

THE WALL STREET JOURNAL.WSJ.com
JANUARY 26, 2009

How Modern Law Makes Us Powerless

The real barrier to Barack Obama's 'responsibility' era.<http://online.wsj.com/article/SB123293018734014067.html?mod=djemEditorialPage> [bold added]By **PHILIP K. HOWARD**

Calling for a “new era of responsibility” in his inaugural address, President Barack Obama reminded us that there are no limits to “what free men and women can achieve.” Indeed, America achieved greatness as the can-do society. This is, after all, the country of Thomas Paine and barn raisings, of Grange halls and Google. Other countries shared, at least in part, our political freedoms, but America had something different — a belief in the power of each individual. President Obama’s clarion call of self-determination — “Yes We Can” — hearkens back to the core of our culture.

But there’s a threshold problem for our new president. Americans don’t feel free to reach inside themselves and make a difference. The **growth of litigation and regulation** has injected a paralyzing uncertainty into everyday choices. All around us are warnings and legal risks. The modern credo is not “Yes We Can” but “No You Can’t.” Our sense of powerlessness is pervasive. Those who deal with the public are the most discouraged. Most doctors say they wouldn’t advise their children to go into medicine. Government service is seen as a bureaucratic morass, not a noble calling. Make a difference? You can’t even show basic human kindness for fear of legal action. **Teachers across America are instructed never to put an arm around a crying child.**

The idea of freedom as personal power got pushed aside in recent decades by **a new idea of freedom** — where the focus is on the **rights of whoever might disagree**. Daily life in America has been transformed. Ordinary choices — by teachers, doctors, officials, managers, even volunteers — are paralyzed by legal self-consciousness. Did you check the rules? Who will be responsible if there’s an accident? A pediatrician in North Carolina noted that “I don’t deal with patients the same way any more. You wouldn’t want to say something off the cuff that might be used against you.” [Thank lawyers like John Edwards for circumstances like these.]

Here we stand, facing the worst economy since the Great Depression, and Americans no longer feel free to do anything about it. We have lost the idea, at every level of social life, that people can grab hold of a problem and fix it. Defensiveness has swept across the country like a cold wave. We have become a culture of rule followers, trained to frame every solution in terms of existing law or possible legal risk. The person of responsibility is replaced by the person of caution. When in doubt, don’t.

All this law, we’re told, is just the price of making sure society is in working order. But society is not working. Disorder disrupts learning all day long in many public schools — the result in part, studies by NYU Professor Richard Arum found, of the rise of student rights. Health care is like a nervous breakdown in slow motion. Costs are out of control, yet the incentive for doctors is to order whatever tests the insurance will pay for. Taking risks is no longer the badge of courage, but reason enough to get sued. There’s an epidemic of child obesity, but kids aren’t allowed to take the normal risks of childhood. Broward County, Fla., has even **banned running at recess**.

The flaw, and the cure, lie in our conception of freedom. We think of freedom as political freedom. We’re certainly free to live and work where we want, and to pull the lever in the ballot box. But freedom should also include the power of personal conviction and the authority to use your common sense. Analyzing the American character, Alexis de Tocqueville, considered “freedom less necessary in great things than in little ones.... Subjection in minor affairs does not drive men to resistance, but it crosses them at every turn, till they are led to sacrifice their own will. Thus their spirit is gradually broken and their character enervated.”

This is not an ideological point. Freedom in daily choices is essential for practical reasons — necessary for government officials and judges as well as for teachers, doctors and entrepreneurs. **The new legal order doesn’t honor the individuality of human accomplishment.** People accomplish things by focusing on the goal, and letting their instincts, mainly subconscious, try to get them there. “Amazingly few people,” management guru Peter Drucker observed, “know how they get things done.” Most things happen, the

philosopher Michael Polanyi wrote, through “the usual process of trial and error by which we feel our way to success.” Thomas Edison put it this way: “Nothing that’s any good works by itself. You got to make the damn thing work.”

Modern law pulls the rug out from under all those human powers and substitutes instead a debilitating self-consciousness. Teachers lose their authority, Prof. Arum found, because the overhang of law causes “hesitation, doubt and weakening of conviction.” Skyrocketing health-care costs are impossible to contain as long as doctors go through the day thinking about how they will defend themselves if a sick person sues.

The overlay of law on daily choices destroys the human instinct needed to get things done. Bureaucracy can’t teach. Rules don’t make things happen. Accomplishment is personal. Anyone who has felt the pride of a job well done knows this.

How do we restore Americans’ freedom in daily choices? Freedom is notoriously malleable towards self-interest. “We all declare for liberty,” Abraham Lincoln observed, “but in using the same *word* we do not all mean the same *thing*.”

Freedom, however, is not just a shoving match. Freedom has a formal structure. It has two components:

- 1) Law sets boundaries that proscribe what we must do or can’t do — you must not steal, you must pay taxes.
- 2) Those same legal boundaries protect an open field of free choice in all other matters.

The forgotten idea is the second component — that law must affirmatively define an area free from legal interference. Law must provide “frontiers, not artificially drawn,” as philosopher Isaiah Berlin put it, “within which men should be inviolable.”

This idea has been lost to our age. When advancing the cause of freedom, **law today is all proscription and no protection.** There are no boundaries, just a moving mudbank comprised of accumulating bureaucracy and whatever claims people unilaterally choose to assert. People wade through law all day long. Any disagreement in the workplace, any accident, any incidental touching of a child, any sick person who gets sicker, any bad grade in school — you name it. Law has poured into daily life.

The solution is not just to start paring back all the law — that would take 10 lifetimes, like trying to prune the jungle. We need to abandon the idea that freedom is a legal maze, where each daily choice is like picking the right answer on a multiple-choice test. We need to set a new goal for law — to define an open area of free choice. This requires judges and legislatures to affirmatively assert social norms of what’s reasonable and what’s not. “The first requirement of a sound body of law,” Justice Oliver Wendell Holmes Jr. wrote, “is that it should correspond with the actual feelings and demands of the community.”

The profile of authority structures needed to defend daily freedoms is not hard to imagine. Judges would aspire to keep lawsuits reasonable, understanding that what people sue for ends up defining the boundaries of free interaction. Schools would be run by the instincts and values of the humans in charge — not by bureaucratic micromanagement — and be held accountable for how they do. Government officials would have flexibility to meet public goals, also with accountability. Public choices would aspire to **balance for the common good, not, generally, to appease someone’s rights.**

Reviving the can-do spirit that made America great requires a legal overhaul of historic dimension. We must scrape away decades of accumulated legal sediment and replace it with coherent legal goals and authority mechanisms, designed to affirmatively protect individual freedom in daily choices. “A little rebellion now and then is a good thing,” Thomas Jefferson wrote to James Madison, “and as necessary in the political world as storms are in the physical ...” The goal is not to change our public goals. The goal is make it possible for free citizens to achieve them.

Mr. Howard, a lawyer, is chair of Common Good (www.commongood.org), and author of the new book “Life Without Lawyers,” published this month by W.W. Norton & Co.