

## THE DYNAMICS OF LEGAL RISK<sup>†</sup>

*Philip K. Howard\**

Thank you, President Maxwell, Dean Walker, and particularly Governor Vilsack. This is a topic that people do not normally talk about during the political season. It is complex, muddy, and not necessarily what people like to hear about, yet I do not think we can make sensible policy judgments without taking it on. I am hoping this forum is the first step in expanding the debates of the current season to approach a more realistic framework for solving some of the problems facing our society.

I, too, am a member of the Psycho-symbiotic Symbolic Society of Seating, and I noticed that, until the last two speakers arrived, no one was sitting in the center of this room. There was a giant hole in this auditorium, as if Iowa were right there, and all of you were in New York and California and Texas and places like that. There has been an absence of the center in talking about risk and also an absence of leadership, as I will discuss in a minute.

Risk and responsibility are areas that cry out for leadership. They cannot be handled sensibly without leadership and authority. The role of leadership and authority in a free society is one that is long overdue for debate. Everybody likes the idea of responsibility; it can be treated either as accountability or as the idea of taking responsibility, but, however you interpret it, people like the idea of talking about responsibility. It is almost like talking about good manners. You work hard. You take responsibility if something goes wrong. You do not make too many demands on the public system, and parents do not demand too much from the schools.

There was something called the communitarian movement that picked up steam in the late 1980s and 1990s.<sup>1</sup> It was all about trying to promote the idea that we are all in a civil society, and we should adopt a different attitude toward the common good.<sup>2</sup> It did not get too far. In fact,

---

<sup>†</sup> Adapted from a speech given at the Risk & Responsibility Symposium, Drake University Law School, Sept. 7, 2007.

<sup>\*</sup> Partner, Covington & Burling LLP; Founder & Chair, Common Good; B.A., Yale University, 1970; J.D., University of Virginia Law School, 1974.

1. See Michael D'Antonio, *I or We?* MOTHER JONES, May/June 1994, <http://www.motherjones.com/news/feature/1994/05/dantonio.html>.

2. *Id.*; see also The Communitarian Network, <http://www.gwu.edu/~cpps/> (last visited Mar. 3, 2008).

all this talk about responsibility has not gotten too far either. I think some people think we have one of the most selfish societies, or perhaps the most selfish phase of our society, in history, and I think there is a reason for that: nobody wants to talk about risk.

Risk is one of those prickly things in society. People in modern society have gotten in the habit of thinking that, with enough caution and intelligence, and the application of modern technology, and making sure the law is available to everyone, we can reduce risk to the point that we do not really have to deal with it much in our lives. People believe that we will have, if not a risk-free society, then at least a “happy” society in which no doctors make mistakes, children never have accidents, teachers do not say the wrong thing, and all managers are fair. It is kind of a brave new world vision of our life in which people happily shuffle through life and then finally die.

I think this is reflected in many aspects of our public dialogue. Risk has become one of those politically incorrect concepts. “You took a risk” is reason enough to get sued in our society. But risk, of course, if you think about it for a nanosecond, is not evil. Risk is the flip side of opportunity; it is exactly the same coin. You cannot be responsible without taking a risk—doing nothing involves risk. Pioneers who rolled out here in their Conestoga wagons took enormous risk. People who try to stay in shape and live long take the risk of an accident or a heart attack. People who do not exercise take the risk of obesity or other bad things. The healthcare system is nothing but risk. It is enormously complex. If you go to five different experts with exactly the same set of ailments, you are apt to get five different, or somewhat different, diagnoses. It is hard; it is complex; there is a risk involved in making judgments in healthcare. It is not a question of right or wrong.

As Governor Vilsack has suggested, risk is in every part of our lives. If you let teachers, camp counselors, or Sunday school teachers hug a child, there is a risk that somebody will do it in an inappropriate way. But if you do not let them hug a child, there is a risk that children will think they are not loved. So again, every single aspect of our lives involves a risk. Treating risk as an evil is an act of self-delusion, and, from the public standpoint, an act of self-destruction.

There are many reasons why we have arrived at this point. I do not have time to talk about all of them, but one of the reasons is human nature. We are wired to see things in black and white; we want things to be clear, either good or bad, risky or not. You can never come to the right solution

when it comes to risk; it is an impossibility. In 1991, the Peruvian government decided to stop chlorinating public water because of studies showing that chlorination could contribute to cancer.<sup>3</sup> As a result, there was a terrible outbreak of cholera that killed thousands of people and injured hundreds of thousands more.<sup>4</sup> People were looking at one risk, while they failed to look at the other.

One of the great privileges I have in life is to occasionally debate Ralph Nader, who is a really cheery guy. Ralph Nader once told me that he would never rent a car that was not really big, because the bigger and heavier cars were safer. Well, that is a fair point, but big cars also use a lot of gas. If you are concerned about the risk to the environment, then you want the lighter, smaller cars. You do not want to have 4,000 or 5,000 pounds hauling around Ralph's 170 pounds. You want, maybe, only a couple of thousand pounds in a Prius. We are faced with a question in which there is no right answer. Both of these examples illustrate something, which is that ultimately you cannot run a society with some degree of risk without government's intervention. In the place of chlorination and cholera, we have agencies—environmental agencies and others—that look into the probabilities and determine which is the bigger risk, and then try to make judgments based on that. They do not necessarily do a great job, but thankfully we have agencies like the Environmental Protection Agency and the Securities and Exchange Commission.

The Nader story illustrates the fact that risk is not just about probabilities, it is also about values—uniquely about values. What do we value? Do we place more value on environmental protection or on safety on the roads? Society cannot decide, which adds to the complexity of the problem. Economists have this problem because they try to see everything as probabilistic. Let us do more and more cost-benefit analyses. It does not answer the question. It is good to do, but it is only part of the exercise.

Thus, it is important to have government, and yet I have been a big critic of how it works. I worked closely with Al Gore, when he was Vice President, on his "Reinventing Government" initiative. Some of the resulting reforms were very important, and I think there is a lot more to do in government. But, we should be grateful that we have an Environmental Protection Agency, and we have building departments that enforce

---

3. Joel Tickner & Tami Gouveia-Vigeant, *The 1991 Cholera Epidemic in Peru: Not a Case of Precaution Gone Awry*, 25 RISK ANALYSIS 495, 496 (2005).

4. *Id.*

building codes. These are good things, because they set boundaries of risk for society. Life, however, is too complex to have a rule for everything. We already have too many rules in those agencies, and we cannot have a central planning agency that tells us how to live our lives in detail.

How do we make sure that doctors, teachers, managers, and others will take reasonable risks and act responsibly? How do we manage ourselves in our daily lives? How do we hold people accountable when they do the wrong thing? People should be responsible so what is the mechanism for doing that? Who decides what risks are involved?

Here is where the train has really fallen off the tracks. Because of a mutant version of what civil justice has become, people in this country do not feel free to act responsibly. It is not that they have the wrong idea of what is responsible; it is that they do not feel free to act responsibly. This fear of litigation has literally changed our culture, and it has happened in the last thirty years.

Let us first look at healthcare. The healthcare system is melting down for a variety of reasons—not just legal fear, though that is one of the main reasons. For example, virtually all of the patient safety experts in this country have joined a coalition that I chair called Common Good to create a new system of justice for healthcare, because their studies show that doctors and nurses will no longer be candid with each other. Doctors will not say, for example, “Are you sure that is the right prescription?,” because they are afraid that they will be taking legal responsibility if they do that. Instead, they stand by silently, even when they think a mistake is being made. The result is thousands of unnecessary errors because of the chilling of professional interaction in healthcare.

Defensive medicine—the ordering of tests that are not needed—is an epidemic that is very hard to measure. Some people say it costs as much as \$20 billion a year; while others say it is more than \$100 billion a year.<sup>5</sup> I recently had minor knee surgery and before I went in, they said I had to have a pre-operative examination. I said, “What is that?” It turns out that it is a very inclusive exam, with blood tests and x-rays. It cost over a thousand dollars, but fortunately my insurance paid for it. I said, “Well, I just had all of those tests during my annual checkup last month.” They responded, “That does not matter. You have to have it, or we are not going to do this minor surgery.” I said, “I will sign a legal document

---

5. See OFFICE OF TECH. ASSESSMENT, U.S. CONG., DEFENSIVE MEDICINE AND MEDICAL MALPRACTICE 47–48, 95 (1994) (citing various studies).

waiving any rights I have for not having the tests.” They said, “No, we are not going to give you the surgery unless you go through this.” Now, by the way, it is bad for you to have too many x-rays when you do not need them, like taking too many pills. That thousand dollars could have been spent on somebody who needed healthcare.

Incidents like this happen thousands of times a day in this country. Virtually every intervention in healthcare probably has some version of that. Hospitals have become slow-motion zones. It now takes three times as long to do an appendectomy in this country as it does in England, which drives up the cost. Because of this, as well as other factors, healthcare is increasingly unaffordable. It is almost twice as expensive as it is in other countries.

The problem is not limited to healthcare, by any means. According to a national survey conducted for Common Good, seventy-seven percent of high school teachers in this country believe their teaching would be more effective if they did not have to spend so much time dealing with disruptive students and maintaining order in the classroom.<sup>6</sup> A book by New York University Professor Richard Arum says that disorder in the classroom is a function of culture.<sup>7</sup> But it is also, in a great sense, a function of the change in legal rules.

We now have lengthy legal processes governing school discipline. You have to go through a hearing if a parent wants to challenge the fact that you sent a student out of the classroom and suspended him for two days. The national survey also showed that seventy-eight percent of middle and high school teachers say that students are quick to threaten them with lawsuits for violating their rights.<sup>8</sup> Think about that; that was unthinkable forty years ago. It is not that the student would ever win, because nobody ever wins these cases. It is just that you drag the teacher through a hearing, and the result is a chilling or diminishing of the authority of the teacher.

We cannot blame the breakdown of school culture just on broader social trends. Parochial schools, in exactly the same neighborhoods, do not have this problem. Charter schools, or at least the good ones, do not have

---

6. PUBLIC AGENDA, *TEACHING INTERRUPTED: DO DISCIPLINE POLICIES IN TODAY'S PUBLIC SCHOOLS FOSTER THE COMMON GOOD?* 2 (2004), <http://commongood.org/assets/attachments/22.pdf>.

7. RICHARD ARUM, *JUDGING SCHOOL DISCIPLINE: THE CRISIS OF MORAL AUTHORITY* (2003).

8. PUBLIC AGENDA, *supra* note 6, at 1.

this problem. You cannot learn if one child in the classroom is acting up; all the attention goes there. This is a serious problem. Why is it happening? Because the polls show, over and over again, that teachers do not feel they have legal authority to run the classroom.<sup>9</sup>

As another example, businesses no longer give job references. My own firm will not give a job reference. Office workshops—those mind-numbing workshops—train us to never be candid. But how is somebody supposed to learn if you do not tell them in frank terms why it is that they are failing? We have all failed at things in life, and we all know talented people who have lost jobs before. It is very important to be accountable and to be judged by other people. That is a characteristic of living in a free society.

Distrust of justice has also transformed our relationship with children. Teachers will not hug a child in America today—that is the rule. My wife's family is in the ski resort business, and so I was in the children's ski school last year, and there was a big sign that said, "We will not put sunscreen lotion on the children." That is dangerous; it gets really sunny at 8,000 feet, and some little child can get baked, but there is no touching the children because everyone is scared of a claim of inappropriate touching.

I challenge you to find a see-saw in Des Moines—a see-saw, a merry-go-round, or anything in a playground for any child over the age of four that might be interesting or exciting. They are not available because anything like that involves a risk. When I was growing up, my brothers would get me on the see-saw, and then they would get off, causing me to come crashing down. Through this I learned an important life lesson—not to trust people, especially my older brothers. However, see-saws can be really fun when you trust the person.

Broward County, Florida, banned running at recess in 2005.<sup>10</sup> Since then, towns in Colorado, Wisconsin, Massachusetts, and elsewhere have banned "tag."<sup>11</sup> It is this drive to avoid any accident or risk that has made it so that children have become sort of "hot house" children. We also have a crisis with childhood obesity. I was on a panel that former Health and Human Services Secretary Tommy Thompson organized a few years ago.

---

9. Jim Bencivenga, *Teachers Tied Down by Legal Worries*, CHRISTIAN SCI. MONITOR, June 14, 2004, at 9.

10. Philip K. Howard, *A Tree Falls in Connecticut*, N.Y. TIMES (WESTCHESTER ED.), July 30, 2006, § 14, at 13.

11. Emily Bazar, "Not It!" *More Schools Ban Games at Recess*, USA TODAY, June 27, 2006, at 1A.

The experts on the panel said, “We have to change our culture back to one of physical fitness.” The last time we tried to do that was with JFK and the President’s Council for Youth Fitness in 1961. But what did they do? Among other things, they encouraged putting see-saws, ropes, and all that kind of stuff in playgrounds—all of which has been ripped out.

Warning labels are the most ridiculous effect of legal fear. There is now a warning label on almost every product. I am surprised there is not a warning label on this podium—it is dangerous somehow, I am sure. “Caution: contents are hot” is on every disposable coffee cup in America. The archeologists that dig them up will think that coffee was some sort of aphrodisiac—with the “extremely hot” label—and try to get the formula for it. My law firm put a “hot” warning on coffee cups, until I told them they had to take it off. One of the other idiocies was that the warning is written vertically, so in order to read it you would have to tip it over.

The Michigan Lawsuit Abuse Watch holds a contest every year, called the Wacky Warning Label Contest in which they cite the most ridiculous warning labels, like “remove baby before folding stroller.”<sup>12</sup> My favorite, because I grew up in eastern Kentucky where there is nothing to do but go fishing, is a five-inch fishing lure with a three-prong hook in the back that said on the side “harmful if swallowed.”<sup>13</sup> Too bad the fish cannot read.

Nobody we have been talking about—not the doctors ordering unnecessary tests, not the teachers tolerating disorder, not the manufacturer putting stupid warning labels on products—thinks they are acting responsibly. What is going on there is a different kind of risk aversion. They are all scared, not of real risk, but legal risk, and what has happened in our society as a result is that legal risk has become disconnected from reasonable social norms of sensible risk. Choices are no longer a matter of probabilities or values, but have become a matter of the lowest common denominator.

A teacher may be acting completely reasonably by removing a disruptive student from a classroom, and helping the other twenty-nine kids learn, but if that one child’s parents get angry, they can drag the teacher through hearings. You can imagine the hearings now, “well so-

---

12. Michigan Lawsuit Abuse Watch, Wacky Warning Labels, <http://www.mlaw.org/wwl/index.html> (last visited Feb. 18, 2008).

13. Michigan Lawsuit Abuse Watch, Past Winners of M-Law’s Wacky Warning Label Contests, <http://www.mlaw.org/wwl/pastwinners.html> (last visited Feb. 18, 2008).

and-so acted up a week before, and you did not kick him out.” The question is not whether the teacher is going to win or lose, rather the concern is the huge amount of emotional energy and time, and teachers and principals are simply unwilling to go through it. They do not have the time to go through it.

The same thing is true in healthcare. The doctor can know that an MRI would only be useful in one of 5,000 cases, and that we should not waste scarce healthcare dollars on unnecessary MRIs because it will make healthcare unaffordable. However, if that one person sues for ten million dollars, it could ruin that doctor. So what do we get? We get an extra 5,000 MRIs. We get a healthcare system that, in part because of lawsuits, is increasingly unaffordable.

Why do Americans not trust justice? There are many reasons. One is media sensationalism, which generally over-hypes the chances of getting sued. People are not good at evaluating risk; they tend to only look at what is in front of them. Like shark attacks, people tend to think of the worst possible risks—lawsuits being one of those—and try to do anything to avoid them. Thus, there is an aspect of media and human nature that plays into this, but there is also something wrong with the legal system.

Oliver Wendell Holmes, Jr. famously defined law as “the prophecies of what courts will do.”<sup>14</sup> Today in America, nobody has any idea what a court will do because cases like these are decided jury by jury, without legal precedent or consistency. Overall, juries are generally sensible. There was a recent study by the Harvard School of Public Health, which found that in medical malpractice cases the error rate was about twenty-five percent in both directions—doctors who did something wrong were not held accountable about twenty-five percent of the time, and doctors who did not do anything wrong were held accountable about twenty-five percent of the time.<sup>15</sup> A seventy-five percent success rate is not all that bad. On the other hand, if you are a doctor playing Russian Roulette, one bullet in four chambers is not so great either.

Is the see-saw a reasonable risk or not? Is it okay to sue for several million dollars for a common accident or not? Where are those boundaries? The truth is that there are no boundaries. It is an ad-hoc

---

14. OLIVER WENDELL HOLMES, *The Path of the Law*, in COLLECTED LEGAL PAPERS 167, 173 (1920).

15. Michelle Mello, et al., *Claims, Errors, and Compensation Payments in Medical Malpractice Litigation*, 354 NEW ENG. J. MED. 19 (2006).

process. Juries do not write opinions. Nine out of ten juries can do the right thing, and then the one out of ten can do exactly the opposite, and that is the way the system works—it is ad hoc. It is a little bit as if we built this giant monument to the unknown plaintiff, and it is sitting right here in Des Moines. It is a thousand feet high and is casting shadows across all the choices of America. That is how Americans feel. It has been polled and polled again. It has been polled by the left, it has been polled by the right. They do not trust the system of justice because they think they might get ruined, even when they act reasonably and in a way other people would think is reasonable.

As I said, people are notoriously bad at weighing risk. They overstate the risk of being sued. It is part of evolution. I think we are somewhat wired to look out for the saber-toothed tiger. Whatever could be in front of us we are scared of, and we often ignore much bigger risks.

Because people are so bad at weighing risk, we need to have leadership in society in order for us to feel free. It takes leadership in government that is reasonable and that people can trust. It takes leadership in law, so we can begin to draw the boundaries of who can sue for what, and so people can begin to trust it again. Probably more than anything else, it takes leadership in politics.

We have a political system that is polarized and basically involves scare mongering, where one side talks about how every person is going to be gay and get married and ruin our fabric of society, and the other side talks about how every corporation is evil and is out to kill you. Obviously, neither of these things is true, but we have a political system designed to scare people, and it is contributing to the problem. As a solution or a partial solution, our system of justice has to take it upon itself to draw lines of what are reasonable social norms. Yes, it is okay to invite the neighbor's kids over to play in the backyard, and, if somebody falls and breaks a leg, absent other circumstances, we are not going to allow that claim. This is a big shift from where we are today because judges do not see that as their job.

There is a role for legislatures in helping to do this, too. Healthcare is so out of control that we need to create a new system of medical justice, as proposed by the coalition that Common Good has developed in connection with the Harvard School of Public Health. The idea is not simply to make justice fairer—it could hardly be more unfair. According to a recent study by researchers at the Harvard School of Public Health, on average it takes

five years to get a medical malpractice case to settlement.<sup>16</sup> Fifty-four cents out of every dollar goes to lawyers' fees and administrative costs.<sup>17</sup>

The idea is to create a judicial proceeding similar to bankruptcy courts or workers' compensation proceedings. It would be a judicial proceeding with neutral experts. Hospitals and providers would have to "open their kimonos." In other words they have to pay up when there is any indication of error without having to go through the five-year process.

We actually do not think this system would cost less. It might cost less overall as a malpractice system. But the point of it is not to save the \$29 billion, which is what the medical malpractice system costs.<sup>18</sup> The point of it is to begin to be able to manage healthcare. You cannot do cost containment until you have a system of justice that is reliable to defend the cost contained. If somebody can sue you for \$10 million, because you did not order the test, you are going to order the test.

We need a system of justice that is trusted to align with citizens. That is why the American Association of Retired Persons (AARP), the largest consumer group in the country, and patient safety experts from the left and right have come together behind this reform—because it is aimed at fixing healthcare.

It is a radical shift—just as is getting judges to take more responsibility for drawing the boundaries of claims, but we have gotten to a point in this country where the system is literally out of control. Recently there was a crazy lawsuit where a guy in Washington, DC sued his dry cleaner for \$54 million for losing a pair of pants.<sup>19</sup> He was never going to win and did not win. But what was amazing is that the case went on for two years, and it went to trial.<sup>20</sup> Cases like these get in the national news and make everyone think that the litigation system is a lottery. But what should have happened here? As soon as the judge saw the case, the judge should have called everybody in and said, "Well, maybe you have a claim in small claims court for a few hundred dollars for a pair of pants, but I am not going to let you make a mockery of my courtroom. I am not going to

---

16. *Id.*

17. *Id.*

18. TILLINGHAST TOWERS PERRIN, 2006 UPDATE ON U.S. TORT COST TRENDS 10 (2006), [http://www.towersperrin.com/tp/getwebcachedoc?webc=TILL/USA/2006/200611/Tort\\_2006\\_FINAL.pdf](http://www.towersperrin.com/tp/getwebcachedoc?webc=TILL/USA/2006/200611/Tort_2006_FINAL.pdf).

19. Marc Fisher, *Wearing Down the Judicial System With a Pair of Pants*, WASH. POST, June 14, 2007, at B1.

20. *Id.*

2008]

*The Dynamics of Legal Risk*

515

let you use the courtroom as a tool for extortion. Case dismissed. Go to small claims court.” That is what should have happened, but that is not what happens today, and that is why people do not trust the courts.

Ultimately, I believe we have to rethink all these authority structures: government, judges, political leaders, and others. We need to understand that in running a society, people need to know whether it is okay to hug the child or have a see-saw. We have to make those choices on behalf of everyone in society, or some people begin to withdraw from a civil society, which I am afraid has happened in our culture. That is why I am so excited that we have had this conference, because we need to talk about this.