Book Reviews

The Rule of Nobody: Saving America from Dead Laws and Broken Government
Philip K. Howard
New York: W.W. Norton, 2014, 244 pp.

Philip Howard is a lawyer nationally known for his best-selling books and extensive commentary on the dysfunctions of the American legal and political systems and the adverse effects those dysfunctions have on individual behavior and the overall workings of society.

Beginning with his 1994 best seller, *The Death of Common Sense*, and throughout the rest of his career, Howard has chronicled an American society buried in law and legalism, tyrannized by jackpot justice trial attorneys, and strangled in red tape; a society smothered with rules and legalistic procedures that paralyze us, prevent us from taking responsibility, and keep us from using our common sense to confront and solve our problems in order to advance the common good.

In response to these problems, Howard has called for a restoration of common sense to government based on principles of freedom, responsibility, and accountability. He has called for a sweeping simplification of government that will allow people to make sensible choices and free them from the oppressive interference of lawyers. One of Howard's books is even called *Life without Lawyers*. As a result of his continued focus on the widely acknowledged problems of our legal system, Howard is firmly

Cato Journal, Vol. 35, No. 1 (Winter 2015). Copyright © Cato Institute. All rights reserved.

established as a well-known legal reformer. He has spoken in a wide variety of venues, including *The Daily Show with Jon Stewart*. In 2002, he founded Common Good in order to better champion his reforms.

In *The Rule of Nobody*, Howard returns to established themes, this time with a focus on government regulation. He presents a compelling description of the dysfunctional American administrative state—strangled in red tape, beset by absurdly detailed means-and-methods regulations with check-the-box compliance requirements, bogged down in endless permitting and other administrative proceedings, and burdened with costly litigation. A thicket of law and a horde of lawyers combine to restrict freedom, obscure responsibility, undermine accountability, and sap individual initiative, thus preventing America from effectively addressing the serious problems that confront it.

Howard laments that rules dictate daily choices and that nobody has authority, or responsibility, to get things done—thus, "the rule of nobody." He underscores his point with anecdotes about sympathetic individuals trying to take responsibility and to get things done—school teachers trying to maintain classroom discipline, nursing home operators trying to provide compassionate care, an official trying to improve a port facility, and someone who just wanted to remove a fallen tree from a creek bed in his town.

Howard is certainly correct that America is strangled by red tape. What then, is the cause of this sorry situation, and what is the cure? According to Howard, our current regulatory mess results from our outmoded attachment to the rule of law and its misplaced emphasis on clear rules, predictability, and procedural safeguards to restrain the arbitrary exercise of state power and to protect the rights of the individual. Attachment to this "orthodoxy" is the key reason for the proliferation of rules and regulations that are so numerous, complex, and restrictive that public officials cannot apply their professional judgment, exercise authority, and take the decisive action that Howard claims is needed to effectively deal with the problems that confront our complex and interdependent modern society. According to Howard, "American government is failing not because officials who deal with the public have too much power, but because they have too little." He asserts that "nothing will get fixed until we give back to officials the authority that goes along with their responsibility." America needs a strong

government that can get things done and "implement our common goals." After all, "the only purpose of government is to serve the common good."

Howard believes we must recognize the "failure of the framer's [sic] vision" and rethink the rule of law, limited government, and individual liberty. According to Howard, the proper role of law in a modern society is to set general policies and to proscribe in very general terms the outer boundaries of prohibited behavior inconsistent with those policies. Law should not attempt to prescribe specific behavior required to support a policy, nor should it proscribe in precise terms the behavior that will constitute a violation of the policy. Both of those tasks should be delegated to responsible administrative officials authorized to apply their professional judgment to determine on a case-by-case basis what behavior is needed to support the policy and whether a certain behavior has violated the policy.

"Think of law as a giant corral," says Howard. Within the fences, the regulator oversees and directs, not by the application of detailed rules and regulations like we have today, but through an ongoing "regulatory conversation" between the regulator and the regulated that indicates what behavior is required so things are "up to snuff" and in accordance with government policies. This conversation is of course backed by the threat of sanctions. "Regulating softly only works . . . as long as government has a big stick."

The obvious vagueness and unpredictability of this sort of "open legal structure" is, according to Howard, not a vice but a virtue. When the regulated are not sure of exactly what kind of behavior is required to avoid punishment, they will use the "regulatory conversation" to learn the sorts of behavior the regulator wants to encourage and "go to the middle" of the corral as "a kind of safe harbor," conforming their behavior to that most closely supportive of the government's policies and to advancing the common good.

Howard maintains that life inside the corral will be free and fulfilling, more so than today. He argues this point by redefining freedom and fulfillment in terms that reduce the individual to a mere component of the collective. He dismisses our traditional concept of individual freedom as "a thin brew of isolated actions and selfish pleasures." In a complex and crowded modern society, "oversight is essential for us to feel free" and "defining freedom by absence of authority is a formula for futility and unimportance."

Collective "enterprises . . . create the opportunities for real accomplishment. But joint endeavors require authority."

Before we can move into the corral and live the more fulfilling collective life under the tutelage of our shepherd regulator, "democracy must be built anew," and government must be restructured from its foundations up to "allow officials to focus on the common good." To accomplish this restructuring, Howard proposes a series of reforms designed to enhance the power and increase the flexibility of administrative officials. Some of these are familiar and individually uncontroversial, but together they combine to support Howard's "open legal structure" at the expense of constitutionally limited government, individual rights, and the rule of law. He calls for the appointment of committees of "experts" to recodify and radically simplify federal statutes. He proposes that all laws with a budgetary impact expire after a period of time. He argues that the powers of the president should be increased, and that Congress should merely "set [policy] goals and . . . leave ample room for the executive to make choices." Judicial review of executive actions should be dramatically curtailed to limit the ability of individuals and corporations to use litigation to "second guess policy choices" of the executive and thus delay the implementation of needed regulatory action "for selfish ends" inconsistent with the broader interests of society.

Who determines what is in the broader interest of society? Howard calls for the presidential appointment of a nine-member Council of Citizens drawn from a pool of 100 people "of high distinction" to "represent the greater good" and "provide the moral keel for public choices." This "independent body" of disinterested experts would provide a "counterbalancing force to the incessant demands of self-interest." Its members would "evaluate the moral basis of policy choices."

As our regulator shepherds apply their judgment to oversee, direct, and sometimes punish us, Howard acknowledges that they will make mistakes. After all, "government oversight . . . involves *complex* activities," and the dialectic of "trial and error is the key to progress." But we do not need detailed rules and regulations, enforced through judicial review, to hold regulators accountable and to protect us from official abuse because the regulators overseeing our corral will themselves be "hemmed in" by generally

stated policies "tethered to community norms of reasonable interpretation." The reasonableness of every policy and every official act of interpretation and application can be judged by whether and the extent to which it advances the common good. "If a decision or law can't be justified as being in the broader interests of our free society, it is morally invalid." So, we will be able to call our regulators to account, but only for actions not consistent with the common good as generally expressed in policies blessed by the Citizen's Council.

As objective analysis, Howard's book must be judged a failure. Its basic premise, that our problems of governance result from the inadequate empowerment of public officials, is thoroughly refuted by the widely reported activities of the IRS, the EPA, the Department of Labor, the FDA, and other agencies. *The Rule of Nobody* is best understood as an argument for progressive governance and the administrative state wrapped up in a beguiling account of bureaucratic dysfunction and laced with personable anecdotes and appeals to commonplace but attractive concepts like common sense, personal responsibility, and the simplification of the legal system. All of the elements of the progressive credo are present: Individuals, on their own, are likely to act in ways that are selfish; we cannot be trusted to manage our affairs and make the choices needed for a complex society to progress; social progress is best directed by a governing class of experts, elite administrators freed from the restrictions imposed by outmoded concepts of limited government, inherent individual rights, and the rule of law who will be shepherds empowered to direct society for the "common good," as they may define it; individuals must adjust their ideas of personal freedom and understand that freedom is only achieved through the imposition of authority; and, finally, personal fulfillment is only achieved as a part of the collective.

Howard is correct that the operations of the administrative state are in tension with and hindered by the Constitution and the rule of law, and that inefficiency and so-called gridlock are often the result. The Founders established a limited government of enumerated powers divided and constrained by law to protect liberty at the expense of efficiency. For 100 years, the progressives have pursued efficiency at the expense of liberty. Howard would like to resolve this historic tension in favor of the administrative state.

There is, of course, a better way to resolve this tension: by recognizing that our Founders' vision is not a "failure," as Howard maintains, but a majestic triumph. Our Founders held that all people are born possessing in equal measure certain natural rights, including the rights to life, liberty, and property. The right to property is especially important because it is property that provides each individual a foundation on which to build an independent life, enjoy liberty, and pursue happiness. The progressives, by contrast, hold that the rights of the citizen are created by the government, conditionally granted to the citizen, and then continuously adjusted as the government determines such adjustment appropriate to advance its evolving policies in support of progress and the common good.

The view that rights are simply the malleable artifacts of government action drives the modern regulatory state. Everything we find so troubling, from the endless maze that typifies the permitting process and the stifling details of means-and-methods regulation, to the heavy-handed enforcement actions brought against even the smallest operators, are the direct and inevitable result of a regulatory process based on a progressive world view that sees the provision, use, and disposition of property as activities requiring government permission rather than as basic human rights that the government is obliged to protect

Red tape and bureaucratic dysfunction are not the fault of the rule of law; they are the essential manifestations of the micromanaging administrative state that seeks to supplant the rule of law with the rule of the regulator. Officials do not need more latitude to corral and shepherd the populace in pursuit of some abstract concept of the collective common good. People have had enough corralling, and we have suffered enough at the hands of collective utopians using the power of the state to impose their vision of a better tomorrow. Individual citizens need more latitude to exercise *their* common sense and personal judgment so that they can lead their lives, enjoy their liberty, and pursue their happiness. It will take years of hard work to tame the administrative state and restore the Founders' vision. A good first step would be to reject the specious analysis and progressive nostrums contained in *The Rule of Nobody*.

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