

THE
MORALITY
OF
LAW

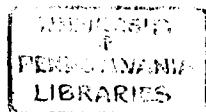
Revised edition

BY LON L. FULLER

NEW HAVEN AND LONDON, YALE UNIVERSITY PRESS

Copyright © 1964 by Yale University.
Revised edition copyright © 1969 by Yale University.
Fourth printing, May 1969.
Designed by Sally Hargrove,
set in Times Roman type,
and printed in the United States of America by
The Carl Purington Rollins Printing-Office
of the Yale University Press, New Haven, Connecticut.
Distributed in Great Britain, Europe, Asia, and
Africa by Yale University Press Ltd., London; in
Canada by McGill-Queen's University Press, Montreal;
and in Mexico by Centro Interamericano de Libros
Académicos, Mexico City.
All rights reserved. This book may not be
reproduced, in whole or in part, in any form
(except by reviewers for the public press),
without written permission from the publishers.

K
F9543
990.5



PREFACE TO
THE SECOND EDITION

In this new edition of *The Morality of Law* the first four chapters have been reprinted from the type as it was originally set, with only a minor correction or two. The only change of substance consists, therefore, in the addition of a fifth and final chapter entitled "A Reply to Critics."

The fact that the first four chapters remain virtually unchanged does not imply complete satisfaction with either the form or the substance of the presentation achieved in them. It means simply that I have not proceeded far enough in my rethinking of the problems involved to undertake any substantial reformulation of the views I first expressed in lectures delivered in 1963. It means also that basically I stand by the positions taken in those lectures.

I hope that the new fifth chapter will not be viewed simply as an exercise in polemics. For many decades legal philosophy in the English-speaking world has been largely dominated by the tradition of Austin, Gray, Holmes, and Kelsen. The central place their general view of law has occupied does not mean that it has ever been received with entire satisfaction; even its adherents have

VJ B64309

PREFACE

but for granting an extension of time so that I might more nearly meet its demands. I must also express my gratitude to the Rockefeller Foundation for helping me to gain access, during the school year 1960–61, to that rarest commodity in American academic life: leisure. By leisure I mean, of course, the chance to read and reflect without the pressure of any immediate commitment to being, or pretending to be, useful. Quite simply, without the aid of the Foundation I would not have been able to accept Yale's invitation. My indebtedness to colleagues runs to so many for such diverse forms of aid that it is impossible to acknowledge it adequately. None of them, it should be said, had any chance to rescue the final text from those last-minute infelicities to which stubborn authors are prone. During the early stages of the undertaking, however, their contributions were of so essential a nature that in my eyes this book is as much theirs as mine. Finally, in acknowledging the very real contribution of my wife, Marjorie, I shall borrow a conceit from another writer: she may not know what it means, but she knows what it meant.

L. L. F.

CONTENTS

Preface to the Second Edition	v
Preface to the First Edition	vii
I. THE TWO MORALITIES	3
The Moralities of Duty and of Aspiration	5
The Moral Scale	9
The Vocabulary of Morals and the Two Moralities	13
Marginal Utility and the Morality of Aspiration	15
Reciprocity and the Morality of Duty	19
Locating the Pointer on the Moral Scale	27
Rewards and Penalties	30
II. THE MORALITY THAT MAKES LAW POSSIBLE	33
Eight Ways to Fail to Make Law	33
The Consequences of Failure	38
The Aspiration toward Perfection in Legality	41
Legality and Economic Calculation	44
The Generality of Law	46
Promulgation	49
Retroactive Laws	51
The Clarity of Laws	63
Contradictions in the Laws	65
Laws Requiring the Impossible	70

CONTENTS

Constancy of the Law through Time	79
Congruence between Official Action and Declared Rule	81
Legality as a Practical Art	91
III. THE CONCEPT OF LAW	95
Legal Morality and Natural Law	96
Legal Morality and the Concept of Positive Law	106
The Concept of Science	118
Objections to the View of Law Taken Here	122
Hart's <i>The Concept of Law</i>	133
Law as a Purposeful Enterprise and Law as a Manifested Fact of Social Power	145
IV. THE SUBSTANTIVE AIMS OF LAW	152
The Neutrality of the Law's Internal Morality toward Substantive Aims	153
Legality as a Condition of Efficacy	155
Legality and Justice	157
Legal Morality and Laws Aiming at Alleged Evils That Cannot Be Defined	159
The View of Man Implicit in Legal Morality	162
The Problem of the Limits of Effective Legal Action	168
Legal Morality and the Allocation of Economic Resources	170
Legal Morality and the Problem of Institutional Design	177
Institutional Design as a Problem of Economizing	178
The Problem of Defining the Moral Community	181
The Minimum Content of a Substantive Natural Law	184
V. A REPLY TO CRITICS	187
The Structure of Analytical Legal Positivism	191
Is Some Minimum Respect for the Principles of Legality Essential to the Existence of a Legal System?	197

Do the Principles of Legality Constitute an "Internal Morality of Law"?	200
Some Implications of the Debate	224

APPENDIX: THE PROBLEM OF THE GRUDGE INFORMER	245
Index	255

THE
MORALITY
OF
LAW

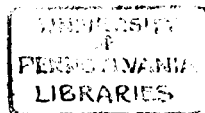
Revised edition

BY LON L. FULLER

NEW HAVEN AND LONDON, YALE UNIVERSITY PRESS

Copyright © 1964 by Yale University.
Revised edition copyright © 1969 by Yale University.
Fourth printing, May 1969.
Designed by Sally Hargrove,
set in Times Roman type,
and printed in the United States of America by
The Carl Purington Rollins Printing-Office
of the Yale University Press, New Haven, Connecticut.
Distributed in Great Britain, Europe, Asia, and
Africa by Yale University Press Ltd., London; in
Canada by McGill-Queen's University Press, Montreal;
and in Mexico by Centro Interamericano de Libros
Académicos, Mexico City.
All rights reserved. This book may not be
reproduced, in whole or in part, in any form
(except by reviewers for the public press),
without written permission from the publishers.

K
F9543
990.5



PREFACE TO
THE SECOND EDITION

In this new edition of *The Morality of Law* the first four chapters have been reprinted from the type as it was originally set, with only a minor correction or two. The only change of substance consists, therefore, in the addition of a fifth and final chapter entitled "A Reply to Critics."

The fact that the first four chapters remain virtually unchanged does not imply complete satisfaction with either the form or the substance of the presentation achieved in them. It means simply that I have not proceeded far enough in my rethinking of the problems involved to undertake any substantial reformulation of the views I first expressed in lectures delivered in 1963. It means also that basically I stand by the positions taken in those lectures.

I hope that the new fifth chapter will not be viewed simply as an exercise in polemics. For many decades legal philosophy in the English-speaking world has been largely dominated by the tradition of Austin, Gray, Holmes, and Kelsen. The central place their general view of law has occupied does not mean that it has ever been received with entire satisfaction; even its adherents have

VJ B64309

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, cauterly 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.

THE CONCEPT
OF LAW

III

As ideas of what law is for are so largely implicit in ideas of what law is, a brief survey of ideas of the nature of law . . . will be useful.—Roscoe Pound

Das Vergessen der Absichten ist die häufigste Dummheit, die gemacht wird.—Friedrich Nietzsche

The purpose of the present chapter is to put the analysis presented in my second chapter into its proper relation with prevailing theories of and about law. This task is taken up, not primarily to vindicate what I have said against the opposing views of others, but by way of a further clarification of what has so far been said here. While I agree that a book on legal theory ought not to be merely "a book from which one learns what other books contain,"¹ the fact remains that what one has learned from other books (sometimes indirectly and without having read them) acts as a prism through which any new analysis is viewed. Some setting off of one's own views against those deeply en-

1. Hart, *The Concept of Law* (1961), viii.

trenched in the vocabulary and thought of one's subject is an essential part of exposition.

Legal Morality and Natural Law

Proceeding with that exposition, then, the first task is to relate what I have called the internal morality of the law to the ages-old tradition of natural law. Do the principles expounded in my second chapter represent some variety of natural law? The answer is an emphatic, though qualified, yes.

What I have tried to do is to discern and articulate the natural laws of a particular kind of human undertaking, which I have described as "the enterprise of subjecting human conduct to the governance of rules." These natural laws have nothing to do with any "brooding omnipresence in the skies." Nor have they the slightest affinity with any such proposition as that the practice of contraception is a violation of God's law. They remain entirely terrestrial in origin and application. They are not "higher" laws; if any metaphor of elevation is appropriate they should be called "lower" laws. They are like the natural laws of carpentry, or at least those laws respected by a carpenter who wants the house he builds to remain standing and serve the purpose of those who live in it.

Though these natural laws touch one of the most vital of human activities they obviously do not exhaust the whole of man's moral life. They have nothing to say on such topics as polygamy, the study of Marx, the worship of God, the progressive income tax, or the subjugation of women. If the question be raised whether any of these subjects, or others like them, should be taken as objects of legislation, that question relates to what I have called the external morality of law.

As a convenient (though not wholly satisfactory) way of describing the distinction being taken we may speak of a procedural, as distinguished from a substantive natural law. What I have called the internal morality of law is in this sense a procedural version of natural law, though to avoid misunderstanding

the word "procedural" should be assigned a special and expanded sense so that it would include, for example, a substantive accord between official action and enacted law. The term "procedural" is, however, broadly appropriate as indicating that we are concerned, not with the substantive aims of legal rules, but with the ways in which a system of rules for governing human conduct must be constructed and administered if it is to be efficacious and at the same time remain what it purports to be.

In the actual history of legal and political thinking what association do we find between the principles I have expounded in my second chapter and the doctrine of natural law? Do those principles form an integral part of the natural law tradition? Are they invariably rejected by the positivist thinkers who oppose that tradition? No simple answer to these questions is possible.

With the positivists certainly no clear pattern emerges. Austin defined law as the command of a political superior. Yet he insisted that "laws properly so-called" were general rules and that "occasional or particular commands" were not law.² Bentham, who exploited his colorful vocabulary in castigating the law of nature, was at all times concerned with certain aspects of what I have called the internal morality of law. Indeed, he seemed almost obsessed with the need to make the laws accessible to those subject to them. On the other hand, in more recent times Gray has treated the question whether law ought to take the form of general rules as a matter of "little importance practically," though admitting that specific and isolated exercises of legal power do not make a fit subject for jurisprudence.³ For Somló retroactive laws might be condemned as unfair, but in no sense are to be regarded as violating any general premise underlying the concept of law itself.⁴

2. See note 6, Chapter 2, p. 49.

3. *Ibid.*

4. "Es kann somit bloss ein Rechtsinhaltsprinzip sein, das die rückwirkende Kraft von Rechtsnormen ausschliesst, nicht ein Voraussetzungsprinzip." *Juristische Grundlehre* (2d ed. 1927), p. 302. See also note 13, Chapter 2, *supra* p. 52.

With respect to thinkers associated with the natural law tradition it is safe to say that none of them would display the casualness of a Gray or Somló toward the demands of legal morality. On the other hand, their chief concern is with what I have called substantive natural law, with the proper ends to be sought through legal rules. When they treat of the demands of legal morality it is, I believe, usually in an incidental way, though occasionally one aspect of the subject will receive considerable elaboration. Aquinas is probably typical in this respect. Concerning the need for general rules (as contrasted with a case-by-case decision of controversies) he develops a surprisingly elaborate demonstration, including an argument that wise men being always in short supply it is a matter of economic prudence to spread their talents by putting them to work to draft general rules which lesser men can then apply.⁵ On the other hand, in explaining why Isidore required laws to be "clearly expressed" he contents himself with saying that this is desirable to prevent "any harm ensuing from the law itself."⁶

With writers of all philosophic persuasions it is, I believe, true to say that when they deal with problems of legal morality it is generally in a casual and incidental way. The reason for this is not far to seek. Men do not generally see any need to explain or to justify the obvious. It is likely that nearly every legal philosopher of any consequence in the history of ideas has had occasion to declare that laws ought to be published so that those subject to them can know what they are. Few have felt called upon to expand the argument for this proposition or to bring it within the cover of any more inclusive theory.

From one point of view it is unfortunate that the demands of legal morality should generally seem so obvious. This appearance has obscured subtleties and has misled men into the belief that no painstaking analysis of the subject is necessary or even possible. When it is asserted, for example, that the law ought not to contradict itself, there seems nothing more to say.

5. *Summa Theologica*, Pt. I-II, ques. 95, Art 1.

6. *Ibid.*, Art. 3.

Yet, as I have tried to show, in some situations the principle against contradiction can become one of the most difficult to apply of those which make up the internal morality of the law.⁷

To the generalization that in the history of political and legal thought the principles of legality have received a casual and incidental treatment—such as befits the self-evident—there is one significant exception. This lies in a literature that arose in England during the seventeenth century, a century of remonstrances, impeachments, plots and civil war, a period during which existing institutions underwent a fundamental reexamination.

It is to this period that scholars trace the "natural law foundations" of the American Constitution. Its literature—curiously embodied chiefly in the two extremes of anonymous pamphlets and judicial utterances—was intensely and almost entirely concerned with problems I have regarded as those of the internal morality of law. It spoke of repugnancies, of laws impossible to be obeyed, of parliaments walking contrary to their own laws before they have repealed them. Two representative samples of this literature appear at the head of my second chapter.⁸ But the most famous pronouncement to come down from that great period is that of Coke in *Dr. Bonham's Case*.

Henry VIII had given to the Royal College of Physicians (in a grant later confirmed by Parliament) broad powers to license and regulate the practice of medicine in London. The College was granted the right to try offenses against its regulations and to impose fines and imprisonments. In the case of a fine, one half was to go to the King, the other half to the College itself. Thomas Bonham, a doctor of medicine of the University of Cambridge, undertook the practice of medicine in London without the certificate of the Royal College. He was tried by the College, fined and later imprisoned. He brought suit for false imprisonment.

7. *Supra* pp. 65-70.

8. *Supra* p. 33. A splendid account of this literature will be found in Gough, *Fundamental Law in English Constitutional History* (1954); (reprinted with minor changes, 1961).

In the course of Coke's judgment upholding Bonham's cause, this famous passage appears:

The censors [of the Royal College] cannot be judges, ministers and parties; judges to give sentence or judgment; ministers to make summons; and parties to have the moiety of the forfeiture, *quia aliquis non debet esse Judes in propria causa, imo iniquum est aliquem suae rai esse judicem*; and one cannot be Judge and attorney for any of the parties. . . . And it appears in our books, that in many cases, the common law will controul Acts of Parliament, and sometimes adjudge them to be utterly void: for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will controul it, and adjudge such Act to be void.⁹

Today this pronouncement is often regarded as the quintessence of the natural law point of view. Yet notice how heavily it emphasizes procedures and institutional practices. Indeed, there is only one passage that can be said to relate to substantive rightness or justice, that speaking of parliamentary acts "against common right and reason." Yet by "common right" Coke may very well have had in mind rights acquired through the law and then taken away by law, the kind of problem, in other words, often presented by retrospective legislation. It may seem odd to speak of repugnant statutes in a context chiefly concerned with the impropriety of a man's acting as judge in his own cause. Yet for Coke there was here a close association of ideas. Just as legal rules can be repugnant to one another, so institutions can be repugnant. Coke and his associates on the bench strove to create an atmosphere of impartiality in the judiciary, in which it would be unthinkable that a judge, say, of Common Pleas should sit in

9. 8 Rep. 118a (1610). For an interesting analysis of the relevance this famous passage had for the actual decision of the lawsuit brought by Dr. Bonham, see Thorne, "Dr. Bonham's Case," *54 Law Quarterly Review* 543-52 (1938).

judgment of his own case. Then came the King and Parliament sticking an ugly, incongruous finger into this effort, creating a "court" of physicians for judging infringements of their own monopoly and collecting half the fines for themselves. When Coke associated this legislative indecency with repugnancy he was not simply expressing his distaste for it; he meant that it contradicted essential purposive efforts moving in an opposite direction.

The view, common among modern scholars, that in the quoted passage Coke betrays a naïve faith in natural law, tells us little that will help us understand the intellectual climate of the seventeenth century. It tells us a great deal about our own age, an age that in some moods at least thinks itself capable of believing that no appeal to man's nature, or to the nature of things, can ever be more than a cover for subjective preference, and that under the rubric "subjective preference" must be listed indifferently propositions as far apart as that laws ought to be clearly expressed and that the only just tax is one that makes the citizen pay the exact equivalent of what he himself receives from government.

Those who actually created our republic and its Constitution were much closer in their thinking to the age of Coke than they are to ours. They, too, were concerned to avoid repugnancies in their institutions and to see to it that those institutions should suit the nature of man. Hamilton rejected the "political heresy" of the poet who wrote:

For forms of government let fools contest—
That which is best administered is best.¹⁰

In supporting the power of the judiciary to declare acts of Congress unconstitutional Hamilton pointed out that the judiciary can never be entirely passive toward legislation; even in the absence of a written constitution judges are compelled, for example, to develop some rule for dealing with contradictory enactments,

10. *The Federalist*, No. 68.

this rule being derived not "from any positive law, but from the nature and reason of the thing."¹¹

A continuing debate in this country relates to the question whether in interpreting the Constitution the courts should be influenced by considerations drawn from "natural law."¹² I suggest that this debate might contribute more to a clarification of issues if a distinction were taken between a natural law of substantive ends and a natural law concerned with procedures and institutions. It should be confessed, however, that the term "natural law" has been so misused on all sides that it is difficult to recapture a dispassionate attitude toward it.

What is perfectly clear is that many of the provisions of the Constitution have the quality I have described as that of being blunt and incomplete.¹³ This means that in one way or another their meaning must be filled out. Surely those whose fate in any degree hinges on the creative act of interpretation by which this meaning is supplied, as well as those who face the responsibility of the interpretation itself, must wish that it should proceed on the most secure footing that can be obtained, that it should be grounded insofar as possible in the necessities of democratic government and of human nature itself.

I suggest that this ideal lies most nearly within our reach in the area of constitutional law concerned with what I have called the internal morality of the law. Within this area, interpretation can often depart widely from the explicit words of the Constitution and yet rest secure in the conviction that it is faithful to an intention implicit in the whole structure of our government. There is, for example, no explicit prohibition in the Constitution of vague or obscure legislation. Yet I doubt if anyone could regard as a judicial usurpation the holding that a criminal statute violates "due process of law" if it fails to give a reasonably clear

description of the act it prohibits.¹⁴ When one reflects on the problems of drafting a constitution the justification for this holding becomes obvious. If an express provision directed against vague laws were included in the Constitution, some standard, explicit or tacit, would have to determine what degree of obscurity should vitiate. This standard would have to run in quite general terms. Starting with the premise that law governs and judges men's actions by general rules, any criminal statute ought to be sufficiently clear to serve the double purpose of giving to the citizen an adequate warning of the nature of the act prohibited and of providing adequate guidelines for adjudication in accordance with law. If one wished to summarize all this in a phrase, it would be hard to find a better expression than "due process of law."

The Constitution invalidates any "law impairing the obligation of contracts." Yet the courts have held that a law unduly *enhancing* the obligation of existing contracts may be equally objectionable and therefore unconstitutional.¹⁵ This seems a surprising result but it rests on a secure constitutional basis. The context of the impairment clause makes it clear that it was regarded as one of several manifestations of the general evil of retrospective legislation, the draftsmen having refrained (wisely in view of the difficulty of the task) from attempting any comprehensive measure covering the subject. When we judge the impairment clause against the background of its general purpose, it becomes plain that the same objection that applies to laws reducing the obligations of existing contracts may equally apply to laws enlarging those obligations. In assuming the risks inherent in a contractual engagement, a man may properly take into account what the existing law prescribes as his obligation in case of default. If that law is then radically changed to his disadvantage, the legislature has broken faith with him.

In these last remarks I may seem to be assigning contradictory

11. *Ibid.*, No. 78.

12. Within the Court itself the debate was initiated by an exchange between Justices Black and Frankfurter in *Adamson v. California*, 332 U.S. 46 (1947).

13. P. 84, *supra*.

14. See the references in note 21, Chapter 2, p. 63, *supra*.

15. The cases are discussed in Hale, "The Supreme Court and the Contracts Clause," 57 *Harvard Law Review* 512, 514-16 (1944).

qualities to the internal morality of the law. I have suggested that this morality lends itself awkwardly to formulation in a written constitution. I have at the same time asserted that in dealing with questions touching the internal morality of the law judicial interpretation can proceed with an unusual degree of confidence in its objectivity, and this despite the fragmentary and inadequate constitutional expressions on which it must build. How can a task so difficult for the draftsman that he must leave his job half-done be thought to provide relatively firm guidelines for judicial interpretation?

The answer to this question has, I think, already been given, though in somewhat unfamiliar terms. I have described the internal morality of law as being chiefly a morality of aspiration, rather than of duty.¹⁶ Though this morality may be viewed as made up of separate demands or "desiderata"—I have discerned eight—these do not lend themselves to anything like separate and categorical statement.¹⁷ All of them are means toward a single end, and under varying circumstances the optimum marshalling of these means may change. Thus an inadvertent departure from one desideratum may require a compensating departure from another; this is the case where a failure to give adequate publicity to a new requirement of form may demand for its cure a retrospective statute.¹⁸ At other times, a neglect of one desideratum may throw an added burden on another; thus, where laws change frequently, the requirement of publicity becomes increasingly stringent. In other words, under varying circumstances the elements of legality must be combined and recombined in accordance with something like an economic calculation that will suit them to the instant case.

These considerations seem to me to lead to the conclusion that it is within the constitutional area I have designated as that of the law's internal morality that the institution of judicial review is both most needed and most effective. Wherever the choice is

16. See pp. 42-44, *supra*.

17. See pp. 42-46, *supra*, et passim in the second chapter.

18. See p. 92, *supra*.

reasonably open to it, the court ought to remain within this area. *Robinson v. California*¹⁹ is, I submit, a case where the Supreme Court quite plainly took the wrong turn. As the majority viewed the issues in that case the question presented was whether a statute might constitutionally make the state or condition of being a drug addict a crime punishable by six months' imprisonment. It was assumed as a scientific fact that this condition might come about innocently. The Court held that the statute violated the Eighth Amendment by imposing a "cruel and unusual punishment."

Surely it is plain that being sent to jail for six months would not normally be regarded as "cruel and unusual punishment"—a phrase that calls to mind at once the whipping post and the ducking stool. In attempting to meet this objection the Court argued that in deciding whether a given punishment was cruel and unusual one had to take into account the nature of the offense for which it was imposed. Thus the Court needlessly took on its shoulders a general responsibility—surely oppressive, even if it has been described as sublime—for making the punishment fit the crime.

This excursion into substantive justice was, I submit, quite unnecessary. We have an express constitutional prohibition of ex post facto criminal laws, and a well-established rule of constitutional law that a statutory definition of crime must meet certain minimum standards of clarity. Both of these restraints on legislative freedom proceed on the assumption that the criminal law ought to be presented to the citizen in such a form that he can mold his conduct by it, that he can, in short, obey it. Being innocently in a state or condition of drug addiction cannot be construed as an act, and certainly not as an act of disobedience. Bringing the decision in *Robinson v. California* within the traditional confines of due process would certainly have presented no greater difficulty than would be presented by a case, say, where a criminal statute was kept secret by the legislature until

19. 370 U.S. 660 (1962).

an indictment was brought under it. (It should be recalled that our Constitution has no express requirement that laws be published.)

Legal Morality and the Concept of Positive Law

Our next task is to bring the view of law implicit in these chapters into its proper relation with current definitions of positive law. The only formula that might be called a definition of law offered in these writings is by now thoroughly familiar: law is the enterprise of subjecting human conduct to the governance of rules. Unlike most modern theories of law, this view treats law as an activity and regards a legal system as the product of a sustained purposive effort. Let us compare the implications of such a view with others that might be opposed to it.

The first such theory I shall consider is one that in mood and emphasis stands at the opposite pole from these chapters and yet, paradoxically, advances a thesis that is easily reconciled with my own. This is Holmes' famous predictive theory of law: "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by law."²⁰

Now clearly the ability to prophesy presupposes order of some sort. The predictive theory of law must therefore assume some constancy in the influences that determine what "the courts will do in fact." Holmes chose to abstract from any study of these influences, concentrating his attention on the cutting edge of the law.

He himself explained that he made this abstraction in order to effect a sharp distinction between law and morality. But he could think he had succeeded in this objective only by refraining from any attempt to describe the actual process of prediction itself. If we are to predict intelligently what the courts will do in fact, we must ask what they are trying to do. We must indeed go further and participate vicariously in the whole purposive ef-

20. "The Path of the Law," 10 *Harvard Law Review* 457-78, at p. 461 (1897).

fort that goes into creating and maintaining a system for directing human conduct by rules. If we are to understand that effort, we must understand that many of its characteristic problems are moral in nature. Thus, we need to put ourselves in the place of the judge faced with a statute extremely vague in its operative terms yet disclosing clearly enough in its preamble an objective the judge considers plainly unwise. We need to share the anguish of the weary legislative draftsman who at 2:00 A.M. says to himself, "I know this has got to be right and if it isn't people may be hauled into court for things we don't mean to cover at all. But how long must I go on rewriting it?"

A concentration on the order imposed by law in abstraction from the purposive effort that goes into creating it is by no means a peculiarity of Holmes' predictive theory. Professor Friedmann, for example, in an attempt to offer a neutral concept of law that will not import into the notion of law itself any particular ideal of substantive justice, proposes the following definition:

the rule of law simply means the "existence of public order." It means organized government, operating through the various instruments and channels of legal command. In this sense, all modern societies live under the rule of law, fascist as well as socialist and liberal states.²¹

Now it is plain that a semblance of "public order" can be created by lawless terror, which may serve to keep people off the streets and in their homes. Obviously, Friedmann does not have this sort of order in mind, for he speaks of "organized government, operating through the various instruments and channels of legal command." But beyond this vague intimation of the kind of order he has in mind he says nothing. He plainly indicates, however, a conviction that, considered just "as law," the law of Nazi Germany was as much law as that of any other nation. This proposition, I need not say, is completely at odds with the analysis presented here.

21. *Law and Social Change* (1951), p. 281.

Most theories of law either explicitly assert, or tacitly assume, that a distinguishing mark of law consists in the use of coercion or force. That distinguishing mark is not recognized in this volume. In this respect the concept of law I have defended contradicts the following definition, proposed by an anthropologist seeking to identify the distinctive "legal" element among the various forms of social order that make up a primitive society:

for working purposes law may be defined in these terms: A social norm is legal if its neglect or infraction is regularly met, in threat or in fact, by the application of physical force by an individual or group possessing the socially recognized privilege of so acting.²²

The notion that its authorization to use physical force can serve to identify law and to distinguish it from other social phenomena is a very common one in modern writings. In my opinion it has done great harm to clarity of thought about the functions performed by law. It will be well to ask how this identification came about.

In the first place, given the facts of human nature, it is perfectly obvious that a system of legal rules may lose its efficacy if it permits itself to be challenged by lawless violence. Sometimes violence can only be restrained by violence. Hence it is quite predictable that there must normally be in society some mechanism ready to apply force in support of law in case it is needed. But this in no sense justifies treating the use or potential use of force as the identifying characteristic of law. Modern science depends heavily upon the use of measuring and testing apparatus; without such apparatus it could not have achieved what it has. But no one would conclude on this account that science should be defined as the use of apparatus for measuring and testing. So it is with law. What law must foreseeably do to achieve its aims is something quite different from law itself.

There is another factor tending toward an identification of

22. Hoebel, *The Law of Primitive Man* (1954), p. 28.

law with force. It is precisely when the legal system itself takes up weapons of violence that we impose on it the most stringent requirements of due process. In civilized nations it is in criminal cases that we are most exigent in the demand for guarantees that the law remain faithful to itself. Thus, that branch of law most closely identified with force is also that which we associate most closely with formality, ritual, and solemn due process. This identification has a particular relevance to primitive society, where the first steps toward a legal order are likely to be directed toward preventing or healing outbreaks of private violence.

These considerations explain, but do not justify, the modern tendency to see physical force as the identifying mark of law. Let us test this identification with a hypothetical case. A nation admits foreign traders within its borders only on condition that they deposit a substantial sum of money in the national bank guaranteeing their observance of a body of law specially applicable to their activities. This body of law is administered with integrity and, in case of dispute, is interpreted and applied by special courts. If an infraction is established the state pursuant to court order levies a fine in the form of a deduction from the trader's deposit. No force, but a mere bookkeeping operation, is required to accomplish this deduction; no force is available to the trader that could prevent it. Surely it would be perverse to deny the term "law" to such a system merely because it had no occasion to use force or the threat of force to effectuate its requirements. We might, however, quite properly refuse to call it a system of law if it were determined that its published rules and robed judges were a mere façade for what was in fact a lawless act of confiscation.

The considerations implicit in this illustration relieve us, I think, from having to explore in any detail a further question: Just what is meant by force when it is taken as the identifying mark of law? If in a theocratic society the threat of hell-fire suffices to secure obedience to its laws, is this "a threat of force"? If so, then force begins to take on a new meaning and simply indicates that a legal system, to be properly called such, has to

achieve some minimum efficacy in practical affairs, whatever the basis of that efficacy—a proposition both unobjectionable and quite unexciting.

In most theories of law the element of force is closely associated with the notion of a formal hierarchy of command or authority. In the passage quoted from Hoebel this association was absent because, as an anthropologist, Hoebel was concerned with primitive law, where any clearly defined hierarchic ordering of authority is generally lacking. Since the emergence of the national state, however, a long line of legal philosophers running from Hobbes through Austin to Kelsen and Somló have seen the essence of law in a pyramidal structure of state power. This view abstracts from the purposive activity necessary to create and maintain a system of legal rules, contenting itself with a description of the institutional framework within which this activity is assumed to take place.

Legal philosophy has paid a heavy price for this abstraction. Within the school accepting it many disputes are left without any intelligible principle for resolving them. Take, for example, the argument whether "law" includes only rules of some generality, or should be regarded as embracing also "particular or occasional commands." Some say that law implies generality of some sort, others deny this. Those who agree on the necessity for generality disagree on the proper way of defining it; does it require a class of acts, a class of persons, or both?²³ The whole argument, resting merely on affirmation and counteraffirmation, ends in a blind alley. I suggest that this debate is without intelligible content unless one starts with the obvious truth that the citizen cannot orient his conduct by law if what is called law confronts him merely with a series of sporadic and patternless exercises of state power.

If we ask what purpose is served by the conception of law as a hierarchy of command, the answer may be that this conception represents the legal expression of the political national state. A

23. See note 6, Chapter 2, p. 49.

less vague and, I believe, juster answer would be to say that it expresses a concern with the problem of resolving conflicts within the legal system. Indeed, one may say that it converts one principle of the internal morality of law—that condemning contradictory laws—into an absolute to the neglect of all others. With Kelsen and Somló this concentration on internal coherence becomes explicit as a fundamental element of their theories.²⁴ Certainly it is desirable that unresolved contradictions within a legal system should be avoided or should be subject to resolution when they arise. But viewing the matter without precommitment, what reason can there be for any preference between a legal system that is full of contradictions and one in which the rules are so vague it is impossible to know whether they contradict one another or not?

It may be answered that common sense and a concern to make his measures effective will ordinarily lead the legislator to make his laws reasonably clear, whereas contradictions among the rules applied by the various agencies of government constitute a perennial problem. Before accepting this answer we should certainly reflect on the very real temptations a government may have to make its laws vague. But more fundamentally the whole issue is misconceived when, instead of clarifying our problems and seeking apt solutions, we attempt to foreclose our difficulties by definitional fiat. It is all very well to define law in such a way that it cannot be self-contradictory because in theory there is always a higher instance that can resolve disputes on a lower level. But this leaves the practical problems of contradiction untouched, particularly that of clarifying what in close cases shall be regarded as being a contradiction. Though Kelsen and Somló make much of the problem of resolving contradictions, so far as I can determine neither ever discusses a single problem of the sort likely to cause difficulties in actual practice. Instead the whole discussion deals with such abstractions as that "it is logically

24. See Kelsen, *General Theory of Law and State* (1945), pp. 401–04 and index entry "Non-contradiction, principle of"; Somló, *Juristische Grundlehre* (2d ed. 1927), index entry "Widersprüche des Rechts."

impossible to assert both 'A ought to be' and 'A ought not to be' "25—a proposition certainly not likely to help a judge struggling with a statute that in one section seems to say Mr. A ought to pay a tax and in another that he is exempt from it. Nor would a judge faced with such a statute derive much assistance from Somló's principle that where there is a "real," as contrasted with an "apparent," contradiction the opposing rules should be regarded as canceling one another.²⁶

Even if we could solve all the problems of contradiction by a definition, it is by no means clear that a neatly defined hierarchy of authority is always the best way of resolving conflicts within a legal system. In discussing what the law is when the lower courts disagree, Gray presupposes a judicial hierarchy and gives the obvious answer that in such a case what the supreme court says is the law.²⁷ But one can easily conceive of a system of courts of equal standing, in which the judges would come together from time to time to iron out any conflicts among them by a process of discussion and reciprocal accommodation. Something like this no doubt occurred when appellate judges used to preside over trials and bring doubtful cases for discussion before the whole court.

In unionized industries in this country we have an institution that has been called "industrial jurisprudence." The rules regulating relations within an industrial plant are set, not through enactment by some legislative body, but by contract between management and a labor union. The judiciary of this legal system is constituted by arbitrators, again chosen by agreement. In such a system there are, of course, opportunities for failure. The fundamental charter of the parties' rights, the collective bargaining agreement, may not come into existence because of a failure of agreement between management and the union. When a dispute arises under a successfully negotiated agreement, the parties may fail to agree in nominating an arbitrator. Usually some

25. Kelsen, p. 374.

26. Somló, p. 383.

27. *The Nature and Sources of the Law* (2d ed. 1921), p. 117.

formal provision is made in anticipation of this possibility; when the parties cannot agree on an arbitrator the American Arbitration Association may, for example, be authorized to nominate him. But such a provision is neither indispensable to success, nor a guarantee against failure. All legal systems can break down, including those with the most neatly ordered chains of command.

In his discussion of theories that identify law with a hierarchic ordering of authority, Pashukanis shrewdly observes²⁸ that if a neat chain of command were the most significant quality of law then we should regard the military as the archetypal expression of juristic order. Yet any such view would violate the most elementary common sense. The source of this tension between theory and everyday wisdom lies, quite obviously, in a concentration by theory on formal structure to the neglect of the purposive activity this structure is assumed to organize. There is no need here to attempt any elaborate analysis of the differences between the kind of hierarchic ordering required for military purposes and that which may be thought essential to a legal system. One need only recall the common and quite troublesome problem faced by a legal order in knowing what to do when a lay citizen relies on an erroneous interpretation of the law rendered by an agency occupying a lower rung of the legal ladder. Plainly no similar question could arise within a military order except in times of martial law, when the military takes over the function of governing lay conduct.

Our discussion of theories of law would be incomplete if we made no mention of the principle of parliamentary sovereignty, the doctrine according to which, in the United Kingdom for example, the Parliament is regarded as possessing an unlimited competence in lawmaking. This doctrine deserves examination here because of its intimate association with theories that accept a hierarchic ordering of authority as the essential mark of a legal system.

28. Pashukanis, *The General Theory of Law and Marxism* (1927), trans. Babb in *Soviet Legal Philosophy*, 20th Century Legal Philosophy Series, 5 (1951), 111-225, at p. 154.

Parliamentary sovereignty can, of course, be supported entirely by an argument of political prudence to the effect that it is always desirable to have a reserve of lawmaking power ready to meet unforeseen circumstances. Explicit limitations on the power of the legislature that seem wise and beneficial when adopted may later serve to block measures necessary to deal with drastically changed conditions. If the pressure of circumstance mounts too high, the restraint may be circumvented by dodges and fictions that themselves carry a high cost in the distortions they introduce into the moral atmosphere of government and even into its institutional structure. These points can be illustrated hypothetically by a reference to the most stringent restraint contained in our own Constitution. This is the provision that no state shall, without its consent, "be deprived of its equal suffrage in the Senate."²⁹ This is the only constitutional restraint now operative that is removed even from the effect of change by amendment of the Constitution itself.

Now it is possible that there might occur—perhaps as the result of some natural disaster—a radical reduction in the population of certain of the states, so that, let us say, one third of the states would contain a population of only about one thousand persons each. In such a situation equal representation in the Senate might become a political absurdity. If the right to equal representation is respected, the whole political life of the nation might be mortally crippled. In such a situation the possibility of some legal maneuver comes naturally to mind. Could we perhaps use the amending power to reduce the role of the Senate to something like that of the House of Lords? Or abolish the Senate in favor of a unicameral assembly? Or is public opinion sufficiently behind us to make it enough simply to rename the Senate "The Council of Elders" and then reallocate representation in it?

In comparing the obvious rigidities of a written constitution with the principle of parliamentary supremacy we must not be misled by the appearance of rugged simplicity which the latter

29. Art. V

principle presents. Parliamentary sovereignty means, in effect, that the parliament stands above the law in the sense that it can change any law that is not to its liking. But, paradoxically, it gains this position of being above the law only by subjecting itself to law—the law of its own internal procedure. For a corporate body to pass laws it must conform to laws that will determine when a law has been passed. This body of laws is itself subject to all the kinds of shipwreck that can visit any other legal system—it can be too vague or contradictory to give sure guidance, and, above all, its standards can be so disregarded in practice as to default in time of need. The kind of crisis that can cause a breakdown in rigid constitutional restrictions on legislative power can also, and perhaps as easily, cause a breakdown in the lawful processes of legislation. Even in England, where men tend to stick by the rules and to keep things straight, it is said that the courts once applied as law—on the basis of an entry in the Parliamentary Roll—a measure that had never actually been passed by Parliament.³⁰ The structure of authority, so often glibly thought of as organizing law, is itself a product of law.

In the country where the doctrine of parliamentary sovereignty is most vigorously cultivated discussions of it run, not in terms of its wisdom, but turn rather on points of law. Those who support the doctrine have generally regarded it as a principle of law to be sustained or refuted entirely by legal arguments; critics of the doctrine have generally accepted this joinder of issue. It is when the argument takes this form that an opening is presented for the entry of theories about the nature of law. The theories that have actually shaped the doctrine are those which display what I have described as a fatal abstraction from the enterprise of creating and administering a system of rules for the control of human conduct.

The effects of this abstraction become apparent in a crucial passage in Dicey's classic defense of the rule of parliamentary sovereignty. In the concluding paragraph of his main argument

30. Dicey, *The Law of the Constitution* (10th ed., 1960), Intro., xl.

he asserts that certain laws passed by Parliament constitute "the highest exertion and crowning proof of sovereign power."³¹

What are the enactments that possess these extraordinary qualities? In Dicey's own words they are "Acts such as those which declare valid marriages which, owing to some mistake of form or otherwise, have not been properly celebrated," and statutes "the object of which is to make legal transactions which when they took place were illegal, or to free individuals to whom the statute applies from liability for having broken the law."³² It was of such enactments that Dicey wrote, "being as it were the legalisation of illegality" they constitute "the highest exertion and crowning proof of sovereign power."

It is only a theory that disregards completely the realities of creating and administering a legal system that could pass such a sweeping—though fortunately highly metaphorical—judgment on retrospective laws. It should be recalled that other adherents of the same general school of thought as that to which Dicey belonged have viewed retroactive laws as a routine exercise of legislative power, presenting no special problems for legal theory.³³ These diametrically opposed views, arising within the framework of the same general theory, are, I submit, symptomatic of a lack of any real concern with the problems of law-making.

A similar lack of concern is revealed in the conclusions Dicey is willing to draw from the rule of parliamentary supremacy. The most famous such conclusion is expressed in the following words: "Parliament could extinguish itself by legally dissolving itself and leaving no means whereby a subsequent Parliament could be legally summoned."³⁴ This is about like saying that the life force manifests itself even in the act of suicide—a statement that may have a certain existential poetry about it, but is about as remote from the ordinary affairs and concerns of men as is Dicey's legal authorization of the suicide of a legal order.

31. *Ibid.*, p. 50.

32. *Ibid.*, pp. 49–50.

33. See esp. Somló, *supra* n. 4, p. 97.

34. *Ibid.*, pp. 68–70 n.

The tradition in discussing Parliament's legal omnipotence is to test statements that are extreme to the point of absurdity by illustrations that are equally absurd. This tradition is fully respected in my next illustration. Let us put together two of Dicey's assertions, that Parliament may legally end itself, and "that Parliament . . . has under the English constitution, the right to make or unmake any law whatever."³⁵ Now let us suppose that in some psychotic future the Parliament were to enact the following measures: (1) that all the persons then members of the Parliament should henceforth be free from the restraint of any laws whatever, and should be authorized to rob, kill and rape without legal penalty; (2) that any interference with the actions of such persons should be a crime, subject to capital punishment; (3) that all other laws of whatever kind were repealed; and (4) that the Parliament be permanently dissolved. Surely it is difficult to imagine any solicitor advising his client, after consulting Dicey, that "as a matter of strict law" the rampaging and ravishing M.P.s were within their legal rights and that the client would have to face for himself the moral issue whether to violate the law by lifting his hand against them. At some point we take leave of the gravitational field within which the distinction between law and not-law makes sense. I suggest that that point is reached far short of the situation I have described, and is indeed reached when we begin to ask whether parliamentary suicide is possible, or whether Parliament can formally assign all its powers to a dictator, or whether Parliament can decide that all future laws enacted by it shall be kept secret from those subject to them. The first two questions are easy grist for Dicey's mill; the third, of course, he does not consider, though in terms of the experience of history it is the least fanciful of the three.

This concludes my criticism of certain theories of law that may be opposed to the analysis presented in these chapters. In summary of the view I have advanced I may repeat that I have tried to see law as a purposive activity, typically attended by certain difficulties that it must surmount if it is to succeed in attain-

35. *Ibid.*, pp. 39–40.

ing its ends. In contrast, the theories I have rejected seem to me to play about the fringe of that activity without ever concerning themselves directly with its problems. Thus, law is defined as "the existence of public order" without asking what kind of order is meant or how it is brought about. Again, the distinguishing mark of law is said to lie in a means, namely "force," that is typically employed to effectuate its aims. There is no recognition that, except as it makes the stakes higher, the use or nonuse of force leaves unchanged the essential problems of those who make and administer the laws. Finally, there are theories that concentrate on the hierarchic structure that is commonly thought to organize and direct the activity I have called law, though again without recognizing that this structure is itself a product of the activity it is thought to put in order.

At this point I am sure there will be those who, though agreeing generally with my negations and rejections, will nevertheless feel a certain discomfort about the view of law I have presented as my own. To them the concept of law that underlies these writings will seem too loose, too accommodating, too readily applied over too wide a range of instances, to serve significantly as a distinctive way of looking at law. These are criticisms that I shall deal with shortly. But first I should like to explore an analogy that may serve to support the conception advanced here.

The Concept of Science

The analogy I have in mind is that of science, by which I mean primarily what are called the physical and biological sciences.

Science, too, may be regarded as a particular direction of human effort, encountering its special problems and often failing in certain typical ways to solve them. Just as there are philosophies of law, so there are philosophies of science. Some philosophers of science, notably Michael Polanyi, are primarily concerned with the activity of the scientist, seeking to discern its proper aims and the practices and institutions conducive to at-

taining them. Others seem to embroider their theories, in various ingenious ways, about the periphery of the scientist's work. Such browsing in the literature as I have done would indicate that the parallels between legal and scientific philosophies are indeed striking. Holmes' definition of law in terms of its cutting edge is certainly not lacking in affinity for Bridgman's "operational theory of concepts."³⁶ One advocate of "scientific empiricism" has expressly asserted that his philosophy has nothing to say about the act of scientific discovery itself, for, he says, this "escapes logical analysis."³⁷ One is reminded at once of Kelsen's relegation of all the important problems involved in the making and interpreting of laws to the realm of the "meta-juristic."

I shall not attempt here, however, any further excursion into the actual literature of scientific philosophy. Instead I shall construct three hypothetical definitions of science after the models presented by legal theory.

In defining science it is quite possible, and indeed quite customary, to concentrate on its results, rather than on the activity that produces those results. Thus, corresponding to the view that law is simply "the existence of public order," we may assert that "science exists when men have the ability to predict and control the phenomena of nature." As a parallel to the view that law is characterized by the use of force, we may, as I have already suggested, suppose a theory of science defining it as the use of certain kinds of instruments. Seeking an analogue for hierarchic theories of law we encounter the difficulty that, except in a totalitarian context, we cannot very well think of science as a hierarchic ordering of scientific authority. But we may recall that with Kelsen the legal pyramid presents, not a hierarchy of human agencies, but a hierarchy of norms. Building on this conception we may then define science as consisting of "an arrangement of propositions about natural phenomena in an ascending order of generality."

36. *The Logic of Modern Physics* (1949), pp. 3-9 et passim.

37. Reichenbach, *The Rise of Scientific Philosophy* (1951), p. 231.

Now it cannot be said that any of these views is false. It is simply that none of them would start the lay citizen on his way toward any real understanding of science and its problems. Nor would they serve the scientist usefully who wanted to clarify for himself the aims of science and the institutional arrangements that would promote those aims.

Recently there has been a movement of reform in scientific education, particularly in the teaching of general courses in science intended for those who do not expect to become scientists. The older courses of this sort generally offered a kind of panoramic view of the achievements of science, supplemented by a fairly abstract discussion of some of the problems of scientific method, notably induction and verification. Newer courses have sought to give the student an insight into the manner in which the scientist reaches for new truths. In the course pioneered by Conant this is done through a study of case histories. The object is to give the student a vicarious experience in the act of scientific discovery. In this way it is hoped that he will come to have some understanding of the "tactics and strategy of science."³⁸

Michael Polanyi's greatest achievement has probably been in his theories of what may be called broadly the epistemology of scientific discovery. But as touching the theme of these essays, his most distinctive contribution lies in his conception of the scientific enterprise.³⁹ With him this enterprise is a collaborative one, seeking the institutional forms and practices appropriate to its peculiar aims and problems. Though men of genius may introduce revolutionary turns of theory, they are able to do so only by building on the thought, the findings, and the mistakes of their predecessors and contemporaries. Within the scientific community the freedom of the individual scientist is not simply an opportunity for self-assertion, but an indispensable means for organizing effectively the common search for scientific truth.

The calling of the scientist has its distinctive ethos, its internal morality. Like the morality of law, it must, by the very nature of

38. *Science and Common Sense* (1951).

39. *The Logic of Liberty* (1951); *Personal Knowledge* (1958).

the demands it has to meet, be a morality of aspiration, not of duty. A single example will suffice, I think, to make clear why this must be so.

A scientist believes that he has made a fundamental discovery of the sort that may touch upon and advance the researches of others. When should he publish? It is clear that if he has in fact made an important discovery, he must make it known to the scientific community even though, for example, he can foresee that a rival scientist, building on it, may perhaps be enabled to make a further discovery overshadowing his own. On the other hand, he must be sure that he has in fact made the discovery he believes he has, for by rushing into print he may waste the time of others by giving a false lead to their researches.

It is questions of this sort that Polanyi has in mind when, borrowing a legal term, he speaks of a "fiduciary" concept of science. There is, indeed, a close correspondence between the moralities of science and of law. Outrageous departures are in both cases easily recognized. Within both fields an adherence to traditional ways, or a coincidence between self-interest and the ethics of the profession, may prevent any moral issue from arising. Yet both moralities may at times present difficult and subtle problems no simple formula of duty can possibly resolve. As to both moralities the general level of perceptiveness and of behavior may vary appreciably from one nation to another, or within a single nation, from one social context to another.

Without some understanding of the tactics and strategy of the scientific enterprise, and of its distinctive ethos, the lay citizen cannot, I submit, have an intelligently informed opinion on questions like the following: What should be the policy of government toward science? How can scientific research be most effectively introduced and cultivated in newly emerging nations? What precisely is the cost society pays directly and indirectly, when the responsibilities of scientific morality are ignored or loosely observed? I think I need not labor to prove that all these questions have close cousins in the law. Nor is there any need to demonstrate that the legal questions corresponding to these of science

must remain unanswered in any philosophy of law that abstracts from the nature of the activity we call law.

Objections to the View of Law Taken Here

I now turn to certain objections that may be raised against any analysis that treats law as "the enterprise of subjecting human conduct to the governance of rules."

The *first* such objection would run in terms something like these: To speak of a legal system as an "enterprise" implies that it may be carried on with varying degrees of success. This would mean that the existence of a legal system is a matter of degree. Any such view would contradict the most elementary assumptions of legal thinking. Neither a rule of law nor a legal system can "half exist."

To this my answer is that, of course, both rules of law and legal systems can and do half exist. This condition results when the purposive effort necessary to bring them into full being has been, as it were, only half successful. The truth that there are degrees of success in this effort is obscured by the conventions of ordinary legal language. These conventions arise from a laudable desire not to build into our ways of speech a pervasive encouragement to anarchy. It is probably well that our legal vocabulary treats a judge as a judge, though of some particular holder of the judicial office I may quite truthfully say to a fellow lawyer, "He's no judge." The tacit restraints that exclude from our ordinary ways of talking about law a recognition of imperfections and shades of gray have their place and function. They have no place or function in any attempt to analyze the fundamental problems that must be solved in creating and administering a system of legal rules.

Of no other complex human undertaking would it ever be assumed that it could meet with anything other than varying degrees of success. If I ask whether education "exists" in a particular country, the expected response, after the addressee of my question had recovered from some puzzlement as to its form, would be

something like this: "Why, yes, their achievements in this field are very fine," or "Well, yes, but only in a very rudimentary way." So it would be with science, literature, chess, obstetrics, conversation, and the mortuary art. Disputes might arise, to be sure, about the proper standards for judging achievement, and of course, any attempt at quantitative appraisal (such as "half"-success) would have to be considered as metaphorical. Nevertheless the normal expectation would be of some performance falling between zero and a theoretical perfection.

Only with law is it different. It is truly astounding to what an extent there runs through modern thinking in legal philosophy the assumption that law is like a piece of inert matter—it is there or not there. It is only such an assumption that could lead legal scholars to assume, for example, that the "laws" enacted by the Nazis in their closing years, considered as laws and in abstraction from their evil aims, were just as much laws as those of England and Switzerland. An even more grotesque outcropping of this assumption is the notion that the moral obligation of the decent German citizen to obey these laws was in no way affected by the fact that they were in part kept from his knowledge, that some of them retroactively "cured" wholesale murder, that they contained wide delegations of administrative discretion to redefine the crimes they proscribed, and that, in any event, their actual terms were largely disregarded when it suited the convenience of the military courts appointed to apply them.⁴⁰

A possible *second* objection to the view taken here is that it permits the existence of more than one legal system governing the same population. The answer is, of course, that such multiple systems do exist and have in history been more common than unitary systems.

In our country today the citizen in any given state is subject to two distinct systems of law, that of the federal government and that of the state. Even in the absence of a federal system, there may be one body of law governing marriage and divorce,

40. See the discussion and references *supra*, p. 40.

another regulating commercial relations and still a third governing what is left over, all three systems being separately administered by special courts.

Multiple systems may give rise to difficulties both for theory and for practice. Difficulties of the first sort can arise only if theory has committed itself to the view that the concept of law requires a neatly defined hierarchy of authority with a supreme legislative power at the top that is itself free from legal restraints. One way of accommodating this theory to the facts of political life is to say that although there may appear to be three systems, *A*, *B* and *C*, actually *B* and *C* exist only by the legal tolerance of *A*. Carrying this a step further it may be asserted that what the supreme legal power permits it impliedly commands, so that what appears as three systems is actually one—"in contemplation of law."

Practical difficulties can arise when there is a real rub between systems because their boundaries of competence have not been and perhaps cannot be clearly defined. One solution of this problem as it affects the division of competence between nation and state in a federal system is to subject disputes to judicial decision under the terms of a written constitution. This device is useful, but not in all cases indispensable. Historically dual and triple systems have functioned without serious friction, and when conflict has arisen it has often been solved by some kind of voluntary accommodation. This happened in England when the common law courts began to absorb into their own system many of the rules developed by the courts of the law merchant, though the end of this development was that the merchants' courts were finally supplanted by those of the common law.

A possible *third* criticism points to the same basic objection as the second, but sees it this time magnified many times over. If law is considered as "the enterprise of subjecting human conduct to the governance of rules," then this enterprise is being conducted, not on two or three fronts, but on thousands. Engaged in this enterprise are those who draft and administer rules gov-

erning the internal affairs of clubs, churches, schools, labor unions, trade associations, agricultural fairs, and a hundred and one other forms of human association. If, therefore, we are prepared to apply with consistency the conception of law advanced in these chapters, it must follow that there are in this country alone "systems of law" numbering in the hundreds of thousands. Since this conclusion seems absurd, it may be said that any theory that can give rise to it must be equally absurd.

Before attempting any general answer to this criticism, let us consider a hypothetical instance of the workings of one such legal system in miniature. A college enacts and administers a set of parietal rules governing the conduct of students in its dormitories. A student or faculty council is entrusted with the task of passing on infractions and when it is established that a violation has occurred, the council is understood to have the power to impose disciplinary measures, which in serious cases may include the organizational equivalent of capital punishment, that is, expulsion.

If we extract from the word "law" any connotation of the power or authority of the state, there is not the slightest difficulty in calling this a system of law. Furthermore, a sociologist or philosopher interested primarily in the law of the state, might study the rules, institutions, and problems of this body of parietal law for the insight he might thus obtain into the processes of law generally. However, so inveterate has become the association of the word "law" with the law of the political state that to call a system of parietal rules in all seriousness a "system of law" suggests an offense against the rules of linguistic propriety. If this were our only problem we might at once make peace with our critics by entering a stipulation that they may regard any such usage as metaphorical and that they may qualify it as much as they like with that ancient question-beggar: "quasi."

The difficulty runs deeper, however. Suppose that under the system of parietal rules a student is tried by the council, and being found guilty of a serious infraction, is expelled from the school. He files suit and asks the court to order his reinstatement.

There is abundant authority that the courts may and should take jurisdiction of such a case, and this without reference to the question whether the school involved is private or public.⁴¹

How will the court decide such a case? If the expelled student contends that, although his expulsion was in accord with the published rules, the rules themselves are grossly unfair, the court may, though normally with reluctance, pass judgment on that contention. Assuming no such objection is raised, the court will address itself to a question that may be expressed in these terms: Did the school in creating and administering its parietal rules respect the internal morality of law? Were these rules promulgated?—a question in this case expressed by asking whether the student was given proper notice of them. Were they reasonably clear in meaning, so as to let the student know what actions on his part would constitute an infraction? Was the finding of the council in accordance with the rules? Were the procedures of inquiry so conducted as to insure that the result would be grounded in the published rules and based on an accurate knowledge of the relevant facts?

Whether the court reinstates the student or upholds his expulsion, it takes its standard of decision from the college's own rules. If to acquire the force of law these rules need the imprimatur of the state, they have now received it insofar as they affect the issue decided by the court. Once we accept the parietal rules as establishing the law of the case, binding both on the college authorities and the courts, the situation is not essentially different from that in which an appellate court reviews the decision of a trial judge.

Why, then, do we hesitate to describe the parietal rules simply as law? The easy answer is to say that such an extension of the word would violate ordinary linguistic usage. This begs the question why linguistic usage has taken the turn it has. I think the answer lies in considerations something like the following: We

41. For the best general treatment see "Private Government on the Campus—Judicial Review of University Expulsions," 72 *Yale Law Journal* 1362-1410 (1963).

intuitively realize that in cases like that I have been discussing we are confronted with delicate issues of maintaining a proper balance of institutional function within our society. That such issues are at stake becomes apparent if the case brought for judicial determination involves a student expelled from a school run by a religious order because of heresy or from a private military academy because "he is constitutionally incapable of accepting military discipline in the proper spirit." When issues as delicate as those here suggested are under consideration we hesitate to throw into the balance a word as heavily loaded with implications of sheer power and established authority as is the word "law."

One may approve the motives that prompt this restraint. I suggest, however, that the real source of difficulty lies in philosophies that have invested the word "law" with connotations which unfit it for use precisely where it is most needed. For in the case at hand it is badly needed. Without it, we face this dilemma: On the one hand, we are forbidden to call law the rules by which a college determines expulsions. On the other hand, these rules are plainly given the force of law in judicial decisions. That the courts may strike down rules that are grossly unfair does not differentiate them from Acts of Congress which may also be declared void when they violate constitutional restrictions on the legislative power. Being denied the term "law" we are compelled to look about for some other conceptual shelter under which we can house these rules. This is generally found in a notion of private law: contract. The parietal rules, it is said, constitute a contract between the school and the student by which their respective rights are determined.⁴²

This "thoroughly artificial nexus of contract"⁴³ has given a great deal of trouble. In considering its inconveniences and short-

42. I am leaving out of account here the limited use courts have made of property concepts and the law of defamation in dealing with some expulsion cases, particularly those involving social clubs.

43. Lloyd, "Disqualifications Imposed by Trade Associations—Jurisdiction of Court and Natural Justice," 21 *Modern Law Review* 661, at p. 668 (1958).

comings we should recall that the school expulsion cases constitute only a small sampling drawn from a vast body of precedent dealing with similar problems as they arise in labor unions, churches, social clubs, and a whole host of other institutional forms. As a device for dealing with this wide range of problems the concept of contract defaults in several important respects. For one thing, it points to remedies that are inappropriate to the context. For another, it suggests that if the institution or association sees fit to do so, it may contractually stipulate for an unrestricted privilege of canceling membership. Most fundamentally, the contract theory is inconsistent with the responsibility actually assumed by the courts in these cases. It is easy to say, for example, that the parietal rules constitute a contract between the college and the student, but how are we to explain the deference accorded by the courts to the interpretation put on those rules by the college authorities in the process of applying them to an alleged infraction? When parties quarrel about what a contract means we do not ordinarily defer to the interpretation made by either of them but judge between the two impartially. These difficulties, and others I have left unmentioned, can be cured by the device of assuming that the contract in question is a very special one, in which all the necessary deviations from ordinary contract law are to be understood as tacitly intended by the parties. But when this is done the "contract" becomes an empty fiction, offering a convenient rack on which to hang any result deemed appropriate to the situation.

The objection to the contract theory is that, like any legal fiction, it tends to obscure the real issues involved and postpones a direct confrontation with them. I submit that the body of law I have been discussing is essentially a branch of constitutional law, largely and properly developing outside the framework of our written constitutions. It is constitutional law in that it involves the allocation among the various institutions of our society of legal power, that is, the authority to enact rules and to reach decisions that will be regarded as properly binding on those affected by them. That this body of constitutional law should have

grown up outside our written constitutions should not be a source of concern. It would have been impossible for the draftsmen of our first written constitutions to have anticipated the rich institutional growth that has occurred since their time. Furthermore, the intellectual climate of the late eighteenth century was such as to obscure a recognition of the centers of authority created when men form voluntary associations.⁴⁴ In the light of these considerations we should be no more disturbed to find that we have a body of unwritten constitutional law than the British have been to discover that since the Statute of Westminster of 1931 they have acquired the rudiments of a written constitution living comfortably in the midst of their unwritten constitution.

A view that seeks to understand law in terms of the activity that sustains it, instead of considering only the formal sources of its authority, may sometimes suggest a use of words that violates the normal expectations of language. This inconvenience may, I suggest, be offset by the capacity of such a view to make us perceive essential similarities. It may help us to see that the imperfectly achieved systems of law within a labor union or a university may often cut more deeply into the life of a man than any court judgment ever likely to be rendered against him. On the other hand, it may also help us to realize that all systems of law, big and little, are subject to the same infirmities. In no case can the legal achievement outrun the perception of the human beings who guide it. The judicial review of institutional disciplinary measures performs its most obvious service when it corrects outrageous injustice; in the long run it can be most useful if it helps to create an atmosphere within institutions and associations that will render it unnecessary.⁴⁵

44. Wyzanski, "The Open Window and the Open Door," 35 *California Law Review* 336-51, at pp. 341-45 (1947).

45. For a general survey of the law, amounting to a short treatise, see the note, "Developments in the Law—Judicial Control of Actions of Private Associations," 76 *Harvard Law Review* 983-1100 (1963). The best general introduction is still Chafee's very readable article, "The Internal Affairs of Associations Not for Profit," 43 *Harvard Law Review* 993 (1930).

THE MORALITY OF LAW

I come now to the *fourth*—and so far as my own account can go—final criticism that may be made of the view of law taken here. This is that it does not sufficiently distinguish between law and morality. Morality, too, is concerned with controlling human conduct by rules. It, too, is concerned that these rules should be clear, consistent with one another and understood by those who ought to obey them. A view that seems to recognize as the characteristic mark of law a set of concerns shared with morality invites the criticism that it obscures an essential distinction.

This criticism conceals, I think, several distinct issues. One is presented when we ask how, when we are confronted with a system of rules, we decide whether the system as a whole shall be called a system of law or one of morality. The only answer to that question ventured here is that contained in the word “enterprise” when I have asserted that law, viewed as a direction of purposive human effort, consists in “the enterprise of subjecting human conduct to the governance of rules.”

One can imagine a small group—transplanted, say, to some tropical island—living successfully together with only the guidance of certain shared standards of conduct, these standards having been shaped in various indirect and informal ways by experience and education. What may be called the legal experience might first come to such a society when it selected a committee to draw up an authoritative statement of the accepted standards of conduct. Such a committee would find itself *ex necessitate rei* embarked on the enterprise of law. Contradictions in standards, previously latent and unnoticed, would have to be

THE CONCEPT OF LAW

one to serve as judge. Nothing, it seems to me, hinges upon the particular manner in which the members of the society, or some of them, are plunged into what I have called the “enterprise” of law.

Though it can be said that law and morality share certain concerns—for example, that the rules should be clear—it is as these concerns become increasingly the objects of an explicit responsibility that a legal system is created. Generality, for example, is taken for granted in morality and can hardly be called a problem. It becomes a problem, and a pressing one, however, when a judge sentences a man to jail and can find no way of expressing any general principle by which his decision can be explained or justified.

These observations admittedly leave uncertain the precise point at which a legal system can be said to have come into being. I see no reason to pretend to see black and white where reality presents itself in shades of gray. Certainly there is little point in imposing on the situation some definitional fiat, by saying, for example, that we shall consider law to exist only where there are courts.

The question just dismissed, though much discussed in the literature of jurisprudence, is not one of great interest in practice. Here the difficult problem is rather that of defining the proper relationship between what is unquestionably an established and functioning system of law, on the one hand, and general standards of morality, on the other. In dealing with this problem I do not think it can be said that the view of law taken in these

tion, gambling, or the requisition of private property for public use.

But the very same considerations that require an attitude of neutrality with regard to the external aims of the law demand a commitment by the judge to the law's internal morality. It would, for example, be an abdication of the responsibilities of his office if the judge were to take a neutral stand between an interpretation of a statute that would bring obedience to it within the capacity of the ordinary citizen and an interpretation that would make it impossible for him to comply with its terms.

The distinction between the external and internal moralities of law is, of course, a tool of analysis and should not be regarded as a substitute for the exercise of judgment. I have been at pains to show that along the spectrum occupied by these two moralities there may appear, in certain applications, a middle area where they overlap.⁴⁶ The two moralities, in any event, interact with one another in ways that I shall analyze in my final chapter.⁴⁷ Suffice it for the present to point out that a judge faced with two equally plausible interpretations of a statute might properly prefer that which would bring its terms into harmony with generally accepted principles of right and wrong. Though this result may be rested on a presumed legislative intent, it can also be justified on the ground that such an interpretation would be less likely to make of the statute a trap for the innocent, thus bringing the problem within the considerations relevant to the law's internal morality.

A perennial debate relates to the problem of "legislating morals." Recently there has been a lively discussion of the proper relation of the law to sexual behavior and more particularly to homosexual practices.⁴⁸ I must confess that I find this argument

46. See especially the discussion of the problems of generality (*supra*, pp. 46-48 and *infra*, pp. 157-59), contradictions (*supra*, pp. 69-70), and the possibility of obedience (*supra*, p. 79).

47. See *infra*, pp. 155-67.

48. P. A. Devlin, *The Enforcement of Morals* (1959), *Law and Morals* (1961); H. L. A. Hart, *Law, Liberty and Morality* (1963).

quite inconclusive on both sides, resting as it does on initial assumptions that are not made explicit in the argument itself. I would, however, have no difficulty in asserting that the law ought not to make it a crime for consenting adults to engage privately in homosexual acts. The reason for this conclusion would be that any such law simply cannot be enforced and its existence on the books would constitute an open invitation to blackmail, so that there would be a gaping discrepancy between the law as written and its enforcement in practice. I suggest that many related issues can be resolved in similar terms without our having to reach agreement on the substantive moral issues involved.

Hart's The Concept of Law

So far I have passed over the important recent book from which I have borrowed the title for this chapter. *The Concept of Law*⁴⁹ by H. L. A. Hart is certainly a contribution to the literature of jurisprudence such as we have not had in a long time. It is not a collection of essays disguised as a book. It is not a textbook in the usual sense. Instead, it represents an attempt to present in short compass the author's own solutions for the major problems of jurisprudence.

Many things about the book are excellent. It is beautifully written and filled with brilliant aperçus. I have learned many things from it. With its fundamental analysis of the concept of law, however, I am in virtually complete disagreement.

In my final chapter I shall have some critical comments on the treatment Hart accords to what I have called the internal morality of law. In summary the criticism I shall there advance is that Hart's whole analysis proceeds in terms that systematically exclude any consideration of the problems I attempted to analyze in my second chapter.

In the present context my quarrel is with "the rule of recognition," a concept Hart seems to regard as the central theme of his

49. Oxford University Press, 1961.

book and its chief contribution. In developing this concept Hart begins with a distinction between rules imposing duties and rules conferring legal powers. So far there can be no complaint. The distinction is a familiar one, especially in this country where it has served as the keystone of the Hohfeldian analysis.⁵⁰ Plainly there is an important difference between a rule that says, "Thou shalt not kill," and one that says, "If you want to make a valid will, put it in writing and sign it before three witnesses."

It should be observed that this distinction, usefully clarifying as it is in some cases, may be misapplied in such a way as to obfuscate the simplest issues almost beyond redemption. Of this there is abundant evidence in some of the writings based on the Hohfeldian analysis.

Let me develop briefly the ambiguities implicit in the distinction with the aid of two illustrations. In the first we shall pose for ourselves the problem of classifying a rule that reads, "Where a trustee has paid out of his own pocket expenses properly chargeable to the trust estate, he has a right to reimburse himself out of trust funds in his possession." The use of the word "right" suggests a corresponding duty on the part of the beneficiary, yet the trustee has no need to enforce this duty; by a species of lawful self-help he simply effects a legally valid transfer from the trust funds to his own account. Accordingly we may conclude that we are here dealing with a power-conferring rule, rather than a duty-imposing rule. But suppose that the instrument creating the trust gives the beneficiary, in turn, a power on coming of age to effect a transfer of the trust estate directly to himself. Suppose, further, that the beneficiary exercises this power before the trustee has had a chance to reimburse himself out of the trust funds. Plainly

50. See Hohfeld, *Fundamental Legal Conceptions* (1923). The best introduction to the Hohfeldian system is Corbin, "Legal Analysis and Terminology," 29 *Yale Law Journal* 163-73 (1919). The Hohfeldian analysis discerns four basic legal relations: right-duty, no-right-privilege, power-liability, and disability-immunity. Of these, however, the second and fourth are simply the negations of the first and third. Accordingly the basic distinction on which the whole system is built is that between right-duty and power-liability; this distinction coincides exactly with that taken by Hart.

the beneficiary now has a legal duty to reimburse the trustee. The fundamental principle is, however, the same in both cases, namely, that the trustee is entitled to reimbursement at the expense of the beneficiary; whether he is given a power to help himself, as it were, or a right against the beneficiary (with corresponding duty) is simply a question of the most apt way of achieving the result.

My second illustration relates to a familiar rule concerning the mitigation of damages. *A* and *B* enter a contract whereby *A* is to construct a specially designed machine for *B* and *B* is to pay \$10,000 when the job is completed. After *A* has begun work on the machine, *B* repudiates his contract. There is no question but that *B* is liable for damages, which would include reimbursement to *A* for expenses incurred up to the time of repudiation as well as any profit *A* would have made on the whole job. The crucial issue is whether *A* can disregard *B*'s repudiation, continue work on the machine and, when he has finished, recover the full price. The law is that he cannot charge to *B* any expenses incurred in performing the contract after *B* has repudiated it; whether he continues work or not, the limit of his recovery is set by the amount he would have been entitled to had he quit work after *B*'s repudiation. The courts have commonly expressed this idea by saying that on the repudiation *A* has "a duty to mitigate damages" by ceasing work on the machine, the notion being that he cannot recover for costs incurred in violation of this duty.

This view has been severely criticized as obfuscating the distinction between rules that impose duties and those that grant or take away legal powers. If *A* foolishly continues to work on the machine after *B*'s repudiation of the contract, *B* has no cause of action against *A* to enforce any "duty." The only sanction this misnamed duty has is that if *A* does continue work, he cannot recover the cost of doing so from *B*. Prior to the repudiation *A* had a legal power in that by continuing work day by day he was increasing *B*'s possible obligation to him. Now he has lost that power. The situation is comparable to that produced by the passage of the Statute of Frauds. Prior to the Statute men had

the power to create binding contracts orally; after the Statute was enacted this power, as to certain kinds of contracts, was removed. So runs an argument based on the Hohfeldian analysis.⁵¹

This argument seems quite convincing until we reflect that in cases like that of the machine the courts start with the assumption that *A* ought to stop work, for by continuing he squanders his and society's resources on something that no longer serves any need. This is what the courts mean by saying *A* has a duty to mitigate. There is no occasion for *B* to sue for a breach of this duty; since he doesn't have to pay for the work done after his repudiation, he is not personally injured by *A*'s continued performance. The Statute of Frauds, on the other hand, does not say that men ought to put their contracts in writing; it simply says that if certain contracts are left in oral form they will not be legally enforced. Contracting parties, familiar with the terms of the Statute, may in fact deliberately refrain from executing a written memorandum so as to preserve for their contract the status of a "gentlemen's agreement."

In the cases of the machine and the Statute, what has been called "the sanction of nullity" is employed to effectuate quite different ends. In the one case it is used to make *A* do what he ought to do, by cutting off his pay, as it were; in the other, it is used to insure that the power to enter binding contracts will be exercised under circumstances that will protect against fraud and mistaken memory.

It is impossible to deal here adequately with the many problems that can arise out of the distinction between rules imposing duties and those conferring powers, particularly when arguments from analogy are involved. Even the sketchy account presented here makes it plain, however, that there are two different standards for applying the distinction. The one inquires into the fundamental legislative intent; the other into the legal mechanics by means of which the aim of the rule is effectuated. A failure to perceive that these are distinct standards has muddied many at-

51. 5 Corbin, *Contracts*, §1039, 205-07 (1951).

tempts to put the Hohfeldian analysis to practical account.⁵² On the other hand, if one attempts always to penetrate behind legal forms to underlying intent, the distinction loses much of its appeal and scarcely provides the pervasive illumination that the Hohfeldians expected of it. The disappointing experience with the Hohfeldian analysis, projected against the enthusiasm with which it was originally greeted, inclines me to view with some skepticism the suggestion that the distinction Hart proposes is "a most powerful tool for the analysis of much that has puzzled both the jurist and the political theorist." (*The Concept of Law*, p. 95.)

These doubts approach something like a certitude when it comes to Hart's "rule of recognition." Let me express what I understand this rule to mean by the aid of an illustration of perhaps grotesque simplicity. A small country is ruled by King Rex. Within this country there is unanimous agreement that the highest legal power rests in Rex. To make this abundantly clear we may suppose that every adult citizen signs, with cheerful sincerity, a statement reading, "I recognize in Rex the sole and ultimate source of law in my country."

Now it is apparent that there is in his kingdom an accepted rule according to which Rex has the final say as to what shall be considered law. Hart proposes to call this "the rule of recognition." Certainly there can be no quarrel with this proposal. But Hart goes further and insists that we apply to this rule the distinction between rules that confer powers and those that impose duties. The rule of recognition, he declares, must be regarded as a power-conferring rule. Again, this seems almost a truism.

But Hart seems to read into this characterization the further notion that the rule cannot contain any express or tacit provision to the effect that the authority it confers can be withdrawn for abuses of it. To one concerned to discourage tendencies

52. An outstanding example is Cook, "The Utility of Jurisprudence in the Solution of Legal Problems." This article appears in *5 Lectures on Legal Topics* 337-90 (1928), published by the Association of the Bar of the City of New York.

toward anarchy something can be said for this and Hobbes in fact had a great deal to say for it. But Hart seems to consider that he is dealing with a necessity of logical thinking. If one is intent on preserving a sharp distinction between rules imposing duties and rules conferring powers, there are reasons for being unhappy about any suggestion that it may be possible to withdraw the lawmaking authority once it has been conferred by the rule of recognition. If Rex began to keep his laws secret from those legally bound to obey them, and had his crown taken away from him for doing so, it would certainly seem foolish to ask whether he was deposed because he violated an implied duty or because, by exceeding the tacit limits of his power, he had worked an automatic forfeiture of his office and thus became subject to "the sanction of nullity." In other words, a rule that confers a power and provides, expressly or by implication, that this power may be revoked for abuses, presents in its proviso a stipulation that straddles ambiguously the distinction between duty-imposing rules and those that grant powers.

It follows then that if Hart is to preserve his key distinction he is compelled to assume that the lawmaking authority cannot be lawfully revoked. In his whole analysis of the rule of recognition it seems to me Hart has fallen into a familiar trap properly dreaded by all of us in the field of jurisprudence. He is applying to the attitudes that bring into being and support a legal system juristic distinctions that can have no meaning in this application. There is no doubt that a legal system derives its ultimate support from a sense of its being "right." However, this sense, deriving as it does from tacit expectations and acceptances, simply cannot be expressed in such terms as obligations and capacities.

Suppose, to borrow a famous example from Wittgenstein, a mother leaving to attend a matinee says to her baby-sitter, "While I'm gone teach my children a game." The baby-sitter teaches the children to throw dice for money or to duel with kitchen knives. Must the mother before passing judgment on this act ask herself whether the baby-sitter has violated a tacit promise or has simply exceeded her authority? I suggest that she would be as little con-

cerned with that question as she would with the one Wittgenstein himself raises: Can she truthfully say, "I did not mean that kind of game," when she never thought of the possibility of such a game being taught to her children? There are some outcomes in human relations too absurd to rise to the level of conscious exclusion. So it would be, in modern times at least, if a parliament should forget that its accepted function is, after all, to make laws and should begin to act as if it had been given the power to save souls or to declare scientific truth. And if the expectations and acceptances that underlie a parliament's power confine it to lawmaking, does not this tacitly entail further limitations? Is it not assumed, for example, that the parliament will not hold a drinking bout with the understanding that those members still on their feet at midnight shall have the power to make the laws? And is it going much further—or even as far—to say that it is tacitly understood that the parliament will not withhold its enactments from the knowledge of those bound to obey them or express its laws in terms deliberately made unintelligible?

Hart is bent on rescuing the concept of law from its identification with coercive power. A legal system, he asserts, is not "the gunman situation writ large." But if the rule of recognition means that anything called law by the accredited lawgiver counts as law, then the plight of the citizen is in some ways worse than that of the gunman's victim. If a gunman says, "Your money or your life," it is certainly expected that if I give him my money, he will spare my life. If he accepts my purse and then shoots me down, I should suppose his conduct would not only be condemned by moralists, but also by right-thinking highwaymen. In this sense not even an "unconditional surrender" is really unconditional, for there must be an expectation on the part of him who surrenders that he is not trading sudden death for slow torture.

Hart's own distinction between the "gunman situation" and a legal system (pp. 20–25) contains no suggestion of any element of tacit reciprocity. Instead, the distinction runs entirely in formal or structural terms. The gunman communicates his threat in a single face-to-face situation; the law expresses itself normally in

standing and general orders that may be published, but do not constitute a direct communication between lawgiver and subject. Acting through general rules is "the standard way in which law functions, if only because no society could support the number of officials necessary to secure that every member of the society was officially and separately informed of every act which he was required to do" (p. 21). Every step in the analysis seems almost as if it were designed to exclude the notion that there could be any rightful expectation on the part of the citizen that could be violated by the lawgiver.

I shall not attempt to trace in detail Hart's application of the rule of recognition to a complex, constitutional democracy. Suffice it to say he concedes that in this case there is not one rule of recognition, but a whole complex of rules, practices, and conventions that determine how lawmakers are elected, what the qualifications and jurisdiction of judges shall be, and all the related matters that affect the determination in a given case of what shall count as law and what not (pp. 59, 75, 242, et passim). He also concedes "that a great proportion of ordinary citizens—perhaps a majority—have no general conception of the legal structure or of its criteria of validity" (p. 111). Finally, he concedes that it is not always possible to draw a sharp line of distinction between ordinary rules of law and those rules that grant lawmaking powers (p. 144). Yet he seems to insist that, despite all these concessions, *the* rule of recognition that ascribes legal sovereignty to the Queen in Parliament can in some way summarize and absorb all the little rules that enable lawyers to recognize law in a hundred different special contexts. He seems further to assert that this view of the matter is not a juristic construction imposed from without, nor an expression of confidence in the political power of Parliament to resolve any conceivable conflicts that may arise within the system, but rather something provable empirically in the daily practices of his government.

I have difficulty in seeing how this can be. "Parliament" is, after all, only a name for an institution that has changed its nature drastically over the centuries. The memory of one such

change is preserved in the gracious fiction that even today speaks, not of lawmaking by the Parliament, but by "the Queen in Parliament." To speak of *one* rule of recognition as pointing to something constantly changing is, it seems to me, almost like saying that in a given country the rule of recognition has always accorded the supreme lawmaking power to *The Great X*, where *X* in one decade meant an elected official, in the next, the eldest son of the last *X*, and in a third, a triumvirate selected by lot from the Army, the Clergy, and the Laborers' Union.

It thus appears in Hart's account that the pointing finger which the rule of recognition directs toward the source of law can move through a wide arc without losing its target. How wide can that arc become? It is perhaps a matter of political wisdom not to ask for too precise an answer to this question. It is well in surveying the past of one's country to see continuities even where contemporaries saw revolutions. But when the rule of recognition is used as a "powerful tool of analysis" then it becomes essential to know when there is anything toward which it can point and when it has shifted from *A* to a quite distinct *B*.

A basic error of method permeates, I submit, Hart's whole treatment of the rule of recognition. He is throughout attempting with the aid of that rule to give neat juristic answers to questions that are essentially questions of sociological fact. This misapplication of the rule is most apparent in his discussion of what he calls the problem of "the persistence of law" (pp. 60-64).

An absolute monarch, King Rex V, succeeds to the throne on the death of his father, Rex IV. Despite this displacement in the human source of law, the laws enacted by Rex IV are commonly regarded as persisting and as remaining unchanged until Rex V announces some alteration in them. This is the sociological fact Hart seeks to explain. It was described more than a century and a half ago by Portalis in these words: "L'expérience prouve que les hommes changent plus facilement de domination que de lois."⁵³

53. "Discours préliminaire," in Loqué, *La législation de la France* (1827), p. 251.

Hart's explanation of this fact of experience is to say that the rule of recognition points not to the man, but to the office, and includes within itself the rules of lawful succession. In a similar way we are in a position to explain, Hart suggests, why a law enacted by Parliament in 1735 can still be law in 1944.

But suppose that in our hypothetical case Rex IV is succeeded not by his son, Rex V, but by Brutus I, who ousts Rex IV from the throne without the slightest pretense of title and in open violation of the accepted rules of succession. Are we to say that it is a necessary consequence of this event that all previous laws—including those of property, contract, and marriage—have now lost their force? This is the result demanded by Hart's analysis, yet it violates the experience of history. In this case Hart would have to employ, presumably, some such argument as that Brutus I, by saying nothing about the matter, tacitly re-enacted the previous law—the very argument Hart himself criticizes in Hobbes, Bentham, and Austin and an argument Hart's analysis is intended to render unnecessary.

There is perhaps an irony here in that the old-fashioned, military, non-ideological coup d'état presents the clearest model of a change in "the rule of recognition," yet perhaps constitutes the least threat to "the persistence of law." The modern ideological revolution, insinuating itself into power by a manipulation of legal forms, represents precisely the kind of change most likely to create doubts as to whether previous laws (say, exempting churches from taxation) remain in effect. As an explanation for the persistence of law the rule of recognition weights the balance exactly in the wrong direction.

An equally infelicitous application of the rule of recognition occurs, it seems to me, when Hart attempts to use it to explain how and when a primitive society makes its "step from the pre-legal into the legal world" (p. 41). A society living in the pre-legal world knows only primary rules of obligation, that is, duty-imposing rules (p. 89). Such a system of rules is defective in a number of respects: it provides no machinery for resolving doubts and contradictions, or for effecting deliberate change; its rules

depend for their effectiveness on diffuse social pressures (pp. 90–91). A transition to the "legal world" occurs when a society first conceives and applies to its affairs the notion that a rule may confer a power to make or change rules of duty (p. 61). This discovery "is a step forward as important to society as the invention of the wheel" (p. 41).

Now it seems to me that this essentially Austinian conception represents, again, a misapplication of juristic distinctions to a context that will not support them. For one thing, in a society where there is a pervasive belief in magic, and where nature is invoked by a formula, it is apparent that there can be no clear distinction between "natural" and "legal" powers. The charismatic lawgiver is not authorized by any man-made rule of recognition to make the law. Rather, the authority he enjoys in society derives from a belief that he possesses a special capacity to discern and declare the law.⁵⁴ If we can speak of the emergence of something like an explicit rule of recognition, this took place over centuries and involved a gradual shift from the notion of powers as an attribute of the person to powers conferred by an assigned social role. Before this transition is complete, we have long since left behind anything that could be called a primitive state of society. Indeed, it may be said that this transition is never secure against a relapse into more primitive notions. The cult of personality remains in some measure with us always.

It is furthermore doubtful whether primitive society was dominated by anything like the modern conception of duty. It is at least arguable that as between power and duty, power represents the more primitive conception. What we would today call "punishment" quite generally took the form in primitive society of an exercise of magical powers over the offender to purge the com-

54. See Weber, *Law in Economy and Society*, trans. Shils and Rheinstein (1954), pp. 73–82. The distinction taken in Chinese philosophy between a government by men and a government by laws is also worthy of note, since it can serve to counteract somewhat Weber's insistence on the nonrational character of "charisma." See Escarra, *Le droit chinois* (1936), pp. 7–57.

munity of an uncleanness. A similar purging was accomplished through the generous use of ostracism. Instead of a generalized notion of duty we encounter acts that are allowed and disallowed, proper and improper, *fas et nefas*. The first legal procedures often took the form, not of a judicial determination of guilt, but of a ritualistic self-help. Every misdeed tended to demand for its cure a distinctive, and specially designed remedy. A generalized conception of duty may perhaps be said to emerge only when we have several remedies for the breach of a single duty, or several duties that may be enforced by a single remedy. So long as the consequences of a misdeed are identified with the formal steps necessary to cure it, it would seem we are confronted with a notion of power, rather than of duty.

It will be useful to test Hart's hypothesis concerning the transition to "the legal world" against the actual experience of a primitive people making that transition in quite modern times. The experience in question is that of the Manus people of the Admiralty Islands as reported by Margaret Mead.⁵⁵

After World War II the Manus people learned from their Australian governors that there was a way of dealing with disputes of which they had no previous knowledge. This was the procedure of adjudication. Their own methods of settling disputes had been most unsatisfactory, consisting as they did of "feuds, raids, and subsequent ephemeral peace-making ceremonies often with payments in expiation." Now they came to see that a dispute could be decided and settled by a submission of it to an impartial arbiter. There followed a veritable fad for adjudication, their own elders being assigned or assuming a quite unfamiliar social role, that of judge. Curiously the justice thus dispensed was a kind of black market commodity since the "judges" who decided their disputes lacked any legal standing with the Australian government; their powers were quite unsupported by any rule of recognition except a very informal and shifting one among the Manus people themselves.

55. *New Lives for Old* (1956). The quotations in the text are taken from pp. 306 and 307.

The attitude of the indigenous people toward this innovation is thus described by Miss Mead:

to the New Guinea native, newly fired with a desire to keep his society "straight," the whole legal system looks fresh and beautiful. He sees it as a magnificent invention, as wonderful as the airplane, so that far into the interior of New Guinea proper the institution of illegal "courts" is spreading.

If Miss Mead's account is correct, then the rule of recognition among the Manus people ran primarily not toward a human agency empowered by the rule to make law, but toward a procedure. And surely if one is going to speak of an invention comparable to that of the wheel or the airplane, it is appropriate to think of a procedure and not of a mere grant of authority.

Law as a Purposeful Enterprise and Law as a Manifested Fact of Social Power

The many different oppositions of viewpoint that have been examined in this chapter may be said to reflect in shifting contexts a single, underlying disagreement. The nature of this fundamental divergence may be expressed in these terms: I have insisted that law be viewed as a purposeful enterprise, dependent for its success on the energy, insight, intelligence, and conscientiousness of those who conduct it, and fated, because of this dependence, to fall always somewhat short of a full attainment of its goals. In opposition to this view it is insisted that law must be treated as a manifested fact of social authority or power, to be studied for what it is and does, and not for what it is trying to do or become.

In dealing with this fundamental opposition let me begin with a statement of the considerations that seem to me to have led to the view which I oppose. Since I have no authority to speak for the opposition, this statement will have to be hypothetical in form. I shall, however, try to phrase it as persuasively as I can.

Such a statement would begin with a concession that purpose

has a proper role to play in the interpretation of individual legal enactments. A statute is obviously a purposive thing, serving some end or congeries of related ends. What is objected to is not the assignment of purposes to particular laws, but to law as a whole.

Any view that ascribes some purpose or end to a whole institutional complex has, it may be said, very unattractive antecedents in the history of philosophy. It calls to mind the excesses of German and British idealism. It suggests that if we start talking about the purpose of law we may end by talking about the Purpose of the State. Even if we dismiss as unreal the danger that the spirit of Hegel may ride again, the view under consideration has other affinities that are far from reassuring. It recalls, for example, the solemn discussions about the Purpose of Swamps that Thomas Jefferson conducted with his associates in the American Philosophical Society.⁵⁶ A naïve teleology, it may be said, has shown itself to be the worst enemy that the scientific pursuit of objective truth can have.

Even if its historic affinities were less disturbing, there is an intrinsic improbability about any theory that attempts to write purpose in a large hand over a whole institution. Institutions are constituted of a multitude of individual human actions. Many of these follow grooves of habit and can hardly be said to be purposive at all. Of those that are purposive, the objectives sought by the actors are of the most diverse nature. Even those who participate in the creation of institutions may have very different views of the purpose or function of the institutions they bring into being.

In answering these criticisms I shall begin by recalling that the purpose I have attributed to the institution of law is a modest and sober one, that of subjecting human conduct to the guidance and control of general rules. Such a purpose scarcely lends itself to Hegelian excesses. The ascription of it to law would, indeed, seem a harmless truism if its implications were not, as I believe

56. Boorstin, *The Lost World of Thomas Jefferson* (1948), pp. 45-47.

I have shown in my second chapter, far from being either self-evident or unimportant.

Before denying ourselves the modest indulgence in teleology I have proposed, we should consider carefully the cost entailed in this denial. The most significant element of that cost lies in the fact that we lose wholly any standard for defining legality. If law is simply a manifested fact of authority or social power, then, though we can still talk about the substantive justice or injustice of particular enactments, we can no longer talk about the degree to which a legal system as a whole achieves the ideal of legality; if we are consistent with our premises we cannot, for example, assert that the legal system of Country X achieves a greater measure of legality than that of Country Y. We can talk about contradictions in the law, but we have no standard for defining what a contradiction is. We may bemoan some kinds of retroactive laws, but we cannot even explain what would be wrong with a system of laws that were wholly retroactive. If we observe that the power of law normally expresses itself in the application of general rules, we can think of no better explanation for this than to say that the supreme legal power can hardly afford to post a subordinate at every street corner to tell people what to do. In short, we can neither formulate nor answer the problems to which my second chapter was devoted.

It may be said that if in truth these problems cannot be formulated in a manner that enables us to answer them then we ought to face that fact courageously and not deceive ourselves with fictions. It is at this point that issue is most sharply joined. The question becomes, not which view is most comforting and reassuring, but which view is right, which view corresponds most faithfully to the reality with which we must deal. In the remainder of this chapter I shall seek to show that the view which pretends to abstract from the purpose of law and to treat law simply as a manifested fact of social power cannot be supported except through a falsification of the reality on which it purports to build.

The view I am criticizing sees the reality of law in the fact of

an established lawmaking authority. What this authority determines to be law *is* law. There is in this determination no question of degree; one cannot apply to it the adjectives "successful" or "unsuccessful." This, it seems to me, is the gist of the theory which opposes that underlying these chapters.

Now this theory can seem tenable, I submit, only if we systematically strike from view two elements in the reality it purports to describe. The first of these lies in the fact that the established authority which tells us what is law is itself the product of law.⁵⁷ In modern society law is typically created by corporate action. Corporate action—by a parliament, for example—is possible only by adopting and following rules of procedure that will enable a body of men to speak legally with one voice. These rules of procedure may meet shipwreck in all of the eight ways open to any system of law. So when we assert that in the United Kingdom Parliament has the final say as to what law is, we are tacitly assuming some measure of success in at least one legal enterprise, that directed toward giving Parliament the corporate power to "say" things. This assumption of success is normally quite justified in countries with a long parliamentary tradition. But if we are faithful to the reality we purport to describe, we shall recognize that a parliament's ability to enact law is itself an achievement of purposive effort, and not simply a datum of nature.

The second falsification of reality consists in ignoring the fact that a formal structure of authority is itself usually dependent on human effort that is not required by any law or command. Weber points out that all formal social structures—whether embodied in a tradition or a written constitution—are likely to have gaps that do not appear as such because they are filled by appropriate actions taken, often, without any awareness that an alternative is open.⁵⁸ Men do not, in other words, generally do absurd things

57. I had occasion to touch on this point in discussing parliamentary supremacy; see p. 115 *supra*.

58. Weber, *Law in Economy and Society*, pp. 31–33. Weber writes, "It is a fact that the most 'fundamental' questions often are left unregulated by

that would defeat the whole undertaking in which they are engaged, even though the formal directions under which they operate permit these absurdities.

A good example of a gap in formal structure is to be found in the Constitution of the United States. That laws should be promulgated is probably the most obvious demand of legality. It is also the demand that is most readily reduced to a formal constitutional requirement. Yet the Constitution says nothing about the publication of laws. Despite this lack I doubt if it has ever entered the mind of any Congressman that he might curry favor with the taxpayers through a promise to save them money by seeing to it that the laws were left unpublished. One can, of course, argue that a constitutional requirement of publication can be reached by interpretation, since otherwise the provisions against certain retrospective laws would make little sense. But the point is that no such interpretation was in fact engaged in by those who from the first assumed as a matter of course that laws ought to be published.

The scholar may refuse to see law as an enterprise and treat it simply as an emanation of social power. Those whose actions constitute that power, however, see themselves as engaged in an enterprise and they generally do the things essential for its success. To the extent that their actions must be guided by insight rather than by formal rule, degrees in the attainment of success are inevitable.

Hart's problem of "the persistence of law"—how can the law made by Rex IV still be law when Rex V comes to the throne?—is another example of a gap in postulated formal structure that does not appear as such in practice. The need for continuity in law despite changes in government is so obvious that everyone normally assumes this continuity as a matter of course. It becomes a problem only when one attempts to define law as an emanation

law even in legal orders which are otherwise thoroughly rationalized." He goes on to say that generally men act so that "the 'absurd' though legally possible situation" does not arise in practice.

of formal authority and excludes from its operations the possible influence of human judgment and insight.

The heavy emphasis theory tends to place on an exact definition of the highest legal power expresses, no doubt, a concern that obscurity on this point may cause the legal system as a whole to disintegrate. Again, it is forgotten that no set of directions emanating from above can ever dispense with the need for intelligent action guided by a sense of purpose. Even the lowly justice of the peace, who cannot make head or tail of the language by which his jurisdiction is limited, will usually have the insight to see that his powers derive from an office forming part of a larger system. He will at least have the judgment to proceed cautiously. Coordination among the elements of a legal system is not something that can simply be imposed; it must be achieved. Fortunately, a proper sense of role, reinforced by a modicum of intelligence, will usually suffice to cure any defaults of the formal system.

There is, I think, a curious irony about any view that refuses to attribute to law as a whole any purpose, however modest or restricted. No school of thought has ever ventured to assert that it could understand reality without discerning in it structure, relatedness, or pattern. If we were surrounded by a formless rain of discrete and unrelated happenings, there would be nothing we could understand or talk about. When we treat law as a "fact," we must assume that it is a special kind of fact, possessing definable qualities that distinguish it from other facts. Indeed, all legal theorists are at great pains to tell us just what kind of fact it is—it is not "the gunman situation writ large," it normally involves the application of general rules to human behavior, etc., etc.

This effort to discover and describe the characteristics that identify law usually meets with a measure of success. Why should this be? The reason is not at all mysterious. It lies in the fact that in nearly all societies men perceive the need for subjecting certain kinds of human conduct to the explicit control of rules. When they embark on the enterprise of accomplishing this subjection, they come to see that this enterprise contains a certain inner logic

of its own, that it imposes demands that must be met (sometimes with considerable inconvenience) if its objectives are to be attained. It is because men generally in some measure perceive these demands and respect them, that legal systems display a certain likeness in societies otherwise quite diverse.

It is, then, precisely because law is a purposeful enterprise that it displays structural constancies which the legal theorist can discover and treat as uniformities in the factually given. If he realized on what he built his theory, he might be less inclined to conceive of himself as being like the scientist who discovers a uniformity of inanimate nature. But perhaps in the course of rethinking his subject he might gain a new respect for his own species and come to see that it, too, and not merely the electron, can leave behind a discernible pattern.

tures, often more powerful than he and sometimes gifted with keener senses, man has so far been the victor. His victory has come about because he can acquire and transmit knowledge and because he can consciously and deliberately effect a coordination of effort with other human beings. If in the future man succeeds in surviving his own powers of self-destruction, it will be because he can communicate and reach understanding with his fellows. Finally, I doubt if most of us would regard as desirable survival into a kind of vegetable existence in which we could make no meaningful contact with other human beings.

Communication is something more than a means of staying alive. It is a way of being alive. It is through communication that we inherit the achievements of past human effort. The possibility of communication can reconcile us to the thought of death by assuring us that what we achieve will enrich the lives of those to come. How and when we accomplish communication with one another can expand or contract the boundaries of life itself. In the words of Wittgenstein, "The limits of my language are the limits of my world."

If I were asked, then, to discern one central indisputable principle of what may be called substantive natural law—Natural Law with capital letters—I would find it in the injunction: Open up, maintain, and preserve the integrity of the channels of communication by which men convey to one another what they perceive, feel, and desire. In this matter the morality of aspiration offers more than good counsel and the challenge of excellence. It here speaks with the imperious voice we are accustomed to hear from the morality of duty. And if men will listen, that voice, unlike that of the morality of duty, can be heard across the boundaries and through the barriers that now separate men from one another.

A REPLY
TO CRITICS



In the internal debate that preceded the decision to add this chapter to my book, I was acutely aware of considerations that weighed heavily against my undertaking it. For one thing, it has been my observation that authors generally serve themselves badly when they attempt to defend their books against critical reviews. The reviewer enjoys the advantage of occupying a fairly well understood role. The expectations of his readers make it appropriate for him to assume the part of a vigorous prosecutor; if he is reasonably fair and sticks to the evidence a considerable license of advocacy will gladly be accorded to him and will indeed seem to serve the ultimate cause of truth.

The author defending his work confronts a very different set of expectations. He has published his book, he has already had his day in court and the becoming posture for him may seem to be that of awaiting quietly the verdict of the intelligent and disinterested reader. Furthermore, any reply to critical reviews is apt to become a muddled thing, mixing charges of misinterpretation with rearticulations of what the author claims he meant to say, intermingling awkwardly defense and counteroffensive, and ending with dark intimations that only limitations of space prevent him from demonstrating with devastating finality how

completely mistaken his critics are. In general, efforts at self justification are apt to be painful for all concerned; there is, indeed, a saying in my profession that a lawyer never appears to worse advantage than when pleading his own cause.

In the case at hand there was also the consideration that any *Reply to Critics* would mark the continuation of a debate between H. L. A. Hart and myself that has already gone on for more than a decade. It began when Professor Hart published the Holmes Lecture delivered at the Harvard Law School in April 1957.¹ In that lecture he undertook to defend legal positivism against criticisms made by myself and others. The first attempt at counterthrust was my critical commentary on this lecture.² Round three was marked by the publication of Hart's *The Concept of Law*; round four occurred when the first edition of the present work was published; round five took place when Hart published his review.³ One has the feeling that at some point such an exchange must terminate. *Interest reipublicae ut sit finis litium*. As Ernest Nagel remarked in the fourth and final round of a debate we had in 1958 and 1959, "There is, in general, little intellectual nourishment to be found in rebuttals to rejoinders to replies."⁴

A final deterrent lay in the sheer number of reviews and the diversity of opinion expressed in them,⁵ not to speak of the contributions to a symposium held on April 2, 1965,⁶ or of incidental

1. "Positivism and the Separation of Law and Morals," 71 *Harvard Law Review* 593-629 (1958).

2. "Positivism and Fidelity to Law—A Reply to Professor Hart," 71 *Harvard Law Review* 630-72 (1958).

3. 78 *Harvard Law Review* 1281-96 (1965).

4. "Fact, Value and Human Purpose," 4 *Natural Law Forum* 26-43, at p. 26 (1959).

5. There have been some 46 reviews. See list, pp. 243-44.

6. "The Morality of Law—A Symposium," 10 *Villanova Law Review* 631-78 (1965). Individual contributions were Murray, "Introduction to the Morality of Law," 624-30; Dworkin, "The Elusive Morality of Law," 631-39; Cohen, "Law, Morality and Purpose," 640-54; Fuller, "A Reply to Professors Cohen and Dworkin," 655-66; with comments by John E. Murray, Jr., 667-70; E. Russell Naughton, 671-72; Francis H. Parker, 673-75; and Donald A. Giannella, 676-78.

appraisals of the book contained in articles of a larger scope.⁷ To do justice to all of the points raised in these reviews and commentaries would require a very long chapter indeed.

Notwithstanding the misgivings just outlined I have decided to undertake in this new and final chapter, not only a continuation of my debate with Hart, but a reply to certain other critics as well. Several considerations have prompted this decision.

One of these lay in certain statements contained in Hart's review. In his first paragraph he remarks that it may be that "our starting points and interest in jurisprudence are so different" that he and I "are fated never to understand each other's works." As critical reviews of my book came in, I myself became increasingly aware of the extent to which the debate did indeed depend on "starting points"—not on what the disputants said, but on what they considered it unnecessary to say, not on articulated principles but on tacit assumptions. What was needed therefore, it seemed to me, was to bring these tacit assumptions to more adequate expression than either side has so far been able to do.

I was further encouraged to undertake this effort at clarification by the closing words of Hart's review—words that seem to intimate what he himself conceives to be the fundamental difference in our "starting points":

In conclusion I would say this: the virtues and vices of this book seem to me to spring from the same single source. The author has all his life been in love with the notion of purpose and this passion, like any other can both inspire and blind a man. I have tried to show how it has done both

7. Anastaplo, "Natural Right and the American Lawyer," *Wisconsin Law Review* 322-43 (1965); Dworkin, "Philosophy, Morality, and Law—Observations Prompted by Professor Fuller's Novel Claim," 113 *University of Pennsylvania Law Review* 668-90 (1965); Hughes, 1964 *Annual Survey of American Law—Jurisprudence* (1965), New York University, pp. 693-97; King, "The Concept, The Idea, and The Morality of Law," *Cambridge Law Journal* 106-28 (1966); Lewan, "Die Rechtsphilosophie Lon Fullers," *Archiv für Rechts- und Sozialphilosophie*, 377-413 (1966); Sturm, "Lon Fuller's Multidimensional Natural Law Theory," 18 *Stanford Law Review* 612-39 (1966).

to the author. The inspiration is so considerable that I would not wish him to terminate his longstanding union with this *idée maitresse*. But I wish that the high romance would settle down to some cooler form of regard. When this happens, the author's many readers will feel the drop in temperature; but they will be amply compensated by an increase in light.⁸

The amatory figure—though inevitably a little vivid for the taste of its victim—I accept as a legitimate literary device. I take it what Hart is attempting to convey is that I make too much of purpose and that I would do well to play it down in my thinking. In my view Hart makes too little of purpose; he suffers from the positivist delusion that some gain—unstated and unanalyzed—will be realized if only we treat, insofar as we can, purposive arrangements as though they served no purpose.

Another development prompting me toward this *Reply to Critics* occurred in November 1966, when there appeared an article announcing the emergence of a new school of legal philosophy, denominated as that of the New Analytical Jurists.⁹ The acknowledged leader of this school of thought is H. L. A. Hart. The school itself is described as being “less positivistic” than its forerunners, though most of its members are said to remain positivists in the sense that their core commitment is to the proposition that “law as it is can be clearly differentiated from law as it ought to be.” To the layman this proposition is likely to seem too obvious a truth to justify running up a philosophic banner over it; to the lawyer experienced in issues of interpretation it will suggest a host of problems hardly intimated in Summers's article.

Though at the conclusion of his article Summers asserts that “professional interest in the new analytical jurisprudence grows

8. *Supra* n. 3, at 1295–96.

9. Summers, “The New Analytical Jurists,” 41 *New York University Law Review* 861–96 (1966).

each year,” he seems throughout to have some difficulty in articulating just what philosophic creed unites this new school of thought. I think I may be able to help him in this. According to Summers the adherents of the New Analytical Jurisprudence include Hart, Ronald Dworkin, and himself. He also considers Marshall Cohen as a philosopher thinking and writing in a vein similar to that of the New Analytical Jurists. These four men have written in all some ninety pages of critical commentary on my book. I can testify to an amazing uniformity in their reactions; whole paragraphs could be transferred from one discussion to another without any perceptible break in continuity of thought. It is apparent that here, too, we are dealing not with explicit theories but with what Hart called “starting points.” Perhaps I can in what follows identify those starting points more clearly than the New Analytical Jurists themselves have been able to do.

The Structure of Analytical Legal Positivism

What I shall attempt here is to bring to articulation the basic intellectual commitments underlying analytical legal positivism. By the adjective “analytical” I mean to exclude behavior-pattern positivism of the sort suggested when it was proposed, at the height of the movement called American Legal Realism, to define law as “the behavior patterns of judges and other officials.”¹⁰ The term “analytical” is also apt in conveying an intellectual mood that finds more satisfaction in taking things apart than in seeing how they fit and function together; there is, indeed, little interest among analytical positivists in discerning the elements of tacit interrelatedness that infuse—though always somewhat imperfectly—what we call, by no accident, a legal system.

The structure of thought I shall try to describe is one generally shared by Austin, Hart, and Kelsen. In presenting it I shall deal only incidentally with intramural debates among adherents of

10. References to behavior-pattern legal realism will be found in my book, *The Law in Quest of Itself* (1940, 1966), pp. 53–57.

the positivist position. Confining myself, then, to the basic "starting points" that shape the positivist creed, I would discern five of these.

First, the analytical positivist sees law as a one-way projection of authority, emanating from an authorized source and imposing itself on the citizen. It does not discern as an essential element in the creation of a legal system any tacit cooperation between lawgiver and citizen; the law is seen as simply acting on the citizen—morally or immorally, justly or unjustly, as the case may be.

Second, the positivist philosophy asks of law not what it is or does, but whence it comes; its basic concern is with the question, *Who* can make law? Intramural disputes within the school of legal positivism relate almost entirely to the problem of defining the principle or principles by which the right to create law is allocated. Thus we have Austin's "sovereign one or many enjoying the habit of obedience," Kelsen's postulated "Grundnorm," and Hart's "empirically" grounded "Rule of Recognition."¹¹ Positivism may recognize, of course, that the authorized lawgiver may lack the power to enact specific kinds of law, as, for example, where a written constitution proscribes certain exercises of legislative power. But no modern positivist elevates to a central position in his thinking any limitations contained in "the law job" itself, to borrow a phrase that was a favorite of Karl Llewellyn's.

Third, the legal positivist does not in fact view the lawgiver as occupying any distinctive office, role, or function. If we spoke of his performing a role this would imply that his role should

11. I have not attempted here or elsewhere any critical appraisal of Hart's concept of the Rule of Recognition. The interested reader will find such an appraisal in Sartorius, "The Concept of Law," *Archiv für Rechts- und Sozialphilosophie* 161-90 (1966); and Dworkin, "The Model of Rules," 35 *University of Chicago Law Review* 14-46 (1967). These two articles make it clear that the Rule of Recognition is by no means so simple a notion as might appear from Hart's presentation of it. How it is to be "empirically" established, instead of being "postulated" after the manner of Kelsen's Basic Norm, remains largely unexamined and unexplained.

be adjusted to the complementary roles of others, including that of the ordinary citizen. Any such view would compromise the attempt to regard law as a one-way projection of authority.

Fourth, since the lawgiver is not regarded as occupying a distinctive and limited role, nothing that could be called a "role morality" attaches to the performance of his functions. The ordinary lawyer is, of course, subject to a code of ethics governing his conduct toward clients, fellow lawyers, courts, and the public. This code is no mere restatement of the moral principles governing human conduct generally, but sets forth special standards applicable to the discharge of a distinctive social function. There is, however, no room in the positivist philosophy for a similar ethical code governing the lawgiver's role. If the lawgiver enacts what Hart calls "iniquitous" laws, he sins of course against general morality, but there is no special morality applicable to his job itself.

I think I need not labor the point that the four elements of the positivist creed just outlined are interdependent; each in a sense implies the others. They may all be summed up in the observation that the positivist recognizes in the functioning of a legal system nothing that can truly be called a *social dimension*. The positivist sees the law at the point of its dispatch by the lawgiver and again at the point of its impact on the legal subject. He does not see the lawgiver and the citizen in interaction with one another, and by virtue of that failure he fails to see that the creation of an effective interaction between them is an essential ingredient of the law itself.

So far I have left out the *fifth* and most central article of faith in the credo of positivism. This lies in a belief that clear thinking is impossible unless we effect a neat separation between the purposive effort that goes into the making of law and the law that in fact emerges from that effort. This aspect of the positivist philosophy—which is, indeed, what justifies its name—may seem unconnected with the other four. It stands, however, in intimate relation with them.

It is in dealing with human interaction that the positivistic

stance toward reality becomes most difficult to maintain. In contrast, whenever human action can plausibly be viewed as unilaterally projected, the embarrassments of a commitment to positivism are reduced to a minimum. If *A* is attempting to accomplish some purpose by acting upon an inert *B*, then we can expect to distinguish with some measure of success between *A*'s purpose—what he was trying to achieve—and the result of his action—some change in the external world. If *A* is a surgeon operating on an anesthetized *B*, we can say that *A* is attempting to achieve some specified result and we can ask ourselves meaningfully what result he in fact achieves. To be sure, if I am not myself a surgeon I may not, as I watch the operation, really understand what is going on, except in broad outlines; the specific motions of the surgeon's hands, the instruments used, and other details may not really register themselves on my perception. All of these details would be meaningful to a fellow surgeon witnessing the same operation, simply because he would perceive and be able to participate in the purposive *why* of what was happening. But ignoring this limitation on my comprehension of what was going on, I can still insist that as a layman I had at least a general understanding of the purpose back of the operation and that this was something quite different from its actual outcome, whether that outcome be viewed as a success or as a failure in terms of the purpose pursued by the surgeon.

Suppose, however, that *A* is not acting upon an inert *B*, but that *A* and *B* are two persons in conscious and lively interaction with one another. *A* and *B* may, for example, have entered upon some common undertaking. They have not yet settled on the terms of their collaboration, but as the venture gets under way they begin to negotiate, by words explicitly and by actions tacitly, a kind of constitution regulating their relations with one another. Each is orienting his words, signs, and actions by what he thinks the other seeks and in part also by what he thinks the other thinks *he* seeks. Here there emerges from the parties' interactions no hard factual datum that can be set off against the purposes that brought it into existence. The quality and terms of

the parties' emergent relationship—its "laws" if you will—constitute an important social reality, but it is a reality brought into being and kept alive by purposive effort and by the way each of the parties interprets the purposes of the other.

What I have just been trying to convey is brought to eloquent expression in the following passage from a treatise on interactional sociology: "Reality, then, in this distinctively human world, is not a hard immutable thing but is fragile and adjudicated—a thing to be debated, compromised, and legislated."¹²

It is then, I suggest, no accident that the elements of interaction that create and give meaning to the law are pushed to one side and largely ignored by the analytical positivist. If they were not, he would be in serious trouble in maintaining the basic articles of his faith.

The remarks just concluded have not been offered in the belief that they constitute any solution for what is ordinarily called the problem of the fact-value dichotomy. What I have presented here has been intended simply to put that question into relation with the other tenets of positivism. If in this effort I have misrepresented the positivist position generally, or the views of particular positivists, especially those designated as the New Analytical Jurists, I stand ready to be corrected. Spelling out the other fellow's tacit assumptions is a hazardous business, but some attempt at it is sometimes necessary if effective communication is to take place at all.

Before proceeding more directly to my *Reply*, I should like to supplement the account just given by referring to two intellectual influences that have, I believe, impinged upon and helped to shape the thinking of the New Analytical Jurists. One of these is the common-language philosophy associated with the name of J. L. Austin; the other is utilitarianism.

In general the practice of ordinary-language philosophy consists in digging out and clarifying the distinctions embedded in everyday linguistic usage. In whatever field these distinctions are

12. McCall and Simmons, *Identities and Interactions* (1966), p. 42.

found, there seems to be a kind of presumption that they will prove valid and useful and that once they have been fully articulated there is no need to go further. An exemplification of the method is offered by Hart's intense interest in the distinction between "being obliged" and "having an obligation." Some useful insights have been derived through this method; there is indeed a lot of tacit and subtle wisdom concealed in the interstices of everyday speech. But the tendency of the practitioners of this method has been to regard as an end in itself what ought to be viewed as a useful adjunct to philosophic thought. As Stuart Hampshire has observed, there seems to be an assumption among linguistic philosophers that distinctions disentangled from ordinary speech have a utility that is independent of the context of any particular problem and that these distinctions can be transferred freely from one problem to another.¹³ I agree with Hampshire that this is a serious mistake.

I shall call attention later to some instances in which the assumptions of ordinary-language have, in my opinion, misled certain of my critics. For the time being let me just note one illustrative outcropping of the spirit of this philosophy. On pages 124-29 I suggested that the problems involved in maintaining the integrity of a legal system were characteristic not only of state and national law, but affected also the creation and administration of the internal law of such associational forms as churches, clubs, universities, and labor unions. I declared therefore that for purposes of my analysis the internal regulations of these bodies were "law." Hart calls this assertion "unashamed,"¹⁴ while Summers was so unnerved by it he could find nothing better to say than that it was another instance of what he regards as my life-long intellectual dedication, that is, to an activity he calls

13. "J. L. Austin and Philosophy," 62 *Journal of Philosophy* 511-13 (1965).

14. "This large conception of law, admittedly and unashamedly, includes the rules of clubs, churches, schools 'and a hundred and one other forms of human association.'" *Supra* n. 3, p. 1281.

"axe-grinding."¹⁵ Surely in a dispassionate analysis one should be permitted to suggest that the ordinary usages of the word "law" may obscure, as well as reveal, essential similarities.

A second major influence on the thinking of the New Analytical Jurists derives from the utilitarian philosophy. It is often considered that the basic fault of utilitarianism is its tendency to trivialize ends. The more basic fault lies, I think, in its falsification of the relation of means and ends—a fault mitigated but certainly not cured by what is called rule-utilitarianism. The utilitarian philosophy encourages us in the intellectually lazy notion that means are a mere matter of expediency and that nothing of general significance can be said of them; it makes us forget that in a legal system, and in the institutional forms of society generally, what is means from one point of view is end from another and that means and ends stand in a relation of pervasive interaction.

Is Some Minimum Respect for the Principles of Legality Essential to the Existence of a Legal System?

In my second chapter I indicated that a sufficiently gross departure from the principles of legality therein set forth would result in something that was not simply bad law, but not law at all. Do my critics agree with this conclusion? It would seem they do.

In his *Concept of Law*, responding in part to points I had made in our exchange of 1958, Hart indicated his acceptance of the proposition that to bring law into existence there must be some minimum respect for what "lawyers term principles of legality."¹⁶ In a similar vein Cohen writes, "Fuller's 'canons' . . . are . . . a tolerable start at producing a set of conditions necessary for the presence of a (modern) legal system. . . . One might argue with Fuller's list, but there can be no doubt that some list of this

15. Summers, review listed on p. 244, at p. 22. In this review Professor Summers finds occasion six times to characterize passages in my book as "axe-grinding"; see pp. 15, 18, 19, 20, 22, and 24.

16. P. 202.

sort is correct.”¹⁷ Dworkin puts it this way: “I accept Fuller’s conclusion that some degree of compliance with his eight canons of law is necessary to produce (or equally as important, to apply) any law, even bad law.”¹⁸ Summers is more cautious: “at least some of [Fuller’s] opponents would not deny that if we are to have law at all, we must have some compliance with [his] ‘principles of legality.’”¹⁹

My four critics, then, do not embrace the Kelsenian doctrine of the Identity of Law and the State; they do not assert that anything—even a grunt or a groan—is law provided only it comes from a source identified by the Rule of Recognition; they share the view that before what emanates from that source can be called law, it must conform to certain standards that will enable it to function meaningfully in men’s lives.

On this general issue, then, the agreement between my critics and me seems, in words at least, complete. To what extent this appearance of agreement conceals underlying differences cannot, unfortunately, be answered without some recourse to the forbidden concept of Purpose; we have to ask, in other words, *to what end* is law being so defined that it cannot “exist” without some minimum respect for the principles of legality? I’m afraid that when we pursue that inquiry we shall find that my critics and I have quite different answers to this question of “why.” I shall for the moment, however, postpone that inquiry, which will find a more congenial environment in my next section.

Meanwhile, I should like to explore briefly a collateral point raised by Dworkin. This lies in his assertion that the existence of law cannot be a matter of degree; law exists or it does not, it cannot half-exist. “Some concepts are almost always matters of degree (baldness is an example),” but law is not of that class. If we wish to talk about the existence and non-existence of law we must “to some extent calibrate the concept of law” by establishing a kind of “threshold” that will mark the line between law

17. *Supra* n. 6, at p. 648.

18. See the article cited *supra* n. 7, at p. 669.

19. See the review listed on p. 244, at p. 25.

and non-law.²⁰ When, through a deterioration in governmental respect for legality, law passes that threshold it ceases all at once to exist; in other words, law does not just fade away, but goes out with a bang.

Dworkin makes no attempt to explain why this should be so—why, in his view, a man can be half-bald, but a country cannot be ruled by a system that is half-law. I suspect that the distinction taken by Dworkin is tacitly drawn from the usages of ordinary language. In ordinary speech the word “law” is indeed an either-or word; it stands in this respect in contrast with even so close a cousin as the word “justice.” Consider, for example, these two statements: “The act you propose would be a little bit unjust.” “The act you propose would be a little bit illegal.” The second sentence is infected with an inevitable flavor of irony, which is not present, or not present to the same degree, in the first. We are accustomed to thinking of justice as something that may be difficult to define; we do not cringe at an open recognition that its boundaries may be shaded and uncertain. The word “law,” on the other hand, contains a built-in bias toward the black-and-white. Since law is a man-made thing, we assume—and the assumption shapes our use of words—that if we but put enough effort into the task, we shall be able to define with exactitude what is lawful and what is not. The usages of language in effect express a resolution not to relax in that effort. We may know perfectly well that a particular statute is so vaguely drawn that it is impossible to determine just where its boundaries lie, but our modes of speaking about the matter will normally continue to run in either-or terms. And this is so not only of the lawfulness or unlawfulness of acts but of the “existence” of a legal system as a whole.

In fairness to Dworkin I should say that he seems not to take his own point with great seriousness, though he does not hesitate to accuse me of a “mistake” in not recognizing the essential difference between baldness and legality. In any event, neither the

20. *Supra* n. 7, at pp. 677–78.

dictates of ordinary language nor the insistences of the New Analytical Jurisprudence need cause any serious inconvenience; if one wishes to avoid saying that the law of *Country A* is more truly law than that of *Country B*, one can simply affirm that the government of *A* displays a greater respect for the principles of legality than does the government of *B*. If one is addressing an audience that has had its tolerance for metaphor and oxymoron reduced through exposure to ordinary-language philosophy, the course of prudence will be to choose the second and more routine form of expression.

Do the Principles of Legality Constitute an "Internal Morality of Law"?

The title of my second chapter, *The Morality that Makes Law Possible*, represents a thesis my four reviewers find thoroughly unacceptable. In attempting a response to their criticisms I shall strive to avoid any escalation of polemics, for the level I confront on this issue is already uncomfortably high. "Axe-grinding," "absurd," "bizarre," "grotesque"—these are some of the terms my critics find necessary in characterizing my thesis that there is such a thing as an internal morality of law.

According to my four critics the notion of an internal morality of law betrays a basic confusion between efficacy and morality. Some respect for the eight principles of legality is essential if law is to be effective, but that does not mean that these principles are moral in nature, any more than holding a nail straight in order to hit it right is a matter of morality. You won't drive the nail properly if you don't hold it straight and so also you won't achieve an effective system of law unless you give some heed to what I have called principles of legality. Neither of these exercises of common prudence has anything to do with morality.

So runs the argument of my critics. They are not content, however, with any such prosaic comparison as that offered by the driving of nails. Instead, they assert that if there is such a thing as an internal morality of law-making and law-administering,

then there must also be an internal morality of even the most disreputable and censurable of human activities. Cohen asks whether there is a lapse in morality when a would-be assassin forgets to load his gun;²¹ Dworkin raises a similar question about an inept attempt at blackmail.²² As usual, Hart is at once the most eloquent and most explicit of my critics:

the author's insistence on classifying these principles of legality as a "morality" is a source of confusion both for him and his readers . . . the crucial objection to the designation of these principles of good legal craftsmanship as morality, in spite of the qualification "inner," is that it perpetrates a confusion between two notions that it is vital to hold apart: the notions of purposive activity and morality. Poisoning is no doubt a purposive activity, and reflections on its purpose may show that it has its internal principles. ("Avoid poisons however lethal if they cause the victim to vomit," or "Avoid poisons however lethal if their shape, color, or size is likely to attract notice.") But to call these principles of the poisoner's art "the morality of poisoning" would simply blur the distinction between the notion of efficiency for a purpose and those final judgments about activities and purposes with which morality in its various forms is concerned.²³

I must confess that this line of argument struck me at first as being so bizarre, and even perverse, as not to deserve an answer. Reflection has, however, convinced me that I was mistaken in this. As I now view the matter no issue in the exchange between me and my critics reveals more clearly the tacit presuppositions that each side brings to the debate; taking seriously this argument that the alleged internal morality of law is merely a matter of efficacy has helped me to clarify not only the unarticulated "starting points" of my critics, but my own as well.

21. *Supra* n. 6, at p. 651.

22. *Supra* n. 6, at p. 634.

23. *Supra* n. 3, at pp. 1285-86.

That something is here involved more basic than any mere quibble about the word "morality" becomes apparent when we note the fundamental obscurity of my critics' position. Just what do they have in mind when they speak of efficacy? It is not hard to see what is meant by efficacy when you are trying to kill a man with poison; if he ends up dead, you have succeeded; if he is still alive and able to strike back, you have failed. But how do we apply the notion of efficacy to the creation and administration of a thing as complex as a whole legal system? Let me offer an example drawn from the recent history of the Soviet Union that will suggest some of the difficulties involved in answering that question.

At the beginning of the 1960s the problem of economic crimes (including illegal transactions in foreign currencies) had apparently reached such proportions in Russia that the Soviet authorities decided drastic countermeasures were in order. Accordingly in May and July of 1961 statutes were passed subjecting such crimes to the death penalty. These statutes were then applied retrospectively and convicted men were put to death for acts which, while not lawful when committed, were not then subject to the death penalty.

The purpose of the Soviet authorities was obviously to make people quit stealing from the state. Was a retrospective application of the death penalty "inefficacious" for this purpose? One of the problems of criminal law is to convey to the prospective criminal that you are not engaged in a game of idle threats, that you mean what you say. Is there any more effective way of conveying that message than the retrospective application of a criminal penalty? The very fact that it marks a drastic departure from ordinary practice is, in effect, a pledge of the earnestness of the lawgiver. Yet there were Russians who were disturbed by this action of the authorities, as my colleague Harold Berman reports in the following passage:

I asked a leading Soviet jurist if he could explain the decision of the Supreme Court of the Russian Republic applying the

July law retroactively—in clear violation, it seemed to me, of the 1958 Fundamental Principles of Criminal Procedure. He replied, "We lawyers didn't like that"—a statement as interesting for the "we lawyers" as for the "didn't like that."²⁴

Now it is reasonable to suppose, I think, that the Soviet lawyer was not asserting that the action of the authorities was an ineffective measure for combating economic crime. He was saying that it involved a compromise of principle, an impairment of the integrity of the law. As Berman remarks with reference to this conversation: "it is the lawyers who understand best of all, perhaps, the integrity of law, the universality of legal standards—in other words, the threat to legality *in general* which is posed by any *particular* infringement of legality."²⁵

At this point I can imagine my critics pulling at my sleeve: "Ah, but you have misunderstood what we meant by efficacy. We did not have in mind short-run efficacy in meeting some passing emergency. The Soviet action impaired the efficacy of law because it tended to undermine public confidence in legal rules generally and reduced the incentive to obey them. It achieved an immediate gain at a cost in the damage done to the institution of law generally." But plainly if my critics begin to expand the notion of efficacy in this direction, they will soon find themselves drifting across the boundary they have so painstakingly set up to distinguish morality from efficacy. They are likely to get themselves into the predicament of those who try to convert all morality into enlightened selfishness and who end up with so much enlightenment, and so little selfishness, that they might have saved themselves a good deal of trouble by simply talking about morality in the first place.

I do not think, therefore, that in discussing problems of legality any useful joinder of issue is achieved by opposing ef-

24. Berman, "The Struggle of Soviet Jurists Against a Return to Stalinist Terror," 22 *Slavic Review* 314-20, at p. 315 (1963).

25. *Ibid.*, p. 320.

ficacy to morality; certainly nothing is attained that justifies treating the use of the word "morality" in this connection as an exercise in obfuscation. In truth, the appeal of "efficacy" does not lie in any definiteness of its meaning, but in the tough-sounding, positivistic flavor of the word; it suggests an observer clear-eyed and result-oriented, not easily misled by fuzzy concepts of purpose. In other words, my critics' preference for "efficacy" over "morality" reflects the influence of deep-seated and largely unarticulated resolutions of the mind, rather than any reasoned-out conclusion about a specific issue.

I confront therefore the most unwelcome task of demonstrating that my critics' rejection of an internal morality of law rests on premises they have not themselves brought to expression in their writings. Let me make it clear, however, that I do not purport to explore unavowed emotional biases; my efforts lie in the realm of the intellect, in the exploration of an implicit structure that shapes my critics' thought processes. If their conclusions do not imply the premises I ascribe to them, they are at liberty to set me straight.

Proceeding then to the task at hand, I perceive *two* assumptions underlying my critics' rejection of "the internal morality of law." The *first* of these is a belief that the existence or non-existence of law is, from a moral point of view, a matter of indifference. The *second* is an assumption I have already described as characteristic of legal positivism generally. This is the assumption that law should be viewed not as the product of an interplay of purposive orientations between the citizen and his government but as a one-way projection of authority, originating with government and imposing itself upon the citizen.

In the literature of legal positivism it is of course standard practice to examine at length the relations of law and morals. With respect to the influence of morals on law it is common to point out that moral conceptions may guide legislation, furnish standards for the criticism of existing law, and may properly be taken into account in the interpretation of law. The treatment of the converse influence—that of law on morality—is generally more

meager, being confined chiefly to the observation that legal rules long established tend, through a kind of cultural conditioning, to be regarded as morally right.

What is generally missing in these accounts is any recognition of the role legal rules play in making possible an effective realization of morality in the actual behavior of human beings. Moral principles cannot function in a social vacuum or in a war of all against all. To live the good life requires something more than good intentions, even if they are generally shared; it requires the support of firm base lines for human interaction, something that—in modern society at least—only a sound legal system can supply.

"Do not take what belongs to another" is about as trite an example of a moral precept as can be found in the books. But how do we decide what belongs to another? To answer that question we resort not to morals but to law. In some contexts we can, of course, talk meaningfully of a person's being morally entitled to some object of property. For example, an ailing mother has two daughters. One of them foregoes marriage and devotes herself for many years to looking after the invalid parent; the other selfishly refuses to go near her mother or to contribute anything to her care. On the mother's death it is found that she left no will; under the law the two daughters succeed equally to their mother's meager estate. Here we may say that the faithful daughter is morally entitled to the whole estate, even though the law apportioned it equally. Indeed, in court decisions involving situations such as I have described, a strain in the judicial process can often be plainly discerned and doubtful interpretations of fact and of law are sometimes indulged in to give the deserving daughter what she ought to have. At the same time, it is perfectly clear that no society could function on the basis of the principle, "Let all property be apportioned in accordance with moral desert." So it is that the moral precept, "Do not take what belongs to another," must of necessity rest on standards borrowed from the law; without that support it could not achieve reality in the conduct of human affairs.

Again, all would agree, I suppose, that the institution of marriage has moral implications—indeed, many of them. But this institution can scarcely function—morally or legally—without some fairly definite rule that will enable us to know when the marital state exists. An illustration drawn from Hoebel's chapter, "The Eskimo: Rudimentary Law in a Primitive Anarchy," may be instructive here.²⁶ It appears that among the Eskimos the concept of marriage exists, but there are lacking clear signposts "which might demarcate the beginning and the end of a marital relationship." The result is that what one man views as a fair contest for the lady's favors, the other may see as an adulterous invasion of his home; in Hoebel's words there are "no cultural devices signaling marriage in such a way as to keep out trespassers." In consequence Eskimo society is beset by an inordinate number of violent quarrels arising out of sexual jealousy and these quarrels in turn produce a high rate of homicide. Plainly the remedy here is not to be found in preaching, but in some explicit legislative measure that will define and set visible boundaries around the marital relation. The Eskimos simply lack the social machinery needed to accomplish this task; the consequent non-existence of needed law may be said to impoverish seriously the quality of their lives.

So when we speak of "the moral neutrality of law" we cannot mean that the existence and conscientious administration of a legal system are unrelated to a realization of moral objectives in the affairs of life. If respect for the principles of legality is essential to produce such a system, then certainly it does not seem absurd to suggest that those principles constitute a special morality of role attaching to the office of law-maker and law-administrator. In any event the responsibilities of that office deserve some more flattering comparison than that offered by the practices of the thoughtful and conscientious poisoner who never forgets to tear the chemist's label off before he hands the bottle to his victim.

26. *The Law of Primitive Man*, Ch. 5, at pp. 83-85 (1954).

To regard as morally indifferent the existence or non-existence of law is to assume that moral precepts retain the same meaning regardless of the social context into which they are projected. It thus illustrates what I have previously described as an abstraction from the social dimension; it brings to expression a distaste for phenomena of interaction characteristic of positivistic thought. This bent of mind comes openly to the fore in the second assumption underlying my critics' rejection of the notion of an internal morality of law. This is the assumption that the essential reality of law is perceived when we picture it as a one-way projection of authority originating with government and imposing itself upon the citizen. Since this assumption is shared by unreflective common sense, and finds tacit recognition in the ordinary usages of language, it will be well to examine in some detail what is wrong with it.

Let me begin by putting in opposition to one another two forms of social ordering that are often confounded. One of these is *managerial direction*, the other is *law*. Both involve the direction and control of human activity; both imply subordination to authority. An extensive vocabulary is shared by the two forms: "authority," "orders," "control," "jurisdiction," "obedience," "compliance," "legitimacy,"—these are but a few of the terms whose double residence is a source of confusion.

A general and summary statement of the distinction between the two forms of social ordering might run somewhat as follows: The directives issued in a managerial context are *applied* by the subordinate in order to serve a purpose set by his superior. The law-abiding citizen, on the other hand, does not *apply* legal rules to serve specific ends set by the lawgiver, but rather *follows* them in the conduct of his own affairs, the interests he is presumed to serve in following legal rules being those of society generally. The directives of a managerial system regulate primarily the relations between the subordinate and his superior and only collaterally the relations of the subordinate with third persons. The rules of a legal system, on the other hand, normally serve the primary purpose of setting the citizen's relations with other

citizens and only in a collateral manner his relations with the seat of authority from which the rules proceed. (Though we sometimes think of the criminal law as defining the citizen's duties toward his government, its primary function is to provide a sound and stable framework for the interactions of citizens with one another.)

The account just given could stand much expansion and qualification; the two forms of social ordering present themselves in actual life in many mixed, ambiguous, and distorted forms. For our present purposes, however, we shall attempt to clarify the essential difference between them by presupposing what may be called "ideal types." We shall proceed by inquiring what implications the eight principles of legality (or analogues thereof) have for a system of managerial direction as compared with their implications for a legal order.

Now five of the eight principles are quite at home in a managerial context. If the superior is to secure what he wants through the instrumentality of the subordinate he must, first of all, communicate his wishes, or "promulgate" them by giving the subordinate a chance to know what they are, for example, by posting them on a bulletin board. His directives must also be reasonably clear, free from contradiction, possible of execution and not changed so often as to frustrate the efforts of the subordinate to act on them. Carelessness in these matters may seriously impair the "efficacy" of the managerial enterprise.

What of the other three principles? With respect to the requirement of generality, this becomes, in a managerial context, simply a matter of expediency. In actual practice managerial control is normally achieved by standing orders that will relieve the superior from having to give a step-by-step direction to his subordinate's performance. But the subordinate has no justification for complaint if, in a particular case, the superior directs him to depart from the procedures prescribed by some general order. This means, in turn, that in a managerial relation there is no room for a formal principle demanding that the actions of the superior conform to the rules he has himself announced; in this context

the principle of "congruence between official action and declared rule" loses its relevance. As for the principle against retrospection, the problem simply does not arise; no manager retaining a semblance of sanity would direct his subordinate today to do something on his behalf yesterday.

From the brief analysis just presented it is apparent that the managerial relation fits quite comfortably the picture of a one-way projection of authority. Insofar as the principles of legality (or, perhaps I should say, their managerial analogues) are here applicable they are indeed "principles of efficacy"; they are instruments for the achievement of the superior's ends. This does not mean that elements of interaction or reciprocity are ever wholly absent in a managerial relation. If the superior habitually overburdens those under his direction, confuses them by switching signals too frequently, or falsely accuses them of departing from instructions they have in fact faithfully followed, the morale of his subordinates will suffer and they may not do a good job for him; indeed, if his inconsiderateness goes too far, they may end by deserting his employ or turning against him in open revolt. But this tacit reciprocity of reasonableness and restraint is something collateral to the basic relation of order-giver and order-executor.

With a legal system the matter stands quite otherwise, for here the existence of a relatively stable reciprocity of expectations between lawgiver and subject is part of the very idea of a functioning legal order. To see why and in what sense this is true it is essential to continue our examination of the implications of the eight principles, turning now to their implications for a system of law. Though the principles of legality are in large measure interdependent, in distinguishing law from managerial direction the key principle is that I have described as "congruence between official action and declared rule."

Surely the very essence of the Rule of Law is that in acting upon the citizen (by putting him in jail, for example, or declaring invalid a deed under which he claims title to property) a government will faithfully apply rules previously declared as those to be

followed by the citizen and as being determinative of his rights and duties. If the Rule of Law does not mean this, it means nothing. Applying rules faithfully implies, in turn, that rules will take the form of general declarations; it would make little sense, for example, if the government were today to enact a special law whereby Jones should be put in jail and then tomorrow were "faithfully" to follow this "rule" by actually putting him in jail. Furthermore, if the law is intended to permit a man to conduct his own affairs subject to an obligation to observe certain restraints imposed by superior authority, this implies that he will not be told at each turn what to do; law furnishes a baseline for self-directed action, not a detailed set of instructions for accomplishing specific objectives.

The twin principles of generality and of faithful adherence by government to its own declared rules cannot be viewed as offering mere counsels of expediency. This follows from the basic difference between law and managerial direction; law is not, like management, a matter of directing other persons how to accomplish tasks set by a superior, but is basically a matter of providing the citizenry with a sound and stable framework for their interactions with one another, the role of government being that of standing as a guardian of the integrity of this system.

I have previously said that the principle against retrospective rule-making is without significance in a context of managerial direction simply because no manager in his right mind would be tempted to direct his subordinate today to do something yesterday. Why do things stand differently with a legal system? The answer is, I believe, both somewhat complex and at the same time useful for the light it sheds on the differences between managerial direction and law.

The first ingredient of the explanation lies in the concept of legitimation. If *A* purports to give orders to *B*, or to lay down rules for his conduct, *B* may demand to know by what title *A* claims the power to exercise a direction over the conduct of other persons. This is the kind of problem Hart had in mind in formulating his Rule of Recognition. It is a problem shared by law-making and managerial direction alike, and may be said to involve

a principle of *external* legitimation. But the Rule of Law demands of a government that it also legitimate its actions toward citizens by a second and *internal* standard. This standard requires that within the general area covered by law acts of government toward the citizen be in accordance with (that is, be authorized or validated by) general rules previously declared by government itself. Thus, a lawful government may be said to accomplish an internal validation of its acts by an exercise of its own legislative power. If a prior exercise of that power can effect this validation, it is easy to slip into the belief that the same validation can be accomplished retrospectively.

What has just been said may explain why retrospective legislation is not rejected out of hand as utterly nonsensical. It does not, however, explain why retrospective law-making can in some instances actually serve the cause of legality. To see why this is so we need to recall that under the Rule of Law control over the citizen's actions is accomplished, not by specific directions, but by *general* rules expressing the principle that like cases should be given like treatment. Now abuses and mishaps in the operations of a legal system may impair this principle and require as a cure retrospective legislation. The retrospective statute cannot serve as a baseline for the interactions of citizens with one another, but it can serve to heal infringements of the principle that like cases should receive like treatment. I have given illustrations of this in my second chapter. As a further example one may imagine a situation in which a new statute, changing the law, is enacted and notice of this statute is conveyed to all the courts in the country except those in *Province X*, where through some failure of communication the courts remain uninformed of the change. The courts of this province continue to apply the old law; those in the remaining portions of the country decide cases by the new law. The principle that like cases should be given like treatment is seriously infringed, and the only cure (at best involving a choice of evils) may lie in retrospective legislation.²⁷ Plainly problems

27. In *Anatomy of the Law* (1968), pp. 14-15, I have given an historical example of retroactive (and "special") legislation designed to cure a judicial departure from legality.

of this sort cannot arise in a managerial context, since managerial direction is not in principle required to act by general rule and has no occasion to legitimate specific orders by showing that they conform to previously announced general rules.

We have already observed that in a managerial context it is difficult to perceive anything beyond counsels of expediency in the remaining principles of legality—those requiring that rules or orders be promulgated, clear in meaning, noncontradictory, possible of observance, and not subject to too frequent change. One who thinks of law in terms of the managerial model will assume as a matter of course that these five principles retain the same significance for law. This is particularly apt to be true of the desideratum of clarity. What possible motive, one may ask, other than sheer slovenliness, would prompt a legislator to leave his enactments vague and indefinite in their coverage?

The answer is that there are quite understandable motives moving him in that direction. A government wants its laws to be clear enough to be obeyed, but it also wants to preserve its freedom to deal with situations not readily foreseeable when the laws are enacted. By publishing a criminal statute government does not merely issue a directive to the citizen; it also imposes on itself a charter delimiting its powers to deal with a particular area of human conduct. The loosely phrased criminal statute may reduce the citizens' chance to know what is expected of him, but it expands the powers of government to deal with forms of misbehavior which could not be anticipated in advance. If one looks at the matter purely in terms of "efficacy" in the achievement of governmental aims, one might speak of a kind of optimum position between a definiteness of coverage that is unduly restrictive of governmental discretion and a vagueness so pronounced that it will not only fail to frighten the citizen away from a general area of conduct deemed undesirable, but may also rob the statute of its power to lend a meaningful legitimation to action taken pursuant to it.

Opposing motivations of this sort become most visible in a bureaucratic context where men deal, in some measure, face to

face. Often managerial direction is accompanied by, and intertwined with miniature legal systems affecting such matters as discipline and special privileges. In such a context it is a commonplace of sociological observation that those occupying posts of authority will often resist not only the clarification of rules, but even their effective publication. Knowledge of the rules, and freedom to interpret them to fit the case at hand, are important sources of power. One student in this field has even concluded that the "toleration of illicit practices actually enhances the controlling power of superiors, paradoxical as it may seem."²⁸ It enhances the superior's power, of course, by affording him the opportunity to obtain gratitude and loyalty through the grant of absolutions, at the same time leaving him free to visit the full rigor of the law on those he considers in need of being brought into line. This welcome freedom of action would not be his if he could not point to rules as giving significance to his actions; one cannot, for example, forgive the violation of a rule unless there is a rule to violate. This does not mean, however, that the rule has to be free from obscurity, or widely publicized, or consistently enforced. Indeed, any of these conditions may curtail the discretion of the man in control—a discretion from which he may derive not only a sense of personal power but also a sense, perhaps not wholly perverse, of serving well the enterprise of which he is a part.

It may seem that in the broader, more impersonal processes of a national or state legal system there would be lacking any impulse toward deformations or accommodations of the sort just suggested. This is far from being the case. It should be remembered, for example, that in drafting almost any statute, particularly in the fields of criminal law and economic regulation, there is likely to occur a struggle between those who want to preserve for government a broad freedom of action and those whose primary concern is to let the citizen know in advance where he stands. In confronting this kind of problem there is room in

28. Blau, *The Dynamics of Bureaucracy* (2d ed. 1963), p. 215.

close cases for honest differences of opinion, but there can also arise acute problems of conscience touching the basic integrity of legal processes. Over wide areas of governmental action a still more fundamental question can be raised: whether there is not a damaging and corrosive hypocrisy in pretending to act in accordance with preestablished rules when in reality the functions exercised are essentially managerial and for that reason demand—and on close inspection are seen to exhibit—a rule-free response to changing conditions.

What has just been said can offer only a fleeting glimpse of the responsibilities, dilemmas, and temptations that confront those concerned with the making and administering of laws. These problems are shared by legislators, judges, prosecutors, commissioners, probation officers, building inspectors, and a host of other officials, including—above all—the patrolman on his beat. To attempt to reduce these problems to issues of “efficacy” is to trivialize them beyond recognition.

Why, then, are my critics so intent on maintaining the view that the principles of legality represent nothing more than maxims of efficiency for the attainment of governmental aims? The answer is simple. The main ingredients of their analysis are not taken from law at all, but from what has here been called managerial direction. One searches in vain in their writings for any recognition of the basic principle of the Rule of Law—that the acts of a legal authority toward the citizen must be legitimated by being brought within the terms of a previous declaration of general rules.

This omission is conspicuous throughout Hart's *Concept of Law*. His only extended treatment of the principle of generality, for example, seems plainly inspired by the managerial model:

Even in a complex large society, like that of a modern state, there are occasions when an official, face to face with an individual, orders him to do something. A policeman orders a particular motorist to stop or a particular beggar to move on. But these simple situations are not, and could not be,

the standard way in which law functions, if only because no society could support the number of officials necessary to secure that every member of society was officially and separately informed of every act which he was required to do. Instead such particularized forms of control are either exceptional or reinforcements of general forms of directions which do not name, and are not addressed to, particular individuals, and do not indicate a particular act to be done. (Pp. 20-21.)

Other comments by Hart on the principle of generality, while less explicit, in no way qualify the statement just quoted. (See pp. 38, 121, 202, 236.) All run in terms of providing “instruments of social control” and of enabling “social control to function.”

With respect to what I have called the principle requiring “congruence between official action and declared rule,” Hart's comments again relate to the problem of achieving “effective control” over the citizen's actions; failure of this control is said to be illustrated when the criminal law is so laxly enforced that the public ends by ignoring it. (See pp. 23, 82, 141.) The only departure from what may be called the managerial frame of reference is found in some remarks (pp. 156, 202) about an abstract affinity between the ideal of justice and an efficiently run legal system; both are said to respect the principle that like cases should be given like treatment. Thus “we have, in the bare notion of applying a general rule of law, the germ at least of justice.” There is no intimation that a government has toward the citizen any obligation to realize this “germ of justice” in the way it makes and administers laws; the point seems to be simply that if we happen to observe a well-run legal system in operation we shall discover in it a certain formal resemblance to justice.

Thus, it will be seen that Hart's concept of law, being based essentially on the managerial model,²⁹ contains no element in-

29. It may be well at this point to mention briefly one possible source of misunderstanding. A reader generally familiar with Hart's *Concept of Law* may recall that he explicitly rejects Austin's “command theory of law.” To one who does not have in mind just what this rejection implies, it may seem

consistent with the view that law is a one-way projection of authority. This does not mean, of course, that the lawgiver can bring a legal system into existence by himself; like the manager he requires the acquiescence and cooperation of those subject to his direction. This is recognized quite explicitly and with his usual aptness of phrasing by Hart himself:

if a system of rules is to be imposed by force on any, there must be a sufficient number who accept it voluntarily. Without their voluntary cooperation, thus creating *authority*, the coercive power of law and government cannot be established. (P. 196.)

There is no suggestion here that the citizen's voluntary cooperation must be matched by a corresponding cooperative effort on the part of government. There is no recognition in Hart's analysis that maintaining a legal system in existence depends upon the discharge of interlocking responsibilities—of government toward the citizen and of the citizen toward government.

If we assume, as I do here, that an element of commitment by the lawgiver is implicit in the concept of law, then it will be well to attempt to spell out briefly in what form this commitment manifests itself. In a passage headed by his translator "Interaction in the Idea of Law," Simmel suggests that underlying a legal system

that in disapproving of the command theory Hart is also rejecting what I have here described as a managerial theory of law. This would, however, be to misunderstand Hart's argument. Hart rejects the command theory chiefly on two grounds: (1) it sees the force of law as residing in the threat of sanctions, rather than in an acceptance of authority; (2) Austin's theory presupposes direct communication between lawgiver and legal subject. But, plainly, effective managerial direction rests, much more obviously than does law, on a willingness to accept authoritative direction. Furthermore, managerial directions need not be conveyed in a face-to-face manner; they are in fact commonly embodied in something like a manual of operations or may be set forth on a bulletin board. The crucial point in distinguishing law from managerial direction lies in a commitment by the legal authority to abide by its own announced rules in judging the actions of the legal subject. I can find no recognition of this basic notion in *The Concept of Law*.

is a contract between lawgiver and subject.³⁰ By enacting laws government says to the citizen, "These are the rules we ask you to follow. If you will obey them, you have our promise that they are the rules we will apply to your conduct." Certainly such a construction contains at least this much truth: if the citizen knew in advance that in dealing with him government would pay no attention to its own declared rules, he would have little incentive himself to abide by them. The publication of rules plainly carries with it the "social meaning" that the rulemaker will himself abide by his own rules. On the other hand, any attempt to conceive of a legal system as resting on a contract between lawgiver and subject not only stirs inconvenient historical associations, but has a certain incongruity about it, especially when we recall that in a democratic society the same citizen may be both lawgiver and legal subject.

There is an old-fashioned legal term that may offer an escape from our predicament. This is the word "intendment." Our institutions and our formalized interactions with one another are accompanied by certain interlocking expectations that may be called intendments, even though there is seldom occasion to bring these underlying expectations across the threshold of consciousness. In a very real sense when I cast my vote in an election my conduct is directed and conditioned by an anticipation that my ballot will be counted in favor of the candidate I actually vote for. This is true even though the possibility that my ballot will be thrown in the wastebasket, or counted for the wrong man, may never enter my mind as an object of conscious attention. In this sense the institution of elections may be said to contain an intendment that the votes cast will be faithfully tallied, though I might hesitate to say, except in a mood of rhetoric, that the election authorities had entered a contract with me to count my vote as I had cast it.

A passage from Lilburne quoted at the head of my second chapter is eloquently in point on this matter of institutional

30. See the references *supra* pp. 39-40.

intendments. This is the passage in which Lilburne demands to know "whether ever the Commonwealth, when they chose the Parliament, gave them a lawless and unlimited power, and at their pleasure to walk contrary to their own laws and ordinances before they have repealed them?" Lilburne is suggesting that underlying the institution of parliamentary government there is an intendment—that is, a generally shared tacit expectation—that parliament will act toward the citizen in accordance with its own laws so long as those laws remain unrepealed. A tacit commitment by parliament to that effect is so taken for granted that, except when things go wrong, there is no occasion to talk or even to think about it.

It is, I am aware, quite unfashionable today to say such things as that institutions have or contain intendments. One might cast about for some linguistic cover more acceptable to modern taste; one might, for example, speak of the "role expectations" that accompany the assumption of legislative powers. But by whatever name we call it, we must not ignore the reality of the commitment implied in lawmaking, nor forget that it finds expression in empirically observable social processes; it is not something projected on those processes by a moralistic outside observer.

Silent testimony to the force of this commitment can be found in the strenuous efforts men often make to escape its grip. When we hear someone say he is going to "lay down the law" to someone else, we tend to think of him as claiming a relatively unfettered right to tell others what they ought to do. It is therefore interesting to observe what pains men will often take *not* to "lay down law." When a person in a position of authority is asked to make some concession in a particular case he will not infrequently insist on an understanding that his action shall not be taken "to set a precedent." What he dreads and seeks to escape is the commitment contained in the Rule of Law: to conform his actions toward those under his direction to general rules that he has explicitly or tacitly communicated to them. That the stipulation against setting a precedent often turns out in practice to be ineffective simply provides further evidence of the force of the

commitment men tend to read into the acts of those having authority over them.

A similar struggle over the meaning to be attributed to exercises of authority is a familiar accompaniment of the managerial allocation of duties among subordinates. An employer, for example, directs *A* to perform certain tasks, at the same time assigning a different set of tasks to *B*. If this division of labor continues for some time any reallocation of functions may arouse resentment and a sense of injury. An employee may resist the assignment of new duties to him, saying, "That's not my job." Conversely, he may oppose the assignment to anyone else of tasks he is accustomed to perform on the ground that these tasks fall within his "jurisdiction." Here the employer thinks of himself as discharging a purely managerial function, free from the restraints that attach to a legislative role. The employees, on the other hand, are apt to read into the employer's actions an element of juristic commitment; they attempt to bring his decisions within the Rule of Law.

The commitment implied in lawmaking is not, then, simply an element in someone's "conceptual model"; it is a part of social reality. I have been emphasizing that obedience to rules loses its point if the man subject to them knows that the rulemaker will not himself pay any attention to his own enactments. The converse of this proposition must also be kept in mind, namely, that the rulemaker will lack any incentive to accept for himself the restraints of the Rule of Law if he knows that his subjects have no disposition, or lack the capacity, to abide by his rules; it would serve little purpose, for example, to attempt a juristic ordering of relations among the inmates of a lunatic asylum. It is in this sense that the functioning of a legal system depends upon a cooperative effort—an effective and responsible interaction—between law-giver and subject.

A complete failure in this interaction is so remote from ordinary experience that the significance of the interaction itself tends to be lost from our intellectual perspective. Yet in numberless instances, all about us, we can perceive the ways in which the

success of law depends on a voluntary collaboration between the citizen and his government, as well as upon a coordination of effort among the various agencies of government concerned with the making and enforcing of law.

In the regulation of traffic the dependence of law on voluntary cooperation often becomes painfully visible. The example I am about to give is by no means entirely hypothetical. In a university city located on the Atlantic seaboard traffic congestion has during the last thirty years presented an increasing problem; at one street intersection in particular the situation has for some time approached a state of crisis. At this intersection there were until recently no stop-and-go signals addressed to pedestrians, and the common law of the situation—as understood by police and pedestrians alike—was that the pedestrian was free to take his own chances in crossing against the flow of vehicular traffic, though if he were particularly foolhardy he might receive a verbal dressing-down from the officer in charge. About three years ago a reform took place; pedestrian signals were installed and signs were posted warning “jaywalkers” that they would be arrested and fined.

For a short time this measure brought an improvement in the situation. Soon, however, a deterioration commenced as pedestrians, discovering that during the slack hours of vehicular traffic no officer was present, began during those hours to disregard the stop signals addressed to them. This disregard then spread into the hours of heavy traffic, quickly reaching such a volume that any police action to restrain it, according even a minimum respect to the principle of “equal justice under law,” would have required arrests on such a scale as to have overwhelmed the traffic courts. Despite this epidemic of pedestrian law-breaking, motorists continued for a period to observe the signals directed to them. In time, however, the deterioration progressed to the point where the motorist, held up by trespassing pedestrians while the light was in his favor, often found his first opportunity to cross just as the red light turned against him; this opportunity he began increasingly to embrace. Finally, the law-abiding pedestrian, intent on his own bodily integrity, might discover that the

only safe course for him was to join a phalanx of stalwart law-breakers, instead of waiting timidly for the signal legalizing a crossing he would have to negotiate alone, unprotected, and perhaps against a flood of delayed motorists seizing their first opportunity to cross.

When a system of legal controls has suffered this degree of breakdown it is often difficult to allocate blame or to discern what curative measures will be effective. Each human element involved will contend that any mending of its own ways would be rendered pointless by a failure in the performance of complementary roles. And it should be noted that in the case of the intersection just described the roster of those implicated may extend much beyond those already mentioned. It may be that the basic difficulty arises from an unwise routing of traffic through the city as a whole, or from a failure of the taxpayers to finance a police force adequate to its task in numbers and training, or from the action of a transportation authority in relocating a bus stand in such a manner as to render inappropriate the existing disposition of traffic signals. Even the performance of the city electrician may enter into the account. If he fails to keep the automatic traffic lights functioning properly, and as a result they operate erratically, then pedestrians, motorists, and the police may all lose any incentive to act in accordance with the signals; conversely, if the electrician knows that the signals will be ignored even if they are in perfect order, doing his job right will lose its point.

It is unfortunate that the interdependencies involved in the successful operation of a legal system are by no means generally so visible as they are in the regulation of traffic. If we could come to accept what may be called broadly an interactional view of law, many things would become clear that are now obscured by the prevailing conception of law as a one-way projection of authority. It would become clear, for example, that a disregard of the principles of legality may inflict damage on the institution of law itself, even though no immediate harm is done to any individual. This point, along with some others, is ignored in a rhetorical question posed by Dworkin in refutation of my sugges-

tion that legal morality embraces a principle against contradictory laws: "A legislature adopts a statute with an overlooked inconsistency so fundamental as to make the statute an empty form. Where is the immorality, or lapse of moral ideal?"³¹

Now in the first place even to imagine a case such as Dworkin supposes requires a fantastic set of assumptions. Suppose, for example, a statute is passed affecting the validity of foreign divorces; as applied to a particular situation of the fact the statute seems in one paragraph to say that *A* is married to *Y*, while by the terms of another provision it would appear that he is still married to *X*. To make a harmless blank cartridge of such a statute we would have to suppose that any layman could see, without having to pay a lawyer to tell him, that the statute was self-cancelling, that he could confidently foresee that no judicial ingenuity would suffice to rescue it from nullity, and that with the dead corpse of the statute removed from the scene the true legal situation would become immediately obvious. But let us, in favor of Dworkin's point, indulge ourselves in all these exercises in whimsy. The case then becomes like that of a man who tells me a reckless falsehood, but leaves me uninjured because before I act on what he told me I happen to learn the truth for myself. In such a case though I may not have suffered any immediate injury, damage has certainly been done to my relations with the man who told me the falsehood and my trust of him in any future dealings will have been impaired.

If we view the law as providing guideposts for human interaction, we shall be able to see that any infringement of the demands of legality tends to undermine men's confidence in, and their respect for, law generally. It is worth recalling in this connection that there is an ancient crime of disturbing boundary markers and a very modern crime of moving, destroying, or defacing official highway signs. Neither of these crimes requires that the perpetrator's action inflict any direct injury on anyone. Part of the basis for such laws is that if the physical pointers by which

31. *Supra* n. 7, at p. 675.

men guide their actions toward one another are sufficiently tampered with, those that remain intact will lose their meaning and men will no longer feel secure in relying on them. If this is true when men tamper with well-placed markers, what shall we say of the engineer who puts the signs up in the wrong places to start with, or of the legislator who bungles the job of laying out the vital written paragraphs by which men's rights and duties toward one another are defined?

My colleague Henry M. Hart offers us a refreshing reorientation in our usual ways of thinking and talking about law when he reminds us that law may be regarded as a *facility* enabling men to live a satisfactory life in common.³² If this facility is to serve its intended beneficiaries, they must use it well. But those whose task it is to design and install the facility itself have an even heavier responsibility, which is that of doing their job right in the first place. It is this onerous and often complex responsibility that I have tried to describe by the phrase, "the internal morality of law."

That such a morality could have any intelligible meaning at all is an idea that is emphatically—not to say, vehemently—rejected by my critics. I have tried to show that our differences on this issue stem from a basic disagreement about law itself. This disagreement I have attempted to express by contrasting a view of law that sees it as an interactional process and one that sees in it only a unidirectional exercise of authority. My reviewers have, of course, criticized a number of positions on specific issues taken in my book that I have left unmentioned and undefended here. I believe that most, though not all, of these disagreements on subsidiary matters have their origin in the same fundamental divergence in starting points that I have just examined at length. This is particularly true of my critics' rejection of the suggestion that governmental respect for the internal morality of law will generally be conducive toward a respect for what may be called

32. "The Relations between State and Federal Law," 54 *Columbia Law Review* 489, 490 (1954).

the substantive or external morality of law. The interested reader will find a defense of my position on this issue in a paper I presented in April 1965.³³

Some Implications of the Debate

In conclusion I should like to explore briefly certain issues that have not been directly raised in the criticisms aimed at my book by the New Analytical Jurists. My reason for going into these issues is that I believe an exploration of them will serve to clarify further the basic differences in viewpoint that underlie our whole debate. The first problem I propose to discuss is that of *interpretation*.³⁴

This is a subject treated at some length in my second chapter, where I viewed it as an aspect of the task of maintaining "congruence between official action and declared rule." At the conclusion of my discussion (page 91) I wrote: "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."

Despite the basic significance of interpretation for every aspect of the legal enterprise, it has never been a subject with which analytical positivism has felt comfortable. This is precisely be-

33. *Supra* n. 6, pp. 661-66.

34. Three recent publications deal helpfully with the problem of interpretation: Dworkin, "The Model of Rules," 35 *University of Chicago Law Review* 14-46 (1967); Gottlieb, *The Logic of Choice* (1968); and Hughes, "Rules, Policy and Decision Making," 77 *Yale Law Journal* 411-39 (1968).

There is one vital problem affecting interpretation that I have not attempted to deal with here and that is not mentioned in the articles by Dworkin and Hughes. This is the problem interactional sociologists call "defining the situation." (See, for example, McHugh, *Defining the Situation*, 1968.) When a court applies a rule or a set of rules to the decision of a case one can distinguish two operations: (1) determining the relevant facts; (2) determining the meaning of the relevant rules for these facts. We tend to think that it is our knowledge of the rules that enables us to sift out irrelevancies and to determine what are the legally operative facts. In reality, however, our definition of the situation is generally conditioned by a host

cause it brings to open expression "the cooperative nature of the task of maintaining legality." Close attention to problems of interpretation is something that comports awkwardly with any attempt to conceive of law as a unidirectional exercise of control over human behavior.

It will be instructive to note briefly how writers in the positivistic mood have dealt with the problem of interpretation and have sought to redefine it in terms congenial to their intellectual commitment. In his 1957³⁵ lecture Hart seemed to assert that in the ordinary run of cases the application of a statute is controlled in a more or less frictionless manner by the common or dictionary meaning of its words. In these usual or normal cases there is no occasion to engage in any conjecture concerning the policies sought to be promoted by the statute or the intentions of its draftsmen. It is only in an occasional borderline or "penumbral" situation that any attempt to fathom legislative purpose becomes necessary. In this lecture Hart inveighed against a disease of jurisprudential thinking which he called "preoccupation with the penumbra." His thesis seemed to be that we should build our edifice of legal philosophy on the routine or run-of-the-mine case and pass over, as irrelevant for the basic analysis of legal phenomena, the occasional difficulties presented in "penumbral" situations. In *The Concept of Law* the word "interpretation" is not to be found in the index, though the thoughts of the Holmes lecture are repeated with some modification on pages 120-32 and 200-01; the viewpoint differs from that expressed in the lecture chiefly in being somewhat less explicit.

Like Hart, his great predecessor, John Austin, largely excluded interpretation from the basic structure of his theory. Unlike Hart, however, when Austin came finally to deal with the subject his

of tacit assumptions that do not appear in the explicit rules at all. Gottlieb's book has some valuable observations on this point in Chapter IV, "The Facts," particularly on pages 56-57, where he remarks that "non-legal standards are infused at a crucial step [that is, in defining the relevant facts] in the process of applying legal rules."

35. *Supra* n. 1, pp. 606-15.

treatment was complex and beset with internal stresses. He distinguished the interpretation of statutory law from the method of "induction" used in applying "judiciary law."³⁶ At no point did he argue that a statute can or should be applied without reference to legislative purpose, though he asserted that the "literal meaning" of a statute should be taken as the "primary index" of legislative intention.³⁷ So far from abandoning a purposive interpretation he wrote: "If the causes of laws and of the rights and obligations which they create be not assigned, the laws themselves are unintelligible."³⁸

In *The Pure Theory of Law*³⁹ Kelsen devotes a few concluding pages to the subject of interpretation, asserting in effect that except as a particular result may be excluded by the logical structure of a statute, judicial interpretation is simply a form of legislation, the motives which shape legislation by judges being as irrelevant for analytical positivism as those that move a legislature to pass one kind of statute instead of another. For Kelsen interpretation is, in short, not a part of juristic analysis at all, but belongs rather to politics and sociology.

A different tack in dealing with the embarrassment of interpretation was taken by Gray and some of the American Legal Realists. Since a statute only becomes "hard law" after its meaning has been judicially determined, Gray proposed that we treat statutes as not being law at all, but only sources of law.⁴⁰ By this device the definition of law was intended to be moved downward so as to coincide with its application to human affairs. Gray's realism was marred, however, by the fact that much law is applied by bureaucrats, sheriffs, patrolmen, and others acting without judicial guidance. Accordingly, some of the Realists pro-

36. II *Lectures on Jurisprudence* (1879), pp. 648-51.

37. *Ibid.*, pp. 644-45.

38. *Ibid.*, p. 1113.

39. (1967), Ch. VIII, pp. 348-56. (This is a translation of the second German edition.)

40. *Nature and Sources of the Law* (2d ed. 1921), Ch. IV, pp. 300-25 et passim.

posed that we define law as "the behavior patterns of judges and other public officials."⁴¹ This conceit represented the final default, since it left to the onlooker to decide for himself by what standards he should discern and interpret the "behavior patterns" that constitute the ultimate reality of law.

These diverse ways of confronting a shared predicament suggest that there is something fundamentally wrong with the premises that serve to define the problem. I suggest that the difficulty arises because all of the writers whose views have just been summarized start with the assumption that law must be regarded as a one-way projection of authority, instead of being conceived as a collaborative enterprise. If we discern, as a basic element of law, a commitment by government to abide by its own law in judging the acts of its subjects, then interpretation will occupy in theory the central place it has always occupied in our everyday thinking about law. This emphatically does not mean that the problem will become simple; on the contrary its hidden complexities will come to light and we shall no longer be able to pretend that it is a peripheral matter to be left to unreflective common sense.

In seeking a more fruitful approach to interpretation, it may be well to begin with some observations about language itself. The first of these observations is that among human activities language represents the interactional phenomenon par excellence; its forms arise out of and live by interaction. Communication by words is not a matter of shipping packages of meaning from one head to another; it involves an effort to initiate in another mind perceptual processes that will as closely as possible match those taking place in the mind of the communicating party. If I direct words toward you in a situation where some precision in communication is demanded, I shall have to ask myself what precisely I mean by the words I am using, what you would mean if you were using the same words, and what you would suppose I would

41. See the reference *supra*, n. 10.

provide a workable guide to action, are all essential for a proper decision.

In my second chapter I dealt at some length with the "antinomies" that may confront those responsible for maintaining legality. Frequently some miscarriage in the legal enterprise will create a situation in which it is impossible to escape some compromise of legality, so that the essential task is to reduce the dimensions of that compromise. The most obvious example of this predicament is presented by situations in which a resort to retrospective legislation will seem the lesser of two evils.

In subtle ways interpretation is permeated with problems of this sort. Suppose, for example, that a statute is passed for the purpose of putting in better order some area of human relations. On its face, we may suppose, the enactment is reasonably clear, but it suffers from the fundamental defect that it is based on a misconception of the situation it is intended to correct, the legislature being in this respect like a physician who prescribes a course of treatment for one disease when the patient is in fact suffering from another. By what standards should a court construe such a statute? A tolerably literal application of its terms may be said to carry out the legislative intent as it actually was, though not as it would have been had the legislature known what it was doing. Furthermore, the interpreter must consider the interest of the occasional citizen who, being an outsider to the situation regulated, may take the statute at its face value, experiencing no qualms in doing so precisely because he is as ignorant as the legislature was of the real nature of the situation addressed by the statute. On the other hand, those who are the primary addressees of the statute, that is, those who actually live in and with the situation the statute is intended to correct, may be able to see in it only obscurity, confusion, and perversity. Reading the statute in the light of their more perceptive definition of the situation which is a part of their own lives, they may regard the statute as a kind of non-law. Here there is no easy way out for the court.

Cases of the sort just supposed provide only one illustration of the perplexities presented when a court has to ask itself how far

it is free to correct the mistakes of the legislature. An obvious misprint may present no difficulty. But deciding what the legislature would have said if it had been able to express its intention more precisely, or if it had not overlooked the interaction of its statute with other laws already on the books, or if it had realized that the supreme court was about to reverse a relevant precedent—these and other like questions can remind us that there is something more to the task of interpreting statutes than simply "carrying out the intention of the legislature."

The remarks just concluded may seem to suggest that what is demanded of an interpreting agency is simply that it achieve a balance of restraint and initiative in correcting the errors and oversights of superior authority. But, of course, the problem is more complex. The interpreting agency must recall, for example, that its perceived standards of interpretation are likely to create expectations among those affected by them and that sudden shifts in those standards may impair the collaborative effort essential for achieving and maintaining legality. Let us suppose, for example, that the courts of a given jurisdiction have traditionally interpreted statutes in a narrow and restrictively literal manner. An anticipation that this practice will continue is almost certain to enter into the calculations of the legislature; the draftsman will be likely to phrase his statute so that it will, as it were, come out right after having had its scope reduced by restrictive judicial interpretation. A sudden shift by the courts toward freer standards of interpretation may alter the meaning of legislation in a way contrary to the intention of those who enacted it and perhaps in a way that will be confusing for all concerned.

Similarly when a court has occasion to apply the law of a foreign jurisdiction, it is not enough to know the text of the law; that text must be read as it would be read by native jurists, that is, as it would be understood by those sharing the tacit assumptions that enter into the functioning of the legal system of which it is a part. This consideration was brought to unaccustomed explicitness in a decision of the United States District Court sitting in Massachusetts. The disposition of the case required the applica-

tion not of Federal but of Massachusetts law. Several precedents of the Massachusetts Supreme Judicial Court were in point, and the question was whether that court, if the controversy were before it, would qualify the language of its precedents and make an exception for the case at hand. In answering that question in the negative, Judge Charles Wyzanski considered it essential to look not simply to the language of the Massachusetts decisions but to the general spirit in which those decisions would be approached by the court that rendered them:

Subtle variations and blurred lines are not characteristic of [the Massachusetts Supreme Judicial Court]. Principles are announced and adhered to in broad magisterial terms. The emphasis is on precedent and adherence to the older ways, not on creating new causes of action or encouraging the use of novel judicial remedies that have sprung up in less conservative communities.⁴²

This exercise in applied anthropology is not the sort of thing one ordinarily encounters in judicial opinions. It can serve to remind us, however, how much of our written law is in reality unwritten; it can help us to see that an understanding of the law in the books requires an understanding of the shared assumptions that enter into the making and interpreting of it.⁴³

The mention of anthropology offers an easy transition to my next general topic, which has to do with *customary law* and *international law*. Like the problem of interpretation, neither of these subjects has ever found a comfortable haven in positivist theory. As with interpretation, legal positivists in their attitude toward these forms of law waver between icy rejection and acceptance in a bone-crushing embrace. For Austin customary law and international law were simply not law at all, but a kind of pseudo-law that should properly be called positive morality. Kelsen takes the op-

42. *Pomerantz v. Clark*, 101 F. Supp. 341, at p. 346 (1951).

43. In *Anatomy of the Law* (1968) I have tried to trace some of the interactions between what I have there called "made law" and "implicit law." (See especially pp. 43-84.)

posite tack of reshaping these two forms of law so that they can be accommodated to his theory, though at the cost of so distorting their premises that the subjects themselves become largely unrecognizable.

Plainly the conception of law as a unidirectional assertion of control over human behavior is not a view that can easily be applied to customary and international law. These two manifestations of law have been described as *horizontal* forms of order, while the law that a state imposes on its citizens we tend to think of as having only a *vertical* dimension. Stated in another way, the difficulty of conceiving of customary and international law as being properly law arises from the notion that the concept of law involves at the very minimum three elements: a lawgiver and at least two subjects whose relations are put in order by rules imposed on them by the law-making authority. The question that gives trouble is, How can a person, a family, a tribe, or a nation impose law on itself that will control its relations with other persons, families, tribes, or nations? Unlike morality, law cannot be a thing self-imposed; it must proceed from some higher authority.

Now I suggest that all these questions would require radical redefinition if we were to recognize one simple, basic reality, namely, that enacted law itself presupposes a commitment by the governing authority to abide by its own rules in dealing with its subjects. There is, in this sense, a horizontal element in what positivism views as vertically imposed law. If this basic principle of law-making and law-administering were accepted, then most of the embarrassments that beset discussions of international and customary law would be seen as also affecting "real" law. For example, does the governmental obligation to abide by its own rules rest on a "legal" or a "moral" commitment? If the commitment is said to be "legal" then the question will arise, How can the authority that makes and unmakes law bind itself by law? If the commitment is "moral" in nature, then we shall face a different kind of embarrassment. It will then appear that the crucial quality that serves to distinguish law from managerial direction, or military command, or sheer power, is itself infected with a moral ele-

ment so that the essential distinction between law and morality is fatally compromised.

If, however, we disregard these conceptual tangles and allow our minds to participate vicariously in the responsibilities involved in maintaining the Rule of Law within a modern state, we shall see that meeting those responsibilities requires a complex, collaborative effort, not different in kind from that demanded by systems of customary and international law. We shall also find ourselves forced to deal with the role of custom in systems of law that purport to be wholly enacted. This role becomes obvious where custom is explicitly made a standard of decision, as it is in this country in the frequent references to commercial usage in the Uniform Commercial Code. But customary law (by which we mean primarily the tacit commitments that develop out of interaction) plays an important, though usually silent role, not only in the interpretation of written law, but in helping to supply the gaps that will always be perceived in any body of enacted law.

Among the different systems of enacted law the generally inconspicuous role of custom will vary considerably, but it is safe to say that the tacit expectations that make up customary law will always enter into any practical realization of the ideal of legality. Fidelity to the Rule of Law demands not only that a government abide by its verbalized and publicized rules, but also that it respect the justified expectations created by its treatment of situations not controlled by explicitly announced rules. Even more plainly it requires that government apply written rules in accordance with any generally accepted gloss written into those rules in the course of their administration. Taking all these complications into account will, of course, embarrass the construction of neat juristic theories. But it will ease the transition of legal thought from state-imposed codes to the somewhat messier seeming manifestations of law exemplified in international and customary law.

In today's world customary law is no longer merely a matter of theoretical interest. The newly emerging nations in Africa, Asia, and elsewhere are engaged in a painful and often hazardous transition from tribal and customary law to national systems of

enacted law. Legal experts from the western nations, particularly from the United States, are playing an important role as advisers in facilitating this transition. Those who have performed this function have often regretted that they were not more adequately prepared for it by a deeper understanding of legal anthropology. If they had had a better training in that subject, they believe that they would have had a better comprehension of the meaning of customary law for those who live by it.

I would suggest that equally needed is a more adequate anthropology of our own legal system. In my second chapter I speak repeatedly of law as an "enterprise" and I realize that this expression has grated on some ears. But for those who have never attempted to create or live by a system of explicitly enacted rules, law is indeed an enterprise and a very hazardous one. In such a context the neat geometry of legal positivism is not merely largely irrelevant, but becomes positively dangerous.

It should not be supposed that theories about law play no role in the practical business of assisting tribal peoples to subject themselves to a regime of enacted law. Plainly they require some definition of the goal toward which to work. Recently there has been published a symposium under the title *Africa and Law—Developing Legal Systems in African Commonwealth Nations*.⁴⁴ The leading article in this collection contains the following statement on its first page:

Professor Harvey has defined law as "a specific technique of social ordering, deriving its essential character from its reliance upon the prestige, authority, and ultimately the reserved monopoly of force of politically organized society." It is a value-neutral tool. In this view, law has no moral authority merely because it is law; rather, it embraces every aspect of state power. Indeed, as Hans Kelsen has pointed out, there is no difference between the state and law; they are

44. T. W. Hutchinson, ed., 1968. The quotation is from p. 3 of the article by Robert B. Seidman.

merely different sides of the same coin. Every state institution is a manifestation of state power and can be viewed either institutionally or legally.

The precise role played by this conception of law in its author's thinking is not clear; he ultimately reaches the conclusion that neither customary law nor the received English law is adequate to the needs of the new African nations. At the same time, I have to say that I cannot imagine a more inappropriate context for the conception of law conveyed in the words just quoted. (I am quite aware that my critics among the New Analytical Jurists do not explicitly embrace the doctrine of the identity of law and the state. But I ask in all seriousness, what tenet of their philosophy, what principle or standard enunciated by them, offers a stopping place short of this ultimate *reductio ad absurdum* of the positivist point of view?)

Among those concerned in this country with programs for world peace there appears to have developed a certain polarity of viewpoints. One side opts for the earliest possible realization of something like a world legal order, "vertical style." The opposing view is advanced by those who recommend, as the surest route to peace, efforts toward achieving reciprocal accommodations among nations, accommodations that may take the form of explicit treaties, but that may also develop through tacit adjustments that will gradually harden into law. Insofar as this difference in strategies is based on a candid and realistic appraisal of alternatives, it is useful and the debate about it should be continued. I cannot escape the conclusion, however, that at least some of those who are content with nothing short of a world legal authority are influenced not by political and sociological realities but by an impulse toward conceptual neatness, by a conviction that nothing counts as law that does not fit our accustomed definitions of domestic law. A reexamination of those definitions might put the problem of international order in a different light and soften somewhat the present opposition of viewpoints.

It would be inappropriate to leave the twin subjects of inter-

national law and customary law without calling attention to a recent book by Michael Barkun, *Law without Sanctions: Order in Primitive Societies and the World Community* (1968). Barkun has many perceptive things to say about the damage done to thinking in the fields of his concern by simplistic theories about law in general. He calls particular attention to the dangers involved when sociologists and anthropologists base their definitions of law on those that have become current in dealing with domestic law:

Despite the social scientist's abhorrence of mixtures of fact and value, he has tended to look at stateless societies, both international and primitive, from the received perspective of domestic law. Domestic law is unavoidably a highly visible part of his environment. We have here a kind of unconscious cultural bias in which the theoretical framework of the legal profession, which appears to cover law adequately (as we normally see it), has been unquestioningly imported into social science. But once we accept the premise that theories are constructed and not discovered in a sphere of Platonic archetypes, there is little to justify this kind of uncritical appropriation. (P. 11.)

So far I have been discussing the implications of my debate with the New Analytical Jurists for problems that arise within a framework that is largely "legal" in nature. I should like now to turn briefly to the implications of that debate for *the concept of morality*.

In the opening portions of this *Reply* I suggested that analytical legal positivism "lacks a social dimension." As a cure for this defect I have recommended "an interactional theory of law." I am convinced that the concept of morality adopted by my critics suffers, in some measure at least, from the same defect and would profit from the same correction.

In rejecting my notion of an internal morality of law, Hart seems at one point to suggest that the utilitarian principle is itself largely capable of taking over all the functions I have assigned to

the eight principles of legality. These principles should be valued, Hart asserts, "so far only as they contribute to human happiness and other substantive moral aims of the law."⁴⁵ In the same passage he indicates that retroactive laws are generally to be condemned simply because they "make no contribution to human happiness" and, if they result in punishment, "inflict useless misery." In commenting on these assertions I would remark that even if we were willing to accept the utilitarian principle as the ultimate test of goodness, any meaningful application of that principle must presuppose some stability of interactional processes within a society and this stability is in turn heavily dependent upon the guidelines furnished by a conscientiously administered legal system. One cannot trace the consequences of a particular action through the fabric of society unless that fabric itself preserves some measure of integrity.

A neglect of the interactional dimensions of morality is generally to be found, I think, in my critics' treatment of what I have called the internal morality of law. None of them seems willing to pass an adverse moral judgment on the legislator who, through indifference to the demands of his role, confuses or misplaces the legal guideposts by which men coordinate their actions. Cohen asserts, for example, that there is nothing

morally outrageous about passing contradictory laws. This is not to say, of course, that such laws might not be passed for reasons that would make them immoral or that a situation inadvertently created might not be abused in an immoral way.⁴⁶

In the same vein Dworkin condemns the legislator who departs from the principles of legality in order to achieve the "deliberate entrapment" of some innocent victim,⁴⁷ but is unwilling to censure the legislator who through a neglect of his job brings about a

condition of legal uncertainty that may give someone else an opportunity to do the entrapping.

Dorothy Emmet has done a great service to ethical philosophy in her book, *Rules, Roles and Relations* (1966), by reintroducing in a cogently argued and perceptive way the ancient concept of social role. Role morality is patently a morality of interaction. But the modes of analysis appropriate to problems of role morality are also relevant to moral problems which do not involve the performance of roles that have been recognized as such. It is for this reason that I believe a study of the complex demands of the internal morality of law would deepen our insight into moral problems generally.

In particular, a close study of the problems encountered in trying to achieve and maintain legality would confront us in an unmistakable way with the problem I have referred to as that of "antinomies," that is, with the sort of dilemma we face when it is necessary to depart from one principle of legal morality to save another. In my second chapter my illustrations of this phenomenon have chiefly to do with cases where the correction of some mishap or oversight requires a departure from the normal practices of legality, as by demanding curative legislation which is by necessity retrospective.

That ethical philosophers are not universally prepared to deal with this kind of dilemma is shown when Cohen raises the question whether I do not "give my case away" when I "admit" that under some circumstances retrospective legislation may be beneficial.⁴⁸ Had I said that in my opinion telling lies is immoral, but that an exception should be made when a lie is told to save an innocent life, I don't think Cohen would have said that in recognizing this exception I had "given away my case" against lying. In both cases the qualification derives from a special social context. The difference is that in one case the demands of this context are highly visible and easily understood—one can imagine a lunatic erupting on the scene and demanding to know where his

45. *Supra* n. 3, p. 1291.

46. *Supra* n. 6, p. 652.

47. *Supra* n. 6, p. 637.

48. *Supra* n. 5, p. 652.

intended victim is hiding—while in the other case the social context is complex and the interactions involved are indirect and inconspicuous.

If Cohen has difficulty with my “admission” that retrospective statutes curing past departures from legality may, on net balance, be beneficial, he has even more difficulty in absorbing the notion that antinomies among the principles of legal morality may be encountered in the design of legal institutions. After dealing with the “admission” involved in my comments on curative statutes, Cohen continues:

But Fuller’s concessions go further. He concedes that whenever a judge decides a case for which the standards are unclear he makes law retroactively. This strain of legal realism is unexpected in Fuller, and is not wholly consistent with his sound claim that unless the judge decides such cases “he fails in his duty to settle disputes arising out of an existing body of law.”⁴⁹

The statement just quoted could hardly come from one able to visualize a context in which two litigants, in an argument over the significance of a statute for their respective rights, take their dispute to a judge and ask him to resolve it. Would Cohen have the judge say, “You gentlemen have performed a public service in calling attention to a serious ambiguity in this statute. Though the arguments are about equally balanced, I hereby resolve your dispute about the meaning of the statute in favor of the contention made by A. Since, however, I do not wish to make retrospective law, this interpretation shall be effective only for situations that may arise in the future. As for the specific controversy between you two, I leave that undecided.” A soliloquizing ethics will, of course, have little occasion to recognize or deal with problems of this sort; a morality concerned with social interaction will inevitably confront them and solve them as best it can, which means that it will often be forced to weigh the advantages and disadvan-

49. Ibid.

tages of one course of action, or of one institutional design, against those of another.⁵⁰

I come now finally, and with a measure of reluctance, to some brief mention of the issue of *positivism v. natural law*. If the present controversy had arisen thirty years ago, this issue would probably have been seen as central to the whole debate. There was a time, certainly within living memory, when to speak disrespectfully of legal positivism was to open oneself up to the suspicion of being an adherent of some darkly conceived, darkly motivated, metaphysical, and probably ecclesiastical version of natural law.

Fortunately, the winds of doctrine seem to have changed their direction. Positivism is now coming under attack on many fronts, notably in linguistics and in the philosophies of science and of art. In sociology and legal anthropology there is a discernible trend away from structural theories and toward a study of interactional processes; I am told a similar shift has taken place during the last fifteen years in psychiatry and psychoanalysis. As for the law, one of the most uncompromising of my critics, Ronald Dworkin, has recently published what he himself describes as an “attack on positivism.”⁵¹ In this new climate of opinion there is no longer any need to apologize for being critical of positivism, nor does one run any serious risk that a rejection of positivism will be taken to imply a pretension that one has established contact with Absolute Truth.

In the reorientation that seems to be taking place, one hopes that there will develop a little more tolerance for, and interest in, the great tradition embodied in the literature of natural law. One will find in this literature much foolishness and much that is unacceptable to modern intellectual tastes; one will also find in it practical wisdom applied to problems that may broadly be called those of social architecture. St. Thomas Aquinas stands for many as a kind of symbol of all that is dogmatic and theological in the

50. In *Anatomy of the Law* (1968), pp. 84–112, I have attempted a comparison in these terms between the Anglo-American common law and systems based on comprehensive codifications.

51. *Supra* n. 34.