions in the Laws*

It is rather obvious that avoiding inadvertent contradictions in the law may demand a good deal of painstaking care on the part of the legislator. What is not so obvious is that there can be difficulty in knowing when a contradiction exists, or how in abstract terms one should define a contradiction.

It is generally assumed that the problem is simply one of logic. A contradiction is something that violates the law of identity by which A cannot be not-A. This formal principle, however, if it has any value at all, has none whatever in dealing with contradictory laws.[24]

Let us take a situation in which a contradiction "in the logical sense" seems most evident. In a single statute, we may suppose, are to be found two provisions: one requires the automobile

22. "Adjudication" is no doubt meant, not "jurisdiction."

23. *The Road to Serfdom* (1944), p. 78.

24. Kelsen's highly formal analysis of the problem of contradictory norms does not, I submit, offer any aid at all to the legislator seeking to avoid contradictions or to the judge seeking to resolve them. *General Theory of Law and State* (1945), pp. 374–75 et passim; see index entry "Non-contradiction, principle of." Nor is much to be gained from Bentham's discussion of "repugnancies." Everett, *Bentham's Limits of Jurisprudence Defined* (1945), pp. 195–98.

owner to install new license plates on January first; the other makes it a crime to perform any labor on that date. Here there seems to be a violation of the law of identity; an act cannot be both forbidden and commanded at the same time. But is there any violation of logic in making a man do something and then punishing him for it? We may certainly say of this procedure that it makes no sense, but in passing this judgment we are tacitly assuming the objective of giving a meaningful direction to human effort. A man who is habitually punished for doing what he was ordered to do can hardly be expected to respond appropriately to orders given him in the future. If our treatment of him is part of an attempt to build up a system of rules for the governance of his conduct, then we shall fail in that attempt. On the other hand if our object is to cause him to have a nervous breakdown, we may succeed. But in neither event will we have trespassed against logic.

One of the accepted principles for dealing with apparent contradictions in the law is to see whether there is any way of reconciling the seemingly inconsistent provisions. Pursuant to this principle a court might hit upon the idea of finding the man who installed his plates on New Year's Day guilty of a crime and of then remitting his punishment because he worked under the compulsion of a statute. This seems a rather labored solution, but stranger procedures have been adopted in the history of the law. At one time in canonical law there was a principle according to which any promise made under oath was binding and another principle according to which certain kinds of promises, such as those extorted or usurious, imposed no obligation. What should the courts do then in the case of a usurious promise under oath? The solution was to order the promisor to render performance to the promisee and then immediately to compel the promisee to return what he had just received.[25] There may even have been a certain symbolic value in this curious procedure. By first enforcing the contract the court would dramatize the rule that men

25. Rudolph von Jhering, *Geist des römischen Rechts,* II[2] (6th and 7th ed. 1923), §45, p. 491.

are bound by promises under oath, and then by undoing its decree, the court would remind the promisee of what his overreaching had cost him.

Assuming that the court confronted with the New Year's Day statute would see no value in convicting the defendant and then remitting his fine, it might adopt one of two interpretations of the statute: (1) that the section making work on New Year's Day a crime overrides the provision concerning license plates, so that the automobile owner may lawfully postpone installing his plates until January second; or (2) that the provision concerning license plates overrides the work prohibition, so that the owner must install his plates on the first, but commits no crime in doing so. A less obvious, but much better solution would be to combine these interpretations, so that the owner who installs his plates on the first violates no law, while the owner who postpones providing his car with new plates until the second is equally within the law. This solution would recognize that the basic problem presented by the statute is that it gives a confused direction to the citizen so that he ought to be allowed to resolve that confusion in either way without injuring himself.

It will be well to consider another "self-contradictory" statute —this time as presented in an actual decision. In *United States v. Cardiff* the president of a company manufacturing food had been convicted of the crime of refusing to permit a federal inspector to enter his factory to determine whether it was complying with the Federal Food, Drug, and Cosmetic Act.[26] Section 704 of that Act defines the conditions under which an inspector may enter a factory; one of these conditions is that he first obtain the permission of the owner. Section 331 makes it a crime for the owner of the factory to refuse "to permit entry or inspection as authorized by section 704." The Act seems, then, to say that the inspector has a right to enter the factory but that the owner has a right to keep him out by refusing permission. There is, however, a very simple way of removing this apparent contra-

26. 344 U.S. 174 (1952).

diction. This would be to interpret the Act to mean that the owner violates the Act if *after* granting his consent that the inspector should enter, he *then* refuses entry. That this would make his liability depend on his own voluntary act is no anomaly; a man doesn't have to make a promise, but if he does, he may fasten a liability on himself by doing so.

The Supreme Court considered this interpretation but refused to accept it. The trouble with it is not that it is lacking in logic, but that it does not correspond to any sensible legislative purpose. It is understandable that Congress might wish to insure that the inspector be able to enter the factory over the owner's protest. It is not understandable that it should limit the inspector's right to enter to the improbable case of an eccentric factory owner who might first grant permission and then shut the door. Sense could be made of the statute by construing the requirement that the inspector first secure permission as relating to the normal courtesies affecting a convenient time and date, though the language counts against this interpretation. The Supreme Court held that the clash of the two provisions produced a result too ambiguous to give adequate warning of the nature of the crime; the Court therefore set the conviction aside.

So far this discussion has related to contradictions as they arise within the frame of a single enactment. More difficult problems can be presented when a statute enacted, say, in 1963 is found to conflict with the provisions of a quite distinct statute passed in 1953. Here the solution sanctioned by usage is to regard as impliedly repealed any provisions in the earlier statute inconsistent with the later enactment, the consecrated maxim being *lex posterior derogat priori*.[27] But in some cases an apter way of dealing with the problem might be to follow the principle now

27. In an early treatise on interpretation Lord Ellesmere laid down the rule that where repugnancies arise within a single statute the first provision —that is, the provision that comes first in the reading order of the text— should control. Thorne, *A Discourse upon the Statutes* (1942), pp. 132–33. One wonders what the basis for this curious view could have been. Was it perhaps an assumption that legislative draftsmen characteristically become weary and less attentive as they near the end of their task?

applied where contradictions arise within the frame of a single statute, that is, by effecting a reciprocal adjustment between the two statutes, interpreting each in the light of the other. This solution would, however, involve its own difficulties. One would be to know where to stop, for the courts might easily find themselves embarked on the perilous adventure of attempting to remake the entire body of our statutory law into a more coherent whole. The reinterpretation of old statutes in the light of new would also present embarrassing problems of retrospective legislation. I shall not attempt to pursue these issues. Enough has been intimated, however, to convey one clear lesson: legislative carelessness about the jibe of statutes with one another can be very hurtful to legality and there is no simple rule by which to undo the damage.

It has been suggested that instead of speaking of "contradictions" in legal and moral argument we ought to speak of "incompatibilities,"[28]—of things that do not go together or do not go together well. Another term, a great favorite in the history of the common law, is useful here. This is the word "repugnant." It is especially apt because what we call contradictory laws are laws that fight each other, though without necessarily killing one another off as contradictory statements are assumed to do in logic. Another good term that has fallen into disuse is the word "inconvenient" in its original sense. The inconvenient law was one that did not fit or jibe with other laws. (Cf. modern French, *convenir,* to agree or come together.)

It should be apparent from the analysis presented here that to determine when two rules of human conduct are incompatible we must often take into account a host of considerations extrinsic to the language of the rules themselves. At one time in history the command, "Cross this river, but don't get wet," contained a repugnancy. Since the invention of bridges and boats this is no longer true. If today I tell a man to jump in the air, but to keep his feet in contact with the ground, my order seems self-contra-

28. Perelman and Olbrechts-Tyteca, *La Nouvelle Rhétorique—Traité de l'Argumentation* (1958), pp. 262–76.

dictory simply because we assume there is no way open to him to take the ground along with him in his leap. The context that must be taken into account in determining the issue of incompatibility is, of course, not merely or even chiefly technological, for it includes the whole institutional setting of the problem—legal, moral, political, economic, and sociological. To test this assertion one may suppose that the New Year's Day statute required the installation of license plates on that day, but in another section levied an excise tax of one dollar on any person performing work on that day. It would be instructive to reflect how one would go about demonstrating that these provisions are "repugnant" and that their inclusion in a single statute must have been the result of legislative oversight.

### *Laws Requiring the Impossible*

On the face of it a law commanding the impossible seems such an absurdity that one is tempted to suppose no sane lawmaker, not even the most evil dictator, would have any reason to enact such a law.[29] Unfortunately the facts of life run counter to this assumption. Such a law can serve what Lilburne called "a law-

29. The question may be raised at this point whether most of the other desiderata that make up the internal morality of the law are not also ultimately concerned with the possibility of obedience. There is no question that the matter may be viewed in this light. Just as it is impossible to obey a law that requires one to become ten feet tall, so it is also impossible to obey a law that cannot be known, that is unintelligible, that has not yet been enacted, etc. But in justification for the separation effected in the text it should be observed that my concern is not to engage in an exercise in logical entailment, but to develop principles for the guidance of purposive human effort. The logician may, if he wishes, view a law that contradicts itself as a special case of the impossibility of observance, though in adopting this view he may, as I have indicated, find it difficult to define what he means by a "contradiction." From the standpoint of the lawmaker, in any event, there is an essential difference between the precautions he must take to keep his enactments consistent with one another and those he must take to be sure that the requirements of the law lie within the powers of those subject to them. Essential differences of this sort would be obscured by any attempt to telescope everything under the head of "impossibility of obedience."

less unlimited power" by its very absurdity; its brutal pointlessness may let the subject know that there is nothing that may not be demanded of him and that he should keep himself ready to jump in any direction.

The technique of demanding the impossible is subject to more subtle and sometimes even to beneficent exploitation. The good teacher often demands of his pupils more than he thinks they are capable of giving. He does this with the quite laudable motive of stretching their capacities. Unfortunately in many human contexts the line can become blurred between vigorous exhortation and imposed duty. The legislator is thus easily misled into believing his role is like that of the teacher. He forgets that the teacher whose pupils fail to achieve what he asked of them can, without insincerity or self-contradiction, congratulate them on what they did in fact accomplish. In a similar situation the government official faces the alternative of doing serious injustice or of diluting respect for law by himself winking at a departure from its demands.

The principle that the law should not demand the impossible of the subject may be pressed toward a quixotic extreme in which it ends by demanding the impossible of the legislator. It is sometimes assumed that no form of legal liability can be justified unless it rests either on (1) an intent to do a harmful act, or (2) some fault or neglect. If a man is held accountable for a condition of affairs for which he was not to blame—either because he intentionally brought it about or because it occurred through some neglect on his part—then he has ascribed to him responsibility for an occurrence that lay beyond his powers. When the law is interpreted to reach such a result it in effect holds a man for violating a command, "This must not happen," which it was impossible for him to obey.

The air of reasonableness that surrounds this conclusion obscures the true extent of what it actually demands. With respect to the proof of fault, for example, the law faces an insoluble dilemma. If we apply to a particular defendant an objective standard—traditionally that of "the reasonable man"—we obviously

run the risk of imposing on him requirements he is incapable of meeting, for his education and native capacities may not bring this standard within his reach. If we take the opposite course and attempt to ask whether the man before us, with all his individual limitations and quirks, fell short of what he ought to have achieved, we enter upon a hazardous inquiry in which all capacity for objective judgment may be lost. This inquiry requires a sympathetic identification with the life of another. Obviously differences of class, race, religion, age, and culture may obstruct or distort that identification. The result is that though an aloof justice is bound at times to be harsh, an intimate justice, seeking to explore and grasp the boundaries of a private world, cannot in the nature of things be evenhanded. The law knows no magic that will enable it to transcend this antinomy. It is, therefore, condemned to tread an uncertain middle course, tempering the standard of the reasonable man in favor of certain obvious deficiencies, but formalizing even its definitions of these.

The difficulties just described, it may be said, arise because a determination of fault involves what is essentially a moral judgment. In contrast, determining the intention with which an act was done seems to require only an inquiry of fact. But, again the reality is more complex. If intention is a fact, it is a private fact inferred from outward manifestations. There are times when the inference is relatively easy. Holmes once remarked that even a dog knows the difference between being stumbled over and being kicked. But at times the intention required by the law is a highly specific one, as where criminal penalties are made dependent upon proof that the defendant knowingly violated the law. This sort of provision is sometimes found in complex economic regulations, its purpose being to avoid the injustice of punishing a man for doing an act which may on its face have seemed quite innocent. From my own observation it is often a question whether in this case the cure is not worse than the disease. The required intent is so little susceptible of definite proof or disproof that the trier of fact is almost inevitably driven to asking, "Does he look like the kind who would stick by the rules

or one who would cheat on them when he saw a chance?" This question, unfortunately, leads easily into another, "Does he look like my kind?"[30]

These, then, are the difficulties encountered when, in order to keep the law within the citizen's capacity for obedience, his liability is limited to cases where fault or wrongful intent can be demonstrated. There are, however, numerous instances in our law of legal liability that is explicitly made independent of any proof of fault or intent.

One rather pervasive form of a liability of this sort presents no serious problem for the law's inner morality. A lunatic, let us suppose, steals my purse. His mental condition may be such that it is impossible for him to understand or to obey the laws of private property. This circumstance furnishes a good reason for not sending him to jail, but it offers no reason at all for letting him keep my purse. I am entitled under the law to get my purse back, and he is, in this sense, under a legal liability to return it, even though in taking it he acted without fault and without any intention of doing wrong. Another case illustrating the same principle arises when in a settlement of accounts a debtor overpays his creditor, both acting innocently and sharing the same mistaken belief as to what is due. Here the creditor is compelled to return the overpayment, though his receipt of it was in no sense a wrongful act.

A considerable body of law has to do with preventing or rectifying the unjust enrichment that may come about when men act inadvertently, or under mistake, or without the ordinary ca-

30. In this connection attention should be called to an article, "The Modern Conception of Animus," 19 *Green Bag* 12–33 (1906), by Brooks Adams, brother of Henry and grandson of John Quincy. In this article Adams presents an ingenious and curiously Marxist argument that the ruling classes have always manipulated in their own interest the definition of intent (animus) required for particular crimes or torts. Adams also seeks to demonstrate that a similar manipulation has been worked on the rules of evidence that determine what suffices to prove or disprove the required intent. Though its main thesis is at times more ingenious than convincing, the article is worth reading for its demonstration of the difficulties of proof involved where liability is made to depend on intent.

pacity to comprehend the nature of their acts. Some of this law is explicitly assigned to quasi contracts; the rest of it makes its presence felt as an influence—often a silent influence—in the law of contracts and torts. Analysis has been confused, both in the common law and in the Roman law, by the fact that actions formally classified as "delictual" or as "sounding in tort" have been used to rectify the unjust enrichment of one party at the expense of another in situations where any wrongdoing by the defendant is quite immaterial.

The existence of a body of law having to do with the rectification of inadvertencies may seem to suggest an objection to the analysis presented in these essays. Law has here been considered as "the enterprise of subjecting human conduct to the governance of rules." Yet when men act under mistake or through inadvertence they obviously do not and cannot pattern their actions after the law; no one studies the law of quasi contracts to learn what he should do in moments when he does not quite know what he is doing. The solution of this difficulty is fairly obvious. To preserve the integrity of a system of legal relations set by advertence there is need for a supplementary system of rules for healing the effects of inadvertence. There is here a close parallel to the problem of retrospective laws. A system of law composed exclusively of retrospective rules could exist only as a grotesque conceit worthy of Lewis Carroll or Franz Kafka. Yet a retrospective "curative" statute can perform a useful function in dealing with mishaps that may occur within a system of rules that are generally prospective.[31] So it is with the rules that cure the effects of inadvertence. If everything happened through inadvertence, there would be no way even of conceiving of the problem of correcting inadvertence. Rules designed for that purpose derive not only their justification, but their very meaning from their function as an adjunct to a larger system of rules intended to be taken as a guide for conduct.

The principle of rectifying the unjust enrichment that results from inadvertence cannot, however, explain all the instances

31. See pp. 53–54, supra.

where legal liability arises without fault or intent. There exists, in fact, a very considerable body of law concerned with imposing a strict or absolute liability for harms resulting from certain forms of activity. Thus, blasting operations may be attended by an accountability for all harm that may result to others even though no intent to harm or any neglect of proper precautions can be demonstrated.[32] In cases like this the law decrees, in the consecrated phrase, that "men act at their peril."

Strict liability of this sort is most readily justified by the economic principle that the foreseeable social costs of an enterprise ought to be reflected in the private costs of conducting that enterprise. Thus, the dangers inherent in a blasting operation are such that no amount of care or foresight can prevent occasional unintended injury to persons or property. If the highway contractor who blasts a cut through a hillside is held accountable only for demonstrated fault, his incentive to accomplish his excavations by a safer means is reduced. His economic calculations, in other words, are falsified and the price of this falsification is borne by the public. To rectify this situation we impose on his blasting operations a kind of tax in the form of a rule that he must respond for any damage that results from these operations, whether or not they can be attributed to any negligence on his part.

The analogy of a tax is useful in clarifying the relation between a strict liability of this sort and the internal morality of law. We do not view a general sales tax as ordering men not to sell goods; we consider that it merely imposes a kind of surcharge on the act of selling. So we should not view the special rule about blasting operations as commanding the man using explosives never to cause any damage, however innocently. Rather we should regard the rule as attaching a special liability to entry upon a certain line of conduct. What the internal morality of law demands of a rule of strict liability is not that it cease commanding the impossible, but that it define as clearly as possible the kind of activity that carries a special surcharge of legal responsibility.

The principle that enterprises creating special risks ought to

32. American Law Institute, *Restatement of Torts* (1938), §519, "Miscarriage of Ultrahazardous Activities Carefully Carried On."

bear the cost of the injuries resulting from their operation is capable of a very considerable expansion. In some countries, for example, the principle has been extended to the operation of automobiles, including those used for pleasure or private convenience. It is a kind of cliché that there exists today "a general trend" toward strict liability. It seems, indeed, often to be assumed that this trend is carrying us remorselessly toward a future in which the concepts of fault and intent will cease to play any part in the law.

I think we can be reasonably sure that no such future lies ahead of us. If strict liability were to attend, not certain specified forms of activity, but *all* activities, the conception of a causal connection between the act and the resulting injury would be lost. A poet writes a sad poem. A rejected lover reads it and is so depressed that he commits suicide. Who "caused" the loss of his life? Was it the poet, or the lady who jilted the deceased, or perhaps the teacher who aroused his interest in poetry? A man in a drunken rage shoots his wife. Who among those concerned with this event share the responsibility for its occurrence —the killer himself, the man who lent the gun to him, the liquor dealer who provided the gin, or was it perhaps the friend who dissuaded him from securing a divorce that would have ended an unhappy alliance?

Some inkling of the nature of this sort of problem we can get from the difficulties encountered in administering those forms of strict liability we already have. One such liability is that imposed by the Workmen's Compensation Laws. Obviously some causal connection must be established between the employee's job and the illness or injury to be compensated. The phrase used in the statutes is that the injury or illness must "arise out of and in the course of the employment." The interpretation of this clause has given rise to a most unsatisfactory and often bizarre body of law. To see what a universal application of strict liability would involve we need only ask how we would apply a rule that required only that the plaintiff's loss or injury should "arise out of" the defendant's conduct.

The account just given of the problem of strict civil liability is by no means exhaustive. Some forms of such liability exist that are not readily explained on the grounds examined here. There are also numerous instances of uncertain or mixed legislative motives, one common supplementary justification for rules of strict accountability being, for example, that they tend to insure due care more effectively than rules making liability turn explicitly on proof that due care was lacking. Some instances of strict liability are probably to be regarded as anomalies, resulting either from analytical confusion or historical accident. Then, too, the line between strict liability and liability founded on fault is often obscured by presumptions of fault, some of those being quite stiff in the sense that they impose a heavy burden on those who seek to rebut them. Finally, it should be recalled that contractual liability is generally "strict"; though certain catastrophic and unexpected interferences with performance may excuse, it is generally not a defense for the defaulting contractor to plead that he did his best. It scarcely requires demonstration that this last form of strict liability presents no problem for the internal morality of law; the law ought not itself to impose an impossible burden on a man, but it is not bound to protect him from contractually assuming responsibility for an occurrence that lies beyond his powers.

We come now to the most serious infringement of the principle that the law should not command the impossible. This lies in laws creating a strict criminal liability—laws under which a man may be found guilty of a crime though he acted with due care and with an innocent intent. In modern times the most generous use of such laws has been in the field of economic, health, and safety regulations, though it is not uncommon also to impose a strict criminal liability in areas having to do with the possession of narcotics, gambling apparatus, and prohibited liquors.

Strict criminal liability has never achieved respectability in our law. Wherever laws imposing such a liability have been enacted they have called forth protests and a defense that seldom goes beyond apologizing for an assumed necessity. There is, however,

no mystery about the reason for their continued and perhaps expanding appearance in modern legislation: they serve mightily the convenience of the prosecutor. Their apparent injustice, he is likely to assure us, is removed by "selective enforcement." Though theoretically such laws are a trap for the innocent, it is only the real villains who are pursued in practice. As for them, their being brought to justice is greatly facilitated because the government in making out its case is relieved from having to prove intent or fault, a particularly difficult task when complicated regulatory measures are involved. When absolute liability is coupled with drastic penalties—as it often is—the position of the prosecutor is further improved. Usually he will not have to take the case to trial at all; the threat of imprisonment or a heavy fine is enough to induce a plea of guilty, or—where this is authorized—a settlement out of court. Drastic penalties also enhance the public relations of the agencies of enforcement. The innocent stumbler who knows that he could have been found guilty is deeply grateful when he is let off and therefore saved from being branded as a criminal. He promises in all sincerity to be more intelligently cooperative in the future.

The conveniences of what has been called "jawbone enforcement"—it might less charitably be called "enforcement by blackmail"—became widely known during the hectic days of World War II, when overworked administrators of complex economic regulations had to find some way of simplifying their task. The continued use of this device should be a source of concern to everyone who likes to think of fidelity to law as respect for duly enacted rules, rather than as a readiness to settle quietly any claim that may be made by the agencies of law enforcement. Fortunately, influential and persuasive voices have recently been raised against this evil and the other abuses that go with strict criminal liability.[33]

33. Hall, *General Principles of Criminal Law* (2d ed. 1960), Chapter X, pp. 325–59; Hart, "The Aims of Criminal Law," 23 *Law & Contemporary Problems* 401–41 (1958); The American Law Institute, *Model Penal Code, Proposed Official Draft* (1962), Sections 1.04(5), 2.01–2.13.

Before leaving the subject of laws commanding the impossible, two further observations need to be made. One is simply and obviously to the effect that no hard and fast line can be drawn between extreme difficulty and impossibility. A rule that asks somewhat too much can be harsh and unfair, but it need not contradict the basic purpose of a legal order, as does a rule that demands what is patently impossible. Between the two is an indeterminate area in which the internal and external moralities of law meet.

My final observation is that our notions of what is in fact impossible may be determined by presuppositions about the nature of man and the universe, presuppositions that are subject to historical change. Today opposition to laws purporting to compel religious or political beliefs is rested on the ground that such laws constitute an unwarranted interference with individual liberty. Thomas Jefferson took a different view. In the original draft of the Preamble to the Virginia Statute of Religious Freedom he condemned such laws as attempting to compel the impossible:

> Well aware that the opinions and beliefs of men depend not upon their own will, but follow involuntarily the evidence proposed to their minds . . .[34]

One may raise the question whether there is not in this conception a profounder respect both for truth and for human powers than there is in our own.

### *Constancy of the Law through Time*

Of the principles that make up the internal morality of the law, that which demands that laws should not be changed too frequently seems least suited to formalization in a constitutional restriction. It is difficult to imagine, for example, a constitutional convention unwise enough to resolve that no law should be

34. Boyd, *The Papers of Thomas Jefferson*, II, 545.

changed more often than, say, once a year. Restrictions on retroactive legislation, on the other hand, have been a favorite among constitution makers.[35] Yet there is a close affinity between the harms done by retrospective legislation and those resulting from too frequent changes in the law. Both follow from what may be called legislative inconstancy. It is interesting to note that Madison, when he sought to defend the provisions in the Constitution prohibiting ex post facto laws and laws impairing the obligation of contract, used language more apt for describing the evil of frequent change than that resulting from retroactive laws:

> The sober people of America are weary of the fluctuating policy which has directed the public councils. They have seen with regret and indignation that sudden changes and legislative interferences . . . become . . . snares to the more-industrious and less-informed part of the community. They have seen, too, that one legislative interference is but the first link of a long chain of repetitions.[36]

The affinity between the problems raised by too frequent or sudden changes in the law and those raised by retrospective legislation receives recognition in the decisions of the Supreme Court. The evil of the retrospective law arises because men may have acted upon the previous state of the law and the actions thus taken may be frustrated or made unexpectedly burdensome by a backward looking alteration in their legal effect. But sometimes an action taken in reliance on the previous law can be undone, provided some warning is given of the impending change and the change itself does not become effective so swiftly that an insufficient time is left for adjustment to the new state of the law. Thus the Court has said:

> it is well settled that [statutes of limitations] may be modified by shortening the time prescribed, but only if this is done while the time is still running, and so that a reasonable time

35. See notes 10 and 11, supra pp. 51–52.
36. *The Federalist*, No. 44.

still remains for the commencement of an action before the bar takes effect.[37]

*Congruence between Official Action and Declared Rule*

We arrive finally at the most complex of all the desiderata that make up the internal morality of the law: congruence between official action and the law. This congruence may be destroyed or impaired in a great variety of ways: mistaken interpretation, inaccessibility of the law, lack of insight into what is required to maintain the integrity of a legal system, bribery, prejudice, indifference, stupidity, and the drive toward personal power.

Just as the threats toward this congruence are manifold, so the procedural devices designed to maintain it take, of necessity, a variety of forms. We may count here most of the elements of "procedural due process," such as the right to representation by counsel and the right of cross-examining adverse witnesses. We may also include as being in part directed toward the same objective habeas corpus and the right to appeal an adverse decision to a higher tribunal. Even the question of "standing" to raise constitutional issues is relevant in this connection; haphazard and fluctuating principles concerning this matter can produce a broken and arbitrary pattern of correspondence between the Constitution and its realization in practice.

In this country it is chiefly to the judiciary that is entrusted the task of preventing a discrepancy between the law as declared and as actually administered. This allocation of function has the advantage of placing the responsibility in practiced hands, subjecting its discharge to public scrutiny, and dramatizing the integrity of the law. There are, however, serious disadvantages in any system that looks solely to the courts as a bulwark against the lawless administration of the law. It makes the correction of abuses dependent upon the willingness and financial ability of the affected party to take his case to litigation. It has proved

37. *Ochoa v. Hernandez y Morales*, 230 U.S. 139, at pp. 161–62 (1913).

relatively ineffective in controlling lawless conduct by the police, this evil being in fact compounded by the tendency of lower courts to identify their mission with that of maintaining the morale of the police force. For an effective control of police lawlessness much can be said for some overseeing agency, like the Scandinavian ombudsman, capable of acting promptly and flexibly on informal complaints.

In those areas where the law is judge-made it may be said that, though the essential congruence between law and official action can be impaired by lower courts, it cannot be impaired by the supreme court since it makes the law. The supreme court of a jurisdiction, it may seem, cannot be out of step since it calls the tune. But the tune called may be quite undanceable by anyone, including the tune-caller. All of the influences that can produce a lack of congruence between judicial action and statutory law can, when the court itself makes the law, produce equally damaging departures from other principles of legality: a failure to articulate reasonably clear general rules and an inconstancy in decision manifesting itself in contradictory rulings, frequent changes of direction, and retrospective changes in the law.

The most subtle element in the task of maintaining congruence between law and official action lies, of course, in the problem of interpretation. Legality requires that judges and other officials apply statutory law, not according to their fancy or with crabbed literalness, but in accordance with principles of interpretation that are appropriate to their position in the whole legal order. What are those principles? The best short answer I know dates back to 1584 when the Barons of the Exchequer met to consider a difficult problem of interpretation in Heydon's Case:

> And it was resolved by them, that for the sure and true interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the common law,) four things are to be discerned and considered:—
>
> *1st.* What was the common law before the making of the Act.

> *2nd.* What was the mischief and defect for which the common law did not provide.
> *3rd.* What remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth.
> And, *4th.* The true reason of the remedy; and then the office of all the Judges is always to make such construction as shall suppress the mischief, and advance the remedy.[38]

If any criticism can be made of this analysis, it is that it should have included a fifth point to be "discerned and considered," which might read somewhat as follows: "How would those who must guide themselves by its words reasonably understand the intent of the Act, for the law must not become a snare for those who cannot know the reasons of it as fully as do the Judges."

Keeping before us the central truth of the Resolution in Heydon's Case, namely, that to understand a law you must understand "the disease of the commonwealth" it was appointed to cure, will enable us to clear the problem of interpretation of the confusions that have typically beclouded it. Some of these have a specious air of common sense about them that has conferred on them an undeserved longevity. This is particularly true of the thought contained in the following passage from Gray:

> Interpretation is generally spoken of as if its chief function was to discover what the meaning of the Legislature really was. But when a Legislature has had a real intention, one way or another, on a point, it is not once in a hundred times that any doubt arises as to what its intention was . . . The fact is that the difficulties of so-called interpretation

38. 3 Co. Rep. 7a. It is apparent that in the passage quoted the word "mischief" is used in a sense no longer current. As used in Heydon's Case it was in fact a close cousin to two other words that were then great favorites: "repugnancy" and "inconvenience." All of these terms described a situation where things did not fit together, chunks of chaos not yet reduced through human effort to reasoned order.

It should perhaps also be suggested that since the report of the Resolution is by Coke, it is possible that he reports what the Barons ought to have resolved rather than what they did in fact think and say.

> arise when the Legislature has had no meaning at all; when the question which is raised on the statute never occurred to it . . . [In such cases] when the judges are professing to declare what the Legislature meant, they are in truth, themselves legislating to fill up *casus omissi*.[39]

Now it is, of course, true that occasionally in the drafting of a statute some likely situation is entirely forgotten, so that one may imagine the draftsman saying something like "Oops!" when this oversight is called to his attention. But cases of this sort are far from typical of the problems of interpretation. More commonly the statute turns out to be blunt and incomplete rather than so directed as to miss an obvious target.

Underlying Gray's view is an atomistic conception of intention, coupled with what may be called a pointer theory of meaning. This view conceives the mind to be directed toward individual things, rather than toward general ideas, toward distinct situations of fact rather than toward some significance in human affairs that these situations may share. If this view were taken seriously, then we would have to regard the intention of the draftsman of a statute directed against "dangerous weapons" as being directed toward an endless series of individual objects: revolvers, automatic pistols, daggers, Bowie knives, etc. If a court applies the statute to a weapon its draftsman had not thought of, then it would be "legislating," not "interpreting," as even more obviously it would be if it were to apply the statute to a weapon not yet invented when the statute was passed.[40]

This atomistic view of intention exercises, directly and indirectly, so much influence on theories of interpretation that it becomes essential to set explicitly off against it a truer view of the problem. To that end let me suggest an analogy. An inventor

39. *The Nature and Sources of the Law* (2d ed. 1921), pp. 172–73.

40. The "atomistic" view of intention described in the text is related to, and may be regarded as an expression of, philosophic nominalism. I have dealt with the influence of this view on the movement known as legal realism in my article, "American Legal Realism," 82 *University of Pennsylvania Law Review* 429, 443–47 (1934).

of useful household devices dies leaving the pencil sketch of an invention on which he was working at the time of his death. On his deathbed he requests his son to continue work on the invention, though he dies without having had a chance to tell the son what purpose the invention was to serve or anything about his own plans for completing it. In carrying out his father's wish the son's first step would be to decide what the purpose of the projected invention was, what defect or insufficiency of existing devices it was intended to remedy. He would then try to grasp the underlying principle of the projected invention, the "true reason of the remedy" in the language of Heydon's Case. With these problems solved he would then proceed to work out what was essential to complete the design for the projected device.

Let us now ask of the son's action questions of the sort commonly asked concerning the interpretation of statutes. Was the son faithful to his father's intention? If we mean, "Did he carry out an intention the father had actually formed concerning the manner of completing the design?" why, of course, the question is quite unanswerable for we do not know whether the father had any such intention, and if so, what it was. If we mean, "Did he remain within the framework set by the father, accepting the father's conception of a need for the projected device and his father's general approach to the problem of supplying that need?" then the answer, on the facts supposed, is yes. If the son were able to call on his father's spirit for help, the chances are that this help would take the form of collaborating with the son in the solution of a problem the father had left unsolved. So it is usually with difficult problems of interpretation. If the draftsman of a statute were called into direct consultation, he would normally have to proceed in the same manner as the judge by asking such questions as the following: Does this case fall within the mischief which the statute sought to remedy? Does it fall within the "true reason of the remedy" appointed by the statute, that is, is the prescribed remedy apt for dealing with this particular manifestation of the general mischief at which the statute was aimed?

The analogy of the incomplete invention may also be helpful in clarifying an obscurity that runs through the vocabulary of interpretation. We tend to think of intention as a phenomenon of individual psychology, though what we are interpreting is a corporate act. Thus we ask after the intention of "the legislator," though we know there is no such being. At other times we speak of the intention of "the legislature," though we know that those who voted for a statute often do so with a variety of views as to its meaning and often with no real understanding of its terms. Moving closer to individual psychology we may speak of the intention of "the draftsman." But again we are in trouble. There may be a number of draftsmen, acting at different times and without any common understanding as to the exact purpose sought. Furthermore, any private and uncommunicated intention of the draftsman of a statute is properly regarded as legally irrelevant to its proper interpretation.[41] Let us turn to the analogy of the incomplete invention to see if it offers any aid in this impasse. It is clear that the son may in working out his problem find it helpful to put himself, as it were, in the frame of his father's thinking, recalling his modes of thought and his characteristic ways of solving problems. Yet it is also plain that this procedure may neither be essential nor helpful. Indeed, if the incomplete design came from the hand of some quite unknown inventor the son's task might not be essentially changed. He would look to the diagram itself to see what purpose was to be served by the invention and what general principle or principles underlay the projected design. We could speak in such a case of "the intention of the design." This might involve a metaphor but it is at least a useful one that does not misdescribe the nature of

41. Speaking of the Statute of Frauds, Lord Nottingham said in *Ash v. Abdy*, 3 Swanston 664 (1678), "I had some reason to know the meaning of this law; for it had its first rise from me." Cf. "If Lord Nottingham drew it, he was the less qualified to construe it, the author of an act considering more what he privately intended than the meaning he has expressed." Campbell's *Lives of the Lord Chancellors of England, 3* (3d ed. 1848), 423 n.

the son's task. So in speaking of legislative intention I think it would be better if we spoke of "the intention of the statute," just as Mansfield in dealing with contractual intention once spoke of "the intent of the transaction."[42]

Fidelity to enacted law is often identified with a passive and purely receptive attitude on the part of the judge. If he acts "creatively," it must be that he is going beyond his assignment as an interpreter. Those who prefer judge-made law to statutes are apt to welcome this departure and rejoice to see the judge apparently make so much from so little. On the other hand, those who distrust judicial power are apt to discern in any creative role an abandonment of principle and a reaching for personal power. When issue is joined in these terms the whole problem is misconceived. In the case of the incomplete invention when the son assumed a creative role he did not, for that act alone, deserve either praise or blame. He was simply meeting the demands of his assignment by doing what he had to do to carry out his father's wish. The time for praise or blame would come when we could survey what he had accomplished in this inescapably creative role. So it is with judges.

It may be objected that the analogy that has been exploited here is misleading. A statute, it may be said, does not serve a purpose as simple and as easily defined as, for example, that of a vacuum cleaner. The social mischief it seeks to remedy is often subtle and complex, its very existence being perceptible only to those holding certain value judgments. Again, the remedy which a statute appoints for curing "a disease of the commonwealth" is not like a shaft connecting one mechanism with another. Often the legislature has to choose among a wide range of possible remedies, some providing a very oblique kind of cure for the defect sought to be corrected.

All this may be conceded and yet I suggest that it is precisely at this point of apparent default that the figure of the incomplete invention becomes most useful. Some obscurity concerning the

42. *Kingston v. Preston*, 2 Douglas 689 (1773).

mischief sought to be remedied by a statute can be tolerated. But if this obscurity exceeds a certain crucial point, then no virtuosity in draftsmanship nor skill in interpretation can make a meaningful thing of a statute afflicted with it. Again, some looseness of thought about the connection between the remedy and the defect it is appointed to cure does not inevitably vitiate a statute. But if this connection is fundamentally misconceived, then all possibility of coherent interpretation is lost. To suppose otherwise would be like assuming that an invention basically mistaken in conception could be rescued by being incorporated in a neat blueprint.

Let me give an historic example of a statutory provision that was vitiated by a fundamental defect in its design. I refer to Paragraph 5 of Section 4 of the Statute of Frauds, passed in 1677. Section 4 of the Statute was predicated on the assumption that certain kinds of contracts ought not to be legally enforceable unless proof of their existence was backed by a signed document. On the other hand, it was thought unwise to extend so stringent a requirement to all contracts, some of which ought to be legally valid though expressed orally. Accordingly, the draftsmen faced the necessity of deciding what kinds of contracts ought to be required to be in writing and what kinds could safely be left to oral expression. One such decision was incorporated in the following language: "no action shall be brought . . . (5) upon any agreement that is not to be performed within the space of one year from the making thereof; unless the agreement upon which such action shall be brought . . . shall be in writing, and signed by the party to be charged therewith."

It is probably safe to say that few statutory enactments have given rise to so many discordant and bizarre interpretations as the words just quoted. What went wrong? The statute is expressed in simple, straightforward English. The mischief aimed at seems fairly obvious. It is also fairly easy to see why the draftsmen should select, as especially needing the security of written evidence, contracts scheduled to run over a considerable period of time; in Holt's words, "the design of the statute was, not to

trust to the memory of witnesses for a longer time than one year."[43]

Difficulty arose because the draftsmen had simply not thought through the relation between the mischief and the remedy they appointed to cure it. In the first place it is clear that there is no direct relation between the time when a witness will be called to testify and the time required to perform the contract; a contract might be scheduled for completion within one month and yet first come into proof in court two years later. Furthermore, the draftsmen failed to ask themselves what the courts should do with the very common case of contracts as to which it is impossible to say in advance how much time their performance will require, such as contracts to employ a man for life or to pay a monthly sum to him until he is cured of an illness. By imagining unexpected events that accelerate or postpone performance this class of contracts can be greatly expanded. In a case coming up for decision shortly after the Statute was passed it was suggested that the validity of the contract should depend on the actual course of events.[44] If it turned out that performance came due within a year, the oral contract was valid; if not, then the contract was unenforceable. But this solution was never accepted and could not be. Parties need to know from the outset, or at least as soon as trouble develops, whether or not they have a contract. To make the existence of a binding contract depend upon later events would invite all kinds of jockeying for position and produce the greatest imaginable confusion. In short, the courts were confronted with a statute which simply could not be applied in a way to carry out the loosely conceived intention of its draftsmen. The British finally found in 1954 the only cure for this situation: outright repeal of the section in question. We still reach for the solution to a puzzle that has no solution.

My second instance of fundamentally misconceived legislation is more modern by nearly three centuries. It concerns a statute which suffers from the defect that it is impossible to define

43. *Smith v. Westfall*, 1 Lord Raymond 317 (1697).
44. See the case cited in the last note.

in any clear terms just what mischief it was intended to cure. With the repeal of prohibition Americans highly resolved "to prevent the return of the old saloon." What did this mean? The old saloon was a complex thing, combining architectural, atmospheric, artistic, commercial, legal, and sociological aspects. It was highly improbable that it would, or even could, return in its old form after an absence of fifteen years during which fundamental social changes took place. Still, to make assurance doubly sure it was thought in many states "there ought to be a law."

How do you legislate against a thing like "the old saloon"? Well, the old saloon had swinging doors; let it therefore be made illegal to serve drinks behind anything that may fairly be called swinging doors. In the old saloon the patrons stood up to their drinks; let it therefore be decreed that they must now sit down—though surely as an original proposition there is much reason for assuming that the cause of temperance would be advanced by requiring the drinkers to stand during their imbibitions. You could not buy a meal in the old saloon, though you might be given one for nothing. Let us create something of the atmosphere of a family restaurant in the new saloon by imposing a legal requirement that it serve meals. But this must not be carried too far. It would be grossly unfair to require the thirsty customer to buy food before he could be served a drink. Let the legal requirement be, then, that the new saloon be prepared to serve food to any who may order it, however few they may be among its patrons.

The primary responsibility for administering this allopathic concoction of rules was of course vested, not with the prosecutor, but with the licensing authority. Can anyone imagine deriving any sense of useful social function from serving on such an authority? Is it any wonder that this area of regulation is notorious for inefficiency and corruption? Even if a conscientious bureaucrat could be found who would consider his life filled with mission if he were simply allowed to enforce rules, however senseless, the problem would still not be solved. There would remain insoluble problems of interpretation, in deciding, for ex-

ample, what constitutes being adequately prepared to serve a meal to a diner who never comes.

At this point our discussion of the problem of interpretation must be broken off. It is too richly textured a subject to be exhausted by any one analogy or metaphor. Its demands depend so much on context that illustrative cases can serve only to disclose general principles, but cannot convey the nuances that attend the application of those principles to particular branches of the law. With all its subtleties, the problem of interpretation occupies a sensitive, central position in the internal morality of the law. It reveals, as no other problem can, the cooperative nature of the task of maintaining legality. If the interpreting agent is to preserve a sense of useful mission, the legislature must not impose on him senseless tasks. If the legislative draftsman is to discharge his responsibilities he, in turn, must be able to anticipate rational and relatively stable modes of interpretation. This reciprocal dependence permeates in less immediately obvious ways the whole legal order. No single concentration of intelligence, insight, and good will, however strategically located, can insure the success of the enterprise of subjecting human conduct to the governance of rules.

### *Legality as a Practical Art*

To the lengthy analysis just concluded some final observations should be added concerning practical applications of the principles of legality.

*First,* a warning about the word "law" is in order. In 1941 there was added to the Annotated Laws of Massachusetts (Ch. 2, §9) a provision to the effect that the chickadee should be the Official Bird of the Commonwealth. Now it is apparent that the public weal would have suffered no serious setback if this law had been kept secret from the public and made retroactive to the landing of the Mayflower. Indeed, if we call by the name of law any official act of a legislative body, then there may be circumstances under which the full details of a law must be kept

secret. Such a case might arise where a legislative appropriation was made to finance research into some new military weapon. It is always unfortunate when any act of government must be concealed from the public and thus shielded from public criticism. But there are times when we must bow to grim necessity. The Constitution itself in Article V provides that each "house shall keep a journal of its proceedings, and from time to time publish the same, excepting such parts as may in their judgment require secrecy." All of this has very little relevance, however, to the laws that are the subject under discussion.[45] I can conceive, for example, of no emergency that would justify withholding from the public knowledge of a law creating a new crime or changing the requirements for making a valid will.

*Secondly,* infringements of legal morality tend to become cumulative. A neglect of clarity, consistency, or publicity may beget the necessity for retroactive laws. Too frequent changes in the law may nullify the benefits of formal, but slow-moving procedures for making the law known. Carelessness about keeping the laws possible of obedience may engender the need for a discretionary enforcement which in turn impairs the congruence between official action and enacted rule.

*Thirdly,* to the extent that the law merely brings to explicit expression conceptions of right and wrong widely shared in the community, the need that enacted law be publicized and clearly stated diminishes in importance. So also with the problem of retroactivity; where law is largely a reflection of extralegal morality, what appears in form as retrospective legislation may in substance represent merely the confirmation of views already widely held, or in process of development toward the rule finally enacted. When toward the end of the sixteenth century the English courts finally gave legal sanction to the executory bilateral contract they only caught up with commercial practice by allowing

45. A discussion of some problems of publicity as they affect governmental action other than the passage of laws in the usual sense will be found in my article, "Governmental Secrecy and the Forms of Social Order," in 2 *Nomos* ("Community") 256–68 (1959).

parties to do directly what they had previously been compelled to achieve by indirection.

*Fourthly,* the stringency with which the eight desiderata as a whole should be applied, as well as their priority of ranking among themselves, will be affected by the branch of law in question, as well as by the kinds of legal rules that are under consideration. Thus, it is generally more important that a man have a clear warning of his legal duties than that he should know precisely what unpleasantness will attend a breach; a retroactive statute creating a new crime is thoroughly objectionable, a similar statute lengthening the term of imprisonment for an existing crime is less so. A familiar distinction between rules of law is that which distinguishes rules imposing duties from rules conferring legal capacities. Both sorts of rules are affected in some measure by all eight of the demands of legal morality. At the same time, rules granting and defining legal powers seldom have any counterpart in the practices of everyday life—shaking hands on a deal has never been accepted as an adequate legal formality. Hence as to rules defining legal powers the requirements of publicity and clarity are apt to be especially demanding. Contrariwise, conferring retroactive validity on what was under existing law a vain attempt to exercise a legal power will often be seen as advancing the cause of legality by preventing a confusion of legal rights.

*Fifthly and finally,* it should be recalled that in our detailed analysis of each of the demands of legal morality we have generally taken the viewpoint of a conscientious legislator, eager to understand the nature of his responsibility and willing to face its difficulties. This emphasis on nuances and difficult problems should not make us forget that not all cases are hard. Each of the demands of legality can be outraged in ways that leave no doubt. Caligula, for example, is said to have respected the tradition that the laws of Rome be posted in a public place, but saw to it that his own laws were in such fine print and hung so high that no one could read them.

The paradox that a subject can be at once so easy and so

difficult may be illumined by a figure from Aristotle. In his *Ethics* Aristotle raises the question whether it is easy to deal justly with others. He observes that it might seem that it would be, for there are certain established rules of just dealing that can be learned without difficulty. The application of a simple rule ought itself to be simple. But this is not so, Aristotle says, invoking at this point a favorite analogy, that of medicine: "It is an easy matter to know the effects of honey, wine, hellebore, cautery and cutting. But to know how, for whom, and when we should apply these as remedies is no less an undertaking than being a physician."[46]

So we in turn may say: It is easy to see that laws should be clearly expressed in general rules that are prospective in effect and made known to the citizen. But to know how, under what circumstances, and in what balance these things should be achieved is no less an undertaking than being a lawgiver.

46. *Nichomachean Ethics,* Book V, 1137a.