Lon Fuller,
The Morality of Law
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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 mis-

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

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

Let me begin by putting in opposition to one another two forms of social ordering that are often confounded. One of these is *managerial direction,* the other is *law*. Both involve the direction and control of human activity; both imply subordination to authority. An extensive vocabulary is shared by the two forms: "authority," "orders," "control," "jurisdiction," "obedience," "compliance," "legitimacy,"—these are but a few of the terms whose double residence is a source of confusion.

A general and summary statement of the distinction between the two forms of social ordering might run somewhat as follows: The directives issued in a managerial context are *applied* by the subordinate in order to serve a purpose set by his superior. The law-abiding citizen, on the other hand, does not *apply* legal rules to serve specific ends set by the lawgiver, but rather *follows* them in the conduct of his own affairs, the interests he is presumed to serve in following legal rules being those of society generally. The directives of a managerial system regulate primarily the relations between the subordinate and his superior and only collaterally the relations of the subordinate with third persons. The rules of a legal system, on the other hand, normally serve the primary purpose of setting the citizen's relations with other

citizens and only in a collateral manner his relations with the seat of authority from which the rules proceed. (Though we sometimes think of the criminal law as defining the citizen's duties toward his government, its primary function is to provide a sound and stable framework for the interactions of citizens with one another.)

The account just given could stand much expansion and qualification; the two forms of social ordering present themselves in actual life in many mixed, ambiguous, and distorted forms. For our present purposes, however, we shall attempt to clarify the essential difference between them by presupposing what may be called "ideal types." We shall proceed by inquiring what implications the eight principles of legality (or analogues thereof) have for a system of managerial direction as compared with their implications for a legal order.

Now five of the eight principles are quite at home in a managerial context. If the superior is to secure what he wants through the instrumentality of the subordinate he must, first of all, communicate his wishes, or "promulgate" them by giving the subordinate a chance to know what they are, for example, by posting them on a bulletin board. His directives must also be reasonably clear, free from contradiction, possible of execution and not changed so often as to frustrate the efforts of the subordinate to act on them. Carelessness in these matters may seriously impair the "efficacy" of the managerial enterprise.

What of the other three principles? With respect to the requirement of generality, this becomes, in a managerial context, simply a matter of expediency. In actual practice managerial control is normally achieved by standing orders that will relieve the superior from having to give a step-by-step direction to his subordinate's performance. But the subordinate has no justification for complaint if, in a particular case, the superior directs him to depart from the procedures prescribed by some general order. This means, in turn, that in a managerial relation there is no room for a formal principle demanding that the actions of the superior conform to the rules he has himself announced; in this context

the principle of "congruence between official action and declared rule" loses its relevance. As for the principle against retrospectivity, the problem simply does not arise; no manager retaining a semblance of sanity would direct his subordinate today to do something on his behalf yesterday.

From the brief analysis just presented it is apparent that the managerial relation fits quite comfortably the picture of a one-way projection of authority. Insofar as the principles of legality (or, perhaps I should say, their managerial analogues) are here applicable they are indeed "principles of efficacy"; they are instruments for the achievement of the superior's ends. This does not mean that elements of interaction or reciprocity are ever wholly absent in a managerial relation. If the superior habitually overburdens those under his direction, confuses them by switching signals too frequently, or falsely accuses them of departing from instructions they have in fact faithfully followed, the morale of his subordinates will suffer and they may not do a good job for him; indeed, if his inconsiderateness goes too far, they may end by deserting his employ or turning against him in open revolt. But this tacit reciprocity of reasonableness and restraint is something collateral to the basic relation of order-giver and order-executor.

With a legal system the matter stands quite otherwise, for here the existence of a relatively stable reciprocity of expectations between lawgiver and subject is part of the very idea of a functioning legal order. To see why and in what sense this is true it is essential to continue our examination of the implications of the eight principles, turning now to their implications for a system of law. Though the principles of legality are in large measure interdependent, in distinguishing law from managerial direction the key principle is that I have described as "congruence between official action and declared rule."

Surely the very essence of the Rule of Law is that in acting upon the citizen (by putting him in jail, for example, or declaring invalid a deed under which he claims title to property) a government will faithfully apply rules previously declared as those to be

followed by the citizen and as being determinative of his rights and duties. If the Rule of Law does not mean this, it means nothing. Applying rules faithfully implies, in turn, that rules will take the form of general declarations; it would make little sense, for example, if the government were today to enact a special law whereby Jones should be put in jail and then tomorrow were "faithfully" to follow this "rule" by actually putting him in jail. Furthermore, if the law is intended to permit a man to conduct his own affairs subject to an obligation to observe certain restraints imposed by superior authority, this implies that he will not be told at each turn what to do; law furnishes a baseline for self-directed action, not a detailed set of instructions for accomplishing specific objectives.

The twin principles of generality and of faithful adherence by government to its own declared rules cannot be viewed as offering mere counsels of expediency. This follows from the basic difference between law and managerial direction; law is not, like management, a matter of directing other persons how to accomplish tasks set by a superior, but is basically a matter of providing the citizenry with a sound and stable framework for their interactions with one another, the role of government being that of standing as a guardian of the integrity of this system.

I have previously said that the principle against retrospective rule-making is without significance in a context of managerial direction simply because no manager in his right mind would be tempted to direct his subordinate today to do something yesterday. Why do things stand differently with a legal system? The answer is, I believe, both somewhat complex and at the same time useful for the light it sheds on the differences between managerial direction and law.

The first ingredient of the explanation lies in the concept of legitimation. If *A* purports to give orders to *B*, or to lay down rules for his conduct, *B* may demand to know by what title *A* claims the power to exercise a direction over the conduct of other persons. This is the kind of problem Hart had in mind in formulating his Rule of Recognition. It is a problem shared by lawmaking and managerial direction alike, and may be said to involve

a principle of *external* legitimation. But the Rule of Law demands of a government that it also legitimate its actions toward citizens by a second and *internal* standard. This standard requires that within the general area covered by law acts of government toward the citizen be in accordance with (that is, be authorized or validated by) general rules previously declared by government itself. Thus, a lawful government may be said to accomplish an internal validation of its acts by an exercise of its own legislative power. If a prior exercise of that power can effect this validation, it is easy to slip into the belief that the same validation can be accomplished retrospectively.

What has just been said may explain why retrospective legislation is not rejected out of hand as utterly nonsensical. It does not, however, explain why retrospective law-making can in some instances actually serve the cause of legality. To see why this is so we need to recall that under the Rule of Law control over the citizen's actions is accomplished, not by specific directions, but by *general* rules expressing the principle that like cases should be given like treatment. Now abuses and mishaps in the operations of a legal system may impair this principle and require as a cure retrospective legislation. The retrospective statute cannot serve as a baseline for the interactions of citizens with one another, but it can serve to heal infringements of the principle that like cases should receive like treatment. I have given illustrations of this in my second chapter. As a further example one may imagine a situation in which a new statute, changing the law, is enacted and notice of this statute is conveyed to all the courts in the country except those in *Province X*, where through some failure of communication the courts remain uninformed of the change. The courts of this province continue to apply the old law; those in the remaining portions of the country decide cases by the new law. The principle that like cases should be given like treatment is seriously infringed, and the only cure (at best involving a choice of evils) may lie in retrospective legislation.[27] Plainly problems

27. In *Anatomy of the Law* (1968), pp. 14–15, I have given an historical example of retroactive (and "special") legislation designed to cure a judicial departure from legality.

of this sort cannot arise in a managerial context, since managerial direction is not in principle required to act by general rule and has no occasion to legitimate specific orders by showing that they conform to previously announced general rules.

We have already observed that in a managerial context it is difficult to perceive anything beyond counsels of expediency in the remaining principles of legality—those requiring that rules or orders be promulgated, clear in meaning, noncontradictory, possible of observance, and not subject to too frequent change. One who thinks of law in terms of the managerial model will assume as a matter of course that these five principles retain the same significance for law. This is particularly apt to be true of the desideratum of clarity. What possible motive, one may ask, other than sheer slovenliness, would prompt a legislator to leave his enactments vague and indefinite in their coverage?

The answer is that there are quite understandable motives moving him in that direction. A government wants its laws to be clear enough to be obeyed, but it also wants to preserve its freedom to deal with situations not readily foreseeable when the laws are enacted. By publishing a criminal statute government does not merely issue a directive to the citizen; it also imposes on itself a charter delimiting its powers to deal with a particular area of human conduct. The loosely phrased criminal statute may reduce the citizens' chance to know what is expected of him, but it expands the powers of government to deal with forms of misbehavior which could not be anticipated in advance. If one looks at the matter purely in terms of "efficacy" in the achievement of governmental aims, one might speak of a kind of optimum position between a definiteness of coverage that is unduly restrictive of governmental discretion and a vagueness so pronounced that it will not only fail to frighten the citizen away from a general area of conduct deemed undesirable, but may also rob the statute of its power to lend a meaningful legitimation to action taken pursuant to it.

Opposing motivations of this sort become most visible in a bureaucratic context where men deal, in some measure, face to

face. Often managerial direction is accompanied by, and intertwined with miniature legal systems affecting such matters as discipline and special privileges. In such a context it is a commonplace of sociological observation that those occupying posts of authority will often resist not only the clarification of rules, but even their effective publication. Knowledge of the rules, and freedom to interpret them to fit the case at hand, are important sources of power. One student in this field has even concluded that the "toleration of illicit practices actually enhances the controlling power of superiors, paradoxical as it may seem."[28] It enhances the superior's power, of course, by affording him the opportunity to obtain gratitude and loyalty through the grant of absolutions, at the same time leaving him free to visit the full rigor of the law on those he considers in need of being brought into line. This welcome freedom of action would not be his if he could not point to rules as giving significance to his actions; one cannot, for example, forgive the violation of a rule unless there is a rule to violate. This does not mean, however, that the rule has to be free from obscurity, or widely publicized, or consistently enforced. Indeed, any of these conditions may curtail the discretion of the man in control—a discretion from which he may derive not only a sense of personal power but also a sense, perhaps not wholly perverse, of serving well the enterprise of which he is a part.

It may seem that in the broader, more impersonal processes of a national or state legal system there would be lacking any impulse toward deformations or accommodations of the sort just suggested. This is far from being the case. It should be remembered, for example, that in drafting almost any statute, particularly in the fields of criminal law and economic regulation, there is likely to occur a struggle between those who want to preserve for government a broad freedom of action and those whose primary concern is to let the citizen know in advance where he stands. In confronting this kind of problem there is room in

28. Blau, *The Dynamics of Bureaucracy* (2d ed. 1963), p. 215.

close cases for honest differences of opinion, but there can also arise acute problems of conscience touching the basic integrity of legal processes. Over wide areas of governmental action a still more fundamental question can be raised: whether there is not a damaging and corrosive hypocrisy in pretending to act in accordance with preestablished rules when in reality the functions exercised are essentially managerial and for that reason demand —and on close inspection are seen to exhibit—a rule-free response to changing conditions.

What has just been said can offer only a fleeting glimpse of the responsibilities, dilemmas, and temptations that confront those concerned with the making and administering of laws. These problems are shared by legislators, judges, prosecutors, commissioners, probation officers, building inspectors, and a host of other officials, including—above all—the patrolman on his beat. To attempt to reduce these problems to issues of "efficacy" is to trivialize them beyond recognition.

Why, then, are my critics so intent on maintaining the view that the principles of legality represent nothing more than maxims of efficiency for the attainment of governmental aims? The answer is simple. The main ingredients of their analysis are not taken from law at all, but from what has here been called managerial direction. One searches in vain in their writings for any recognition of the basic principle of the Rule of Law—that the acts of a legal authority toward the citizen must be legitimated by being brought within the terms of a previous declaration of general rules.