

PART I

The Rule of Law and The Rule of the Many



CHAPTER 1

The Rule of Law and its Limits

My grandmother used to say that too much, even of a good thing, is bad for you. She was no philosopher, my grandmother; she just used to say this when I asked for another serving of her wonderful home-made jam. Needless to say, she would not have connected her thoughts about the good with the rule of law. In fact, I think she lived her ninety-odd years without knowing what the rule of law is. She lived through most of the twentieth century in Romania, where “rule of law” was not a very popular political slogan. Nowadays, however, when the Eastern European countries have freed themselves of communism and wish to join the western world, implementing the rule of law is one of the main social changes that they seek to establish. Perhaps nowhere is the rule of law so cherished as in those places where it was largely ignored for decades. Indeed, at least in the Western world, the rule of law has long been associated with the idea of a well-ordered society. We criticize countries which do not strictly adhere to the rule of law, and we take pride in having it.¹ In spite of its popularity, however, the various ideas associated with the rule of law are often conflicting and not infrequently rather confused. When a complicated idea becomes a popular political slogan, this is not surprising.

The most common mistake about the rule of law is to confuse it with the ideal of the rule of good law; the kind of law, for instance, that respects freedom and human dignity.² But of course, understood as a general ideal of good law, the rule of law is no longer a unique ideal but a whole moral-political philosophy about what the

¹ Needless to say, admiration of the rule of law is not universal; Marxists have been traditionally hostile to the rule of law, and more recently, other critical theories have come to share this hostility. See, for example, C. Sypnowich, “Utopia and the Rule of Law,” in D. Dyzenhaus (ed.), *Recrafting the Rule of Law: The Limits of Legal Order*, 179.

² In spite of his awareness of this danger, it is difficult to avoid the impression that Hayek fell into this trap. See: Friedrich Hayek, *The Road to Serfdom*, Ch 6.

law should achieve and the values it should uphold.³ Thus, the challenge for any theory about the rule of law is to articulate a much narrower interpretation of the rule of law that avoids this mistake. Namely, we must focus on what legalism, *per se*, means, and then ask why it is a good thing to have. Not less importantly, however, we must also realize that legalism can be excessive. Even if the rule of law is a good thing, too much of it may be bad. So the challenge for a theory of the rule of law is to articulate what the rule of law is, why is it good, and to what extent.

Let us assume, then, that the essence of the ideal of the rule of law is that people ought to be governed by law. This general ideal has at least two main components. First, it requires that governments, namely, *de facto* political authorities, should rule—that is, guide the conduct of their subjects—by law. Second, it requires that the law by which governments purport to rule should be such that it can actually guide human conduct.⁴ Interestingly, it is the second component of the rule of law that has attracted most of the scholarly attention and, as I shall argue, rightly so. But let us take up these two components of the rule of law in this order.

A. Basic Principles

1. Governments *Should* Rule by Law

This first aspect of the rule of law is less obvious than it seems. Many people associate it with the familiar slogan of “government by law, not by men.” But it is difficult to understand what this slogan actually means. As Raz rightly noted, we must be governed by human beings, not just by law. It is human beings, namely, legislators, judges, and countless other officials, who make the law and apply it, and this is, presumably, as it should be.⁵ Thus, this slogan cannot really mean what it literally states. Perhaps sometimes it is meant to suggest that those people who are assigned the role of making laws should be subject to the laws they enact. But this is, at best, a very rough generalization. Whether the lawmaker should be

³ J. Raz, *The Authority of Law*, 211.

⁴ See Raz, *The Authority of Law*, 212–214. Some commentators assume that the rule of law also requires the subjects to obey the law. In one sense, this is clearly true; unless the law is by and large obeyed, it cannot function as a means of social control. But of course, it should not be assumed that the rule of law entails a general *prima facie* obligation to obey the law. The question of whether there is such a general obligation to obey the law is clearly a moral one.

⁵ See Raz, *ibid.*

subject to the particular law it enacts is bound to vary according to the kind of law it is. (Nothing would be wrong, for example, with an act of parliament prescribing that no other institution can alter the laws parliament enacts; by definition, this is a kind of law that applies to every institution except the legislature that enacted it.) Furthermore, even if the lawmaker exempts herself, as a private person, from the law she enacted in her public role, we could only say that it is a bad law, unless it was enacted for very good reasons.

Finally, the slogan of “government by law, not by men” is sometimes meant to suggest that all governmental actions should be authorized by law. But, as Raz rightly noted, this is a tautology: “Actions not authorized by law cannot be the actions of the government as government.”⁶ It is true, of course, that any governmental agent might perform a specific act that purports to be authorized by law but, in fact, is not. Raz’s point is not to deny that there are actions which are legally *ultra vires*. The point is that governmental acts without legal authorization are by definition illegal, and therefore if governmental agents act without legal authorization, they simply fail to obey the law.⁷

So we are back to the question of what it means to suggest that governments *ought to rule by law*. This can be answered only if we have an idea of what would violate this ideal: How could a government rule if not by law? By sheer terror, perhaps? Or just through haphazard, whimsical orders? Would that be a form of governance? In other words, can we observe any sustained form of governance which is somehow achieved without law? This question is surprisingly difficult to answer, partly because the answer depends on a theory about what law is, and what kinds of means of social control are legal. For example, according to a somewhat crude version of the command theory of law, any order backed by sanction of the *de facto* sovereign would be law, by definition.⁸ Therefore, once we have a group of people actually governed by a sovereign, the governance is bound to be legal regardless of the exact form of the sovereign’s commands. On the basis of such a command theory of law, it would be very difficult to think of a case where *de facto*

⁶ *Ibid.* 212.

⁷ To be more precise: there is a technical legal sense in which lack of authority is not equivalent to illegality. A governmental action can be *ultra vires* in various respects (e.g. wiretapping without legal permission) without also being illegal in the sense of a crime, or tort, or other violation of the law. Nevertheless, when a governmental agent acts without the requisite legal authority, he simply fails to obey the law. This is what I mean in the text. I am indebted to John Finnis for this comment (which is not to suggest that he agrees with me).

⁸ See J. Austin, *The Province of Jurisprudence Determined*.

governance is sustained by means which are not legal. At the other end of the spectrum, if one relies on a traditional natural law theory, and assumes that only those norms which meet certain moral constraints can count as law, one would get the opposite problem—a great deal of what we would normally call law would not really be law even in a well-ordered legalistic society.

The problem is not confined to particular theories about the nature of law. There is a genuine dilemma here: If we assume that any means of social control which actually amounts to a form of governance are legal, then the ideal that government should rule by law becomes morally vacuous. Alternatively, if we impose some substantive moral constraints on what counts as law, then the ideal that governments should rule by law would amount to the ideal that governments should rule by *good* law, which, as we have already seen, is too broad an ideal. Now, one would be tempted to think that there must be other options between these two horns of the dilemma. That may be right. Still, the ideal that governments should rule by law remains somewhat unclear, as long as we do not have a sense of the alternatives. What this partly shows, however, is that this first aspect of the rule of law actually depends on the second. The idea that governments *should* rule by law must be premised on the assumption that rule by law, regardless of the laws' specific content, is to be preferred to governance by other means of social control. And this immediately brings us to the second component of the rule of law, namely, that the law must be such that it can actually guide human conduct, and the further assumption that these necessary features of law embody certain virtues. In other words, unless we can first articulate what is unique about legal means of social control, and explain why those features promote certain goods, we cannot ground the ideal that governments should rule by law. This, I think, is why the second component of the rule of law has rightly attracted most of the scholarly attention.

2. The Law Should Be Such that it Can Actually Guide Human Conduct

Lon Fuller⁹, Joseph Raz¹⁰, John Finnis¹¹, Neil MacCormick¹², and many others who have written about the rule of law all share the view that there are many ways

⁹ Fuller, *The Morality of Law*, mainly Ch. 2.

¹⁰ Raz *The Authority of Law*, Ch. 11.

¹¹ Finnis, *Natural Law and Natural Rights*, 270–276.

¹² MacCormick, “Natural Law and the Separation of Law and Morals” in R. George (ed.), *Natural Law Theory*, 105.

in which one can fail to make law. There are certain conditions that the law has to meet in order to be able to fulfill its pivotal function of guiding human conduct. Law's ability, as a social instrument, to guide human conduct necessitates certain features the law must possess in order to fulfill such a function, regardless of its specific contents. Furthermore, there seems to be a fairly wide consensus on what those conditions are. Following is the list of these conditions, roughly along the lines originally suggested by Lon Fuller:¹³

i. Generality

Legal prescriptions must be issued at some level of generality. No legal system can function by addressing its prescriptions to individuals, one by one, or by addressing each particular act separately.

ii. Promulgation

For law to be able to guide human conduct, it must be promulgated to its subjects. People can only be *guided* by rules or prescriptions if they know about the existence of the rule or prescription. One can act *according to* a rule without being aware of the rule one actually follows, but then it is not the case that one is guided by the rule. It is, in a sense, the essence of *following* a rule that one is aware of the rule one follows.

iii. No retroactive rules

For the law to be able to guide human conduct, it must prescribe modes of behavior prospectively. Retroactive rules, namely, rules purporting to affect behavior which had already occurred prior to the rule's promulgation, cannot achieve the purpose of actually guiding human conduct.

iv. Clarity

Rules or prescriptions can only *guide* human conduct if the subjects understand what the rule requires. Promulgation is not enough. If you tell me that I ought to do ϕ , but I do not understand what ϕ is, or ϕ strikes me as confused or incomprehensible, then I cannot follow your prescription. A certain level of understanding of the rule is essential for rule-following.

¹³ *The Morality of Law*, Ch. 2.

v. No contradictory rules

For similar reasons, if the rule prescribes one thing and at the same time its contradiction, people cannot follow it. Or, if people are prescribed to do ϕ by one rule and not- ϕ by another rule, then there is no way in which they are able to follow both.

vi. No impossible prescriptions

A rule or prescription may be comprehensible and not inconsistent but, in practice, impossible to follow. A rule that people cannot follow is a rule that cannot guide human conduct, even if it is understood perfectly well. Suppose that you order me to fly without any mechanical assistance. I understand what you say, and I know what would following your command be like, but I just cannot do it. To guide human conduct, rules must require conduct that is possible for the rule subjects to perform.

vii. Stability

It is generally assumed that some level of stability over time is essential for the law to achieve its purposes, whatever they are. The law can change, of course, and changes in the law are not infrequent in any modern legal system, but the assumption is that *if changes are too frequent*, people cannot follow the law. This stems partly from the fact that many of our actions that the law purports to regulate require advance planning, preparation, and a certain level of guaranteed expectations about the future normative environment.

viii. Consistent application

For the law to be able to guide human conduct, it must maintain considerable congruence between the rules promulgated and their actual application to specific cases. In other words, the law cannot guide human conduct if actual deviations from it are not treated as such, namely, as deviations from the rule. This is a very complex requirement which entails a whole range of principles and practices. Generally speaking, it requires that the agencies dealing with the enforcement and application of law to specific cases actually apply those rules promulgated by the law. In practice, given the conditions of society and politics as we know it, this aspect of the rule of law may well require such important things as an independent and professional judiciary, relatively easy access to litigation, reliable enforcement agencies, and so on.

Assuming, then, that this or some other similar list of conditions is a set of features the law must possess in order to be able to guide human conduct, we must proceed to ask: Why is it a virtue of law to have these attributes, if it must have them anyway in order to fulfill its functions? The answer is, presumably, twofold. First, if feature *x* is functionally necessary for *A* to fulfill its designated task *y*, then having *x* is *functionally good* for *A*. For example, to the extent that knives are made to cut, and assuming that a knife must be sharp in order to cut, then the sharpness of the knife is functionally good; a sharp knife is a good knife. This must be true of the rule of law as well. To the extent that certain features are functionally necessary for law to guide human conduct, and to the extent that the law purports to guide human conduct, these features of the rule of law make the law good, that is, good in guiding human conduct.

Secondly, it is widely assumed that the law can possess these features to a greater or lesser extent, and the better it scores on each one of them, the better it functions in regulating behavior. The sharper the knife the better it cuts, and thus the better the knife it is.

Both of these points, however, require considerable modifications. Maintaining that the only virtue of the rule of law consists in a purely functional good, as described above, would seem to miss a great deal of what makes the rule of law worthy of our appreciation. After all, as I mentioned at the beginning, the rule of law ideal is closely associated with the ideal of a well-ordered society. We typically employ the rule of law as a critical standard, aspiring to better implementation of it, and criticizing aspects of the law which fall short of implementing it. The rule of law would not seem to deserve such normative attention if its only values were strictly functional, as the above argument suggests. Perhaps, ultimately, there is no more to it than that. Perhaps associating other values with the rule of law virtues will turn out to be a mistake. But at least it is worthwhile to explore the possibilities.

One possibility we should explore is the following. Purely functional values do not have any additional value beyond the value that is instantiated by the function they perform. The only good there is in the sharpness of a knife is that it makes the knife cut better. There is no additional value to sharpness (of a knife) as such. On the other hand, it is arguable that the rule of law virtues, though essentially functional, promote other goods that we value independently of, or in addition to, the function they serve in enabling the law to guide human conduct. For example, the condition of generality may ensure a certain level of impartiality which we value in addition to the fact that it enables the law to function as an instrument of social control. Or, to take

another example, it is arguable that the condition of promulgation and publicity make the law politically transparent and open for public deliberation, which again, is something we value independently of law's ability to guide human conduct. Whether these, and similar, arguments withstand closer scrutiny remains to be seen. For now, suffice it to say that there may be complex relationships between the conditions of the rule of law, understood in purely functional terms, and a host of other goods that we value. This would explain why so many people regard the rule of law as an important ideal. They believe that upholding the conditions of the rule of law is likely to promote a whole set of goods that are worth promoting.

With respect to the second point, it is, indeed, quite true that the law can meet the conditions of the rule of law to various degrees. Just as one can fail to make law, one can succeed in making law to a greater or lesser extent. The sharper the knife, the better it cuts. Likewise, most commentators assume that the more a legal system instantiates the conditions of the rule of law, the better it functions in regulating human conduct, and in promoting other values which emerge from adherence to the rule of law. But this, as we shall see as we discuss the details of rule of law virtues, is far from true. Generally speaking, it is not necessarily the case that the more of a good thing, the better, and for two main reasons. First, implementation of ideals is rarely costless because values and ideals often conflict with each other. Promoting one kind of good often comes at the expense of another. Less trivially, however, there are some values or ideals that do not call, on their own grounds, for anything like full or perfect implementation. That is, not because we must give up on their full implementation, but because such values, on their own grounds, set only a *rough* standard whereby gross deviations from it would be wrong.¹⁴

B. The Rule of Law Virtues (Or, God is in the Details)

1. Generality

i. Norm-subjects

The feature of generality pertains to two separate aspects of any given norm: the *norm-subjects* and the *norm-act*.¹⁵ Generality is opposed to particular denotation,

¹⁴ For the distinction between these two types of ideals see Ch. 12, Section 3.

¹⁵ The distinction was introduced by G.H. von Wright, *Norm and Action*.

but it also admits of degrees. Let us consider the norm-subjects first. A norm can either be addressed to particular individuals, or addressed at some level of generality to individuals with a certain feature. Consider these two types of norms:

1. Individuals *A, B, & C* [particular norm-subjects] ought *to* φ [norm-act].
2. *All X's with feature F* [norm-subjects] ought *to* φ .

Thus, **1** is the kind of norm which is addressed to particular individuals, and it can prescribe either a particular act, or some general act-type. For obvious reasons, it would be exceedingly inefficient for the law to be comprised of rules which are addressed to particular individuals. Indeed, exceptions are quite rare. But they do exist, and sometimes it makes sense to address the law to particular individuals.¹⁶ Mostly, however, the law addresses its rules to subjects defined by a certain general feature in the form of **2**, above. Note that the generality of the definition of the norm-subjects does not entail anything about the size of the set of the norm-subjects to whom the rule applies. The size of the set depends entirely on the question of how many subjects actually possess the relevant feature *F*. Maybe nobody does (as with, for example, “all individuals who have landed on Mars . . .”), and maybe everybody does. And there are indefinite possibilities in between.

Generally speaking, there is no reason to assume that the size of the set of the norm subjects is of any particular concern. Some rules should apply to everybody and others ought to apply to a very small set of people (e.g., rules governing the authority of the U.S. president or other officials). It is certainly not the case that the more the better, and I do not know of anyone who has claimed otherwise. But there is a genuine aspect of generality that does raise important and complicated issues. After all, we are not indifferent to the question of who are the norm-subjects of a given legal rule. Rules can be either over-inclusive or under-inclusive or, actually, both. But what makes a rule over- or under-inclusive with respect to its norm-subjects? Essentially, it is determined by the substantive relevance of the feature *F*, by which the norm-subjects are identified, to the norm-act, φ , that the rule prescribes. The reasons for identifying the norm-subjects by feature *F* must be derived from the reasons for prescribing the norm-act φ . For instance, if the

¹⁶ For example, the law can authorize a particular individual to act as a negotiator or arbitrator, etc., in a particular dispute. More interestingly, the prevalent use of ballot lists exemplifies that the law can address itself to a huge number of individuals by naming them.

norm is enacted to prevent a certain form of pollution by restricting the activities of the polluters, the characterization of the norm-subjects by feature *F* must be such as to capture those, but only those, who are the polluters. Otherwise the law would miss its own target. Needless to say, in practice this is not easily achieved, and numerous laws often end up being either over-inclusive, under-inclusive or, not infrequently, both.

This essential connection between the reasons for prescribing the norm and the appropriate characterization of its norm-subjects is precisely what is meant by generality (of the norm-subjects) as a rule of law virtue. The assumption is that, whatever the purpose of a legal norm, its purpose will be defeated if it does not address itself to the relevant set of norm-subjects. Let me call this the *generality-relevance principle*. On the face of it, it would seem that the generality-relevance principle is a *pure functional* value of law. Arguably, however, it is more than that. The generality-relevance principle may have valuable aspects over and beyond its pure functional value. To some extent it serves as a safeguard against favoritism or partiality. As opposed to individuals in their private dealings, who may well be justified in acting on the basis of partial reasons, favoring, for example, their family members just because they are family members, the law should act on the basis of general reasons. It is plausible to assume that in the public domain partiality is never justified. When the law favors or disfavors a certain class of people, it may only do so on the basis of general reasons that warrant the differential treatment, and not because the lawmakers or judges simply favor, for example, their relatives or supporters.

It is a truism, but an important one, that favoritism and partiality cannot be judged on the basis of the actual results of decisions and actions. The question is not whether one side ended up favored over another, but whether such uneven results were justified by the right reasons which apply to the case.¹⁷ Compliance with the generality-relevance principle is crucially important in safeguarding against such unjustified favoritism since it requires that the norm's subjects be those who qualify as such only on the basis of the reasons for enacting the norm in the first place. In other words, the generality-relevance principle imposes a certain reason-based identification of the norm-subjects which is essentially general in nature, thus preventing partiality and favoritism of a certain kind. But of course, there are endless possibilities for the law to be biased, prejudiced, or unjustly discriminate

¹⁷ See my *Positive Law & Objective Values*, 150–151.

between groups of people, even if it strictly adheres to the generality-relevance principle. Apartheid in South Africa was quite legalistic in this respect. If the law is based on bad reasons, then the fact that its norm-subjects are identified on the basis of those reasons does not prevent it from being a bad law.

ii. Norm-act

The generality of the norm-act is a different matter altogether, and its connection to the rule of law virtues is much less clear. A norm-act can either be defined in terms of a particular action or omission one is required to perform (or avoid), or else, it can be defined in terms of a general act-type. If I tell my daughter, “eat this peanut butter sandwich,” I have prescribed a particular act; if I tell her “you should eat peanut butter sandwiches for breakfast,” I have prescribed a general act-type. Needless to say, the law generally prescribes act-types, but there is nothing to prevent it from occasionally prescribing the performance of particular acts.¹⁸ Examples of the latter are abundant. The law may authorize, for example, an official to perform a particular act (e.g., the U.S. president to wage war on Iraq), or it may require all public companies to pay a one-time tax on certain income, etc. Usually the law does not work in this way, simply because it is much more efficient to regulate behavior by generalizing actions under types and regulating types of behavior as such.

The level of generality with respect to the act-types prescribed by various legal norms admits of degrees. It has become familiar nomenclature by now to call “rules” those norms which prescribe relatively specific act-types, and “standards” those which prescribe relatively general act-types. This rules-standards distinction is a rather vague continuum where, on the one extreme, we would have very specific rules (such as “all F’s must file a tax return by April fifteenth of every calendar year”) and on the other, very general standards (such as “act with reasonable care”), with an indefinite number of possibilities in between. The legislative choice between enactment of rules or standards involves a great many complex issues which have, not surprisingly, engendered a considerable amount of literature. For example, it is arguable that the more norms are standard-like, the greater the judicial discretion in applying and interpreting them. Whether this is good or bad depends on the particular legal domain, relative institutional competence of courts, legislatures, administrative agencies, and so forth. We need not go into

¹⁸ Why J. Austin insisted otherwise is a bit of a mystery. Surely he was wrong about this. See his *The Province of Jurisprudence Determined*, 19.

this here. Suffice it to say that the distinction between rules and standards would seem to have one main bearing on the rule of law issue. Namely, it may be argued that the more general the norm-act prescribed by the legal norm, the less actual guidance to conduct it provides. If the law tells you to “be good,” or to act with “reasonable care,” or the like, there is very little that it actually says in terms of the specific behavior you are required to perform.

It may be worth keeping in mind that there is a distinction between the generality of a norm-act and its vagueness. A definition of a norm-act type can be more or less general, and it can also be more or less vague. For example, a rule requiring that we add vitamin C to every meal we eat is fairly general but not vague. However, a rule which prescribes that due care be taken when fixing electric appliances is perhaps less general but quite vague. Most legal “standards,” however, are both general and vague.¹⁹ In the context of the rule of law, both generality and vagueness raise the same kind of concern, although I presume that it is, actually, mostly vagueness that people tend to worry about.

But what, exactly, is the concern here? There are commentators who claim that over-generality, or vagueness, of legal norms is a serious deficiency, and one which violates the rule of law virtues. The law’s purpose is to guide human conduct, and if the legislature purports to guide conduct, it must do so in fairly specific manner, so that we can understand what the law actually requires and follow it. Leaving statutes and regulations too general or vague, it is claimed, undermines law’s function in guiding conduct.

The problem is that there is an ambiguity here with respect to what “the law” prescribes. When a statute prescribes rather general standards, or when the definition of the act-type is vague, it normally leaves the specification of the details of the requisite behavior to other institutions, such as administrative agencies or the

¹⁹ See Frederick Schauer, *Playing by the Rules*, Ch. 2. Vagueness should not be confused with ambiguity. Ambiguity is, normally, a deficiency in law-making. If the law prescribes that you ought to do ϕ , but ϕ can either mean x or y, then it is, indeed, not clear what is it that you should do. To be more precise, there are two types of ambiguity: one word can mean two different things, like “bank,” for example, which can either mean a financial institution or riverbank. This is rarely a practical problem since we can normally disambiguate according to the context of the expression. More frequently in the legal context, we face ambiguities that derive from the fact that a certain concept-word has both a narrow and a wide meaning, and it is often difficult to determine which one is meant. For example, the word “drug” can either mean, in its wider sense, any type of chemical substance that purports to have medical use, or it can mean, in the narrow colloquial sense, hallucinatory drugs. A nice example of such ambiguity in the legal context is the famous case of *Rector, Holy Trinity Church v. U.S.*, 143 U.S. 457 (1892).

courts. After all, somebody would have to determine what, for example, “reasonable care” under the circumstances is, and it is normally assumed that eventually administrative agencies or the courts will do that. Thus, from the perspective of the norm-subjects, it is more a question of *who* decides what exactly has to be done: whether it is the legislature, an administrative agency, or the courts. In other words, legal norms are rarely left in their very general, or vague, form; ultimately, some institution must specify in greater detail what the norm requires, and the question is basically one of institutional choice.

Furthermore, there are good reasons, quite familiar to every law student, why the legislatures are often justified in leaving the specification of their statutes to agencies and the courts. To mention just a few examples: consider those cases where the specification of legislative details is better left to administrative agencies due to their relative expertise; or those cases in which the legislature may rightly assume that the law should be developed by the courts, piecemeal, adjusting itself gradually to the specifics of individual cases and changing circumstances.²⁰ Finally, though perhaps most problematically, there are many cases in which the legislation is a result of a delicate compromise between opposing ideological factions, and a compromise can only be reached at a fairly abstract or general level, thus *de facto* delegating the lawmaking power to agencies or the courts.

Whether or not any of these, and similar, legislative decisions are warranted is a complicated issue that must be considered on the merits of particular cases. Those who oppose over-generality, or vagueness, of legislation can make an argument based on considerations pertaining to separation of powers, limits on the delegation authority of the parliament, requirements of democratic decision procedures, or relative institutional competence. But none of this bears on the rule of law virtues.²¹ The rule of law requires that the law be such that it can actually guide human conduct. It is indifferent about the question of *who* makes the law.

2. Promulgation

The requirement that the law should be promulgated seems so obvious that it barely needs any elaboration. After all, how can the law *prescribe* human conduct

²⁰ As we shall see, judicial law-making may give rise to problems about retroactivity, but that is a separate issue.

²¹ With one exception, namely, the separation of powers. As we shall see later on, some aspects of separation of powers may derive from the rule of law requirements, but in a different context.

if it is kept secret? The law must be promulgated because it must *guide* human conduct. But suppose that this were not the case, and that human conduct could be directed, to some extent, without the awareness of the relevant rule. Suppose, for example, that instead of promulgating a new rule of conduct, the legislature could induce the behavior consistent with the rule by something like very sophisticated subliminal advertising. The rule would not be made public, but we would be “brainwashed,” so to speak, to act in accordance with the rule by subliminal TV advertisements. Needless to say, we would find this appalling. But is it a violation of the rule of law? One might be tempted to reply that the answer is no: the rule of law requires only that the law be such as to be able to fulfill its functions. If it can do so by subliminal messages, so be it. To be sure, there are very good reasons to object to this method, but those reasons would have nothing to do with the rule of law virtues. Consider the analogy of the sharpness of knives: we think that a knife has to be sharp in order to cut, but this is just a question of technology. If we invent a new type of knife which cuts better without being sharp (say, with some laser technology), then sharpness will no longer be functionally necessary for knives to cut well. Similarly, if people can be brought to follow the legal rules without possessing an awareness of them, then promulgation would no longer be functionally necessary for the law to guide human conduct.

But the analogy is actually misleading. If the legal rules are somehow inculcated in the subjects by subliminal messages, then it is not really *the law* that guides their conduct, though the “law” makers might. In other words, this is an issue about the concept of law. Not every conceivable mode of affecting human conduct is legalistic. It is part of the concept of law that the law purports to affect human behavior by introducing new norms and changing old ones. The concept of a norm and conduct-guidance by norms is an essential aspect of what the law is. Norms, as such, necessarily purport to provide *reasons* for action. A norm cannot provide a reason for action, however, unless its subjects are aware of the norm and regard it as a reason for action.²² Just like language, law must be public; its public aspect is an essential feature of its normativity.

But isn't there a puzzle here? After all, most people do not know the vast majority of the laws of their country. In a modern legal system, the sheer size of the law makes it practically impossible to be known by any single person. Not even expert

²² The subjects of a norm need not be aware of the precise formulation of the norm. But they must know that there is such a norm and have at least a rough idea of what the norm requires.

lawyers are familiar with the vast majority of the law of their jurisdiction. At best, they know how to find out what the law is. Even then, there is much less to find out about it than their naïve clients tend to assume.²³

Perhaps all this is beside the point. Perhaps the rule of law requires promulgation only in a formal sense: it only requires that once a law is enacted, it must be put in the public domain, so that those who want to know what the law is have the opportunity to find out. We do not need to know the vast majority of the laws because most of them do not affect our dealings. And when they might, all we need is access to those agents who can tell us about the law which is relevant to us. Then we will know all that is necessary for our pertinent purposes.

There is, of course, a great deal of truth in this. There is, as it should be, a considerable amount of *division of labor* in the regulation of behavior by law. Different segments of society are entrusted, as it were, with different segments of the law, and various agents provide relevant information when it is needed. Like so many other aspects of our life in a modern society, only a complex division of labor ensures a practical way of regulating behavior by numerous and complex rules. Once again, the analogy with language is not irrelevant: there is also a complex division of labor in the use of language.²⁴ Nobody knows everything that there is to know about the meaning and the precise reference of all the concepts which comprise natural languages. Nevertheless, we are able to use language correctly and regard its rules as normative because there are numerous experts who know the details. When the practical need arises, we can rely on others who know better.

The conclusion so far is very limited, however. We have seen that the law cannot be a system of norms unless it is essentially public. Publicity is an essential aspect of law's normativity. But this does not entail that each and every norm must be made known to everybody. The desired *extent* of promulgation remains an open question. Many laws could be made available only to their specific addressees without being disclosed to others. It seems, then, that from a purely functional-normative perspective, the law must be promulgated only to those subjects whose behavior it purports to regulate. Sometimes this comprises the population at large, but many

²³ First year law students discover this in the first few weeks of classes; they suddenly realize that there is much less certainty about what the law requires than they had assumed when they enrolled for their legal studies. At first students tend to find this discovery utterly frustrating. Later on they realize that this uncertainty is rather conducive to the prosperity of their professional careers.

²⁴ See H. Putnam, *Mind, Language and Reality*, 227–229.

times the addressees of the legal rules are a very small subset of the population. Thus, from a purely functional perspective, there is no reason to assume that all laws must be promulgated to the public at large.

The value of promulgation, however, is not confined to this functional aspect. Making the law public renders it politically transparent and open for public deliberation and criticism, which we value regardless of the law's purely functional aspects. We can have good reasons for criticizing laws even if they do not purport to guide our conduct, even if we are not their intended addressees. Arguably, the less laws are known to the public, the less they would be exposed to critical appraisal.²⁵ Assuming, then, that the possibility of critical appraisal of the law is a general good, we seem to have good reasons to expect the law to be made widely available to the public at large.

The more the better? Not necessarily. Ignorance of the law is sometimes bliss. Meir Dan-Cohen has argued, very convincingly I think, that in the sphere of criminal law, sometimes partial ignorance of the law is morally desirable.²⁶ Consider, for example, the relatively recent defense, or quasi-defense, in criminal law referred to as the "battered women's syndrome."²⁷ In considering whether to recognize such a defense, the law faces a familiar dilemma. On the one hand, values of compassion call for legal recognition of such a defense. On the other hand, there are serious worries about the deterrence-deficit that might result from such legal recognition. After all, the law does not want to encourage women, even if they are subject to serious abuse over the years, to get rid of their abusive husbands by killing them. Thus, it would be ideal from the law's perspective if the law could conceal from its potential addressees that there is such a defense, but then grant the defense whenever it is warranted under the circumstances. Furthermore, the less a particular defendant knew about the defense when she committed the crime, the more credible her reliance on it in court. Needless to say, in practice such an "acoustic separation," as Dan-Cohen called it, is very difficult to achieve, but the law does have certain means of achieving it in part

²⁵ See J.S. Mill, *On Liberty*, Ch. 2.

²⁶ See M. Dan-Cohen, "Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law," reprinted in Dan-Cohen, *Harmful Thoughts*, 37.

²⁷ Experts have come to realize that there is severe cumulative psychological effect on women who are subjected to continuous abuse by their husbands which might reach a breaking point at some stage, even if at that particular stage the abusive husband's behavior does not amount to a grave provocation. As consequence, women have occasionally killed their husbands in act of otherwise almost inexplicable rage. Many jurisdictions have recently recognized this cumulative aspect of provocation, thus giving effect to its consequences by recognizing some sort of defense called the "battered women's syndrome" (usually reducing a murder charge to manslaughter). This is not Dan-Cohen's example but it refers to the same idea.

(more on this later). At least, it demonstrates that some ignorance of the law is not necessarily a deficiency.

How much can we generalize from such examples? That is very difficult to say. As Dan-Cohen carefully demonstrated, the virtues of such partial “acoustic separation” apply to many defenses in criminal law, as well as to the definition of many offenses. Criminal law often faces the difficult dilemma between an *ex ante* interest in deterrence and an *ex post* concern with human compassion. There are numerous things people ought not to do, but under certain circumstances, if they do them, we should partly forgive them and forgo their punishment. In such cases, deliberately creating partial ignorance of the law is a mechanism through which the law can reconcile its conflicting interests in deterrence and compassion. But is this limited to the criminal law? Presumably not. There may be other areas in the law where a similar dilemma, and perhaps a similar solution, exist.

Let me pull some of the strands together. We have seen that in one important sense, promulgation is an essential element of law’s normativity. The law is a system of norms, and norms purport to provide reasons for action, so it must be publicized to those whose action it purports to guide. But, as we have seen, such a functional explanation does not fully capture the values we associate with the requirement of promulgation. From a purely functional perspective, many laws need not be made entirely public. To the extent that we have reasons to require a wider promulgation of the law, those reasons must be derived from other, non-functional values, such as the need for public scrutiny, open deliberation, and critical appraisal of the laws of our community. In other words, the promulgation of law serves deliberative and critical values over and beyond its role in securing the normative efficiency of the law. On the other hand, it should not be assumed that promulgation is always morally costless. Under certain circumstances, it is better if people are not entirely aware of the laws governing their situation. There is, in such cases, a certain conflict between the political values of promulgation, ensuring public scrutiny and critical appraisal, and considerations of individual justice or human compassion. From a political perspective, perhaps we would always want to put the law under glaring light, but there is something to be said for the need to resolve some subtleties if not quite in the darkness, at least in the twilight.

3. No Retroactive Rules

One may wonder how the law can purport to guide human conduct if it is enacted after the conduct has taken place. Surely, retroactive guidance of conduct is an

oxymoron. The fact that retroactive laws do exist, however, and much more abundantly than laypersons often assume, might indicate that guiding conduct is not the law's only function. I do not intend to suggest that retroactive laws are always justified, or even if they are, that they do not raise serious concerns about efficiency and fairness. Far from it. My only suggestion at the moment is to proceed with caution.

Presumably, the bluntest violation of the no-retroactivity requirement of the rule of law would occur in the case of a criminal law creating a new type of offense that has retroactive effect. We would find it appalling, and rightly so, if the law purports to render a certain mode of conduct which has been legal in the past a criminal offense retroactively. Criminalizing something which a person had no reason to think would be a criminal offense when engaging in the pertinent behavior would be utterly wrong. Note that in such blunt violations of the rule of law, our reasons for concern would be twofold: First, the retroactive law would simply fail from a functional perspective. It would fail in guiding conduct since it would attempt to guide conduct that had already occurred. But we would also have other, moral, reasons to object to criminalization of past conduct. We would see it as an affront to human dignity and freedom. People deserve to be treated in a rational and dignified way, whereby the law must set its standards of conduct in advance, standards with which we can either choose to comply or willingly disobey.

There is an important caveat, however, that needs to be mentioned here. It is certainly true that in a relatively just legal system, people are morally entitled to assume that behavior which is not prohibited by law will not become prohibited retroactively. But not all legal systems are even minimally just. If the legal system is profoundly corrupt (as it was, for instance, in Nazi Germany, in South Africa during the apartheid era, and still is in many regions of the world), citizens *are not morally entitled to assume* that whatever is legal at the time is something that they are permitted to do. There is a great deal to be said against the assumption that the law cannot criminalize, even retroactively, wicked behavior just because it had not been prohibited by the law at the time it occurred. Of course, in such cases, the law does not purport to guide conduct retroactively; that cannot be done. The retroactive criminalization of such wrongful conduct is aimed at punishment alone. Its value is mainly expressive, conveying the message that legalism should not be allowed to shield atrocities.²⁸

²⁸ A recent example is the criminal prosecution of East-German guards who followed orders to shoot-to-kill people who tried to escape to the West over the Berlin wall. See R. Alexy, "A Defense of Radbruch's Formula," in D. Dyzenhaus, *Recrafting the Rule of Law: The Limits of Legal Order*, 15.

Bearing this important exception in mind, however, we should return to consider the problems of retroactivity in legal systems which are at least minimally just. In such cases, it would be fair to assume that retroactive criminalization of behavior is a double failure of the law; both in functional terms, as the law would fail to actually guide conduct, and in moral terms, as the law would fail to treat its subjects with due dignity and respect. There are many other cases of retroactive laws, however, which are much more complex than this, and we should consider them in some detail. In particular, I will consider two types of retroactive laws: those which purport to rectify a previous legal mistake and, mainly, judicial retroactivity in the application of the law.

Retroactive laws are sometimes justified—required, actually—to correct a mistake created by the law itself. Even with the best intentions, the law sometimes inadvertently creates a problem that must be corrected by enacting a law that retroactively nullifies a previous one. Suppose, to generalize from Fuller's example,²⁹ that the law had made the validity of a certain legal action conditional upon a certain element, say E, assuming that E is readily available to the parties concerned. As it happens, however, it turns out that the assumption was wrong, and E is not available. Furthermore, suppose that the relevant parties were not even aware of the fact that they needed to obtain E for the validity of their transactions and went ahead without E. When the mistake is discovered, the law should correct it, and the only sensible way of doing so would be to enact a new law that retroactively nullifies the requirement of E for the validity of the relevant transaction. In such cases, no harm is done to anyone, and the retroactivity of the law poses no reasons for concern.³⁰

Far more pervasive, however, is the retroactive effect of any change in the law which is introduced by judicial decisions. Within the common-law tradition, judges have ample legal tools to introduce changes in the law by their judicial holdings. Previously settled cases can be overruled or, much more frequently, distinguished by later courts. In common-law jurisdictions, higher courts have the

²⁹ See *The Morality of Law*, 53–54.

³⁰ What if there is a rule or convention in a certain legal domain that makes it clear to the norm-subjects that retroactive rules might be enacted in that domain? Arguably, a limited convention to this effect exists in U.S. tax legislation. In this context, the function of the convention is to signal to the law subjects that they should be careful not to exploit legislative errors as they might be corrected retroactively. For obvious reasons, such a legislative policy is generally undesirable since it undermines people's ability to rely on the law as a guide to their conduct. Sometimes, however, reliance on the law is simply unreasonable. (I am indebted to Elizabeth Garrett here.)

power to overrule their previous decisions, and thus change the law quite straightforwardly. Overruling is not done very often, partly, I presume, because its retroactive effect is so obvious to all parties concerned. Distinguishing previous cases, however, is a legal power that can be exercised by all courts, as is often done, thereby introducing gradual, almost surreptitious modifications of previous holdings, typically by narrowing them down to increasingly specific circumstances. Unsettled cases can become settled by judicial innovation or extension of previous rulings by analogy and other familiar forms of judicial reasoning.³¹

All these changes that are introduced into the law by judicial law-making have a *de facto* retroactive effect. The new decision, which changes the law, applies to the parties to the litigation and often to many other parties who behaved similarly under similar circumstances. Thus, any judicial decision which introduces a change in the law actually changes the law in a retroactive manner for the parties concerned.³² Is this necessarily a problem? Does it give rise to functional and moral concerns?

The main worry about the retroactivity of judicial decisions concerns the frustration of legitimate expectations.³³ One of the main virtues of the rule of law consists in the value that we attach to the predictability of the legal environment. People should be allowed to lead their lives and conduct their business in a way which allows them to plan their conduct. The very idea of planning is only rational, however, if there is a certain level of certainty as to the future normative consequences of one's choices.³⁴ Thus, once again, we can see that law's failure to create a predictable legal environment would amount to a double flaw: both functional and moral. From a functional perspective, the law would fail to guide people's conduct since it would undermine their ability to plan their conduct in advance.

³¹ See Raz, "Law and Value in Adjudication," in his *The Authority of Law*, Ch. 10.

³² This is not quite accurate: In principle, judges could render decisions which would have only prospective effect and sometimes, though rarely, they have done so. But as a general policy, this would be extremely problematic, both from a political perspective, as it would highlight the legislative role of judges in a manner which is politically problematic, and, mainly, because it would seriously undermine the incentive of potential litigants to bring forth their cases. If litigants knew in advance that their success in court may not result in a decision that affects them, why would they bother to spend their resources on expensive litigation? Some jurisdictions have a practice of referring some hard cases back to the legislature, but these tend to be rare cases not frequently used.

³³ To be sure, retroactive legislation is not the only way in which the law can frustrate legitimate expectations. For example, a statute which repeals the mortgage interest deduction for all future interest payments is prospective, but it unsettles the expectations that homebuyers had when they bought homes and committed themselves to paying a certain amount of interest for decades.

³⁴ Not complete certainty, of course; we frequently plan our conduct under conditions of (partial) un-certainty.

And from a moral perspective, such a legal regime would manifest a profound disrespect for people's freedom and autonomy.³⁵ However, all this is a matter of degree. People ought to have a certain range of legitimate expectations about the future normative environment, but they are not entitled to assume that nothing will change in the future.

The problem with the retroactivity of judicial law-making, however, concerns the question of *how* the change in the law is introduced, and not the change itself. Changes in the law that are introduced by the legislature can provide due notice about the expected change, and thus allow the subjects to accommodate their conduct accordingly. On the other hand, when the law is changed through a judicial decision, it is changed retroactively with respect to the particular litigants addressing the court. That is why judicial law-making seems to be at odds with the value of protecting legitimate expectations.

The retroactivity of judicial decisions would seem to be much less of a problem in the cases of previously *unsettled* law. When the law is not clear, litigants cannot claim that they had legitimate expectations that the judicial decision frustrates. Of course they may have had expectations, but those expectations cannot be regarded as legitimate in the context of unsettled law. What makes an expectation about the law legitimate is the fact that it relies on the law as it is, and not as the litigant would want it to be. To the extent that the law is not clear, frustrating expectations about it hardly raises a serious concern.

But what about those changes that are introduced by judicial law-making in areas of law which had been previously settled? It is difficult to deny that in such cases the judicial decision does, indeed, frustrate legitimate expectations. Presumably, it is the price we have to pay for the social benefit of allowing the courts to improve the law and adapt it to changing circumstances.

Dworkin thought that there is a way around this problem. In fact, he had to produce a solution because Dworkin has long held that all law is, ultimately, settled. The solution derives from his famous distinction between decisions based on *policy* and those based on *principle*. A decision based on policy, Dworkin claimed, is based on collective societal goals. "Arguments of policy justify a political decision by showing that the decision advances or protects some collective goal of the

³⁵ Cf. F. Hayek, *The Road to Serfdom*, Ch. 6.

community as a whole.”³⁶ In contrast, a decision based on principle is one which is justified by an appeal to pre-existing rights. Thus, Dworkin argued, as long as judges refrain from policy decisions and confine their judicial reasoning to considerations of principle, they would not violate the requirement to avoid retroactivity, because their decisions would simply reaffirm pre-existing rights: “If the plaintiff has a right against the defendant, then the defendant has a corresponding duty, and it is that duty, not some new duty created in court, that justifies the award against him. Even if the duty has not been imposed upon him by explicit prior legislation, there is . . . no [more] injustice in enforcing the duty . . .”³⁷

Unfortunately, however, this solution is illusory. To begin with, judicial decisions, like many complex decisions in our lives, are more often than not over-determined by reasons. A certain change in the law can be justified both because it advances certain societal goals and because it better protects the rights of the relevant parties. An example can illustrate the point. Consider the famous decision by Justice Cardozo in *MacPherson v. Buick Motors*³⁸, which effectively introduced into American law the doctrine of product liability. Prior to this case, both English and US law had not quite recognized the liability of a manufacturer to the ultimate consumer for damages caused to the latter by their defective products (mostly due to lack of privity of contract). Justice Cardozo, in a rather bold and far-reaching decision, held that manufacturers should be held liable to consumers for any defective product if the producer should have known that the product *could* become dangerous if defective.

It is not difficult to see that Cardozo’s ruling lends itself to an analysis both of a decision based on principle and one based on policy. On the one hand, it can be described as a decision which recognizes the right of consumers to a minimal level of safety of the products they purchase. On the other hand, the decision is also based on considerations of policy, reasoning, in effect, that manufacturers are the best cost-avoiders of accidents potentially caused by their dangerous products. These two types of reasons (if, indeed, they are two distinct types) are not mutually exclusive. It would be rather odd to say, however, that the *MacPherson* decision frustrates legitimate expectations from one perspective but not from the other. Generally speaking, the question of whether legitimate expectations have been frustrated cannot depend on the kind of reasoning that the court employs to

³⁶ Ronald Dworkin, *Taking Rights Seriously*, 82.

³⁷ *Ibid.* at 85.

³⁸ 217 N.Y. 382 (1916).

justify its decision. It depends on the question of how settled and certain the previous legal situation had been. If Buick Motors Co. was right to assume that it was not legally liable to consumers for defects in its products, then the *MacPherson* decision caught Buick by surprise. And the question of whether it was right to make such an assumption simply cannot depend on how Justice Cardozo justified his ruling in that case. It can only depend on how settled the law had actually been prior to *MacPherson*.³⁹

Judicial decisions, then, must be acknowledged as introducing legal changes which often have, at least with respect to the particular litigants, retroactive effect. Most judges and jurists are quite aware of that, and some of them believe that this in itself is sufficient to warrant a policy of judicial restraint, requiring judges to refrain from changing the law. Introducing legal changes is always better left to the legislature, they say, since the latter can do so prospectively with due warning.⁴⁰ Although the concern about retroactivity is a serious one, the conclusion is far too quick, even from the limited perspective of the rule of law virtues. After all, flexibility in the application of the law is partly what makes the law an effective tool of social control. The sheer number and complexity of legal issues in a modern society renders it impossible for any legislature to deal with all the subtleties and legal ramifications of the entire normative system. A modern legal system must rely on other agents, like judges and administrative agencies, to work out these numerous details and adjust the law to specific cases and changing circumstances. Presumably, much more harm will be done by a legal system that does not allow for such flexibility in the application of the law than the harm in retroactivity which could be avoided by it.⁴¹

4. Clarity of rules

Perhaps there is not much that needs to be said about the requirement of clarity. Surely, rules can only guide conduct if its putative subjects understand what the rule requires. This doesn't mean, however, that each and every legal rule must be clear to the ordinary citizen. A great many rules are not addressed to ordinary

³⁹ It is interesting to note that Cardozo in his opinion is at pains to show how unsettled and uncertain the law had been prior to that case.

⁴⁰ This was precisely the gist of the dissenting opinion of Justice Bartlett in *MacPherson*.

⁴¹ None of the above is meant to justify Justice Cardozo's particular decision in *MacPherson*. There is much to be said in favor of the dissent's position arguing that such an important social and economical change in the law should have been left for the legislature to introduce.

people, but to various officials and legal experts. The requirement of clarity only requires that those who need to understand what the law is should be able to do so.⁴² The only question that we need to ask, therefore, is whether it is generally true that the clearer and more comprehensible the law is, the better. The patient reader should not be surprised by now if I propose a negative answer to this question. Clarity, I submit, is not always a virtue. The clearer the law, the more rigid it is, and rigidity is often a deficiency in the law. In other words, it is partly because the law is sometimes obscure that courts and other law application agencies have the flexibility they need to adjust the law to particular needs and circumstances. As I have just noted above, some degree of flexibility in the application of the law is also a rule of law virtue.

In addition, we should also bear in mind that the law is often obscure not because the legislators (or other law-makers) have made a mistake in its drafting. In a pluralistic, democratic society, legislation is often a result of a delicate compromise between conflicting views and purposes. Sometimes the only way to achieve a compromise is by forgoing maximum clarity. Parties to a dispute may find it easier to agree on a formula which is not entirely clear, hoping (as they often do without too much delusion) that future interpretation will favor their stance. If we could envisage a world in which no level of obscurity in law-making is allowed, we might find that world to be one in which the only law enacted is the law supported by a solid ruling majority. A “winner takes all” strategy, as this would entail, is a high price to pay for the advantages of maximum clarity. Whether one thinks that the need to compromise in a pluralistic society is a regrettable fact obviously depends on one’s moral-political views about the values of pluralism. I cannot go into this here. Suffice it to say that for those who regard pluralism itself as a virtue, the need to compromise is not necessarily a regrettable fact. To the extent that a certain level of unclarity tends to facilitate desirable compromises, maximum clarity may not always be the objective that we ought to seek. I will say more on this in the next section.

5. No Contradiction

It would be unfortunate, and quite useless, if the law prescribed the performance of one thing and at the same time its exact opposite. But this doesn’t happen very often. On the other hand, the law is never entirely coherent. If only because so

⁴² On the possible discrepancy between officials and ordinary citizens understanding of the law, see the discussion of the application of law in sub-section 8 below.

many agents are involved in creating, developing and modifying the law, it can hardly be expected that the entire body of law, even in a particular legal domain, will manifest a coherent set of norms. Surely, there is some level of coherence which the law must have in order to function properly in guiding the conduct of its subjects. But it is equally clear that from a functional perspective, the law can tolerate a considerable amount of incoherence. Whether this is necessarily regrettable is a difficult question to answer, partly because legal coherence is itself a rather complicated idea. The law can manifest incoherence in at least three ways: logically, pragmatically, and morally. Let me explain.

Suppose that the law prescribes that all F's should ϕ under circumstances C, and, at the same time, that all F's should not- ϕ under circumstances C. In this case the law is simply inconsistent in a straightforward logical way:⁴³ it requires its subjects to do one thing and its exact opposite under the same circumstances. Therefore, it doesn't allow for any way in which people can comply with one of law's requirements without necessarily violating another. This kind of inconsistency is both a functional and a moral failure. It undermines law's ability to actually guide conduct, and it puts people in a morally unacceptable predicament. Since the law is rarely incoherent in such a blatant way, I will not dwell on this further.

Pragmatic inconsistency of the law is a much more frequent and familiar occurrence.⁴⁴ The law is pragmatically incoherent when it actually promotes aims, policies, or patterns of conduct which practically conflict. For example, suppose that one part of the law, say, a certain tax exemption, may have the (intended) effect of encouraging people to increase their long term savings, while another provision of the law, say, setting very low interest rates, may have the opposite effect, encouraging people to spend more of their income on purchases of consumer goods. What happens in such cases is simply the fact that the (intended or unintended) actual ramifications of a legal regime create opposing incentives for people's behavior. Similar practical inconsistencies may arise out of different judicial decisions. For example, in one case, a judicial determination placing product liability on manufacturers may have been driven by the objective of encouraging manufacturers to internalize the accident-costs of their products, while another judicial decision, concerning the interpretation of warranties, could have the opposite

⁴³ Assuming that these are not empty sets. Another example of logical inconsistency would be the following: suppose the law prescribes that "all F's should ϕ " and that "all G's should not ϕ ," and there are persons who are both F and G.

⁴⁴ See Raz, *The Authority of Law*, 201.

effect, providing manufacturers with ways of avoiding such costs and transferring them to the consumers. Such pragmatic inconsistencies are often very difficult to detect. Not infrequently, it would be genuinely controversial whether a pragmatic incoherence actually exists or not. It may largely depend on economic, social, or psychological theories which are notoriously inconclusive.

Finally, and most problematically, the law can be morally incoherent. The law is morally incoherent if its various prescriptions and their underlying justifications cannot be subsumed under one coherent moral theory. Or, we could say that in such cases there isn't a conceivable single rational moral agent whose moral point of view could justify the entire set of prescriptions under consideration. I think that this is basically what Dworkin means by the value of integrity in law. Whether we should expect the law to be morally coherent in this way is the topic of chapter 2.

6. No Impossible Prescriptions

Generally speaking, the law would fail to guide behavior if it purported to guide it in a way which is simply impossible to comply with. If the law prescribes the impossible, it fails both in its functional aspect, and quite often, in its moral legitimacy as well. The functional failure consists in the fact that the law would not achieve its own purpose in guiding conduct. The moral failure would consist in the fact that the law would not treat its subjects with due respect. Asking someone to do something that he cannot possibly do, especially when you know this in advance, typically involves an offensive message; it is like telling your subordinate that he ought to have been taller, or smarter, or the like. Since you know that he cannot become taller (or smarter, etc.), you are, in effect, criticizing a deficiency over which your addressee has no control; you just manifest disappointment in him. It is no longer a genuine attempt to guide conduct, but an expression of disapproval. In personal relations, such criticism, though perhaps somewhat offensive, is not always out of place. But there are good reasons to hold that, generally, the law should not be in the business of such critical appraisals of its subjects.

There are, however, justified exceptions to this principle. To begin with, "impossible" is too strong a word here. Most instances of conduct which are potentially subject to legal regulation would not be actually impossible to follow but rather just too difficult or costly given the circumstances. The law may require, for instance, investing in such precautionary measures with respect to a certain activity as to render the activity itself unprofitable. But of course, this would not necessarily indicate that the law has failed to guide conduct as it purported to. Perhaps the

precautions are so valuable that they outweigh the value of the activity which they would render out of business. These kinds of questions are addressed by various legal agents on a day to day basis, and there is very little room here for generalities or *a priori* guidelines.

Similarly, compliance with the law can be morally too costly. It may require the subjects, say, to perform an action that they deem morally imperative to avoid. Once again, it would be difficult to come up with general guidelines about such issues since they involve complicated moral-political questions which vary from case to case. Some of these cases concern the question of the justification and the limits of conscientious objection; others concern the question of the enforcement of morality by law and the moral limits of, e.g., criminal law; at other times the concerns about the moral burden that the law imposes involve difficult questions about distributive justice and equality, and so on.

Furthermore, not infrequently the law is justified in setting standards of conduct which may be somewhat unrealistically high. The law may have, in certain areas, a symbolic or educational function which permits it to set higher standards than those with which some of its subjects could comply. For example, it is arguable that in societies which have a disturbing history of racial discrimination, we should expect the law to impose very strict, even harsh, anti-discrimination laws that in other societies might not be warranted. There is in such cases a symbolic and educational value to setting standards so high, given the past iniquities and their potentially lingering effects. Needless to say, the higher the law sets its standards, the more it runs the risk of noncompliance and failing to guide conduct.⁴⁵ But perhaps the risk of a certain functional failure in the law is sometimes a reasonable price to pay for such symbolic and educational objectives.⁴⁶

7. Stability over Time

There is very little that needs to be said about this requirement of the rule of law. The desirable level of the stability of the law over time is a very rough standard.

⁴⁵ The dangers of this were all too apparent in the wake of the famous *Brown v. Board of Education* case, 347 U.S. 483, requiring the federal judiciary to engage in a very aggressive continuous enforcement campaign which lasted for decades, and was often close to miserable failure.

⁴⁶ Another familiar example of laws which often set high standards are the technology-forcing laws which explicitly set standards not yet attainable, aiming to force the industry to invest in R&D for purposes of developing new technology.

We know that the law must change over time, and we also know that it would be difficult to follow the law if it changed too frequently. But it would be absurd to assume that we can have a precise notion of the ideal pace of change. This requirement of the rule of law is basically a rough standard, whereby gross deviations from it, in both directions, constitute a deficiency. We can criticize changes in the law if they are too frequent or too slow. But it hardly makes any sense to say that a given change in the law is ever so slightly too fast, or just a little bit too slow. A rough standard of stability over time is what law needs to apply in order to function properly.

8. Congruence between the Rules and Their Application

Perhaps this is the most complicated and intricate requirement of the rule of law. Although the general idea is clear enough, its various ramifications are convoluted and often difficult to evaluate. The general idea is that for the law to function properly, its promulgated rules must be the rules which are actually applied to specific cases by the various law enforcement agencies. Rules cannot guide conduct unless deviations from the rule are actually treated as such, namely, as deviations from the rule. In order to see to what extent the law can fail in this regard we need only observe those legal systems where corruption is rampant and bribery is the standard means of achieving almost any official result. Often enough, we would find that those societies have elaborate anti-bribery laws. It is not the law on the books which measures the law's success in guiding human conduct, but its application in practice. The application mechanisms of the law are therefore crucially important in determining law's success or failure in fulfilling its putative functions. What those application mechanisms need to be obviously depends on the specific circumstances of our social lives and the political environment in which we live. Most commentators agree, for instance, that unless there is an independent and relatively powerful judiciary, little would guarantee that the laws on the books are the laws applied to specific cases. Some commentators go as far as to suggest that this aspect of the rule of law requires a full-fledged doctrine of separation of powers. Whether this is generally the case is somewhat doubtful, but we need not go into this here. Suffice it to say that the judiciary is certainly not the only actor in this game; other law application agencies play a crucial role as well. There are countless officials, including within the executive branch, whose job it is to determine, in various domains, how the law is applied in practice.

Generally speaking, the congruence between the legal rules and their application raises two types of issues. First, there is a whole set of questions about the appropriate institutional design which would be required in order to implement this

aspect of the rule of law, some of which we have mentioned above: What is the level of separation of powers appropriate for the relevant society? What kind of administrative agencies are needed, and what is the desired level of their independence? How should judges be appointed and what kind of authority should they have? How easy should the access to adjudication be? And there are countless other questions of a similar type. But in addition to these institutional issues, which I will not discuss here, there is another question that arises with respect to the *desired* level of congruence between the law and its application to specific cases: should we necessarily aspire to a perfect match? The more, the better? Let me explain the question.

Kelsen (in)famously maintained that all laws are actually just fragments of laws, forming part of a long list of conditions addressed to officials and authorizing them to impose certain sanctions when those conditions are met.⁴⁷ In other words, Kelsen thought that the law is always ultimately addressed to officials, instructing them how and under which conditions to use force. Those laws which *seem* to be addressed to the general public are only part of the conditions constituting the instructions to officials how to impose the sanction of the law when the appropriate conditions are met. That Kelsen erred in this generalization is hardly deniable. Surely the law cannot be addressed only to officials, since a major part of its function is to guide the conduct of its putative subjects.⁴⁸ But it is equally clear that part of the law functions in the way in which Kelsen describes, namely, instructing numerous officials how to apply the law and how to impose official coercion to various parties. But even this modest version of Kelsen's thesis poses the danger of entrenching a misconception: it is all too tempting to think that the part of the law which is addressed to its putative subjects necessarily forms a fragment of the set of instructions to officials about the appropriate application of those legal prescriptions. This is misleading, however, since it is not conceptually necessary that the rules addressed to the putative subjects of the law be the same rules which form part of the instructions to the relevant officials about how to apply the law. As Meir Dan-Cohen convincingly argued,⁴⁹ these two sets of rules, namely, the rules addressed to the public and those addressed to officials, need not be the same. Whether they ought to be the same is an open question which needs to be determined on normative grounds.

⁴⁷ See H. Kelsen, *General Theory of Law and State*, 45.

⁴⁸ See H.L.A. Hart, *The Concept of Law*, 38–42.

⁴⁹ Dan-Cohen *Harmful Thoughts*, 38–40.

In order to see this, Dan-Cohen asks us to imagine a world divided into two separate chambers: In one chamber we would have the general public, law's subjects, so to speak, and in the other chamber we would have the various officials who are supposed to apply the law to specific cases. Now suppose that the legislature could announce the law to each one of these chambers separately, and suppose that they are acoustically separated so that the announcements to one chamber cannot be heard in the other. Surely, there would have to be a considerable level of congruence between these two sets of rules, but isn't it clear that this congruence need not be perfect? Some rules announced to the public might be somewhat different from those which are promulgated to the officials' chamber. Perhaps such incongruence would not be desirable, but that is something which needs to be determined on normative grounds.

Needless to say, the real world cannot be divided into two acoustically separated chambers. But some level of a partial acoustic separation is possible, and it exists in practice. The very need for considerable legal expertise in different areas of the law attests to that. What "malice aforethought," for example, means to judges and criminal lawyers is probably quite different from what it means to the general public. The technicalities in legal language and the sheer complexity of the law allow for a certain level of acoustic separation, and raise the possibility of some incongruence between the laws promulgated to the public at large and those addressed to officials. The question of whether such potential discrepancies are desirable or not is, indeed, a normative question, directly pertaining to the aspect of rule of law under consideration.

Dan-Cohen argues, and I think rightly so, that some discrepancy between the content of the rules addressed to the public and those addressed to officials is not always regrettable. On the contrary, it enables the law, particularly in the criminal domain, to accommodate conflicting purposes. For example, the law may instruct judges and other officials to interpret various offences in a very technical and rather restrictive manner, thus making sure that only behavior which is surely and unquestionably wrong would be subject to punishment. At the same time, however, the law would achieve better deterrent effect, and perhaps, on the whole, better social results, if the general public's perception of such offenses is more expansive.⁵⁰ After all, the good citizen who wants to be guided by the law would

⁵⁰ But of course, not the other way around: if the public perception of the offense is more restricted than its official understanding, people will think that an action is legal whereas in fact, it is not. That would certainly violate the rule of law. See Dan-Cohen, *Harmful Thoughts*, 90, fn. 106.

want to be on the safe side, avoiding behavior which is on the verge of illegality. But again, in case the citizen happens to stumble and finds himself in front of a court, the judge should also play it safe and convict the defendant only if she is very confident that the conduct was, indeed, legally wrong. Thus, the fact that the rules are understood somewhat differently by the public and the judges enables both to be on the safe side, as it were.⁵¹

But this is not so simple. Consider a non-criminal case first: suppose we assume that similar considerations apply to contract law as well. Suppose that it would be better if people believed that their contractual obligations are somewhat stricter than the technical-legal doctrines actually require. The problem with such a situation is rather apparent here: the more there is a discrepancy between general perceptions and legal technicalities, the greater the *relative advantage* of those parties with better access to legal expertise, who are, most often, the wealthier parties or the repeat-players (who are usually the wealthier litigants anyway). This situation raises a concern about equality. A systematic lack of congruence between general perceptions of the law and its actual application to specific cases normally plays into the hands of those who can afford better access to legal expertise. The same holds in criminal law as well, though perhaps less disturbingly in those cases in which crime is not premeditated. Thus, even if there is some social benefit to be gained by a certain incongruence between the rules which are addressed to the general public and the rules addressed to law application officials, as Dan-Cohen argues, this benefit must be weighed against the cost in terms of inequality between potential litigants. To be sure, I am not denying the possibility of such a benefit but only its scope. Perhaps the conclusion is that Dan-Cohen's argument should be limited, as it may have been intended to be anyway, to very specific instances in the criminal law area.⁵² Nevertheless, the more general point remains valid: in principle, it is an open question whether the rules promulgated to the law's subjects and the accompanying rules addressed to the law application officials ought to be exactly the same, or not. That generally they ought to be identical is hardly disputed, but it is possible that certain exceptions are justified.

⁵¹ See Dan-Cohen, *Harmful Thoughts*, 56. Note that the idea of trial by juries actually goes against this, but it is mitigated by the detailed legal guidance judges are required provide to the jury.

⁵² Dan-Cohen is careful to point out that the more there is opportunity for *ex ante* legal consultation, the less acoustic separation the law can maintain; thus, he would not necessarily disagree with the argument in the text. He could still maintain that acoustic separation is beneficial in those mainly criminal law cases in which the relevant parties do not have an opportunity to obtain legal advice *ex ante*.

C. The Inner Morality of Law?

Lon Fuller has made these conditions of the rule of law which we have addressed in the previous pages central to jurisprudence by claiming that they exhibit the “inner morality of law.”⁵³ These conditions which the law must meet in order to function as law, regardless of its specific contents, Fuller argued, are valuable in themselves, in that they instantiate certain moral virtues, and therefore render the law, in its form alone, morally valuable. H.L.A. Hart and Joseph Raz responded that these virtues of the rule of law are merely functional values, not moral ones.⁵⁴ Just like the sharpness of a knife, which makes the knife a good one, so the rule of law virtues make the law good, but only in terms of its functioning as a means of social control. Functional good, Hart and Raz argued, must not be confused with moral value.

I hope that our detailed discussion of the rule of law virtues proves Hart and Raz to be wrong about this criticism of Fuller. We have seen in some detail that most virtues of the rule of law, though essentially functional, are also moral-political virtues. In addition to the fact that the conditions discussed are necessary for law to function as a means of social control in guiding human conduct, they also enhance certain goods which we have reasons to value in addition to their functional merit. If the law fails on these conditions, it would not only fail in guiding its putative subjects’ conduct, but it would also fail morally. As Neil MacCormick aptly put it, “There is always something to be said for treating people with formal fairness, that is, in a rational and predictable way, setting public standards for citizens conduct and officials’ responses thereto . . . That indeed, is what we mean by the Rule of Law.”⁵⁵

Even if it is the case, however, that the rule of law virtues are partly moral in content, Raz claims that these values do not prove that there is necessarily some moral

⁵³ See Fuller, *The Morality of Law*.

⁵⁴ See H.L.A. Hart, *Essays in Jurisprudence and Philosophy*, 349–350, and J. Raz, *The Authority of Law*, 226. Raz qualifies this to the extent that he does admit that in addition to functional values, the rule of law enhances certain goods indirectly, at 225.

⁵⁵ “Natural Law and the Separation of Law and Morals” in R. George (ed.), *Natural Law Theory*, 105, at 123. The truth is that there may be an exception to this: when the law is profoundly corrupt, it might be better if it also failed in its ability to guide conduct, and therefore, violations of the rule of law virtues may actually do more good than harm. But it is very difficult to generalize. Sometimes, even in a profoundly corrupt legal system, the fact that the law also violates some rule of law virtues, say, in that it is kept secret, or haphazardly applied, may be an additional iniquity over and beyond the law’s substantive injustice. It all depends on specific circumstances.

value in law, as such. The rule of law values are essentially “negative values,” Raz claims, because the conditions of the rule of law are only designed to “minimize the danger created by the law itself.”⁵⁶ Thus, Raz concludes, “the rule of law is a negative virtue in two senses: conformity to it does not cause good except through avoiding evil and the evil which is avoided is evil which could only have been caused by the law itself.”⁵⁷

Let us take a closer look at this argument. Many moral values consist in the avoidance of evil rather than the direct promotion of a good. Raz is right to claim that not every instance of avoiding evil justifies moral credit to the agent; as he rightly notes, the person who cannot poison another due to his ignorance or inability does not deserve credit for it. Moral agents normally deserve credit for avoiding evil when they would have had both the *opportunity* and the *temptation* to commit the wrong, and they have resisted it. But we should not confuse a theory of moral agency and ethical virtue with the question of what is a good. Even if some people cannot physically commit murder, and therefore would not deserve any credit for it, we would still say that it is good that a possible evil is avoided. Suppose, for example, that we discover a world in which people, who are otherwise similar to us, cannot possibly kill each other. Thus they would not deserve any credit for the avoidance of murder. But we would still be able to say that it is a good world in that respect. The fact that those creatures cannot kill each other is good, in itself, even if it is not a personal accomplishment that they deserve credit for. Similarly, the fact that a properly functioning legal system cannot sanction certain forms of arbitrary force or violation of human freedom and dignity is simply good, even if it is true that the law does not deserve moral credit for it.

Now consider the second prong of Raz’s argument: The kinds of evil which the rule of law conditions avoid, Raz claims, are only those which could have been created by the law itself. No evil is avoided by, say, the publicity of law or its prospective aspect, unless there is law, first, which could violate these conditions (to some extent). In other words, the rule of law virtues only mitigate possible evils that the law could create to begin with. If there is no law, then there are no such evils that need to be avoided. Raz’s analogy with the wrong of deceit is revealing: there is no way in which I can lie to you unless I communicate with you. It is only because I can talk to you and tell you a lie that my honesty, in the limited sense of avoiding

⁵⁶ Raz, *The Authority of Law*, 224.

⁵⁷ *Ibid.*

deceit, is a virtue. Honesty, in this limited sense, Raz claims, “does not include the good of communication between people, for honesty is consistent with a refusal to communicate.”⁵⁸ But what if I have a positive duty to tell you the truth? Surely, the physician who avoids telling her patient that he suffers from a serious disease, simply by not telling him anything, violates a duty to be honest. Similarly, the unfaithful husband who cheated on his wife does not manifest honesty by simply keeping quiet about it. If there is a background expectation to communicate the truth, an avoidance of communication might be deceitful. Raz would surely not deny this general point. But then we must take into account the first component of the rule of law, namely, the idea that governments *ought to rule by law*. If we have good reasons to expect governance by law, the absence of law is wrong just as the absence of communication under certain circumstances is deceitful.

I do not intend to undermine Raz’s basic insight here. He is right to insist that if there is anything which makes the law essentially good, it is not the fact that the conditions of the rule of law, by themselves, actually create certain goods. We must first assume that the existence of law is good. Similarly, unless we assume that the institution of monogamous marriage is good, there is no wrong in the silence of the deceitful husband. In this respect, Fuller’s argument about the inner morality of law is, indeed, incomplete. But it can be completed by adding the necessary assumption which, in fact, Raz has never denied. The necessary assumption is that we have good reasons to have law in the first place.

As a final comment, let me clarify one point: it is sometimes assumed that this debate about the inner morality of law is a debate between legal positivism and some modern version of natural law.⁵⁹ But this is a mistake. The truth of legal positivism is simply not at stake here. The main insight of legal positivism is that the conditions of *legal validity* are determined by social facts. This involves two separate claims which have been labeled The Social Thesis and The Separation Thesis. The Social Thesis asserts that law is, profoundly, a social phenomenon, and that the conditions of legal validity consist of social facts. Early legal positivists followed Hobbes’s insight that the law is, essentially, an instrument of political

⁵⁸ Raz, *The Authority of Law*, 224.

⁵⁹ Fuller certainly gave at least the impression that his views about the “inner morality of law” form part of his anti-positivist argument. Even recent literature on the rule of law, however, seems to share this characterization of the debate. See, for example, David Dyzenhaus’s introduction to the volume he edited: *Recrafting the Rule of Law*, pp. 1–12. See also R. George, “Reason, Freedom, and the Rule of Law: Their Significance in the Natural Law Tradition,” 249.

sovereignty, and they maintained that the basic source of legal validity resides in the facts constituting political sovereignty. Law, they thought, is basically the command of the sovereign. Later legal positivists have modified this view, maintaining that social conventions, and not the facts about sovereignty, constitute the grounds of law. Most contemporary legal positivists share the view that there are conventional rules of recognition, namely, social conventions which determine certain facts or events that provide the ways for the creation, modification, and annulment of legal standards. These facts, such as an act of legislation or a judicial decision, are the *sources of law* conventionally identified as such in each and every modern legal system.

Traditional Natural Law denies this insight, insisting that a putative norm cannot become legally valid unless it passes a certain threshold of morality. Positive law must conform in its content to some basic precepts of Natural Law, that is, universal morality, in order to become law in the first place. In other words, Natural Lawyers maintain that the moral content of norms, and not just their social origins, also forms part of the conditions of legal validity.⁶⁰

The Separation Thesis is an important negative implication of this Social Thesis, maintaining that there is a conceptual separation between law and morality, that is, between what the law is, and what the law ought to be. The Separation Thesis, however, has often been overstated, and this overstatement is the source of the confusion here. It has been assumed by Fuller and others that natural law asserts, and legal positivism denies, that the law is, by necessity, morally good or that the law must have some minimal moral content. But the Separation Thesis does *not* entail the falsehood of the assumption that there is something necessarily good in the law. Legal positivism can accept the claim that law is, by its very nature or its essential functions in society, something good that deserves our moral appreciation. Nor is legal positivism forced to deny the plausible claim that wherever law exists, it must have a great many prescriptions which coincide with morality. There is probably a considerable overlap, and perhaps necessarily so, between the actual content of law and morality. Once again, the Separation Thesis, properly understood, pertains only to the conditions of legal validity. It asserts that the

⁶⁰ Note that contemporary Natural Lawyers have suggested different and more subtle interpretations of the main tenets of Natural Law. For example, John Finnis views Natural Law (in its Thomist version) not as a constraint on the legal validity of positive laws, but mainly as an elucidation of an ideal of law in its fullest, or highest sense, concentrating on the ways in which law necessarily promotes the common good. See his *Natural Law and Natural Rights*. As I explain in the text, however, it is not clear that such a view about the necessary moral content of law is at odds with the main tenets of Legal Positivism.

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conditions of legal validity do not depend on the moral content of the norms in question. What the law is cannot depend on what it ought to be in the relevant circumstances. But this is quite consistent with the view which holds that law is essentially good in the simple sense that we have good reasons to have law and be governed by it. And it is also consistent with Fuller's basic insight that the rule of law, properly understood, promotes certain goods which we have reasons to value regardless of their purely functional merit.⁶¹

⁶¹ I am indebted to Scott Altman, Meir Dan-Cohen, David Enoch, John Finnis, Chaim Gans, Elizabeth Garrett, and Alon Harel for invaluable comments on earlier drafts.