QUESTIONS FOR DISCUSSION

1. In challenging others he believes have misinterpreted the natural law tradition, Finnis says that "to delegate is not to delegate unconditionally." What does he mean by this, and how is it relevant to thinking about the natural law idea?

2. If Finnis is right in rejecting views about natural law associated with, for example, Cicero, then what is his version of the natural law position?

3. What, according to Finnis, makes a law valid?

4. Does Finnis think that all laws should be obeyed? Does he think that all valid laws should be obeyed? Why or why not?

THE Morality OF LAW

LON FULLER

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

EIGHT WAYS TO FAIL TO MAKE LAW
Rex came to the throne filled with the zeal of a reformer. He considered that the greatest failure of his predecessors had been in the field of law. For generations the legal system had known nothing like a basic reform. Procedures of trial were cumbersome, the rules of law spoke in the archaic tongue of another age, justice was expensive, the judges were slovenly and sometimes corrupt. Rex was resolved to remedy all this and to make his name in history as a great lawgiver. It was his unhappy fate to fail in this ambition. Indeed, he failed spectacularly, since not only did he not succeed in introducing the needed reforms, but he never even succeeded in creating any law at all, good or bad.

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

Becoming aware of his limitations, Rex gave up the project of a code and announced to his subjects that henceforth he

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

After this fiasco Rex realized it was necessary to take a fresh start. His first move was to subscribe to a course of lessons in generalization. With his intellectual powers thus fortified, he resumed the project of a code and, after many hours of solitary labor, succeeded in preparing a fairly lengthy document. He was still not confident, however, that he had fully overcome his previous defects. Accordingly, he announced to his subjects that he had written out a code and would henceforth be governed by it in deciding cases, but that for an indefinite future the contents of the code would remain an official state secret, known only to him and his scrivener. To Rex's surprise this sensible plan was deeply resented by his subjects. They declared it was very unpleasant to have one's case decided by rules when there was no way of knowing what those rules were.

Stunned by this rejection Rex undertook an earnest inventory of his personal strengths and weaknesses. He decided that life had taught him one clear lesson, namely, that it is easier to decide things with the aid of hindsight than it is to attempt to foresee and control the future. Not only did hindsight make it easier to decide cases, but—and this was of supreme importance to Rex—it made it easier to give reasons. Deciding to capitalize on this insight, Rex hit on the following plan. At the beginning of each calendar year he would decide all the controversies that had arisen among his subjects during the preceding year. He would accompany his decisions with a full statement of reasons. Naturally, the reasons thus given would be understood as not controlling decisions in future years, for that would be to defeat the whole purpose of the new arrangement, which was to gain the advantages of hindsight. Rex confidently announced the new plan to his subjects, observing that he was going to publish the full text of his judgements 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 reassuming the judicial power in his own person. In this way he could directly control the application of the new code and insure his country against
another crisis. He began to spend practically all of his time hearing and deciding cases arising under the new code.

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

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

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

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

**THE CONSEQUENCES OF FAILURE**

Rex's bungling career as legislator and judge illustrates that the attempt to create and maintain a system of legal rules may miscarry 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. Government
saying to the citizen in 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. A situation begins to develop, for example, in which though some laws are published, others, including the most important, are not. Though most laws are prospective in effect, so free a use is made of retrospective legislation that no law is immune to change except after it suits the convenience of those in power. For the trial of criminal cases concerned with loyalty to the regime, special military tribunals are established and these tribunals disregard, whenever it suits their convenience, the rules that are supposed to control their decisions. Increasingly the principal object of government seems to be, not that of giving the citizen rules by which to shape his conduct, but to frighten him into impotence. As such a situation develops, the problem faced by the citizen is not so simple as that of a voter who knows with certainty that his ballot will not be counted. It is more like that of the voter who knows that the odds are against his ballot being counted at all, and that if it is counted, there is a good chance that it will be counted for the side against which he actually voted. A citizen in this predicament has to decide for himself whether to stay with the system and cast his ballot as a kind of symbolic act expressing the hope of a better day. So it was with the German citizen under Hitler faced with deciding whether he had an obligation to obey such portions of the laws as the Nazi terror had left intact.

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

**THE ASPIRATION TOWARD PERFECTION IN LEGALITY**

So far we have been concerned to trace out eight routes to failure in the enterprise of creating law. Corresponding to these are eight kinds of legal excellence toward which a system of rules may strive. What appear at the lowest level as indispensable conditions for the existence of law at all, become, as we ascend the scale of achievement, increasingly demanding challenges to human capacity. At the height of the ascent we are tempted to imagine a utopia of legality in which all rules are perfectly clear, consistent with one another, known to every citizen, and never retroactive. In this utopia the rules remain constant through time, demand only what is possible, and are scrupulously observed by courts, police, and everyone else charged with their administration. For reasons that I shall advance shortly, this utopia, in which all eight of the principles of legality are realized to perfection, is not actually a useful target for guiding the impulse toward legality; the goal of perfection is much more complex. Nevertheless it does suggest eight distinct standards by which excellence in legality may be tested.

In expounding in my first chapter the distinction between the morality of duty and that of aspiration, I spoke of an imaginary scale that starts at the bottom with the most obvious and essential moral duties and ascends upward to the highest achievements
open to man. I also spoke of an invisible pointer as marking the dividing line where the pressure of duty leaves off and the challenge of excellence begins. The inner morality of law, it should now be clear, presents all of these aspects. It too confronts us with the problem of knowing where to draw the boundary below which men will be condemned for failure, but can expect no praise for success, and above which they will be admired for success and at worst pitted for the lack of it.

In applying the analysis of the first chapter to our present subject, it becomes essential to consider certain distinctive qualities of the inner morality of law. In what may be called the basic morality of social life, duties that run toward other persons generally (as contrasted with those running toward specific individuals) normally require only forbearances, or as we say, are negative in nature: Do not kill, do not injure, do not deceive, do not defame, and the like. Such duties lend themselves with a minimum of difficulty to formalized definition. That is to say, whether we are concerned with legal or moral duties, we are able to develop standards which designate with some precision—though it is never complete—the kind of conduct that is to be avoided.

The demands of the inner morality of the law, however, though they concern a relationship with persons generally, demand more than forbearances; they are, as we loosely say, affirmative in nature: make the law known, make it coherent and clear, see that your decisions as an official are guided by it, etc. To meet these demands human energies must be directed toward specific kinds of achievement and not merely warned away from harmful acts.

Because of the affirmative and creative quality of its demands, the inner morality of law lends itself badly to realization through duties, whether they be moral or legal. No matter how desirable a direction of human effort may appear to be, if we assert there is a duty to pursue it, we shall confront the responsibility of defining at what point that duty has been violated. It is easy to assert that the legislator has a moral duty to make his laws clear and understandable. But this remains at best an exhortation unless we are prepared to define the degree of clarity he must attain in order to discharge his duty. The notion of subjecting clarity to quantitative measure presents obvious difficulties. We may content ourselves, of course, by saying that the legislator has at least a moral duty to try to be clear. But this only postpones the difficulty, for in some situations nothing can be more baffling than to attempt to measure how vigorously a man intended to do that which he has failed to do. In the morality of law, in any event, good intentions are of little avail, as King Rex amply demonstrated. All of this adds up to the conclusion that the inner morality of law is condemned to remain largely a morality of aspiration and not of duty. Its primary appeal must be to a sense of trusteeship and to the pride of the craftsman.

To these observations there is one important exception. This relates to the desideratum of making the laws known, or at least making them available to those affected by them. Here we have a demand that lends itself with unusual readiness to formalization. A written constitution may prescribe that no statute shall become law until it has been given a specified form of publication. If the courts have power to effectuate this provision, we may speak of a legal requirement for the making of law. But a moral duty with respect to publication is also readily imaginable. A custom, for example, might define what kind of promulgation of laws is expected, at the same time leaving unclear what consequences attend a departure from the accepted mode of publication. A formalization of the desideratum of publicity has obvious advantages over uncanalized efforts,
even when they are intelligently and conscientiously pursued. A formalized standard of promulgation not only tells the lawmaker where to publish his laws; it also lets the subject—or a lawyer representing his interests—know where to go to learn what the law is.

One might suppose that the principle condemning retroactive laws could also be very readily formalized in a simple rule that no such law should ever be passed, or should be valid if enacted. Such a rule would, however, disavow the cause of legality. Curiously, one of the most obvious seeming demands of legality—that a rule passed today should govern what happens yesterday—turns out to present some of the most difficult problems of the whole internal morality of law.

With respect to the demands of legality other than promulgation, then, the most we can expect of constitutions and courts is that they save us from the abyss; they cannot be expected to lay out very many compulsory steps toward truly significant accomplishment.

LEGAL MORALITY AND NATURAL LAW

[An important] task is to relate what I have called the internal morality of the law to the ages-old tradition of natural law. Do the principles expounded in my second chapter represent some variety of natural law? The answer is an emphatic, though qualified, yes.

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

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

As a convenient (though not wholly satisfactory) way of describing the distinction of being taken we may speak of a procedural, as distinguished from a substantive natural law. What I have called the internal morality of law is in this sense a procedural version of natural law, though to avoid misunderstanding the word "procedural" should be assigned a special and expanded sense so that it would include, for example, a substantive accord between official action and enacted law. The term "procedural" is, however, broadly appropriate as indicating that we are concerned, not with the substantive aims of legal rules, but with the ways in which a system of rules for governing human conduct must be constructed and administered if it is to be efficacious and at the same time remain what it purports to be.

In the actual history of legal and political thinking what association do we find between the principles I have expounded in my second chapter and the doctrine of natural law? Do those principles form an integral part of the natural law tradition?

With respect to thinkers associated with the natural law tradition, [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. 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."

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

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 prodigalities, 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. The most famous pronouncement to come down from that great period is that of Coke in Dr. Bonham's Case.

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

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 alii quis non debet esse fides in propria causa, ino iniuriam est aliquem suae ra 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 control 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 control it, and adjudge such Act to be void.
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 case. 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 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.

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

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." 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. This means that in one way or another their meaning must be filled out. Surely those whose fate in any degree
hinges on the creative act of interpretation by which this meaning is supplied, as well as those who face the responsibility of the interpretation itself, must wish that it should proceed on the most secure footing that can be obtained, that it should be grounded insofar as possible in the necessities of democratic government and of human nature itself.

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

QUESTIONs FOR DISCUSSION

1. Fuller lists eight "desiderata" of law. He then claims that these are each necessary for the existence of law. Why does Fuller think they are necessary rather than merely desirable? Does he think they are also sufficient for the existence of law?

2. What is the difference between an "internal" and an "external" moral requirement? Why is an internal requirement a "moral" requirement? What is the relationship, according to Fuller, between the internal requirements and substantive morality?

3. How is Fuller's position different from the natural law positions of Aquinas and Finnis? How is it similar?

4. In "Positivism and Fidelity to Law—A Reply to Professor Hart," Harvard Law Review, vol. 71 (1958), pp. 158 ff., Fuller made the empirical claim in support of his internal morality of law that "coherence and goodness have more affinity than coherence and evil . . . . I also believe that when men are compelled to explain and justify their decisions, the effect will generally be to pull those decisions toward goodness, by whatever standards of ultimate goodness there are." Do you think that Fuller is correct in believing that compliance with internal morality will increase the likelihood of observance of substantive morality?