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### **FIXING THE SIXTIES: SIMPLIFY GOVERNMENT AND RESTORE HUMAN RESPONSIBILITY**

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# **FIXING THE SIXTIES: SIMPLIFY GOVERNMENT AND RESTORE HUMAN RESPONSIBILITY**

*Philip K. Howard\**

## **ABSTRACT**

*Take any frustration with overbearing or sluggish government, and ask yourself: Who has authority to fix it? Precisely. Referring back to the 1960s overhaul of American government, this Article argues that Washington requires a new philosophy of governing – that human responsibility must replace mindless rules at the point of action. Law should be reconceived as a framework for human responsibility, not an instruction manual that strives to supplant human judgment.*

## **I. ATTACKING GOVERNMENT COMPLEXITY TO ALLOW COMMON SENSE CHOICES**

Americans are fed up with broken government, and want big change. What is missing so far in this raucous election is the vital ingredient of fundamental reform—a new vision of how to govern better. New blood in the White House, without a new governing philosophy, is unlikely to change much. Just as Barack Obama promised “Change We Can Believe In,” the 2016 candidates tout their personal leadership qualities. But there’s no focus in the campaign on *how* to govern better. Calling for smaller government, as all Republicans do, does not provide a mandate for how to remake thousands of programs imbedded in old laws and thick regulations. The Tea Party approach of “just say no” hasn’t worked—most Americans want to fix, not eliminate, government functions. The absence of an alternative approach to governing is a reason why the federal government grew, not shrank, under the seven presidents—including two Democrats—since 1968, notwithstanding their efforts to rein in government excesses.<sup>1</sup>

Why does new leadership make so little difference? Liberal reformers tend to focus on campaign finance, gerrymandering, and other electoral distortions. But most choices in government are paralyzed by imbedded law and bureaucracy, not current political fights. In 2009, for example, Congress

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<sup>1</sup> See generally *Reg Stats*, REGULATORY STUDIES CTR, THE GEORGE WASHINGTON UNIV., <http://regulatorystudies.columbian.gwu.edu/reg-stats> (last visited May 10, 2016) (For instance, the Code of Federal Regulations has increased from about 50,000 pages in 1968 to over 175,000 pages in 2014).

authorized nearly \$800 billion to stimulate the economy, but no official had the legal authority to approve new infrastructure projects.<sup>2</sup> Red tape, not partisanship, prevented President Obama from fixing broken bridges.<sup>3</sup> What is missing in modern government is the critical ingredient of a functioning democracy: Human responsibility to get things done. Law has replaced leadership at every level of government, from the White House to the school house. Donald Trump won't have a chance. He'll say "You're fired," and the bureaucrats will smile and point to their invincible civil service protections.

Take any frustration with overbearing or sluggish government, and ask yourself: Who has authority to fix it? Precisely. Washington requires a new philosophy of governing—human responsibility must replace mindless rules at the point of action. Law should be reconceived as a framework for human responsibility, not an instruction manual that strives to supplant human judgment. The last time America overhauled its legal framework was the 1960s. The changes in that tumultuous decade demonstrate the power of a new governing vision. Revisiting that decade also reveals the wrong turn that has progressively paralyzed government.

## II. THE SUCCESS AND FAILURE OF THE RIGHTS REVOLUTION

The overhaul of American government in the 1960s was driven by a philosophical shift that redirected public priorities away from private ownership prerogatives towards reducing harm done to minorities, consumers and the environment. Scores of laws were written or changed that reflected this new public philosophy that has come to be known as the "rights revolution."<sup>4</sup>

In one short decade the rights revolution broke down ancient practices of discrimination against minorities, women, and the disabled<sup>5</sup>; catapulted government into regulating product and worker safety<sup>6</sup>; created consumer rights<sup>7</sup>; and ended the ability of land owners to pollute private property and

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<sup>2</sup> See generally COUNCIL OF ECONOMIC ADVISERS, EXEC. OFFICE OF THE PRESIDENT, THE ECONOMIC IMPACT OF THE AMERICAN INVESTMENT AND RECOVERY ACT FIVE YEARS LATER 34-37 (2014), [https://www.whitehouse.gov/sites/default/files/docs/cea\\_arra\\_report.pdf](https://www.whitehouse.gov/sites/default/files/docs/cea_arra_report.pdf) (describing how the Recovery Act allocated stimulus funds to various infrastructure projects).

<sup>3</sup> See Michael D. Shear, *Obama Lesson: 'Shovel Ready' Not So Ready*, N.Y. TIMES (Oct. 15, 2010), [http://thecaucus.blogs.nytimes.com/2010/10/15/obama-lesson-shovel-ready-not-so-ready/?\\_r=1](http://thecaucus.blogs.nytimes.com/2010/10/15/obama-lesson-shovel-ready-not-so-ready/?_r=1) (describing how red tape stalled Obama's infrastructure stimulus program implementation).

<sup>4</sup> See generally Sarah Staszak, *Realizing the Rights Revolution: Litigation and the American State*, 38 LAW & SOC. INQUIRY 222, 22-26 (2013) (discussing the mid-twentieth century rights revolution).

<sup>5</sup> Civil Rights Act of 1964, Pub. L. 88-352, 78 Stat. 241 (1964) (current version at 42 U.S.C. § 2000 et seq.).

<sup>6</sup> Consumer Product Safety Act of 1972, 15 U.S.C. § 2051 et seq. (2012).

<sup>7</sup> See, e.g., Truth in Lending Act of 1968, Pub. L. 90-321, 82 Stat. 146 (1968) (current version at 15 U.S.C. § 1601 et seq.).

common resources. These shifts in goals were long overdue. The new public narrative—expanding the vocabulary of rights to protect against any form of power—was unstoppable. Rights put the magnifying glass on the plight of the little guy, and posed the issue in a way that trumped the even the most influential defenders of the status quo. Are you for hurting people?

But the governing philosophy of the rights revolution went too far: It tried to eliminate abuses of authority not just by changing public values, but by eliminating authority. Its new way of governing was to write rules as precisely as possible—dictating exactly how to make a factory safe. Where rules could not dictate the choice—as with the scope of environmental review—the choice would be reached by consensus in drawn-out processes or by a lawsuit. Everyone, conservatives and liberals alike, bought into the idea of government where officials had minimal authority. Clear rules would replace fallible human judgment. “Administrative rule-making,” Professor Kenneth Davis pronounced, “is . . . one of the greatest inventions of modern government.”<sup>8</sup> Democracy would be automatic, like a modern appliance.

Striving to dictate the most minute choices of government and regulation, however, leads to law that is incomprehensible. Today, after 50 years of drafting to close every ambiguity with ever-more detailed rules, officials and citizens must hack through over 100 million words of law and regulation.<sup>9</sup> The guiding principles of the Volcker Rule against bank proprietary trading, promulgated as part of the Dodd-Frank financial reform, can be stated in a few paragraphs. The final rule is 950 pages.<sup>10</sup> American regulation has become a form of central planning. It is sometimes better than no regulation at all, but its complexity is counterproductive and progressively paralytic. A safe workplace mainly turns on training and factory culture, not whether the light switch is so many inches from the door or the machinery has the latest guard mechanism.<sup>11</sup> Environmental review must be timely;

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<sup>8</sup> KENNETH CULP DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* 65 (1969).

<sup>9</sup> *See Reg Stats, supra* note 1 (The Code of Federal Regulations currently is about 175,000 pages long, which itself is over 100 million words).

<sup>10</sup> SULLIVAN & CROMWELL LLP, *VOLCKER RULE: U.S. AGENCIES APPROVE FINAL VOLCKER RULE, DETAILING PROHIBITIONS AND COMPLIANCE REGIMES APPLICABLE TO BANKING ENTITIES WORLDWIDE* (Jan. 27, 2014), [https://www.sullcrom.com/siteFiles/Publications/SC\\_Publication\\_Volcker\\_Rule.pdf](https://www.sullcrom.com/siteFiles/Publications/SC_Publication_Volcker_Rule.pdf).

<sup>11</sup> *See, e.g.,* William H. Simon, *Optimization and Its Discontents in Regulatory Design: Bank Regulation as an Example*, 4 *REGULATION & GOVERNANCE* 3 (2010) (discussing the culture of safety at Alcoa). The Kemeny Commission Report on the Three Mile Island nuclear meltdown famously concluded that overly voluminous rules had shifted workers’ focus away from overall safety and towards mindless compliance. The report found that “once regulations become as voluminous and complex as those regulations . . . [in place at Three

otherwise lengthy environmental review harms the environment by prolonging bottlenecks that cause pollution.<sup>12</sup>

The 1960s philosophy of avoiding human authority had the further baleful effect of anesthetizing America's public culture. Public employees are trained to mindlessly follow rules, frustrating Americans in encounters at every level of government: "The rule made me do it."<sup>13</sup> Politicians also accept laws mindlessly, as if they were the Ten Commandments and not man-made tools which political leaders are supposed to fix when broken. President Obama is not to blame for the infrastructure red tape that strangled the 2009 stimulus projects, but why didn't he immediately propose a new law giving him similar authority to FDR's in the New Deal? Republican leaders of Congress are not to blame for the undisciplined accretion of agency regulations—but why don't they do something about the undisciplined accretion of their own statutes?

Governing without human authority, one of the pillars of the rights revolution, was supposed to avoid abuse. Instead it exacerbated a natural inclination by public officials to avoid responsibility. Political scientist Samuel Huntington saw it coming. "Who governs?" is obviously an important question, he observed. "Even more important, however, may be the question 'Does anybody govern?'"<sup>14</sup>

### **III. TOWARDS A NEW PUBLIC PHILOSOPHY: SIMPLIFY LAW AND RESTORE RESPONSIBILITY**

America's public law must be radically simplified to *require* officials to take responsibility. Democracy is supposed to empower elected officials to make choices, not preempt their choices. Making room for human responsibility

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Mile Island], they can serve as a negative factor in nuclear safety." REPORT OF THE PRESIDENT'S COMMISSION ON THE ACCIDENT AT THREE MILE ISLAND 9 (1979).

<sup>12</sup> PHILIP K. HOWARD, TWO YEARS, NOT TEN YEARS: REDESIGNING INFRASTRUCTURE APPROVALS 5-6, 13-15 (2015), [http://commongood.3cdn.net/c613b4cfda258a5feb\\_e8m6b5t3x.pdf](http://commongood.3cdn.net/c613b4cfda258a5feb_e8m6b5t3x.pdf).

<sup>13</sup> See generally MICHAEL LIPSKY, STREET-LEVEL BUREAUCRACY: DILEMMAS OF THE INDIVIDUAL IN PUBLIC SERVICES (1980) (discussing how public service workers wield much discretion in their implementation of public programs); Robert K. Merton, *Bureaucratic Structure and Personality* 18 SOCIAL FORCES 4 (1940) ("Discipline can be effective only if the ideal patterns are buttressed by strong sentiments which entail devotion to one's duties, a keen sense of the limitation of one's authority and competence, and methodical performance of routine activities. The efficacy of social structure depends ultimately upon infusing group participants with appropriate attitudes and sentiments.").

<sup>14</sup> MICHAEL J. CROZIER ET AL., THE CRISIS OF DEMOCRACY: REPORT ON THE GOVERNABILITY OF DEMOCRACIES TO THE TRILATERAL COMMISSION 92 (1975).

requires radically simplifying legal codes into open frameworks of principles, like the Constitution, instead of striving to dictate in advance every possible choice. Some areas—for instance, pollution levels—require detailed rules. But the goal should be the same for almost all programs: Is an identifiable human responsible and free to act sensibly? The virtues of simplifying law are many. Law based on general goals and principles gives flexibility for people to adapt to the situation and make practical choices. It focuses disagreements on the ultimate goal—right and wrong—not parsing legal language. It reinvigorates democracy because decisions are made by people who can be held accountable, not disembodied rules. Law can be understood by real people. As Judge Richard Posner has observed, “[s]tandards that capture lay intuitions about right behavior . . . may produce greater legal certainty than a network of precise . . . non-intuitive rules . . . .”<sup>15</sup>

There’s a fear, which I will discuss, that leaving room for human judgment will open the door for abuse. But history shows otherwise, and demonstrates how radical legal simplification can energize a society and restore respect to government—for example, the Uniform Commercial Code in the 1950’s, the Civil Code sponsored by Napoleon, and of course our own Constitution.<sup>16</sup> The task is not as daunting as you might imagine, because restoring human responsibility obviates the need for 95 percent of the legal detail. Experience shows it is best implemented by delegating responsibility to a small committee of respected citizens, such as the Simpson Bowles committee or base-closing commissions. Then Congress can vote it up or down.

In the 1980s Australia replaced a thousand rules for nursing homes with 31 general principles: for example, to provide a “homelike environment” and “[respecting] [t]he dignity of residents.”<sup>17</sup> Within a year, nursing homes were markedly better.<sup>18</sup> Regulators didn’t give up their power; arguably they had more authority. But disagreements now focused on the quality of care, not compliance with nitpicking rules.

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<sup>15</sup> RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 48 (1990).

<sup>16</sup> See PHILIP K. HOWARD, *THE RULE OF NOBODY: SAVING AMERICA FROM DEAD LAWS AND BROKEN GOVERNMENT* 147-49 (2014) (discussing the value of recodification efforts through history). See also LAWRENCE M. FRIEDMAN, *AMERICAN LAW IN THE 20TH CENTURY* 377–98 (2002) (discussing the development of the Uniform Commercial Code); Jean Louis Bergel, *Principal Features and Methods of Codification*, 48 *LA. L. REV.* 1073, 1074-75 (1988) (discussing the Napoleonic Code).

<sup>17</sup> See John Braithwaite & Valerie Braithwaite, *The Politics of Legalism: Rules versus Standards in Nursing-Home Regulation*, 4 *SOC. LEGAL STUD.* 307, 313-16 (1995) (detailing reforms in nursing home regulation in light of a series of scandals).

<sup>18</sup> *Id.*

This is the way many laws used to be written before the 1960s—law provided a framework for responsibility, not an instruction manual. The 1956 statute authorizing the interstate highway system, for example, was 29 pages long.<sup>19</sup> By 1970, about 30,000 miles of highway had been constructed.<sup>20</sup> Today it would take almost that long to get permits. The brevity of law that sets goals and lines of authority will surprise people. A recent legislative proposal by Common Good to streamline infrastructure approvals from ten years to two years, for example, is less than three pages long: it allocates authority to environmental officials to decide when there's been sufficient review, and expedites judicial review.<sup>21</sup>

Reinstating human responsibility to implement public decisions doesn't guarantee good decisions, but it makes them possible and creates the conditions for accountability when they're not. A leaderless legal process, by contrast, just ends up being a mosh pit at the government spigot—where self-interest is justified by contortions of legal language, and almost no one talks about what is right. The upshot of this legalistic culture is that the values of Washington are no longer confluent with those of the rest of society. This is the definition of a deviant subculture.<sup>22</sup>

An overhaul of historic proportions is needed. Just as the shift in public philosophy in the 1960s had a clear approach, focusing on individual rights, so too simplifying American public law should have a clear standard by which all regulatory choices can be judged: What is the right thing to do here?

#### IV. DISCARDING THE PHILOSOPHY OF DISTRUST

Distrust is the mortar that keeps the massive bureaucratic edifice in place. What if the environmental official is corrupt, inept or has ulterior motives? Giving officials authority to make choices is a terrifying prospect to most people. The rational answer is that, even with the authority to decide, the official still has to comply with laws, and is accountable to higher officials for his judgment, and to courts for legal compliance. The evidence overwhelmingly favors more responsibility. People taking responsibility are the secret sauce of any school or

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<sup>19</sup> Federal-Aid Highway Act of 1956, Pub. L. No. 84-627, 70 Stat. 374 (1956).

<sup>20</sup> WENDELL COX & JEAN LOVE, *THE BEST INVESTMENT A NATION EVER MADE* 4 (1996), available at <http://www.publicpurpose.com/freewaypdf.pdf>.

<sup>21</sup> COMMON GOOD, POSSIBLE AMENDMENTS TO TITLE XXXI, SUBTITLE A—ACCELERATING PROJECT DELIVERY OF THE DRIVE ACT, TO SIMPLIFY AND STREAMLINE INFRASTRUCTURE REVIEW AND PERMITTING, [http://commongood.3cdn.net/70cb063afe28bfd79f\\_ynm6b5jj6.pdf](http://commongood.3cdn.net/70cb063afe28bfd79f_ynm6b5jj6.pdf).

<sup>22</sup> See HOWARD *supra* note 16, at 137-42.

public department that works well.<sup>23</sup> Official abuse is also best deterred, studies repeatedly conclude, by shining the spotlight on responsible people.<sup>24</sup>

Still, there is an instinctive revulsion to the idea of giving people in government any amount of authority. No matter how many checks and balances. The siren song of what is called “clear law” entices even the best minds. Conservative economist Friedrich Hayek wrote early in his career that “government in all its actions . . . [should be] bound by rules fixed and announced beforehand.”<sup>25</sup> Liberal legal philosopher Joseph Raz advocates the “use [of] rules as much as possible for regulating human behavior” because they “lend themselves more easily to uniform and predictable application.”<sup>26</sup>

On the other hand, Aristotle observed that the need to adjust for the circumstances means that “it is impossible that all things should be precisely set down in writing.”<sup>27</sup> “Justice . . . is a concept by far more subtle and indefinite,” Justice Benjamin Cardozo observed, than “is yielded by mere obedience to a rule.”<sup>28</sup> Judgment on the spot, not any legal or rationalist directive, is required to get anything done. Historian Jacques Barzun put it this way: “No scientist has chosen a spouse or bought a house using scientific methods.”<sup>29</sup> The future of good government hinges on this debate, and not for the first time. The tension between legal precision and human responsibility was the main fight in the constitutional debates. The anti-federalists wanted detailed limitations on state power.<sup>30</sup> James

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<sup>23</sup> See, e.g., PHILIP K. HOWARD, *THE DEATH OF COMMON SENSE: HOW LAW IS SUFFOCATING AMERICA* 64-65 (2011) (highlighting Sam Schwartz’s innovation in fixing Brooklyn’s Carroll Street Bridge); PHILIP K. HOWARD, *LIFE WITHOUT LAWYERS: RESTORING RESPONSIBILITY IN AMERICA* 93-121 (2010) (discussing the correlation between teacher autonomy and classroom success). See also PASI SAHLBERG, *FINNISH LESSONS: WHAT CAN THE WORLD LEARN FROM EDUCATIONAL CHANGE IN FINLAND?* (2011) (discussing the extremely decentralized Finnish education system).

<sup>24</sup> See, e.g., STATE-CITY COMMISSION ON INTEGRITY IN GOVERNMENT, *REPORT AND RECOMMENDATIONS RELATING TO CITY PROCUREMENT AND CONTRACTS* (1986) (showing how New York’s unwieldy and complex implementation of public contracting operations invited corruption). See generally FRANK ANECHARICO & JAMES B. JACOBS, *THE PURSUIT OF ABSOLUTE INTEGRITY: HOW CORRUPTION CONTROL MAKES GOVERNMENT INEFFECTIVE* (1996) (increasingly complicated mechanisms to combat corruption undermine governance).

<sup>25</sup> FRIEDRICH HAYEK, *THE ROAD TO SERFDOM* 75 (1944).

<sup>26</sup> Joseph Raz, *Legal Principles and the Limits of Law*, 81 *YALE L.J.* 823, 841 (1972).

<sup>27</sup> ARISTOTLE, *POLITICS* 81 (Benjamin Jowett trans., Dover Thrift ed. 2000).

<sup>28</sup> BENJAMIN N. CARDOZO, *THE GROWTH OF THE LAW* 87 (1924).

<sup>29</sup> JACQUES BARZUN, *A STROLL WITH WILLIAM JAMES* 162 (1983).

<sup>30</sup> See, e.g., *THE ANTI-FEDERALIST PAPERS* NO. 81 (Brutus) (“I showed, that the judicial power of the United States under the first clause of the second section of article eight, would be authorized [sic] to explain the constitution, not only according to its letter, but according to its spirit and intention; and having this power, they would strongly incline to give it such a construction as to extend the powers of the general government, as much as possible, to the diminution, and finally to the destruction, of that of the respective states.”).



Madison argued in rebuttal that the first goal was to provide “powers [that] were necessary means of attaining . . . necessary ends,” and not to agonize over “the possible abuses which must be incident to every power or trust.”<sup>31</sup>

George Washington similarly wrote that “no government can be well administered without powers,” and chastised opponents who fixate on immediate abuses and imagine officials as “tyrants . . . [with] no other disposition but to oppress.”<sup>32</sup> In the end, Washington concluded:

No man is a warmer advocate for proper restraints and wholesome checks in every department of government than I am; but I have never yet been able to discover the propriety of placing it absolutely out of the power of men to render essential Services, because a possibility remains of their doing ill.<sup>33</sup>

Life is too complex to dictate decisions in advance, especially in this century. A fast-paced interdependent world requires more, not less, public oversight to safeguard common resources and protect against hidden risks. The more complex the world, however, the simpler law must be: “The simpler, the better” according to complexity theorist Nicholas Taleb.<sup>34</sup> People must feel free to act on what they understand to be social norms of right and wrong, and then be accountable, not get bogged down in intricate regulatory schemes they can barely understand. At the end of his life, Hayek recanted his earlier views of mechanical law, saying that he had reconsidered “the supposed greater certainty . . . [when] all rules of law have been laid down in written and codified form.”<sup>35</sup> Ultimately law is more predictable when decisions are not made by “the letter of the law,” but “by generally held views of what is just.”<sup>36</sup>

The best indictment of “clear law” is what it has wrought—a dense bureaucratic jungle that is progressively paralyzing daily choices in government and society. The dream of automatic government has undeniable appeal: we hoped to avoid bad judgment by avoiding all judgment. It just does not work. Americans’ frustration with Washington has reached a boiling point. It is time to look at broken government with

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<sup>31</sup> THE FEDERALIST NO. 41 (James Madison).

<sup>32</sup> Letter from George Washington to Bushrod Washington (Nov. 9, 1787) (reproduced at <http://teachingamericanhistory.org/library/document/letter-to-bushrod-washington-2/>).

<sup>33</sup> *Id.*

<sup>34</sup> NASSIM NICHOLAS TALEB, ANTIFRAGILE: THINGS THAT GAIN FROM DISORDER 11 (2012).

<sup>35</sup> FRIEDRICH A. HAYEK, LAW, LEGISLATION AND LIBERTY, VOLUME I: RULES AND ORDER 116 (1973).

<sup>36</sup> *Id.*

clear eyes, and acknowledge the flaw in philosophy that has prevented any recent president from fixing it. “[U]nless government is first effective,” management theorist Peter Drucker concluded, “all the more ambitious goals will remain mere rhetoric . . .”<sup>37</sup>

Ask again: Who today has authority to fix any problem? Simplifying legal codes, history shows, can transform society—like replacing a muddy road with a paved highway. The benefits here may be exponential, because the new codes will release human energy that for 50 years has been actively repressed by an anti-human legal philosophy. Fixing broken government requires a historic overhaul. The new governing philosophy, however, could hardly be more traditional: to reactivate the role of human responsibility in democratic governance.

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<sup>37</sup> Peter F. Drucker, *Individual Freedom and Effective Government in a Society of Superpowers*, in *POWER AND DEMOCRACY IN AMERICA* 3 (William V. D’Antonio & Howard J. Ehrlich eds., 1961).