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Communication of Legal Standards Policy Development and Effective Conduct Regulation

Daniel J. Gifford

COMMUNICATION OF LEGAL STANDARDS, POLICY DEVELOPMENT, AND EFFECTIVE CONDUCT REGULATION

Daniel J. Gifford†

The purpose of this article is to inquire into some of the problems of conduct regulation associated with the formulation of laws and other conduct standards by officials and the transmission of the formulated standards to affected persons. Although legal policy formulation and the communication of such policy can be separate fields for inquiry, they are nevertheless interrelated. If communication is characterized as the transmission of information, then officially-promulgated conduct standards that are couched in highly general or vague language transmit less information to affected persons about how to act than do standards that are more precise. Such language vagueness suggests both minimal communication and openness to policy development. Thus, in the familiar case in which a judge "interprets" or "construes" meaning into a law, we observe that the need for the interpretation arose from the imprecision or ambiguity of the law as it existed prior to that judicial decision. If the interpretation adds content to the law, we will be correct in stating that (*1*) the original law lacked some content that was later added to it; and (*2*) the process of determining or completing that law's meaning took place over time. Accordingly, a person who learned of the law prior to the judicial decision interpreting it could have learned only some of the meaning that the law ultimately contained.

Imprecision—or open-endedness—in laws permits substantive development that necessarily takes place over time. The central concerns of this article are problems inherent in the communication of legal knowledge as they are affected by the interplay of imprecision in laws and law development over time. The discussion proceeds from an initial focus upon the more general problems of communication by officials to affected persons to a focus upon the problems of policy development and communication in the special context of modern regulatory agencies.

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† Professor of Law, State University of New York at Buffalo. A.B. 1953, Holy Cross College; LL.B. 1958, Harvard University.

I

PROBLEMS ASSOCIATED WITH THE COMMUNICATION OF CONDUCT STANDARDS

A. *Lack of Technical Legal Knowledge*

It is axiomatic that no person can guide his conduct by a law unless he knows what that law is. It is also reasonably apparent that most persons do not know the detailed contents of the laws that affect them[1] and that they possess, at most, only generalized and nontechnical knowledge of those laws. Their conduct, then, insofar as it is influenced by laws at all, cannot be guided by the detailed technicalities of those laws, but must be guided by their generalized and nontechnical knowledge. Moreover, many laws that may appear superficially to be guides to conduct may not be such guides at all: they may embody community moral standards and merely reflect social activity rather than guide it. Sometimes laws that embody community standards are said to reenforce those standards.[2] But how can they reenforce moral standards if it is those standards rather than the law to which most persons conform? Perhaps it is because a violation of the moral standard—such as the moral prohibition against stealing—will often run afoul of the law as well. If the converse is also true, then the law's prohibitions will never be transgressed by persons who conform to the moral standard—even though they have little or no knowledge of exactly what the law prohibits.

A person who has overcome his own moral scruples against stealing may focus upon the legal prohibition and the threat of punishment and disgrace accompanying its violation. For him the law would become the primary standard, superseding his conscience. But even for such a person the primary standard is the law as he apprehends it, and not the law as it is written. For the habitually honest majority, the specter of the law's sanctions may reenforce inclinations to honesty in moments of temptation. But here again, the reenforcement depends not upon what the law actually provides but upon our perceptions of what the law provides. Since, as we have observed, most of us rarely

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1 For an illustration of this statement, see Rosenberg, *Court Congestion: Status, Causes and Proposed Remedies*, in THE COURTS, THE PUBLIC AND THE LAW EXPLOSION 56 (H. Jones ed. 1965). *See* McBoyle v. United States, 283 U.S. 25, 27 (1931) (Holmes, J.). *But cf.* People v. Grogan, 260 N.Y. 138, 145-46, 183 N.E. 273, 276 (1932).

2 Decisions to avoid law-violating conduct may be reenforced not only by an apprehended threat of punishment but also by the satisfaction of believing that others who do violate the laws will be punished. *Cf.* H. HART, THE CONCEPT OF LAW 193 (1961). *See also* Andenaes, *General Prevention—Illusion or Reality?*, 43 J. CRIM. L.C. & P.S. 176, 180 (1952) (referring to legal sanctions as reenforcements to moral inhibitions).

possess a full grasp of the law in its full technical complexity, general, nontechnical understandings of law usually perform the described reenforcement function.

B. *Communication and Obedience to Law*

Punishments are meted out for violating the law found in the statute books or in judicial decisions. The general and undetailed understanding of the law by an actor is rarely relevant to an official determination of his guilt. Yet it would be an exceptional case in which an actor's understanding of the law he is charged with violating was the same as his judge's. If we ask the reason for this dichotomy between the law that guides conduct and the law that judges it, we are likely to be met with the assertions that inquiries into defendants' subjective understandings of laws are impractical and fraught with danger, and that presupposing universal and accurate legal knowledge generally encourages the public to learn of the laws that pertain to them[3] and prevents defendants from escaping punishment by feiguing misunderstanding or iguorance.[4] But if the public in general lack knowledge of most of the legal technicalities that pertain to their respective activities, these are at best incomplete and inadequate replies.

Where do the technical complexities of the law come from? Why does the law concern itself with larceny, larceny by trick, embezzlement, and burglary rather than simply with stealing? Why is it relevant whether a stolen item was taken from the "possession" of its owner, especially when this "possession" may be a highly artificial one? Why is a "breaking" relevant? One answer to these questions lies in historical development; another answer may be that the technical criteria embodied in the definitions of these separate crimes serve to distinguish, in the forbidden activities, degrees of "badness" or of danger to others. A thief who enters a house from the outside may be more dangerous than a dishonest servant; an embezzler may be less dangerous than a holdup man. Again, especially in connection with more recently enacted statutory crimes, the legislature may define an offense in detail to minimize dispute over the scope of the prohibition. The detail serves as some insurance that the scope of the prohibition will not be enlarged in criminal trials to include, retrospectively, the conduct there

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[3] This seems to be Blackstone's rationale for imputing knowledge of laws to the public. 1 W. BLACKSTONE, COMMENTARIES *46.

[4] *Cf.* Hart, *Legal Responsibility and Excuses*, in DETERMINISM AND FREEDOM IN THE AGE OF MODERN SCIENCE 95, 108 (S. Hook ed. 1961).

being judged.[5] But the very detail that produces this salutary effect will rarely be known by the persons to whom the law applies.

In attempting to evaluate the effects of the seeming dichotomy between a detailed, technical or official version of a law and its undetailed, nontechnical or popular version, it is appropriate to consider Professor H. L. A. Hart's approach to the classic (and contrary-to-fact) presumption of universally and accurately held legal knowledge among people and among various classes and groups.[6] Professor Hart distinguishes between "primary rules of obligation" and "secondary rules." Primary rules of obligation are the rules that impose duties upon persons;[7] secondary rules provide the criteria for determining the validity of primary rules, procedures for their administration, and penalties for their violation.[8] According to Hart, primary rules must be generally obeyed;[9] by inference, the knowledge requisite for such obedience must be disseminated. He admits, however, that knowledge of secondary rules is largely confined to lawyers, judges, and government officials.[10] He thus concedes the great divergence among people in the amount and accuracy of their legal knowledge, without acknowledging the potential injustice that could infect a system in which the mass of people obeyed one set of rules but were punished for deviating from a different (and to them unknown) set of rules.

The success of Hart's approach, accordingly, depends upon his assumption that primary rules of obligation are generally obeyed,[11] which implies a corollary assumption that knowledge of those rules is generally shared by the public. Hart does not, however, deem it essential that knowledge of the primary rules be generally held; it is sufficient if they are generally obeyed. Certainly some knowledge is requisite for obeying them, but what kind of knowledge: knowledge of the laws on the statute books, or of some popular versions of those laws? Hart says that the rules which must be generally obeyed are "those rules of be-

5 Some precisely-drawn laws, however, include within the scope of their prohibitions actions that the legislature did not intend to cover. The precision in coverage is designed to eliminate disputes at trial over coverage and thus to prevent "bad" persons from availing themselves of an excuse. Those persons whose acts fall within the literal scope of the law's prohibition but whose acts are not viewed as antisocial by the legislature are expected to receive their protection from "selective enforcement" by prosecutors. *See* L. FULLER, THE MORALITY OF LAW 77-78 (rev. ed. 1969); W. LAFAVE, ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY 83-101 (1965).

6 H. HART, *supra* note 2, at 110-14.

7 *Id.* at 89.

8 *Id.* at 92-95.

9 *Id.* at 111, 113.

10 *Id.*

11 *Id.*

haviour which are valid according to the system's ultimate criteria of validity"[12] and this statement seems to connote officially-formulated rules rather than popular understandings of legal prohibitions. Here, unfortunately, for the purposes of our present inquiry, Hart fails to pursue the point suggested by his reference to general obedience to, rather than general knowledge of, primary rules of obligation.[13] Since a legal system will work as long as the primary rules of obligation are generally obeyed, it is not necessary that knowledge of the official versions of those rules be widely held. If violations of official versions of laws would be inconsistent with adherence to another set of rules, knowledge of and adherence to the latter would suffice. Observance of the command "thou shalt not steal" would produce compliance with the legal prohibitions against larceny, larceny by trick, embezzlement, burglary, and armed robbery, and knowledge of the details of these legal prohibitions would be unnecessary. Moreover, some statutory provisions, even in criminal law, may be designed as criteria for judging the lawfulness of past conduct without being intended to create standards to which people would consciously attempt to conform their future conduct. Such provisions are designed to codify moral or customary patterns of action, rather than to create new patterns. The complexities of the New York Penal Law[14] suggest that some of its provisions may be designed for this use. There is little likelihood that these provisions—which will be applied in criminal prosecutions—will be known in detail, if known at all, to most of the persons whose conduct is governed by them. But persons who observe patterns of moral or customary behavior that do not violate the Penal Law will not suffer for their ignorance; and if persons deviating from generally-accepted norms of behavior are punished because their deviations from those norms also constitute violations of the Penal Law, then that law may serve a reenforcement function with respect to those norms. This

12 *Id.* at 113.

13 The "primary rules" that are actually operative would be those rules to which people conform their conduct (*e.g.*, the biblical or popular "thou shalt not steal"), whereas the officially-formulated "primary rules" would be the official prohibitions of larceny, larceny by trick, embezzlement, and burglary. Hart's attribution of an officially-stated form to primary rules could have been avoided if he had equated "primary rules" with Austin's "positive morality" (1 J. AUSTIN, LECTURES ON JURISPRUDENCE 171-72 (4th ed. 1873)) and then used the official prohibitions of larceny and so forth as "secondary rules" with which to evaluate the lawfulness of conduct (rather than the validity of rules) performed pursuant to (or in disregard of) popular morality. Such a restatement would have brought into focus the possibilities for the infliction of undeserved sanctions inherent in a system that punishes according to a set of rules different from those that serve as guides to conduct.

14 N.Y. PENAL LAW §§ 1.00-500.10 (McKinney 1967).

brings us back to our original dichotomy between rules governing conduct and rules for determining punishment, but with a clue to a partial resolution of the problem as it was originally formulated: part of the justification for judging with one "rule" conduct guided by a different "rule" in the mind of the actor is probably that some of the details of the officially-formulated rule may tend to excuse rather than to entrap; that is, to restrict rule coverage rather than to enlarge it.

Knowledge of "primary rules" of obligation in their official versions is not widely shared by the lay public, but is confined for the most part to the judges, lawyers, and officials who possess knowledge of the secondary rules. Moreover, the popular formulations of those "primary rules" that are obeyed may vary considerably. Although Hart's suggestion that "in a healthy society [private citizens] will in fact often accept these [primary] rules as common standards of behaviour and acknowledge an obligation to obey them, or even trace this obligation to a more general obligation to respect the constitution,"[15] is true, it should be qualified. In a healthy society private citizens will often accept rules of morality whose observance is consistent with observance of officially-formulated "primary rules" of obligation. A legal system that functions as a primary motivational force imposes a greater strain upon the methods and procedures available for disseminating information about legal commands than is imposed by a system in which private citizens observe (nonlegal) moral codes or practices and thereby avoid actions violative of legal prohibitions.

We are thus brought to an initial consideration of the extent to which limitations upon the ability of a legal system to disseminate information about laws should affect the content of legislative or decisional law. That the nexus between law content and information dissemination has long been recognized as a troublesome problem is shown by a passage from Aquinas. Picking up the remarks of the ancient philosophers[16] that no legislator is wise enough to write a law that can properly be applied to every case without exception because no legislator possesses the requisite foresight, Aquinas went on to say that even if a legislator were in fact able to foresee all of the situations to which a given law might be applicable, "he ought not to mention them all [in that law] in order to avoid confusion . . . ."[17] Aquinas

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15 H. HART, *supra* note 2, at 113.

16 *E.g.*, ARISTOTLE, NICOMACHEAN ETHICS bk. V., § 10, in THE BASIC WORKS OF ARISTOTLE 935, 1020 (R. McKeon ed. 1941); PLATO, STATESMAN 315 (R. Klibansky & E. Anscombe eds. 1961).

17 T. AQUINAS, SUMMA THEOLOGICA pt. I-II, q. 96, art. 6, reply obj. 3, in THE POLITICAL IDEAS OF ST. THOMAS AQUINAS 77 (D. Bigongiari ed. 1953).

thus seemingly rejected any attempt by a legislator, commensurate with this foresight, to narrow penumbral or uncertain areas surrounding his laws.

It is easy to concede the practical inability of a legislator to foresee all of the situations to which a given law might be applicable; it is not so easy to discern, if a legislator were able to foresee all of those situations, why he should not spell them out in his law. It would seem that spelling them out in advance would eliminate rather than cause confusion; certainly it would eliminate judges' confusion over unexpressed legislative intent. Aquinas's remark would make sense, however, if what he sought to avoid was the confusion resulting from the existence of an "official" version of a law, known or accessible to judges, which, as a practical matter could not be communicated in full detail to the lay public. If the scope of the "official" and detailed version of the law was wider than one or more of its popularly understood versions, confusion would result— the bewilderment of those punished for conduct subjectively apprehended as lawful at the time of performance. Although Aquinas's distaste for detail was probably a desire to prevent misunderstood exceptions to laws and conditions excusing noncompliance with laws from subverting the influence of their prohibitions,[18] he was nonetheless referring to the "confusion" generated by laws that existed in detailed official and undetailed unofficial versions. It is a credit to Aquinas's perceptiveness of problems of administration[19] that he seems to have recognized that lay confusion over the scope of a law's prohibitions may be aggravated by increasing the detail of those prohibitions because of the impracticability of effectively communicating such additional detail to a widespread public.

That public confusion over the scope of a law cannot always be remedied by increased verbiage also suggests the existence of a correlation between methods used for disseminating information about prohibitory laws and their substantive content.[20] Laws containing detailed prohibitory commands governing conduct in situations in which

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18 This is suggested by the way Aquinas visualized the operation of a legal system. He thought that an implied exception to a general prohibition ought to receive express official confirmation before conduct pursuant to that exception took place. *Id.*, reply obj. 2, at 76. He thus seems to have assumed that official expressions of the applicability or inapplicability of a legal prohibition were easily obtainable in advance of acting. Accordingly, his concern to avoid "confusion" seems to have been directed at preserving the understanding of the more generally applicable prohibition.

19 *Cf.* H. SIMON, ADMINISTRATIVE BEHAVIOR 41 (2d ed. 1965).

20 See text accompanying notes 121 & 181-82 *infra* for the suggestion of a correlation between substantive content and enforcement resources if evenhandedness and effectiveness are accepted as governing restraints.

people customarily do not consult with lawyers may tend to have a relatively high rate of violation since the lawyer-function is often useful for clarifying the application of detailed laws to the concrete problems of the legally untrained. Such a relationship would suggest the need for careful reflection by legislators before they adopt detailed prohibitory rules requiring conduct that deviates substantially from socially-accepted norms and customs. On the other hand, if some exceptions or excusing conditions are, because of their detailed or technical nature, or for other reasons, unlikely to find their way into popular versions of the law, their encouragement of law violations—through suggesting to potential violators the possibility of avoiding punishment by claiming coverage of such exceptions or conditions—would be reduced.

Recognition of the difference between popular versions of laws and their official formulations may aid in responding to another surprisingly ancient[21] but still relevant question: should extraordinary means be taken to communicate applicable laws to persons handicapped by their social or other environmental positions in learning about them? In some circumstances, society does indeed take extraordinary means. Factories are required to post notices of rights granted to employees by the Fair Labor Standards Act[22] at prominent locations in order to ensure that the employees know of those rights.[23] The Immigration and Naturalization Service advertises on the mass media and solicits church and community organizations' cooperation in circulating information concerning the annual obligation of resident aliens to report their current status and residence.[24] Again, recognition of the difference between popular and official versions of laws as well as the frequent necessity for verbal imprecision in laws of widespread application suggests that

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21 C. ST. GERMAIN, DOCTOR AND STUDENT, dialogue II, ch. XLVI, at 254-55 (17th ed. 1787), took the view that in choosing the means for promulgating a law one could ignore impediments to learning about the law imposed by the stations in life of particular subjects. J. BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 173 (2d ed. 1907), recommended that the law

> employ any of the expedients which are necessary, to make sure that every person whatsoever, who is within the reach of the law, be apprized of all the cases whatsoever, in which (being in the station of life he is in) he can be subjected to the penalties of the law.

Accord, L. FULLER, *supra* note 5, at 51.

22 29 U.S.C. §§ 201-19 (1964).

23 29 C.F.R. § 516.4 (1970). *See* N.Y. CODES, RULES & REGS. tit. 9, § 466.1 (1969), which requires employers publicly to post notices concerning employee rights under the anti-discrimination provisions of N.Y. EXEC. LAW §§ 290-301 (McKinney Supp. 1970). *See also* N.Y. CODES, RULES & REGS. §§ 466.2-66.4 (1969).

24 8 U.S.C. § 1305 (1964).

initial warnings[25] and opportunities to comply with them may be especially desirable methods of administering laws among the poor and in other subcultures where perceptions of substantive law content may tend to deviate substantially from officially-formulated versions, as a result both of the incidence of greater-than-normal ignorance and the difference in cultural contexts supplying the content for value words employed in the laws.

Here we might observe that since these initial warnings—desirable as they are—must be administered by enforcement officials (often policemen or social workers in the case of the poor), the apparent "law" to many of the poor tends to coincide with a policeman's or a social worker's view of the applicable law. They may thus be pressed to obey "laws" that reach into, and perhaps beyond, the penumbral areas of the "official" versions of such laws in accordance with the perceptions of those laws and judgments about their applicability made by individual policemen and social workers. And when police and social worker personnel change, the asserted applicability of the laws to varying situations—and, hence, the effective content of the laws for those whose ignorance or poverty prevents challenges to those assertions—may change with them. This situation suggests that the view of "law" held by some of the poor may at times differ radically from that which prevails among middle-class property owners. The important laws to the latter concern ownership rights, landowner liabilities, and business and commercial arrangements where "laws" tend to be highly stable in both their official and unofficial versions. In these areas "law," official and unofficial, approaches Professor Mishkin's symbolic fixity.[26] But the

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[25] *Cf.* W. LAFAVE, *supra* note 5, at 92-94, who reports that the practice of an initial warning is often employed by police in some contexts in which an offender is ignorant of the legal standards applicable to him. It is interesting to compare the emerging recognition of a need to administer an initial warning before official action in the form of an arrest is taken against an offender of a criminal law with the long-held and widely-shared recognition of a need to administer an initial warning before official action in the form of a license revocation is taken against a license holder. Administrative Procedure Act § 9(b), 5 U.S.C. § 558 (Supp. V, 1970); REVISED MODEL STATE ADMINISTRATIVE PROCEDURE ACT § 14, in HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 219 (1961). Most license holders are business enterprises or professionals and LaFave's examples of police use of an initial warning procedure involved a businessman and an automobile driver. This may suggest that insufficient attention is being given to the need of the poor and other subcultures for an initial warning procedure.

[26] This represents "a widely-held symbol of law" as a "fixed body of doctrine impersonally, even mechanically, applied . . . ." P. MISHKIN & C. MORRIS, ON LAW IN COURTS 84 (1965); Mishkin, *The High Court, the Great Writ, and the Due Process of Time and Law, Foreword* to *The Supreme Court, 1964 Term*, 79 HARV. L. REV. 56, 62-63 (1965).

important legal areas to many of the unemployed poor may be loitering,[27] vagrancy,[28] disorderly conduct,[29] stop-and-frisk laws,[30] and welfare requirements[31] where, despite an arguable stability in official versions of these laws, the "discretion" of individual policemen and social workers determines the applicable law and hence the "law" perceived by the affected poor.[32] Middle-class persons may thus tend to apprehend "law" as highly stable whereas poor persons may tend to see it as highly dependent upon the personalities of particular enforcement officers.

II

INCOMPLETENESS IN CONDUCT STANDARDS

A. *The Problem Outlined*

Although people perform most of their everyday activities without legal advice, most middle-class persons probably tend to seek a lawyer's counsel prior to performing unusual acts of substantial importance. In such circumstances, legal counselling mediates between abstract "official" commands and the determination of the applicability of those commands to individual situations. This permits the effective use of a substantially higher degree of precision in laws governing those types of conduct in which people customarily seek legal advice before acting than in laws governing other types of conduct. Here, to the extent that the lawyers who are consulted are themselves adequately informed, "popular" versions of laws that differ from their "official" counterparts no longer present a potential for harm.

Where lawyers advise individual clients on the applicability of "official" versions of laws, the communication of legal information is facilitated, but there remain aspects of another communication problem (or of its perceptual concomitant to the laws' subjects): "incompleteness" in

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27 *E.g.*, MODEL PENAL CODE § 250.6 (Proposed Official Draft 1962).

28 *E.g.*, MASS. ANN. LAWS ch. 272, § 66 (Supp. 1969); *cf.* Fenster v. Leary, 20 N.Y.2d 309, 229 N.E.2d 426, 282 N.Y.S.2d 739 (1967).

29 *E.g.*, MASS. ANN. LAWS ch. 272, §§ 53-54 (1956).

30 *E.g.*, N.Y. CODE CRIM. PROC. § 180-a (McKinney Supp. 1970).

31 M. HARRINGTON, THE OTHER AMERICA 111-12 (1962) describes "hostile" administrators insisting upon strict documentation of age and residency by welfare applicants who frequently were unable to supply that documentation. Although, in Harrington's example, the general policy of strictness was adopted by the local welfare administration rather than by particular administrators, it suggests the variations in official policy that applicants would face in dealing with individual officials who exercise discretion in passing upon the satisfaction of conditions for assistance.

32 *See, e.g.*, K. DAVIS, DISCRETIONARY JUSTICE 80-90 (1969); A. KEITH-LUCAS, DECISIONS ABOUT PEOPLE IN NEED 45-46 (1957).

the legal commands. Thus, Professor Hart's essay[33] on the impossibility of completely defining many legal concepts echoes the classic philosophical position that legislators could not frame a law so detailed that it would provide expressly for the resolution of every case to which it ought to be applicable.[34] Accordingly, all laws possess, in varying degrees, marginal or penumbral areas[35] in which the application of their prohibition is possible, but uncertain. But why is this so? Why cannot a law be framed to provide in detail for the resolution of every case falling under it? In part, it is because the mix of factual circumstances that will arise in some cases cannot be predicted. Many facts will not be foreseen by the legislators. And the particular combinations of unforeseen facts and equities will impel solutions that would not be predictable in advance.

The best that legislators can do in many cases—especially those that are likely to involve mixtures of factual circumstances that present few recurring patterns—is to legislate in terms of word-referents to community or social values, and to leave to subsequent applications the working out of the detailed meaning of those referents as applied to particular sets of facts. This approach is used in many licensing and license revocation statutes.[36] It is embodied in the prohibitions of antitrust law[37] condemning (as interpreted) "unreasonable" trade restraints.[38] It is partially embodied in the New York Penal Law's criminal nuisance provision[39] and in that law's catch-all disorderly conduct and harassment provisions.[40] These value-referents reflect more than an attempt to avoid the confusion between official and unofficial commands which more detailed laws might engender; they reflect the inability of the legislature to speak more precisely. When value-referents are applied

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33 Hart, *The Ascription of Responsibility and Rights*, 49 PROCEEDINGS OF THE ARISTOTELIAN SOC'Y (n.s.) 171, 173-74 (1948-49); *cf.* G. ANSCOMBE, INTENTION 59, 61 (1963).

34 Text accompanying notes 16-17 *supra*; *cf.* L. WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS ¶ 88, at 41e (G. Anscombe transl. 1953).

35 *See, e.g.*, H. HART, *supra* note 2, at 123-25; Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 607 (1958); *cf.* R. WASSERSTROM, THE JUDICIAL DECISION 34 (1961). *See also* L. WITTGENSTEIN, *supra* note 34, ¶ 99, at 45e; *id.* ¶ 142, at 56e; Waisman, *Verifiability*, in ESSAYS ON LOGIC AND LANGUAGE 117, 117-30 (A. Flew ed. 1st ser. 1951).

36 *E.g.*, N.Y. ALCO. BEV. CONTROL LAW § 63(6) (McKinney 1970) (license issuance on grounds of "public convenience and advantage"); *id.* § 17(3) (revocation for "cause"). "Cause" would probably refer to violation of the governing statute or of the State Liquor Authority's rules. *Cf.* N.Y. CODES, RULES & REGS. tit. 9, § 53.1(n) (1970).

37 Sherman Act § 1, 15 U.S.C. § 1 (1964).

38 Standard Oil Co. v. United States, 221 U.S. 1, 60 (1911).

39 N.Y. PENAL LAW § 240.45 (1967).

40 *Id.* §§ 240.20(7), 240.25(5).

to conduct in litigation, injustice is likely to result if the referents are construed to apply in a manner contrary to the expectations of the parties—or contrary to the expectations of counsel if the parties sought legal advice before acting. But this is true principally when the legal machinery is consciously "punishing" past conduct. Thus, a businessman who is advised by his lawyer upon the probable meaning of a "reasonable" restraint but who is subsequently adjudged liable for treble damages may feel unjustly treated. Antiwar demonstrators who are advised by counsel about the probable meaning of "near" in the federal statute prohibiting some types of demonstrations "near" a courthouse,[41] but who are subsequently convicted for demonstrating too close to the courthouse, may feel a similar injustice.

In these situations no tribunal or legal institution exists for giving content to the law in a definitive manner in advance of performing action that is later judged by that law.[42] The problem, accordingly, results less from the legislature's failure to communicate its standards than from the incomplete or open-ended nature of those standards. The standards are incomplete in the sense that the norm or value embodied in the law does not precisely specify the manner of its application in particular cases that may arise under it. The value-referent is a delegation by the legislature to the public and to the courts to apply (and to give meaning to) that value; and the fairness, and to a large, if lesser, extent, the workability of that delegation depend upon the degree to which the affected members of the public (with the assistance of their counsel) and the courts attribute a consistent and coherent meaning to that norm or value. The greater the number of factors involved in the application of a value to a situation, however, the greater the likelihood that the situation may be evaluated in terms of the relevant value (such as "reasonableness") differently by different persons.[43] Emphasis on different facts, attribution of relevance to different factors, and misapprehension of facts all contribute to the in-

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41 18 U.S.C. § 1507 (1964). The vagueness of the word "near" is offset by making "intent" to interfere with, to obstruct, or to impede the administration of justice or to influence any judge, juror, witness, or court officer a component of the offense. However, any one out of many participants in a protest demonstration may find that the likelihood of his arrest and conviction may be more likely to turn on how "near" the courthouse he was than exactly what his own subjective intent was with respect to influencing the proceedings.

42 *See* text accompanying notes 83-84 *infra*.

43 *Cf.* Boyce Motor Lines, Inc. v. United States, 342 U.S. 337, 344-45 (1952) (Jackson, J., dissenting); Urmson, *On Grading*, in ESSAYS ON LOGIC AND LANGUAGE 159, 174-76 (A. Flew ed. 2d ser. 1953).

creased likelihood that different evaluations of a complex situation may be made by different persons. This likelihood increases whenever the situation is not a recurring one, so that experience with a particular mix of relevant factors in that type of situation is lacking. Thus, the failure of perceived law to converge with officially-formulated law here creates the same potential for injustice and inefficiency that we saw was created by the nonconvergence of popular and official versions of laws.[44] The situations differ analytically because in the earlier example the simultaneous nonconvergence could be explained as resulting from a failure of communication between the legislature and the affected members of the public, whereas here the consecutive nonconvergence results from an incomplete or open-ended standard embodied in the law, which is completed or filled in, in relevant part, only after the activity in question has been performed.

For sake of completeness, we must again advert to the situation in which a law may not be intended primarily as setting forth a conduct standard that is expected to be correctly self-applied by the people regulated. A reference to "reasonableness" as the governing criterion for lawful carrier rates in a statute creating a right of action for reparations exhibits an inability of the legislature to speak precisely, but in this case the delegation is not so much to the regulated public and the courts or other adjudicating bodies to arrive at the same interpretation of reasonableness as is the delegation implicit in references to matters such as "unprofessional conduct" in license revocation provisions.[45] The former statute may contemplate that the delegation is primarily to the courts to determine "reasonableness" in an after-the-fact proceeding. True, the court's judgment will redress a prior occurrence that is determined to have been inequitable only at the point of judgment. But since the redressing merely reallocates money that has previously changed hands without stigmatizing any party as a criminal, it ought not to be viewed as involving the "punishment" of anyone. Thus, no substantial injustice seems to result merely because the carrier may have acted upon a conception of "reasonableness" that differed from one subsequently determined by a court in reparations proceedings.

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44 Text accompanying notes 1-32 *supra.*

45 *E.g.*, MASS. ANN. LAWS ch. 112, § 71 (1965), *construed in* Forziati v. Board of Registration in Medicine, 333 Mass. 125, 128 N.E.2d 789 (1955) ("gross misconduct in the practice of his profession"); N.Y. EDUC. LAW § 6514(2)(g) (McKinney 1953) ("unprofessional conduct"). The New York law contemplates the issuance of rules by the State Board of Regents to give effect to the "unprofessional conduct" criterion.

B. *Legislative Intent and Developing Statutory Meaning*

A classic approach to the application of laws that are verbally incomplete is to search out meaning from legislative "intent."[46] It is apparent, of course, that the conscious but unexpressed "intent" of even a single legislator about how a given enactment would apply to particular hypothetical problems is limited. A fortiori, the conscious but unexpressed intent of a multi-member legislature is even more limited, since the attribution of conscious intention to such a body may properly be made only with respect to the overlapping—or at least the consistent—conscious intentions of its members.[47] Accordingly, intent has sometimes been sought in the context of enactment, in the problems the legislature perceived, or in the "evils" it sought to reduce or eliminate.

The context of enactment may be found in varying ways. The legislative documents and reports may help to recreate, in the minds of later actors and adjudicators, the legislature's view of the problems to which it reacted. Other documents may help to recreate other contemporary views of those problems. But later experience and scholarship may also throw additional light upon the problems with which the legislature struggled and in some cases may furnish new guides to statutory interpretation.[48] Here again we face a potential for applying different criteria for evaluating a defendant's conduct than those he or his counsel perceived at the time the conduct was undertaken. Library facilities, firm size, and the general economics of law practice

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46 Heydon's Case, 3 Co. Rep. 7a, 7b, 76 Eng. Rep. 637, 638 (K.B. 1584) (recommending "such construction [of a statute] as shall suppress the mischief [existing before the enactment of the statute being construed] and advance the remedy [chosen by Parliament]"); J. BENTHAM, A COMMENT ON THE COMMENTARIES 122-23 (C. Everett ed. 1928); *cf.* T. AQUINAS, *supra* note 17; ARISTOTLE, *supra* note 16.

47 The conscious, subjective intent, if one exists, of a multi-member legislature is a composite of the individual intentions of its members. The more the legislative action depends upon the institutional processes of government for information gathering and evaluation, or upon scholarly or other evaluations, the more justifiable it seems to infer that the actions of the individual legislators were predicated upon the conclusions and recommendations of committees or specific studies. This is not nearly so true, however, when an understanding of the problem dealt with by legislation is not dependent upon hard-to-find information or upon the conclusions of expert analysis. In the latter case, individual legislators may be more capable of evaluating the problem for themselves and may be less dependent upon committee recommendations or other studies.

48 It appears that the congressional understanding of the post-World War II merger movement—an understanding upon which the 1950 amendment to § 7 of the Clayton Act (15 U.S.C. § 18 (1964), *formerly* ch. 323, § 7, 38 Stat. 731 (1914)) was largely based—was erroneous. *See* Adelman, *Economic Aspects of the Bethlehem Opinion*, 45 VA. L. REV. 684, 685-86 (1959); Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74 HARV. L. REV. 226, 232-34 (1960).

may limit the abilities of counsel to evaluate legislative "intent" when, for example, that intent has to be pieced together from documents that are not easily accessible.[49] Limitations of education, imagination, and experience may also impede counsel's abilities fully to evaluate that intent. More rarely, defendant's counsel may have delved more deeply into legislative intent and its implications than it would be possible to communicate effectively to a judge in litigation.[50] In these situations, the defendant's conduct would be judged by a "rule" different from the "rule" to which he felt called upon to conform his action. Ideally, in the former cases the imposition of punishment ought to be limited by a construction of legislative intent that would have been reasonably apparent to the defendant's counsel before the defendant acted. The practical need to avoid creating exceptions and excuses, coverage of which may be easily feigned, may prevent the legal system from recognizing individual differences in that degree; and probably in most of these situations the defendant would have known that he was taking a risk when he acted, so that the infliction of punishment upon him is not open to the objection that he is being punished for conduct concededly proper at the time it was performed.

It is appropriate here to add a comment upon the notion of evolving statutory meaning, which has been a continuing interest of Professor Fuller.[51] Fuller seems to visualize a process of law development in which a piece of legislation suggests an incompletely-defined purpose which, against the prevailing and developing values of the society and its experiences, becomes progressively more articulated; and he would attribute meaning to unclear portions of that legislation in the light of that evolving purpose.[52] Fuller's position thus seems to me to be consistent with at least some of the lingnistic philosophers, and it can add a significant dimension to lingnistic analysis.

Because of their focus upon usage as the criterion of word meaning, Wittgenstein and the linguists have been accused of developing a

49 *See, e.g.*, United States v. Public Util. Comm'n, 345 U.S. 295, 319-20 (1953) (Jackson, J., concurring); Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 396-97 (1951) (Jackson, J., concurring).

50 Counsel may be prevented from effectively communicating to a judge a complexly-reasoned determination of the implications of legislative intent by a restriction upon brief length imposed by custom; by the need not to discourage the judge from reading the brief; by limitations upon the time permitted for oral argument; by the careless manner in which the judge reads the brief; or by the intellectual limitations of the judge. *Cf.* J. BENTHAM, *supra* note 21, at 172-75; Cohen, *The Place of Logic in the Law*, 29 HARV. L. REV. 622, 638 (1916).

51 L. FULLER, *supra* note 5, at 84-85, 145; Fuller, *Human Purpose and Natural Law*, 3 NATURAL L.F. 68, 71, 73-74 (1958).

52 L. FULLER, *supra* note 5, at 85.

static representation of meaning in which the prior (usage) experiences of a speaker supply and limit the meaning of his words.[53] But since words are themselves meaningful only as means of communication, the meaning of a word could be said to be that which is communicated to the person to whom it is addressed. The distinction between the speaker's meaning and the listener's meaning is significant here because it opens the way for a dynamic approach to analyses of communication and intention. We have already noted that a legislature's use of certain words may embody a delegation to the courts to attribute meaning to those words which the legislature itself did not.[54] Implicit in Fuller, however, is the recognition that this delegation is a collaborative process between the enacting legislature and the evolving goals and values of society, particularly as reflected in court decisions. Thus, developed "law" is something more than a court's "interpretation" of a legislative enactment even as informed by an "intent" inferred from the circumstances of enactment. It may best be described as the product of the interaction of the enactment and its imprecisely-defined goals with the effects of experience and reflection that emerge from decisions applying the enactment. The obviousness of this statement ought not to obscure the importance of giving implicit recognition, in appropriate cases, to the essential role of court participation in a course of development that may culminate in a "law" providing for results that would have been inconceivable (or even shocking) to its original authors. Clear instances in which law development surpasses conceptions that could appropriately be ascribed to liberal views of legislative intent derivable from the context of enactment may not be numerous, but they exist. The Sherman Act[55] and the commerce clause[56] furnish the most obvious examples. Moreover, in a growing number of instances the legislatures are consciously using concepts to which they attach no clear meaning but which are intended to evolve in their applications.[57]

This familiar notion of evolving statutory meaning, to which Fuller has contributed a philosophical articulation, presents again the danger that a defendant may act pursuant to one standard of conduct and yet later be judged by another standard—a standard that has evolved from the former, but that is nonetheless different from it. An expected response would be that courts attribute new content to a law every time

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53 H. MARCUSE, ONE-DIMENSIONAL MAN 178 (1964).

54 *See* text accompanying notes 33-42 *supra*.

55 15 U.S.C. §§ 1-7 (1964).

56 U.S. CONST. art. I, § 8, cl. 3.

57 *See, e.g.*, J. LANDIS, THE ADMINISTRATIVE PROCESS 68-69 (1938). *See also* K. DAVIS, *supra* note 32, at 49.

they apply it, for the meaning of every law is ultimately determined by its application. But the appropriate rejoinder here is that the attribution of "new" content to an existing law is a matter of degree, and that which can sometimes be done by stages cannot necessarily be achieved in one decision. Fuller has pointed out the essential role in law development performed by cases raising points that serve as "doctrinal bridges"[58] to other and different points. A conceptual jump from *A* to *C* may appear unwarranted, and *C* may be judicially rejected as not within the ambit of a particular law. But if point *B* arises and extends the meaning of the governing law, the jump to *C* may seem more appropriate. Thus, Fuller notes that the holding of *Shuey v. United States*[59] that a published reward offer could be withdrawn by a revocation announced with publicity equal to that accorded the offer was criticized by Pollock as "a rather strong piece of judicial legislation."[60] But, continues Fuller, given the prior case law background holding that the revocation of a reward offer was effective when "communicated," suppose *Shuey* had been preceded by a case in which a revocation was mailed to the offeree but remained in an unopened envelope on his desk. The court, in such a case, would probably have held the revocation "communicated" after the offeree had had a reasonable opportunity to become familiar with it. And had the intermediate case arisen and had it been decided as suggested, the result in *Shuey* would probably not have elicited Pollock's criticism.[61]

The scope of the logical jump from one decision to another is especially critical in those decisions that "punish" a person for engaging in unlawful conduct. Thus, the commitment of General Electric executives to jail for engaging in price-fixing[62] could not have been as easily justified without the prior course of decisions culminating in the "law" that price-fixing was per se illegal.[63] And it is the breadth of the logical jump from the "law" as it was previously declared to the "law" as declared by an adjudicator in a punishment proceeding that determines whether an accused had fair warning, at the time he acted, that his conduct was proscribed. The traditional objections to vague penal laws are based on the fear that a logical jump

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58 Fuller, *American Legal Realism*, 82 U. PA. L. REV. 429, 441-42 (1934).

59 92 U.S. 73 (1875).

60 F. POLLOCK, PRINCIPLES OF CONTRACT 23 (3d Am. ed. 1906); Fuller, *supra* note 58, at 441.

61 Fuller, *supra* note 58, at 441.

62 Wall St. J., Feb. 7, 1961, at 2, col. 2.

63 *E.g.*, United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 223 (1940); United States v. Trenton Potteries Co., 273 U.S. 392, 398 (1927).

in a criminal proceeding will result in punishments being imposed without fair warning;[64] the objections to the reasserted power of the English courts to develop common law offenses against public morality are similarly based.[65] The less precise the laws, the greater the power of an adjudicator to make a logical jump to a result that could not have been predicted beforehand, and thereby to punish (or to stigmatize as antisocial) an actor who conformed to society's demands as he and others saw them at the time he acted. The more the existence of such power is widely recognized, the less chance there is that actors will be punished pursuant to criteria of legality different from those they apprehended as possibly applicable at the time they acted; at the same time, however, the perceived risks of a variety of legal interpretations may expand the inhibiting scope of a law over larger areas of conduct than are, or ought to be, socially tolerable.[66]

III

LEGAL PENUMBRAE AND UNCERTAINTY

A. *Effects of Legal Penumbrae on Conduct*

Granted that all laws possess, in varying degrees, penumbral areas of unclarity, let us consider the likely effects of that unclarity upon conduct. In many situations, of which the antitrust and demonstration examples described above[67] are illustrative, binding official interpretative rulings are unavailable prior to taking action. In other situations, declaratory procedures may be too cumbersome, too expensive, or too impractical to be invoked, or possibly unknown to, or unconsidered by, the actors or their counsel.[68] In such circumstances, persons subject to a particular law must determine their own course of conduct after considering the possible applicability of the law's prohibition to their contemplated action.

Unless strong countervailing incentives are present, a habitual commitment to the observance of laws containing prohibitory commands, plus a fear of the consequences of violation, may induce many

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64 *Compare* McBoyle v. United States, 283 U.S. 25, 27 (1931), *with* Hall, *Strict or Liberal Construction of Penal Statutes*, 48 HARV. L. REV. 748, 758-59 (1935).

65 *See* H. HART, LAW, LIBERTY AND MORALITY 12 (1966), *commenting on* Shaw v. Director of Pub. Prosecutions, [1962] A.C. 220 (1961).

66 *See* text accompanying notes 74-80 *infra*.

67 Text accompanying notes 37-42 *supra*.

68 *See* C. HORSKY, THE WASHINGTON LAWYER 92-97 (1952); *cf.* J. BENTHAM, *supra* note 46, at 101-04.

people to make "safe" decisions—decisions to avoid conduct falling into the penumbral areas of prohibition. Through such decisions, the scope of the legal prohibitions involved—as they influence conduct rather than as criteria for evaluating past conduct in punishment proceedings —may be enlarged to embrace substantial amounts of their penumbral areas. Doubt about how the judiciary may later "fill in" unclear areas of a law may tend to expand that law's operative scope as a guide to conduct beyond the area it will occupy after the judiciary ultimately acts. Even those laws which are not properly viewed as prohibitory but which are designed to authorize courts or administrative bodies to restructure or set aside prior transactions[69] may discourage conduct that potential actors fear will probably be restructured or set aside. And penumbral areas of those laws will similarly (though to a lesser degree) act to discourage activities otherwise apprehended as desirable by potential actors, since the costs of later restructuring those activities or the costs that would be incurred as a result of their later invalidation (as well as the costs of defending challenged activities in litigation) would tend to diminish their perceived profitability or attractiveness.

Note, then, three sources that tend to extend the inhibiting scope of a law upon conduct: (*1*) uncertainty of application, which may tend to project the law's conduct effects beyond its "core" or area of certain application; (*2*) an actor's assessment (*a*) of the likelihood that a questionably covered transaction will be required to be restructured or will be set aside, and his assessment of the costs of that restructuring or rescission, or (*b*) of the likelihood that his performance of that transaction will subject him to "punishment" or other penalties, and his assessment of the nature and amounts of those penalties; and (*3*) costs of contesting an assertion by the enforcement authorities that the law applies to the contemplated transaction. The first factor may involve a moral impetus upon the will of an actor towards conformity with an officially-asserted will;[70] the second and third factors may give economic or other coercive reenforcement to the moral impetus, but they also carry an impetus towards compliance which is independent of the

[69] In many of their more novel or doubtful applications, the federal antitrust laws (note 79 *infra*) probably ought to be viewed principally as granting remedial powers to set aside transactions that are officially determined to need rescission rather than as creating standards to which conduct is expected to conform in the first instance. *Cf.* Standard Oil Co. v. United States, 221 U.S. 1, 97 (1911), where Justice Harlan, in a separate opinion, pointed out that criminal punishments cannot appropriately be imposed for nonconformity with a standard as vague as "reasonableness."

[70] A person moved by such a moral impetus would be accepting the legal standard (here expanded or contracted in scope by its uncertainty of application) as an "internal" one in Hart's terminology. H. HART, *supra* note 2, at 55.

moral question. Moreover, when the stakes are low enough relative to the costs of conducting a defense to an enforcement action, the third factor may tend to inhibit conduct even though no moral impetus is felt and even though there appears little likelihood that the asserted application of the law would be upheld on the merits if contested in litigation.

Enlarged areas of prohibition are desirable in many cases; society may need a safety margin[71] surrounding the prohibitions contained in most of the common law crimes. And the perennial refusal of equity to define fraud has been based, at least in part, upon society's need for such a safety margin.[72] That need may also have partially accounted for the reluctance of many of the ancient and medieval philosophers to recommend specificity in prohibitory rules.[73] In some areas, however, it may not be socially desirable for a law's operative prohibition upon conduct to expand very far into a penumbral area of substantial scope.[74] Thus, for example, although the public interest in the dissemination of news may ultimately be progressively defined in court decisions in libel cases, that interest may be effectively limited for many years prior to those decisions by the restraining effects upon publishers which flow from the uncertainties of predicting the responses that courts may make in libel litigation.[75] Accordingly, the importance of *New York Times Co. v. Sullivan*,[76] as expressly recognized by the Supreme Court in its opinion,[77] lies not primarily in the new criteria for liability that will be used by courts adjudicating libel actions involving political figures, but rather in how those new criteria will work in relaxing inhibitions previously felt by writers and publishers. And in *Bantam Books, Inc.*

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71 Such a "safety margin" could be visualized as an area in which conduct was discouraged, not necessarily because of social antipathy towards all conduct in that area, but because, on balance, the institutions charged with defining illegality had so far found the task of definition within that area of insufficient societal concern to justify expending effort on it. *Cf.* Euclid v. Amber Realty Co., 272 U.S. 365, 388 (1926).

72 *See, e.g.*, Leach v. Central Trust Co., 203 Iowa 1060, 213 N.W. 777 (1927). *See also* SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 193 n.41 (1963).

73 T. AQUINAS, *supra* note 17; ARISTOTLE, *supra* note 16; PLATO, *supra* note 16.

74 All laws have penumbral areas in which their application is in doubt. But the operative prohibition of those laws would tend to extend into their penumbrae in accordance with a balance between the total detriments and the total benefits expected from acting.

75 *Cf.* New York Times Co. v. Sullivan, 376 U.S. 254, 292 (1964). Bentham stated:

> I think it of use to communicate some observations concerning the conduct of affairs; but am afraid to do it, doubting, tho with the Law before me, whether what I have to say, would or would not be deemed a libel.

J. BENTHAM, *supra* note 46, at 101.

76 376 U.S. 254 (1964).

77 *Id.* at 277-82.

v. Sullivan,[78] the Court gave some implicit recognition to the third of the identified factors that tend to expand the inhibiting effect of a law over conduct. Again, business corporations sometimes may be dissuaded from entering into profitable sales transactions because of the possibility that the transactions might subsequently be held to have violated one or more of the federal antitrust laws.[79]

In other situations, however, the uncertainty of a law's application may have a different effect. When the forces countervailing a law's possible prohibitions are strong in comparison to the chances that serious sanctions will be imposed for its violation, conduct in the penumbral areas may not be discouraged.[80] Thus, for example, the difficulties of ascertaining with certainty the application of the antitrust laws to a host of business practices combined with the economic attractiveness of many of those practices mean that much activity in the areas penumbral to those laws will occur. In short, the infiuence of a law's penumbra upon people's conduct is likely to be a function of the degrees of uncertainty that they apprehend combined with the utility to them of conduct in the penumbral areas.

A final word about safety margins. Many laws and judicial decisions may be drawn as a result of imprecise analysis. Thus, for example, if a judge in a given case were to order the eviction of a penniless widow in favor of a wealthy mortgagee because to do otherwise would weaken confidence in commercial transactions generally, he would have imprecisely analyzed the necessary precedent-effect of his action; he could create an exception for penniless widows to mortgagee foreclosure rights without adversely affecting confidence in all other commercial arrangements.[81] Exceptions to law, however, have their own penumbrae;

78 372 U.S. 58 (1963). In *Bantam*, the Court recognized that a book distributor "who is prevented from selling a few titles [because of official objection to obscenity] is not likely to sustain sufficient economic injury to induce him to seek judicial vindication of his rights." *Id.* at 65 n.6. Put another way, the Court recognized that the economic injury suffered by the distributor in acquiescing to an officially-asserted objection to certain titles is often less than the economic costs he would incur in contesting those objections in litigation. The Court implied that even preenforcement challenge to the system by the distributor would be impossible for similar economic reasons. *But see* International Longshoremen's Union v. Boyd, 347 U.S. 222 (1954); United Pub. Workers v. Mitchell, 330 U.S. 75 (1947).

79 Sherman Act, 15 U.S.C. §§ 1-7 (1964); Clayton Act, *id.* §§ 12-14, 19-22, 27; Federal Trade Commission Act, *id.* §§ 41-58. *See* C. HORSKY, *supra* note 68, at 90-91.

80 *Cf.* J. BENTHAM, *supra* note 21, at 172-75.

81 R. WASSERSTROM, *supra* note 35, at 143. The judge could logically support a decision to evict on the ground that creating a special rule for widows would harm the class he wished to help by making it more difficult for widows to obtain mortgages. *Id. See* G. WILLIAMS, CRIMINAL LAW: THE GENERAL PART 347 (1953), where Williams recognizes that the "segregation from punishment" of "a defined class" will "not impair

and if a legislator or a judge is unable to frame an exception with precision he may decide either not to create it or to define it so narrowly that the penumbral area adversely affects the exception rather than the prohibition. The more experience a legislator or a judge has in a given area, the more refined distinctions will he be able to draw and the better will he be able to limit the prohibitions that he creates to the conduct actually objectionable to him.[82]

B. *The Dynamics of Legal Penumbrae*

We have previously concluded that uncertainty in meaning and uncertainty in application of legal prohibitions are likely to have conduct effects that are determined in large part by the economic and other incentives or disincentives to action experienced by the persons subject to those prohibitions. It is now appropriate to inquire how the process of penumbra clarification may affect those incentives or disincentives, and, accordingly, the substance of regulated activity. The more easily, quickly, and cheaply a person may obtain a definitive ruling upon the consequences of his contemplated action, then, all other things being equal, the more likely is it that he will seek such a ruling before he acts. Conversely, the more trouble, delay, and expense are involved in obtaining the ruling, the more will he be discouraged from seeking it.

A major reason, however, why a person may fail to obtain official views upon the legal propriety of a particular transaction in advance may be his reluctance to draw official attention to the transaction.[83] And this reluctance may not be based altogether upon a hope that the transaction will be overlooked. Sometimes enforcement officials will not react to a given transaction if they are not asked about it. Posing the question forces them to express a view about the transaction which in the absence of the question they would not express. Accordingly, a person contemplating a certain transaction may decide not to solicit an opinion from an enforcement agency because the answer might question the legality of the desired transaction, whereas if he does not inquire, no statement of illegality will be forthcoming from an official source. The decision not to inquire thus preserves the uncertainty that permits the transaction to be performed under the appearance of, or

the efficiency of the sanction for people generally." *But see* Hart, *supra* note 4, where Hart notes that the existence of an excuse or an exception to punishment may weaken the deterrent effect of a punishment by encouraging people to "take a chance in the hope that they will bring themselves, if discovered, within these exemption provisions . . . ." *See also* W. LAFAVE, *supra* note 5, at 89-91.

82 G. MILLER, LANGUAGE AND COMMUNICATION 238 (1951); *cf.* L. WITTGENSTEIN, *supra* note 34, ¶ 208, at 83e.

83 *See, e.g.*, C. HORSKY, *supra* note 68, at 93.

at least under a claim of, legality, and under a claim of adherence to the accepted morality of obedience to laws.

Other factors also discourage persons from making inquiries of enforcement officials about the legalities of particular transactions. Enforcement agencies whose substantive policies are reevaluated and modified by reviewing judicial tribunals may sometimes feel an obligation to view statutory prohibitions broadly and to rely upon subsequent judicial review to provide the necessary correctives for their broad interpretations. Asking such an agency for its opinion about the legality of a given transaction would subject the transaction to an evaluation based upon a broader, enforcement-oriented view of statutory policy rather than to a possibly narrower view of that policy which might ultimately be obtained from a court. An aura of illegality, which would have been absent were no such question asked of the agency concerned, might thus infect the contemplated transaction. Also the rendering of an opinion by an agency may commit that agency to enforce its opinion.[84] Accordingly, the soliciting of an opinion from an enforcement agency may heighten the possibility that a proposed transaction will be officially attacked.

The above considerations tend to encourage potential actors to avoid taking steps to remove those existing states of uncertainty that are conducive to the actions they desire to perform. The prospect that a contemplated transaction may be set aside or undergo forced modification if attacked by an enforcement agency, however, creates a countervailing impetus to obtain that agency's view of the contemplated transaction. Strengthening this impetus are the costs likely to be incurred if the transaction is subsequently set aside or modified and the likelihood that the enforcement agency's policies will be upheld in court. Also conducive to seeking advance agency approval are the prospects of delay, harassment, and expense that a hostile enforcement agency can impose.

Another important factor in the decision of an actor to seek (or not to seek) advance approval for a proposed transaction is his assessment that if the transaction in its contemplated form is not approved, it can nonetheless be adapted relatively inexpensively to a form that will meet with official approval. Moreover, if the transaction is so adaptable in its

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84 *See* An Interview with the Honorable Donald F. Turner, Assistant Attorney General in Charge of the Antitrust Division, in 30 A.B.A. ANTITRUST SECTION 100, 121 (1966). In an analogous manner, it has been suggested that the FTC should treat its trade regulation rules (16 C.F.R. §§ 400-19 (1970)) as not merely statements of substantive policies but as also embodying an enforcement commitment. Baum & Baker, *Enforcement, Voluntary Compliance, and the Federal Trade Commission*, 38 INDIANA L.J. 322, 355 (1963).

early stages, but would not be adaptable in its later stages, then his incentives to seek an advance official expression will be increased. Let us take some specific examples. Persons contemplating a merger of two firms of moderate size which is neither clearly lawful nor clearly unlawful under the existing authorities[85] might make the judgment that if the merger is attacked at all, it will be attacked either immediately prior to its consummation or at least shortly thereafter.[86] Acting under such a forecast, they might assess the costs of undoing or modifying the merger in its early stages against the disadvantages of seeking prior clearance for the transaction from the Justice Department.[87] They might conclude that the costs of undoing or modifying an announced or just-consummated merger would be so great that the need to ensure their avoidance would overcome the disadvantages (the risk of official agency disapproval) of seeking the prior clearance. But if the costs of undoing or modifying the merger in its early stages are not large, the advantages to be gained from not forcing a Justice Department opinion may outweigh the risks that the transaction may later have to be undone or modified.

Compare, however, the case of a sustained advertising campaign or of the development of a trade name. If the views of enforcement agencies about the lawfulness of the campaign or trade name are available to the firm concerned before it has committed a substantial and unrecoverable investment to the campaign or trade name promotion, it has strong incentive to seek out those agency views so that it can, if necessary, modify its advertising campaign or its choice of a trade name to conform to the agency's views of lawfulness. Otherwise, the firm risks a later imposition of the agency's views which may be much more burdensome than an early modification.[88] The litigation over the Mary Carter Paint Company's advertising and promotional practices, under which that company established retail paint prices on a per-can basis but publicized that it furnished a second can "free," is a case in point.[89]

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85 The area of doubt about Justice Department enforcement policy has been reduced as a result of the issuance of the Department's Merger Guidelines. U.S. Dep't of Justice, Merger Guidelines (May 30, 1968), in 1 TRADE REG. REP. ¶ 4430 (1968).

86 *Compare* United States v. E.I. duPont de Nemours & Co., 353 U.S. 586 (1957) (stock acquisition in 1917-19 period determined illegal 40 years thereafter), *with* Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 623-24 (1953) (consideration of long-tolerated trade arrangements held relevant when "monopolistic purpose rather than effect" was being gauged).

87 *See* text accompanying note 84 *supra*.

88 *Cf.* Gellhorn, *Declaratory Rulings by Federal Agencies*, 221 ANNALS 153, 157-58 (1942).

89 Mary Carter Paint Co., 60 F.T.C. 1827 (1962), *rev'd*, 333 F.2d 654 (5th Cir. 1964), *rev'd*, 382 U.S. 46 (1965).

Had the company been able to obtain a statement from the FTC of the views the Commission took in the litigation before the company had invested heavily in its continuing advertising campaign,[90] it would have had more incentive to modify that campaign to conform with the Commission's views voluntarily and less incentive to carry its resistance to those views all the way to the Supreme Court.

A generalization developed from the foregoing would suggest that an agency that communicates its standards to those persons subject to its regulatory control before they develop strong economic incentives to resist agency policies can implement those policies more effectively and with less effort and expense than an agency that waits to communicate its policies until such incentives to resistance are built up. And since the development of a policy is a *sine qua non* to its communication, the time at or during which policy development takes place may often be an important function of efficient and effective regulation. To put it more simply: knowledge of agency policies which is acquired by those subject to the agency's regulation prior to their acting tends to promote activities that conform to those policies; but knowledge acquired after action has begun may be ineffective to offset fully the economic incentives engendered by the activities themselves, which tends to discourage compliance with agency policies.

One conclusion to be drawn from these considerations is that policy development and implementation of new policy may be more effective and may cost less when it is directed to the control of conduct in a manner that tends to be prospective in fact regardless of its prospectivity in theory. I hasten to add that the prospectivity in fact of a policy, a rule, or a law is quite often a question of degree. An order setting the rates of a public utility for a period of future operation may be theoretically prospective,[91] but a substantial divergence of the new rate

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90 The company did have access to Commission objections about advertising of "free" products. *See* Walter J. Black, Inc., 50 F.T.C. 225 (1953); FTC, Guides Against Deceptive Practices: Guide V, 23 Fed. Reg. 7965 (1958); FTC Release (Dec. 3, 1953), in 4 TRADE REG. REP. ¶ 40,210 (1967). The specificity of the Commission's published statements may have led the company to assume that the Commission would not object to the advertising of "free" products which was not within the literal scope of those specific objections.

From a purely economic viewpoint the company may have had an incentive to resist implementation of the new FTC policy solely for the purpose of delay. The use of official proceedings by private parties solely to delay the implementation of official policies is a perversion of their proper use. To the extent possible, administration should be carried out in such a way as to minimize the incentives for such misuse of formal administrative and judicial proceedings.

91 *Cf.* Administrative Procedure Act § 2(c), 5 U.S.C. § 551(4) (Supp. V, 1970); Gifford, *Report on Administrative Law to the Tennessee Law Revision Commission*, 20 VAND. L. REV. 777, 784-85 (1967).

from the expectations of the investors in the utility at the time they committed their funds to it would seem to reflect a certain retroactive aspect to the new rate order.[92] Is it possible to recognize that prospectivity in fact is an important element in law administration and that prospectivity in fact is a matter of degree? Were that recognition forthcoming, we would approach the development and application of new policy with a slightly different orientation than we are presently inclined to use. An agency which subjected new conduct to a newly-developed policy but which created an exception for preexisting investment in a course of activity inconsistent with the new policy during an amortization period[93] might find its affected public more cooperative and both the effectiveness and the efficiency of its regulation increased.

The apparent unequal treatment of persons in similar positions[94] which such a course would entail might be thought to weigh against its acceptance as a valid method of administration, but a moment's reflection indicates that a person with no or very little investment in a course of conduct is in quite a different position from a person with a heavy investment in that course of conduct. The grandfather clauses scattered throughout the regulatory statutes[95] illustrate an accepted differentiation in the treatment of persons based upon investment committed to an activity prior to the time at which the legislature embarked upon a new policy affecting that activity. Administration—as exemplified especially by the Internal Revenue Service's Revenue Rulings—which applies newly-formulated policies retroactively but carves out an exception for those who relied on prior administrative advice[96] gives implicit recognition to the differentiation between a theoretical retroactivity and a retroactivity in fact. It is true that in the latter cases the differentiations in treatment may have been based upon the felt injustice of interfering with actors' reasonable expectations of how their conduct would be treated officially rather than upon the interference with effective regulation that would be engendered by widespread resistance to agency policies. And it is true that resistance probably ought not in general to be the sole factor that influences an agency against implementing one of its declared policies. But resistance or proneness to resist may

92 *Cf.* J. BONBRIGHT, PRINCIPLES OF PUBLIC UTILITY RATES 128 (1961).

93 *E.g.*, PHILIPPINE ANN. LAWS tit. 18, § 44 (1956) (prohibiting aliens from engaging in retail businesses but providing a 10-year amortization period); *cf.* 16 U.S.C. § 803(d) (Supp. V, 1970).

94 *See, e.g.*, M. GINSBERG, ON JUSTICE IN SOCIETY 7 (1965).

95 *E.g.*, 49 U.S.C. § 5a (1964); *id.* § 306(a); *id.* § 909(a); *id.* §§ 1010(a)(2)-(3); *cf.* 16 U.S.C. § 817 (1964).

96 *E.g.*, Rev. Rul. 54-172, 1954-1 CUM. BULL. 394, 401.

also reflect committed investment; and if the investment has been made in unexceptionable circumstances, then a proneness towards resistance may partially coincide with circumstances in which the formulation and immediate implementation of a new policy would, with perhaps some definitional stretching, be described as inequitable. The points must not be overstated. They are the narrow ones that (*1*) when proneness towards resistance to agency policies is uncovered, that proneness may partially reflect a felt injustice about the immediate implementation of those policies; and (*2*) efficient allocation of agency resources requires that choices among methods and areas for enforcement reflect informed judgments of where expenditures of official effort will yield a maximum of beneficial results.

C. *Uncertainty as a Regulatory Device*

If uncertainty about the applicability of laws sometimes extends the operative scope of their prohibitions, it follows that uncertainty and hence the wider operative scope of those laws will be preserved when specific criteria governing their penumbral applications are (*1*) not formulated, or (*2*) formulated but not disclosed. Recognition of the effects of legal uncertainty on conduct can lead lawmaking or policy-making officials consciously to employ that uncertainty as a regulatory device.[97]

For example, let us initially take a look at enforcement policies and uncertainties surrounding their use. Sanctions or the threat of sanctions traditionally have been viewed as an integral part of "law";[98] they perform a reenforcement function for the great majority of us who attempt to act in conformity with the laws, and they have been thought to deter transgressions by persons taking an "external" or hostile attitude towards society's laws.

We have noted that the deterrent or reenforcing function of sanctions exists only to the extent that the threat of sanctions is communicated to affected persons. A priori, the threat of sanctions (and hence the deterrent or reenforcing function) will tend to vary in its impact with the likelihood, perceived by affected persons, that the threat will or will not be carried out. The difference between a perceived and an

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[97] *See, e.g.*, L. JAFFE & N. NATHANSON, ADMINISTRATIVE LAW: CASES AND MATERIALS 407-08 (1961).

[98] Indeed, Austin would say that the threat of a sanction creates the "obligation" to obey a legal command, and that without that threat the obligation is nonexistent. 1 J. AUSTIN, *supra* note 13, at 458. *See also* J. BENTHAM, *supra* note 21, at 193; H. KELSEN, GENERAL THEORY OF LAW AND STATE 168 (3d ed. 1961); Kelsen, *The Pure Theory of Law*, 50 L.Q. REV. 474, 487 (1934).

actual likelihood suggests the first—and most justifiable—role for "secrecy" in law. Secrecy over enforcement policies and the deployment of enforcement resources (and hence secrecy over the real efficacy of a law's sanctions) can often be justified on the ground that nonsecrecy would detract from the law's influence upon conduct. For example, information about an enforcement agency's policy to reserve more serious punishments for second or repeated offenses could be publicly disseminated only at the cost of reducing the deterrent effect of the threat of sanctions for initial offenses.[99] Or, were it to become public knowledge that the police had temporarily reallocated most of their manpower to a particular section of a city, the law's deterrence in other sections of that city might be weakened.[100]

The latter example suggests the general problem presented when the number of law violations exceeds the capacity of society's enforcement apparatus to detect, to apprehend, or to prosecute. In such situations, it is arguable that maximum benefit can be derived from any given number of policemen or prosecutors (or from any fixed budget limitations applicable to a police department or a prosecuting office) when those officials concentrate their attention upon major or more serious violations. But the undesirability of publicizing an enforcement agency's practice to ignore minor violations is apparent; to the extent that the public become aware that minor offenses are not being prosecuted, the threat of sanctions will cease to discourage them. Secrecy over such a policy, therefore, may be called for. Alternatively, the police and prosecutors might consciously devote a portion of their energies to matters of lesser importance to maintain a facade of "complete" law enforcement or to create uncertainty over just where enforcement resources are allocated, thereby maintaining the law's threat of punishment for violation.[101]

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99 [T]o promulgate a regulation incorporating an agency's policy to overlook, in license revocation proceedings, minor violations of a particular character, or to impose a penalty only for a second or later violation of a particular kind, would encourage such violations.

1 R. BENJAMIN, ADMINISTRATIVE ADJUDICATION IN THE STATE OF NEW YORK 296 n.12 (1942).

100 *But cf.* Cramton, *Driver Behavior and Legal Sanctions: A Study of Deterrence*, 67 MICH. L. REV. 421, 434 (1969).

101 Professor Fuller, a vigorous critic of "secret laws" in other contexts, has not yet expressed his views as to the propriety of these possible justifications for secrecy over aspects of enforcement policies. His failure to do so is surprising since sanctions traditionally have been closely tied to law by writers and since apparent sanctions sometimes constitute a major reason why people obey laws commanding action counter to their individual interests. It is, of course, possible to abhor secrecy in those aspects of law that establish standards of conduct, violations of which will be punished, and, at the same time, to approve of secrecy over enforcement policies under the justifications raised above. Such an approach would be based upon an obvious need to publicize standards

In the situations described, the effectiveness of the laws—to the extent that it depends upon the threat of sanctions—is being maintained by a sort of public deception:[102] the public is induced to obey laws by the threat of sanctions that in reality either are nonexistent or are less likely to be imposed than they appear. More accurately, perceived threats of punishment for disobedience suggest official capacities to make good those threats that may greatly exceed the capabilities of existing enforcement institutions and may be inconsistent with the deployment of the limited resources of those institutions. Withholding information about enforcement policies applicable to a given law—or enforcing such a law sporadically—may thus increase that law's regulatory scope (by enlarging its apparent sanctions)[103] beyond what it would be if full information about the enforcement policies with which it is being administered were generally disseminated.

IV

THE NEXUS BETWEEN ENFORCEMENT POLICIES AND NORMATIVE STANDARDS

When the meaning of a law is in doubt, persons subject to that law may decide to avail themselves of the doubt, depending in part on the risks of prosecution that they perceive. Indeed, prosecution policies may be, in some situations, a prime indicator of what official enforcement policies do in fact exist. Thus, for example, the failure of the Antitrust Division to proceed against the host of requirements contracts

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of required conduct if they are to be useful in promoting conduct in conformity with these standards and the lack of a need to publicize standards used for other purposes. Although Professor Fuller seems to take this approach (L. FULLER, *supra* note 5, at 34-35, 49-51, 92), he earlier had censured "secret laws" that were not guides to conduct. The Nazi secret laws condemning innocent people to death, referred to by Fuller in *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630, 651-52 (1958), were not guides to conduct. Nevertheless, it was precisely the secret aspect of those laws (as opposed to their substantive content) that Fuller isolated as indicative of their departure from legality. *See also* Fuller, *Governmental Secrecy and the Forms of Social Order*, in NOMOS II: COMMUNITY 256, 256-68 (C. Friedrich ed. 1959).

102 The roles of deception or secrecy as devices to bring about compliance with law or otherwise to affect conduct has received attention in discussions of utilitarian ethics. *See* E. CARRITT, ETHICAL AND POLITICAL THINKING 65 (1947); Mabbott, *Punishment*, 48 MIND (n.s) 152, 156-57 (1939); Melden, *Two Comments on Utilitarianism*, 60 PHIL. REV. 508, 519-24 (1951); Rawls, *Two Concepts of Rules*, 64 PHIL. REV. 3, 10 (1955).

103 *Cf.* J. BENTHAM, *supra* note 21, at 193, where it is noted that conduct is formulated with reference to the apparent punishment associated with a law violation rather than with reference to the real or actual punishment that would be incurred as a result of a violation. *See also* I J. AUSTIN, *supra* note 13, at 458.

that probably were in violation of the antitrust laws under a strict reading of the "quantitative substantiality" test of *Standard Oil Co. v. United States* (*Standard Stations*),[104] may have indicated a Division policy of applying that test leniently to contracting suppliers.

Of course, prosecution policies may be kept secret in order to avoid encouraging law violations in areas where limited enforcement resources are not presently directed. We have observed the circumstances in which the legitimate concern of enforcement authorities with preserving a law's deterrent effects despite their limited prosecutorial capabilities was most justified: when the standard of substantive conduct to which the public was expected to adhere was relatively clear. However, where the substantive standard becomes less clear and prosecutorial policies, accordingly, represent official concerns regarding the scope of the prohibition in its penumbral areas, concealment of prosecutorial policies also obscures the official concerns that underlie them. The result is that the uncertainty of application that permeates the penumbral area—with its resultant variety of effects on the conduct of different persons—is preserved.[105]

Analytically intermediate between these extremes is the situation where the substantive standards as applied are unclear and where prosecution policies are kept secret in circumstances in which the individually- and socially-beneficial effects of disclosure of those policies would be outweighed by the socially-harmful effects of the deterrent shrinkage on other transactions. The need for this kind of balancing results partially from an official inability to make appropriate distinctions[106] among the various types of conduct falling within the literal scope of the governing statute; it could be partially relieved by the enforcement agency's enunciation of more precise conduct standards. The content of such standards could be derived from the resolution of policy questions involved in formulating prosecutorial priorities.[107] These priorities need not themselves be disclosed; prosecution policies may evidence official concerns with conduct, but because they may also reflect an inability to proceed against clear violations of the law, their public dissemination is not always desirable.[108] Nevertheless, nondisclosure of prosecution policies when substantive standards are unclear means that however much policy clarification has proceeded within the agency

104 337 U.S. 293, 314 (1949); *see* text accompanying notes 148-51 *infra.*

105 *See* text accompanying notes 68-82 *supra.*

106 *Cf.* Cohen, *supra* note 50; note 81 *supra.*

107 *Cf.* Dixon, *Program Planning at the Federal Trade Commission*, 19 AD. L. REV. 408, 410 (1967).

108 *Cf.* text accompanying notes 99-100 *supra.*

through the formulation of prosecutorial policies, the regulated public remains in the same state of uncertainty that existed prior to the clarification within the agency.

A. *Imprecision in Enforcement Policies*

An agency that has a siguificant policy-formulating function to perform can seek to perform that function in the process of adjudicating a relatively small number of cases. In these adjudications it can seek to resolve questions or apparent questions of the acceptability of conduct. This operation is, of course, the classic method by which administrative policy making is supposed to occur: an agency challenges certain activities and in an adjudication works out policy with respect to those activities which it will then apply to other cases.[109] It is able to concentrate on policy questions in the adjudication because, in the vast majority of activity regulated by it, conduct conforms to acceptable norms. This need not mean that detailed norms have been worked out or that great diversity does not permeate the "acceptable" category, but it does mean that the agency is able at least to discriminate among types of conduct even though its notions of unacceptability may be largely unarticulated. But if the agency's norms remain largely unarticulated even to itself, and therefore remain necessarily unarticulated to the public, those norms will suffice only if the behavior that the agency would find unacceptable occurs only infrequently.[110] If activity that an enforcement agency finds unacceptable on the basis of either ad hoc reactions or internally-formulated conduct-evaluation standards occurs more frequently than the agency can react against it, then agency regulation becomes ineffectual.

B. *Effects of Imprecision*

Observe that conduct can be controlled in two ways: (*1*) conduct standards can be enforced by carrying out official threats of harm to persons who violate them; or (2) conduct can be directly controlled

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109 *Cf.* SEC v. Chenery Corp., 332 U.S. 194, 201-03 (1947); FINAL REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE 29 (1941).

110 Friedman, *Legal Rules and the Process of Social Change*, 19 STAN. L. REV. 786, 799, 815 (1967), points out the interrelationship between caseload and the degree of precision in the "rules" used in case resolution. The author concludes that caseload volume can be handled by a limited number of courts and judges through (in his terminology) "quantifying" the rules; *i.e.*, making them more precise. My thesis goes beyond Friedman's perceptive insight by suggesting, as will be seen later, that the interrelationship between volume and precision has a number of facets that are connected to the problem of allocation of enforcement resources and that (relative) degrees of rule precision and imprecision should reflect the substantive importance of the conduct to which the rules refer.

through official action undoing the offensive behavior or prohibiting its repetition. For purposes of discussion, the first method will be described as "punishment" and the second as "restructuring." Official restructuring of a transaction, however, may itself be burdensome to the person whose conduct is restructured. When any significant amount of investment has been committed to a course of conduct that is later officially restructured, the actor may suffer substantial economic harm if his investment is largely unsalvageable. Accordingly, the prospect of economic or other harm from a restructuring proceeding may itself take on a "punishment" role; it may discourage conduct deviating from a standard in the same way that "punishment" does. Persons are thus encouraged to conform to restructuring standards—to use them as conduct guides—much as they are induced to conform to a standard backed by an official threat of "punishment." Restructuring standards further take on the role of conduct guides when transactions that are found in need of official restructuring are described as in "violation" of the law or legal standard authorizing the restructuring. This formula —frequently used in connection with cease-and-desist orders—encourages affected persons who possess an internal allegiance to law to attempt to comply beforehand with a restructuring standard.

Although the standard of conduct that official threats of punishment are designed to encourage must be known for those threats to be effective (and hence "rational" in the sense of constituting an effective means to an end), restructuring can "rationally" be employed both where the applicable conduct standards are known outside the enforcement agency and where they are not. Naturally, where they are unknown, conduct cannot intentionally be made to conform to them and the burden of ensuring compliance with those standards falls entirely on the officials charged with restructuring deviant transactions. But it would be rare indeed for restructuring standards to be entirely unknown. Rather, like other legal standards, they would in some degree lack precision; to that extent, they would be open to development and consequently "unknown" in varying degrees. When official policies are publicly unclarified, however, lawyers are encouraged to feel that the resolution of questions of doubtful legality is the responsibility of enforcement institutions and that, therefore, doubts about what the applicable substantive legal "norms" (for example, imprecisely-worded statutes, regulations, or judicial decisions) mean for a client's contemplated conduct can properly be resolved by the client in favor of his individual interests. The client would be advised of the doubt and

he would then decide among his alternative conduct choices, weighing in the process a risk of official attack.

This procedure is not necessarily objectionable where the conduct involved occurs in a statutory penumbral area of relatively narrow scope and where the conduct in question does not have significantly antisocial consequences. It may be especially common where official attack would take the form of "restructuring" rather than of a "criminal" sanction or other overt official "punishment." Advice by a tax attorney pointing out statutory ambiguities resolvable in his client's favor would seem to be a commonplace example. Here, the official concern seems not necessarily to be to "correct"[111] every case in which officialdom would disagree with the client's resolution of the doubtful question, but rather to ensure that the "core" meaning of the statute is complied with, and perhaps gradually to clarify policy in penumbral areas as well. Where the "penumbral" or publicly-doubtful areas invade much of the statutory prohibition, however, as was the case, for example, with antitrust in past years,[112] this procedure seems to assume in enforcement institutions unlimited abilities to perceive and to evaluate (or at least to react to) substantially all transactions that are questionable under existing publicly-known criteria of evaluation. This assumption may sometimes be at odds with the real capabilities of those institutions.

In the situation described, the actors accept a risk of later official attack. Their decisions are made, accordingly, in the light of the risks and their consequences. Such a focus by actors upon the risks of official

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111 Since the "penumbral" area is the area of doubtful applicability, the doubt in the statute's applicability may arise because official policy has not yet been made at the higher levels of administration. Accordingly, the concern of the higher-level officials could not be to "correct" every case if those officials lacked a criterion for correction and the time to develop one. There could be an official concern that every case be "corrected" by lower-echelon staff members, but this would assume that the "correction" is to be made by those lower-level officials regardless of the criteria used. The test of appropriateness of all tax decisions then becomes their conformity with the views of lower-echelon officials unless and until those officials are overruled by their superiors. Such a state of affairs would place more emphasis on the person of the decision maker than on the content of the decision, and becomes incomprehensible to third persons in situations where lower-echelon officials make unreversed but inconsistent tax policy decisions in identical cases. *Cf.* 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 4.10, at 89-91 (Supp. 1965).

112 Antitrust law has been notoriously vague in years past, largely because of its "rule of reason" approach to most problems. Hence, I have been able to extract a number of examples of the effects of uncertainty from antitrust law for use throughout this article. Within recent years the precision of the governing criteria has significantly increased as the categories of per se and presumptively per se offenses have been expanded and refined. The recent Merger Guidelines appear to have added immeasurably to the precision of rules governing enforcement policies. Note 85 *supra*.

attack recalls Professor Hart's dichotomy of "external" and "internal" rules:[113] apprehension of prosecution rather than internal assent tends to govern conduct in the penumbral areas of a statute's application. But the "external" aspect may be present even more than is suggested by the Hartian dichotomy: to the extent that precise substantive standards are lacking, an enforcement agency is in effect allocating to itself the determination of legality in individual cases. To the extent that precise substantive standards are lacking, the "rationality" of its punishment proceedings becomes open to question, and restructuring becomes the appropriate vehicle for conduct control. But to that very extent, regulation tends to cast a significant burden on the enforcement or regulating agency concerned.

When standards employed in punishment or restructuring proceedings are known in advance, regulated persons can attempt to comply with them, thereby rendering official enforcement action unnecessary. To the exent that they are unknown, however, regulation, from the viewpoints of the subjects of regulation, then becomes "external": those whose conduct is regulated cannot observe standards of which they are iguorant; an "internal" acceptance and adherence to a standard of legality is therefore not possible for them. Retention within an enforcement agency of the responsibility to determine the legality of particular transactions shifts the burden of law observance to the agency and, in a substantive area in which much activity is taking place, shifts it with a vengeance. Decision making, which under relatively precise normative standards would be performed by many individual persons or firms, must now be undertaken by the same relatively small group of agency officials. Common sense indicates that if these officials attempt to evaluate each case individually and in depth for its ultimate social worth, only a small number of cases will be evaluated. This in turn means that many cases that would be disapproved in an agency evaluation will go unreviewed and unchallenged. Agency policy will then appear erratic and arbitrary.

C. *Partially-Developed Standards*

An agency may develop and disseminate substantive standards which are precise enough for self-application in some cases but which remain unadaptable for self-application in the bulk of cases to which they pertain. (Or substantive standards furnishing an effective guide to conduct for a substantial number of cases, for a majority of cases, or for an overwhelming number of cases may be developed and disseminated.)

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113 H. HART, *supra* note 2, at 55-56, 86-88.

To the extent that the standards do not furnish a self-applicable guide to conduct, however, the enforcement agency is reserving to itself the responsibility for determining legality[114] and hence must necessarily accept the consequence that situations that cannot be reviewed or are not reviewed by it will be governed by forces other than its own individually-oriented evaluations. Whenever a rule or standard is adopted which, as applied to the facts of a given case, is imprecise enough to allow for varying interpretations, the actors will tend to balance the economic profitability or other attractions of acting against the chances of incurring the burdens of prosecution. Here the critical question becomes: are the resources of the enforcement agency adequate to correct such "externally"-made decisions where they have socially-undesirable consequences? It now becomes apparent that there is a relationship between the degree of precision in official policy, which results in a given allocation of the burden of law observance between the public and the enforcing agency, and the resources[115] that are available to the agency to fulfill the burden thereby placed upon it.

1. *Effects of Combining Precise and Imprecise Standards*

Standards are not only infinitely variable in the degree of precision with which they are formulated, but it is possible to combine standards of varying degrees of precision. Thus, in *United States v. Philadelphia National Bank*,[116] the Supreme Court adopted a presumption that any horizontal merger resulting in the aggregation in one firm of thirty percent of the relevant market was illegal[117]—a relatively precise standard. Mergers involving less than an aggregate thirty percent market share were left to be governed by the preexisting and less precise standards.[118] Here the relationship between the (relatively) precise and imprecise standards determines the division between conduct that is basically regulated by self-applications of officially-formulated standards and conduct that is allocated to individual decisions within residual,

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114 The enforcement agency reserves to itself the responsibility for determining legality if it feels free to remake or to "correct" decisions initially made in the penumbral areas by private persons.

115 The deployment of limited resources available to government instrumentalities has received increasing attention in recent years. *See, e.g.*, Smithies, *Conceptual Framework for the Program Budget*, in PROGRAM BUDGETING 2, 19 (D. Novick ed. 1964-65); Dixon, *supra* note 107. *See also* W. LAFAVE, *supra* note 5, at 144-45; *Developments in the Law—Deceptive Advertising*, 80 HARV. L. REV. 1005, 1099-1101 (1967); Note, *Program Budgeting for Police Departments*, 76 YALE L.J. 822 (1967).

116 374 U.S. 321 (1963).

117 *Id.* at 364-65.

118 *Id.* at 365 n.41.

officially-created boundaries. Hence mergers involving less than thirty percent of the relevant market were, under the *Philadelphia Bank* approach, left initially to individual judgment, guided by the "rule of reason" and prior decisions, but the outer boundary of the area allocated to individual decision lay at the thirty percent figure.[119] Control within the limits of the area to which the imprecise standard applied was primarily allocated to individually-oriented Justice Department or FTC actions.

In such situations the question whether official resources are adequate to engage in the requisite amount of individually-oriented exercises of control is crucial. At the time the Justice Department was operating with the *Philadelphia Bank* presumption, a legitimate question existed as to whether the Department resources were adequate to evaluate individual cases and to challenge the more obnoxious mergers involving less than thirty percent of the relevant market. If they were not, consideration should properly have been given to moving the presumptively illegal figure downward; but then the further question would have arisen—whether a move of the presumptively illegal standard downward would more effectively discourage the socially-obnoxious mergers only at the expense of discouraging a disproportionate number of socially-beneficial ones. The Merger Guidelines[120] issued by the Justice Department resolved these conflicting considerations in favor of a substantial lowering of the presumptively illegal figure.

2. *Effects of Reserved Power To Grant Exceptions*

The converse regulatory situation exists where an enforcement agency reserves to itself an affirmative power to approve transactions otherwise forbidden. Again a relation between the substantive content of regulation and enforcement agency resources emerges. A hypothetical case will be illustrative. Suppose a rule[121] of the FTC were to ban those vertical mergers in the cement industry resulting in the acquisition by a cement company of any firm that regularly purchases 50,000

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119 The only prior Supreme Court decision under amended § 7 of the Clayton Act (15 U.S.C. § 18 (1964), *formerly* ch. 323, § 7, 38 Stat. 731 (1914)) was Brown Shoe Co. v. United States, 370 U.S. 294 (1962), which, although it attributed substantial importance to an aggregation of five percent control in finding a horizontal merger inconsistent with § 7 (*id.* at 343-44), nonetheless seems to have taken a "rule of reason" approach to evaluating the legality of the merger.

120 U.S. Dep't of Justice, Merger Guidelines (May 30, 1968), in 1 TRADE REG. REP. ¶ 4430 (1968).

121 Although the rule discussed in the text is modeled, in part, upon an FTC enforcement policy, I have substantially altered the content of the actual rule for the purposes of my illustration. *Cf.* FTC Release (Jan. 17, 1967), in 1 TRADE REG. REP. ¶ 4510 (1968).

or more barrels of cement annually. Assume further that the Commission has reserved to itself the right to grant exceptions to this general prohibition. Such an arrangement would probably be based on the following premises: (*1*) although the 50,000-barrel rule would probably deter some socially-desirable mergers, that unfortunate effect is more than offset by the salutary effect of the rule in preventing many socially-undesirable mergers; and (*2*) the reserved power of the Commission to grant exceptions to the rule mitigates some of the harshness with which the rule would otherwise deal with socially-desirable mergers. But this is a critically incomplete statement of the regulatory consequences of the rule and the exception-granting mechanism. A third important aspect of the arrangement is the obverse of (*2*): those mergers that are not or cannot be reviewed by the Commission will be barred by the rule. The deficiency, if any, in the procedural arrangement depends upon an assessment of the social consequences of the Commission's limited capacity to review. Are too many socially-desirable mergers deterred by the general rule because the Commission lacks the resources to perform an effective reviewing and exception-granting function? Asking this question sharpens our focus upon the relation between the type of substantive regulation attempted and the available resources that the exception-granting agency can bring to bear on individual approvals.

The technique of coupling a general rule with a reserved exception-granting power has been successfully employed by a number of federal agencies. The point is, however, that the exception-granting mechanism imposes a cost (in manpower and budget terms) upon the administering agency, and the ability of the administering agency to bear that cost in combination with other and competing demands upon its resources must be acknowledged. Sometimes the cost imposed by the exception-granting mechanism is lower than the cost of other alternatives available to an enforcement agency, sometimes it may be the lowest cost alternative that does not unduly burden the general or the regulated public, and sometimes that cost may be easily absorbed in the costs of day-to-day administration. In *United States v. Storer Broadcasting Co.*,[122] *FPC v. Texaco, Inc.*,[123] and *American Airlines, Inc. v. CAB*,[124] the technique was employed in connection with license-granting policies or policies affecting the rights of licensees; it reduced the supervising agency's workload by reducing the number of individual hearings that the agency otherwise would have been required to hold.

122 351 U.S. 192 (1956).

123 377 U.S. 33 (1964).

124 359 F.2d 624 (D.C. Cir.), *cert. denied*, 385 U.S. 843 (1966).

Where licenses cannot be denied except after hearing, the agency is always burdened with the duty of holding hearings prior to negative decisions. A rule embodying a generalized non-issuance policy saves agency time, even where an exception-granting power is contained in the rule. A prohibitionary rule, however, makes hearings unnecessary where the rule is observed, whereas a reserved exception-granting power recreates a hearing burden that the prohibitionary rule alone would have avoided. Thus, it is at least possible that in some cases the costs of administering an exception-granting mechanism will be a significant administrative burden. And when the administrative costs of determining whether to grant or to deny applications for exceptions tax the capacities of the supervising agency, the most visible symptoms may be delayed approvals and a backlog of cases. Delays, coupled with whatever expenses are entailed in applying for and obtaining an exemption decision, may themselves discourage potential exemption applicants from applying. The burden of handling a large caseload in such circumstances thus ultimately falls on the regulated public who must bear the delay.[125] Crystallized exemption decisional policies, of course, ease the administrative burden of exemption decision making in the same way that crystallized prohibitionary policies or rules ease the burden of enforcing prohibitions.

D. *Resource-Conserving Effects of Precise Standards*

In the preceding pages it has been suggested that the effectiveness of regulation is dependent upon the sufficiency of official resources to proceed individually against transactions not prima facie acceptable to the governing agency under its formulated conduct standards or its unarticulated attitudes. It has also been suggested that the need for individual ad hoc actions will increase to the extent that officially-promulgated conduct standards lack precision. When an imbalance occurs between the agency's resources and the volume of transactions requiring its individual evaluation and action, regulation tends to lose its effectiveness. In such circumstances the agency must find ways to change prima facie questionable or offensive conduct into prima facie acceptable conduct. One method, of course, is for the agency, by hardening its sensibilities, to find less conduct questionable or offensive; that is, to modify its norms of (substantive) acceptability to

125 In the merger example, substantial delay and uncertainty over the result might interfere with merger negotiations based upon stock-values if price changes upset agreed-upon exchange ratios (although a vertical merger might be more likely to survive a period of delay and doubt than horizontal or conglomerate merger attempts where the merging companies may have no continuing economic tie with each other).

conform to its own capacity for individual evaluation and individually-oriented corrective action. A second approach is for the agency to articulate with greater precision, at least to itself, the types of conduct it finds objectionable.[126] This would enable it to formulate for its own use a scale of priorities concerning expenditures of its available resources of manpower and money.[127] It would then at least expend its individual evaluations on the more important matters.

Communication of the agency's more precise formulations to its regulated subjects would enable them to conform their behavior to those formulations; this, in turn, would further free the agency to deal individually with conduct falling outside the articulated zone of acceptability and help to reduce the imbalance between the agency's enforcement tasks and the resources available to it for accomplishing them. But the articulation of precise standards has a further resource-conserving impact. By narrowing or simplifying the issues in enforcement proceedings, such articulation may both shorten the proceedings and ensure greater certainty in their outcomes. These effects of precise standards would tend to inform the agency's constituents of the increased likelihood of corrective or punitive enforcement action; this, in turn, would tend to increase their incentives to comply with the reformulated policies.

E. *The Role of Private Economic Incentives*

The troublesome nature of imprecise standards, from the viewpoint of enforcement authorities, tends to increase in proportion to the size of the economic stake of the person affected by their implementation. The higher the economic stakes, the greater the impetus in regulated persons towards resolving the uncertainties of standard application in favor of the course of action to which they are otherwise committed. Moreover, high economic stakes are a strong incentive to litigate every doubtful issue in an enforcement proceeding. If, as is likely with an imprecise standard, such issues are many, the litigation burden borne by a supervising agency in an enforcement suit is substantial.[128] Finally, the temptation (engendered by high economic stakes) to delay enforcement by forcing doubtful issues to litigation[129] is offered a fertile field for exploitation by the multitudinous issues often

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126 This is the route suggested by Friedman in his notion of "quantified" rules. *See* note 110 *supra.*

127 *See* Dixon, *supra* note 107. *See also* note 115 *supra.*

128 *See, e.g.*, McAllister, *The Big Case: Procedural Problems in Antitrust Litigation*, 64 HARV. L. REV. 27 (1952).

129 *See* notes 80 & 88-97 and accompanying text *supra.*

spawned by an attempted application of imprecise standards. Accordingly, the application of imprecise standards to circumstances in which high economic stakes engender increased resistance to agency policies aggravates the resource-draining effect of voluminous enforcement suits.[130]

One solution, as we have seen, is to clarify the governing standards,[131] but another is to see that the scope of the prohibition is no wider than necessary to achieve official goals.[132] If a prohibition is unnecessarily wide, it may rule out alternative ways of reaching the same goal, some of which would be compatible with official policy. A private party faced with official hostility on one course of action will look for alternative routes. If these are open to him, the path of least resistance is to seek the alternative to which the enforcement agency does not object. Litigation is thus avoided, enforcement agency resources are conserved, and official policy is observed.

Consider the case of a sustained advertising campaign. A relatively narrow objection to a proposed promotion—for example, to the use of the word "free" to characterize a second can of paint when two cans are sold for a single price[133]—can be met by a seller without a great deal of inconvenience as long as he learns of the official objection in time to mould his advertising campaign to avoid the objectionable phrase. But an official objection to, say, sustained advertising campaigns in general,[134] leaves the seller with no easy alteruative courses by which to seek his business goals. The private party, seeing no easily available substitute course of action, is more likely to resist the policy implementation directed at him and to force it to litigation. An enforcement burden is thus imposed on the agency which, if official goals had been properly clarified and narrowed, might have been avoided. In the same vein, effective utilization of official resources ought to encourage compliance with officially-asserted policies by removing all unnecessary disincentives to compliance.[135]

130 Enforcement suits are costly in the antitrust field where the issues are often many and the cases complex. *See* the cost estimates of FTC enforcement proceedings in 209 BNA ANTITRUST & TRADE REG. REP., at A-9 (July 13, 1965).

131 Text accompanying notes 126-27 *supra.*

132 Analogously, the insistence of the FTC upon a broad, all-encompassing order would be likely to discourage the acceptance by respondents of consent orders. *Compare* FTC v. Henry Broch & Co., 368 U.S. 360, 367-68 (1962), *with* FTC v. Ruberoid Co., 343 U.S. 470, 473-74 (1952).

133 Notes 89-90 and accompanying text *supra.*

134 Perhaps on the rationale that long-term advertising campaigns increase the barriers that would be faced by a newcomer to the market.

135 *See, e.g.*, Archer, *Relationships Between Government Enforcement Actions and Private Damage Actions: The Defendant's View*, 37 A.B.A. ANTITRUST L.J. 823, 837, 842 (1968).

Precisely-drawn and generally-applicable substantive standards—necessary for self-application by many regulated persons—and prohibitions that are sufficiently limited in scope to encourage private compliance with official demands are not necessarily incompatible imperatives. As the advertising example illustrates, a narrow and precisely-drawn prohibitory rule can be formulated which will contain the official objections and yet will be sufficiently narrow to avoid bringing within the scope of its prohibition other and unobjectionable types of advertising.[136] Such a rule could be self-applied without recourse to official help, and because of the limited scope of the rule, the balance of economic incentives would tend to favor compliance.[137] Moreover, when a goal of precisely-drawn substantive standards does tend to conflict with needs for individual adjustment, the two objectives sometimes can be reconciled by the use of a precise prohibition combined with an exception-granting mechanism, although this mechanism, as we have seen, has its problematic aspects.[138]

F. *Other Effects of Imprecision*

Several tendencies connected with imprecise formulation appear also to be fostered by the permeation of conduct standards by issues that are largely "factual" in nature. Although every attempted application of a legal standard depends upon the facts to which the standard is sought to be applied, the present discussion assumes that the application of some standards requires a greater "factual" investigation than others.[139]

The effects of substantive standards whose formulation is relatively imprecise or whose application is permeated by factual issues are sev-

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136 *See* text accompanying note 133 *supra.*

137 *See* text accompanying notes 85-97 *supra.*

138 *See* text accompanying notes 121-24 *supra.*

139 Matters are "factual," for purposes of this discussion, when many issues must be determined in order to ascertain whether the allegedly applicable legal standard applies. This will frequently, but not invariably, be the case when the issues are "facts" of a low level of abstraction. Thus, for example, such close-to-life facts as who said what to whom, the detailed context in which statements were made, and background personal relationships are frequently involved in the issues presented to the NLRB. *See, e.g.*, NLRB v. Universal Camera Corp., 179 F.2d 749 (2d Cir. 1950), *vacated & remanded*, 340 U.S. 474 (1951). Compare the "factual" issues involved in assessing the legality of a corporate merger under the antitrust laws. Here the relevant "facts" are often the percentage share of the market that the merged firm would possess and the percentage shares possessed by other firms in the industry. Such "facts" are of a highly abstract kind and their use as decisional criteria permits ignoring less abstract facts similar to those confronting the NLRB.

Because "factuality," like "precision," is a matter of degree, the most that can be achieved in an analytical discussion of general scope is to elucidate tendencies rather than specific effects.

eral. First, the determination of what constitutes a violation is obscured and prosecutorial omissions of the enforcement agency are no more visible than offenses that have not been prosecuted.[140] Accordingly, it will not always be apparent that the enforcement agency has selected only one respondent out of many in the same circumstances[141] for prosecution since the delineation of the relevant circumstances will depend either upon the standards for agency action, which are imprecise, or upon the availability of testimony and witnesses, which varies from case to case. These contingencies tend to free an enforcement agency somewhat from external pressures to be consistent in its choice of respondents. Second, the relative invisibility of agency nonenforcement which is a consequence of imprecise standards and "factual" issues supports the enforcement agency's image to the public as a generally effective governmental instrumentality.[142] Third, the agency's credibility as an effective enforcement instrumentality may be preserved in the eyes of those subject to its regulation for the same reasons. Fourth, imprecise standards may be used by the agency or its officials to affect conduct in areas in which the agency is not prepared to commit substantial staff resources to enforcement proceedings. Thus, with a minimal expenditure of resources an agency or its officials may, by threatening suit or by relying on the uneven deterrent effect produced by an unclear prohibition, consciously use the uncertainty of a legal prohibition's bounds to discourage conduct in areas penumbral to it.[143]

The first effect—freeing an agency from external restraints against inconsistency—is largely a negative value. Consistency is, and always has been, a goal of law and of its administration.[144] The second effect is also a negative one; the public should not be deceived into believing that its enforcement agencies are more effective than they in fact are. An undeserved public satisfaction with enforcement agencies may deny those agencies the funds and other resources that would make them truly effective. The values of the third effect seem mixed. Impressing regulated persons with the *general* effectiveness of an enforcement

140 *Cf.* Goldstein, *Police Discretion Not To Invoke the Criminal Process: Low Visibility Decisions in the Administration of Justice*, 69 YALE L.J. 543, 551-54 (1960).

141 The FTC's selection of one out of a group of several apparently identical offenders appears arbitrary when enforcement criteria are unknown. *See* FTC v. Universal-Rundle Corp., 387 U.S. 244 (1967); Moog Indus., Inc. v. FTC, 355 U.S. 411 (1958); *cf.* K. DAVIS, *supra* note 32, at 224.

142 *Cf.* Goldstein, *supra* note 140, at 552.

143 Since it is not forced to follow a consistent enforcement policy, the agency may carry out threatened litigation against a few respondents without committing itself to proceed against all similarly situated persons.

144 *See, e.g.*, M. GINSBERG, *supra* note 94.

agency is not necessarily desirable, although it is of value that each regulated person perceive an effective enforcement mechanism in the *particular* areas in which he contemplates acting. The fourth effect—extension of regulatory control into penumbral areas without substantial expenditures of enforcement resources—requires some analysis. An enforcement threat implied in the margins of a hazily-defined prohibition or command is, as previously noted, likely to exert uneven deterrent effects upon conduct: among people in similar situations, combinations of subjective strict or narrow interpretations of the provision and of varying incentives to action may produce divergent behavior. Although the governing agency could reduce this unevenness by clarifying its prohibitions or commands, a cost-benefit approach to the use of higher-echelon agency time would suggest that high-level agency officials should devote their time to policy clarification in accordance with a priority of importance, one indicator of which would be the number of transactions that would be affected by the policy clarification.[145] The more conduct tends to fall into recurring patterns, the greater the impact policy clarification can have upon conduct, and the greater the claim it can have on the scarce time of high-level officials. Conversely, the time of high-level officials may not be most effectively employed in clarifying policies in areas where conduct does not fall into recurring patterns and where, therefore, policy clarification would tend to have little regulatory impact in terms of the number of transactions affected.[146]

Although recurring patterns of activity facilitate clarification of conduct standards, which, in turn, increases the supervising agency's power to affect or to control conduct, the impetus towards clarification is reduced to the extent that clarification will not aid the agency in its regulatory task. Thus, the absence of precise standards in areas of recurring patterns of conduct may not indicate agency satisfaction with prevailing patterns, but rather that antisocial conduct is not, in the agency's eyes, occurring on a large scale. The latter indication is siguificantly different from agency approval of existing conduct patterns, because it means that the absence of agency clarifying action may be based upon toleration of conduct patterns that are divergent or inconsistent, as long as no large-scale antisocial conduct is perceived.

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145 *See* Gifford, *supra* note 91, at 783.

146 This, in turn, raises the question why, if policy clarification is not likely to affect much conduct, would an agency maintain a rule or a particular part of a rule whose effects are minimal. The basic answer seems to be a combination of agency ignorance about the actual conduct-affecting impact of the rule and a reluctance to discard a rule until more is learned about its impact.

Take, as an example, a state statute prohibiting "discrimination" in employment. Some persons conceivably may read that statute as requiring affirmative action by employers to find and to hire members of minority groups. Others may read it as requiring employers merely to accept or to reject applicants without regard to race. Suppose some employers are in fact making affirmative efforts. An enforcement agency which, in these circumstances, does not clarify the meaning of "discrimination" indicates, by its silence, its belief that the aggregate effects of existing hiring practices are not generally opposed to the goals of the antidiscrimination legislation. Its silence, however, is consistent with a view: (*1*) that some overall affirmative effort is needed to employ minority persons, although not necessarily by each employer; (*2*) that as long as minority employment is rising, no policy decision on the meaning of the statutory term need be made; (*3*) that the statutory purpose ultimately will require affirmative efforts by every employer, but not now; or (*4*) that the statute does not require affirmative hiring efforts by any employer. Here, policy clarification is not necessary to achieve the statutory goals, and the statute remains ambiguous. In the example, the current divergence of employer hiring practices would probably not be eliminated by the agency's breaking its silence, since any employer's failure to take affirmative action would probably not be due to his interpretation of the ambiguous statute but to the absence of immediate sanctions for such failure.[147]

In other cases, where diverse conduct patterns would be attributable to varying statutory interpretations, it is the responsibility of the enforcement agency to clarify the situation by removing the statutory ambiguity. Antitrust law furnishes an example in the *Standard Stations*[148] condemnation of requirements contracts on a test of "quantitative substantiality." Some suppliers may have read that test as outlawing all requirements contracts involving large amounts of commerce.

147 Such statutes generally would penalize an employer who interpreted his statutory obligation narrowly only after the contested issue was resolved against him in a rule or cease-and-desist order and he refused to comply with his now-clarified statutory obligation. *See, e.g.*, CAL. LABOR CODE § 1426 (West Supp. 1970); MASS. ANN. LAWS ch. 151B, § 9 (Supp. 1969). N.Y. EXEC. LAW § 297 (McKinney Supp. 1970) allows some policy making in a damage proceeding. Since no penalty would attach until the scope of his statutory obligation had been clarified, an employer opposed to making affirmative hiring efforts would have no incentive to do so prior to such clarification by the enforcement agency.

In the example in the text, the agency's silence is explainable on one of the grounds (*1*)-(*4*). Disclosure of any one of these policy positions by the agency would not compel any particular employer to make affirmative hiring efforts. Nor would such disclosure dissuade any employer from abandoning affirmative hiring efforts since no more risk would be entailed in abandoning than in failing to undertake affirmative hiring efforts.

148 Standard Oil Co. v. United States (Standard Stations), 337 U.S. 293, 314 (1949).

Others may have confined the scope of the prohibition by focusing upon the strategic location of the outlets[149] involved in the *Standard Stations* case and upon the oligopolistic position of the supplier.[150] The general silence of the Antitrust Division and the FTC in the face of varying interpretations of the case did not indicate endorsement of any particular interpretation, but only administrative satisfaction that aggregate requirements contract activity throughout the economy was not so severely restraining competition as to justify the substantial diversion of agency resources from other regulatory tasks to policy clarification in this area. As in the previous example, the silence of the enforcement agencies would have been compatible with several views about "quantitative substantiality" (all of which are subsumed under the notion that aggregate requirements contract activity was not so objectionable as to justify the resource expenditures involved in policy clarification): (*1*) that some degree of restraint was required of suppliers but that most were then—because of the deterrent effect of *Standard Stations* or for other reasons—exercising the necessary restraint; (*2*) that as long as outlets were expanding in most industries, no policy decision need be made; (*3*) that although a strict policy would be needed, no such need then existed; or (*4*) that the most permissive construction of *Standard Stations* was all that the statute required.

While the enforcement agencies did not need to clarify requirements contract policy in order to bring about compliance with what, on any of the above assumptions, they deemed proper behavior, the question remains whether they should have enlightened the public about their policy, especially if it was the most permissive. Their failure to do so may have meant that some suppliers were avoiding the use of requirements contracts in the mistaken belief that they were required to do so by law. From the standpoint of promoting compliance with the enforcement agencies' views of the law, however, these agencies had no incentives to clarify the existing vagueness in the governing standard.

Besides the deterrent effect produced by implied threats of enforcement in its marginal areas, an imprecisely-worded prohibition also enables agency enforcement officials to affect behavior by threatening enforcement against penumbrally-covered conduct. An imprecisely-worded prohibition also delegates to enforcement officials the determination of its operative effects, since these officials may by their acquiescences, statements, or conversations indicate more precisely the

149 *Id.* at 304 n.6.

150 *Id.* at 309.

generic types of conduct they will treat as covered or not covered by the prohibition. Similarly, by initial warnings, threats, or clearances they may communicate more specific and individualized applications of the prohibition.[151] Such administrative techniques also insulate from judicial review conduct compliance obtained by enforcement threats and facilitate the disposition of challenges to these enforcement threats in private settlements.

From the standpoint of resource allocation, an imprecisely-worded prohibition may be more compatible with the administering agency's control over its litigation expenditures than a more precisely-worded one: in administering the former, the agency could choose when to institute or not to institute suit without creating the appearance of nonenforcement that would accompany the selective enforcement of a precisely-worded prohibition. Moreover, enforcement through judicious use of threatened (as opposed to actually instituted) suits might be the most effective way to influence conduct in substantive areas where the regulatory authority cannot allot a substantial amount of manpower or funds.

A difficulty with the last-mentioned procedure, however, might arise when an admonition from the regulatory authorities is not observed. Threatened suits are relatively costless, but carrying out threats is not. If the regulatory authorities, for whatever reason, were to feel committed to enforcing all of their admonitions and threats, then a tool that could be employed cheaply could also become a double-edged sword giving the persons threatened the power to force the enforcement agency into committing its funds and manpower to litigation where its intrinsic social and regulatory importance would not merit that expenditure. Yet such a resource misallocation may not be a phenomenon entirely unknown to enforcement instrumentalities of diverse kinds. It seems to have afflicted the police who have on occasion let challenges to their authority provoke them into arrests that consume manhours not justified by the underlying offenses,[152] and the suspicion has sometimes existed that the Antitrust Division will bring lawsuits against noncomplying advisees regardless of the intrinsic importance of the matter in dispute and regardless of whether suit would have been brought if its advice had not been given and rejected.[153]

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151 Observe, however, that the dynamics of regulatory approvals or disapprovals may impel the formulation of standardized evaluative criteria in order to cope with voluminous transactions. *See* text accompanying notes 111-27 *supra*. *See also* K. DAVIS, *supra* note 32, at 109-10. As the illustration in the Davis book shows, however, standardized evaluative criteria will not always be willingly disclosed by the officials who have formulated them.

152 *See* W. LAFAVE, *supra* note 5, at 102-04, 146-49.

153 *See* note 84 *supra*.

Whether a practice of invariably backing up scorned advice with a suit for enforcement is a defensible use of scarce enforcement resources depends in part upon the types and importance of the cases for which advice is sought and the degree to which that advice is observed. The enforcement apparatus maintains its general credibility by ensuring that its advice will be taken seriously. But we earlier observed that it is not always "general" credibility that is important. If, for example, the Antitrust Division disapproved in advance a particular transaction that was performed anyway, and the Division took no action against it, an inference would arise that with respect to this type of transaction the advance advice of the Division need not always be taken as embodying an enforcement commitment if disregarded. But if the transaction was sufficiently (and recognizably) unique, the loss of the perceived enforcement threat would not necessarily accompany the Division's advice on other transactions.

The real question is the degree of general nonenforcement implicit in a particular act of nonenforcement. An agency response to a very unique situation does not say anything about its response to other situations. On the other hand, a unique situation may be categorized by the agency for its enforcement purposes with other "unique" situations—that is, with those falling into nonrecurring patterns. If so, a lack of enforcement of advice concerning an unimportant, because nonrecurring and hence unique, situation would imply nonenforcement of advice on other unimportant and nonrecurring situations. On this analysis, enforcement of a supervising agency's advice on unimportant questions would need to be maintained in order to preserve a high level of perceived enforcement commitment on advice relating to other nonrecurring situations. Since, however, an enforcement agency can commit itself expressly or not as it chooses, it does have the option of including an express enforcement commitment in advice relating to matters that it deems sufficiently important, while relying on bluff and sporadic enforcement suits to obtain compliance with advice on matters of lesser consequence.

Explanations of the conscious use of imprecision by regulatory bodies largely depend upon whether more effective control can be achieved through imprecise than precise standards. The arguments for precise standards are that they are more capable of self-application, easier to enforce, and tend, if consistently enforced against violators, to engender a normative force that makes them increasingly self-enforcing. But since these effects are most likely to occur in circumstances in which recurring patterns of conduct are found, it will be a factual matter whether, in a given context, the most effective impact upon conduct

can be obtained from standards that are relatively precise or imprecise. Since the dichotomy between precise and imprecise standards is not complete (for it is usually possible to combine them) the more accurate question is whether, in the light of available enforcement agency resources and the amounts of these resources that would be consumed in standard clarification, the existing combinations of varying degrees of precision and imprecision are optimum from the standpoint of influencing conduct in the directions officially desired.

G. *A Caveat*

The interconnections between enforcement resources, indefiniteness of standards, and caseload volume that have been developed must now be rather drastically qualified. They must be qualified on the Hartian notion that law observance is, after all, largely a cooperative venture between lawmakers and law observers in which the latter voluntarily accept the standards made by the former as criteria by which to govern their behavior. Attention was called above to situations in which persons in like circumstances responded differently to the same law. This behavioral disparity, insofar as it was properly attributable to law, was said to raise the classic problem of justice. Now let us see how that problem can be analyzed, and perhaps partially explained away.

1. *Willing Compliance and the Regulation of Aggregate Behavior*

When standards are imprecise, and hence leave room for doubt in their application to individual cases, their acceptance by affected persons as behavioral criteria may very well result in persons in like situations acting differently because they honestly attribute differing meanings to the same imprecise standards. Sometimes, as when official standards incorporate value terms (for example, "prudence," "reasonableness," "fraud"), or are otherwise verbally imprecise, they serve as directional guides for conduct—that is, persons whose actions are affected by such guides are expected to use them as conduct-referents. But broad official directions cannot be expected to supply precise answers to factually unique situations. Thus, persons concerned are delegated the primary responsibility for applying the directions to their respective individual circumstances. The "prudent man" standard[154] of

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154 Although the "prudent man" standard is used in tort law to assess the propriety of past conduct for the purposes of allocating losses caused by accidents, it describes a normative standard—a standard of reasonable care—that most people probably feel should govern their conduct toward others at the time they act.

tort law and various "fraud" prohibitions[155] are illustrative. In those areas, government specification of the precise forms of individual behavior would be both unworkable and intolerable.[156] The societal goal is the permeation of individual activity by these values, and the forms that such activity must take in hosts of individual applications cannot be legislated in precise detail. Some latitude in individual applications of those and similar norms will necessarily result: one person will think "prudence" requires a speed of fifteen miles per hour below the speed limit in a given snowstorm; another, in the same storm, will find a five mile per hour reduction prudent; and still another will believe no reduction in speed is necessary. Yet each will consider his actions governed by a standard of prndence or reasonable care.[157]

Such latitude, however, is more descriptive or predictive than normative in the sense that the enforcement authorities do not deliberately seek inconsistent applications of officially-formulated standards. Rather, these inconsistencies should be seen as necessary concomitants of embodying an official policy in imprecise terms. Moreover, a posture of official nonrecognition of latitude in norm interpretation is preserved in the power of the governing authorities to examine the correctness of any individual norm application in an after-the-fact enforcement proceeding. Thus, in the example considered earlier, if penalties attached to violations of a statute condemning "discrimination," an employer could be penalized for following the less demanding course which was all that he believed the law required of him.[158]

It should be noted, however, that the "norm" to which the actor related his conduct when he performed it was the officially-promulgated standard, that is, the antidiscrimination, prndent man, or antifraud provisions. The "norm" applied in the enforcement proceeding is less open-ended because it is applied in a context where previously doubtful

155 Besides actual and constructive common law fraud, "fraud" prohibitions have been embodied in many places in the law. *See, e.g.*, 15 U.S.C. §§ 77q, 78o(c)(1)-(2) (1964); 3 L. Loss, Securities Regulation 1421-30 (2d ed. 1961).

156 *But cf.* Baltimore & O.R.R. v. Goodman, 275 U.S. 66 (1927).

157 Compare the varying employer conduct hypothesized in the face of the antidiscrimination statute previously described. Text accompanying note 147 *supra*.

158 This may also have been the situation involved in SEC v. Chenery Corp., 318 U.S. 80 (1943). According to Justice Frankfurter, no equity court had ever laid down a rule that officers and directors could not acquire interests in a reorganized company during the period of the reorganization. It also appeared that the Public Utility Holding Company Act of 1935, 15 U.S.C. §§ 79-79z-6 (1964), was reasonably and in good faith interpreted by the officers and directors involved not to forbid the acquisition of such interests during the reorganization period. Yet the Court indicated that the officers and directors of the Federal Water Service Corporation could be denied interests in the reorganized company on the basis of an agency application of the Act.

questions of construction are answered—the hypothetical antidiscrimination provision may require affirmative hiring efforts, the prudent man standard may require reduction of speed in a heavy snowstorm, and antifraud provisions may require full discosure of all relevant information.

If societal goals are seen as implemented through aggregate rather than through individual conduct, they are achieved when the imprecise standards are used as referents even though the referents may occasionally be applied differently in similar circumstances. There will be no need for official intervention solely because differing applications have occurred since it is general rather than individual conduct which is being officially controlled. In the situation described, the supervising agency tolerates latitude, within limits, in the interpretation and application of a standard. In one sense, therefore, the agency is not "regulating" conduct; it has delegated the interpretation and application of the standard to those subject to it. Within limits of toleration, behavior may be influenced by apprehension of sanctions (whose application may be unlikely), but within those limits conduct is basically influenced by voluntary, internalized acceptance of the official standard as a behavioral referent and by the individual (and not necessarily consistent) interpretations and applications of that referent by regulated persons.

Accordingly, conflicting individual applications of the standard will call for official intervention through an enforcement or restructuring proceeding if the conflicting behavior brings into question the workability of the standard as a general conduct guide. Do the general prohibitions of discrimination and of fraud have an adequate impact on conduct? Are they effective directional guideposts?[159] Official intervention will be called for if an individual application attains such notoriety that it threatens the workability of the standard as a conduct guide; it will be appropriate, as an educative tool, when the agency sees a need for a clarification of the standard; it will also occasionally be necessary as reenforcement. The reenforcement function can best be reconciled with fairuess towards the person proceeded against when the standard as applied in his case—in the context of custom, usage, legislative history, and the facts peculiar to the case—involves a "core" application of the standard, one in which doubtful questions of interpretation are absent. From a purely functional viewpoint, it is, of course, unnecessary that no doubtful questions of interpretation have impregnated the conduct proceeded against, and indeed the practice of resolving such questions in enforcement proceedings will encourage

159 *Cf.* L. WITTGENSTEIN, *supra* note 34, ¶ 242, at 88e.

the development of a safety margin around an area of prohibited conduct, and thereby strengthen the effectiveness of the core prohibition. However, punishment imposed with respect to conduct whose illegality was clarified only after the fact, does, as we have seen, raise problems concerning the fair treatment of an accused.

In the situation described, where some latitude in interpretation is tolerated within outside limits, the workability of standards is determined by how well they serve to guide conduct. Imprecision may be acceptable not only when, as we have already seen, it affects a small share of the cases, but also when the conduct that is attributable to the imprecise standard is, in the aggregate, socially tolerable. Professor Friedman has told us that any but the most precise—"quantified"—standards break down when they are subjected to constant testing at the margins; a standard that may be adequate for dealing with a few cases becomes grossly inadequate for dealing with hundreds because voluminous applications of any standard expose its inability to make appropriate distinctions.[160] But relatively imprecise standards, like "prudent man," or indeed "fraud," may survive voluminous applications when these applications are not compared, one with another. The "prudent man" standard works, and makes sense, because the reference in each case is back to the original imprecise standard and not to each of the many cases in which the standard has been specifically applied and "elaborated."[161]

When a supervising agency attempts to seize control of a behavioral area, consciously or unconsciously attempting to reserve to itself the final decision as to the propriety of every transaction—by restructuring nonconforming transactions, threatening punishment proceedings against persons contemplating transactions of which the agency disapproves, or actually bringing punishment proceedings against every violator of its standards—it faces the work overload discussed above that will exert an imperative towards precision in standard formulation.[162] When its restructuring or punishment proceedings are designed less for precise "control" over every incident than for the "education"

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160 Friedman, *supra* note 110, at 815, 818.

161 In normal activity, a person attempts to be "prudent" or to use "care"; he does not compare his contemplated conduct with that of others or with court decisions. Similarly, judges and juries apply a "prudent man" standard in negligence cases. They do not attempt to refine the standard for use in other cases nor do they seek to relate their own decision to the outcome of previous cases. This process is analogous to that used by courts of civil law countries, which, in each case, rely on the original code provision rather than the decisions that have elaborated it.

162 *See* text accompanying notes 152-53 *supra*.

of its public about revisions in those standards, the pressures for precision that volume exerts are eased. Volume-generated pressures may remain to the degree that the agency seeks to assert a high degree of control not only over conduct beyond the outer limits of toleration, but over the exact limits of toleration themselves. The agency may use its "educational" role as a normative guide for its own conduct in deciding when and where to bring enforcement actions or to issue rules and policy statements. This use, combined with the agency's perception of punishment-administering and conduct-restructuring as largely reenforcement activities subservient to a primary goal of promoting voluntary compliance with agency standards, may help ease the pressures generated by the factors of case volume, verbal imprecision in standards, agency resources, and the traditional imperative of equality of treatment.

2. *Educationally-Directed Proceedings*

Proceedings brought for their "educational" value have their own imperatives. They will fail of their purpose if their outcomes confuse rather than clarify. Sometimes a proceeding with a thrust inconsistent with an earlier decision is a necessary corrective to the regulated public's use of the earlier decision as a conduct guide. Here the "inconsistency" is better described as "modification" of a behavioral standard than as a contradiction of it. But if the impact of a decision is so to confuse that fewer people are acting as the governing agency wishes after the decision was rendered than before, then the educational objective of that proceeding has obviously failed.

Educational proceedings make sense when they create or clarify standards that regulated persons accept as conduct-referents. To do this the proceedings must be generalizable to other situations. Some factors in an official proceeding must be sufficiently relevant and applicable to other cases that the proceeding, principally through its decision and accompanying opinion, creates or clarifies standards and thereby makes official policies more self-applicable by regulated persons. Otherwise, an official proceeding has relevance only to the case at hand—and hence contributes nothing to the ability of regulated persons to govern their own conduct. Often one will encounter the tendency of many administrators to speak of the siguificance of each case as largely confined to its own "facts."[163] Of course, every case is distinguishable on its "facts," but there must be connecting analytical links—connecting rationales for the decisions—or else each case is purely a unique event having no

163 *Cf.* 1 K. DAVIS, *supra* note 111, § 4.16, at 110-11.

regulatory significance for other equally unique events under the general supervision of the same enforcement agency, and the burden of law observance is borne to an undue extent by that agency.[164] Referring to every case as a unique regulatory event may betray a restricted view of the agency as playing primarily a "managerial" rather than an educational role,[165] and one perhaps in excess of its real capacity to administer. In fact, many agencies with restructuring powers—for example, the power to issue cease-and-desist orders—sometimes tend to see their function as principally a restructuring one that does not involve the creation of standards for voluntary application by others. But such a view of regulatory authority cannot withstand the resource-expenditure analysis that we have already considered.

H. *Standard Development, Delegation, and Secrecy*

The interrelation between the substance of officially-promulgated normative standards and the resources entrusted to the body charged with their enforcement possesses a time dimension in which rule indeterminacy because of nondevelopment meets rule indeterminacy because of officially-maintained secrecy. This time dimension is also related to the process by which evaluation standards used by officials can develop into normative standards by which the public regulates itself. Let me be more explicit. The policy of a government enforcement agency develops over time. In agencies charged with policy development, initial steps in the development process frequently are made by lower-echelon staff members: unless the rule concerns a matter of great import, an efficient allocation of agency resources may call for delegation of less important matters to these lower-ranking personnel. Accordingly, such personnel may often formulate rules governing their own behavior in relation to the regulated public.

In performing its enforcement function, an agency that normally acts on the basis of complaints submitted to it (such as the FTC)[166] may be substantially guided in its prosecution decisions by the recommendations of its lower-echelon personnel. Internal rules governing agency responses to given categories of complaints may be drawn at low staff levels and these rules may never involve the Commission or its higher-level staff members. The result is that nothing emanates from the Commission suggesting that certain forms of conduct—lawful under

164 *See* text accompanying notes 126-38 *supra*.

165 *Cf.* Fried, *Two Concepts of Interests: Some Reflections on the Supreme Court's Balancing Test*, 76 HARV. L. REV. 755, 762, 771 (1962). *See also* note 181 *infra*.

166 *See, e.g.*, Auerbach, *The Federal Trade Commission: Internal Organization and Procedure*, 48 MINN. L. REV. 383, 393-96 (1964).

the lower-echelon policies—are illegal. Since the burden is on the Commission to act if it wishes to prevent conduct, this type of delegation of authority may give to lower-echelon personnel the power to withhold action that would bring areas of conduct under the scrutiny of the supposed "policy-making" echelons of the agency. If those lower-echelon personnel have the power to bring (or to refrain from bringing) issues to the attention of the higher-ranking "policy makers," the nonexercise of that power may sometimes mean that no official action is taken to clarify doubtful standards of conduct. Since this in turn means that regulated persons are left to make their own interpretative judgments about how these standards apply to themselves, some will construe the law more harshly against themselves than will others and persons in like situations will be guided by different conduct standards.

Although this result is at odds with the classical ideal of "justice" under which the same "law" would be applied to people in similar situations,[167] and may be at odds with a more modern concern with the "effectiveness" of attempts at conduct control, the application of different "law" is ultimately due to the failure of the policy-making arm of the agency to clarify the applicable conduct standards, and that failure may be a function of a need to allocate the limited time of the policy-making echelons to more important tasks. The failure of the FTC and the Justice Department for many years to clarify their own policies on the appropriate degree of control that a manufacturer might exercise over the selling territories of its dealers[168] can perhaps be justified on the ground that the policy-making echelons in those agencies were preoccupied with more important matters. And, whether or not the policy-making echelons address themselves to further resolution of particular regulatory problems—such as formulation of standards governing vertical mergers in the cement industry,[169] filling in the questions left unanswered in *United States v. Arnold, Schwinn & Co.*,[170] or formulating rules governing the use of the word "free" in advertising[171]—depends in part upon whether lower-ranking officials bring these matters to their attention. This may depend in turn on judgments by the lower-ranking officials as to whether higher-level con-

167 M. GINSBERG, *supra* note 94.

168 *See, e.g.*, White Motor Co. v. United States, 372 U.S. 253 (1963), in which—73 years after the enactment of the Sherman Act—the Court observed that the case was the first one brought before it "involving a territorial restriction in a vertical arrangement." *See also* United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967).

169 FTC Release (Jan. 17, 1967), in 1 TRADE REG. REP. ¶ 4510 (1968).

170 388 U.S. 365 (1967).

171 FTC Release (Dec. 3, 1953), in 4 TRADE REG. REP. ¶ 40,210 (1967).

sideration of such problems is required or whether they can be effectively and correctly disposed of at the lower levels. Thus, for example, if lower-level Justice Department officials accept dealer handling of a token amount of competing products as compliance with the *Schwinn* insistence that a dealer accept consignments from more than one producer,[172] the question of how large a proportion of competing products a dealer must handle in order to bring himself within the permissive *Schwinn* rule governing consignment arrangements may not be pressed upon the higher echelons for decision. The Department may then leave this question of "tokenism" unanswered.

A variation of this type of process occurs when lower-ranking personnel do indeed take unusual matters to the policy makers or when the policy makers periodically review the work of their subordinates. Here a decision to refrain from clarifying policy in certain areas, such as in refinement of the *Schwinn* problem or in private brand price discrimination,[173] is more clearly that of the policy makers themselves. They may avoid clarification in the face of private activities in these areas by deciding to leave them unchallenged, in which case they may be implying that their time can be more productively spent upon more important tasks. The result is that many questions necessarily remain unclarified and the regulated public is frequently left to its own devices in deciding whether to embark upon particular courses of conduct in areas that are nominally subject to regulation.

Individual assessments of the prohibitionary scope of vague or ambiguous standards conflict with the functions of the regulators unless the vagueness or ambiguity affects only a fringe area of conduct safely beyond the realm of that to which the agency objects. Such de facto delegation to individual persons or firms to apply a vague or ambiguous law to themselves may be objectionable to the extent that their expectations are jeopardized by the power of an enforcement agency later to make its own construction of that law in a punishment or restructuring proceeding. Aware of the possibility that unless the application of vague or ambiguous standards is clarified beforehand the enforcement agencies may subsequently place an adverse construction on a presently vague standard, businessmen and others frequently demand clarification of the relevant legal standard before they undertake potentially affected transactions. But, as noted above, agency officials primarily charged with policy determination may not be prepared to devote their own time to many of the needed clarifications; and yet

172 388 U.S. at 381.

173 FTC v. Borden Co., 383 U.S. 637 (1966).

they probably feel that to delegate policy-making responsibility to others would be to forfeit their own functions.

How then can the private demands for certainty be reconciled with unclear agency standards and with the limited time of the principal policy makers? One way is for the agency's policy makers to delegate to relatively subordinate personnel the power to answer individual inquiries while committing the agency to honor the replies so given. Such an arrangement is familiar. It is followed in the SEC,[174] and is highly formalized in the Internal Revenue Service's rulings procedures.[175] Notice, however, that the reconciliation of private demands for certainty with official uncertainty is carried out by committing the agency involved to its answers only in the particular cases addressed; the agency remains uncommitted to persons to whom it has not addressed its advice individually. Indeed, the Internal Revenue Service is quite explicit in denying that one can properly rely on a ruling given to another person; it even goes so far as to state that the Service does in fact ignore relevant precedent created in its rulings processes.[176]

Advice from the SEC is said to involve higher-echelon officials, including at times the Commission itself, when the importance of the matter warrants it (or when an inquirer insists upon it),[177] but full-scale evaluation of the regulatory area concerned may result in policy conclusions different from those embodied in answers to particular inquiries. The system of secret advice in force in the past nonetheless may have had the effect of preserving the Commission's freedom from commitment: in an individual case that agency committed itself only to the particular person addressed, and the agency ensured that its commitment was so limited by refusing to make that ruling public.[178] Until recently, the FTC's strange advisory rulings system preserved the utmost freedom from commitment by that agency; the secrecy of the rulings were jealously gnarded[179] and the Commission answered only a relative handful of inquiries.[180]

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174 3 L. Loss, *supra* note 155, at 1844, 1894-95.

175 *See, e.g.*, Caplin, *Taxpayer Rulings Policy of the Internal Revenue Service: A Statement of Principles*, N.Y.U. 20TH INST. ON FED. TAX. 1 (1962); *cf.* 1 K. DAVIS, *supra* note 111.

176 *E.g., Introduction* to 1970 INT. REV. BULL. No. 45, at 2.

177 *See* 3 L. Loss, *supra* note 155, at 1894-99.

178 *See* SEC Securities Act Release No. 4924 (Sept. 20, 1968). The SEC has now adopted a policy that would make no-action and interpretive letters public records. SEC Securities Act Release No. 5098 (Oct. 29, 1970).

179 The FTC has amended its rules to allow publication of advisory opinions and requests for such opinions. 16 C.F.R. § 1.4 (1970).

180 The Commission issued two advisory opinions in 1964; nine in 1965; 93 in 1966; 52

Under these arrangements, until the time that the enforcement agency is prepared to commit itself on a particular issue, the "law" for some is different from the "law" for others. Those who have had the initiative or foresight to request an advance ruling may receive favorable responses and, accordingly, avoid the burdens borne by those who, out of ignorance or inertia or other cause, fail to request an advance ruling and rely instead on their own or their lawyer's interpretation of a doubtful legal point, construing the "law" less favorably to themselves. Here an agency of the legal system is administering "law" in a way which not only operates to treat equals unequally, but which is consciously designed to do so.

This practical compromise between needed administrative flexibility and the demand of private persons for certainty thus sometimes seems to require for its development the unequal treatment of equally situated persons. The decision of how all persons in a similar situation should be treated is too weighty a matter to be entrusted to low-level civil servants; only the decisions applicable to those few who actually make affirmative inquiry should be entrusted to them. Policy development in such an administrative context is, accordingly, significantly different from policy development in the judicial context. The courts also develop policy over time and they too are often reluctant to commit themselves before they are ready. They gnard their needed flexibility in a process of judicial restraint. Although their policies may be developed slowly, however, they are developed in full public view. Many unclarified questions provoke differing interpretations by affected persons and thus the judicial process sometimes results in different people applying to themselves the differing norms that they have construed from a judicial opinion. But the development of administrative policy promotes the application of differing norms to identical conduct, not because different persons construe differing operative norms from the same open-ended, publicly-disclosed langnage, but because a legal institution—the governing agency—speaks differently to different persons.

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in 1967; 157 in 1968; and 86 in 1969. 1 TRADE REG. REP. ¶ 50 (1970). If the number of advisory opinions grows, the FTC's ability to clarify its standards both for itself and for public consumption should increase.

It may not be proper to compare the relatively small number of FTC advisory opinions with the "thousands" of advisory opinions given each year by the SEC staff and the 30,000 to 40,000 tax rulings issued each year by the Internal Revenue Service because the FTC advisory opinions are issued by that Commission itself rather than by its staff, and because the FTC staff will readily discuss particular problems with inquiring lawyers. *See* 3 L. Loss, *supra* note 155, at 1895; F. ROWE, PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT 477 (1962); Caplin, *supra* note 175, at 9.

CONCLUSION

In sophisticated systems of regulatory control, giving content to a substantive standard tends to transfer decision making from officials to regulated persons. If effectiveness and even-handedness are seen as desirable guides to administration, they tend to be viewed as restraints limiting the content that can be placed in a substantive standard. That content appears to be a function of the amount of resources that a supervising agency has available to it and is willing to commit to the enforcement of that standard, and the receptiveness of affected persons to the standard. That receptiveness is, in turn, dependent upon the ease with which affected persons can orient their affairs to comply with the standard. In short, there seems to be a three-way relationship between resource expenditure, effectiveness of control, and substantive standards.

If resource expenditure is constant and substantive standards are also viewed as constant, regulation becomes increasingly ineffective when resistance to the standards exceeds the ability of the agency to proceed against offenders. If effectiveness is accepted as an operational restraint, then the relationship becomes one between resource expenditure and the content of substantive standards.[181] But it is necessary to

181 Professors Rawls and Fried, in differing contexts, have attempted to show a relationship between the necessity for logically consistent decisions and the permissible substantive content of those decisions. Rawls, in the course of a defense of a rule-oriented form of utilitarian ethics, finds that the need to formulate decisional criteria for application by an administrative body exerts a constraint over the types of decisional criteria that it can be authorized to use. Rawls, *supra* note 102, at 11-13. Fried, in discussing the "role" of the United States Supreme Court, asserts that the Court's role is determined by the way in which the Court frames the issues for its decision. Fried, *supra* note 165, at 762. The more particularistically the Court decides certain constitutional questions, the greater the managerial role it asserts over a plenitude of questions. For example, in deciding a contest between a congressional investigating committee and a recalcitrant witness, the Court asserts a more modest role in determining generally the extent of the legitimate interests of such committees in obtaining knowledge and the extent of the legitimate rights of witnesses to withhold information than it does by determining, on the basis of reasons limited to the case before it, whether a particular bit of information must be disclosed. In the latter case, it asserts a general managerial authority over both congressional and individual prerogatives. Since the scope of the Court's managerial role is functionally related to the substantive decisional criteria that it employs, the choice of the latter role is constrained by constitutional limitations.

Simply put, Rawls and Fried have found that procedural limitations (in a broad sense of the phrase) affect substantive decisions. Both Rawls and Fried find the use of categoristic (*i.e.*, nonparticularistic) approaches to decision making required; Rawls in the ethical-rule system that he is defending; Fried in the constraint exerted by the limited "role" that the Court is constitutionally permitted to exercise. Both then find that the necessity to follow categoristic as opposed to particularistic approaches to decision making exerts an influence over what the substantive content of those decisions can be. In our analysis we have found a categoristic approach to administrative decision making required

modify this relation by focusing upon the internal acceptance of legal standards as a widespread phenomenon and yet, at the same time, to recognize the latitude in application that imprecise standards facilitate. Hence, there is an official educational function to elucidate conduct standards which is different from enforcement and which might be an official concern on a par with enforcement proceedings or restructuring objectionable behavior. This is especially true in areas—such as antitrust—where private enforcement actions can follow official standard creation. But educational objectives themselves exert a tendency towards precision in standard application. Recognition of a relation between the official need to facilitate and encourage conduct conformable to official views of acceptability and the constraint of limited official resources may generate a greater degree of official consciousness that precision in policy formulation is a tool that, where employed in a sophisticated fashion, may produce greater regulatory control than presently exists.

Recognition of the interrelations between substantive content of standards, the resources available to enforce them, and the supervising official agency's educational role may constitute the beginning of an attempt to come to grips with the common complaint that many administrative agencies have failed to clarify their standards.[182] The first step in finding a remedy for unclarified standards is to identify their causes and the circumstances in which such standards can be expected.

Recognition of the relationship between resources expended and the substantive content of regulation would seem to direct both the agencies and their critics to choose priorities among substantive areas and degrees of substantive control to be exerted in those areas. Where can the agency obtain the most socially-beneficial impact within its staff and budgetary constraints? Agencies and their critics ought to recognize that undeveloped standards in a substantive area ought to reflect a low priority of regulation in that area. It should reflect official unconcern either for the area itself or with the details of conduct in the area. In either event, the agency should be saying through the medium of undeveloped standards that for the present it is concerned only with the more flagrant cases in the areas affected by those standards. This emphasis upon priorities, in turn, suggests a focus upon

by the need to use limited budget and personnel resources effectively. The latter constraint, if recognized by a perceptive administrator, should exert a more powerful influence over substantive standards than would the decisional constraints discovered by either Rawls or Fried.

182 *E.g.*, Friendly, *The Federal Administrative Agencies: The Need for Better Definition of Standards*, 75 HARV. L. REV. 863, 867 (1962).

planning. Although long-range planning has not been a particular forte of many agencies in the past, recognition of the underlying three-way relationship among agency resource expenditures, effectiveness of control, and the substantive content of regnlation gives a new importance to planning.

The need for planning is incidental to the three-way relationship described. But the significance of even this relationship ought not to be overstated. At present it is probably more useful in evaluating what officials could do than what they in fact do. Moreover, some agencies, such as the NLRB, may find that standards can best be developed by dealing case-by-case with individualized factual situations and that the emergent standards are unlikely ever to bear a significant relation to a cost analysis of various official regnlatory options. Other agencies, such as the SEC, may find that standards and long-range goals emerge from in-depth studies of particular substantive areas rather than from cost analysis as such. However, the three-way relationship does, by furnishing a gnide to substantive standard content within a regnlatory system, provide a theoretical tool for relating the practical problems of administration to the problems of communicating laws and legal policies from officials to affected persons.