

EIGHT WAYS TO FAIL TO MAKE LAW

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

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

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

Becoming aware of his limitations, Rex gave up the project of a code and announced to his subjects that henceforth he would act as a judge in any disputes that might arise among them. In this way under the stimulus of a variety of cases he hoped that his latent powers of generalization might develop and, proceeding case by case, he would gradually work out a system of rules that could be incorporated in a code.

Unfortunately the defects in his education were more deep-seated than he had supposed. The venture failed completely. After he had handed down literally hundreds of decisions neither he nor his subjects could detect in those decisions any pattern whatsoever. Such tentative toward generalization as were to be found in his opinions only compounded the confusion, for they gave false leads to his subjects and threw his own meager powers of judgment off balance in the decision of later cases.

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

Stunned by this rejection Rex undertook an earnest inventory of his personal strengths and weaknesses. He decided that life had taught him one clear lesson, namely, that it is easier to decide things with the aid of hindsight than it is to attempt to foresee and control the future. Not only did hindsight make it easier to decide cases, but-and this was of supreme importance to Rex-it made it easier to give reasons. Deciding to capitalize on this insight, Rex hit on the following plan. At the beginning of each calendar year he would decide all the controversies that had arisen among his subjects during the preceding year. He would accompany his decisions with a full statement of reasons. Naturally, the reasons thus given would be understood as not controlling decisions in future years, for that would be to defeat the whole purpose of the new arrangement, which was to gain the advantages of hindsight. Rex confidently announced the new plan to his subjects, observing that he was going to publish the full text of his judgments with the rules applied by him, thus

meeting the chief objection to the old plan. Rex' s subjects received this announcement in silence, then quietly explained through their leaders that when they said they needed to know the rules, they meant they needed to know them *in advance* so they could act on them. Rex muttered something to the effect that they might have made that point a little clearer, but said he would see what could be done.

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

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

Once again the code was withdrawn for revision. By now, however, Rex had lost his patience with his subjects and the negative attitude they seemed to adopt toward everything he tried to do for them. He decided to teach them a lesson and put an end to their carping. He instructed his experts to purge the code of contradictions, but at the same time to stiffen drastically every requirement contained in it and to add a long list of new crimes. Thus, where before the citizen summoned to the throne was

given ten days in which to report, in the revision the time was cut to ten seconds. It was made a crime, punishable by ten years imprisonment, to cough, sneeze, hiccough, faint or fall down in the presence of the king. It was made treason not to understand, believe in a correctly profess the doctrine of evolutionary, democratic redemption.

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

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

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

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

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

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

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

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

The Consequences of Failure

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

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

¹ The Sociology of Georg Simmel (1950). trans. Wolff. §4, "Interaction in the Idea of Law" pp. 186-89; see also Chapter 4, "Subordination under a Principle," pp 250-67. Simmel's discussion is worthy of study by those concerned with defining the conditions under which the ideal of the rule of law" can be realized.

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

The citizen's predicament becomes more difficult when, though there is no total failure in any direction, there is a general and drastic deterioration in legality, such as occurred in Germany under Hitler.² A situation begins to develop, for example, in which though some laws are published, others, including the most important, are not. Though most laws are prospective in effect, so free a use is made of retrospective legislation that no law is immune to change *ex post facto* if it suits the convenience of those in power. For the trial of criminal cases concerned with loyalty to the regime, special military tribunals are established and these tribunals disregard, whenever it suits their convenience the rules that are supposed to control their decision. Increasingly the principal object of government seems to be, not that of giving the citizen rules by which to shape his conduct, but to frighten him into impotence. As such a situation develops, the problem faced by the citizen is not so simple as that of

² I have discussed some of the features of this deterioration in my article “Positivism and Fidelity to Law” 71 *Harvard Law Review* 630, 648-57(1958). This article makes no attempt at a comprehensive survey of all the postwar judicial decisions in Germany concerned with events occurring during the Hitler regime. Some of the later decisions rested the nullity of judgments rendered by the courts under Hitler not on the ground that the statutes applied were void but on the ground that the Nazi judges misinterpreted the statutes of their own government. See Pappé, “On the Validity of Judicial Decisions in the Nazi Era”. 23 *Modern Law Review* 260-74 (1960). Dr. Pappé makes more of this distinction than seems to me appropriate. After all, the meaning of a statute depends in part on accepted modes of interpretation. Can it be said that the postwar German courts gave full effect to Nazi laws when they interpreted them by their own standards instead of the quite different standards current during the Nazi regime? Moreover, with statutes of the kind involved, filled as they were with vague phrases and unrestricted delegations of power, it seems a little out of place to strain over questions of their proper interpretation.

a voter who knows with certainty that his ballot will not be counted. It is more like that of the voter who knows that the odds are against his ballot being counted at all, and that if it is counted, there is a good chance that it will be counted for the side against which he actually voted. A citizen in this predicament has to decide for himself whether to stay with the system and cast his ballot as a kind of symbolic act expressing the hope of a better day. So it was with the German citizen under Hitler faced with deciding whether he had an obligation to obey such portions of the laws as the Nazi terror had left intact.

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