

# Fear of Discretion

PHILIP K. HOWARD

*THE DEATH OF COMMON SENSE: HOW LAW IS SUFFOCATING AMERICA*

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AS ITS TITLE SUGGESTS, *The Death of Common Sense* is a book with a simple and straightforward message: Our society's reliance on law is excessive, misbegotten, and possibly fatal. The subtitle of the book is "How Law is Suffocating America." Indeed this missive does leave the reader at least worried, if not convinced, that modern law is an asphyxiating smog. An asphyxiating smog that is stifling our society's creative energies and poisoning our public processes – because it is too detailed, too procedurally rigid, and too dependent on creation of new legal rights as the solution to policy ills.

The sustained themes of the book are abstract and even theoretical – about how our legal culture came to be preoccupied with regulatory detail, with legal procedures, and with creation of legal rights. The book's extraordinary commercial success (it's sold about half a million copies, was many weeks on the

bestseller lists after it came out in 1994, and remains popular in trade paperback) has perhaps less to do with its abstract theory than with its method. The method of the book is to compile anecdotes – anecdotes featuring real human beings, one anecdote after another, sometimes three or four on one page.

Every anecdote is designed to highlight the pathologies of our modern legal system. The New York City building code requirement that all remodeled residential apartment buildings contain elevators prevents Mother Theresa and the Missionaries of Charity from opening a much-needed homeless shelter. Half of all violations found by inspectors for the Occupational Safety and Health Administration are for not filling out forms correctly. The Occupational Safety and Health Administration in Washington decides, after much study, that bricks are industrial poisons, thus subjecting this ancient building material to

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complex and exhaustive federal regulatory control. Jane O'Reilly's day-care center outside of Boston must find room for 30 separate changes of clothes, one for each child who uses the center at any time during the week, while a little coffee shop in New York had to switch to paper plates because hand-washing didn't meet the sanitary code and it had no room for an automatic dishwasher. Contracting with the City of New York involves so much paperwork and regulatory nightmare that most small businesses don't even attempt to participate in the protracted bidding process. Classrooms throughout America are disrupted by rude and delinquent children who can't be kicked out of school. Persons with significant mental illness live like stray animals on the street because, after all, that is their right.

Not that the volume is only vivid anecdotes held together by abstract themes. It does, at least in a casual way, attempt to locate itself within the history of ideas. It occasionally makes reference to the Enlightenment, to competing philosophical concepts such as pragmatism and rationalism, to the philosophies of Aristotle, John Locke, and Karl Marx, to modern thinkers such as Michael Oakeshott and Ronald Dworkin.

The author's solution to the problem of government's ineffectiveness is not, he says, to abolish or reduce the scope of government, but to empower officials with the discretion and flexibility they need to tailor legal requirements to the needs of particular situations. Our public servants should not be bureaucrats who faithfully enforce the dictates of a dense legal code. They should instead follow the model of common-law judges, who, guided by flexible standards, solve concrete, fact-specific problems by applying the dictates of experience and common sense. The author believes that by liberating government officials from the confinement of precise legal dictates, we also liberate ourselves. If a government regulator is permitted to use her discretion to solve

specific regulatory problems, then so can individual citizens and businesses.

So who is this author? His name is Philip K. Howard, and this is his first book. Son of a traveling Kentucky social worker and preacher, Howard has been for thirty years a New York lawyer, whose small and well-respected corporate law firm represents a variety of individuals and companies, sometimes in their battles with the government, but mostly in their business battles with each other. As Howard makes clear, however, *The Death of Common Sense* has emerged not from the author's practice of law, but from his experiences and observations outside of the office. He has written for a general audience and believes that his complaints will resonate with anyone who has had firsthand experience with the modern regulatory state – at all levels, federal, state, and local.

Still, the author's legal background suffuses the book. Howard makes no attempt to move beyond the limitations of the legal culture in which he operates. In other words, this is a book about law, and with the typical conceit of lawyers (including law professors, I might add), Howard believes that every problem in our society must be a problem with our laws. This narrow focus on law to the exclusion of the wider culture is ironic, to be sure, for Howard's complaint, succinctly stated, is that there is too much law. But his solution is to fix the laws – as if changing the laws would or could change the essential society or change the fundamental character of our government.

I suspect that there are much larger forces at work here – that the problems Howard sees are at bottom not problems of law, but problems of culture and society. Surely there are larger cultural causes of the legal phenomena that Howard decries. There is a presumption in many quarters that life is supposed to be risk-free and that the government is to be faulted when risks become realized harms. At the same time, the post-Vietnam cynicism about authority of any kind (legislatures and cops and

courts and parents and teachers) has left us distrustful of human judgment and led us to seek the safety of rigid, *ex ante* rules to govern our every decision.

Howard occasionally alludes to these larger cultural issues, but focuses on matters of legal culture. In his view, there are three overriding attributes of contemporary law in America. The three characteristics that Howard attacks are, first, modern law's extraordinary detail, resulting from an attempt to establish a rule for every conceivable circumstance. Second, the law's preoccupation with legal procedures, as if the process by which a decision is reached is of paramount importance, rather than the wisdom or correctness of the decision itself. Third, modern law's ubiquitous strategy of creating new rights or entitlements as a primary tool of social policy.

Howard's themes are not new, of course. He perhaps does not give enough credit to a distinguished line of scholars who have made similar arguments in less popular forms, especially the late political scientist Aaron Wildavsky. At a simple partisan level, he sounds like many of the "New Democrats" of the last decade. Indeed, several times as I was reading his book I was reminded of one of Mayor Ed Koch's favorite sayings. Koch said that a conservative is a liberal who has been mugged. There is a story, perhaps apocryphal, that one time when Koch was speaking to a group of senior citizens, he made that remark. A lady in the audience raised her hand and said, "Well, Mr. Mayor, I have always been a liberal. I was mugged. And I'm still a liberal." To which a wag in the back of the room is alleged to have called out: "Mug her again!"

Today, some on the Right are calling for a reassessment of basic questions concerning the legitimacy of government interference in the private market, and are insisting that we need to reduce greatly the size of government. Howard, on the other hand, assumes (or says he assumes) both the desirability and the inevitability of an activist government, asserting at one point that "hatred of government is not caused mainly by its goals, whatever their wisdom, but by government's techniques." That is, Howard insists he opposes not the objectives of modern government, but only many of its means.

Given this important hedge by Howard, it is no answer to the success of this book to respond, simply, "Well, for every one of his anecdotes about the stultifying and lamentable consequences of our regulatory regimes, there are probably nine stories to be told about the terrible consequences that would ensue if we didn't regulate." OSHA may be bad, you might say, but without OSHA surely there would be more workplace accidents, and Howard doesn't tell us about that side of the story. Of course, such books have been written – think of Upton Sinclair, Rachel Carson, Ralph Nader – and were instrumental in leading to calls for the very government regulatory apparatus that Howard decries. A contemporary book of stories about the perils of not regulating health and safety would provide some sort of balance to Howard's endless anecdotes, but it would not respond to his argument. His stated argument is not that we shouldn't regulate health and safety, but that we do it badly – in particular, with too much detail, process, and complexity.

The difficulty of placing Howard easily on a simple partisan or ideological map suggests, quite rightly, that the subliminal message of this book is much more complex than its explicit message. In the context of current political discourse, one must resist the impulse to pigeonhole *The Death of Common Sense* as an anti-government polemic. To the contrary, the book on several occasions praises the inventiveness, activism, and spirit of the New Deal – though Howard is clearly less sanguine about many specific programs that were created in the Great Society years and thereafter. Newt Gingrich and Bob Dole have said nice things

about this book, but so have President Clinton and Vice President Gore. It also may be noted that the only presently active politician who gets a positive plug in the book is the Vice President; he's mentioned twice for his effort to "reinvent government" by reducing the wasteful burdens of some forms of federal regulation; Vice President Gore had Mr. Howard at his side when he proposed new legislation that would reduce the complexity of the federal regulatory apparatus.

While Howard's themes can be summarized as anti-rights, anti-process, and anti-bureaucracy, Howard does not sound like those who dominate talk radio. Most of his anecdotes are, for want of a better term, politically correct. They are not about gun-toting cowboys whom the government is out to get, but about targets or victims of the regulatory state who are the natural allies of affirmative and active government: the socially committed public school teacher who has no effective recourse to the invocation of rights by unruly students, the Baptist minister in Harlem, Calvin O. Butts, who can't get the OK to build low-cost housing. Howard does occasionally quote snippets from prominent black conservatives and white neo-conservatives, but he also extensively quotes critics with liberal credentials. Thus we hear Julian Bond's concern that the right of African-Americans to be free from discrimination has become diluted because the same right was handed out to others with lesser histories of injustice. In today's rights-crowded world, says Bond, "the protected classes extend to a majority of all Americans, including white men over forty, short people, the chemically addicted, the left-handed, the obese. ... [But] in our society there are only so many fruits to go around."



The portion of Howard's book that most resonates with my own experience in govern-

ment and my own academic research is his first complaint, about regulations being too complex and elaborate, trying to formulate a rule for every eventuality. Indeed, Howard is right that legal complexity has many adverse consequences. For instance, much regulatory law is so detailed that it is unknowable to all but legal specialists. Additionally, regulations of particular activities are so numerous and extensive that they may be impossible to comply with, leaving the regulated citizen at the mercy of arbitrary government enforcement. Moreover, the detail of modern regulatory law leaves little room for adjustment to the specific circumstances of each case. Formal equality in the application of precise rules can actually have disparate and unfair practical effects. Finally, the over-specificity of modern regulatory law discourages individuals from engaging in the trial and error that leads to progress. Businesses must focus their attention on often irrelevant regulations, rather than spend their energy developing practices that will promote safety, environmental awareness, and the myriad other aims of regulatory law.

Of all of these unfortunate consequences of detailed regulatory dictats, however, I propose that the most significant problems stem less from the detail and more from the dictat. Howard's constant refrain is that the law is too complicated, but upon examination of his specific anecdotes, that is often not the problem at all. Take Mother Theresa. The problem there was not that the building code was too complex or detailed. The problem was that there was no one who had authority to waive the elevator requirement. "The devil may be in the details," as they say, but the reason it's a devil is that it's a dictat, a requirement, a rule, a prescription that has no flexibility.

Even as to regulatory regimes that are very complex, I wonder if the problem is not their complexity per se, but, rather, their complexity

coupled with the fact that there is no way to get around them, to propose an alternative solution. Howard is on to a real source of the problem, I suggest, when he notes that our contemporary society is so mistrustful of authority, of discretion, that it tries to make every rule in advance and not permit any human judgment in applying that rule.

I must confess I find the preference for prescriptive, *ex ante* rules, terribly paradoxical. We don't trust bureaucrats, so we make sure that their every breath – and thus our every breath – is hemmed in by prescriptive rules. But who do we think writes the rules? The same bureaucrat whom we don't think can be trusted to make case-by-case determinations with a modicum of integrity and common sense.

The second prong of Howard's attack – that we have too many procedures – also has roots in our society's fear of case-by-case exercise of judgment. Radical distrust of government power led to the indiscriminate application of procedures based on criminal trials and the constitutional system of checks and balances to constrain most forms of government conduct. Procedural techniques designed to protect individuals from arbitrary government coercion are used to regulate the provision of public services and the granting of government procurement contracts. Procedural requirements also empower disgruntled individuals and interest groups to file endless challenges to government actions as a means to getting around earlier losses on the merits in the political arena. Finally, rather than increase government accountability, excessive procedural requirements shield individual officials from having to accept responsibility for their actions.

The denial of official discretion may also be at the root of the third phenomenon that Howard targets: the proliferation of rights in the law. Howard notes that over the last several decades, legislators have increasingly used the

granting of rights as a tool of social policy. He singles out the Americans with Disabilities Act as an instance in which legislators created vast entitlements without considering their costs to society. According to Howard, the proliferation of rights has poisoned the workplace and contributed to an adversarial culture that discourages dialogue and creative problem solving. Classifying government benefits and burdens in terms of "rights" prevents officials from making the compromises that are necessary to balance individuals' needs with the common good.

I have seen this great fear of discretion, of human judgment, in my own study of the new regime governing criminal sentencing in the federal courts. Federal judges don't sentence defendants anymore; there is a rulebook, constantly being amended and added to, written by a new agency in Washington called the Federal Sentencing Commission. Its federal sentencing "guidelines" are almost a parody of the overly detailed, inflexible rules that Howard criticizes in *The Death of Common Sense*. The Washington rulebook purports to take into account just about every factor that is relevant to a just sentence. All the judge need do is read the rules, add up the pluses and minuses, and figure out, literally in arithmetic terms, which of the 258 boxes on the "sentencing grid" the defendant fits in.

The consequences of this system are distressing to those most intimately involved in the criminal justice process. Federal judges, prosecutors, defense attorneys, and probation officers find themselves operating under a Byzantine system of regulations devised by a distant administrative agency in Washington. The rules generally ignore individual characteristics of defendants. *En toto* they sacrifice comprehensibility, common sense, and humanity on the altar of pseudo-scientific uniformity. Governed by nearly 900 pages of labyrinthine edicts, federal sentencing hearings today are often unintelligible to victims,

defendants, and observers, not to speak of the lawyers and judges involved. One major effect of so regulating the judges has been to increase the relative power of prosecutors; often, they are the ones who effectively decide sentence in their charging and plea-bargaining decisions. And the judges aren't there anymore to serve as a check and balance on the prosecutor's judgments. Ironically, despite the rules' apparent precision, sentencing disparity – that is, different sentences for defendants whose characters and crimes seem similar – may be as ubiquitous under the new regime as it was under the discretionary system we used to have.

The response thus far to criticisms of the new federal sentencing rules does not, I regret, give one hope for the future. The response has not been to simplify the federal sentencing rules, or to make them merely guidelines, perhaps presumptive but not binding. Rather, when someone has pointed out an injustice under the new sentencing rules – because the rules do not take into account some especially sympathetic characteristic of this defendant, for instance – the Sentencing Commission in Washington has responded by writing another rule! As often as not, the new rule has simply declared that the supposedly distinguishing characteristic is irrelevant to a just sentence. Thus the Commission tells the federal judges that henceforth they may not take such a factor into account.

Another response to concern about the new federal sentencing rules has been to try to reduce prosecutorial discretion. There is a hope among rationalist reformers out there that some bureaucracy will eventually apply to prosecutors the same sort of ex ante rules of decision that the Sentencing Commission has imposed on judges. This is the knee-jerk response of a society whose legal institutions seem stuck in the Modern, as opposed to the post-Modern, age. I believe it would be a big mistake to hem in prosecutors the way

that the judges have been hemmed in. Let me try to state my argument as concisely as possible:

*Citizens may be subjected to as much arbitrariness from an overlegalized regime as from a regime in which officials exercise discretion. More law (more pages in the law books) does not necessarily mean more justice or less arbitrariness.*

To be sure, allowing government employees to exercise discretion may result in arbitrariness of one type – they may, for instance, favor their friends. But arbitrariness of another type results from not allowing regulators to exercise discretion, because the regulations themselves are inevitably arbitrary or unfair when applied in some cases. Not permitting the exercise of prosecutorial discretion looks like a good thing if it means the prosecutor can't let off the hook the producer of spoiled meat. It looks like a bad thing if the meat packer must be prosecuted because he filled out the form wrong and no meat spoilage or threat of spoilage occurred.



Although I can agree with Howard that law without human judgment in its application is not law at all, I am skeptical of the breadth of Howard's claim that every regulated activity needs regulations that are much less complex and that rely primarily on human judgment in application.

Invoking the standard categories found in jurisprudence, Howard argues that we wouldn't need so many specific rules if we just adopt a few broad standards and give bureaucrats some freedom in applying those standards. Yet I wonder whether the replacement of "rules" with "standards" really would work in the various areas of concern to Howard. Many of his anecdotes involve matters of some

technological expertise, such as health regulations, construction standards, and the like. One reason we end up with very detailed regulations in these areas is that we are regulating complicated activities, and there are many different considerations and factors which are relevant in deciding exactly which regulatory standard is applicable. Surely not all of these activities are more properly regulated through the application of broad standards. I suspect that determining the proper mix of standards and rules is a far more difficult task than Howard suggests.

If Howard really does not oppose the goals of modern government – health and safety and non-discrimination and so forth – then he is going to have to accept some significant complication either in the regulations themselves or in their application. That is, either detailed regulations, or detailed procedures or both. But Howard doesn't want detailed regulations or detailed procedures. In addition, I am not nearly as sure as Howard is that we have over-"proceduralized" our pre-trial criminal processes. There is, after all, a response to Mayor Koch's insight that "a conservative is a liberal who has been mugged." Surely it is equally true that a liberal is a conservative who has been arrested.

Nor should we fool ourselves into thinking that it would be easy to implement health and

safety regimes that rely on general standards and few procedures. For instance, I imagine that it would be quite costly to develop an individualized "regulatory profile" for each business, as Howard proposes. More generally, we must recognize that there would be significant disagreement within the American polity about what would constitute the exercise of "common sense" by public officials.



If I seem to have concentrated more on Howard's indictments of our legal system than on his solutions, that is because Howard does the same. After cataloguing the problems, Howard ends *The Death of Common Sense* with a short chapter entitled "Releasing Ourselves," in which he summarizes his prescriptions for reform: "relax a little and let regulators use their judgment"; "stop looking at law to provide the final answer"; and finally, "go out and try to accomplish our goals and resolve disagreements by doing what we think is right."

Howard's inability to produce more substantive recommendations hints at the real difficulty of reform in the directions he proposes. What Howard really wants is not simply to change our laws; he wants change in our civil society itself, or what passes for civil society. 