

from
Upholding the Law
and Other Observations

by
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Regarding The Law And Its Virtues



A society transforms itself into a state through the adoption of law. By the use of law, what had been more-or-less spontaneous interactions of conflict are regularized and formalized. This more reliably secures to each participant the benefits of predictability and stability (and that of a superior defensive capacity against individuals or organizations which might seek to subjugate them). Law provides these benefits by replacing the vagaries of custom and tradition with demonstrably authorized, written, unambiguous and procedurally scrupulous rules governing the interactions of the participants, backed by the cooperative and coordinated actions of each such participant.

When performing its legitimate purpose, the law is a great blessing to all. When carelessness or ignorance permit its application to illegitimate purposes, the enormous power of a coordinated and cooperative society becomes a potent tool for the satisfaction of private interests and the abuse of political targets, as well as the imposition of tyranny. It is possible to measure the character of that which claims status as law by its conformity to three essential principles: 1. Legitimacy of

authority; 2. Clarity of command; and 3. Conformity with established procedures of notice.

Though once the very pinnacle of respect for legitimate rule of law (and the most richly rewarded beneficiary thereof), the United States has fallen deeply from that high ground. An analysis of the essential principles of law will reveal how we have stumbled, and provide guidance as to how to once again find the right path.

But first, Sovereignty

Before discussing the characteristics of law, which is the product of a state, it is necessary to briefly comment on sovereigns, who are the precursors to the state. A sovereign is a free-standing, independent agent, whose right to exist and act are inherent by nature. While much weird and degenerate philosophy has been fabricated over the centuries alleging social contracts, mystical fatherlands, divine right and the like, ad nauseum, the simple and incontrovertible facts are:

- *No human being can assert a claim of authority by right over any other human being;*
- *All human agencies are merely subordinate constructs which can claim no authority beyond that of their creators; furthermore, such agencies can assert nothing for themselves, and assertions made on their behalf can have no demonstrable standing beyond that of the speaker or speakers-- who are just other human beings;*
- *No one can claim rights superior in quantity or quality to those of anyone else.*

Therefore, regardless of whether or not each of us really has a right to act freely, no one else has a right to interfere with our acting freely. So, we are all sovereign by default at least, if not by design. Our power-to-act is not dependent upon or answerable to any other person or any other person's creation.

States, on the other hand, are not sovereign, except as to other states. This will be discussed in more detail below.

On to the law...

1. Legitimacy of Authority

The starting point of any law is the authority of the legislators. A law can only issue from an agency to which those upon whom the law will act have delegated appropriate authority. Such authority can be broad or narrow, depending upon the wishes of the delegator, but is in all cases limited and explicit-- for the authority to withdraw, modify or define any delegation cannot itself be delegated. A delegation, after all, is an assignment, not a negotiation; furthermore, only that over which an individual has authority himself can be delegated to another.

"Authority" means creatorship, or, because the attributes of the created are as designed by the creator, the rule of the created by the creator. (The root of the word is the Latin, "auctor", which means "creator". The principle which is addressed here doesn't rest on semantics, of course, but as is often the case, the etymology of the appropriate term can clear away cobwebs of confusion spun by its promiscuous misuse.)

Being possessed of authority over their own decisions, individuals can delegate the making of such decisions to an agent, and can agree to adopt such decisions as their own and act accordingly. The quality of self-directed independence (sovereignty) however, is not under human authority and therefore cannot be delegated to the state. Thus, the state can have no standing or interest on behalf of which its spokesmen may properly dispute, redefine, qualify or interpret the terms of the delegation. The state is not a party to the deal and is, insofar as its own nature is concerned, voiceless.

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It is, after all, the delegation itself which creates the state. The creation cannot partake of the decision by which it is created; that is, the state cannot authorize its own authority. Not only is such a lifting-oneself-up-by-one's-own-bootstraps impossible temporally, it is also impossible legally, for it would create a dysfunctional and irresolvable tension between competing authorities. The creation would argue with the creator, from equal standing, as to what authority has been granted it-- the legal equivalent of two bodies occupying the same space at the same time.

Further, even if the metaphysical impediments could be overcome, such a delegation *could not* be accomplished, for it would constitute an unmistakable act against the delegator's own interests, be evidence of an unsoundness of mind, and therefore be void. Basic logic and legal principle establish that one cannot competently or effectively choose to divest oneself of the power to delegate, or to be the sole determinant of the meaning and extent of delegations made, or otherwise compromise one's sovereignty. Simple natural law precludes the possibility as well-- as Samuel Adams, the Father of the American Revolution, points out,

"If men, through fear, fraud, or mistake, should in terms renounce or give up any natural right, the eternal law of reason and the grand end of society would absolutely vacate such renunciation. The right to freedom being the gift of Almighty God, it is not in the power of man to alienate this gift and voluntarily become a slave."

Nor, of course, can one individual be bound by delegative choices made by another. Any individual has only the capacity to delegate his own deliberative and decision-making powers, not those of his neighbor.

Although these points about the subordinate, voiceless nature of the state seem elementary upon examination,

violations of the principle are now routine in America, in service to factions wishing to exercise illegitimate power for their own benefit at the expense of their neighbors. This is done through a corrupt and corrupting sophistry which twists legitimacy of authority and sovereignty into conveniences of the politically powerful.

The process can be perceived by consideration of any victimless "crime". Because the relevant behavior involves no conflict in regard to which the participants might have an interest in the benefits of law, no credible or proper basis for a relevant delegation authorizing state involvement can be alleged. Also, of course, no victim with standing from which to seek suppressive redress can be called upon. Factions which wish to nonetheless assert power over their neighbors in regard to the disapproved behavior must overcome these infirmities.

To do so, they posit a mysticism by which the aggregate mass of delegators, personified by the state, has, *prest-o change-o!*, acquired sovereignty-- and sovereignty of superior stature to that of any of its individual parts. This magical sovereign claims standing as an aggrieved party where no real one can make a complaint, so as to legitimize calling upon itself for remediation from the "offense". Godlike, this sovereign exists at all times and in all places, available to be offended against whenever and wherever any vile perpetrator acts, and, being relieved of the necessity of proving personal injury, it admits to no meaningful limit as to the behavior within its reach. Thus the state creates its own authority to act at will, by self-proxy-- where no authority to act by delegation exists. Which is to say, those in control of the state's power create-- all on their own-- new authority under which it will act, doing their will.

Partaking of the fiction of the magic sovereign is the philosophically complementary proposition that each and every person within the state's reach can be presumed, whether they acknowledge it or not, to have entered into an unwritten

contract with it and owe it performance, which notion finds expression in the concepts of *duty to the state* and *offenses of omission*. Both are invoked heavily either directly or sub-textually in support of much improper behavior by the state.

Another pernicious consequence of this construct is the recent trend toward direct adoption of its principles by various factions, in a bizarre balkanization of the polity into a multitude of magic sovereigns. So-called "hate crimes", which amount to the criminalizing of behavior causing no demonstrable harm to any individual but offending the sensibilities of a sub-community of identity-- according to its spokespeople-- serve as examples.

Whether the conduct being targeted (or demanded) through these legal and philosophical contortions is good or bad is not at all the point-- the point is the ugliness of narrow political interests adopting the mantle of an imaginary authority backed by all the vast power delegated to the state, for any purpose whatever.

2. Clarity of Command

A second essential element of proper law is clarity. Just as the delegation of authority must be explicit, so too must the product of the legislators to whom such delegations have been made. Clearly, no benefits over the soft and fuzzy admonitions of custom and tradition are extended by law which is ambiguous or subjective, or prone to constant interpretation and re-interpretation. Indeed, the entire purpose of law-making is to inform those to whom it applies precisely what is expected of them by others and how those others will formally react to any given behavior.

Law which can only be applied with the assistance of interpretation is therefore improper and void-- such law not only provides no usable notice of its requirements to those for whose interests it is purportedly crafted, but becomes necessarily the law of the interpreter rather than that of the delegates. While

an argument in defense of such free-form law has been advanced, to the effect that those delegates are merely delegating authority in their turn, this proposition fails. Such delegates do not have, and cannot delegate, such authority. Their only authority is what has been delegated to them, and they cannot be given the power of self-direction.

This is not to say that a delegation could not include the command that under this or that circumstance, and regarding this or that particular, law-making authority will pass to this or that other organ of the state. A command of this sort could even refer to this complication with language such as, "When such and such is the case, the legislature shall delegate law-making authority to the executive (or the judiciary)", although it would be an example of poor construction. What is really being said, however (the awkward language notwithstanding), is that when the specified circumstances obtain, the delegators withdraw the delegation from the legislature and grant it to the executive (or whoever) instead.

This principle is so elementary and fundamental that it needs no elaborate analysis. The law must mean what it says, and say what it means, or there is no purpose to it whatsoever. We do not establish a legislature, and delegate authority thereto, in order to guess at the meaning of its products or learn of their requirements and nuances only once charged with their violation, and in jeopardy of life, liberty or property.

Notably absent from our delegation of authority to the state is any providing that in cases in which the legislature should produce incomprehensible or even simply ambiguous "law", authority transfers to the judiciary under which that branch can "interpret" and "clarify" such flawed enactments. Judges are charged with the responsibility for overseeing the fair and proper enforcement of what the law IS, not of what it SHOULD be, or what they imagine the legislature must have meant. That the judiciary is empowered to rule an enactment unconstitutional is not an exception to this truth; such a ruling is

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no more than a declaration that the enactment in question either fails to provide clarity of command; exceeds delegated authority; or violates the requirements of proper notice (which we shall examine shortly). No law is thus promulgated by those to whom such authority has not been delegated. Sophomoric late-night-dorm-room protestations to the contrary notwithstanding, to say what something *isn't* does not amount to saying what it *is*, (which principle applies equally to the saying of what the delegated authority-- itself, by the way, also capable of insufficient clarity-- isn't).

Furthermore, the law must be expressed such that each participant can understand its requirements and nuances for themselves. No member of a society can properly be subject to the risks of being on the losing end of a conflict of interest with an interpreter, or be obliged to trade with an industry of translators in order to have explained what has been done with their own delegation of authority! The principle of rational self-interest precludes the legitimacy of such legislation, as much as does that of primary authority. That proper law is thus necessarily limited in both its scope and its depth is a facet of an elegant dynamic favoring the minimalist state.

There will, of course, always be some members of a society who cannot (or will not) comprehend some laws crafted by the associated state. Such persons cannot be viewed as having given their consent for those laws. They must be viewed as outside such laws. To the degree that such laws address transgressions against other members of society, non-consentors can be subject to their restraint-- the authority of self-defense thus exercised by those other members is unalienable and itself precedential to the state-- but cooperation with requirements-to-act (all versions of which amount to acts in support of the state), cannot properly be expected of them. No one can be legitimately enslaved to the interests of others, however untidy such a prohibition may seem. The practical

application of this is that, once again, the state must remain small and simple.

Despite the obviousness of the principle of clarity of command, courtrooms across the United States are filled with defendants-- rich and poor alike-- being made to answer to a "law" which in many cases specifically excludes them from its ambit, but is deliberately written so as to encourage misunderstanding of this fact. Even more victims are held to account for requirements allegedly to be found among the incomprehensible hundreds of thousands of words of which many "laws", crafted to serve political rather than societal purposes, are made-- words which neither the judges, prosecutors, or defense attorneys could make even a credible pretense of having actually read.

3. Conformity to Established Procedures of Notice

The third pillar of legal propriety concerns the means by which the requirements of the law are made known to those on whom they will have effect. The legal cliché that, "Ignorance of the law is no excuse" can be true enough, but only where proper law prevails. Ignorance of a law passed in secret, or ambiguously crafted, is a complete and perfect excuse. No one can be held to account for a law the existence, meaning, or authority of which is kept from them, or is otherwise unavailable. Thus it is an essential principle that a consistent and effective means of notice be established and deployed.

As in all else regarding the law, ambiguity cannot be tolerated as to notice. A legitimate state will institute, and scrupulously abide by, explicit and well publicized rules for the construction, language, and dissemination of the law. (Indeed, no less than as regards clarity of meaning, a failure to do so must be viewed as an attempt to create a favored class within

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the greater host of participants, equipped with knowledge to be ransomed to their fellows.)

Laxness, even in the case of law related to the simplest and most common-sense behavior for which long and deeply established bodies of custom and tradition might exist, is unjustified and unacceptable. The necessity of rigid conformity to rules regarding form and notice is still more essential for statutes not enjoying such universal and instinctive embrace.

The very pinnacle of the importance of this principle attends statutes purporting to require positive action, as opposed to restraint. Such requirements are not natural to human interaction, and, unlike those imposing restraint, they involve no other interactive member whose competing interests an actor's behavior directly affects and who could therefore play a role in the notice process. (Restraints on purely private individual behavior are not under consideration here; they are all illegitimate.) The associated complications are undesirable, and are fertile ground for misunderstanding and the development of intricate-- and therefore error-prone-- case law. Thus, it bears repeating: requirements of positive action under the law must be most scrupulously clear in authority, construction and notice.

The importance of respect for this principle, particularly as regards the element of clarity, can be illustrated by a look at America today. The mechanisms of proper form and notice are diligently provided for in the American legal structure, including two key elements in the United States Code:

*Title 1, Chapter 2, Section 101- Enacting Clause:
"The enacting clause of all Acts of Congress shall be in the following form: "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled."*

and,

*Title 5, Part 1, Chapter 5, Subchapter 2, Section 552-
Public information; agency rules, opinions, orders,
records, and proceedings:*

*“(a) Each agency shall make available to the public
information as follows:*

*(1)(D) substantive rules of general applicability adopted
as authorized by law, and statements of general policy
or interpretations of general applicability formulated and
adopted by the agency;”*

The US House of Representatives' Office of the Law Revision Counsel observes that of the 50 titles in the US Code, only 1, 3, 4, 5, 9, 10, 11, 13, 14, 17, 18, 23, 28, 31, 32, 35, 36, 37, 38, 39, 44, 46, and 49 have been enacted as positive law, leaving a 27 title majority both un-enacted, and often lacking published rules for significant sections.

Nonetheless, federal workers issue forth from high-rise fortresses throughout the country every morning to browbeat fines, plea bargains and concessions from citizens based upon those 27 titles, which consist largely of congressional declarations and executive orders, rather than statutes with general applicability. (At best, mere portions of those titles are distorted reflections of older actual statutes).

The fact is, those un-enacted titles are intermingled with the others, and within each type are intermingled in turn general statutes and the far more limited declarations and executive orders mentioned above, which only have application to federal entities or within federal territorial jurisdiction. This intermingling makes distinguishing each from the other extremely difficult-- effectively neutralizing the benefits of form and notice and leaving most Americans unable to challenge or resist illegitimate assertions of federal authority. The resultant passing of practical power from the citizenry to the state, by default rather than by consent, makes manifest the importance of respect for *all* the requirements of proper form and notice.

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The chief object of the lawful state is to ensure domestic tranquility-- the kind of tranquility which results from the countless conflicts of a free and energetic society having reliable access to an impartial system of resolution and remedy. Such tranquility is not tidy, it is not quiet, and it is not ambitious. It is sheer, resting lightly upon all; and it is flexible, being constructed of values shared by the widest possible divergence of interests. It is as resilient as the laws of nature upon which it is based; and it is as beautiful as the aspirations of individual happiness cherished by each of those it protects. It yields great wealth and power to those who embrace it, but will abide only a light, sober and respectful embrace.

The founders of this great country drew up its plans in the illumination of their understanding of that tranquility and the engine that makes it possible: proper law. Only that particular radiance will reveal how the ongoing project can continue to fit together with the harmony and liberty which are its unique contribution to human weal. Arrogance, ambition, greed and fear all cast long shadows now, but the sharp lines of that great work of genius and humility are still there to be followed if such obstacles can be pushed aside. I hope we all find it in us to lend our weight to the task.