Life Without Lawyers
Liberating Americans from Too Much Law

Philip K. Howard
LIFE WITHOUT LAWYERS
ALSO BY PHILIP K. HOWARD

The Death of Common Sense: How Law Is Suffocating America

The Collapse of the Common Good: How America's Lawsuit Culture Undermines Our Freedom
LIFE WITHOUT LAWYERS

LIBERATING AMERICANS FROM TOO MUCH LAW

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W. W. NORTON & COMPANY
New York * London
For Alexandra,

and for Olivia, Charlotte, Lily, and Alexander,

who can make anyone an optimist
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LIFE WITHOUT LAWYERS
"Sometimes I wonder how it came to this," a teacher in Wyoming told me, "where teachers no longer have authority to run the classroom and parents are afraid to go on field trips for fear of being sued." Thomas Jefferson might have the same question. How did the land of freedom become a legal minefield? Americans tiptoe through law all day long, avoiding any acts that might offend someone or erupt into a legal claim. Legal fears constantly divert us from doing what we think is right. A pediatrician noted that "I don't deal with patients the same way anymore. You wouldn't want to say something off the cuff that might be used against you."

Living in a free society is something we take for granted. After all, we're free to live and work where we choose. Civil libertarians are vigilant to keep government from abusing its authority. But freedom should also include the joy of spontaneity, the power of personal conviction, and the authority to use common sense—for example, to maintain order in the classroom, and to interact honestly with a patient or a co-worker.

The idea of freedom as personal power has been pushed aside
in recent decades by a new idea of freedom—where the focus is on the rights of whoever might disagree with a decision. There were good reasons why we went in this direction, but now the momentum has carried us to a point where we no longer feel free in daily interaction. Almost any encounter carries legal risk. Lawyers are everywhere, both literally—the proportion of lawyers in the workforce almost doubled between 1970 and 2000—and in our minds, sowing doubt into ordinary choices. Americans increasingly go through the day looking over their shoulders instead of where they want to go.

What’s been lost is a coherent legal framework of right and wrong. A free society requires that people generally understand the scope of their freedoms. Without reliable legal boundaries, distrust will infect daily dealings. People start to fear each other, and they start to fear law. That’s what’s happened in America, particularly for teachers, doctors, managers, and others with responsibility.

I’ve written about how aspects of modern law undermine our freedoms, but diagnosing the flaws of the current system, I’ve learned, is not sufficient to stimulate change. In *The Death of Common Sense*, I described how detailed regulation functions like central planning—causing Mother Teresa to abandon plans to build a homeless shelter in the Bronx, for example, rather than waste money on a code-mandated elevator that no one would ever use. In my second book, *The Collapse of the Common Good*, I described how America’s lawsuit culture has injected defensiveness into daily relations. The town of Oologah, Oklahoma, dismantled the double slide in the central square, the joy of children for more than fifty years, after a minor injury prompted fears of future liability. I was gratified that leaders in the White House and state capitols endorsed the message of these books, and even undertook some important reforms. On the whole, however, the status quo has proved more powerful than the frustrations.

In 2002, with the support of leaders such as Bill Bradley and Tom Kean, a group of us formed a nonpartisan organization, Com-
mon Good (www.commongood.org), with the goal of restoring reliability to American law. Common Good has succeeded in bringing broad coalitions together behind new authority structures—for example, an expert administrative court to handle malpractice claims, developed in a joint venture with the Harvard School of Public Health. Common Good is also working to design and pilot a new system of discipline for New York City schools, jointly with the United Federation of Teachers and the city’s Department of Education. What we are learning with Common Good is the power of a new vision. Frustrated people are happy enough to complain, but to support change people need to see where they’re going.

In this book I present a vision for a new authority structure for America in which people are free to make daily choices. Judges aspire to keep lawsuits reasonable, understanding that what people can sue for ends up defining the limits of freedom. Schools are run by the instincts and values of the humans in charge, not organized like a bureaucratic assembly line. Public choices aspire to balance for the common good, not, generally, to appease someone’s demand for individual rights. Washington undergoes a hundred-year cleaning, to restore transparency and accountability. Democracy can’t function if Washington is weighed down by decades of accumulated law, beyond the influence of anyone except special interests that scurry around the baseboards making sure nothing ever changes.

The proposal here is based on one overriding principle, which is this: Nothing works—not health care, not schools, not democracy, not our relationship to children, not personal fulfillment—without the freedom to exercise judgment on the spot. The power of humans must be released. Individual attributes like willpower and character must be allowed room to flourish. People need freedom to take responsibility. Accountability should be based on accomplishment, not bureaucratic conformity. We must embrace human differences, not try to stamp people out of the same legal mold. Each individual, management expert Chester Barnard observed,
is “a single, unique, independent, . . . whole thing.” I propose to pull law back from daily choices and give people the freedom to be themselves, drawing on their personal energy, instincts, and values. Many will succeed. Some will not. But the current overlegalized system, to varying degrees, drains us of the powers needed for accomplishment. The effects ripple through society, and virtually guarantee the failure of public institutions.

This book, in eight chapters, will describe how to rebuild coherent legal boundaries to protect an open field of free choice (Chapter 1); these boundaries define reasonable risk (Chapter 2), restrict the role of rights (Chapter 3), draw the limits of lawsuits (Chapter 4), liberate teachers and others from bureaucracy (Chapter 5), restore personal accountability (Chapter 6), revive public responsibility in Washington (Chapter 7), and make room for leadership at every level of society (Chapter 8).

Every thirty years or so America has had a basic shift in social structure. The last one was the rights revolution in the 1960s, when America faced up to racism and other forms of discrimination. Reaching back in history, there was the New Deal in the 1930s, creating social safety nets; then the Progressive era around 1900, ending laissez-faire and instituting regulation of industrial America; then the Civil War in the 1860s, abolishing slavery; then Jacksonian democracy in the 1830s, instituting populist rule; then the Republicans taking over from the Federalists just after 1800; then the American Revolution in 1776. We're overdue for a shift. The new structure will fix the excesses of the rights revolution and its false idea that law and rights can substitute for human judgment in daily dealings. Pulling law back into coherent boundaries will liberate each of us to make a difference, and allow Americans to come together to meet the challenges of our time.
On a hot day in the Cheshire region of England in 1995, an eighteen-year-old named John Tomlinson went for a swim in the lake of a local park. Racing into the water from the beach, he dived too sharply and broke his neck on the sandy bottom. He was paralyzed for life.

The accident could have happened anywhere in America. The lawsuit could have as well. Mr. Tomlinson sued the Cheshire County Council for not doing more to protect against the accident. The council certainly knew about the risks of swimming in lakes. There were three or four near drownings every year. No Swimming signs had been posted and widely ignored for more than a decade. The popularity of the park—more than 160,000 visitors every year—made effective policing almost impossible. Fearful of liability, the Cheshire council had decided to close off the lake by dumping mud on the beaches and planting reeds. But before the reeds could be planted, Mr. Tomlinson had his accident.

As in America, the lawyer’s arguments were passionate. The Cheshire council should have acted sooner, Tomlinson's lawyer argued, to prevent “luring people into a deathtrap” and to protect
against a “siren call strong enough to turn stout men’s hearts.” The lower court accepted this argument and awarded damages because the county obviously knew the danger.

The case eventually made its way up to the highest court in Britain, the Appellate Committee of the House of Lords. Although applying the same common law principles that would apply in an American court, the British court in 2003 rendered a decision almost unheard of in America. It ordered the case to be dismissed. The lead opinion by Lord Hoffmann declared that whether a claim should be allowed hinged on not just whether an accident was foreseeable but “also the social value of the activity which gives rise to the risk.” Permitting Mr. Tomlinson’s claim, the law lords held, would encourage this and other parks to restrict access to normal and healthy activities, affecting the enjoyment of countless people. “[T]here is an important question of freedom at stake. It is unjust that the harmless recreation of responsible parents and children with buckets and spades on the beaches should be prohibited in order to comply with what is thought to be a legal duty.”

The county’s ineffective effort to prevent swimming, instead of establishing negligence, the law lords held, demonstrated how a misguided conception of justice hurts the public. “Does the law require that all trees be cut down,” Lord Hobhouse asked, “because some youths may climb them and fall?” Lord Scott added, “Of course there is some risk of accidents. . . . But that is no reason for imposing a grey and dull safety regime on everyone.”

The Tomlinson decision exposes a forgotten goal in American law—to protect our daily freedoms. What people can sue for is a key marker defining the scope of free activity. Lawsuits “often have their greatest effect,” former Harvard president and law school dean Derek Bok observed, “on people who are neither parties to the litigation nor even aware that it is going on.” The news in 2005 that a jury awarded $6 million to someone who had broken his leg on the sledding hill in Greenwich, Connecticut, was dismaying to town taxpayers. But it had another, broader effect—other towns
soon announced that they would no longer permit winter sports on town property.

Law is vital to freedom. By enforcing norms of honesty, for example, law provides the foundation of free interaction. But law can destroy freedom as well as support it. Our founders were concerned about oppressive laws—they added the Bill of Rights precisely to prevent abuses of state power, even through duly enacted laws. Freedom—by definition, the absence of restraint—can be encroached upon from many sides. Freedom can be destroyed by tyrants, by lawlessness—and by too much law.

"The only freedom that deserves the name," John Stuart Mill famously wrote, "is that of pursuing our own good in our own way, so long as we do not attempt to deprive others of theirs. . . ." The problem with modern law is not freedom to pursue "our own good"—we can choose where we live and work—but with Mill's second feature of freedom: doing things "in our own way." In work, in play, in human relations generally, Americans increasingly do not feel free to do what they think is right, especially where there's even the slightest possibility someone might have a different view. Law has infected the spontaneity and instinct needed for both accomplishment and personal fulfillment.

We have forgotten life truths that our founders took for granted. Real people, not legal rules, make things happen. Freedom is supposed to afford a near infinity of possible choices. It is this wide range of possibility that gives freedom its power. It is the individuality of choice that gives full scope to the inner resources of each person, and gives each of us the satisfaction of knowing that we made a difference. The high priest of American culture, Ralph Waldo Emerson, saw self-reliance as the ultimate virtue of the free person. "Insist on yourself; never imitate," Emerson advised. "Trust thyself: every heart vibrates to that iron string."

Better not pluck that iron string today. Did you check the rules? Will anyone disagree? We have come to believe that law can be a kind of software program for life choices that, with enough plan-
ning, can spew out the correct or fair answer to any situation. Free choice has become freedom to do things properly, as if freedom were like checking the right box on an exam. Today Emerson’s trumpet call for self-reliance is as outmoded as his nineteenth-century flourish. The person of conviction is replaced by the person of caution. When in doubt, don’t.

What is needed is not a reform but a quiet revolution. This shift in approach is not about changing our goals—almost everyone I know wants a clean environment, safe workplaces, good schools, competent doctors, and laws against discrimination. The challenge is to liberate humans to accomplish these goals. This requires a sharp turn away from current legal conventions—nearly endless rules and rights designed to avoid decisions by people with responsibility—toward law that restores free exercise of judgment at every level of responsibility. We must remake our legal structures so that Americans are free again to make sense of everyday choices.

LAW EVERYWHERE

Something’s amiss when a girl in kindergarten, all of forty pounds, is led away in handcuffs by police. That’s what happened in the spring of 2005 in St. Petersburg, Florida. Equally strange, the whole episode was taped and shown on national television. There’s the little girl, hair neatly braided, going from desk to desk, throwing books and pencils on the floor, tearing papers off the bulletin board, and methodically destroying her classroom. The assistant principal circles her, arms outstretched as if in a linebacker drill, but assiduously avoiding contact. (Why not just hold on to her? You wonder, watching . . . Is the child a hemophiliac?) The little girl is eventually steered into the principal’s office, where she continues to wreak havoc on the orderly piles of paper and announcements tacked to the wall. Eventually the police arrive and handcuff the five-year-old. She screams. The tape ends.
For as long as there have been schools, teachers have had to deal with unreasonable five-year-olds. Calling the cops isn’t the time-tested solution. Let’s rewind the tape and handle this sensibly. Problem: temper tantrum in kindergarten classroom. Solution: Ask the girl to stop. When she refuses, hold her by the arm, preventing more destruction. If necessary, take her to another room until she calms down. Doing what’s right here isn’t rocket science.

But teachers in America can’t do this. Taking hold of a child’s arm is verboten—touching is taboo, except to prevent harm to others. So a five-year-old ends up in handcuffs.

The rule against touching a student is now pretty much universal in America. One of my daughter’s college roommates, teaching beginning swimmers in East Harlem, was strictly forbidden to hold her students up in the water (to prevent drowning) until she had asked and received explicit permission from each child. She had to ask not once, but each and every time she did it. “May I put my hand on your stomach?” over and over again. The youngsters realized this made no sense. “Why do you keep asking me if you can put your hand on my stomach?” But she had been instructed never to make contact without asking the question.

Physical contact is one of those subjects that’s a little touchy. We can all agree that anyone who has a tendency to act inappropriately around children should be shown the door, or put in the slammer. There are some people, as we learned with the Catholic priest scandal, who have this problem. But a blanket rule against physical contact is itself weird, almost as disturbing as contact that’s a little too friendly. Young children need physical reassurance. Sometimes older children need physical restraint, or least the fear of physical restraint. Otherwise some students will flout the teacher’s powerlessness.

OK, let’s change the rule about physical contact. That’s our instinct whenever we hear stories like this. But what would the rule say? “Appropriate conduct is acceptable”? That should be implicit in a free society. Nor do we need a rule to say that physical abuse of
students is forbidden. We know that already as well. The problem is in implementation: How does law sort out what’s appropriate in this or that situation?

The rule against physical contact isn’t really there to protect children. The ban on touching is meant to protect teachers and schools. You bet there’s a rule against any touching—doing that could get you sued. Teachers have had their lives ruined by grabbing hold of a misbehaving child. Josh Kaplowitz, a young college grad in the Teach for America corps, put his hand on the back of a misbehaving seventh grader to make him leave the classroom and was sued for $20 million. The parents even got him criminally indicted. After two years of hell, the criminal case was finally dropped. The lawsuit was settled with the school paying $90,000. Other teachers have had their careers ruined by an accusation not of any sexual misconduct but just of holding on to the child, or, in one case of a music teacher, of positioning a child’s fingers on a flute.

No organization can function effectively unless people can make choices and someone else has responsibility to hold those people accountable. The teacher must be free to do what makes sense, including restraining disruptive students and putting an arm around a crying child. And the principal must be free to make judgments—for example, about the credibility of the student, or about whether he has a queasy feeling about the teacher. Today the principal lacks that authority, and looks to grab hold of a legal lifeline. But how can he prove that the conduct was appropriate, or that the teacher is creepy? So the rule, by default, is zero contact.

This dilemma can’t be fixed with better rules on appropriate behavior. Nor can the problem be solved with years-long legal proceedings, complete with child witnesses and heated emotions. The problem here is with the scope of law. We ask law to do too much. It’s very hard to prove or disprove whether incidental physical contact—a hug, grabbing an arm—is appropriate. Overt sexual misconduct can be proved, but law isn’t good at dealing
with the nuances of human behavior. Rules can’t distinguish right from wrong in this context—precisely because rules lack context. Nor can lawsuits—a lawsuit accusing a teacher of inappropriate touching is itself abusive, ruining a teacher’s life just by the accusation. Normal relations between adults and children are impossible under these conditions; the possibility of an accusation has put normal adult-child relations in a kind of deep freeze. The effects ripple into the school culture. Students past a certain age sense the legal fear and start challenging teacher authority. Like poisoned air, law becomes an ever-present factor in school relationships.

We must draw legal boundaries here. The only way to normalize adult-child relations is to remove law from incidental relations: No claim should be allowed without credible allegations of overt sexual misconduct. For conduct short of that, people must have the freedom deal with people as they think best—for example, by the principal’s reassigning or firing the teacher about whom he has qualms.

Straining daily choices through a legal sieve basically kills the human instinct needed to get things done. Law applied to ordinary decisions leads to bad choices, which leads to more law, which leads to worse choices. Pretty soon law is everywhere, separating people from their instincts of right and wrong.

In 2007, fourteen-year-old Mariya Fatima suffered a stroke in class at Jamaica High School in Queens, New York. But no one called an ambulance for ninety minutes because a rule prohibited teachers or nurses from calling 911 without the principal’s permission. (First observation: People take law seriously, even when its application is idiotic and leads to tragedy.) The rule at Jamaica High School had been instituted because of overuse of emergency calls in run-of-the-mill disciplinary situations, such as fights between students. (Second observation: Law is the culprit here as well. School officials had lost the ability to deal with disorder because law has undermined their authority by, for example, taking away their ability physically to restrain the students.) The
principal instituted the rule against calling 911 because, under the objective metrics under which schools are evaluated, these emergencies were considered an indicator of bad management. (Third observation: Law readily takes a life of its own, even if inconsistent with the ultimate goals.)

After the shocking delay in calling the ambulance for Mariya Fatima, Jamaica High School changed its rule. This time it put in a four-step process specifying exactly when 911 could be called: First, the teacher must inform the nurse; second, the child's parents must be notified, and, if a parent approves, an ambulance can be summoned; third, if the nurse is unavailable, the teacher must inform an assistant principal and principal; and fourth, if the principals aren't available, the dean's office is charged with securing proper medical care. (Fourth observation: The legalistic mind-set is deeply entrenched. People trained to look to rules lack even the idea that they can just do what seems right. "By step four," one teacher observed, "the kid's already dead.") When the idiocy of the new rule was exposed by the New York Daily News, Chancellor Joel Klein stepped in and ordered the solution that was obvious from the start: There would be no rule limiting the use of 911.

Rules can't make decisions, to paraphrase the philosopher Joseph Raz, any more than a book on chess can tell you how to win. But that's the core assumption of modern law. In an effort to avoid human error, we have created legal structures based on an unspoken premise that correctness can be proved or programmed in advance.

Two great intellectual currents came together over the past century to bring America to this state of hyper-legalism. The first, which grew naturally out of the Industrial Revolution, is the idea of organizing how to do things. Frederick Winslow Taylor, the father of scientific management, preached the idea of creating systems in order to increase productivity. Organization is undeniably essential for complex products; Henry Ford's assembly lines proved that. Regulatory organization is also necessary to rein in the abuses of
big business. Today we assume unquestioningly that any activity will be more effective if we detail in advance how to get the job done. That’s how we’ve organized schools. Instead of an assembly line of machines, schools are organized by a kind of assembly line of rules. Do this and then do that, and then fill out forms that say you did what the rules required.

The second social current, which burst out of the 1960s in an explosion that still reverberates forty years later, is based on a new idea of individual rights: Let any individual who feels aggrieved bring a legal claim for almost anything. Fairness, the thinking went, would be guaranteed by letting people assert their own rights. The abuses of discrimination were long overdue for a remedy and required a dramatic shift in law. But looking at disputes as a matter of individual rights had implications far beyond patterns of discrimination. These modern rights gave undefined powers to individuals to assert claims over other free individuals. Unlike constitutional rights, which shield citizens from state power, these new rights gave citizens a sword against other free citizens. To legal thinkers in the 1960s, however, legal self-help seemed like the perfect solution to the conflicts of a diverse society. Let each defendant demonstrate why his actions were appropriate. Why didn’t we think of this before?

These two great currents of social organization—prescribing rules to specify how to do things and affording individual rights to invoke a legal proceeding—now sweep us along through our day like a mighty river, causing us to cling to legal logic for ordinary daily choices. To stay afloat, we must constantly be prepared to answer this question: Can you show this was done properly? Where the rallying cry for our revolutionary forebears was “No Taxation Without Representation,” today’s cry is “No Decision Without Justification.”

The effort to organize human behavior into legal categories has expanded lawbooks exponentially—more than 70,000 pages of new and revised rules in the Federal Register every year. No activ-
ity is immune. Companies develop thick manuals on what not to say and do with other employees—including such helpful tips as “Do not attempt to discuss an employee’s personal problems” and, in interviews, never to ask, “Where did you grow up?” Teachers and principals basically need a law degree. A study in 2004 by Common Good of all the legal requirements imposed on public schools in New York City found more than sixty sources of law—from internal regulations by the city education department to federal laws dealing with immigration and with teacher certification. Suspending a disorderly student for a few days triggers dozens of legal steps and considerations, including, if the parents demand them, formal hearings and several levels of appeals.

All this law has provided ample fodder for late night comedians, who regale us with the latest legal idiocy. No one could make up stories like the first-grade boy in North Carolina suspended for sexual harassment when he kissed a first-grade girl. E-mails fly around the country with stories of crazy lawsuits, many of which never happened but are nonetheless believable in a legal system disconnected from accepted norms of right and wrong. People behave in genuinely bizarre ways. The warning labels that manufacturers plaster all over products are priceless. There’s a “wacky warning contest” every year that gives prizes to the stupidest labels—for a letter opener, “Caution: Safety Goggles Recommended.” My favorite is the fourth-place winner in 2003—a five-inch fishing lure, with three-pronged hook, with the following legend on its side: “Harmful if swallowed.”

The totality of stupid rules and lawsuits does not come close, however, to describing the effects of the modern legal order. It has changed our society. In this new legalistic culture, people no longer look inside themselves to do what’s right. Instead they focus on possible legal implications. What if something happens? How will you justify your decision?

Defensiveness has swept over the culture like a giant wave, drenching daily choices in cold water. Doctors routinely order tests
and procedures that they don't believe are needed—squandering so many billions, according to some estimates, that the waste could provide health insurance to the forty-seven million Americans who are uninsured. Hardly any disagreement in the workplace is far from the threat of a possible discrimination claim. Teachers and principals spend their days filling out forms and "making the record clear," just to show they've been attentive to legal concerns. Authority has been turned upside down. A 2004 survey by Public Agenda found that 78 percent of middle and high school teachers in America have been threatened with lawsuits or accused of violations of rights by their students. Legal fear ripples through society—instead of acting sensibly, Americans do what seems safest legally. Simple pleasures become suspect. In 2006 the school system in Broward County, Florida, banned students from running at recess. Other schools have banned the game of tag.

From time to time reformers try to simplify all this law. But most rules by themselves seem reasonable, and have their own logic. The effort to rationalize them is a little like pruning the jungle. You can cut some back, but then they tend to grow back elsewhere. Once you accept the idea that choices need to be justified through a structure of rules and processes to govern how to do something, the game is lost. Law engulfs our daily lives.

All these rules and rights, we're told, are just the price of living in a crowded society, necessary to ensure fairness and to make the institutions of society work properly. Maybe things were simpler for our pioneer forefathers, but modern society is diverse, with many different values. Detailed legal codes and processes are needed to keep society in working order.

But the institutions of modern society are not in working order. Schools have been in a steady decline for decades. Reforms are passed almost every year, with little or no effect. Health care is like a nervous breakdown in slow motion. Costs are out of control, leaving millions without insurance and driving companies with obligations to care for retirees to the brink of bankruptcy.
Humans tend to accept legal structures, just as we accept the location of roads and other infrastructure and make our way through the day using whatever paths are available. We still have choices enough in our jobs and in our pleasures to support ourselves and to keep our sanity. But if you zoom away from the earth and look at the patterns of modern life from above, you'll see a culture in which countless important goals, both private and public, are not accomplished because modern law has diverted sensible choices into self-protection. As our individual freedom wanes, so does our sense of purpose—people increasingly feel they can't make a difference.

We have it backwards. The legal shackles that frustrate teachers, doctors, and managers in daily dealings are not the inevitable price of a working social order. Modern law is a main cause of the decline of our social order. Schools and hospitals are failing in part because the people within them no longer feel free to make decisions to make them work.

America indeed is in a crisis—a crisis of individual freedom. We have lost the idea, at every level of public life, that people can grab hold of a problem and fix it. We have become a culture of rule followers, driven to frame every solution in terms of existing law or possible legal risk. Gradually, without noticing when it happened, we've lost our ability to make the choices needed to run a society.

REBUILDING THE BOUNDARIES OF FREEDOM

The story of America, retold many times, is that it unlocked human potential. You can try anything. You can do it your way. You can . . . is the theme that resonates through American history. This belief in individual power, so different from the feudal cultures of Europe, was forged in the challenges faced by pioneers. Frederick Jackson Turner, in his famous description of America's character, referred to it this way: "That practical, inventive turn of mind, quick to find expedients; . . . all that restless nervous energy; that dominant
individualism, working for good and for evil, and withal that buoyancy and exuberance which comes from freedom.”

Harry Evans’s collection of short biographies of innovators, *They Made America*, is a testament to the power of personal initiative in America. Orville and Wilbur Wright come alive in their bicycle shop, tinkering with new ideas and rebounding from failures. No longer wooden figures in history books, they compete to achieve manned flight against the world’s leading scientists, not by scientific calculation but by trial and error. They unlock the secrets of aerodynamics by rigging foils on the front of a bicycle and riding around Akron to see which has greater lift. After they succeed at Kitty Hawk, most people still don’t believe them. The scene at Le Mans racetrack in Paris in 1908, the grandstand filled with doubters waiting to see the Americans fail—dubbed by the French press as *le bluff*—is itself worth the legend. When Wilbur Wright takes off from the infield, they gasp. When he makes the machine turn—*turning in the air* around the racetrack oval—it is clear to the French, and to the world, that a couple of bicycle mechanics from Akron have forever changed human transportation.

Flipping through our national album, the impression that repeats itself is that of the remarkable power of individuals to make things happen. The force of individual willpower practically pops off the page, as if little hurricanes were bottled up inside certain humans. Thomas Edison’s technique was not analytical brilliance—he had only three years of formal schooling—but he was perhaps history’s greatest master of trial and error. “Nothing that’s any good works by itself,” Edison said. “You got to make the damn thing work.”

A few traits of the American brand of freedom stand out. One is a belief in personal resourcefulness. Hugh Aaron tells the story of his father: “At 18, he became a telegrapher when the field was at the cutting edge of communications. He thought his future was assured—until the arrival of teletype machines in the late 1920s. Then, finding he had mechanical abilities, he created a niche for himself by learning how to service the machines. Eventually, in
the depressed 1930s, as telephone and radio replaced teletype, he opened an upholstering shop. . . . Seeing the trend, he had learned the trade working days while supporting his family as night manager at the telegraph office.” “I can attribute our successes, small though they were,” Aaron concludes, “to our willingness to adapt and learn again and again.”

Another trait of what is sometimes referred to as “American exceptionalism” is the belief in social mobility rather than status. People can strive to get somewhere. Immigrants understand this better than anyone. “Here a man can go as far as his abilities will carry him,” Edward Bok wrote in The Americanization of Edward Bok. “No traditions hamper him; no limitations are set except those within himself.” Immigrants in fact constantly battled against barriers erected by the establishment, but they were free to do battle, and the marketplace generally decided who won.

Finally, a belief in the uniqueness of each individual encouraged people to find fulfillment in their own interests, skills, and values. Marilyn Whirry, who was National Teacher of the Year in 2000, did not intend to be a teacher. But she was required to teach a class at a high school as a condition of a scholarship. “At first I was grumpy about it. But once I started teaching, something magnificent happened. It was like an epiphany. I found I could relate to people, I found I could excite them and give them some joy of learning. I found they responded to me. And fortunately for me I never left the classroom again.”

Growing up in the South, I remember wondering how people found a sense of purpose in their lives. It was hard to see much originality underneath all those southern manners. It was as if everyone were stamped out of a politeness mold. Then, at eighteen, I was picked out of the summer lawn-mowing brigade at the Oak Ridge National Lab and assigned to be a junior researcher to a small group of scientists led by Eugene Wigner, a Hungarian émigré and Nobel laureate. They explored ideas, all day long, even over sandwiches at lunch—about the effects of nuclear war, about
bioterrorism, about economic recovery following disasters. They
didn’t care where the ideas came from—even from a college stu-
dent, and I ended up co-authoring a monograph on postwar eco-
nomic recovery. Three summers with Dr. Wigner and his colleagues
put to rest any doubts I had about my opportunities to reach inside
myself and offer something that was uniquely mine.

This freedom to be yourself—to have personal ownership of
your choices—is, for my money, the greatest gift of the American
culture. Self-determination has long been recognized, by theolo-
gians, management experts, psychiatrists, and sensible people of
all stripes, as the surest path to personal fulfillment. People with
this sense of ownership of daily choices readily acquire a sense of
ownership of the community as well; this is seen in the tradition
of barn raisings, Grange halls, and Rotary clubs. In America people
could make a difference.

But this American exuberance, born of individual drive, is fad-
ing. Teachers who feel a sense of ownership of the classroom, like
Marilyn Whirry, are increasingly hard to come by. In talks with
teachers around the country, the dominant feeling is one of pow-
erlessness. “There’s no correlation with what’s best for kids,” said
Phil Anzalone, a teacher on Long Island. “They just tell you, ‘This is
what you’re going to do.’ ” The spirit of community ownership has
also faded—a 2006 Kettering Foundation report found that many
Americans “have become consumers in the democracy instead
of its citizen-proprietors.” It’s as if we pulled the plug, and the
American spark is now generated mainly by people who, for their
own reasons, are highly motivated—immigrants, for example, or
people with unique skills and vision, such as Bill Gates, Steve Jobs,
and Oprah Winfrey.

American exceptionalism is fading, not because we rejected the
explicit credo of our culture—the belief in the power of the indi-
vidual. Indeed, much of modern law is advanced in the name of
individual rights. What changed is that the scope of law now sti-
flies our freedom of self-invention. The American difference is not
civil liberties or democratic rights—other cultures have come to have similar legal rights—but the fact that other societies are constrained by the yoke of cultural constraints about people's place in society. In Europe, Tocqueville noted, people consider themselves a kind of tenant, . . . without the feeling of ownership.” All services and activities of the community, even the ability to respond to immediate threats, are the responsibility of a “powerful stranger called the government.” As they went through the day, and through life, Europeans were constrained by self-consciousness about their place in society.

Americans didn't have this self-consciousness or sense of personal limits. People just forged ahead. Damn the torpedoes and all that. Charles Dickens, in his travelogue about his trip to America in 1842, is fascinated by this aspect of American character. He describes locomotive engineers speeding far beyond reason, to the glee of the passengers. He is in awe of Boston institutions dedicated to social work, such as the Perkins Institute for the Blind, established with the help of wealthy individuals determined to live their faith. Americans followed their nose, doing what they felt like doing.

Better than any society in history, America shed the baggage of cultural self-consciousness and let people access everything that was in them. Americans acted; they didn't wring their hands about how to act. They looked ahead, not over their shoulders. It is spontaneity, as Emerson suggested, that "makes the moment great."

The evil of modern American law is not that it addresses the wrong goals—by and large it addresses the right goals. Nor is it the undisputable fact that law has become absurdly dense—although this surely must be addressed, and I will propose an approach for mucking out the legal stables. The evil of modern law is that it has infected daily choices with a debilitating legal self-consciousness. Americans no longer feel free to do what they feel is right. With his usual prescience, Tocqueville was concerned about taking law down to daily choices:
I should be inclined to think freedom is less necessary in great things than in little ones. . . . Subjection in minor affairs . . . does not drive men to resistance, but it crosses them at every turn, till they are led to surrender the exercise of their own will. Thus their spirit is gradually broken and their character enervated. . . .

This is not a problem of degree. A culture of legal fear is not what our founders had in mind when they created the legal framework for a free society. Law is supposed to support free choice, not impede choices all day long. Slowly but surely, legal self-consciousness is killing our culture.

Here we stand, facing the challenges of the twenty-first century, without any conception of law that actually allows us to harness our personal power to meet those challenges. What’s needed is to rebuild the structure of law that, while sorting out the needs of an interdependent society, revives the one essential resource that made our country so great: the power of individual freedom.

But how exactly? Arguing about the limits of law seems like trying to reverse a tidal wave—that inexorable drive toward what legal historian Lawrence Friedman calls “total justice.” Fairness can readily be couched in the language of freedom. Finding a unifying theory of law that balances demands for fairness against daily freedoms seems inevitably to lead to a legal rule or process for every social interaction. Freedom has always been putty in the hands of people who can link their personal interests with a purported public goal. “We all declare for liberty,” Abraham Lincoln observed, “but in using the same word we do not all mean the same thing.”

Safeguarding our freedom against claims of fairness is not even on the table. Legal scholars who worry about freedom devote about 99 percent of their energy on civil liberties against state power, which, with a few exceptions, are generally alive and well.
If pressed, most scholars would probably say that law protects our daily freedoms by providing recourse against wrongful acts—say, breaches of contract, or crimes, or negligent acts. These are indeed vital functions of law.

But is law only a system of enforcement against wrongful acts? Any disagreement, as we see every day, can be framed in the language of legal deprivation. Give Me My Rights! It’s exhausting. This one-sided focus on possible wrongdoing doesn’t acknowledge the need to preserve an open field of freedom so people can live their lives. Freedom today is just whatever’s left over after everyone’s made their legal demands.

Freedom is not supposed to be a swamp of possible claims. Nor does freedom long survive if defined by whatever anyone chooses to argue. Freedom is a zone in which people may engage in “unobstructed action according to our will,” as Jefferson put it. This zone of freedom requires a formal legal framework. This framework, largely washed away by the flood of law in the last century, consists of two principles:

- Law sets boundaries that proscribe wrongful conduct.
- These same boundaries also protect an area for free choice in all other matters.

The forgotten idea is the second principle—that law must affirmatively protect an area of free choice, including freedom from legal interference.

Law must work both ways: It must prohibit defined wrongs, and it must affirmatively protect an area of freedom. Law must provide “frontiers, not artificially drawn,” as philosopher Isaiah Berlin put it, “within which men should be inviolable.” It may seem novel that a judge should stand up and rule, as Lord Hoffmann did, that swimming is a reasonable risk as a matter of law. But that’s how law protects freedom: It defines “the boundaries of the protected domain of all persons and organized groups,” as Friedrich Hayek
put it. Protecting an open field of freedom is a core precept of the rule of law. “The end of law,” John Locke said, “is not to abolish or restrain, but to preserve and enlarge freedom.”

This idea has been lost to our age. It is only a modest overstatement to assert that, when advancing the cause of freedom, law today is all proscription and no protection. There are no boundaries, just a moving mudbank comprised of accumulating bureaucracy and whatever claims people unilaterally choose to assert. Instead of legal dikes defining the field of freedom, our lives are flooded with laws and rules, so many that no one can possibly know them and so detailed that they operate as central planning. We are free to do what we want . . . only so long as we don’t wade into this unknowable sea of rules and no one around us disagrees.

This ever-rising flood of requirements and proceedings is accepted as the way things have to be—as if the more law the better. We’ve gotten in the habit of thinking every decision should be justified at the demand of anyone else. Imposing legal self-consciousness on daily choices is not a formula for success, however. It’s a formula for failure. Otherwise sensible people, applying legal logic, somehow come to think that it’s okay to handcuff a five-year-old girl.

We will never fix our schools or make health care affordable, or reenergize democracy, or revive the can-do spirit that made America great, unless American law is rebuilt to protect freedom in our daily choices. Drawing the boundaries of reasonable risk, discussed next, is a good place to start.
CHAPTER 2

THE FREEDOM TO TAKE RISKS

The houses on Wildemere Avenue in Milford, Connecticut, sit under the shade of towering hickory and oak trees. It's the kind of old-fashioned neighborhood where both young families and retired couples live next to one another, like a scene from a Norman Rockwell painting. You can practically see the young boy pulling his red wagon down the street.

Milford is the last place you would expect to see pushing the boundaries of social policy defining unacceptable risks of life. Since the 1960s, as we've seen, few areas of daily life have been immune from legal scrutiny. Food, drink, play, social relations of almost every sort, you name it. But the town fathers of Milford introduced a new area of legal scrutiny—nature itself.

In 2005, Una Glennon, a grandmother who lives on Wildemere Avenue, put in a pool for the enjoyment of her fourteen grandchildren. The hickory trees spread their branches all around her house. That was the problem. One of her grandchildren is allergic to nuts and can't play in the pool with the other children when the nuts are falling. Mrs. Glennon sent a letter to the mayor demanding the removal of three large hickory trees on the street near her
house. What’s a mayor to do? Allergy to nuts is indeed a serious risk to those who have it, and requires that parents or caretakers of children always carry a shot of epinephrine to counteract the reaction when there is unintended exposure. On the other hand, the neighbors on Wildemere Avenue weren’t happy at the prospect of leaving a gap in the middle of the block, three stumps instead of a canopy of shade.

Where do you draw the line? Public choices are not usually matters of right and wrong. They require balance and trade-offs of one sort or another—here balancing the extra effort to safeguard the child, on the one hand, against the majesty of trees rising over sixty feet above Wildemere Avenue. Deciding between competing interests is one of the main jobs of government. But how does an official decide? The philosopher John Rawls famously suggested that social choices should be made behind a “veil of ignorance,” where the decider here would imagine that he could end up in the position of either a tree lover or someone with a nut allergy.

The logical implications here would probably be enough to convince me. Cutting down trees to accommodate people with allergies could be ominous news for trees that reproduce themselves with nuts—walnut, chestnut, pine, pecan, and hazelnut as well as hickory trees. About one out of 200 Americans is allergic to tree nuts. Making all their neighborhoods safe from nuts could spawn a new logging industry. And what do we do about all the other serious allergies—say, bee stings, shellfish, and pollen? Do we start a national drive to obliterate bees? Doctors say that there is no safe zone for people with severe allergies; children with an allergy have to learn to be always on their guard. Balancing the risks of allergies against nature’s realities should lead us down a path toward personal caution, not obliteration of nature.

Balancing these interests is not what happened in Milford, however. In the letter to the mayor, Mrs. Glennon enclosed a letter from a doctor suggesting the possibility of dire consequences to the child. Risk to the child, no matter how remote, was enough to
make the mayor capitulate. The town ordered the trees chopped down. According to the mayor, he had no choice. “It really came down to taking a risk,” he said, “that the child may be sick or even die.”

Risk has become a hot button in public and private decisions. Press the risk button, and discussion pretty much ends. If there’s a risk, better not do it. Part of the problem, as we’ve seen, is fear of lawsuits. The accusation “You took a risk” is reason enough to get sued. But there’s something deeper that’s infected our cultural psyche. There’s a compulsion to move heaven and earth to eliminate a risk even if in the clear light of day, everyone agrees that the effect is a grotesque misallocation of resources. There was a panic to require flame-resistant pajamas for children in the early 1970s—at a cost seven times greater than the cost of smoke alarms that would save the same number of lives. Then it turned out that the flame retardant was carcinogenic, and it had to be banned. Certain pesticides that result in dramatically greater safety and increased crop productivity have been banned because of minuscule cancer risks.

Humans are wired by evolution to deal with immediate risks—uh-oh, there’s a saber-toothed tiger and I’d better do something about it. Human nature exaggerates this tendency for vivid risks, such as fear of shark attacks—the phenomenon identified by Nobel laureates Daniel Kahneman and Amos Tversky as the “overweighting of low probabilities.” But an interdependent society presents risks at many levels; exhausting resources to deal with one risk means that we are defenseless against other risks.

Risk, by definition, is a question of trade-offs and odds—accepting one set of risks in order to accomplish something (or in order not to incur worse risks). Build a heavy car for maximum safety and it may be less affordable, as well as burn more fuel. A key role of public leadership is to sort through these risks and put resources and legal protections where they are most effective. These are the choices we refer to as public policy.
In the age of individual rights, however, American leaders have been told not to focus on the odds. Instead they focus on the effect on one person. No one wants bad things to happen to other people, but in America today we try to make public policy by looking at the effect of one situation on one person. Uncle Sam has become a kind of mad scientist, peering all day through the microscope to identify risks to individuals instead of looking at the effect on everyone. Any risk is cause for a campaign to eradicate it. With enough money and effort, we assume, we can create a world without danger or disappointment. The superfund pollution cleanup, for example, required dirt to be purified to a level where people could eat it every day and not get sick. As Justice Stephen Breyer observes in *Breaking the Vicious Circle*, redirecting those resources to vaccinating children against meningitis would have dramatically greater health effects for urban children.

Risk, unfortunately, is inherent in all life choices. Every choice involves a risk. Every movement involves a risk. Doing nothing involves risk. Crossing the street, exercising, taking a job, getting married, all involve risks. Risk is just the flip side of opportunity—do away with risk, and we lose all chance for accomplishment. Safety itself, as I discuss shortly, is impossible without risk. The question with each choice is to weigh the risks and benefits, not reflexively to avoid risk. Using the logic of Milford, we might as well enact a legal ban on nut trees. Certainly this logic was not lost on the residents of Milford. The town hall received forty calls from residents asking whether they should chop down their hickory trees.

This hair-trigger approach to risk, about as thoughtful as a scared squirrel’s, makes it impossible to make coherent choices. “People seem to think that products and activities are either ‘safe’ or ‘unsafe,’” Professor Cass Sunstein observes, “without seeing that the real questions involve probabilities.” More children could be saved, Professor Sunstein notes, if we didn’t spend so much on futile treatments for people who are terminally ill. Responsi-
ble choices, whether about risk or any other aspect of life, always involve trade-offs.

The mayor of Milford didn’t even know how to talk about the common good. Reclaiming the vocabulary of public choice is the first hurdle here. We must learn again to talk as leaders. The rhetoric of risk avoidance must be abandoned, at least for most public decisions, and replaced by a practical discussion of trade-offs. This requires getting beyond the obsession with safety.

THE NEED TO PROMOTE RISK

The surge in childhood obesity was the topic for a panel of health care leaders convened by Health and Human Services Secretary Tommy Thompson. The trend, they agreed, is unsettling—the rate of obesity in children has tripled in two decades. One in three is overweight, and one in six is obese. The harm to these individuals is inevitable. More than 70 percent will be overweight as adults, and most of these will suffer chronic illness as a result, including heart problems and type 2 diabetes. The harm to society is also frightening: The cost of obesity today is more than $100 billion—almost enough to provide health insurance to all Americans who don’t have it, or to give each teacher in America a $30,000 raise. This self-inflicted cost will only rise as obese children become obese adults.

But what do we do about it? Lecturing kids about their diet is unlikely to be effective. More responsible marketing, such as selling juice instead of soda in school vending machines, is certainly useful, but only at the margin. Banning all the things that contribute to the trend would lead to a pretty bare landscape—candy, fast food, soft drinks, bread, video games, television, the Internet . . . But most of us grew up with candy, soda, and fast food and didn’t have this problem. The difference is how children spend their days. Obesity is mainly a cultural problem. Kids no longer find it fun or feel peer pressure to lead active lives.
Reversing this trend, the experts on the panel agreed, required reinstilling a culture of physical fitness. Almost fifty years ago JFK's President's Council on Youth Fitness, with the same goal, recommended installing monkey bars and other athletic equipment in playgrounds across the country. But they've all been ripped out. Why? Someone might fall and hurt himself.

Playgrounds are so boring, according to some experts, that no child over the age of four wants to go to them. Jungle gyms, merry-go-rounds, high slides, large swings, climbing ropes, even seesaws are, as they say, history. Recess in school is also not what it used to be. About 40 percent of elementary schools have eliminated or sharply curtailed recess. Dodgeball is gone. Tag has been banned in many schools.

Playgrounds are only the tip of the sedentary lifestyle. Children don't wander around the neighborhood anymore; one study found that the range of exploration from home by nine-year-olds is about 10 percent what it was in 1970. Only 15 percent of children walk or bike to school, compared to half in 1970. Kids have been taught that outside means danger—from cars, from adults, from the uncertainty of the real world; almost two-thirds of children think unknown adults pose a danger to them. The hovering parent wants control—unstructured play is too risky. "Countless communities have virtually outlawed unstructured outdoor nature play," Richard Louv observes in *Last Child in the Woods*. So what are children doing instead of wandering around, pushing their friends on swings or making mischief? Eight- to ten-year-olds spend an average of six hours per day in front of a television or computer screen. These trends, more than any others, account for the surge in obesity.

Safety is the reason for many of these changes in children's play opportunities. Ever since Ralph Nader exposed GM for making an unsafe car in the 1960s, safety has been a primary goal of public policy, right up there with individual rights. SAFETY might as well be a billboard that looms over almost any activity. AVOID
RISK is its twin. Nothing in schools or camps or home activities occurs without people first looking up at those billboards and asking themselves whether, well, something might go wrong. Amen, you might say, especially with children, our most precious assets. This cult of safety, drawing out parents’ worst fears, new envelops children in America. Better not let the dear darling out alone. Who knows what might happen out on the street?

It’s hard to be against safety. Regulators should certainly try to keep us safe from hidden defects. We can hardly protect ourselves against lead paint on toys and other invisible flaws of mass-market products. But the Consumer Product Safety Commission (CPSC) and other safety groups go a lot farther than hidden defects. They want to protect against any activities that involve risks. The CPSC has standards that recommend removal of “tripping hazards, like . . . tree stumps and rocks.” Many other organizations, public and private, also loudly champion the cause of ever-greater safety. The National Program for Playground Safety, at the University of Northern Iowa, advises that “Children should always be supervised when playing in the outdoor environment.” Professor Neil Williams, at Eastern Connecticut State College, has created a Physical Education Hall of Shame, whose inductees include dodgeball, kickball, red rover, and tag.

Focusing on safety, it’s hard to know where to stop. The drive toward eliminating risk grows ever more powerful, pushed by true believers and by people terrified by legal liability. Each new risk avoided ratchets up the stakes for the next one. Broward County has put up warnings on playgrounds admonishing children not to use equip.nent “unless designed for your age group.” That’s about as effective, I suspect, as warning fish that the lure is “harmful if swallowed.” But we can’t help ourselves. We’ve become safety addicts.

Something is wrong here. The headlong drive for safety has resulted in a generation of obese children who bear not only the risk, but the near certainty, of terrible health problems.
Safety, as it turns out, is only half an idea. The right question is what we're giving up to achieve safety. A playground may be designed to be accident-free, but be so boring that children don't use it. Conversely, a playground may serve its purpose perfectly, but there will be a certainty that every once in a while, a child will be hurt. Safety and risk always involve trade-offs—of resources, of efficiency, and, especially in the case of children, of learning to manage risk.

Taking risks, it also turns out, is essential to a healthy childhood. Risk in daily activities—running around in a playground, confronting classmates at recess, climbing trees, or exploring the nearby creek—is different from hidden product flaws. Learning to deal with these challenges is part of what children need—not only physically but socially and intellectually. "The view that children must somehow be sheltered from all risks of injury is a common misperception," says Professor Joe Frost, who ran the Play and Playgrounds Research Project at the University of Texas. "In the real world, life is filled with risks—financial, physical, emotional, social—and reasonable risks are essential to a child's healthy development."

Let's start with the most obvious. Children need exercise, and traditionally they get it not mainly in organized activities but as part of their daily going and coming. To deal with the crisis of obesity, the most important change would be to revive a sense of freedom by children to wander around and do what they feel like. "Opportunities for spontaneous play may be the only requirement that young people need," observes Dr. William Dietz, a senior official on obesity at the Centers for Disease Control and Prevention.

But what is it that attracts children to running around? It's not that compulsiveness that drives many adults to the gym with clenched jaws and fierce self-discipline. What attracts children is the fun of it. It's fun to play a pickup game of baseball or tag. It's fun to test your limits on a climbing rope or jungle gym. Exploring anything, especially if you're not supposed to, is fun. What's really
fun—more fun than anything—is risk. I used to climb up on the roof of the neighbor’s garage (using an adjoining fence as a ladder), test my balance by walking around on the sloping roof, and then, with my heart beating fast, take the leap down to the lawn. Why did I do that? I don’t know. It was fun. It was fun to experiment with different ways of cushioning my fall.

Risk is an essential attraction of a culture of physical fitness. Mandatory PE classes are OK, but they’re not fun, at least not unless there’s an element of risk—like dodgeball, an activity exciting (and now banned) precisely because of the somewhat sadistic attraction of hitting someone with the ball. An informal survey of children by the University of Toronto’s Institute of Child Study found that “merry-go-rounds . . . anecdotally the most hated piece of playground equipment in hospital emergency rooms—topped the list of most desired bits of playground equipment.” The centrifugal forces that throw kids off the merry-go-round are also the forces that make it fun. Those of us of a certain age can remember the sprinting required to get the contraption really moving. That was fun. And a lot of exercise.

Socialization skills are learned not under adult supervision but by coping with other children. “The way young people learn to interact with peers is by interacting with their peers, and the only place this is allowed to happen in schools is at recess,” observes psychology professor Anthony Pelligrini. “They don’t learn social skills being taught lessons in class.” “Life is not always fair,” notes Professor Tom Reed, an expert in early childhood education. “Things like this are learned on the playground.” Dr. Stuart Brown, who led the commission trying to understand why Charles Whitman murdered fourteen people at the University of Texas in 1966, found that “his lifelong lack of play was a key factor in his homicidal actions.” This was also true with other mass murderers. Dr. Brown went on to found the National Institute for Play, dedicated to understanding the cognitive and cultural benefits of play.

Being on your own is a critical component of play because, among
other benefits, it makes you responsible for yourself. Responsibility, like risk, is intrinsically interesting. Instead we have trained children to believe that being on your own presents an ever-present danger of abuse by adults who are strangers. Milk cartons display photographs of abducted children, as if there’s a scourge of kidnappers up from Mexico City or Manila intent on nabbing children in Akron and Atlanta. In fact, the chances of abduction by a stranger are about as small as getting hit by a meteorite, and dramatically smaller than having an accident when riding in a car with your parents. Contrary to popular wisdom, the National Crime Prevention Council advises that “If children need help—whether they’re lost, being threatened by a bully, or being followed by a stranger—the safest thing for them to do in many cases is ask a stranger for help.”

Perhaps the most surprising, and important, benefit of children’s risk is this: Children’s brains do not fully develop without the excitement and challenge of risk. A report from the American Academy of Pediatrics found that unsupervised play allows children to create and explore worlds of their own creation, helps them develop new competencies, teaches them to work in groups and to negotiate and resolve conflicts, and, perhaps most significant, is important for developing their cognitive capacity: Play “develop[s] their imagination, dexterity, and physical, cognitive, and emotional strength.” Research at Baylor College of Medicine found that “children who don’t play much or are rarely touched develop brains 20 percent to 30 percent smaller than normal for their age.” Professor Joe Frost concludes: “Early experiences determine which neurons are to be used and which are to die, and consequently, whether the child will be brilliant or dull, confident or fearful, articulate or tongue-tied. . . . Brain development is truly a ‘use it or lose it’ process.”

All these activities—merry-go-rounds, tag, climbing trees, wandering around on their own—involve risk. That’s what’s appealing. That’s how kids stay healthy. That’s what fires their neurons, leading
to better brain development. That's how kids learn to smell danger, and to deal with difficult people. That's how kids learn confidence.

The error of the safety police was to move from protecting against hidden hazards to meddling in life activities where the risks are apparent. The most sacred of CSPC's sacred cows is that playgrounds should be covered with soft material, preferably rubber matting, to cushion the falls of the dear ones. "Asphalt and concrete are unacceptable. They do not have any shock absorbing properties. Similarly, grass and turf should not be used." It seems sensible that soft surfaces are best for toddlers who can't be expected to understand risk, and for equipment on which we expect children to be hanging upside down, like jungle gyms. But for almost everything else, the hard ground is just part of the risk calculus that kids, consciously or unconsciously, will factor into their play. I actually learned, all by myself, without any regulator's help, that concrete has no "shock absorbing properties."

I'm bracing myself for the return blast: More than 200,000 injuries per year on slides, swings, and climbing equipment! Not only that—there are fourteen deaths per year on playgrounds. I can practically hear the accusation now—that I'm in favor of kidocide, and that a generation of brain-damaged and lame children would be limping around America were it not for the vigilance of the safety police.

Yes, there are many accidents involving children on playgrounds. Whether the number is reasonable involves evaluating not only the positive benefits of risk, but also the universe of other life risks. It turns out that there are almost five times as many children's accidents in the home—over 200,000 on stairs alone, another 200,000 falling out of beds, 113,000 crashing off chairs, and almost 20,000 from falling television sets. What are the policy implications? Carrying the logic of safety to these home risks, we could mandate rubber floors, safety rails on beds, air bags on televisions, and, almost certainly, a ban on running at home.

What's going on in the child safety movement is not prudence,
but something more akin to paranoia. Instead of safety, we are creating the conditions of danger: children who are not physically fit, have arrested social development, and don't have the sense or satisfaction of taking care of themselves. In the name of safety we're creating, in the words of Hara Marano, editor at large of Psychology Today, "a nation of wimps."

REBUILDING BOUNDARIES OF REASONABLE RISK

A wealthy society, like a wealthy person, is apt to err on the side of caution, an instinct akin to trying to protect a lead in games. But what's going on here is not the age-old tension between caution and risk. There's a third dimension of risk that never existed, at least not in ordinary daily choices, until recent decades: legal risk. In any social dealings, whether selling products, managing employees, running a classroom, or building a playground, there's a chance that someone might be hurt or offended. And in modern America that carries with it the risk of being sued.

Dealing with legal risk is different from dealing with other risks because, instead of weighing the benefits and costs of a choice, it requires focusing on the lowest common denominator. A choice might be beneficial or productive but nonetheless carry huge legal risk. The playground could be perfectly suited for its purpose, attracting tens of thousands of children to healthy activity, and still be the source of liability whenever some boy decides to launch himself off the swing and breaks his leg—as is certain to occur from time to time.

This is not a problem that takes care of itself. America has a public health crisis but doesn't know how to make the legal choices needed to let children to take the risks of growing up. We don't know how to say that sometimes things go wrong. This is an odd phenomenon, as if the adults fell on their heads and developed a kind of amnesia about how life works. The victim of an accident appears, demanding satisfaction, and we shrink back in legal fear.
Every time there's an accident—each and every time—it couldn't be easier to identify something that could have been done differently. When a six-year-old in Valparaiso, Indiana, broke his femur sliding head-first down a slide, the claim was that the school “did not provide proper supervision.” Broward County decided to ban running in the playgrounds after it got a report showing that it had settled 189 playground lawsuits in the prior five years. “To say ‘no running’ on the playground seems crazy,” said a member of the Broward County School Board, “but your feelings change when you're in a closed-door meeting with lawyers.”

There's never been a time a like this in American history. Society has lost its sense of balance on ordinary life choices. Many people no longer have a clear sense of what we should allow our children to do. Once fear sets in, and common sense capsizes, nothing short of leadership can make it upright again. Here are two changes I think are required.

1. **Law must reclaim its authority to draw enforceable boundaries of reasonable risk.** Prevailing judicial orthodoxy today allows anyone to sue for almost anything—allowing any injured person, in effect, to set unilaterally the agenda on risk for the rest of society. Just allowing the claim to go to the jury sets social policy, as we will discuss shortly. Judges, legislatures, and regulators must take back the responsibility of drawing these boundaries.

2. **Create “Risk Commissions” to offer guidance on where to draw the lines.** Legislatures should set up nonpartisan risk commissions to offer guidance to courts and regulators for activities that have been most affected by legal fear, including for children's play and for physical contact with children. These risk commissions should be independent of existing safety agencies, which are dug in too deep to see the trade-offs. Standard-setting bodies are common in industry—for example, for industrial tools—and in professions such as medicine. The standards set by these bodies enjoy broad
support and are considered authoritative by courts. If legislatures don't establish these independent risk commissions, then private groups should seize the authority by building broad-based coalitions that assert standards. Common Good, working with health care and child development organizations, has begun the process of creating a playbook of guidelines for healthy play.

In 2005, U.K. Prime Minister Tony Blair gave a speech on risk in which he observed that "something is seriously awry when teachers feel unable to take children on school trips, for fear of being sued" and that "public bodies . . . act in highly risk-averse and peculiar ways." Blair called for laws to "clarify the existing common law on negligence" and for issuance of "simple guidelines" on reasonable risks. He concluded with these thoughts:

Government cannot eliminate all risk. A risk-averse scientific community is no scientific community at all. A risk-averse business culture is no business culture at all. A risk-averse public sector will stifle creativity and deny to many the opportunities to be creative. . . . We cannot respond to every accident by trying to guarantee ever more tiny margins of safety. We cannot eliminate risk. We have to live with it, manage it. Sometimes we have to accept: no-one is to blame.

In countries across the globe, children run and play all by themselves. In India unstructured play is considered an essential tool of child development. Germany has adventure playgrounds that are stocked with scrap lumber, nails, and hammers, so children can come and build things, and then tear them down and build something else. These are the children against whom our children will be competing. Are we really protecting our children, or are we putting them at risk of failure because they lack tools of self-reliance?

"The age cries out for all the freedoms," historian Jacques
Barzun observed, “Yet it turns its back upon risk, the companion to free will.” Accomplishment at all levels, as well as personal growth, requires looking at the challenges of life realistically, not succumbing to the cheap rhetoric of a safety utopia. People will disagree on where the lines will be drawn. Certainly the safety zealots will defend decades of a bubble wrap approach to child rearing. But that difference in view only underscores the need to reestablish sensible boundaries. More than at any time in recent memory, America needs legal red lights and green lights. Our freedom depends on it.
CHAPTER 3

THE AUTHORITY TO BE FAIR

The parents of the child with autism in Hartford, Connecticut, were convinced that he should be in a classroom with other students. He had shown a tendency to be violent at an early age, but by 2002, when in the seventh grade, he was unusually large and increasingly prone to violence. He began attacking other students without provocation. He kicked the teacher and, a few days later, punched her in the face. The school told the parents that he had to be removed to an environment where he couldn't injure others. Asserting their legal rights under federal law, they refused. His conduct got worse. He bragged about hitting the teacher, and started throwing furniture. The sense of urgency increased. "It is very difficult to control him while he is throwing furniture," the teacher's report stated. "He is a grave danger to other children, paraprofessionals and teachers."

The class practiced evacuation drills so that they could move quickly when the attacks started. But no one at the school had the authority to send him to a special education setting where there was more control. Under federal law, the school had to institute formal legal proceedings and receive a formal order from the judge. The