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Common Sense and the Law

Philip K. Howard
Attorney, Author, *The Death of
Common Sense*

The son of a Presbyterian minister, Philip K. Howard was raised in eastern Kentucky. Summers working in the tobacco fields convinced him of the value of education, and he went on to earn degrees from Yale University and the University of Virginia School of Law. From 1967-1969, he did research at Oak Ridge National Laboratory, and from 1970-1979 at the Rand Institute and Fund for the City of New York. In 1974, he joined the law firm of Sullivan & Cromwell, and in 1983 he became a founding partner of Howard, Darby & Levin.



After twenty years spent as a corporate lawyer and civic leader in New York City, he was prompted to write *The Death of Common Sense: How Law Is Suffocating America*, which was on the *New York Times* best-seller list for over six months. The book has been adopted for use by both major political parties and has helped define the debate on governmental and legal reform.▲

Attorney Philip K. Howard suggests that instead of a nation of laws, we have become a nation of lawsuits. The only answer is a return to common sense—and to individual responsibility. His remarks, based on his best-selling book, The Death of Common Sense, were delivered at Hillsdale College's Shavano Institute for National Leadership seminar, "The Future of American Business," in Chicago in May 1996. The seminar and this month's issue of Imprimis were made possible by the Edward Lowe Foundation, a private nonprofit organization devoted to free enterprise education.

Mother Teresa and the Building Inspectors

In the winter of 1988, nuns of the Missionaries of Charity, an order led by Nobel laureate Mother Teresa, were walking through the snow in the South Bronx in their saris and sandals to look for an abandoned building that they might convert into a homeless shelter. They came to two fire-gutted buildings on 148th Street and, finding a Madonna among the rubble, thought that perhaps Providence itself had ordained the mission. New York City offered the abandoned buildings at one dollar each, and the Missionaries of Charity raised \$500,000 for the reconstruction. For a year and a half, the nuns then traveled from hearing room to hearing room, presenting the details of the project to city government officials. Finally, in the fall of 1989, the project won approval.

Providence, however, was no match for the law. After they had begun reconstruction, the nuns were informed that the building code required an elevator in every new or renovated multiple-story building. It would add \$100,000 to the cost, and the law could not be waived even if an elevator didn't make sense. Mother Teresa and the nuns gave up. They didn't want to devote that much extra money to something that wouldn't really help the poor.

Law is generally thought of in its Perry Mason sense, but courtroom dramas do not touch most of our lives. The law of government, on the other hand, controls almost every activity of common interest—fixing the pothole in front of the house, running public schools, regulating day care centers, supervising the workplace, cleaning up the environment, and deciding whether Mother Teresa gets a building permit.

No person decided to spite Mother Teresa. It was the law. And what it required offends common sense. There are probably one million buildings in New York without elevators. Homeless people would love to live in almost any one of these. Walking up a flight of stairs is not, after all, the greatest problem in their lives. But the law, aspiring to the "perfect" housing abode, only permits housing that satisfies middle class standards.

Amoco and the EPA

When, after years of hearings, the Environmental Protection Agency (EPA) passed a rule requiring that specific equipment be put in waste pipes to filter benzene, a harmful pollutant, the Amoco Oil Company readily complied. In the late 1980s, it even let a team from the EPA into one of its Virginia refineries to see how environmental rules—written in windowless rooms in Washington,

piled high with scientific evidence and legal briefs—actually worked in practice.

The EPA team found that the refinery was emitting significant amounts of benzene, but nowhere near the waste pipes. The pollution was at the loading docks, where gasoline is pumped into

barges. Just as fumes escape when you use an old-style nozzle when filling up your car at the gas station, large quantities of benzene were escaping as Amoco annually pumped several hundred million gallons of gasoline into barges.

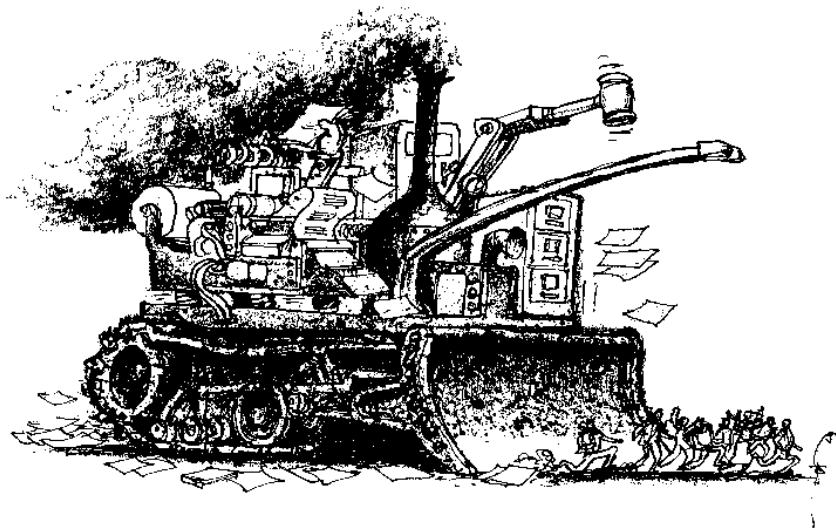
Once EPA and Amoco officials actually stood on the dock together and realized the problem, the solution was easy and relatively inexpensive. Meanwhile, pursuant to the rigid dictates of a 35-page rule that many government experts had spent years fine-tuning, Amoco had

spent \$31 million to capture an insignificant amount of benzene at the smokestack. The rule was almost perfect in its failure: It maximized the cost to Amoco while minimizing the benefit to the public. It is no wonder that environmental laws and rules, which now fill 17 volumes of fine print and have cost \$1 trillion in the last 20 years, often seem to miss the mark or prove counterproductive.

The Glen-Gery Brick Factory and OSHA

The Labor Department's Occupational Safety and Health Administration (OSHA), created by Congress in 1970, passes safety regulations and inspects workplaces. For over 25 years OSHA has been hard at work. It has written over 4,000 detailed regulations. It has about 2,000 safety inspectors in the field—not many compared with 6 million workplaces, but enough to do some good if they focus on firms with bad safety records. Several hundred billion dollars have been spent by industry to comply with OSHA's

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rules. Intuitively, all this expense must have done some good.

But it hasn't. Safety in the American workplace has been largely unaffected. A tour through the Glen-Gery brick factory, near Reading, Pennsylvania, gives an indication why. Brickmaking is not generally considered hazardous. People have been doing it more or less the same way for several thousand years by mixing clay and water, applying heat, and then stacking up the finished bricks for delivery. No hidden hazards have ever been identified with brickmaking, no "red clay disease" or the like. But modern brickmakers use an assembly line to mass-produce them, so there are machines and kilns that hold the potential for accidents.

OSHA inspectors visit the Glen-Gery factory once or twice a year. The inspectors walk around the factory with a measuring tape and always find violations. They are especially interested in railings. Glen-Gery has been cited for having railings in older parts of the factory 39 and 40 inches high, not the regulation 42 inches. In one area already partitioned off by railings, OSHA required several thousand dollars to be spent for an automatic shutoff on a one-foot-wide conveyer belt. The rule applied, OSHA pointed out, because occasionally a repairman might enter the area and step across it.

Warnings are posted everywhere. A large POISON sign dominates one side of a storage shed filled with bags of something hazardous: It turns out to be sand. OSHA categorizes sand as poison because it contains a mineral called silica. If the inspectors can't find anything else, they go to the factory shop, where machinery is fixed. There are always some oil rags used to wipe down gears and clean bearings that can be cited as a fire hazard.

The inspectors also spend a lot of time upstairs in the office looking at paperwork; Glen-Gery was recently cited because the wrong box was accidentally checked on some internal form. About 50 percent of all OSHA violations across the nation are for not filling out forms correctly.

The one thing that seems to be of no interest to the inspectors is Glen-Gery's safety record. In the inevitable discussion after each inspection, they are unwilling to discuss whether a violation actually has anything to do with safety. Glen-Gery has never had an incident, for example, related to its railings. OSHA inspectors, in the words of almost everyone who has to deal with them, are "just traffic cops" looking for rule violations.

Since 1988, however, Glen-Gery's safety record has improved dramatically. When Ron Smeal became manager, he calculated that the company was losing over \$30,000 per injury in health and unemployment benefit costs. He got together with some key supervisors, and they decided to institute safety contests. At the end of each quarter, prizes like tool sets are given to each worker who has not lost a workday. This seems to have had a good effect and has been expanded to all Glen-Gery plants. Recently, the company stepped up the campaign and started distributing a tax-free cash sum by lottery at the end of each quarter: The lower the overall injury record, the higher the award. These contests, intended to instill peer-group pressure to be careful, have worked almost like magic: The number of workdays lost has declined by 75 percent. And creating a culture of safety has worked where all OSHA's rules have not.

Losing Respect for the Law

Law has always been the pride of our country. It is the common framework within which a free people can take their own path to fulfillment. The addition of regulatory law, as law professor Edward Rubin has observed, has not arisen out of some lapse of moral vigilance. We want it to protect common resources and to advance common goals. Yet, increasingly, law makes us feel like its victims. We divert our energies into defensive measures designed solely to avoid tripping over rules that seem to exist only because someone put them there. Knowing for certain that full compliance is impossible and that the government's formalistic reaction may be wholly out of proportion, law has fostered what law professor Joel Handler has described as a "culture of resistance."

New rules are looked upon with resignation and are often considered, as one prominent lawyer says, to be "transient, boring, and hardly worthy of serious study." Indeed, unless getting caught is a real risk, why should we comply with these rules? Are we at the point, as legal scholar Bayless Manning feared, where a scofflaw attitude has become accepted by the public? When law is too dense to be known, too detailed to be sensible, and is always tripping us up, why should we respect it?

And how can anything good happen, the Austrian economist and Nobel laureate Friedrich Hayek once asked, if individuals cannot think and do for themselves? Rules preclude initiative. Regimentation precludes evolution. We have deluded ourselves into thinking that government should only act through central, self-executing rules. We have cast aside our good sense to worship an icon made of abstract logic and arbitrary words.

All this governmental process has spilled over into our daily lives and diverts us from doing our jobs. We fill out forms: Making sure everything is documented precisely is critical to modern process. Indeed, a tidal wave of forms has engulfed the country. Keeping up with OSHA's forms (like the ones caked with dust at the Glen-Gery brick factory) takes 54 million hours per year. At \$20 per hour, that is about \$1 billion to catalog the dangers of such items as Windex and Joy. Under one environmental statute that requires extensive

record keeping, 99.5 percent of all the covered chemicals are used by 14,000 companies; but 600,000 other companies, who use the other .5 percent of the chemicals, have to fill out all the same forms. As with detailed rules, "uniform procedures" have nonuniform effects.

The medical care industry is the hardest hit. Everything—every aspirin, every simple lab test—requires that a form be filled out. How else, the theory goes, can we assure that everything is in order? But hospitals now spend as much as 25 percent of their budget on administration, mainly to

comply with these procedural requirements. In the middle of a medical care crisis, it is unsettling to consider all the time spent by doctors, nurses, and staff on paperwork. Supposedly, the goal is to make sure that procedures are properly followed and that money isn't squandered, but the process itself discourages proper procedure and squanders money.

We seem to have forgotten two indispensable ingredients

of any successful human endeavor: the first is *use of judgment*. We have constructed a system of regulatory law that basically outlaws common sense. Modern law, in an effort to be "self-executing," has shut out our humanity. And as process has developed into a kind of religion, we have also forgotten about the second ingredient: *responsibility*.

"Whenever the rules are eased, our energy and good sense pour in like sunlight through opened blinds."

A Return to Common Sense

But we Americans can do almost anything. We will figure it out, and if we don't, we will work so hard it won't matter. Our energy has always amazed foreigners. As the 19th-century French observer Alexis de Tocqueville wrote: "No sooner do you set foot on American soil than you find yourself in a sort of tumult; a confused clamor rises on every side and a thousand voices are heard at once....All around you, everything is on the move."

Whenever the rules are eased, our energy and good sense pour in like sunlight through opened blinds. After the 1994 earthquake in Los Angeles toppled freeways, California Governor Pete Wilson suspended the thick book of procedural guidelines and, using federal aid, authorized financial incentives for speedy work. Instead of a four-year trudge through government process, the Santa Monica

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