

All letter, little spirit

Authors fear legalism has replaced justice

**THE DEATH OF COMMON SENSE:
How Law is Suffocating America**
By Phillip K. Howard (Random House, \$18)

**A NATION UNDER LAWYERS: How the
Crisis in the Legal Profession is
Transforming American Society**
By Mary Ann Glendon (Farrar, Straus, &
Giroux, \$24)

By Michael Sean Quinn

The rule of law is one of the noblest creations of democratic community, and it provides our legal system moral legitimacy. The rule of law includes antecedent notice, clarity of expression, the subordination of decision to principle, the absence of secrecy, the subjection of government to law, the elimination of arbitrariness, and the achievement of fairness in administration. Civilized life is impossible without it.



HOWARD

Achieving fairness and avoiding arbitrariness through the contemporary administrative state has created a monster, according to Mr. Howard, a New York litigator. Having the same detailed rules for everybody curtails official discretion and therefore reduces judgment, creativity, freedom and even humanity in public life. What has not been eliminated is corruption — something upon which our country is fixated.

Mr. Howard's argument is a version of Edmund Burke's organic conservatism, renewed in the 20th century by Michael Oakeshott. Elaborately precise rules must



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go, since numerous narrow rules produce their own kind of irrationality. Instead, society should establish wide areas of discretion subject to after-the-fact evaluation by adjudication. Besides, says Mr. Howard,

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reducing bureaucratic discretion does not eliminate arbitrariness. We simply get a new form of it.

Similarly, the cause of fairness is not served by requiring the same rules for everybody since mindless uniformity leads to a profoundly irrational social order.

If anything can be regarded as sacred in our secular legal system, due process is the holiest of holies. But, according to Mr. Howard, the worship of process creates an unworkable contradiction at the heart of the modern state. "Process is a defensive device; the more procedure, the less government can do. We demand an activist government while also demanding elaborate procedural protections against government."

There is nothing really new in Mr. Howard's slim, sprightly book,

except for its attack upon the citadel of legal process. It is filled with well-told anecdotes; alas, they do not prove his point. Mr. Howard does not discuss how many lawsuits would result from the elimination of the administrative state and the restoration of pure common law. The unreality of Burkean conservatism, no matter what its popularity, is that it does not grasp the tremendous social — and hence, legal — problems inevitably created by the combination of size and complexity.

Ms. Glendon, a professor in the Harvard Law School, also describes our society as "law-saturated." She, too, thinks that the rule of law is in trouble. She sees our country as beset by a "frenzy of blaming and claiming." Lawyers should love this, since more lawsuits mean more attorneys' fees. So, Ms. Glendon asks, "Why are so many lawyers

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so sad?" And what does this melancholy mean? Since the legal profession is a leadership elite, the malaise pervading the profession is suggestive about the country at large. It may even be a sort of moral cancer.

Legal ideals have always played a significant role in American culture, as have the virtues characteristic of lawyers: gentlemanliness in conflict, courtliness in disputes, self-discipline, objectivity and detachment uncomfortably combined with client-commitment and intimacy akin to friendship. Whether lawyerly virtues are honesty-based, loyalty-based, or some prickly combination of the two, legal ethics have always been tremendously important and influential.

In the last 40 years, however, their influence on the profession has declined, she claims. This decay endangers public order, because a law-dependent democracy must depend upon its lawyers. Given the size and complexion of the country, its need for talented persons in such roles as consensus-building, problem-solving, troubleshooting, dispute avoidance, dispute resolution and adjudication is greater than ever before. And yet, the self-discipline and ethical structure of the legal community are crumbling.

Even the criteria for a good judge are under stress. It used to be that excellent judges were impartial, prudent, restrained and craftsmanlike — yet pragmatic. This was the classical judge. That image of excellence has been challenged by that of the "romantic judge," of which Justice William Brennan is a paradigm. These judges are compassionate, responsive, progressive, and "pro-active." Unfortunately, says Ms. Glendon, "romantic judges are pied-pipers enticing bureaucrats everywhere to heights of arrogance and abuse of power."

Ms. Glendon's solution is conservative *a la* Burke and Oakeshott. She argues for hallowing through indoctrination the great traditions of lawyering. She believes that this should be done primarily through the example of noncynical legal scholarship and morally engaged law teaching. Re-educate, re-orient, and rehabilitate the sensibilities of the legal elite, and we get a new generation of moral leadership in America. Tutoring the moral sensitivities of lawyers is no panacea, says the author, but it might do some good.

Ms. Glendon's image of the history of American lawyering is fundamentally flawed. She may be right that attorneys are "connoisseurs of conflict." The suggestion that courtliness and gentility were pervasive values in litigation before World War II is nonsense, however. Perhaps Ms. Glendon has not talked to real-life lawyers who handled personal injury, domestic or criminal cases years ago. Perhaps Ms. Glendon's elitism is showing here.

If anything, legal ethics have a higher profile now than they did a half-century ago across the entire profession, and lawyers are better educated with respect to values. Cynical, left-wing, legal scholarship is uninfluential — indeed, unread — in the practicing bar.

Nevertheless, Ms. Glendon is certainly right that the legal profession's vision of itself needs reformation and that lawyers are not a happy lot.

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