
How America's Lawsuit Culture Undermines Our Freedom

Philip K. Howard

Philip Howard's first book, The Death of Common Sense: How Law Is Suffocating America, chronicles the many ways in which common sense actions have been stifled by a regulatory philosophy that leaves no room for human judgment. His latest book, The Collapse of the Common Good, has spawned a national movement. It focuses on the fear instilled by the ability of anyone to sue over almost anything and the paralyzing impact on our common institutions like health care and education. That national movement, which Howard founded and chairs, is called Common Good. He is vice chairman of the Washington firm of Covington & Burling. Common Good's website is ourcommongood.com. Howard spoke at a Center of the American Experiment luncheon in October 2002.

Common Good's mission—to overhaul America's litigation philosophy—could hardly be more presumptuous. We're not trying to persuade Congress to pass a particular law or laws. Instead, we're organizing leading citizens to lock arms and demand a kind of legal revolution, to bring sense back to our legal system.

Our board illustrates the kind of support we're aiming to get: Newt Gingrich and George McGovern, who probably have never before been on a board together. We also have former

senators Alan Simpson and Paul Simon, former attorney general Dick Thornburgh and Deputy Attorney General Eric Holder, the heads of three universities, and the heads of four think tanks from both sides of the ideological spectrum. We have leading reformers in a number of areas, including education reformer Diane Ravitch.

We are attracting these people not because they agree on ideology, but because they agree that the structure of our legal system prevents us from asserting our values and from making

sense of what we all care about, including our common institutions.

We are sympathetic to the tort reform movement being led by chambers of commerce and others because we think the litigation system has gotten out of hand, but our mission is broader than tort reform, which focuses on limiting verdicts like multi-billion-dollar punitive damage awards against companies. Crazy verdicts really are quite rare. Studies show that juries generally are sensible, but not often enough to be considered reliable.

The harm we see is fear and distrust of the justice system. For every claim that's made in a lawsuit, there are millions, probably billions, of decisions not made or not made reasonably because Americans no longer trust the justice system. This distrust and fear are literally corroding the character of our culture.

We don't think it's possible to fix problems in health care, education, and other essential areas until we restore the foundation of reliable law in America.

Law and Health Care

Doctors and nurses will tell you that they have come to see patients as potential plaintiffs, and thus they no longer always do what they think is right.

Last summer we read about the trauma center in Las Vegas closing down and the next day a visitor dying because he couldn't make it 186 miles to the next trauma center. It reopened only with special legislative action. The maternity ward at Methodist Hospital in south Philadelphia closed

down permanently, unable to afford malpractice premiums. Obstetricians, neurosurgeons, and certain other so-called high-risk specialists are becoming unavailable or less available in many parts of the country because of spikes in malpractice rates that often approach hundreds of thousands of dollars per doctor.

But that's not the worst of it. When Common Good did a nationwide poll of physicians, the Harris Poll's chairman said he'd never seen numbers so high as the percentage of doctors who distrust the justice system. Five out of six physicians said they did not trust the justice system to generally achieve a reasonable result if they were sued. And because of that, they said, they give tests that aren't needed, refer patients to specialists they don't think are needed, give medicines they don't think are needed, even do invasive procedures they don't believe are needed—all because they feel they have to do something to put on the record in case there is a lawsuit.

But that's probably not the worst of it in health care, either. The Institute of Medicine, the policy arm of the National Academy of Science, and patient quality experts like Donald Berwick at Harvard have been making the point that without openness and candor, you can't improve health care. If people don't disclose mistakes or near misses, we can't prevent them the next time. If doctors are unwilling to be candid about their own uncertainty or reservations with other physicians, then it's very hard to catch a mistake. If doctors are unwilling to be open and

candid with patients, it's hard to have the kind of relationship that you need for effective health care.

Many doctors have decided not to use—and many hospitals have decreed that doctors cannot use—e-mail in communicating with patients because they don't want a written record in case of a lawsuit.

Law and Education

Many teachers have been threatened with legal claims, and many teachers—particularly in inner-city schools—say they have difficulty maintaining discipline because they might have to prove in a legal hearing which student threw the pencil first. That's very difficult to do, and so they don't even try, and give up on discipline.

Principals say they have a hard time maintaining high standards in a school because it's hard to get rid of a teacher who isn't doing his job. How do you prove that in a legal hearing?

Many school districts now forbid teachers to touch children. According to the rules of many—perhaps even most—school districts, you can't put an arm around a crying second-grader, because you can't prove that it wasn't an act of unwanted sexual touching.

Some churches have told their ministers not to counsel troubled parishioners because there might be a lawsuit if the couple ends up getting divorced or someone ends up committing suicide.

Even some of the ordinary joys of childhood are no longer available. If one child got off a seesaw and another crashed down, somebody might bring a

lawsuit—so it's safer to take away all the seesaws.

A California school district recently banned tag because it involves running around and touching or pushing someone. A child might get hurt and the school district might get sued. A school district in Pennsylvania banned recess altogether—who knows what children might do to each other?

Wacky Warnings

In a thousand years, when archaeologists dig us up, they may not realize that doctors were paranoid and teachers couldn't maintain order in the classroom and ministers stopped counseling troubled people and seesaws disappeared. But they will see, in black and white, warning signs everywhere: "caution: contents are hot" or "contents are extremely hot" on billions of coffee cups. A subspecialty of the future will be trying to figure out whether coffee was an aphrodisiac.

Every year, the Wacky Warning Contest gives out a copy of *The Death of Common Sense*, among other things, to the winners. Past winners have included a baby stroller warning: "caution: remove baby before folding stroller." This year's winner is on one of those composite fireplace logs: "caution: risk of fire."

I used to buy peanuts at the World Series every year in New York and on the bag it would say, "caution: this product processed with peanuts."

What all these things have in common is that nobody is doing what they think is right. Doctors know that you

don't need a CAT scan because you have a headache. Teachers know who is misbehaving and who isn't. Manufacturers know it's stupid, indeed counterproductive, to put a warning on everything because then everyone just ignores all the warnings. But they all distrust the justice system.

An Imperfect System

We've all been trained to believe that our justice system is perfect, or nearly so. Anyone can bring a claim, and it goes into a neutral proceeding. We wouldn't want judges or anybody else asserting their own values, because who knows what bias lurks in the heart of a judge. (We didn't have such a great record in certain areas in the past.) Each side has a lawyer, and then we think that the case is either proved or not.

We've all been trained to think that this is both good and fair, mainly because it's a neutral process in which no one has an advantage. But there's a flaw in the premise: you can't prove any of the things we're talking about. You can present evidence, but you can't prove what the right medical judgment is in a given case. It's a matter of professional standards and judgment that varies depending on the time and the circumstances.

How do you prove who's a good teacher and who's not? Everybody probably knows, but trying to prove it at a hearing is hard. And these hearings often go on for years, with a magnifying glass and a teacher saying, "Well, how about that other teacher, who did that? Really, I'm not as bad as this other per-

son who did something or other."

A committee of Pennsylvania superintendents a couple of years ago determined that thirteen Pennsylvania teachers had been dismissed for incompetence since 1957. The numbers are like that all across the country. There is no accountability. The result is not that schools are inhabited with terrible teachers; the effect is on the morale of the culture, because people begin to give up.

When a lawsuit ultimately hinges on a value judgment, anyone can bring a lawsuit for almost anything. All you have to have is a different point of view. So, for example, every time a sick person gets sicker, you can come up with a theory of something else the doctor might have done. It's not that people necessarily win the case—juries generally get it right—but the claim is available.

What's happened is that over the past thirty years, the philosophy of neutrality that we basically adopted during the 1960s has taken hold, and the verdicts have escalated from year to year and decade to decade. People used to be shocked when someone got a half-million-dollar verdict for an ordinary accident. Making someone rich is not the purpose of the legal system. Now, people sue for billions. It's not because of inflation. It's because people have been pushing the envelope for thirty or thirty-five years. Americans now know that almost anything is possible in a courtroom, and as a result, they go through the day looking over their shoulders.

What's Next?

So what's missing? What's wrong? It's hard to imagine how else the justice system could work.

Oliver Wendell Holmes Jr. was one of the great thinkers among common law judges in our history. (An amazing man, he was left for dead on the fields of Antietam in 1862 and was still sitting on the United States Supreme Court in 1933, seventy-one years later.) Holmes once defined law as "the prophecies of what courts will do." Today, no one has any idea of what an American court will do. That means we've lost the protection of law.

We forget sometimes why law is important in a free society. Another great judge, Benjamin Cardozo, said that the purpose of law is to uphold the standards of right conduct that find expression in the mores of the time. In other words, law makes you feel comfortable doing what's right and nervous doing what's wrong.

Today, the American legal system makes people nervous doing almost anything. It's as if we have built a huge monument to the unknown plaintiff that casts a shadow across all our daily choices. Put yourself in the position of a doctor who is confronted with someone with a headache. What will happen if that person ends up suing years later? Who will protect the doctor? Nobody will. It would just go into this neutral process.

The solution is this: standards of conduct must be declared as a matter of law. Who can sue for what is a decision that's not supposed to be made by

juries; it's supposed to be made by judges and, more broadly, for bigger issues, by legislatures. The traditional role of juries is to decide disputed issues of fact—who ran the red light—not whether seesaws are an acceptable risk. If you let one person sue over a seesaw, even if a jury decides that it's not a valid claim, now everybody knows that a lawsuit is available and someone else can bring a claim the next day. Juries don't have the authority to make rulings that are binding in the future.

To restore the protection of law, we must change our litigation philosophy and restore what Holmes and Cardozo and others have said is the role of judges: to assert, on behalf of society, an appropriate standard of care—and also an appropriate amount of damages, because damages can act as a tool for extortion, even if the claim is very remote. Who wants to go to bed every night with a \$10 million claim hanging over his head?

A Right to Sue?

My friends in the plaintiff's bar say that taking away the right to sue is violating people's constitutional rights. Even the tort reformers don't challenge the so-called right to sue.

Common Good is saying that who can sue for what is not a matter of rights. These are common choices that have to be made, balancing the predicament of the individual against broader societal interests. Whose rights? The kid who fell off the seesaw or the millions of kids who want to use seesaws? You can't have it both ways. If

you let one child sue, win or lose, all the seesaws are going to start disappearing. Whose rights? The person whose headache turned out to be a tumor or the tens of thousands of people whose lives are saved because we don't squander billions in unnecessary CAT scans? You can't have it both ways. You either protect the doctor who reasonably recommended aspirin for a headache or we're going to squander all that money and many more people will be hurt.

The Seventh Amendment says that in suits at common law the right to trial by jury shall be preserved, "and no fact tried by a jury shall be overturned other than according to the rules of the common law." The right to go to court is bounded by what the law says. That's why it's called a lawsuit, not a go-for-whatever-you-want suit. Who decides what the law is? Judges and legislatures, not juries.

The law is not an open season for anything you want to claim. The whole point of the law is to define who can sue for what—a fundamental idea that we lost beginning in the 1960s. We woke up to bad values and decided to fix them by taking away values altogether. The better answer is to have good values.

There's a paradox in the current system. The rights that our Founders gave us were rights against state power: the government can't take away property, can't tell you what to say, that sort of thing. Suing is a use of state power against another private citizen, coming down to that fateful verdict, at which point the government will force you to

pay millions of dollars to somebody else. We've actually turned the idea of rights upside down by letting any individual bring a claim for almost anything against someone else. Letting a prosecutor indict somebody and seek penalties for a hundred million dollars would be an outrageous abuse of government authority. Why do we let private citizens do it? Allowing people to use state power for their selfish interests has removed everyone else's freedom.

My friend John Jeffries, who's dean at the University of Virginia Law School, says we've reached the point where one generic warning could apply to all products: caution, this product should be used by a person exercising ordinary intelligence.

Our legal system is not supporting the right choices because it no longer distinguishes between right and wrong. It's broken, and we need to fix it. I hope that some of you will join with us in this growing movement, not to end lawsuits, not to bar people who have meritorious claims, not to adopt automatic cures like loser pays or caps on awards, but to restore the values needed for a functional system of law.

Following his speech, Philip Howard took questions from his American Experiment audience.

Mitch Pearlstein: You talked about neutral values, good values, and bad values. Could you expand on what good values are?

Philip Howard: In a society with many diverse interests, people will not

agree on values, which makes it all the more necessary that we nonetheless have red lights and green lights so people know where they stand. A bad ruling is better than no ruling, because with no ruling, fear becomes the ruling.

I'm personally agnostic as to what the values should be, but I believe there has to be a system—which is what judges and legislatures are supposed to do—that establishes exactly what the society's values are. Then, if people don't like them, they can try to get them overturned by appeal or legislation. The point is for people to know where they stand, not for there to be a particular set of values. When someone sues because a Little Leaguer gets hit by a ball that he loses in the sun, it's pretty obvious that the courts ought to rule that it's an ordinary risk and, under the doctrine of assumption of risk, case dismissed. That's the kind of ruling I think you would get from judges if judges got back the idea that it was their job to make those rulings. That case actually exists, and the judge did not dismiss it. It went to a jury. Making rulings so that people know where they stand is the most important need.

Don Patton: Could you comment on the cigarette litigation and, more specifically, the case in Minnesota?

Philip Howard: First let me issue a disclaimer. I don't talk much about corporate tort reform or corporate matters because I work for a big corporate law firm that represents a lot of companies, including some tobacco companies. Before I joined this firm, I wrote a *New*

York Times op-ed in which I said I thought tobacco disputes should be resolved by Congress, because it's a matter of social policy that affects millions of people. If they want to put the cigarette companies out of business, Congress has the authority to do that. If they want to get money from them for a fund for victims, Congress has the authority to do that. I don't think ad hoc litigation is the right way to solve social problems.

Mitch Pearlstein: You mentioned that you are opposed to some of the more conventional or routinely offered suggestions for reform. Why?

Philip Howard: In the case of caps, there are examples of egregious situations in which it's unfair to cap: when a child is injured and will never be able to enjoy life in a certain way, for example, the idea of a cap may be unfair.

In the case of loser pays, big companies do bad things to little people, and little people shouldn't be discouraged from making a claim because they might get stuck with the big company's millions of dollars in legal fees. At the same time, many cases I would consider frivolous, win. Loser pays would basically force, say, McDonald's to pay the expenses of a hot coffee spill.

Also, many of these reforms don't solve the underlying problem: the feeling that the law won't protect you if you do the right thing. A famous law professor, Donald Black, once said that an act is illegal if it is vulnerable to legal action. People don't respond to the probability of a lawsuit. They

respond to the possibility of a lawsuit. They know that the justice system doesn't try to affirmatively protect reasonable conduct. In order to restore trust in justice, we have to change the underlying philosophy.

Loser pays doesn't work because sometimes the frivolous case wins. It's not enough to have a cap, because the obstetrician can still get sued for \$20 million when he didn't do anything wrong. If we really want to solve the underlying problem, which is the freedom from harm, which is the freedom of Americans to run schools in a way that is sensible and to run hospitals in a way that is sensible, we have to recreate a reliable system of justice that people trust.

Daryl Williamson: Why don't judges throw out more lawsuits? Are we attracting the quality in judges that we should be attracting?

Philip Howard: In Minnesota, you are, yes. There are problems in parts of the country with judicial elections and the quality of judges, but by and large, I'm an optimist and I believe that people—even those who get elected with money from the plaintiff's lawyers—want to do the right thing.

The problem is that we changed our judicial philosophy in the 1960s to the idea that judges are not supposed to impose their own values. Charles Wyzanski, a famous federal judge and supposedly one of the best trial judges in the history of trial judges, in 1972 said—notwithstanding a whole career

of doing the opposite—that choosing among values is much too important a job for judges to do, that we must leave it to the people.

I just wrote a summary for the new *Oxford Companion to American Law* of how this happened. It's like a snowball rolling. It became the correct thing to do, to think you're not supposed to assert your values. I talk to a lot of judges' groups, and many judges come up to me and say, it would be great if they could do that, but they just don't have that authority. Well, they do have the authority, but they don't think they do, so part of this movement is to re-instill that sense of authority and responsibility in judges.

I debated the McDonald's hot coffee judge on Oprah about six years ago. During a break, he turned to me and said, "Your theory is great, but who am I to judge?"

Don Helmstetter: What were some of the bad values of the '60s that you referred to?

Philip Howard: Racism. Sexism. Manufacturers making unsafe products. Environmental abuses. The Vietnam War. Richard Nixon was the maraschino cherry on top of this decade of distrust, with Watergate. You couldn't trust anyone. The government couldn't be trusted to be truthful about what was going on in the war. It was perfectly natural to try to fix the problem. We just tried to fix it in the wrong way. We just tried to take away the authority that's needed in a free society. We need to have these common choices made.

Joe Weis: At what point in your law career did you decide to do something about frivolous lawsuits?

Philip Howard: This is a true story. My wife threw away the television set in 1991 because we had so many children, you couldn't avoid the television being on. I couldn't watch baseball games anymore, so I started reading. I had always been interested and active in civic affairs, so I started reading about civic affairs.

What I was reading didn't make any sense. People weren't addressing the core of the problem: why is it that sensible people who work for government can't do what they know is right? The problem wasn't that we were regulating—or over-regulating—the wrong thing. The problem was our philosophy that regulation had to be perfectly clear.

People looking at worker safety were going around factories with their noses in 4,000-rule rulebooks, tripping over saws and hurting themselves, and, in fact, worker safety had not improved, notwithstanding billions of dollars spent in new equipment, because there wasn't any layer of judgment on top of it. We'd been writing rules for decades, but you can't make a perfectly clear legal system.

Galen Wolfe: How would you weigh in on issues of a joint and several nature, when those kinds of rules apply?

Philip Howard: I think it's incredibly unfair for New York City taxpayers to be liable for \$8 million when a taxicab driving too fast jumps a curb or veers out of its lane, hits another car,

injures people, and the jury finds that the driver is 95 percent at fault. And because there was a little bump in the road, the city is 5 percent at fault? And so, because the taxicab doesn't have any money, \$8 million comes out of city schools and health care.

Joint and several liability doesn't make much sense in that circumstance, but I can imagine circumstances where it might make sense.

Health care is so complex and the distrust so great and the patterns of practice so counterproductive to the quality of health in America that it can't be fixed using the existing judicial system. We need an entirely new system of medical justice. The heads of the American Medical Association, the heads of the health plans, and the heads of public health schools are coming together to demand that. Our thesis is that deliberate rulings must be made on behalf of the common good. I don't like the silver bullets that the tort reformers come up with. They don't really solve the problems, and they don't restore trust. What we need is a new system that sees it as its job to make needed social judgments, not to respond to the demands of any particular self-interested person or group.

Mike Hickey: When did use of the contingency fee become prevalent in America?

Philip Howard: I don't know. There is a significant problem of trying to find a place for professional values in the legal profession, and that includes issues like advertising and fee arrangements. There have been many times

when contingency fee arrangements were the only way someone who was injured could get to the courtroom, many other times when it was clearly abusive and exploitative. And, of course, the fact that there's no effective gatekeeper in the courtroom—anyone can sue for anything—makes it into this business of extortion. When you can sue for any amount, that's not the rule of law. There is significant room to look at fee arrangements and other arrangements, but in the context of rethinking the whole legal system, starting with who can sue for what.

Chuck McDonald: What's your opinion of the patient's bill of rights?

Philip Howard: I think it's a great name and a terrible piece of legislation. It is basically turning physicians against the health plans and not addressing the underlying problem, which is the lack of an authority mechanism to determine, fairly quickly, what the coverage should be in a particular disease context. The bill instead focuses on recrimination—we have this current conception of justice which assumes people will do the right thing if you threaten them with bigger amounts. In that bill, the plan was to have punitive damages for \$5 million, so any dispute could possibly leave the health plan liable for punitive damages on top of actual damages of millions of dollars. The actual effect of that however, would be to raise the cost of health care and to reduce the kinds of illnesses that are covered by health care. So, it's completely counterproductive. I had a long talk with John McCain,

who is one of the sponsors of it, recently and I think I sold him on the idea of a new approach. I hope he's going to come out for the idea of getting a reliable system of medical justice so that patients will have more health care, not less, which is what I think the effect of the patient's bill of rights would have been.

Peggy Kaplan: Everything you've been saying sounds wonderful, but I know a lot of people who perceive the justice system as the only way they can get justice when they're harmed. How do you propose selling your ideas to the public?

Philip Howard: The rhetoric of rights is powerful. You're trying to take away my right to sue? Everybody will object.

We have to persuade people that the unlimited right to sue has taken away their rights. That, for example, schools don't work as well as they could because everyone has their noses in rulebooks. Zero tolerance rules are just a response to litigation. No one has the authority to distinguish between aspirin and marijuana, so you get kicked out even if you have aspirin in your purse.

People have to begin to understand that a \$20 million verdict against a hospital creates increased health care costs for everyone. We have 41 million uninsured people, all of whom could be paid for if we simply created a reliable system of justice. We have to change the way the media talk about it and think about it.

We're not proposing taking away

the right to sue. We're proposing making judgments about what is and isn't a reasonable lawsuit so that everybody knows where they stand. Restoring reliability to law is going to be a difficult assignment, and that's why we're trying to get people whose credibility is unimpeachable. I don't have a lot of corporate leaders on my board. I have people who have no axe to grind. They've run universities, they're former senators on both sides. It's very important for credible citizens to come together behind this, because it is a difficult and significant shift in the way we think about things.

Sheryl Ramstad: In terms of the common good, what role has litigation had in exposing the exploitation of young parishioners by the clergy?

Philip Howard: People, companies, institutions, the Catholic Church do things for which they should be legally accountable. It's important in a free society to have access to the courts to expose and to bring claims when people do something wrong. That continues to be the case. No one would argue that the sexual abuses practiced by certain members of the church weren't unlawful and shouldn't be the basis for lawsuits. That's clearly a valid claim.

I might argue that the right form of accountability is not a claim for \$100 million, but rather throwing somebody in prison. We've also lost sight of the role between regulatory accountability—fines, throwing people in prison, taking away the credentials of a bad

doctor—and money. Money doesn't return people from the dead or take away the trauma of being molested by a priest as a child. When we award huge sums of money instead of just throwing the offenders in jail, which is what I think ought to happen, all that money comes out of essential services—it's not coming out of nowhere. Even in the case of a completely valid lawsuit, there is still room for a common judgment about the right form of accountability.

Elsa Carpenter: Should punitive damages exist and, if so, should they go to the government, not to the plaintiff?

Philip Howard: Common Good filed an amicus brief in an important case, *State Farm Insurance v. Anderson*, soon to be argued in the United States Supreme Court. We pointed out that what is significantly harmful about punitive damages is not the handful of crazy verdicts, but the extortion factor when people claim punitive damages. In some counties in America, over 95 percent of all personal injury claims now include a claim for punitive damages. It's just a form of extortion, if you add another \$10 million or \$100 million or whatever in damages. We suggested to the Supreme Court that punitive damages no longer play the role they used to play in the common law—the rare exception for truly horrible conduct. Now you cloak any accident in the rhetoric of outrage and you've got a punitive damage claim. ■