

Too Much Law?

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Something bad happens. So we pass a law. Then the law takes on a life of its own. It gets more complicated and extended, expanded, and enhanced. It benefits some group of people or businesses, who then have an interest in promoting and protecting it. And of course my own legal profession exists to interpret, apply, and resolve disputes about laws – so the more laws, and the more extensive and complex they are, the better.

When circumstances change, we rarely go back and ask whether any of our historical accumulations of laws still make any sense. Instead, we pass new laws as if that creates value in itself. If a legislature doesn't pass enough new laws, then it's regarded as ineffective. Perhaps, instead, in evaluating legislative effectiveness one should ask whether a legislature has eliminated enough old and unnecessary laws that no longer make sense. But that test doesn't seem to apply.

The world of real estate, particularly development, offers some examples. Pennsylvania Station was demolished for redevelopment; hence came the good idea of a law to preserve truly special buildings – landmarks – as part of our cultural heritage. But landmarking grew to the point where a significant percentage of the city is subject to landmark regulations. Has the landmarking process become just another tool to frustrate development?

Someone built a very large building on Lower Broadway in the early 20th century; hence came the New York City zoning resolution. That resolution grew to the point where it is incomprehensible to mere mortals and offers lots of surprises for developers, drawing all kinds of tediously detailed lines that complicate any development process. Do we really still need every one of those restrictions and rules?

At some point after the repeal of Prohibition, New York established a regulatory scheme for alcoholic beverages to prevent public drunkenness and alcoholism and protect children. Those regulatory rules grew and grew. Do we really still need all of them? Do they all really make sense? Of course, anyone who asks such questions must favor public drunkenness and alcoholism, particularly among children, so no one asks.

As one example of an alcohol regulation that might justify reconsideration, New York prohibits the sale of wine in supermarkets and drugstores. Many other states, including California, allow supermarkets and drugstores to sell wine with no apparent adverse effects. Why not New York?

Conversely, California has its own laws that just don't exist in other states, with no apparent ill effect in those other states. In California, for example, anyone who wants to act as a general contractor, commercial or residential, faces a strict and complex licensing scheme, including a fingerprinting requirement for corporate officers. New York manages without that, at least for commercial work. If other states get by without a vast regulatory scheme for contractors doing commercial work, does California really need one?

Now that car insurance companies use computers to keep the state department of motor vehicles informed of the status of insurance coverage and police cars have online or other ready access to that information, does it still make sense to require insurance cards in cars? They are hardly a major burden – unless you get pulled over and don't have one. But their elimination would strike a minor blow in favor of a little more simplicity and a little less law in our lives.

Along similar lines, but on a larger scale, is it time to start thinking about phasing out the post office or at least taking an entirely different approach? Private businesses replicate its package delivery services. Should the federal government compete with them? First class mail is steadily being replaced by email. To the extent that the post office serves a public purpose, in the 21st Century might we better serve that purpose by developing a system of public-access computers for people who can't afford their own? Would private enterprise figure out a way to handle delivery of magazines and junk mail if the post office gradually exited that business?

The examples above suggest questions that a legislature might reasonably ask about some existing law or some existing program. But those questions rarely get asked. Once any law or program is in place, it develops a life of its own and an inertia in favor of its continuation. It becomes part of the landscape. The idea of asking any questions about it becomes an absurdity. But we should ask more questions like those suggested above. Instead, we seem to have a huge bias toward more laws and more programs, never fewer.

As a rare exception, New York City just eliminated the rule against operation of sidewalk cafes before noon on Sundays. Is that the beginning of a trend? Probably not.

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