THE MORALITY OF LAW

Revised edition

BY LON L. FULLER

NEW HAVEN AND LONDON, YALE UNIVERSITY PRESS
Copyright © 1964 by Yale University.
Revised edition copyright © 1969 by Yale University.
All rights reserved. This book may not be reproduced, in
whole or in part, in any form (beyond that copying
permitted by Sections 107 and 108 of the U.S.
Copyright Law and except by reviewers for the public
press), without written permission from the publishers.
ISBN: 0–300–00472–9 (cloth), 0–300–01070–2 (paper)
Library of Congress catalog number: 72–93579

Designed by Sally Hargrove Sullivan,
set in Times Roman type,
and printed in the United States of America by
BookCrafters, Inc.,
Fredericksburg, Virginia.

In this
have
only
consistent
entitled
The
does
substantial
that
problem
of
mean
lecture
I
an
English
tradition
general
been
[A] law which a man cannot obey, nor act according to it, is void and no law: and it is impossible to obey contradictions, or act according to them.  
—Vaughan, C. J. in Thomas v. Sorrell, 1677

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a lawless unlimited power, and at their pleasure to walk contrary to their own laws and ordinances before they have repealed them?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

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

Eight Ways to Fail to Make Law

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

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

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

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

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

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

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

Rex now realized that there was no escape from a published code declaring the rules to be applied in future disputes. Continuing his lessons in generalization, Rex worked diligently on a
revised code, and finally announced that it would shortly be published. This announcement was received with universal gratification. The dismay of Rex’s subjects was all the more intense, therefore, when his code became available and it was discovered that it was truly a masterpiece of obscurity. Legal experts who studied it declared that there was not a single sentence in it that could be understood either by an ordinary citizen or by a trained lawyer. Indignation became general and soon a picket appeared before the royal palace carrying a sign that read, “How can anybody follow a rule that nobody can understand?”

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

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

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

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

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

Within a short time this source of discontent began to cure itself as the pace of amendment gradually slackened. Before this had occurred to any noticeable degree, however, Rex announced an important decision. Reflecting on the misadventures of his reign, he concluded that much of the trouble lay in bad advice he had received from experts. He accordingly declared he was reason-
suming the judicial power in his own person. In this way he could
directly control the application of the new code and insure his
country against another crisis. He began to spend practically all
of his time hearing and deciding cases arising under the new code.

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

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

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

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

The Consequences of Failure
Rex’s bungling career as legislator and judge illustrates that the
test to create and maintain a system of legal rules may mis-
THE MORALITY THAT MAKES LAW POSSIBLE

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

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

THE MORALITY OF LAW

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

The citizen’s predicament becomes more difficult when, though there is no total failure in any direction, there is a general and drastic deterioration in legality, such as occurred in Germany under Hitler. When this bond of reciprocity is finally and completely ruptured by government, nothing is left on which to ground the citizen’s duty to observe the rules.

2. I have discussed some of the features of this deterioration in my article, “Positivism and Fidelity to Law,” 71 Harvard Law Review 630, 648–57 (1958). This article makes no attempt at a comprehensive survey of all the postwar judicial decisions in Germany concerned with events occurring during the Hitler regime. Some of the later decisions rested the nullity of judgments rendered by the courts under Hitler not on the ground that the statutes applied were void, but on the ground that the Nazi judges misinterpreted the statutes of their own government. See Pappe, “On the Validity of Judicial Decisions in the Nazi Era,” 23 Modern Law Review 260–74 (1960). Dr. Pappe makes more of this distinction than seems to me appropriate. After all, the meaning of a statute depends in part on accepted modes of interpretation. Can it be said that the postwar German courts gave full effect to Nazi laws when they interpreted them by their own standards instead of the quite different standards current during the Nazi regime? Moreover, with statutes of the kind involved, filled as they were with vague phrases and unrestricted delegations of power, it seems a little out of place to strain over questions of their proper interpretation.
that of the voter who knows that the odds are against his ballot being counted at all, and that if it is counted, there is a good chance that it will be counted for the side against which he actually voted. A citizen in this predicament has to decide for himself whether to stay with the system and cast his ballot as a kind of symbolic act expressing the hope of a better day. So it was with the German citizen under Hitler faced with deciding whether he had an obligation to obey such portions of the laws as the Nazi terror had left intact.

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

Do the principles expounded in my second chapter represent some variety of natural law? The answer is an emphatic, though qualified, yes.

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

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

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

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

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

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

2. See note 6, Chapter 2, p. 49.
3. Ibid.
With respect to thinkers associated with the natural law tradition it is safe to say that none of them would display the casualness of a Gray or Somlo toward the demands of legal morality. On the other hand, their chief concern is with what I have called substantive natural law, with the proper ends to be sought through legal rules. When they treat of the demands of legal morality it is, I believe, usually in an incidental way, though occasionally one aspect of the subject will receive considerable elaboration. Aquinas is probably typical in this respect. Concerning the need for general rules (as contrasted with a case-by-case decision of controversies) he develops a surprisingly elaborate demonstration, including an argument that wise men being always in short supply it is a matter of economic prudence to spread their talents by putting them to work to draft general rules which lesser men can then apply.5 On the other hand, in explaining why Isidore required laws to be “clearly expressed” he contents himself with saying that this is desirable to prevent “any harm ensuing from the law itself.”6

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

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

6. Ibid., Art. 3.
Yet, as I have tried to show, in some situations the principle against contradiction can become one of the most difficult to apply of those which make up the internal morality of the law.\textsuperscript{7}

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

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

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

\textsuperscript{7} Supra pp. 65–70.

\textsuperscript{8} Supra p. 33. A splendid account of this literature will be found in Gough, \textit{Fundamental Law in English Constitutional History} (1954); (reprinted with minor changes, 1961).
THE MORALITY OF LAW

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

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

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

\(^9\) 8 Rep. 118a (1610). For an interesting analysis of the relevance this famous passage had for the actual decision of the lawsuit brought by Dr. Bonham, see Thorne, "Dr. Bonham's Case," 54 Law Quarterly Review 543–52 (1938).
judgment of his own case. Then came the King and Parliament sticking an ugly, incongruous finger into this effort, creating a "court" of physicians for judging infringements of their own monopoly and collecting half the fines for themselves. When Coke associated this legislative indecency with repugnancy he was not simply expressing his distaste for it; he meant that it contradicted essential purposive efforts moving in an opposite direction.

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

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

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

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

10. The Federalist, No. 68.
THE MORALITY OF LAW

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

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

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

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

11. Ibid., No. 78.
12. Within the Court itself the debate was initiated by an exchange between Justices Black and Frankfurter in Adamson v. California, 332 U.S. 46 (1947).
13. P. 84, supra.

102
description of the act it prohibits. When one reflects on the problems of drafting a constitution the justification for this holding becomes obvious. If an express provision directed against vague laws were included in the Constitution, some standard, explicit or tacit, would have to determine what degree of obscurity should vitiate. This standard would have to run in quite general terms. Starting with the premise that law governs and judges men's actions by general rules, any criminal statute ought to be sufficiently clear to serve the double purpose of giving to the citizen an adequate warning of the nature of the act prohibited and of providing adequate guidelines for adjudication in accordance with law. If one wished to summarize all this in a phrase, it would be hard to find a better expression than "due process of law."

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

In these last remarks I may seem to be assigning contradictory

14. See the references in note 21, Chapter 2, p. 63, supra.
15. The cases are discussed in Hale, "The Supreme Court and the Contracts Clause," 57 Harvard Law Review 512, 514-16 (1944).
qualities to the internal morality of the law. I have suggested that this morality lends itself awkwardly to formulation in a written constitution. I have at the same time asserted that in dealing with questions touching the internal morality of the law judicial interpretation can proceed with an unusual degree of confidence in its objectivity, and this despite the fragmentary and inadequate constitutional expressions on which it must build. How can a task so difficult for the draftsman that he must leave his job half-done be thought to provide relatively firm guidelines for judicial interpretation?

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

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

17. See pp. 42-46, supra, et passim in the second chapter.
18. See p. 92, supra.
reasonably open to it, the court ought to remain within this area. *Robinson v. California*\(^{19}\) is, I submit, a case where the Supreme Court quite plainly took the wrong turn. As the majority viewed the issues in that case the question presented was whether a statute might constitutionally make the state or condition of being a drug addict a crime punishable by six months' imprisonment. It was assumed as a scientific fact that this condition might come about innocently. The Court held that the statute violated the Eighth Amendment by imposing a “cruel and unusual punishment.”

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

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

\(^{19}\) 370 U.S. 660 (1962).
an indictment was brought under it. (It should be recalled that our Constitution has no express requirement that laws be published.)

Omitted