IS COMMON SENSE DYING, DEAD, OR JUST DORMANT?

PETER MACDONALD

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Choosing a subject for an Athenaeum Society paper can be an intimidating and formidable obstacle. In the past I have been rather cowardly and chosen topics that have been purely objective, and left little, if any, room for interpretation or introspection. After all, what can one discuss about topics ranging from the Middle Ages to Hell's Angels or bomb shelters and drive-in movies. In my mind it was time to select a subject that would be stimulating to the members of the society, for Lord knows, this group needs it. Having reached that conclusion, it then became my task to select a topic that would fulfill my goal. I toyed with the idea of writing about the Anasazi, this subject being a keen interest of mine, especially after a trip last summer to New Mexico and Colorado, and in particular a visit to Mesa Verde National Park. I am fascinated with the culture and history of these ancient Americans and spend a great deal of time reading about them and thinking about why they disappeared from the area and why anthropologists have not been able to determine why they left. But two other events within the past year have had a more profound effect on me and led to the choice of my subject matter for this paper. The first was a letter I received from the clerk of the Supreme Court and the other was my service on the Discipline Committee of Hopkinsville High School's Site Based Decision Making Council.

The letter that I received from the clerk of the Supreme Court was one that in essence required that the Third Judicial District,

which consists of Judge James G. Adams and me, submit written rules of court to the Supreme Court for its approval and then our implementation. We have been operating quite well for over 18 years without written rules so why is it now necessary for us to set out specific rules that will only further complicate an already complicated legal system? It seemed idiotic to me but I'm sure that before the dust clears, we will have rules in place that are designed to cover every possible action in court. Granted, it is important to have a set schedule so that attorneys, clerks, law enforcement officers and the general public will know when to appear in court. However, for the past eighteen years we have had basically the same schedule and it is available to those who are not aware of it by simply making a short telephone call. The second event that has influenced my choice of a topic is the service on the Discipline Committee. Our task of the past year has been to rewrite and/or develop a Code of Conduct for the students at Hopkinsville High School. This task has proven to be quite formidable, and not without its attendant frustrations. It is apparent that today's administrators are loathe to act without specific rules and regulations in place. They no longer use common sense in dealing with anything and revert to rules so that no decision can be made unless the answer is already set out.

Americans are bursting with frustration at government. Thick rule books dictate results that almost never make sense. Government can barely fix potholes or fire an employee who doesn't show up for work, much less accomplish important goals. With the

best of intentions, government hands out new legal rights like land grants, usually to victims of history or circumstance, but fails to notice that it then loses its ability to balance everyone's welfare. Law began infiltrating the nooks and crannies of our lives in the 1960's, crowding out our common sense. Rules replaced thinking. Process replaced responsibility. One false idea lay at the bottom of these developments: that human judgment should be banned from anything to do with law. We fell for the idea that all could be laid out in a tidy legal system where decisions were pre-determined, social choices premade.

It is true that sometimes the external restraint of law is required because the internal restraint of morality is missing. And it is also true that sometimes the external order of rule is necessary because the internal common sense is missing. But where did we go wrong, or why is it necessary to put in the context of a rule that all students must not sleep in class, that they are required to bring all materials to class and that they are required to complete all of their assignments? Isn't it common sense that students in a classroom setting should know that all of the above are required. Are we now at the point where we are paralyzed unless specifically authorized to do something? Or is it maybe that we have lost the ability to think for ourselves and to exercise sound judgment based on learned experience?

There is a wonderful book written by an attorney, of all people, that gives example after example of how our common sense is rapidly disappearing. Philip K. Howard's <u>The Death of Common</u>

Sense, is well worth reading. Although he practices in New York, he is a native of Eastern Kentucky. Everything he writes about the law and administrative regulations makes one seeth with frustration and rail at our vast system of rules, regulations, and law.

Just one example in his book shows just how far we have gone in removing common sense from our lives. In the winter of 1988, nuns of the Missionaries of Charity 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. Mother Teresa, the Nobel Prize winner and head of the order, had agreed on the plan with Mayor Ed Koch after visiting him in the hospital several years earlier. The nuns 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 set aside $500,000 for the reconstruction. The nuns developed a plan to provide temporary care for sixty-four homeless men in a communal setting that included a dining room and kitchen on the first floor, a lounge on the second floor, and small dormitory rooms on the third and fourth floors. The only unusual thing about the plan was that the Missionaries of Charity, in addition to their vow of poverty, avoid the routine use of modern conveniences. There would be no dishwashers or other appliances; laundry would be done by hand. For New York City, the proposed homeless facility would be a godsend.

Although the city owned the buildings, no official had the authority to transfer them except through an extensive bureaucratic process. For a year and a half the nuns, wanting only to live a life of ascetic service, found themselves instead traveling in their sandals from hearing room to hearing room, presenting the details of the project and then discussing the details again at two higher levels of city government. In September 1989 the city finally approved the plan and the Missionaries of Charity began repairing the fire damage.

Providence, however, was no match for law. New York's building code, they were told after almost two years, requires an elevator in every new or renovated multiple-story building. The Missionaries of Charity explained that because of their beliefs they would never use the elevator, which also would add upwards of $100,000 to the cost. The nuns were told the law could not be waived even if the elevator didn't make sense.

Mother Teresa gave up. She didn't want to devote that much extra money to something that wouldn't really help the poor: According to her representative, "The Sisters felt they could use the money much more usefully for soup and sandwiches." In a polite letter to the city expressing their regrets, the Missionaries of Charity noted that the episode "served to educate us about the law and its many complexities."

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 the street, running public schools, regulating day care centers, establishing rules of court, controlling behavior in the workplace, cleaning up the environment, and deciding whether Mother Teresa got a building permit.

No person decided to intentionally spite Mother Teresa. It was the law. And what it required offends common sense. There are probably 1 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, has accumulated so many good ideas that the only type of new housing that is permitted must satisfy middle-class standards.

Environmental laws and rules, now seventeen volumes of fine print, often seem to miss the mark or prove counterproductive. Under one requirement, before industrial land with any toxic waste can be used, it must be cleaned up to almost perfect purity. It sounds great, but the effect is to drive industry out to virgin fields, where it encounters no such costs. Instead of cleaning up one dirty lot, the strict law creates a second dirty lot.

Big government is the usual suspect for the failure of anything to be simple or to work using common sense. If only the government got out of our hair, everything would work fine. But dreaming of an agrarian republic is not likely to help much. No one wants to eliminate environmental protection. Fire codes are a good idea, after all, we wouldn't want our next door neighbor's

house built of kindling. The more important question is not why government is so big-we all know that any reduction in government would only occur at the edges-but why, with only a few exceptions, it fails in even its simplest tasks.

"The characteristic complaint of our time seems to be not that the government provides no reasons," said former Supreme Court justice William Brennan, "but that its reasons often seem remote from human beings who must live with the consequences." Government acts like some extraterrestrial power, not an institution that exists to serve us. Its actions have an arbitrary quality: It almost never deals with real-life problems in a way that reflects an understanding of the situation.

Making rules as precise as possible has become almost a religious tenet. "Only precise, specific guidelines," said Herbert Kaufman, of the Brookings Institution, in 1977, "can assure common treatment of like cases." Otherwise, he said, "programs lose all consistency." As nearly as possible, another legal scholar wrote, legal rules should be "self-executing" and "aim toward solutions that can be carried into effect without discretionary administration." In 1970, during a lawmaking surge that began with Lyndon Johnson's Great Society, federal appeals judge J. Skelly Wright attacked the idea of administrators having freedom to make decisions as the "soft underbelly of the American legal system" and called on "all branches of government to join in the fight against discretion" by passing more rules. Professor Kenneth Davis, the author of perhaps the most famous administrative law text, asserts

that "administrative rule-making is....one of the greatest inventions of modern government." Through detailed rules, regulation would be made certain.

Certainty, we seem to think, is important to law. But look up at what we have built: a legal colossus unprecedented in the history of civilization, with legal dictates numbering in the millions of words and growing larger every day. Our regulatory system has become an instructions manual. It tells us and bureaucrats exactly what to do and how to do it. Detailed rule after detailed rule addresses every eventuality, or at least every situation lawmakers and bureaucrats can think of. Is it a coincidence that almost every encounter with government is an exercise in frustration?

This system is not some constitutional mandate but a comparatively recent invention. Only three decades ago, in the 1960's, government puttered along quite well without detailed rules to meet every eventuality. Forest rangers could carry all of their rules on a list in their shirt pockets. They did just fine armed with a single pamphlet of rules and their own common sense. Now they have to consult several volumes of fine print.

We seem to have achieved the worst of both worlds: a system of regulation that goes too far while it also does too little. This paradox is explained by the absence of the one indispensable ingredient of any successful human endeavor: use of judgment.

What is known as the "common law," which we inherited from England, still governs relations among citizens. For centuries

before the rise of the modern state and all its statutes and rules, the common law dominated the legal landscape; its principles still provide the framework of our modern legal system. The common law is not a legislative enactment but the synthesis of general standards derived from countless court decisions. The common law is the opposite of ironclad rules that seek to predetermine results. More than anything else, the common law glorifies the particular situation and invites common sense.

For our nation's first century, statutory law was used mainly to allocate money for defense and public works. Statutes began to replace the common law in importance at the turn of the century. With the New Deal, statutes began to dominate the legal landscape, providing job relief, welfare programs and Social Security; agencies like the Securities and Exchange Commission were created as part of a broad plan to regulate the economy. Lawmaking momentum was interrupted by World War II, but it surged again in the 1960's, providing social programs like Medicare, oversight in areas like worker safety, and control over common resources such as the environment. Much of the growth in law, however, was due not to government's expanded role but to its techniques. We changed our attitude toward legal detail: The words of law expanded faster that the new areas of the law. The Federal Register, a daily report of new and proposed regulations, increased from 15,000 pages in the final year of Kennedy's presidency to over 70,000 pages in the last year of George Bush's.

Included in the Occupational Safety and Health Administration's over 4000 detailed regulations are over 140 regulations on wooden ladders, including one specifying the grain of the wood. Several hundred billion dollars have been spent by industry to comply with OSHA's rules. Intuitively, all this expense must have done wonders. It hasn't. Safety in the American workplace is about the same as it was in 1970.

How can law function as a guide to action if almost no one knows it? How can anybody know the fine print in four thousand rules? Several million small employers operate pursuant to their own moral code, comfortable only in the assurance that they could never figure out the letter of the law if they tried. This is a predicament one witness before Congress termed the syndrome of "involuntary noncompliance." What good, we might ask ourselves, is a legal system that cannot be known? One observer has noted that it is common knowledge in the meat packing industry, denied only by USDA spokesmen, that if all meat-inspecting regulations were enforced to the letter, no meat-processor in America would be open for business. Are we reaching the point where a scofflaw attitude has been 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?

Soon after the Civil Service Act in 1883, at the beginning of America's modern bureaucracy, Woodrow Wilson, a noted political scientist before he became president, emphasized the need to vest public servants with "large powers and.....discretion" as the

indispensable "condition of responsibility." Otherwise, he warned, nothing will get done. How has it happened then, that in less than a century, we traveled full circle from Wilson's advice? The founders of modern bureaucracy sought to make government effective by liberating it from the tangled world of procedural delay and lawyer's tricks. We have now circled back to the world where people argue, not about right and wrong, but about whether something is done the right way. Bureaucracy, founded to liberate government from process, does almost nothing else.

One more example of governmental insanity for your listening pleasure. Finding a public bathroom in New York is not easy. Most public toilets were closed down years ago because of vandalism and crime. In 1991 the Kaplan Fund put forth a modest proposal to finance a test of six sidewalk toilet kiosks in different sections of the city. The kiosks had been perfected over years of experience in Paris. They clean themselves with a shower of water and disinfectant after each use. Their size is small which means that they wouldn't block sidewalks and the whole idea was just too good to be true. Because then came the glitch. Wheelchairs couldn't fit inside the kiosks. New York's antidiscrimination law provides that it is illegal to withhold or deny from the disabled any access to public accommodation. The law requires that everyone go the bathroom in exactly the same place. When someone had the nerve, at a public forum, to ask how many wheelchair users there might be compared with other citizens who might benefit(including blind and deaf citizens), the questioner was hooted down for asking

a politically incorrect question. Rights give open-ended power to one group, and it comes out to everyone else's detriment. What about the right of all non-wheelchair users to use the kiosk?

Handing out rights does not resolve conflict. It aggravates it.

Gifted students, in contrast to disabled children, receive virtually no support or attention from America's school systems; about two cents out of every hundred dollars is allocated to programs for them. The ration of funding of special education programs to gifted programs is about eleven dollars to one cent. We have built an educational system obsessed with its potential failures to the detriment of its potential successes. It is hard to establish a discipline process for special education students when federal law prohibits their being suspended for more than ten days and virtually impossible to expel them. There is no such problem in dealing with the regular student. Last year at Hopkinsville High School approximately 35 students out of 1200 caused 60% of the discipline problems. These were special education students and nothing could be done about it, at least as long as the school system accepted federal money.

Rights for the disabled are particularly paradoxical, because what benefits a person with one disability may harm someone with another. Low drinking fountains and telephones are harder to use for the elderly or those with bad backs. Curb cuts are more dangerous for the blind, who have more difficulty knowing when they have reached the end of the block. The Americans with Disabilities

Act supposedly protects 43 million Americans. The overwhelming preponderance of the ADA regulations, however, and virtually all cost and conflict, relate to wheelchair users. But there are not 43 million people in wheelchairs. There are not 10% of that number in wheelchairs. Billions are being spent to make every nook and cranny of every facility in America wheelchair accessible, when children are dying of malnutrition and our schoolchildren finish almost dead last in math proficiency in the world.

Our hatred of government is not caused mainly by government's goals, whatever their wisdom, but by government's techniques. Law is hailed as the instrument of freedom because without law, there would be anarchy, and we would eventually come under the thumb of whoever gets power. Too much law, we are learning, can have a comparable effect. Every generation has smart people who think they can figure everything out, once and for all. We happen to be the generation that fell for it. Conquering human nature was not the idea when our founders devised a new nation around the freedom of each individual. Avoiding coercion by making law into a detailed manual only assures another form of coercion. Modernizing democracy with a huge legal monument crushes what may be one of democracy's most important qualities, continual trial and error.

Judge Adams and I are currently putting the finishing touches on our court rules. We are, however, somewhat apprehensive because the rules we are proposing to the Supreme Court will provide for every possible legal contingency, and will therefore make our jobs obsolete. We are presently on page 2227, which provides for the

attire of attorneys. Rule 74-RCC-28914(c)(5) provides, in part, as follows: Dress for attorneys-No pastel colors will be allowed under any circumstances, except on those recognized holidays where color is of some significance. However, prior approval must be secured from the chief judge, or his or her designee at least ten days in advance of the holiday excepting weekends and other holidays. Female attorneys will wear skirts or dresses-no pants are permitted. The hem of the skirt or dress shall not be higher than two inches below the knee, regardless of the current east or west coast fashion. All bailiffs are instructed to carry a yard stick at all times to measure those hems in doubt. The yardstick is to be made of wood and shall not exceed 36 inches in length. etc. etc. etc. Ad nauseum. Ad infinitum.