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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Laws Requiring the Impossible

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

31. See pp. 53–54, supra.

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

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

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

The principle that enterprises creating special risks ought to

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Constancy of the Law through Time

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

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

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

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

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

> it is well settled that [statutes of limitations] may be modified by shortening the time prescribed, but only if this is done while the time is still running, and so that a reasonable time still remains for the commencement of an action before the bar takes effect.[37]

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

Congruence between Official Action and Declared Rule

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The primary responsibility for administering this allopathic concoction of rules was of course vested, not with the prosecutor, but with the licensing authority. Can anyone imagine deriving any sense of useful social function from serving on such an authority? Is it any wonder that this area of regulation is notorious for inefficiency and corruption? Even if a conscientious bureaucrat could be found who would consider his life filled with mission if he were simply allowed to enforce rules, however senseless, the problem would still not be solved. There would remain insoluble problems of interpretation, in deciding, for example, what constitutes being adequately prepared to serve a meal to a diner who never comes.

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

Legality as a Practical Art

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

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

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

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

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

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

Article on Governtal Secrecy.

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

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

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

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

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

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

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

III THE CONCEPT OF LAW

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.