Generally we are content with informal methods of decision—often screened from the public—when selections are made for honorary degrees, military decorations, hero medals, literary and scientific prizes, foundation awards, and testimonial dinners. One outstanding exception to this laxness may seem to be presented by the elaborately formal procedure of beatification in the Roman Catholic Church. But this procedure does not in fact constitute an exception. Its object is not to honor a saint, but to authorize a cult. In the language of administrative law, it is a certification procedure. The required performance—including as it does the working of miracles—of necessity runs off the top of the scale of human achievement. Presumably, however, it falls within the lower rungs of the supernatural.

In the social practices I have just described there is a standing refutation for the notion, so common in moral argument, that we must know the perfectly good before we can recognize the bad or the barely adequate. If this were true, it would seem to be much easier to assess a five per cent deviation from perfection than to judge a ninety per cent departure. But when it actually comes to cases, our common sense tells us that we can apply more objective standards to departures from satisfactory performance than we can to performances reaching toward perfection. And it is on this common sense view that we build our institutions and practices.

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a lawless unlimited power, and at their pleasure to walk contrary to their own laws and ordinances before they have repealed them?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.

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 shootings 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]

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).

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 possession 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.

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

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.