THE UNINTENDED CONSEQUENCES GAME

We are in troubled times. As is almost always the case when a nation is in troubled times, the rules of the game are changed, and the government or other group in power changes them. A simple consideration of history tells us that whenever there is change in the rules a new class of successful entrepreneurs is created that benefits from the new opportunities created by untested and often hasty legislation. The public looks for its scapegoats and the politicians may offer hasty and ill-considered legislation (such as Sarbanes-Oxley) under the pretext that something has to be done now. The lions are hungry. The Coliseum is full and the crowd wants action.

After the legislation has been passed the entrepreneurs and their lawyers move in. The loopholes are located. Some are small, but others are such that one can drive a bullion laden truck through them. The unintended (and sometimes intended) consequences take over and the broad print of the legislation has satisfied the public and punished the scoundrels. A skilled drafter of legislation can put in the appropriate fine print to take care of her special interest group while placating a public that has neither the time nor the ability to read the fine print.

There is a straightforward solution that would not be popular with special interest groups and would probably make a few young lawyers rich fairly quickly. Create in the Department of Justice a small operational “war gaming” group for all major new legislation. Starting with the Prussian
Army and building up for around a hundred and fifty years virtually every major army or navy has had a war gaming facility to check out and stress test its plans and strategies. This technique can be applied to legislation. A game is designed around a new piece of legislation and a first prize of say a million dollars is to be awarded to the competing lawyer or team of lawyers who finds the most egregious hole in the legislation. The competition is open to any lawyer or any student registered in an accredited law school and the “war gaming group” sponsors the scenario, runs a series of games to be played by ten or twenty applicants selected by a panel picked by an institution such as the American Bar Association or a consortium of law schools. A prize of a million or so is enough to attract young lawyers or students, both for the money and prestige, but it is not enough to attract many established law firms who stand to make tens or hundreds of millions on the loopholes.

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