

The Wisher and the Legislator: A Lesson from a Fairy Tale

by Joseph S. Fulda

The fairy tale, or fable, is a literary device by which adults—who have learned many of life’s lessons the hard way—impart wisdom to the young. It is at once an exciting and captivating story and a lesson in moral imagination. It succeeds because it is simple and direct.

Across most cultures, there is a recurring fable: The fairy tale of the three wishes. The poor chap who is at once hero and fool of the story is given three wishes. The first wish is inevitably spent on something foolish and trivial, but the wish is fulfilled powerfully and right away, thereby emboldening the wisher. The next wish is much more serious, one that will thoroughly change the life of the wisher all at once. Inevitably, it brings disaster and ruination upon him. The third wish is humbler—to be rescued from the disasters of his earlier wishes, with everything in his world restored to normalcy. This wish also is granted, and the hero comes away a much sadder but much wiser man.

What is the moral of this story? It is not quite that we do not know our own minds and what we really want, because of course in some important senses we do. I think the teaching of the story is that we are not wise enough to get what we want all at once by merely wishing for it, for we cannot foresee

the multitude of consequences that will undoubtedly ensue, many of which we would not want. Unlike when objects of our desire are earned slowly, there is no feedback about the wisdom and appropriateness of the goal, no turning back or perhaps merely turning aside—the wish is carried out by the genie exactly as it is expressed in words. There is thus no opportunity for re-evaluation, re-examination, and ultimately reconsideration, as there is when one embarks on a long path to a goal.

Furthermore, when working toward a goal, a person commits his whole self to it in that he must take action after action to achieve it, and he must do so over a prolonged period. When wishing, however, he does not have to put thought, care, or repeated and sustained effort into attaining his goal. Each action a man has to put toward a goal takes effort, and each such action is therefore a reason to abandon the goal if it is not worth—if it is no longer worth—the effort. The actions that men must take to achieve their dreams dampen their enthusiasm for them. Engineers call such dampening a “negative feedback loop,” and it is the hallmark of a stable system that it centers around such a loop. “Positive feedback loops” quickly go out of control and rock the system’s limits.

So what, then, is it fair to conclude about knowing one’s own mind? At every step of the way toward a goal, a person knows whether the next step is worth it in light

Contributing Editor Joseph Fulda (fulda@acm.org) is the author of Eight Steps towards Libertarianism (Free Enterprise Press). Copyright © 2004 Joseph S. Fulda. The author dedicates this article to the memory of his beloved Aunt Ruth.

of that small step's consequences—small enough to be seen and felt—and the effort required. Whether the step after that will also be worth it is something he will not *finally* decide till it is ripe for decision. The saving grace is that even if a subsequent step is no longer worth the effort, often that does not mean the prior steps were in vain: Instead of turning back, the man may turn aside, and choose a path parallel rather than perpendicular to the original path.

Laws Are Wishes

The astute reader will already have divined the point we wish to make. The legislator is a wisher. Laws are wishes. And legislatures have not learned the teaching of the child's simple but profound tale. Consider: Laws, like wishes, are effected at any speed—even all at once; with the exception of Prohibition and a few other less notable cases, they are rarely reconsidered. The legislatures of this land do not take incremental steps toward

whatever end they desire and then re-evaluate both ends and means, always in light of the continued worthiness of the goal and the additional effort required. Laws are not like life's goals. Many of them are foolish and trivial, like the first wish in the fairy tale. Many of them are much more serious and wreak havoc on everyone and everything in sight in countless unthought-of ways. But unlike the sadder but wiser fool who through his learning becomes the hero of the tale, the legislators do not learn simply to undo their wishes expressed as legal fiat. Rather, seeing the untoward consequences of their wishes, they remain, sometimes willfully, sometimes not, ignorant of the causes of the calamities their wishes have brought about. And they proceed to "repair" the damage with another, yet another, and yet still another wish, and the calamities multiply as the wishes are effected by the genies of government enforcers.

That, my friends, explains the current mess. □

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Losing the Law: From Shield to Weapon

by William L. Anderson and Candice E. Jackson

In recent years lawmakers and enforcers have increasingly criminalized business behavior. From the prosecution of Michael Milken and other Wall Street figures in the 1980s to the indictment of Martha Stewart in 2003, federal criminal law has become a wild card influencing economic matters in unpredictable ways. This affects everyone. Should this criminalization continue, the result will be less private investment, as frightened executives decide that investment in this country is not worth risking a stint in federal prison.

We must first explode the myth that only “guilty” people get in trouble with the law. Federal law today encompasses such a wide range of actions that the majority of people reading this article have probably engaged in conduct that could result in federal criminal charges.

For example, readers who have miscalculated their income taxes and sent the incorrect form through the mail have committed mail fraud, a federal felony. Anyone who has sent wrong figures or information over the Internet has committed wire fraud. In the first case, if you had the help of another person in figuring (or misfiguring) your taxes, that is conspiracy.

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Federal prosecutors usually don't pursue individuals making innocuous mistakes, but they can if they so wish. The U.S. Supreme Court already has ruled that *intent* to commit a crime (the ancient doctrine of *mens rea*, or “guilty mind”) is no longer a requisite element in some criminal prosecutions. The Supreme Court has created an entire category of statutory crimes it calls “public welfare offenses,” permitting Congress and state legislatures to provide criminal penalties for acts and omissions that technically violate a regulatory statute.¹ The unfortunate defendant need not even know that a violation of the law occurred.² While the Court initially applied this doctrine to permit Congress to dispense with *mens rea* requirements for regulations concerning things like possession of narcotics and hand grenades, the doctrine has evolved to include ordinary business activities, and threatens today to become the rule for criminal liability rather than the exception.³

The evisceration of *mens rea* is a mechanism for empowering the state. In a 1943 Supreme Court decision, Justice Felix Frankfurter declared: “The good sense of prosecutors, the wise guidance of trial judges, and the ultimate judgment of juries must be trusted. Criminal justice necessarily depends on ‘conscience and circumspection’ in prosecuting officers.”⁴

In other words, government employees whose careers depend on convicting people determine the standard of justice. However,