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Book Review: The Death of Common Sense - How Law Is Suffocating America by Philip K. Howard

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The Death of Common Sense: How Law Is Suffocating America.

By PHILIP K. HOWARD.

New York: Random House, 1994, Pp. 202. (\$25.00).

Reviewed by Lorne Sossin* & Julia E. Hanigberg**

Philip Howard, an American lawyer, has a simple point to make in this book, and he makes it effectively and often: the predominance of procedures and rules precludes any role for human judgment from shaping bureaucratic decision-making. The result is that the application of law in the administrative state is irrational, inappropriate, dangerous, costly, counterproductive and silly, depending on the example under scrutiny. While the setting for Howard's polemic is the American welfare state, the same arguments could as easily be levelled against bureaucratic decision-making in Canada, perhaps even more so, given that Canadian society is more heavily regulated, and public officials intervene in more areas of life in Canada than in the United States (e.g. health care).¹ The problem of discretion in the two welfare states is basically the same:

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¹ Indeed, the argument that bureaucracy should embrace more discretion, and rely less on abstract rules, recently has been made in the Canadian context as well; see L. Sossin, "Redistributing Democracy: Authority, Discretion and the Possibility of Engagement in the Welfare State" (1994) 26 Ottawa L. Rev. 1-46; and L. Sossin, "The Politics of Discretion: Towards a Critical Theory of Public Administration" (1993) 36 Can. Pub. Admin. 364; See also G. Albo *et al.*, eds., *A Different Kind of State?* (Toronto: Oxford University Press, 1993).

government is seen as a remote and arbitrary force issuing decisions that affect people's lives according to rules that do not always make sense.

The examples employed by Howard are as lively and readable as they are illustrative of bureaucracy's pathologies. For example, on the first page of the book, he chronicles the struggle of Mother Theresa's charitable mission to renovate an abandoned City-owned tenement building and convert it into a homeless shelter in New York. It took over a year to secure approval. The City then demanded elevators be put in, despite testimony that to use elevators would violate the Nuns vow of poverty. Faced with a bureaucracy unwilling to make exceptions, Mother Theresa packed up her good intentions and went elsewhere. Howard spins one horror story after another in this vein for most of the rest of the book. On one page, he decries the designation of bricks as a "poisonous" substance because silicon might be released through sawing (despite the fact that bricks are never sawed), the next page he assails sentencing guidelines for drug offences which are tied to the weight of the drugs smuggled, allowing nefarious street-dealers who push joints to children to escape jail, while putting middle-men who arrange for the shipment of large quantities of drugs in jail for life. In Howard's formulation, the archetype of a law able to be applied justly is the U.S. Constitution, which is concise, ambiguous, and therefore flexible, while the archetype of a law susceptible to unjust application is the *Income Tax Act*, which is voluminous, precise, and therefore gives rise to loopholes for the rich, and more work for lawyers.

Howard's insights regarding the causes of this malaise are both random and compelling; for example, he contends that legislation such as the *Occupational Health and Safety Act* is saddled with detailed regulations attempting to provide a rule covering any conceivable judgment an official might be called upon to make, thus preventing officials from overlooking minor violations if a company's overall safety record is exemplary. He points to a bribery scandal involving local New York politicians and procurement contracts in which, due to complex checks and balances, no one appeared actually to have authority to give out the contracts. Because no one has ultimate responsibility for a given outcome, no one has any incentive to get the job done. This chapter, Howard entitles, "The Buck Stops Nowhere." Likewise, Howard considers why the process of constructing a desperately needed hospital in Queens, for which funds were budgeted in 1984, has taken over ten years to get off the ground. The villain this time is due process, as challenges, hearings and reviews between rival contractors drag on. These procedural guarantees have become, in Howard's view, a tool with which to manipulate government for one's own ends. Hearings have supplanted handshakes, rules have taken the place of reason, and a system designed to increase fairness has instead handcuffed public officials, and inundated them in wasteful paperwork. To be sure, Howard makes a valuable point, but to where does this point lead us? For Howard, if the outcome of bureaucratic action makes sense, why should we quibble about the means? So what if a few boxes in the forms are skipped? On the one hand, "red tape" is undeniably a serious problem. On the other hand, a certain measure of chaos must always attach to democratic governance if it

is to be genuine. In Howard's argument, however, there is little room for such subtleties. It was Mussolini, after all, who made the trains run on time.

Howard next joins forces with the backlash against the folly of "political correctness" which is blamed with clogging the courts with frivolous discrimination suits and victim narratives. He alludes ominously to rumours he has heard of minority candidates who were not hired for positions because the employers feared they would be sued if they ever tried to fire the prospective employee. He recounts the story he has heard of a female student extorting good grades from a professor by threatening a harassment suit. These undocumented anecdotes suggest that those claiming to protect their rights are instead seeking to promote their power. To believe the portrait of America painted by Howard, it is a wonder any able-bodied, straight, white males are able to make ends meet. Most of Howard's venom, however, is reserved for the handicapped, who insist on enormous expenditures to provide comparable services to those without comparable abilities. For example, he cites vast sums of money spent on special education for autistic students resulting in less money for books and resources for the majority of able-bodied students, or the time it takes a bus in New York City to accommodate a wheelchair bound rider during rush-hour, resulting in other passengers arriving to work late. Howard's conclusion is that rights have no right to dominate the debate on the distribution of public goods and services:

Rights are not the language of democracy. Compromise is what democracy is about. Rights are the language of freedom, and are absolute because their role is to protect our liberty. By using the absolute power of freedom to accomplish reforms of democracy, we have undermined democracy and diminished our freedom.²

Howard's thesis, in the final analysis, is deeply conservative. Bureaucracy would be much better if it were run like a business, we are told.³ Participatory procedures, more often than not, get in the way of the necessary and proper exercise of authority. Howard does not cite a single example of a wiser or more just bureaucratic decision resulting from increased public consultations. Feminists, environmentalists and other "lobbyists" are portrayed as powerful agents of special interest groups who pressure timid officials to take a myopic view of law, resulting in the fabric of American society coming apart at the seams. For example, a progressive and cheap program to install public, self-cleaning toilets on New York City streets was torpedoed by self-serving advocates of the handicapped who insisted on access to the public toilets, and

² At 168.

³ Howard's analysis adopts the argument that public managers should learn from private managers to always view the bottom line. This was best articulated in D. Osborne and T. Gaebler, *Reinventing Government: How the Entrepreneurial Spirit is Transforming the Public Sector* (New York: Penguin, 1992); and institutionalized as the U.S. government's plan for administrative reform in Vice President Al Gore, *From Red Tape to Results: Creating a Government That Works Better and Costs Less: The Gore Report on Reinventing Government* (1993); see in the Canadian context, B.G. Peters & D.J. Savoie, "Reinventing Osborne and Gaebler: Lessons from the Gore Commission," (1994) 37 Can. Pub. Admin. 302.

refused the compromise of separate facilities. The hijacking of government by special interests, and the need to somehow return it to the control “of the people” is, by now, a familiar refrain in American politics. But rather than calling for town-hall meetings or grass-roots protests, Howard seems more interested in a flexible civil service motivated by results rather than process. The proper model for the application of law, in Howard’s estimation, is the common law, where gridlock is the exception and adaptability the rule, and where Judges know best. Howard’s answer to the morass of rigid rules and rudderless administration is to allow public officials the chance to simply muddle through: “Americans can do almost anything. We’ll figure it out, and if we don’t, we’ll work so hard it won’t matter.”⁴

For common sense to be reintroduced into government, more discretion must be provided bureaucrats to apply laws outside the rigid confines of uniform rules and regulations, and free from the fear of vexatious litigation. What principles should guide this vast new delegation of power? In the absence of rules, how will bureaucrats justify the lack of uniformity in the application of law to those adversely affected by it? The brief, concluding chapter of the book, entitled portentously, “Releasing Ourselves,” offers up only bland platitudes (such as “Judgment is to law as water is to crops”⁵ and “The sunlight of common sense shines high above us whenever principles control”)⁶ and an abiding belief in the frontier values of self-reliance. To Howard, this means bureaucrats should be more decisive and citizens should tolerate bureaucratic indecision less. On this view, if only officials and those subject to their authority could sit down, look each other in the eye, and say “let’s be reasonable,” everything else would work itself out. Our criticism of this ideal is not that it is hopelessly utopian, but that it is dangerously naive. The application of law, like its formulation, is not a neutral enterprise. Some people benefit, others are burdened. It is one thing to remove waste and inefficiency from the administrative process, but it is altogether another to remove any participatory input from a structure of power with explicitly political outcomes.

Howard’s failure to elaborate on what he means by “common sense”, or more to the point, whose idea of “common sense” should take precedence, does not weaken his attack on a lamentable status quo. What it does do, though, is skirt the question of *why* increased bureaucratic discretion is so widely feared, and *who* benefits from the status quo. Despite its shortcomings, it should not come as a surprise that this book quickly has become a bestseller. It succeeds in touching a powerful chord with the multitude who believe in the idea of law but have lost faith in the practice of government.

Though this book is aimed at a general audience, its message will resonate most strongly with those who study or practice law. Each chapter is really a compendium of anecdotes, followed with a general proclamation on how the

⁴ At 171.

⁵ At 175.

⁶ At 177.

stories demonstrates or expand upon the thesis. Additionally, short sections are devoted to the history of relevant topics such as due process, welfare rights, and judicial review, which serve as crisp introductions for those not familiar with the cornerstones of American Administrative Law. Though the book contains no footnotes, and neither promises nor delivers an academic treatise, Howard's prose is peppered with memorable quotations from American legal luminaries such as Cardozo, Brandeis, Frankfurter, Holmes as well as many law professors, political scientists, government officials and philosophers. All of these authorities are deployed to convey the same message: sensible judgments are good; senseless rules are bad.

The Death of Common Sense serves to highlight an interesting paradox. The premise of the book is that too much bureaucracy is bad for democracy, too much democracy is bad for bureaucracy, and the welfare state has found itself with too much of both. Howard addresses this premise with a catalogue of parables on how disconnected practical reason has become from both the legal and administrative processes with shape people's lives. If you are mad as hell at the system, this book will give you the basis for concluding that you ought not to take it any more; if you are looking for more than this, you may well be disappointed, for Howard concludes, "law cannot save us from ourselves."⁷