If Howard plays his cards right, he may be on the brink of creating his own internal industry along the lines of Peters and Waterman's, "In Search of Excellence." There appears to be a broad range of acceptance of his views on the excesses of regulation. President Clinton recently shared the same stage with Howard when he aligned himself with the popular intention of reducing big government. Senator Dole and the democratic Governor of Florida, Lawton Chiles, have also embraced Howard's book. Even outside the United States, other countries seem to be changing course toward a reduction in government and regulation. For example, France elected conservative, Jacques Chirac, and a conservative recently won office in a Canadian province.

It is not clear whether Howard's book is a harangue against regulation or the U.S. legal system. Does the latter lead to the excess of the former? Because Howard is a corporate lawyer, his polemic is all the more compelling.

Howard proposes the notion of a "regulatory budget" (pp. 9, 26). This has been seen before under the rubric of "sunset laws," in which regulations are evaluated periodically according to certain criteria to justify the continuation of the regulations. Howard notes lawmakers' zest for promulgating regulations, but their lack of enthusiasm for reducing them. Evaluating regulations may be currently revived in the proposed legislation in the Senate, which would require cost/benefit analysis to be undertaken before any proposed regulations can be adopted.

At the heart of Howard's concern is the seemingly wrong turn the United States has taken in trying to solve every national problem with detailed regulations. It would be better to allow the nation's administrators to use a little common sense, judgment, and discretion. Indeed, the common law is based on such a premise; namely, past experience with legal matters accumulated over time in the form of legal precedent provides the guidelines for evaluating future legal issues. The situation is further exacerbated by the deluge of regulations, as well as the ridiculousness of so many of them. According to the author, if only Americans could rely on lawyer friendly terms of art, such as the reasonable man standard and good faith (pp. 23, 24), society would be better served. Yet, Howard also expresses frustration with those administrators in the school systems who "knew, or reasonably should have known" (p. 128) that their disciplinary actions were violating the constitutional rights of students. His embracing of the reasonable man standard is difficult to fit with its application in reality. Anyone who has attempted to study antitrust law in which the rule of reason standard is applied, knows the frustration in trying to apply a standard (1) when the plaintiff has the burden to show that the conduct in question is more anticompetitive than procompetitive in the relevant geographic and product markets and (2) when the defendant has not employed the least restrictive competitive alternative in restraining trade.

Howard correlates the regulatory mess the United States is in to trends or political eras. Prior to the turn of the century, the United States was relatively free of regulations and statutes. Rules and regulations began to replace the common law around the late 1800s, with trust-busting legislation and laws dealing with child labor. The New Deal, under President Franklin Roosevelt, put the United States on the road to a regulated economy. President Lyndon Johnson's Great Society, with Medicare, work safety, and civil rights laws, capped the progression (pp. 24–28).

If this meddling at the government end is not bad enough, the trend toward legalizing everything "spills over" into the business world. Howard bemoans the use of Brobdingnagian legal contracts to cover every conceivable contingency—the "Definitions" sections themselves often run into many pages (p. 26). What a breath of fresh air it is to see those few instances of dealings among businessmen and women in which word and trust take precedent over contracts (e.g., McDonald's in some of its relationships with suppliers on the west coast) and in which some of the more enlightened franchise systems treat their franchisees as true partners, not as contractual punching bags (e.g., Taco John's).

Howard criticizes a legal system in which the law cannot be known. This strikes a responsive chord. Aside from the author's examples of such legal minefields as antitrust law and regulatory codes ad infinitum, who in higher education has not encountered faculty handbooks that do not help in collegial governance or, worse, do not provide the necessary information about sexual harassment. There is something wrong with a legal system that is unintelligible (pp. 30–31).

Howard cites an example of overregulation in which arguably good intentions produced an adverse result—cable television legislation in which quality and service deteriorated, but actual costs increased (pp. 44–45). A similar example could have been made of Medicare and the attempts to control doctors' fees through reimbursement codes. Doctors simply ordered more tests and increased the number of office visits, which resulted in increased health care costs.

The process of law has become an end in itself, as the O. J. Simpson trial demonstrates. Whether Simpson is guilty or innocent became irrelevant long ago. Instead, on a daily basis, the nuances and tricks of the procedural process, combined with a large economic war chest, strongly suggest that in a trial in which smoking guns or hot documents are unavailable, a defendant can never be proven guilty.

The author exposes one of the ways in which law is used as an end in an of itself: Law is a means to beat down the competition (p. 46). The recent example of Microsoft contemporizes this concern. Competitors requested the antitrust enforcement authorities to investigate whether certain Microsoft tactics constitute unlawful restraints of trade. And it is fair to say that Microsoft itself and other behemoths on the information highway might use legal maneuvers to thwart competition. Similarly, in the health care field, competitors used the certificate of need process to stall competition. A former Federal Trade Commission member suggested that such routine opposition to competitive offerings be investigated to determine whether the real purpose of the opposition is to forestall competition through the legal process.

Another unsavory aspect of litigation is evidenced by the example of the New York City bus that was in an accident on
125th Street. Quickly, 18 people sued the city, claiming they were injured on this bus, though the bus was obviously out of service. Their scam was to sue and rely on the increasing tendency of those who are wealthy to settle rather than litigate (pp. 103–104). Howard describes this manipulation as extortion (p. 104). How many cases of hot coffee spills have erupted as a result of the McDonald’s settlement? Or how many small-town libraries are giving one-quarter of a million dollars to persons who come into the library and menace the library users, because a library in Morristown, NJ found it was cheaper to pay $250,000 to the person who had his “constitutional rights violated” when he was asked to leave the library, than to litigate the matter. The time and cost of litigation are tactical variables. The ten-year litigations of IBM and AT&T with the government may well have influenced Microsoft’s decision to enter a consent decree, rather than combat the antitrust enforcement agencies. The “mother of all” antitrust cases—Matsushita v. Zenith—lasted over ten years, cost both sides millions of dollars, and never reached trial on the merits.

Occasionally, Howard makes general claims that, on closer inspection, do not hold. For example, he states, “Most people expect their ... leaders to balance the pros and cons and make decisions in the public interest” (p. 116). Is this true? It sounds laudable, but when politicians attempt to act for the public good, particularly when tax increases are involved (e.g., consider recent state elections), those politicians not acting the way voters wanted them to pay the consequences. The power of lobbyists, such as the National Rifle Association, the tobacco industry, trial lawyers, or congressmen voting for more money for their districts, belies the quaint notion that leaders should make decisions in the public interest.

Howard notes the practical problems in trying to legislate integration. He cites the examples of all black dormitories at colleges in which the races can, but simply do not want, to physically live together (p. 143). A recent Wall Street Journal (Siskind 1995, p. A15) column underscores the exasperation in trying to make sense of court-ordered desegregation. Because of court imposed racial enrollment caps that desegregated a Chinese-American student out of the school the student preferred, the student is suing the school. The defendants’ attorneys are fighting the challenge. Court records show that legal expenses related to the desegregation plan have averaged $460,000 a year before this lawsuit. Paraphrasing Howard, the courts may not be the best medium for this contest. Paraphrasing Martin Luther King, all the law can do is physically aggregate the races, the hearts and souls of men and women must come together for there to be true integration.

The author provides many powerful anecdotes, but offers virtually no analysis or solutions. And there may be another “side of the story,” as well as Howard’s own point of view. One columnist notes (see Cohen 1995), if not discrepancies, a possible lack of thoroughness in some of Howard’s war stories. For example, the columnist questions the American Disabilities Act incident, which involved making the scorer’s box in a municipal hockey rink wheelchair accessible, after probing the incident with the municipal official who monitors compliance with the Act. The columnist also finds more to the story of the great Chicago flood. The Chicago official actually did exercise judgment, rather than be caught up in rigid regulations: The official in charge believed the tunnel could have lasted for 20 years, but unfortunately, it did not. The tunnel collapsed causing the flood before the contractor who made the initial bid could have saved it. This is not to say that Howard’s main premise—there is excessive regulation, much of it absurd—is not valid. But if he does nothing more than regale the reader with anecdotes, there may be more to them than just the surface retelling.

The book has too many descriptive examples. I yearned for more solutions of what to do now. Perhaps the most surprising omission, because the author is a lawyer, is the absence of any mention of the new revolution in the procedural tactic, the motion for summary judgment. Howard correctly notes that it is easy to manipulate the rules of procedure (pp. 45–46) and states that the common law is there to “weed out unreliable claims” (p. 140). Indeed, it was and it still is. There is a procedural motion in law known as the motion for summary judgment. It is available to either or both parties in a lawsuit. Stripped of its legalese, it requires each party or the moving party to prove at an early stage of the litigation that there is a plausible issue for trial. If not, the matter should be “summarily” dismissed by the court. At present, law is similar to games of chance. A person can go to Las Vegas, bet $150 rolling dice, and come up “snake eyes,” or he or she can take the $150 and file an extortion lawsuit and hope that the defendant sees the efficiency and economic rationale for settling a case for $100,000, when to litigate it might cost more than $100,000. In fact, a federal court in New York in the mid-1970s threw out a rule that prohibited the sale of shares in a lawsuit. The motion for summary judgment again allows either side after sufficient discovery (interrogatories, depositions, document requests) to move to summarily dismiss the action if there is no genuine issue for trial or if it is clear that the nonmoving party cannot prevail at trial. The motion is designed to weed out frivolous or sham lawsuits. It would be interesting to learn how the so-called revolution in summary judgment resulting from the three Supreme Court cases in 1986 dealing with the motion have changed (or not changed) the legal lottery system.

Another surprising omission is the absence of any mention of the increase in alternative dispute resolution, including, but not limited to, arbitration and mediation. Certainly, in a world out of control with lawsuits, alternative dispute resolution seems to be an idea whose time has come. Yet, Howard does not even mention it. Most arbitration is voluntary. It can be compulsory. In other words, a person must submit to arbitration, and though it may not be binding, the results of the arbitration can be admitted into court. In general, arbitration tends to be less expensive and time consuming than litigation. The best known arbitration entity is the American Arbitration Association. But there are many more resolution dispute services across the country, which use retired judges as arbiters. There is even specialization in arbitration: For example, the National Health Lawyers Association Alternative Dispute Resolution Service focuses on complex health care matters, such as medical staff privileges and antitrust issues.

Another glaring omission in Howard’s book is what I term rubbing salt into the wounds. Howard does not savage
those who feed on the grist of his book. Recently, “20/20,” the ABC television magazine, reported on the class action suit taken on by a major southern law firm dealing with alleged price fixing by the major trunk airlines. The suit settled out of court. The result for the lucky class participants (including me) was a coupon based on the participant’s mileage flown with each airline that entitled him or her to fly for free, assuming that he or she qualified to do so. There were also numerous requirements attached to the coupons. The class participants merely received discount coupons that could only be used to fly if seats were available, but the law firm reaped hundreds of millions of dollars in legal fees.

In addition, there has been a running advertisement in major business periodicals and newspapers showing a disappointed class action shareholder in a shareholder derivative action in which the shareholder received a pittance, but the law firm reaped millions. Superfund monies supposedly to be used to clean up toxic waste go more to the lawyers than to actually cleaning up the waste.

Regarding possible remedies, Howard strongly suggests that judicial activism be curbed. The courts are not the only or the best way to solve social problems. The prognosis is not hopeful with 23 of 41 presidents having been lawyers and a majority of the congress being lawyers. The projection for New Jersey is that by the year 2000, there will be one lawyer for every 100 persons who live in the state. Soon, the lawyers will run out of people to sue and will need to sue each other, which they are increasingly doing as legal malpractice insurance rate continue to escalate.

Another approach that Howard supports is if, as a society, people stop being victims and take responsibility for their actions. Similar to Howard’s example of the impossible 100% safe hammer, the Consumer Product Safety Commission and the corresponding trade lobby could have saved hundreds of thousands of dollars and time if it recognized that it is impossible to manufacture a fool-proof five-gallon bucket. At some point, common sense and judgment are preferable to all-encompassing strait jacket regulations.

Although the book is more an “over the top” read, it does suggest possible further research. A recent article in Business Week questions whether regulations are doing more harm than good. The “95:5” principle might be an important one. Companies can spend enormous amounts of money trying to satisfy 100% of a problem when people would be content with fixing 95% of it. The siren song of cost/benefit analysis is also challenged. The article cites cotton dust, vinyl chloride, and acid rain as examples of regulatory situations in which the regulations cost much less than expected because industry found cheap ways to comply with them. To Howard’s liking, there appears to be a movement that prefers setting goals for industry and giving companies the flexibility and creativity to meet the goals, instead of detailed regulatory prescriptions (Carey and Regan 1995, pp. 75–76). The trend in environmental management and accounting concentrations and majors in business schools facilitates research along these lines.

Another intriguing question is to what extent are innovation and entrepreneurship being stifled by the death of common sense. The classic cartoon of the Wright Brothers preparing to go up in their newfangled invention comes to mind. One of the brothers turns to the other and says he cannot take the plane up because they have no insurance. I am reminded of the true story of the travails of a young couple who had produced an idea for a new baby carriage. The critical obstacle to bringing the new product to market was the impossibility of getting liability insurance. (And I thought I had problems trying to keep little league baseball games going in light of ever increasing insurance premiums!)

A book such as The Death of Common Sense fits better in a marketing and public policy/society/ethics course. Courts should take a back seat to corporate ethics and societal responsibility. The sad case of Kehm v. Procter & Gamble (see Swazy 1993), its progeny, and the many cases that followed the outbreak of toxic shock syndrome come to mind. The plaintiff’s wife, a young mother, tried RELY tampons. Four days later she was dead, a victim of toxic shock syndrome. The full story of RELY has never been revealed, because Procter & Gamble, through confidential settlements, effectively limited what the public knows about this tragedy. Kehm chose to go to trial; the jury found for him and awarded him $300,000. But was this adequate to compensate him for his loss? (Swazy 1993). As Howard might say, the common law complements regulatory safeguards by allowing damages, sometimes punitive, to deter unsafe products. “Class Action,” a recent movie starring Gene Hackman, portrayed a class action suit against a thinly veiled Ford Pinto-like disaster. The movie serves as a reminder that “cost/benefit” analysis sometimes outweighs serious injury and possible death to consumers.


References


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The Tangled Web They Weave: Truth, Falsity, & Advertiser
by Ivan L. Preston (Madison, WI: The University of Wisconsin Press, 1994, $22.50)

I respond to the JPP&M Spring 1995 review by Gene R. Laczniak of my book, The Tangled Web They Weave. Although I appreciate the good information and favorable comments Laczniak provides, he also misstated facts about content that concern me. Essentially, I want to clarify that I do not want a rule by which, as Laczniak wrote, almost all nonfact claims would be “regulated out of existence” (Laczniak 1995, p. 175).

I criticized nonfacts (i.e., puffery and image claims) and proposed a reliance rule to subject them to a scrutiny that the current law does not impose. The reliance rule calls for advertisers to have a reasonable basis, not merely for the truth of their factual claims, but more broadly, for their own willingness to rely on any claim for making purchasing decisions. The rationale behind this rule is that many claims escape the test of truth because they are not of explicit factual form; yet, they are offered to consumers as bases for reliance and, thus, might reasonably be called deceptive when evidence shows the advertiser itself would not rely on them.

As Laczniak omitted, however, I went to great lengths to show how claims could pass, as well as flunk, that test. In Chapter 48, “What the Reliance Rule Will Allow and Disallow,” I explain that the discussed claims “are not always deceptive.... The rule would allow all claims for which the advertiser could show either nonconveyance or a reasonable basis for reliance” (p. 191).

Conveyance, explicitly and impliedly, would be determined by consumer evidence already used in Federal Trade Commission and Lanham cases—the difference is in applying it to explicitly nonfactual, as well as factual, claims. Although it would be applied to more claims, it would excuse those conveyed to few or no consumers, including some of the examples Laczniak uses, which I did not. How many consumers interpret Pepsi’s “New Generation” campaign as referring only to nontargeted babies and, thus, find the phrase truthful only for breast milk? Absurd as it is, Laczniak implied I would find deception in that phrase.

I do not want regulators to attack messages not conveyed to consumers, but only to start searching for conveyance of various types of content for which, traditionally, they have not looked. If so, they will sometimes see deceptiveness, which they would never have found if they had never searched for it. Rather than create new instances of deceptiveness, I want only to identify the deceptiveness not now recognized. Although Laczniak is entitled to his opinion that my reliance rule would be banned by the First Amendment, the rule proposes only to identify deceptiveness, which is not banned by the First Amendment.

The principal distinction Laczniak misses is that to oppose the current blanket immunity given to puffs and image claims is not to support a blanket condemnation. I am committed to flexibility. The reliance rule, by being based on observation, is extremely flexible concerning outcomes. That is far preferable to the current drawing of conclusions from case precedents, which merely make assumptions about consumer response and are so old they reflect market conditions that no longer exist.

References

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