RHETORIC, DISCIPLINES, AND STORIES: HOW WILL WE KNOW WHEN WE HAVE TOO MUCH LAW?

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On February 12, 1995, the New York Times reviewed Philip K. Howard's *The Death of Common Sense*.[1] The subtitle of Mr. Howard's book—*How Law is Suffocating America*—is meant, one assumes, to catch the eye. The reviewer, Cass Sunstein, a widely published scholar on the law faculty at the University of Chicago, contends in the review that Howard has set the "right mood," but Sunstein expresses caution and warns that *The Death of Common Sense* is "a reflection of a mood rather than a sustained argument." Professor Sunstein goes on to explain his concern. *The Death of Common Sense* is, argues Sunstein,

> too impressionistic and anecdotal, collecting lots of stories without giving anything like a systematic sense of the costs and benefits of rules or the costs and benefits of what he calls common sense. Once freed from rules, public officials and private citizens may exercise their discretion invidiously. They may be confused, biased or corrupt. Without rules, it may be very hard to monitor whether people are doing what they should do. . . . To know whether law is really suffocating America, and whether rule-free common-sense judgments would be better, we need to have a more systematic investigation of our current approach and of possible alternatives. In some contexts rules and rights are indispensable; the alternatives would be much worse.[2]

Professor Sunstein is, after all, a professor, and might be expected to think carefully about matters involving law, rules, and public policy. Sunstein wants to know as precisely as possible the cost and benefits of all this law we have created for our mutual benefit and protection. Sustein relfects the growing concern, in political and academic circles, that the benefits of law have their costs, and the costs are too seldom identified and given a proper accounting.

It is not, however, Professor Sunstein's disciplinary caution that caught my attention, but a second point he makes about Phillip Howard's book I want to examine. Sunstein, the academic, favors "systematic investigation" and is critical of the "impressionistic and anecdotal" nature of *The Death of Common Sense*. This may seem, on

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[1] Cass Sunstein, Book Review, New York Times Book Review, February 12, 1995, p. 12, c. 2.

[2] Id. at 12.

first impression, as a small point, a minor difference of orientation between Sunstein the scholar/professor and Howard, a lawyer/writer (who may well have had in mind producing a book for a general audience rather than a monograph to satisfy the critical gaze of a law professor and scholar). A small point, but one I think worth pursuing.

Sunstein says of *The Death of Common Sense* that it is a collection of "lots of stories." The stories substitute for something Professor Sunstein would find more persuasive: "a systematic sense of the costs and benefits" of law. Sunstein, in this passing comment, points to an interesting divide in the academic landscape, a kind of fault-line that underlines our knowledge of the world and our understanding of law, indeed a fault-line that underlines our way of knowing.

The fault-line divides folk knowledge and academic study, what Sunstein calls "systematic investigation" and knowledge derived from "lots of stories." Academics and scholarly law professors, if one reads between the lines, do not imagine their scholarly endeavors as another way to tell stories, or for that matter, as persons expected to listen to and collect stories. Professors, schooled in the ways of a discipline, have their own way of going about discipline business—a way of knowing the world that makes them leery of stories.

Sunstein, in his offhanded criticism of *The Death of Common Sense*, points to a more fundamental divide, a split in the way we know about and study what we know of the world. We follow, it seems, different paths. The path of immediate concern to the disciplines is the academic, university, professorial way of "systematic investigation" (knowing all that can reasonably be known by investigation and research about a subject). This way of knowing is the path offered by disciplines, by social and behavioral sciences, by an economics of law that once held itself out as a science. (Yes, even the economics of law seems now to be moving away from its early claims to being a science.) A discipline-focused investigation into law—and whether we have too much law, law that has become too costly, contentions based on systematically gathered data subjected to methodical analysis—will provide data and we should seek all the data we can obtain. We should certainly be cautious— disciplined—and use the best available investigative methods associated with the social and behavioral sciences. There is, I would assume, nothing in the arrival of anecdotal and story evidence and our use of this kind of evidence in everyday life to obviate the need for empirical investigation.

There are different ways of talking about the kind of analysis Sunstein proposes. It may be thought of as social science, putting scientific reasoning to work on a social problem. It may be something

rather more simple, a matter of working out the pros and cons of proposed action in a reasoned way. What arguments, for example, can be made for law, for the law we already have, for the use of regulatory law to maintain and improve health, work place safety, and a sustainable environment? What reasoned arguments can be put forth against law? Against the quantity of law and regulations we now have?

In law, as in life, we find arguments and counter-arguments on just such matters of importance. The arguments are as much political and ideological as they are scientific. Arguments arise and abate as our politics address and ignore matters of importance. There is nothing unusual, even if distressing, that with both science and politics, our knowledge seems uncertain, the road ahead unclear.

Sunstein, in a brief eight paragraph review of Philip K. Howard's *The Death of Common Sense*, argues that if we follow his favored disciplinary approach to the efficacy of law we will have "a systematic sense of the costs and benefits" of law. But will we have anything more than more data upon which arguments can be made and politics pursed? We will have more data, but will we have sufficient basis for settled conclusions?

We have come to use the rhetoric of cost-benefit analysis in all manner of ways, not just as an argument on behalf of science and objectivity, but as a defense of the status quo, a methodology which makes government intervention more difficult. Cost-benefit analysis has become a political tool as well as a reputable methodology. But cost-benefit analysis, stripped of its scientific pretense and new found political baggage, is just a way of saying a matter deserves careful argument, a weighing of gains and losses, an argued elaboration, and reasoned judgment. Sunstein's word "systematic" undercuts this lay/folk interpretation of cost-benefit analysis. It suggests a method beyond the politics of reasoned public discourse where arguments are made and matters settled based on our ability to present the best possible cases for actions (and inaction). In my reading of "systematic," we citizens are asked to take a back seat to the professionals, to those qualified to conduct disciplined, focused inquiry. Sunstein seems to have in mind not rhetoric and argument, but economics and economic analysis.

A cost-benefit analysis implies an accounting, a kind of ledger-sheet in which both costs and benefits will be priced in dollar terms so they can be measured and weighed, one against the other. Sunstein does not

spell all this out, but he uses coded language and he is a man of discipline-cut cloth. There are implications in what he says.[3]

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The preference for systematic study (using methods identified with the social sciences) is a regular feature of our political and legal life. On the same Sunday that Professor Sunstein's review appeared, the lead editorial for the New Times warned of "The Next Environmental Threat."[4] The editorial explained how a bill pending before Congress, H.R. 9, purported to offer a political response to the problems raised by Philip Howard in *The Death of Common Sense*, the proliferation of stifling regulations. H.R. 9 would, in the words of the editorial, "subject all old and new regulations dealing with health, public safety and the environment to a new system of risk assessment, cost-benefit analysis and peer review." With economic knowledge of the costs associated with governmental regulation (what some view as a nightmarish maze of regulatory schemes), we would regain our common-sense and rely on less law and less regulation.

But is risk assessment and cost-benefit analysis the way to determine whether we have too much law? Too many regulations? Are present regulations on worker safety, food quality, and community health too restrictive? Do our environmental regulations hamper the everyday (non-harmful) activities of industrial and commercial enterprises?

The New York Times editorial notes that "some risks are not easily quantifiable" and "it is hard to attach a dollar figure to the benefits of cleaner air or water." If it is hard to attach a dollar figure to clean air and clean water, you can imagine the difficulty one might face in costing out, in any realistic way, the cost of environmental law generally, or a statute like the Clean Air Act, or calculating precisely the benefits and costs of even a narrow regulatory scheme.

During the course of these readings, I attended a colleague's Environmental Law course. It was early in the semester and my colleague was attempting to engage students in just the kind of musings I have entertained here. He introduced his students to the prominence of risk assessment and cost-benefit analysis in environmental law, and as a exercise asked students to put a value on the life of a single bald

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[3] I cannot, without a more sustained investigation of Professor Sunstein's work, say what the implications of his language might turn out to be in practice.

[4] "The Next Environmental Threat," Editorial, New York Times, February 12, 1995, p. 14 E, c.1.

eagle. To begin the exercise in valuation, my colleague wondered whether it would not simply be possible to value a bald eagle by comparison to a comparable size turkey, a bird whose carcass can be readily priced by a visit to a local supermarket. The students were amused by this straight-forward, literal way of establishing the value of a bald eagle. The exercise took a more perplexing turn when the discussion turned to the dollar value placed on the extinction of a bird that happens to be a national symbol. One student claimed that he had not as yet seen a bald eagle, but hoped to do so, and that the money value placed on the eagle's extinction would never take into account his loss if the extinction took place before he had a chance to see this bird in the wild. Consequently, he argued, the loss for him would be incalculable, exactly the point my colleague had in mind with the exercise.

During the course of that classroom discussion I realized, again, what so many of us know and are in the process of forgetting—we are all, already, engaged in the process of cost-benefit analysis in our common-sense, ordinary thinking, and everyday concerns, concerns we express by anecdotal vignettes and stories. When we assume that cost-benefit analysis is possible only in the form of "systematic investigation" we are left with no authority to argue our concerns on matters such as preserving habitat for bald eagles and spotted owls and the massive mountain top removal coal mining now underway in southern West Virginia.[5] Cost-benefit analysis is a social science methodology and a way for all citizens to commit themselves to rational, thoughtful, inclusive, and cautious conclusions about important matters.

Cost-benefit analysis cannot, ultimately, answer the question whether we should save bald eagles or spotted owls, or whether the environment is worth the costs of the laws and regulations we have created (laws that have, for the most part, simply slowed the rate of decline and degradation of the environment). We face not so much new questions but old ones, and we are no more likely to answer them with "systematic study" and cost-benefit analysis than with the stories we tell about what is taking place around us.

Is a humanities or liberal arts education worth what it costs? Is being informed about the world worth the pain our knowledge brings us? Is a pristine environment worth the costs? Are national parks? Safe bridges? Economics has no method by which these questions can,

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[5] See Penny Loeb, Special Report: Shear Madness, U.S. News & World Rpt. (August 11, 1997).

ultimately, be answered. Perhaps Professor Sunstein was too hard on Philip Howard for telling stories.

There are questions disciplines cannot answer. Regardless of the methodological care and sophistication of the social sciences, regardless of how rigidly economic and scientific we may try to be about pricing costs and benefits, no economic, mathematical, quantitative equation is going to provide good answers about how much law, or what quality environment, we can afford. Do we need less law or more, fewer environmentalists or more? We will need all the stories we can get and more to answer these questions.

There are many ways to think about the matters under consideration here, and James Boyd White has offered a good working summary of the position I have adopted:

> In actual life our central words are...complex words, and our central mode of discourse is...poetic; to deny our language and minds these resources [of complexity] in favor of a mode of thought impossibly mathematical would be to diminish our intellectual and social lives beyond reason.[6]

We will, as Professor Sunstein suggests, do well to study the costs of law and legal regulation. We need to know all we can about costs. Social scientists bring matters to our attention that are not readily available in the New York Times and explored in the nightly television news. We may find, on close study and sufficient years of cost-benefit analysis, that we pay dearly for a society heavily saturated with law and regulation. But it will not, in the final analysis, be these disciplinary studies of law and their costs that drive us to change, to elect politicians that favor fewer laws and regulations. We will change government, and our thinking about law, not because of an equation measured in costs and benefits, dollars and cents, but a different equation, one of heart and mind, sentiment and reason, experience and belief. We will have less law, significantly less law, only when the hope we place in the benefit of mutual coercion has been sufficiently polluted by our felt experience of law's failure, of the injustice that law permits, abides, and sanctions. This failure we will know by the telling of stories about injustice.

We have not yet, I think, come to the point of letting cost-benefit analysis and economics shape our heart's desire, even if it now at times

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[6] James Boyd White, WHEN WORDS LOSE THEIR MEANING: CONSTITUTIONS AND RECONSTITUTIONS OF LANGUAGE, CHARACTER, AND COMMUNITY 23 (Chicago: University of Chicago Press, 1984).

dominates public discourse. How can we account for the pervasiveness of economics talk? James Boyd White argues that a language, whether of economics, law, or the social sciences, is a "repository of the kinds of meaning and relation that make a culture what it is."[7] In a language like economics and its political translation as cost-benefit analysis, one finds terms of

> motive and value by which action is directed and judged. In a sense we literally are the language that we speak, for the particular culture that make us a "we"—that defines and connects us, that differentiates us from others—is enacted and embedded in our language.[8]

We have, historically, if not eagerly, and indeed at times ambivalently, been willing to let the language of law, and the social prescriptions embodied in regulations, provide social motive and a sense of public value by which we might be judged. We have increasingly relied on law to promote what we assume to be public goods. The law may have been a creaky, balky, awkward, conflicted language in which to express the public good, but it has, increasingly become the only shared public language with which we can carry on our querulous public life. There were, and are, other languages in which the public good is evaluated and expressed—religion, science, psychology, ethnicity, race, and individual and group stories, compete for our attention. To date, now of these languages have advanced a workable substitute for the language of law.

Law does not, I want to make clear, exist as final arbiter of all other languages, nor can the languages of law, science, religion, economics and story be sorted out in any definitive hierarchal order. We have with our many and conflicting languages, something more akin to the Tower of Babel than a Tower of Order. Law is certainly not the only language suitable for expression of public concern for public goods. All too often, legal discourse and legal institutions are used for public discourse in ways that fail to recognize the limits of law as a disciplined way of talking about public life and public goods.

Law does, however, constitute a developed (and developing) public language, widely shared, although never so widely as we might assume. Law creates, rather than a static order, what White calls a "culture of argument." We see in law the disputation of "matters that really divide a community," and it is, says White, on such matters, that we lay claim

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[7] Id. at 20.
[8] Id.

> to the power of proof. Agreement with a proposition of mathematics or of science can simply be compelled by the force of a logical or empirical demonstration. But on the matters that really divide a community, agreement cannot be compelled by the force of logic or by the demonstration of facts; it can only be reached, by discussion and argument....[9]

It is in argument that White sees a link between law and the humanities, even law and literature. "The region that can be ruled by the methods of logic and science, and by the parts of the mind that function in these ways, is, after all, rather small; and, for good or ill, much the larger part of human life must proceed without the certainties these two forms of reasoning provide."[10]

The language of law and those who traffic in it—judges and lawyers—are now more exposed than at any time in history to the fundamental contradictions and tensions in law. The law has been increasingly subjected to the steady gaze of disciplined inquiry and found wanting, problematic, flawed, and contradictory in its foundational premises.

Law still has its defenders. It continues to express vestiges of the ideals that ground our continued faith in it. Today, however, law is held out in nightly television news broadcasts and in daily newspaper accounts of government and politics to be distasteful and unwanted. Both the political left and political right have lost confidence in law. In the discipline of law, it has been the left (Critical Legal Studies, feminist jurisprudence, critical race theory, and some legal narrativists) that has provided persistent, if not systematic, attack on traditional, classical liberal conceptions of law. But has been, in the politics of the day, the political right that has mounted the most vocal political and public attacks on law and government regulations.

Law is no longer imagined as a neutral basis for engagement of the forces of change and stasis, but now stands indicted as a politically tainted and ideologically charged language that distorts, deforms, and diverts progressive change and public life. The political right, fearing the law's tolerance for new lifestyles, social equality, and new rights, warns of a frayed social fabric and would have society right itself (as in a kind of cleansing) by having less law and using what law remains to clean up

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[9] Id. at 22.
[10] Id.

a socially polluted world.[11] The left, having failed to secure adequate electoral support for progressive social change, now questions our focus on law and rights, viewing them as a rhetoric that masks and mutes the social and political consciousness necessary for social change.

If you run a political Geiger-counter over the terrain of law, you find "hot" spots. Like the polluted land and industrial landscape we have created, our legal terrain is marred by its own waste-dumps and polluted streams. Lawyers, in the new world of Law, are the new industrialists and polluters. Today, in the public perception lawyers serve themselves first, then their paid clients, then the institution of law, and finally, with what little energy that remains, the public good. Serving law, lawyers are seldom seen as advocates of the public good. We live in a society that tolerates lawyers, but they are increasingly disparaged and held in contempt.

Finally, it will not be the cost-benefit analysis of the total sum and cost of law in society that sets the legal profession on a new course but individual lawyers pursuing different values, leading different lives, making a place for themselves in their communities, and representing law by stories worth telling.

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[11] Ironically, the right is far more concerned with social pollution than with environmental pollution.