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IS THE REPUBLIC CIRCLING THE DRAIN?

THE COLLAPSE OF THE COMMON GOOD: HOW AMERICA'S LAWSUIT
CULTURE UNDERMINES OUR FREEDOM

By Philip K. Howard. Ballantine Books, 2001.

*W. Taylor Reveley III**

AT THE THRESHOLD

The Collapse of the Common Good walks hand in hand with its older sibling by the same author, *The Death of Common Sense*. Their author, Philip Howard, explains the fraternal link in a brief prolegomenon to *Collapse*:

In . . . Death . . . I observed that Americans' frustration with government regulation was caused not mainly by what is regulated . . . but by how regulation works. Government regulates us like central planning, using ironclad legal dictates that effectively banish human judgment and good sense.

Following publication, . . . I was surprised . . . when people kept asking me for a solution. [It] could not have been clearer: Unchain people from detailed rules and bureaucratic process and let them take responsibility, to succeed or to fail. . . .

What I did not appreciate was that America has lost the idea that people with responsibility, like judges and school principals, should have the authority to make decisions just because it seems right. Authority has become a suspect concept, the enemy of individual rights. Letting someone decide about someone else isn't fair. . . .

The triumph of individual rights over authority has implications far beyond the functioning of regulation. Because almost any decision affects someone, ordinary choices are often paralyzed. Fear and suspicion now infect daily dealings in the workplace. . . . The common good is pervaded with a sense of apathy and powerlessness.¹

Howard's themes resonate with me, perhaps because our backgrounds

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¹ PHILIP K. HOWARD, *THE COLLAPSE OF THE COMMON GOOD: HOW AMERICA'S LAWSUIT CULTURE UNDERMINES OUR FREEDOM* 1 (2001).

are so similar. We're both white males, fairly long in the tooth. Each of us grew up in the South, the son of a Presbyterian minister. Howard is now the managing partner of an international law firm. I used to be. We're each married with four children. Not surprisingly, the same aspects of contemporary American society jangle our nerves and arouse our fears for the future of the Republic.

The Collapse of the Common Good, in my view, does sound an important alarm. There is substance to its concerns. Part II, below, looks at the basic elements of Howard's argument. Part III laments his failure to suggest concrete remedies and Part IV concludes. But first, in Part I, it is important to test just how steely a hold on reality the book has. The weaker the hold, the less acutely the Republic is imperiled by the ills Howard describes (one after another, in relentless profusion). If the hold is not all that steely and the Republic not all that imperiled, then the reader must approach Howard's argument with real caution. Further, since *Collapse* makes its case mainly by anecdote, not by structured argument, the quickest, surest feel for the book comes by sampling its stories.

I. JUST HOW THREATENED IS AMERICAN SOCIETY?

A. Shocking Vignettes

The Collapse of the Common Good is chock full of stories meant to appall us. Howard presents these vignettes as if they are typical of life in America today. He doesn't describe them as isolated examples or simply as harbingers of the future. He marshals them as if they are normal behavior. But are they? The reader should juxtapose the following stories with his or her own sense of contemporary reality. Is what happened in each of Howard's vignettes typical of what you would expect in like circumstances?

Boy Left Bleeding to Death Outside Hospital

Christopher Sercye, fifteen, was shot while playing basketball on a playground close to the Ravenswood Hospital in Chicago. With the help of two friends, the boy made it to within thirty feet of the hospital entrance. When Christopher collapsed, almost at the hospital door, his friends ran in to get help, but the emergency-room staff refused to come out. Hospital policy was that they should not leave the hospital because . . . of fear of possible legal liability for neglecting patients already in the hospital. . . . As Christopher lay bleeding on the sidewalk, a policeman begged the staff to come out. . . . Christopher lay on the sidewalk for twenty-five minutes before a police sergeant arrived and commandeered a wheelchair to bring him in. The boy died shortly thereafter.²

Children's Game Cancelled Because of Missing Ump

Everyone was warmed up and ready to play in the Little League baseball

² *Id.* at 6.

game in Slingerlands, New York, but . . . the umpire didn't show. The coaches talked; several parents volunteered; everyone wanted to play, but the longer the discussion went on, the more nervous everyone got. "And what would happen if someone got hurt?" There might be legal liability, the coaches suggested, without the official umpire. The game was cancelled. Several teams of disappointed children went home.³

Disgusting Window Glob Unwashed

A huge hock of mucus was dripping down the window of her classroom at Walton High in the Bronx, but when the teacher, Nancy Udell, called in a custodian, he patiently explained that the union contract requires window cleaning only on a set schedule. "Actually cleaning the window was the furthest thing from his mind," Ms. Udell marveled. "What interested him, as the disgusting glob stared at us, was how I could be so naïve as to ask."⁴

Rats Spared

[R]ats . . . were infesting rest stops in Georgia's park system. But the commissioner . . . learned that no one could put down rat poison because the regulations prohibited it. . . . At one rest stop, however, a stray cat wandered by and took the matter into its own paws. But the cat's success meant that it was also soon out of food. The cat's natural instincts were not matched . . . by the bureaucrats. They looked, but there was no line in the budget for cat food. . . . As so often happens in government, the rats win again.⁵

All this sounds awful, outrageous. Think about it for a moment, though. How many of the countless hospitals in this country do you think would actually let a wounded boy lie bleeding to death, unhelped, thirty feet from the ER door? How many policemen would argue with hospital employees rather than themselves quickly carrying the wounded kid the thirty feet? Wouldn't the boys' friends pull him to the ER door, if all else failed?

Don't you think most Little League games in the United States get played with parents officiating when the umpires fail to show? Isn't it likely that most schools in the country have custodians who willingly wash disgusting globs off windows, to say nothing of teachers who do it themselves? As for the rat-and-cat story, what are the odds that most U.S. rest stops are hobbled by rat-friendly regulations? Have you ever seen a rat in the rest stops you've visited over the years? If rats were a problem at a rest stop and a cat offered hope, don't you think someone would spring for a small bag of dry cat food to see if the terminator might stick around?

The dying boy, the game not played, the unremediated glob, the rats triumphant—these and other vignettes in *The Collapse of the Common Good* do seize the reader's attention and rouse reformist passion. That's

³ *Id.* at 10.

⁴ *Id.* at 96.

⁵ *Id.* at 119.

their point, not to describe life as it usually is. Howard uses these stories for bald-faced advocacy, not dispassionate anthropology. It follows that the reader must approach *The Collapse of the Common Good* with the cold and suspicious eye appropriate when reading briefs.

Advocates in full cry often do find hyperbole irresistible. Here's my favorite bit of verbal overkill from the book:

Like weeds in a rainy spell, claims have grown ever larger over the past few decades. First it was millions that took our breath away, then tens of millions, then hundreds of millions. Now it's billions. Pretty soon, one lucky victim may own the world. Not even Huxley or Orwell imagined this would be our end.⁶

Now is a good time to remind the reader that Howard's subtitle for the book is *How America's Lawsuit Culture Undermines Our Freedom*.

B. Disquieting American Attitudes

Let's continue testing how firm a hold on reality *The Collapse of the Common Good* has. As with the vignettes, Howard advances many propositions about American thought and behavior that sound more like advocacy than anthropology.

1. No Beliefs Left Standing.—

Americans of every political persuasion cringe at the idea of people imposing their beliefs of right and wrong.⁷

To our modern sensibility, giving someone authority to judge right and wrong is inconceivable.⁸

Americans no longer believe in belief.⁹

Americans are so out of practice that we no longer know what we believe. Our self-confidence has evaporated: Who are we to judge?¹⁰

To the contrary, in my experience countless Americans still believe in belief, constantly make value judgments based on their understanding of right and wrong, and often seek to have the government impose their views on others. Here are some matters about which belief remains alive and well in today's America: abortion, affirmative action, cloning, the death penalty, dress codes, environmental controls, euthanasia, federalism, gun control, HMOs, homosexuality, lawsuits, NCAA tournament selections and seedings, pornography on television, prayer in public places, regulatory takings,

⁶ *Id.* at 58.

⁷ *Id.* at 9.

⁸ *Id.* at 39.

⁹ *Id.* at 54.

¹⁰ *Id.* at 201.

school vouchers, whether men should open doors for women, table manners, and taxes. The diversity and intensity of beliefs about these matters—and countless others—are enormous.

2. *Lawsuit Phobia.*—

Exorbitant verdicts are the exception . . . and don't directly touch the lives of most Americans. But law has changed our culture. Instead of looking where we want to go, Americans are constantly looking over our shoulders.¹¹

The air in America is so thick with legal risk that you can practically cut it and put it on a scale.¹²

Social relations in America, far from steadied by law's sure hand, are a tangle of frayed legal nerves. Any dealings in public—whether in hospitals, schools, offices, or in the ebb and flow of daily life—are fraught with legal anxiety. An undertow pulls at us constantly, drawing us away from choices that we believe are reasonable. Legal fear has become a defining feature of our culture.¹³

"When every American must think like a lawyer . . . no American can [live] naturally, spontaneously, or freely."¹⁴

True, there are far more lawsuits than a generation ago. There is new and greater exposure to liability. But Howard's characterization of the effect of these realities on society seems hyperbolic. Do most Americans dwell morbidly on the possibility of being sued? Do they allow this possibility to shape their lives any more than they allow other risks to dominate them? Being sued, choking on a pretzel, having an automobile accident, slipping in the shower, seeing the house burn down, losing a job, the death of a loved one—risks loom on all sides. Most people take them in stride and get on with their lives. Are you and your friends constantly looking over your shoulders for fear of lawsuits? Is your air so thick with legal risk that you can practically cut it and put it on a scale? Are your social relations a tangle of frayed legal nerves? Can you no longer live naturally, spontaneously or freely because you must think like a lawyer? Of course not!

3. *Compliance Uber Alles.*—

Teachers and principals acting on their own instincts and judgment . . . are the last thing you can find in America's schools today. . . . Teachers are given instructions "telling them what to do and when to do it, every day of the year." . . . Every choice—about students, janitors, other teachers, the lunchroom, extracurricular activities, even the next thirty minutes—is laden with in-

¹¹ *Id.* at 6.

¹² *Id.* at 7.

¹³ *Id.* at 11.

¹⁴ *Id.* at 136 (quoting EUGENE KENNEDY & SARA CHARLES, *AUTHORITY: THE MOST MISUNDERSTOOD IDEA IN AMERICA* 17 (1997)).

structions. There's "little room for spontaneity or that leap of imagination we called creativity."¹⁵

Today, the personal perceptions of teachers and principals about what's going on, whether about a student or a class, or what makes sense or what's fair, are basically irrelevant. . . . What matters is compliance.¹⁶

The need to comply with regulatory *diktat* clearly burdens us, sometimes mindlessly, and not just in schools. Howard's conclusions, however, do not apply to the schools where my four children have gone. Admittedly, these schools have been largely private, and Howard focuses on public schools. Even then, his conclusions seem germane, at best, to very large, intensely bureaucratic, militantly unionized systems in some big cities. Smaller, more suburban, less bureaucratic and less unionized systems still provide receptive soil for human initiative and spirit.¹⁷

4. *Government Gone to Hell.*—

According to *The Collapse of the Common Good*, "[a]lmost twenty million people—one out of six working Americans—works for the government."¹⁸ Twenty million is a very large number. Presumably it includes members of the U.S. armed forces, all police and firefighters, a host of teachers and school administrators (including those at state-owned institu-

¹⁵ *Id.* at 76.

¹⁶ *Id.* at 81.

¹⁷ See generally LOWELL C. ROSE & ALEC M. GALLUP, THE THIRTY-THIRD ANNUAL PHI DELTA KAPPA/GALLUP POLL OF THE PUBLIC'S ATTITUDES TOWARD THE PUBLIC SCHOOLS (1999), available at <http://www.pdkintl.org/kappan/kimages/kpoll83.pdf>. "For the first time in the 33-year history of these polls, a majority of respondents assign either an A or a B to the schools in their communities. And . . . the closer people are to the public schools, the better they like them. The percentage of A's and B's rises from 51% for all respondents to 62% for public school parents and to 68% when these same parents are asked to grade the schools their oldest child attends." *Id.* at 1. In the 1999 variant of this poll, people were asked to evaluate how well their local public schools prepared students for tomorrow's job market. 79% responded either "very effectively" or "somewhat effectively." LOWELL C. ROSE & ALEC M. GALLUP, THE THIRTY-FIRST ANNUAL PHI DELTA KAPPA/GALLUP POLL OF THE PUBLIC'S ATTITUDES ABOUT THE PUBLIC SCHOOLS 8 (1997), available at <http://www.pdkintl.org/kappan/kpo9919.htm>. Surveys taken by some individual school districts show even greater confidence in their public schools. See, e.g., WANDA N. WILDMAN, PARENT SURVEY RESULTS 2000-2001, available at http://www.wcpss.net/evaluation-research/index_reports/2001/parent_survey_results_01.pdf (survey of parents whose children attend public schools in Wake County, North Carolina—Raleigh and the surrounding areas); YI DU & LARRY FUGLESTEN, BEYOND ACHIEVEMENT, STUDENT/STAFF/PARENT SURVEYS USED FOR EDINA DISTRICT SCHOOL PROFILES AND ACCOUNTABILITY SYSTEM (Paper for Presentation at the Annual Conference of the American Educational Research Association, Seattle, Washington, Apr. 2001) (survey information about suburban school district ten miles from Minneapolis), at <http://www.wcer.wisc.edu/sipsig/aera2001du.pdf>.

The current furor in many states over standards of learning and other test-based measures of public-school effectiveness is rooted in parents' belief that they can influence their children's education. These parents are not mired in apathy or despair. See generally James Traub, *The Test Mess*, N.Y. TIMES, Apr. 7, 2002, § 6 (Magazine), at 46.

¹⁸ HOWARD, *supra* note 1, at 170.

tions of higher education like the College of William & Mary), air traffic controllers and countless other bureaucrats. Howard's account of how this mass of public employees has fallen into despair and fecklessness is among his most vivid. It runs for sixteen pages. Some highlights:

Americans don't exactly hold government in high regard, but the reality is probably worse than they imagine. Public employees become almost half-human. . . . "These people are depressed. They learn they can't make a difference. So they give up."¹⁹

Taking a trip into the operations of contemporary government is like descending into Dante's rings of hell, ever darker and stranger as we get farther away from the sunlight of the outside world.

. . . Near the entrance there seem to be people doing this and that, but most stay close to the shadows and look furtive as we approach. These . . . are people who believe in getting the job done. They talk in whispers because they're constantly ignoring or breaking the rules. "You have to cheat to do your job." . . .

Moving past the lobby into the bureaucracy itself, the complexity immediately overwhelms you, with regulations and numbers all around, even painted on the floor. . . . The language is foreign and always capitalized. . . .

The expertise sounds impressive but, as we stop to watch, nothing much seems to happen . . .²⁰

As we get deeper, . . . [m]otion is casual in the offices, as if passing the time until . . . the inevitable. Middle-level employees spend time selling real estate in their cubicles or reading books, while clerical worker wander around selling hair care products or the like to their co-workers. . . . Why don't they bail out? The inevitable . . . is retirement with a pension.²¹

Only halfway down in our journey, we realize that the idea of working toward any common goal, even cleaning up the office, has disappeared. . . .

Like animals dozing, bureaucrats are quiet but not indifferent to what happens near them. Each person has a designated spot, zealously guarded, with each responsibility and right carefully delineated. . . .

Get too close or try to dislodge these entitlements, or make a negative comment on an evaluation form, and they snap back, often viciously, with a legal "grievance" proceeding. Public employees value the right to be left alone above all others. No one can make demands on them.²²

Getting near the bottom now, there's a human quality we've never seen before. Bureaucrats' eyes often look dead, like someone cut the nerve to the brain. Many people do nothing. . . .

¹⁹ *Id.* at 130–31.

²⁰ *Id.* at 116–18.

²¹ *Id.* at 119.

²² *Id.* at 122–23.

Other bureaucrats do nothing about the bureaucrats who do nothing. . . .

People can get away with almost anything as long as it's not theft or political incorrectness.²³

At last, we arrive at the door to the bottom level [W]e're practically blinded by the brightness of artificial lights, like on a movie set. . . . Well-dressed men (it's mainly men on this level), with handkerchiefs in their suit pockets and every hair in place, strut back and forth, talking in the language of capitalized letters. Back and forth they go, like windup toys, but doing nothing. These . . . are the people in charge. . . . Their job is to pretend that someone's in charge.²⁴

What a tour de force! Howard's account of the descent into bureaucratic horror is a gripping read in its entirety. It reflects enough reality, as does any good parody, to keep us riveted as we plunge deeper and deeper into "Dante's rings of hell." But Howard goes way too far.

If government were uniformly as he describes it, how inexplicable that the U.S. armed forces succeeded so brilliantly in Afghanistan, that police have done so well in recent years reducing crime, that fires get successfully fought across the country day in and day out, that FAA-directed airplanes rarely run into one another in flight or while taking off and landing, that state-owned colleges and universities often deliver world-class teaching and scholarship—you get the picture.

I practiced administrative law for decades before going into the decanal business. Dealing with federal and state bureaucracies was often frustrating, at times infuriating, but it never took me into Dante's rings of hell. Among the bureaucrats encountered during my years of practice were an elite few who were quite smart, very hardworking, devoted to the common good, and willing (when unavoidable) to make tough decisions that exposed them to bureaucratic second-guessing and political risk. At the other end of the continuum were an equally small number of tin-pot despots, usually junior in an agency's pecking order but empowered to grant or withhold small, incremental approvals crucial to a project's progress. These tin-pots wielded arbitrary power, withholding approvals until their persons were venerated and their regulatory demands sated. To do otherwise was to delay even further while seeking redress from higher authority and, thereafter, to experience in other contexts the wrath of the embarrassed minor bureaucrat. Between the elite public servants and the tin-pot despots was the mass of bureaucrats—journeymen of middling ability, no particular ambition, and scant willingness to bestir themselves beyond the minimum required, though people who (sooner or later) turned their assigned wheels in ways that allowed decisions to be made. This was not an edifying spectacle. But it was government that worked, slowly.

²³ *Id.* at 124–25.

²⁴ *Id.* at 126–27.

5. *Loss of Collective Capacity to Do Good.*—

There is little sense of being together in a great society, not to mention a society with the future of the earth more or less in our care. We don't *feel* that power.

We don't have that power. We lost it when we took away the authority of those with responsibility to make judgments and replaced it with bureaucracy. There's no longer any effective mechanism by which anyone can do what they feel is right for the common good.²⁵

Ordinary choices are burdened with legal fear and argument. Cooperation of all kinds has become risky. Daily interactions are imbued with distrust. Is the doctor free to act on his best judgment? Does the teacher have authority to run the classroom? Are you free to say what you think?²⁶

Again, there is a kernel of truth to what Howard says, but again he goes beyond reasonable bounds. In response to the terrorist attacks on September 11, the country has acted at home and abroad with purpose and commitment to the common good.²⁷ Even without such a catalyst, America still has many effective mechanisms by which people can do what they feel is right for the common good. From neighborhood associations to the great charitable foundations, in countless cultural and arts organizations, from the work for the common good of religious organizations to the pro bono and community service efforts of law firms, in the work of many educational institutions, there is enormous activity in this country born of choices made by people who believe they are making a difference for the better.²⁸

C. *Countercurrents*

It is telling, too, that Howard's bad news lacks internal consistency. After many pages saying that contemporary Americans are so terrified of being sued that they assiduously avoid any situations that might spawn a lawsuit against them, the book then describes a number of situations in which litigation time bombs were allowed to go on ticking for years—

²⁵ *Id.* at 136.

²⁶ *Id.* at 200.

²⁷ "[T]he closing decades of the twentieth century found Americans growing ever less connected with one another and with collective life. We voted less, gave less, trusted less, invested less time in public affairs, and engaged less with our friends, neighbors and even our families. Our 'we' steadily shriveled." But "the unspeakable tragedy of September 11 dramatically interrupted that trend. Almost instantly, we rediscovered our friends, our neighbors, our public institutions, and our shared fate." Robert Putnam, *Bowling Together*, AM. PROSPECT, Feb. 11, 2002, at 20.

²⁸ At various times over the last twenty-five years, I've been intimately involved in the workings of a powerful neighborhood association, symphony orchestra, historical society, art museum, research university, theological seminary, preparatory school, and three foundations of national and international reach, as well as the activities of the organized bar, the community service and pro bono initiatives of a large law firm, and the efforts of William & Mary. In my experience, these groups have been strongly led, rooted in clearly articulated values, and characterized by sustained contributions to the common good.

unbalanced, abusive, even criminal teachers left with students, a train engineer with moving violations allowed to stay at the throttle, a violent and paranoid city employee kept on the job, a drunk school superintendent tolerated for years.²⁹ If everyone was as bent on avoiding litigation as Howard argues, surely ways would have been found to remove these people more briskly.

It is telling, as well, that occasionally Howard delivers good news. He glowingly depicts some public schools that are thriving.³⁰ He describes how American corporations, after focusing for years "on organizational compliance instead of making sense of the situation,"³¹ suddenly decided in the 1980s to reclaim the power of their employees' insight and initiative: "Virtually overnight, American business rediscovered the human."³² Howard also reports that at least one state, Georgia, has successfully brought its bureaucracy back from hell.³³

The Collapse of the Common Good would be more persuasive if it acknowledged its internal tensions—its countercurrents—and then suggested how the reader might best understand the whole. Are we to conclude, for instance, that firing public employees is so procedurally demanding that the pain and suffering of the process outweighs a boss's fear of being sued for knowingly keeping unfit, even dangerous, employees on the job? Are the successes in certain schools, American business as a whole, and Georgia's bureaucracy isolated points of light amid suffocating darkness, or (to switch metaphors) are they signs that our society can cure itself and is on the road to recovery? Howard doesn't say.

D. *The Golden Age?*

One final thought about how large a grain of salt to take when appraising the apocalyptic parts of *The Collapse of the Common Good*. The book says there was no golden age in years past, but then talks as if one existed before the 1960s. Once this decade hit, "[i]n the wake of the civil rights movement and the Vietnam War . . . Americans no longer trusted anyone to decide anything."³⁴ There were "giants" in the Senate as late as the 1950s.³⁵ Before the sixties, "[r]eading through the chronicles of civic engagement in American history, you can practically feel the determination as like-minded people got together to get something done, just because that's what they believed was important."³⁶ The ills Howard describes, some of which we've

²⁹ HOWARD, *supra* note 1, at 137–39, 156–64.

³⁰ *Id.* at 144–49, 151–52, 210.

³¹ *Id.* at 90.

³² *Id.* at 92.

³³ *Id.* at 154.

³⁴ *Id.* at 109.

³⁵ *Id.* at 131–32.

³⁶ *Id.* at 200.

seen in prior pages, did not plague the country before the sixties, in his telling of the tale. He does seem to find a golden age that ended in the fifties.

Think for a moment, however, about how golden the fifties actually were. The Cold War was raging, with recurrent Berlin crises and an absolutely terrifying missile race with the Soviets; there were nuclear bomb drills in public schools and bomb shelters in back yards. Racial segregation remained a malignant presence in the South and de facto segregation was intense in many other parts of the country. Employment opportunities for women, especially in the professions, were quite limited, as was women's capacity to participate equally with men in civic, political, and religious leadership. It would have defied imagination in the 1950s that, early in the next century, women would head the University of Pennsylvania, and Princeton and Brown Universities. In the fifties, non-WASPs, especially Jews, were not welcome in many leading law firms. Until the decade was half over, polio still ran riot, especially in the summer. The healing arts remained pale shadows of today's pharmacology and technology. How many of us would trade life today for life then or, for that matter, life during any earlier era of American history? It would be fun to visit the fifties again. That's when I grew up. But give me daily life amid today's challenges, not yesterday's.

People do have a tendency to remember the past more generously than it deserves while unduly damning the present. Often we posit a lost golden age the better to grind some of our contemporary axes. Marc Galanter has captured the essence: "[T]he Golden Age is an essentialist argument, well-suited to produce vivid contrasts and to suppress continuities. Typically, such an account emerges not from independent examination of the past but from the polemical thrust of a critique of the present."³⁷

³⁷ Marc Galanter, *Lawyers in the Mist: The Golden Age of Legal Nostalgia*, 100 DICK. L. REV. 549, 555 (1996). As Galanter notes, "the lure of nostalgia is not peculiar to law. The sense of painful loss and disaffection with the new pervades much cultural criticism." *Id.* at 551.

Two strikingly elegant accounts of current legal nostalgia are MARY ANN GLENDON, *A NATION UNDER LAWYERS: HOW THE CRISIS IN THE LEGAL PROFESSION IS TRANSFORMING AMERICAN SOCIETY* (1994), and ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* (1993). While Glendon and Kronman do not wholly agree on when the lost golden age was, they do share a profound sense that much of the good traditionally done American society by lawyers (whether of the practicing, judicial or academic sort) has been lost. Kronman is more pessimistic about prospects for renewal than Glendon, but neither is a ray of sunshine when it comes to the current state of the legal profession. There are even more grim accounts. See, e.g., Carl T. Bogus, *The Death of an Honorable Profession*, 71 IND. L.J. 911 (1996).

You cannot study Glendon, Kronman, and other "golden age" scholars without realizing how much we have to learn from the best of the legal profession's past. See Davison M. Douglas, *The Jeffersonian Vision of Legal Education*, 51 J. LEGAL EDUC. 185 (2002). But suggestions that the legal profession has fallen from grace are nothing new. See, e.g., LOUIS D. BRANDEIS, *BUSINESS: A PROFESSION* 317-18 (Augustus M. Kelley 1971) (1914); William J. Brennan, Jr., *The Responsibilities of the Legal Profession*, in *THE PATH OF THE LAW FROM 1967: PROCEEDINGS AND PAPERS AT THE HARVARD LAW SCHOOL CONVOCATION HELD ON THE ONE HUNDRED FIFTIETH ANNIVERSARY OF ITS FOUNDING* 88, 90-91 (Arthur E. Sutherland ed., 1968). Useful perspective comes also from Harry T. Edwards. While

No era is golden. Each confronts its peculiar mix of difficulties and opportunities. Each must seek salvation amid its own particularities. Today's America hasn't gone to hell in comparison to past Americas. We do, however, have some important remedial work to do in many areas, including those that Howard describes.

I would be more moved by his book, though, if it didn't so relentlessly overstate its evidence. Howard need not claim the Republic is circling the drain to establish the importance of his argument. It's important without the hype.

II. WHAT, EXACTLY, IS HOWARD'S ARGUMENT?

The way is not easy, nor the burden light for a reader searching for the precise terms of Howard's argument. Bits and pieces of it appear throughout *The Collapse of the Common Good*. They are never pulled together. It is left to the reader to weave Howard's threads into a coherent whole. Let me weave. The resulting fabric, in candor, may include more Reveley than it should. But when the author of a book provides only threads, the reader must be cut some slack to attempt a design.

A. *Fairness to Individuals Run Riot*

According to Howard, a little over a generation ago the country ran off its historic trolley. We Americans suddenly became obsessed with fairness for everyone in all of life's circumstances. As Howard puts it, "[f]airness to every individual is the billboard that hovers over American society."³⁸

In search of fairness for each of us, we have seriously narrowed our understanding of justice. It has become simply the vindication of individual rights. "Today, Americans believe that fairness to individuals is the goal of justice."³⁹ We live in a regime of "[j]ustice based on individual rights"⁴⁰ that "have an almost theological power" for us.⁴¹ "[J]ustice is only about fairness to the particular parties."⁴²

We believe, Howard says, that to get justice (defined in terms of individual rights) it is necessary to have "neutral," that is, valueless, decision-making. American society is on a "quest to achieve individual fairness

seeing much that needs changing in today's legal profession, Judge Edwards remains "highly skeptical of suggestions that we should look to the 'good old days' to find cures for our profession's ills." Harry T. Edwards, *A New Vision for the Legal Profession*, 72 N.Y.U. L. REV. 567, 571 (1997). As the judge notes, in the "good old days," he, as an African-American, couldn't have gotten a job with a major law firm or sat on the federal bench. *Id.* at 572.

³⁸ HOWARD, *supra* note 1, at 155; *see, e.g., id.* at 19, 62.

³⁹ *Id.* at 8.

⁴⁰ *Id.* at 21.

⁴¹ *Id.* at 18.

⁴² *Id.* at 19.

through neutrality.”⁴³ According to Howard, “The more society frays, the tighter we cling to our ideal of neutral justice. . . . Justice almost reeks of neutrality. Practically no claim is too extreme or disingenuous. Whenever there’s a dispute, we reflexively drop to our knees before the altar of neutral process.”⁴⁴

Neutrality, in turn, hinges on allowing no one to have authority over anyone else. Others may not tell us what’s right or wrong, when to sit down and shut up, when to buck up and move along. Society is awash in an “inability to judge other people.”⁴⁵

The rhetoric of modern justice is individual rights, but its foundation is the avoidance of authority. Americans can’t stand the idea of some unknown jerk having the power to make decisions. With neutral justice, we don’t have to give anyone authority to make choices for the common good. Almost subconsciously, we can’t bring ourselves to confront the need for authority in a free society.⁴⁶

Even judges find themselves frozen by the power of someone’s asserted rights. The judge knows that the sandbox case involving . . . three-year-olds is ridiculous, but if he furrows his brow and looks at the sandbox case as a matter of individual rights, the claim is perfectly logical, almost open-and-shut. How dare Jonathan Inge monopolize the sandbox with his bullying tactics. The sandbox is a public facility. The Pevnevs have just as much right to be there as he does. A dispute over three-year-olds sharing the sandbox is absurd, but what can he do? People have their rights.⁴⁷

B. Ensuing Societal Dysfunction

1. Structural Flaws.—

The society that results from American obsession with fairness for each of us in all circumstances, says Howard, has serious “structural flaws.”⁴⁸ There is rampant, destructive litigation born of private citizens with “broad powers to bring lawsuits”⁴⁹—indeed, “the right to bring a lawsuit for almost anything.”⁵⁰

There is rampant, destructive regulation (for instance, “the detailed rights of the civil service system and teachers’ unions”)⁵¹ that prescribes every jot and tittle of too much American life. This prescription eliminates

⁴³ *Id.* at 13.

⁴⁴ *Id.* at 22.

⁴⁵ *Id.* at 143.

⁴⁶ *Id.* at 35–36.

⁴⁷ *Id.* at 19.

⁴⁸ *Id.* at 174.

⁴⁹ *Id.*

⁵⁰ *Id.* at 211; *see, e.g., id.* at 31.

⁵¹ *Id.* at 211.

our discretion to do what common sense suggests under the circumstances.⁵²

There is rampant, destructive due process designed to prevent anything adverse being done to anyone without exhaustive prior procedure. This procedure is so burdensome that it either precludes any attempt to vindicate the common good or strangles it in mid-process.⁵³

Due process by the mid-1970s had become a kind of legal air bag, inflating instantly to protect students and public employees. These changes in constitutional law . . . “blur[red] any distinction between the government as regulator and the government as employer.” Losing your job or being disciplined in school had become a deprivation of basic rights . . .⁵⁴

[W]e imagine due process as a kind of fountain of truth, automatically bestowing accountability and fairness in equal measure. In practice, applying due process to internal decisions is more like pouring acid over the culture. It may be hard to comprehend how one of our most hallowed constitutional protections could possibly work such mischief, but consider the effect if you had to prove your position every time you disagreed with, say, one of your children. Due process for ordinary management choices basically ensures the corrosion of the common good.⁵⁵

2. *Forgotten Realities About the Common Good.*—

American society, in addition to developing structural flaws, has forgotten four facts of life crucial to nurturing the common good. First, “[f]reedom . . . is not just an individual concept.”⁵⁶ Your freedom impinges on mine, and mine on yours. “In shared activities, one person’s asserted rights almost always affect what other people could claim as their rights.”⁵⁷

The whole class is affected by the inability to remove the teacher who doesn’t try. Every American is injured by the legal fear paralyzing the medical profession. The complexity of these interrelationships, however, makes any objective legal formulation impossible. Where do you draw the line? The people with responsibility must have the authority to make these common judgments.

. . . Each person must be able to freely choose, equal to the scope of his responsibility, or else all lose their authority to act on their beliefs. . . . Only if those with responsibility are free to choose what’s right and reasonable can we be free to do so. That’s how our reasonable choices get affirmed and how abusive conduct gets rejected.

. . . Take away the personal authority of the teacher to act on his best judg-

⁵² See, e.g., *id.* at 37.

⁵³ See *id.* at 159.

⁵⁴ *Id.* at 113.

⁵⁵ *Id.* at 156.

⁵⁶ *Id.* at 212.

⁵⁷ *Id.* at 101.

ment, and the students' suggestions can't be implemented. The teacher's lack of authority causes the principal to lose his authority—how do you blame a teacher who is just following the script? . . .

The greater the responsibility, the more reducing authority will detract from everyone's freedom. Remove a judge's authority to assert his views of what's right and reasonable . . . and the entire society starts acting like a nervous wreck.⁵⁸

Second, institutions are not our enemies; they "are us."⁵⁹ Their success is vital to our success.

[O]ur freedom only exists on a platform of institutions that provides common services and makes common choices. Our lives are cloaked in choices made by these institutions: about justice, education, medical care, the range of products available at the store, the lakes available for recreation, the air we breathe—how, indeed, we interact with each other.⁶⁰

And more: "The authority of justice, schools, and government is directly linked to our own authority to act on our beliefs. How they are organized makes the difference between feeling secure to do what's right, or just avoiding responsibility altogether . . ."⁶¹

Third, our institutions will not get much done, and we as individuals won't be free to work for the common good, unless decision-makers have authority to make "sense of the situation,"⁶² and "people on the spot [have] authority to do what they think is right."⁶³

[J]udges have a responsibility on behalf of a free society to assert standards of reasonable behavior and to prevent the power of justice from being used by private parties as a form of extortion.⁶⁴

Everything is personal. A fair system of justice requires constant value judgments: Americans won't be free to do what's reasonable until judges take the responsibility of deciding who can sue for what. Running the institutions of democracy is uniquely dependent on the particular people: Schools will continue to deteriorate until we replace the system of bureaucratic rights with personal judgment and accountability.⁶⁵

Fourth, when people do have authority, not all their decisions are good. Sometimes they make honest mistakes. Sometimes they act foully. Even

⁵⁸ *Id.* at 212–13.

⁵⁹ *Id.* at 205.

⁶⁰ *Id.* at 206–07.

⁶¹ *Id.* at 208.

⁶² *Id.* at 90.

⁶³ *Id.* at 214. In Howard's scheme, this is not a prescription for rule by individuals outside a framework of law, or even for the exercise of authority not "grounded" in the "consent" of those who have delegated freedom to one of their number to make "group choices." *Id.* at 152–53.

⁶⁴ *Id.* at 62.

⁶⁵ *Id.* at 216–17.

their good decisions are rarely thought fair by aggrieved parties.⁶⁶ This is inevitable, however. It's the cost we pay to enjoy the radically greater benefits of having decision-makers free to act for the common good.

As the first head of the National Civil Service Reform League . . . put it: "It is better to take the risk of occasional injustice from passion and prejudice . . . than to seal up incompetency, negligence, insubordination, insolence and every other mischief in the service by requiring a virtual trial at law before an unfit and incapable clerk can be removed."⁶⁷

[George] Washington knew leaders would make mistakes, but also understood that striving too hard to eliminate error is the perfect formula to achieve error. "No man is a warmer advocate for proper restraints . . . than I am," Washington wrote in 1787, "but I have never been able to discover the propriety of placing it . . . out of the power of men to render essential services, because a possibility remains of their doing ill."⁶⁸

So, our fixation on individual fairness has led to structural flaws in society inimical to the common good, as well as societal amnesia about conditions essential to nurturing this good. Perversely, we've ended up with the opposite of what we sought—less individual freedom rather than more.

Almost without our noticing how it happened, the regime of individual rights began threatening our freedom instead of protecting it.

Our system of individual rights . . . unintentionally transfers power for common decisions to self-interested individuals. Individual rights, girded with legal powers against institutions, have become an intimidating institution itself. This new institution of individual rights, however, doesn't have any common enterprise in mind. Nor is it readily accountable to the common good. It exists only for the aggrieved individual.⁶⁹

When individual authority to judge people was trumped by individual rights, the resulting bureaucracy rendered everyone powerless to act for the common good.⁷⁰

The sum of all these [individual] rights is far less than the parts. Individuals are not more free, with all their rights, but less free, because the organization they're part of is out of control.⁷¹

C. *Yes, But!*

My reaction to Howard's argument, like my reaction to the evidence he

⁶⁶ *Id.* at 149; *cf. id.* at 158–60.

⁶⁷ *Id.* at 106 (quoting PAUL P. VAN RIPER, HISTORY OF THE UNITED STATES CIVIL SERVICE 102 (1958)).

⁶⁸ *Id.* at 216.

⁶⁹ *Id.* at 203–04.

⁷⁰ *Id.* at 144.

⁷¹ *Id.* at 103.

adduces to support it, is, "Yes, but!" Fairness to individuals does have almost talismanic appeal these days, but often for good reason. We're involved as a society in redressing a balance that had long been out of whack. From the Declaration of Independence in 1776 well past *Brown v. Board of Education* in 1954, American promises about freedom, equality and opportunity had real meaning mainly for white protestant heterosexual males from educated families. People with institutional authority often behaved in summary, discriminatory fashion toward women, minorities, non-protestants, homosexuals, and others outside the favored cast. Even WASP males, when they were children, students, workers or poor, could easily find themselves on the short end of the institutional stick. Pre-sixties authority was too unfair to too many people for too long to avoid a powerful reaction. In pendular fashion, the reaction swung too far toward individual fairness at the cost of the common good, but in pendular fashion society will swing back toward the middle, in due course.

I recently saw a courtroom cartoon on the op-ed page of my local newspaper.⁷² A very fat plaintiff was leaning out over the witness box pointing furiously at a scrawny young McDonald's worker sitting next to his defense attorney. Plaintiff's counsel was shown, with bared teeth, snarling, "Let the record show my client pointed out the McDonald's server who forced him to overeat!" This cartoon ridicules lawsuits of an extreme sort. It doesn't elicit sympathy for an unfairly treated plaintiff driven to overeat by the addictive allure of french fries and burgers. In cartoons and other contexts, the lawsuit pendulum does seem to have begun its swing back to a more restrained understanding of who can sue whom for what.⁷³

⁷² Gary Brookins, Editorial Cartoon, *News: Obesity-Related Class Action Suits Are on the Way*, RICH. TIMES-DISPATCH, Mar. 9, 2002, at A11.

⁷³ See, e.g., Bloomberg News, *Denny's Refutes Discrimination Suit: Video Shows Plaintiffs Exaggerated Their Wait, Judge Dismisses Case*, BALT. SUN, Aug. 3, 2000, at C2; Thomas R. Collins, *Litigation Bill Sparks Fiery Debate: Some Say the Bill Will Boost the Economy by Limiting the Impact of Frivolous Lawsuits*, LEDGER, May 10, 1998, at B1 (according to Circuit Judge Robert A. Young, "I do see a lot of frivolous lawsuits, but they all get dismissed"). On the other hand, it does seem that British judges are more willing than their American counterparts to call it as they see it. See, e.g., Anthony Ramirez, *Word for Word/Hot Water: For McDonald's, British Justice Is a Different Cup of Tea*, N.Y. TIMES, Apr. 7, 2002, § 4, at 7 ("In a scalding coffee case, a judge argues for what he sees as personal responsibility, not to mention common sense."). And there remains a strong sense in the U.S. business community that tort suits are running wild. See, e.g., Michael Freeman, *Tort Mess*, FORBES, May 13, 2002, at 91. "The tort crisis . . . is really tomorrow's news. If the momentum of litigation costs cannot be slowed, it could easily . . . crush important parts of the economy." *Id.* "For the U.S. economy, when it comes to tort costs, there is . . . no end in sight." *Id.* at 98.

Tort suits, however, represent only a small fraction of the litigation brought in U.S. courts. A 1992 study found that tort claims represented 10% of the civil filings in major urban courts that year, and of these 60.1% dealt with car accidents and only 4.9% with medical malpractice and 3.4% with products liability. See Thomas A. Eaton & Susette M. Talarico, *A Profile of Tort Litigation in Georgia and Reflections on Tort Reform*, 30 GA. L. REV. 627, 651 (1996). A 1993 study of rates of "tort filings per 100,000 population" in twenty-nine states found tiny percentages: "The filing rates range from a low of 83 . . . per 100,000 in North Dakota to a high of 819 per 100,000 in New Jersey." *Id.* at 647; see also

What about needlessly prescriptive regulation and obstructive due process? America, in my experience, does have too much. The solution, however, is not to throw regulation and due process indiscriminately overboard, but rather to study rigorously *which sorts* of regulation and *which sorts* of process have worked well for the common good and which have not. So informed, we can affirm the sorts that have served us well and cut or reshape the rest. There has been remarkably little scholarly effort to study regulation and process in this fashion. It may be beginning, at least regarding regulation.⁷⁴

Some aspects of Howard's argument do make very good sense, especially his insistence that America has forgotten four basic realities, sketched above, about the common good: (1) freedom is not just an individual concept—your freedom impinges unavoidably on mine and vice versa, and if either of our individual rights enjoy untrammelled play, the other's freedom suffers; (2) institutions are not our enemies, they are us, and their success is vital to society's welfare; (3) for institutions (and people in them) to work effectively for the common good, decision-makers must have authority to get the job done; and (4) if we want authority exercised for the common

Lawrence M. Friedman, *Are We a Litigious People?*, in *LEGAL CULTURE AND THE LEGAL PROFESSION* 53, 55–58 (Lawrence M. Friedman & Harry N. Scheiber eds. 1996).

It's also the case that lawsuit alignments are beginning to blur in ways hardly imaginable a few years ago. Some physicians and plaintiffs' lawyers are getting together. "I never thought I would turn to a trial lawyer to help me save my medical practice and to preserve the sacred relationship I have with my clients," said one doctor. "And," said his lawyer, "I promise you I never thought I would be working for thousands of doctors on a contingency fee basis." Mark Curriden, *Formidable Friends*, A.B.A. J., Feb. 2002, at 41.

⁷⁴ The last generation has seen a vast proliferation of federal, state, and local regulations. Economic, behavioral, and other theories abound about how regulations have, or should, work. But systematic study of how regulations have actually worked is rare. This is especially true in the environmental sphere. See, e.g., J. CLARENCE DAVIES & JAN MAZUREK, *REGULATING POLLUTION: DOES THE U.S. SYSTEM WORK?* 7–8, 22–23, 25–26, 38–40 (1997).

Several years ago, The Andrew W. Mellon Foundation began encouraging basic research about how regulation works in practice. Mellon's focus is not debate over the policy merits or demerits of particular regulatory regimes, though this is what most regulatory scholars want to conduct (whether historians, sociologists, economists, environmental experts or legal scholars). Rather, the foundation's focus falls on the ways regulations are actually adopted and implemented, how they in fact affect the behavior of different constituencies (industry in particular), how they concretely evolve over time, and like questions. The goal is to develop a base of peer-reviewed scholarship that systematically examines regulations in practice and informs policymakers about which approaches are most likely, for instance, to be cost-effective, to spur voluntary cooperation on the part of the regulated, and to build broad political support for the regulatory regime. The research will also identify approaches to regulation that have been counterproductive in the real world.

After a few years in which it proved very difficult to prime the scholarly pump, The Mellon Foundation now supports a fellowship program at Resources for the Future, a distinguished nonprofit research organization that encourages basic regulatory research. The Mellon Foundation is optimistic that this program will stir scholarly interest and over time lead to understandings crucial to crafting better regulatory regimes in the environmental sphere, and beyond. As a lawyer who practiced regulatory law for many years and as a Mellon Foundation trustee, this initiative is especially close to my heart.

good, we have to accept the inevitable byproducts—sometimes decision-makers make mistakes, occasionally they do foul deeds, and even when they act wisely, adversely affected individuals usually see it differently, demand more process, and tug at our fairness sensitivities. We Americans do need to renew our grip on these four facts of life crucial to nurturing the common good.

III. PRACTICALLY SPEAKING, WHAT NEXT?

One last quarrel with *The Collapse of the Common Good*: When Howard's threads are woven together, his tapestry says America has taken some serious wrong turns since the 1960s. We have lost our way when it comes to fairness, rights, freedom and authority, to the great detriment of our common good. There springs to mind the obvious question: Where do we find the path home? Practically speaking, how do we get back on track? The reader rips through *Collapse*'s final pages looking for a path, becoming increasingly anxious none will appear.

None does, except very tersely and abstractly. We are told to start asserting, again, our "reasonable beliefs of what's right and good," especially about "day-to-day relations." If we do this, and keep doing it, we will "get back the authority needed for real freedom." Howard's two remedial paragraphs amount to nothing but this:

To get back the authority needed for real freedom, we have to take it back. That's how democracy works. . . . The institutions of government look powerful, but the walls are long-weakened by the absence of anyone's beliefs of right and wrong. A government used to being cowed by any individual threatening a bogus lawsuit won't long stand up to a coherent force of public opinion. . . .

. . . We have to keep asserting our beliefs. Otherwise our new system will derail as well. The beliefs needed are not mainly about liberal and conservative differences . . . but our beliefs in day-to-day relations. We need to speak up if we think the principal was unreasonable when disciplining a student, or believe another parent is being too pushy. In a free society, these responsibilities are supposed to belong to us, not to an anonymous legal proceeding. . . . Our future, and our relation to the society around us, will be limited only by our reasonable beliefs of what's right and good.⁷⁵

Howard would surely also say that the structural flaws in society, previously noted, must be eliminated, and the conditions key to nurturing the common good, also previously noted, must be remembered. He stresses as well the need for us to learn how to talk candidly with one another, especially across racial lines. He reasons that "[f]reedom requires that each of us has the authority to deal honestly with one another. Whites need to be able to be honest in their evaluation and criticism. Blacks need to know

⁷⁵ HOWARD, *supra* note 1, at 217–18.

they're being dealt with honestly, not being patronized, and to engage whites frankly on issues of race."⁷⁶

All this remains exceedingly thin gruel, practically speaking. How do we get started building Howard's "new system?" Consistent human experience says you have to start with specific steps taken in a particular place by people with names. It is not unreasonable to expect that Howard, after extensive research for two books on much the same subject,⁷⁷ would have some ideas about likely "alpha" sites for the "new system." For instance, where has he found an especially egregious sort of lawsuit being brought in a jurisdiction whose citizens seem ready "to get back the authority needed for real freedom?" Or where has he seen a particularly mindless set of prescriptive regulations vulnerable to a fed-up populace? How about a place where paralyzing due process has so obstructed the common good that people seem ready to resist? Or a specific school district where identifiable steps could be taken to spur parents to begin asserting "reasonable beliefs of what's right and good?" Or a particular corporation willing and able to spur meaningful communication among its employees across racial lines? And if the common good were to be vindicated at any such "alpha" sites, what has Howard learned about practical ways to carry the flame to "beta" sites and thence from sea to sea?

If he has learned anything practical, it's not revealed. Perhaps this awaits a third sibling for *The Death of Common Sense* and *The Collapse of the Common Good*. For now, Howard remains far more into diagnosis than cure, ironically, since he wrote *Collapse* to provide "a solution" for the ills *Death* described.⁷⁸

IV. THE REGRET OF THE CHIPS

This leaves the reader disappointed. A bag of potato chips comes to mind—fresh, salty, enticing. Once the bag is open, one chip leads irresistibly to another. So with *The Collapse of the Common Good*—once open, one page leads irresistibly to the next. Too soon the bag is empty; the pages read. Then comes regret. The chips were short on nutrition, heavy on fat. The pages were light on practical wisdom, heavy on drum beating. Such is the nature of chips. *Collapse* could and should have done better.

⁷⁶ *Id.* at 198.

⁷⁷ *See id.* at 251–53 (listing acknowledgements and research done in preparation for the books).

⁷⁸ *Id.* at 1.