

Lawyered Up

A Book Review Essay by Charles N. W. Keckler*

LIFE WITHOUT LAWYERS: LIBERATING AMERICANS FROM TOO MUCH LAW, by Philip K. Howard. New York: W.W. Norton. Pp. 224 pages. 2009. \$24.95

For a substantial portion of the American business and professional class, a book entitled "Life Without Lawyers" must surely conjure some of the same feelings evoked in faithful readers of the Harlequin romances, a sort of vicarious fantasy filled by the joy of liberation from burdens, strictures, and anxieties that have come to define quotidian existence. Such people are, in my experience, called clients. They may admit that – all too frequently – they are in need of a good lawyer, but they mightily regret this need and attribute it, in the main, to the existence of other lawyers, past, present or future.¹ Like any fantasy, the vision of hoisting the black flag and leaving the lawyers astern is unrealistic and exaggerated. But it is not uncommon and it is not new. There will be many readers of the sort Howard believes will be in sympathy with his arguments, and they cannot be dismissed simply as people whose contacts with the legal system are negligible, their impressions of the law distorted by a hysterical media. A 1998 survey found that under a third of in-house counsel and only 20% of executives were satisfied with the process of litigation they had personally experienced.² And the more experience executives had with the court system, the less they liked it.³ The client population, to say nothing of the population at large, may have “significant misunderstandings” of the actual social and economic effects of

* Visiting Assistant Professor of Law, Dickinson School of Law, The Pennsylvania State University. A.B., Harvard College, M.A., J.D., The University of Michigan. Email – cnk3@psu.edu. The author acknowledges support for this research from a summer research stipend provided by the Dickinson School of Law, and research support from my assistant, Michael Ribble, Dickinson Class of 2011. All errors and opinions are those of the author.

¹ There has been an alienation of a significant part of the middle and upper class from the legal profession, considered collectively. Perennially, lawyers are viewed more poorly than other professions; three-quarters of the public currently sees the legal field in a less than positive light. See Jeffrey M. Jones, *Automobile, Banking Industry Images Slide Further*, available at <http://www.gallup.com/poll/122342/Automobile-Banking-Industry-Images-Slide-Further.aspx?version=print> (showing for 2009 a more negative view of lawyers than of bankers, despite financial crisis). This kind of skepticism has long been present. See Gary A. Hengstler, *Vox Populi: The Public Perception of Lawyers: ABA Poll*, A.B.A. J., Sept. 1993, at 60; Chris Klein, *Poll: Lawyers Not Liked*, NAT'L L.J., Aug. 25, 1997, at A6; Randall Samborn, *Anti-Lawyer Attitude Up*, NAT'L L.. Aug. 9, 1993, at 1. And it is precisely those who one would think would be the most well-informed, “those with higher incomes, and more education, and more direct experience with the legal system” that have the most negative views. MARC GALANTER & THOMAS PALAY, *TOURNAMENT OF LAWYERS: THE TRANSFORMATION OF THE BIG LAW FIRMS* 196 (1991).

² John Lande, *Failing Faith in Litigation? A Survey of Business Lawyers' and Executives Opinions*, 3 HARV. NEGOTIATION L. REV. 1, 24 (1998)

³ See *id.*, at 42; see also GALANTER & PALAY, *supra* note 1, at 196.

lawyers.⁴ Yet it remains true, and relevant, that Howard, I, and our fellow lawyers are in a service industry, one in which the customer is not happy at all (whether or not the customer is right). This is a point in Howard's favor, and until it improves, the case for reform will never be wholly without merit.

In this review essay, I begin by specifying more precisely what Howard is attempting to achieve in this book – and to some extent in his previous ones, all of which are obviously part of a larger project, although what that project is turns out to be not so obvious. I argue his advocacy of systemic reform is essentially cultural in nature, in that he is endeavoring to reinvigorate certain social norms that may be in decline. Following this, I consider critically Howard's general avoidance of what ought to be the empirical foundation of his project – whether there is, in fact, “too much law” – and whether the evidence that exists on this question, tentative as it is, strengthens or undermines Howard's brief for transforming contemporary legal culture. I find that America remains the most heavily “legalized” society in the world, and that there was indeed a substantial re-ordering of the relationship during the years 1960 and 1990 between lawyers and society that solidified this role for law, although the situation has now stabilized. Yet these simple macroeconomic facts are ultimately inconclusive about whether the amount we spend on it is too much, because we do not know with any confidence what we are getting for the extra money. Finally, I examine the prospects for wide-ranging legal reform and what it would entail, proposing that any major reform will, instead of rolling back the changes of the recent past, most probably arise from overlaying these with new legal arrangements among people who prefer a different way. “Liberating” Americans from law is something that it is more likely to happen to individual Americans, contract-by-contract. It could, ironically, involve introducing a legal component into even more transactions and interactions, and require a greater “mindfulness” of the law on the part of individuals, as they purposely decide to limit the scope of the law in particular situations.

Although I will argue that, in part because he departs from the statistical and systematic norms that rule policy analysis, Howard is far from making his case to anyone not already convinced there is something seriously awry with American law, there are many people who in

⁴ Lande, *supra* note 2, at 6.

fact fit this description. In an important sense, Philip Howard represents these people and voices their view – unchanged and unchangeable by any number of law review articles – that law and potential liability play too great a role in contemporary America. This is still a worthy debate to have in a democracy, because whether the changes of 1960-1990 were on the whole good or bad is not a settled question. To fully resolve it would require a thorough identification and analysis of the benefits in each sphere, while admitting the increased costs, and because people disagree fundamentally about matters of risk and harm and rights, the question may not be one that can be settled in a unitary was satisfactory to all. But if I am concerned about how far Howard has advanced the discussion, his work has been valuable in keeping it going, and there is something to be said for his persistence in the face of what must seem to be a million (now 1.1 million) obstacles.

I. Howard's End

Howard's book is the latest in a line of well-written popular essays on the law in society beginning with *The Death of Common Sense* in 1995, and is part of a larger literature broadly critical of law and lawyers, which includes, for instance, Jeremy Bentham, and Fred Rodell's *Woe Unto You, O Lawyers*, and more recently, and from different perspectives, Paul Campos's *Jurismania* or Walter Olson's *The Rule of Lawyers*. Bentham wanted to get rid of the common law entirely, and Rodell argued, not very convincingly, for the complete elimination of lawyers, achieved by making the practice of law a criminal offense.⁵ Howard means something considerably less drastic: namely that there are zones of life and behavior that should be lawyer-free or at least considerably more lawyer-free than they are today, and that lawyer-crafted rules and fear of litigation are imposing a cost on everyone (besides the lawyers), although – and this is the nub of the problem with Howard's critique, he is none too specific about what this toll is, exactly. He has a strong tendency to assume that “we” (his favorite pronoun) all agree this is true, and although he does not quite come out and say, much less prove it, he also seems to suggest that lawyer-rich environments have a kind of vicious feedback quality to them, in which declines in trust are stimulated by legalism – a term that has many meanings, but which here is intended to convey a reliance on formal written rules enforceable by the court system (as

⁵ *Woe Unto You, O Lawyers* was described by Judge Posner as “the worst book ever written by a professor at a major law school.” RICHARD A. POSNER, *OVERCOMING LAW 2* (1995). This immediately stimulated me to go and find a copy.

opposed to other, more informal and informally enforced norms). This new fear of others as potential legal adversaries turn creates further demand for law.

One of the most curious choices Howard makes in this book, as in his previous works, is to couple critiques of litigation with the expansion of the law more broadly (the proliferation of laws, rules, warning labels, obligations and other assorted fine print), criticism of direct regulation by administrative agencies, and complaints about the ossification of the civil service generally, and of the public schools in particular. He has directed his ire at this collection of problems and institutions over the course now of three books, (rather than, as one might expect, tackling them severally), putting forth vignettes on each one, but necessarily never in much depth. Howard's choice of targets can only be called deliberate, and it certainly separates his books from being straightforward anti-lawyer tracts; presumably, this is at least in part an attempt on his part to situate the "trouble with lawyers" as part of larger problem (legalism) which in turn arises from even broader sociocultural forces.

What is offered as a unifying theme for the set of problems Howard addresses is different in his different books. The various dysfunctional institutions supposedly each provide a window into a particular cultural trait that we either undervalue or overvalue: more "common sense" needed was the leitmotif his first book, and the second asked for less devotion to fairness at the cost of decisiveness and judgment.⁶ The theme of *Life Without Lawyers* is authority ("we" need more of this) and reflexive anti-authoritarianism. ("We" need less of this and it is the sources of the ills described, for instance, because "we" won't accept a judge's authority to terminate a case before it goes to jury or a principal's authority to discipline a bad teacher). This could also be rephrased as a lack of trust, or a lack of confidence in those in a hierarchy such as executives, managers or professionals to exercise their authority responsibly, without close legal oversight. This oversight in those we distrust is achieved by detailed regulation of them prior to their acting and imposition of litigation risk afterward, should they go astray.

⁶ PHILLIP K. HOWARD, *THE DEATH OF COMMON SENSE: HOW LAW IS SUFFOCATING AMERICA* (1995); *THE COLLAPSE OF THE COMMON GOOD: HOW AMERICA'S LAWSUIT CULTURE UNDERMINES OUR FREEDOM* (2002).

Reading Howard's books singly, one has a tendency to nod along as he carries forward his theme and weaves in his examples. He is a skillful master of the supporting anecdote and the ringing Ciceronian exhortation; indeed he has all the obvious talents of the practiced attorney, which in the context of this book, I should clarify I mean as unironic praise. The more block quotes I were to include here, the better written this review would surely be.

What is needed is not a reform but a quiet revolution. ... This requires a sharp turn 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 (p. 18).

And yet, when Howard's books are taken seriatim, the arguments become somewhat strained. Was it excessive procedural neutrality, lack of judicial common sense, selfish entrepreneurial lawyering, or the revolt against the Establishment that has raised the litigation rate? All of them? How much of the problem do we assign to each? Collectively, Howard has now designated a number of cultural causes for his favored suite of social problems, which makes one question whether any of his books have accurately diagnosed the issues, at least with any kind of precision. A likely, and reasonable, response might be that Howard has been "naming the elephant" by highlighting different and related aspects of an underlying social trend, which might well be summarized as the legal consequences of a decades-long decline in social trust in the American population.

For, although Howard does have specific policy goals – for instance, the creation of specialized courts for the adjudication of medical malpractice (pp. 90-91)⁷ – his books are not focused on either analysis or policy prescription, at least in any precise way. In many ways, *Life Without Lawyers* (and each of Howard's other books as well) is best seen as an adjunct to works of social theory like Robert Putnam's *Bowling Alone*,⁸ or Francis Fukuyama's *Trust*.⁹ This body of work develops the case for a decline in American social capital and for the costs that occur when social networks of those we implicitly trust devolve into a mass society of strangers,

⁷ See also Phillip K. Howard, *Just Medicine*, NEW YORK TIMES, April 2, 2009 (proposing expert courts as a means of health reform).

⁸ ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* (2001).

⁹ FRANCIS FUKUYAMA, *TRUST: THE SOCIAL VIRTUES AND THE CREATION OF PROSPERITY* (1996).

resulting in increased friction and suspicion. Howard has plenty of citation to Putnam, as well as to the earlier work in the same vein of Edward Banfield.¹⁰ Thus, the lack of trust in authority is just one symptom of the lack of trust and social solidarity generally. If one were to attempt to reconcile Howard's earlier works, presumably one would go on to argue that a low social capital environment invites an emphasis on the resort to formal processes, independent detailed rules and extended guarantees of neutrality and fairness; they also lack any comfort level with "common" sense or the "common" good, because increased diversity of interest – both perceived and real – causes a decline in attachment to any purportedly shared assumptions or values.

If this is what Howard is getting at, he is feeling his way toward a real problem – Putnam's achievement was to show its reality¹¹ – but it is a broad one for which there is no clear resolution. How does one go about changing the culture? Are we really romanticizing the past and its civic order? These are all pertinent questions that have been explored in response to Putnam's thesis, and assuming Howard is writing at this level of abstraction, they apply to him as well. Then, of course, there is a more specific set of concerns regarding the expanded role of law-like models in organizations and the increase in litigiousness. Both the strength and the weakness of Howard's approach is his tying of the latter to the former. The strength is that the increase in lawyers and litigation is seen in a broader social and cultural context.¹² The weakness comes about because his weaving together of troublesome vignettes from various realms of litigation, education and public administration creates the impression that unless we are capable of reinvigorating broad values such as responsibility, common sense, public spiritedness, and courage, we will not be capable of reversing the trends that Howard decries. This inevitably takes the focus off the specific reforms, particularly the procedural ones that could be implemented to achieve significant improvement.

At the end of the day, is Howard mainly interested in American culture, or in reducing the legal burden on businesses, organizations and individuals? He says, credibly, that he is interested in the latter, and he should be, and he will have to be if he wants to achieve his ends,

¹⁰ EDWARD C. BANFIELD, *THE MORAL BASIS OF A BACKWARD SOCIETY* (1970).

¹¹ *But see* Frank B. Cross, *Law and Trust*, 93 *GEO. L.J.* 1457, 1474 ("Putnam and others have presented some evidence that trust has declined, but other evidence suggests that there has been no great loss of trust in society.")

¹² For instance, the number of security guards and lawyers rose in close parallel, suggesting lawyer growth is part of broader pattern, and dare I say, problem of risk aversion and mistrust. *See* PUTNAM, *supra* note 8, at 145.

but he never really engages with the kind of dollars-and-cents debates that have to be entered into in order to develop a policy consensus around specific legal reforms. A little textual work shows that Howard is far more invested in the culture – the diffusion of the legalistic mindset – than in what many professionals working on the role of law in society would likely think to be the central macroscopic question: is there, as Howard’s subtitle, “too much law?” In contrast to his extended discussions of Putnam and Banfield, and to Howard’s various references to Hayek and Hayekian principles on organizing a free society through free choices, the only quantitative assertion I found about law as an overall phenomenon is this:

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 (p. 12).

This assertion is backed only by a single citation to Robert Putnam, a secondary source discussing the issue rather briefly, based on data from a couple decades ago, rather than to any of relevant primary literature on the causes and consequences of this increase. That is an awfully thin empirical basis for a “revolution” (and there is no citation at all for whether law infests our minds excessively). Tellingly, in a prominent (and positive) journalistic review of the book, though, it was precisely that factual assertion that was highlighted, and used to validate the book’s wider concerns.¹³ I infer that the empirical debate about whether there is too much law doesn’t interest him very much. Similar complaints about his previous book prompted him to assert that statistics could prove anything and that “[t]he central theme of the book is not about the litigation explosion,’ he says. ‘It is about the fear and unreliability of litigation. . . . The truth of the broader point will be demonstrated not by facts and figures but by whether they are true in the experience of the reader.’¹⁴ It seems clear that *Life Without Lawyers* is written in the same spirit.

¹³ George Will, *Litigation Nation*, WASHINGTON POST, January 11, 2009.

¹⁴ *A Tort Reply; Philip Howard Is Dressing Down the Legal Community for Its Frivolous Suits*, WASHINGTON POST, October 1, 2002.

To wholly ignore the underlying reality, though, and simply try to accord with and appeal to the perception of that substantial segment of American society that thrives on anti-lawyer anecdotes, and deeply resents legal expenses and risks, runs a considerable risk of preaching to the choir.¹⁵ It is a serious mistake to simply dismiss the statistical evidence and the debate surrounding it, at the very least because this is unavoidably needed as a foundation before accepting the rest of Howard's views.¹⁶ Anthony Lewis reviewed Howard under the title "Shall We Get Rid of the Lawyers?",¹⁷ a classically unfair way to pose the issue as a false dilemma, but that in some ways was lent strength by Howard's polemic and qualitative approach to the subject. Howard is of course not arguing for "getting rid of" of all lawyers, for he is not Rodell: he knows the value of law and lawyers to society. At the same time, he surely seems to want to get rid of some of them, but the reader is left rather at sea about how many.

Are there too many lawyers, or as it might preferably be phrased, too much devotion of our economic activity to legal advice, compliance, and disputes? Perhaps that is too narrow a view of the matter, and Howard seems interested in the excessive devotion of our mental activity, which might not perfectly correlate with economic importance. Yet it seems like a reasonable place to begin. Lawyers are the material basis of the law; without their active presence to make and enforce rules, these rules would become of little importance and the difficulty of compliance would not be "in our minds" to nearly the same degree. And, after all, if society is not paying in time and money from a surfeit of legal activity, what exactly is the problem? Whereas, if it can be shown that we *are* devoting more resources to this, the burden shifts back to the other side, to defenders of the legal status quo, who would need to make some showing that we are getting something for our extra time and money (or else, perhaps, that for American society as currently constituted, the increased use of the law is the least-bad remedy).

Howard wants have a debate about the social resources spent on law, and this debate might usefully be framed in much the same way as is done with other pillars of the service

¹⁵ Cf. Deborah L. Rhode, *Frivolous Suits and Civil Justice Reform*, 54 DUKE L. J. 447, 483 (2004) ("Frivolous cases make entertaining reading but a misleading blueprint for reform.")

¹⁶ Moreover, this kind of objective evidence has a practical political importance – a quantitative metric of a social problem is generally necessary to allow it to be scaled and weighed against other priorities by policy makers; it gives the indecisive a publicly defensible reason to act, and the interest groups a factual standard to rally behind.

¹⁷ Anthony Lewis, 56 N. Y. REV. BOOKS, 6 (2009).

economy like health care. It is perfectly legitimate and sensible to debate whether the United States, for example, spends “too much” on health care. We do not ask, in conducting this debate, whether America has “too much health”. Rather we ask whether the health that we get costs more than it is worth, or perhaps whether it could be obtained more cheaply. This is also the right question to ask about the law, and if Howard had focused on it, I think he could have pushed the public toward a long-overdue discussion along precisely these lines – presuming he could prove as a factual predicate that there really is a problem. Assuming that crucial point, the public policy issue would become whether there is a more efficient way to secure rights within a modern commercial society involving complex systems of exchange, and to provide mechanisms to peaceably redress the grievances and injuries that inevitably occur.

One way to go beyond specific reforms, toward systemic change, is to propose, along the pattern of the health care debate, that the U.S. realign itself along the lines of some other national model; Howard evidently prefers British tort law (p. 16), while Professor Langbein has made a well-known argument for the German system of civil procedure, for example.¹⁸ This would parallel those who support adopting the Japanese system of health insurance, say, or the Dutch model of primary care. Nevertheless, in order to motivate any such proposals, people, especially policymakers, would want firm evidence that something is seriously economically amiss with the status quo. There probably is this consensus with regard to American medical care, even if there is no agreement about what to do about it. America pays, very roughly, 50% more for health care costs than similar countries pay, and isn’t notably healthier.¹⁹ It would be a very useful starting point to say how much we additionally pay (30% more?, 60% more?) for our legal system (as opposed to some plausible alternative), and then assess this increment against the greater level of freedom, justice, increased economic dynamism, or some other putative product of the law with which such a purchase could be justified.

¹⁸ John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV., 823, 843-846 (1985).

¹⁹ There is, of course, a vast and highly contentious literature on this topic, including many views about specific statistics and their interpretation. It is very far from my purpose to wade into this area substantively, beyond discussing it as a useful analogy. I have tried, however, to make statements that are conservative and consistent with the scientific consensus as I understand it. See Organization for Economic Co-operation and Development, *Health Data 2008: Statistics and Indicators for 30 Countries* http://www.oecd.org/document/30/0,3343,en_2649_34631_12968734_1_1_1_37407,00.html. See also Gerard F. Anderson, et al., *Health Spending in the United States and the Rest of the Industrialized World*, 24 HEALTH AFFAIRS, 903, 905 (2005) (discussing this data).

The product of law is obviously a more complex one in terms of its contribution to human well-being than is health, both in terms of generating a variety of different goods, and also because, presumably, one can have too much as well too little legal regulation of some behavior. So to assert there is “too much law,” one has to discuss what law is and isn’t achieving in terms of its effects on particular areas. Is a greater amount of legalism in education helping children learn more?²⁰ Are more medical malpractice actions improving patient outcomes?²¹ The undeniable costs involved in lawyering up these areas of life have to be balanced against the benefits they might have to offer, and surely do have to offer at some level. In order to formulate an assertion that there is too much law in a more precise way, one might begin by proposing that in Country X, there is a field of economic or social life where the amount of legal activity is hampering the substantive goals of that field, or, at least, where the positive contributions of law to that field could be largely achieved with much less cost. Further, one would go on to attempt to extend this analysis to several different fields within the country, and also indicate that there were no other (or only a few) areas of endeavor in Country X that were under-supplied with legal rules and actions. If these things could be in fact supported – a difficult but not impossible task – the claim that America indeed has too much law would be considerably more convincing. More fundamentally, it would “make sense” in terms of being an assertion whose practical implications would be evident, and which would be subject to disproof.

²⁰ Howard’s advocacy organization, Common Good, generated a report on the law in educational contexts, see Jean Johnson & Ann Duffett, *I’m Calling My Lawyer: How Litigation, Due Process and Other Regulatory Requirements are Affecting Public Education* (2003), available at www.publicagenda.org. This study essentially showed that a good many principals and teachers were unhappy with the risk of litigation and burdens of compliance, but what the report did not address is the effect on educational outcomes, good or bad (and related goods such as the prevention of abuse). Cf. Perry A. Zirkel, *Paralyzing Fear? Avoiding Distorted Assessments of the Effect of Law on Education*, 35 J. L & EDUC. 461, 495 and *passim* (harshly attacking this study for being wholly based on perceptions, among numerous other alleged flaws). Neither Zirkel nor Common Good’s study actually address the issue in terms of the goals of the educational process; it seems apparent from the tenor of Zirkel’s critique that a focus on outcomes would have presented a case for reform that would have been more difficult to rebut.

²¹ The evidence on this point, as a general matter, seems to be ambiguous. See, e.g., Gary T. Schwartz, *Reality in the Economic Analysis of Tort Law: Does Tort Law Really Deter*, 42 UCLA L. Rev. 377, 402 (1994) (finding that responses to malpractice include positive as well as useless or counterproductive defensive medicine). It is worth pausing to note that Howard often links our increased health care expenses to defensive medicine and litigation costs (p. 77), tying the hypothesized inefficiencies of the legal and medical sectors to one another. So it is all the more puzzling and frustrating that he makes so little effort to address this material.

Despite his unwillingness to engage empirically, Howard understands this, which is why, one supposes, his books are organized to delve into a variety of fields like education, playground safety, and employment discrimination, etc., rather than simply focusing on traditional targets of tort reform like medical malpractice and product liability. But in his coverage of these areas, he rarely goes beyond attempting to show that (1) there has been an increase in legal influence, (2) it has produced changes in practice, which (3) have upset some people. Even granting that Howard succeeds in these showings (holding him to the charitable standard appropriate for a popular book), they are insufficient, because they fail to really grapple with either the substantive benefits or the costs – except in the limited sense of the money and hassle associated with lawsuits and compliance – involved in this new legalism. Putting the argument in these terms would be hard work, but if tested in this way and supported, the case for reform would be immensely strengthened in the eyes of people in general, and especially to those who care most passionately about this area of the law.

Of course, it also exposes an argument built around increased legal cost to a more fundamental refutation based on real benefits. This is illustrated by Benjamin Barton’s analysis of the claims of Howard and others regarding playground design.²² Barton found that indeed contemporary liability concerns and new regulatory standards (from the Consumer Product Safety Commission) had instituted a profound change, and “killed the traditional playground.”²³ However, Barton argues that this process had the salutary effect of prompting manufacturers to redesign equipment, making them not only safer but more amusing, attractive and appropriate for child development.²⁴ That is, according to Barton, “more law” in the area of playgrounds has resulted (partly intentionally and partly serendipitously) in better playgrounds, “better” being determined in the substantive goals of playgrounds: the greater enjoyment and physical development of young children, with a minimized but not wholly eliminated risk of accidents.²⁵

²² Benjamin H. Barton, *Tort Reform, Innovation, and Playground Design*, 58 FLA. L. REV. 265, 290 (2006). Barton focused on Howard’s claims in his second book, *THE COLLAPSE OF THE COMMON GOOD*, at 3-4, but Howard reiterates these in *LIFE WITHOUT LAWYERS*, using the same signal example of the removal of a beloved double slide in Oolagah, Oklahoma in the face of liability concerns (p. 12).

²³ Barton, *supra* note 22 at 268.

²⁴ *Id.* at 290.

²⁵ *See also id.* at 300, discussing a minority of playgrounds that simply replace standard equipment with safer but more boring equipment, and indicating that if this had been substantive result, the policy conclusion would also change, stating “[i]f this is what had happened in playgrounds across America, I probably would agree with the tort reformers.”

This case study shows the advantages of empiricism, in that it supports Howard's claim that law and lawyers have been an engine of social disruption and economic cost when it comes to playgrounds. And even though Barton goes on to claim compensating social value accompanied these changes, making them on the whole beneficial, this surely advances the debate to a more sophisticated level.

Howard might well respond that Barton passes over rather lightly the added costs of replacing all these playgrounds, done by junking previous and otherwise usable equipment with what are obviously far more expensive pieces of "compliant" playground furniture. Some of this new equipment costs over a \$100,000,²⁶ a rather serious difference from the few hundred dollars one might pay for a swing set or a seesaw. Further, one might question whether every place in the country has the same level of increased safety consciousness (to which Barton attributes much of the change),²⁷ and thus should be compelled by the tort system to make the same calculus of costs, risk and safety. If some places have different priorities for public spending, it might be argued that this should be reflected in their (within limits) continuing to use the cheaper and more traditional playgrounds. These sorts of hypothetical rejoinders – which could be backed up empirically, but which are far from my purpose to develop here – might serve as the next phase of a debate on this topic.

Perhaps the cynical view that one can prove anything with statistics is true. As a good advocate with a cynical streak, though, the appropriate response would seem to be to go ahead and prove one's case with favorable statistics (if any are available and seem reasonably valid) and thereby compel one's opponents to rebut this with numbers of their own, in the fashion of the Brandeis brief. At the very least, this argumentative strategy might have the virtue of sharpening the debate and stimulating new research directed toward resolving it. But Howard instead has chosen not to make the empirical case at all. In the next Part, I consider whether there might be an empirical case waiting to be made.

²⁶ Found from a review of playsets from Game Time, a leading manufacturer, at www.gametime.com; for instance, the "Access Plus" model for 2-5 year olds, is a good deal nicer than what I grew up with, but costs \$115,224.

²⁷ Cf. Barton, *supra* note 22, at 299 ("Most notably, changes in societal mores and psychology have driven most of the reforms. People, especially parents, are simply much more safety conscious these days."). One could query whether this changed consciousness is true as to all people everywhere to the same degree. Nor is it likely that social norms are consistent in this area; indeed the positive reaction to Howard's complaints suggests they are not. In Part III, *infra*, I discuss further this variation and its possible significance for the legal reform project.

II. Can a Million American Lawyers Be Wrong?

As of the end of 2006, there were 1,130,134 lawyers active and resident in the 50 states or the District of Columbia.²⁸ That's a lawyer for every 266 residents – old, young, or in-between.²⁹ Two decades earlier, during significant academic debate on whether there were “too many lawyers,” there was one for every 322.³⁰ This seems like a lot of lawyers: it is more than America used to have, relatively and of course, in absolute numbers. In particular urban areas where legal work is concentrated, the increase in the relative number of lawyers is likely to lead to an even more noticeable density. (So it might well seem to somebody living in Washington D.C. – lawyer/population ratio of 1:13 – or in Manhattan, that lawyers are indeed now everywhere). But is this number of lawyers too many?

Even though Howard never phrases the question quite in this way, his concerns inevitably tend to center on this question, for, if one reduces the amount of mental and social effort devoted to legalism – as his arguments intend – the demand for legal work will inevitably fall. Howard's goal is to make Americans need lawyers less; for fewer sorts of things, less often, and when used, for a shorter period of time. It is hard to see how this vision, if actually implemented, would not end up impacting billable hours deleteriously, and as a consequence reducing lawyer income or lawyer numbers. The brutal truth about the macroeconomics of a service sector is that reducing its overall economic weight, and achieving cost savings, generally implies there will be fewer service providers, or that those providing the services will make less money, or both.³¹

²⁸ American Bar Association, *National Lawyer Population by State, 2007*, not including Puerto Rico, or U.S. territories.

²⁹ Estimate of the American population is taken from the July 1, 2007 column (not including Puerto Rico) of Table 1: Annual Estimates of the Resident Population for the United States, Regions, States, and Puerto Rico: April 1, 2000 to July 1, 2008 Population Division, U.S. Census Bureau, *NST-EST2008-01* available at <http://www.census.gov/popest/states/NST-ann-est.html>.

³⁰ Richard Sander & E. Douglass Williams, *Why Are There So Many Lawyers? Perspectives on a Turbulent Market*, 14 *LAW & SOC. INQUIRY* 431, 433 (1989).

³¹ The one exception to this would be if some lawyers were redirected from their current work into other potential work that would not conflict with Howard's reform agenda, and which is currently not being done, despite the high supply of legal providers. The most plausible source for this new work would be the American poor, whose legal needs go unmet due to costs. In order to make it cost effective for lawyers to meet these needs, however, the current income they derive would have to go down substantially, and subsidies for such work would have increase. See Deborah L. Rhode, *Too Much Law, Too Little Justice: Too Much Rhetoric, Too Little Reform*, 11 *GEO. J. LEGAL ETHICS* 989, 998 (1998) (discussing evidence for unmet needs in the midst of lawyer growth). The end result of this shift is likely to be, on net, lower lawyer income, when the clients who are served have less capacity to pay.

During the initial round of debate about excess lawyering two decades ago, Magee attempted to assert that there was an optimum number of lawyers, and moreover, that the United States was 30% above this level.³² Although this view was extremely controversial, even Magee's harshest critics acknowledged that conceptually the idea of an optimum number might have some promise, no matter how dubious the evidence is for any particular conclusion on this, given the paucity of evidence and analytical tools available.³³ In the rest of this Part, I attempt to limn the outlines of an answer to a rather reductive form of the question I take Howard to be posing – is the optimum number of American lawyers less than 1,100,000? In order to answer that securely we would have to specify what the “right” number “really” is, and we are very far from having the ability to supply this. Nonetheless, without attempting the vaulting ambition of giving a precise number, there does seem to be something one can say along these lines, at least when it is understood that the “optimum number of lawyers” is a loose (and occasionally misleading)³⁴ way of discussing the right amount of legal input an efficient economy would incorporate into the myriad relationships and interactions that constitute its operation.

Zero lawyers is too low a number: no modern society is without a substantial number of legal professionals, because no society is without problems that require professional legal attention. Although comparative data on the number of lawyers is subject to many caveats, it seems to have improved, or at least become more widely available in the last decade.³⁵ The main difficulty of comparison is that the role of what are labeled as “lawyers” in the economic sector of “legal services” (as we understand those in the United States) varies from legal system to legal

³² Stephen P. Magee, *The Optimum Number of Lawyers: A Reply to Epp*, 17 LAW & SOC. INQUIRY 667 (1992).

³³ Marc Galanter, *News from Nowhere: The Debased Debate on Civil Justice*, 71 DENV. U. L. REV. 77, 82 (1993) (“... the view has an intuitive plausibility: surely if all Americans were lawyers and did nothing else, our economy would have problems. Magee's leap to the conclusion that there are, in fact, too many lawyers in the United States is a different matter.”)

³⁴ Its most misleading aspect would be to mistake effect for cause and simply suppose that reducing lawyer numbers – perhaps by making law school or the bar exam more difficult barriers to entry into the profession – would reduce the mental and financial cost of law to the rest of the population. It would certainly price yet more people out of the system, preventing them from getting the benefits they were seeking from legal advice, and make it more costly for those using legal services. Getting rid of lawyers only gets rid of legal problems if lawyers themselves are responsible for stimulating their own demand, and there is not a strong theory this accounts for most of client costs. *But see* Sander & Williams, *supra* note 30, at 471-473 for an admittedly “highly speculative” argument that supply-driven demand could have some role in the legal market, which might not follow standard economic patterns.

³⁵ For previous tables of numbers, *see* Ray August, *The Mythical Kingdom of Lawyers*, 78-SEP A.B.A. J. 72, 73 (1992); Marc Galanter, *Pick a Number, Any Number*. 14 LEGAL TIMES, No. 39, 26 (1992). It continues to be the case, as Galanter maintained, that “Counting lawyers comparatively is a daunting undertaking, plagued by poor data and a bushel of apples-and-oranges problems.”

system.³⁶ In some, various other functionaries (such as notaries, for instance) or professionals within their sphere of competence (accountants, for example) will generate legal advice, drafting of legal documents, and other matters that we generally reserve for lawyers. This could be largely overcome by directly comparing the amount of Gross Domestic Product (GDP) devoted to legal matters by different advanced economies. However, systematic data of this sort is not generally collected for law in the way that it is for health care; below, I briefly discuss the limited information that it is available along these lines. In Table 1, I have confined myself to lawyers in the countries of the Organization for Economic Cooperation and Development (OECD),³⁷ which as the more developed commercial economies, are likely to be more comparable.

³⁶ This problem is particularly acute in the case of Japan where formal membership in the bar is highly restricted and many others with legal training provide services including as in-house counsel. See, e.g. August, *The Mythical Kingdom of Lawyers*, *supra*, note 33.

³⁷ Unless otherwise noted, the number of lawyers is taken from the Council of Bar and Law Societies of Europe, *Number of Lawyers in CCBE Member Bars 2008*, available at http://www.ccbe.org/fileadmin/user_upload/NTCdocument/Table_of_Lawyers_in_1_1241426399.pdf. This source is useful, but clearly requires caution. The figure given there for the Republic of Ireland (2,008), for instance, was clearly too low, and it is likely certain others, such as Finland, are also substantially underreported. Cf. <http://elixir.bham.ac.uk/Country%20information/Finland/frameset.htm>. For all statistics, I have estimated as far as possible the numbers for resident and active members of the bar in order to more closely approximate the American Bar Association figures. For Australia, the estimate is from the Law Council of Australia, available at http://www.lawcouncil.asn.au/about/about_home.cfm. For Canada, see *2005 Law Societies Statistics*, available at <http://www.flsc.ca/en/lawSocieties/statisticsLinks.asp>. For Ireland, see the Law Society of Ireland, *2007/2008 Annual Report*, at 20, available at <http://www.lawsociety.ie/displayCDAContent.aspx?node=493&groupID=493&code=About>, together with information on Irish barristers, available at <http://www.lawlibrary.ie/ViewDoc.asp?fn=/documents/aboutus/irishbar.asp&CatID=1&m=a>. For Japan, see Japan Federation of Bar Associations, ed., BENGOSHI HAKUSHO: 2006 NENPAN [LAWYER WHITE PAPER: 2006 EDITION] at 9, cited in Bruce E. Aronson, *The Brave New World of Lawyers in Japan*, 21 COLUMN J. ASIAN L. 45, 48 and n.7 (2007). For South Korea, see Bae Hyun-jung, *Lawyers Not Exempt from Job Crisis*, THE KOREA HERALD, May 12, 2009 (reporting statistics from the Korean Bar Association). For the United Kingdom, see IFSL Research, *Legal Services 2009*, at 9-10, available at <http://www.ifsl.org.uk/output/ReportItem.aspx?NewsID=87>. For the United States, see *supra* note 28.

Table 1. Lawyers Around the World Compared to the United States

Country	Lawyers	Population ³⁸	Persons/Lawyer	% of U.S.
Australia	56,000	21,262,641	380	70.21%
Austria	4,234	8,210,281	1,939	13.75%
Belgium	6,727	10,414,336	1,548	17.22%
Canada	74,447	33,487,208	450	59.27%
Czech Rep.	7,729	10,211,904	1,321	20.18%
Denmark	4,901	5,500,510	1,122	23.75%
Finland	1,761	5,250,275	2,981	8.94%
France	45,686	64,420,073	1,410	18.91%
Germany	138,679	82,329,758	594	44.91%
Greece	36,000	10,737,428	298	89.38%
Hungary	9,717	9,905,596	1,019	26.15%
Iceland	713	306,694	430	61.98%
Ireland	10,207	4,203,200	412	64.74%
Italy	121,380	58,126,212	479	55.67%
Japan	22,059	127,078,679	5,761	4.63%
South Korea	9,516	48,508,972	5,098	5.23%
Netherlands	14,251	16,715,999	1,173	22.73%
Norway	5,390	4,660,539	865	30.83%
Poland	22,545	38,482,919	1,707	15.62%
Portugal	12,617	10,707,924	849	31.41%
Slovak Rep.	4,302	5,463,046	1,270	20.99%
Spain	114,143	40,525,002	355	75.09%
Sweden	4,415	9,059,651	2,052	12.99%
Switzerland	7,710	7,604,467	986	27.03%
Turkey	55,176	76,805,524	1,392	19.15%
United Kingdom	161,005	61,113,205	380	70.24%
United States	1,130,134	301,290,332	267	100.00%

A perusal of Table 1 demonstrates some interesting patterns. First of all, there is obviously great variation. Despite the differences in system, it is quite plausible to, at least as an initial matter, imagine that there is greater amount of “life without lawyers” in certain countries

³⁸ All non-U.S. population figures taken from the U. S. Bureau of the Census International Data Base, *available at* <http://www.census.gov/ipc/www/idb/>. For the United States, see *supra* note 29.

other than the United States. However, this is not nearly so extreme a differential as many people have presented in previous work, where it has been supposed that America has “three times” the number of lawyers per capita of any other place.³⁹ To be sure there has been substantial increase in lawyers per capita in other nations, so these statements might have had more truth at the time they were written. But they are certainly not accurate today, being off roughly by a factor of two; America has about one and a half the number of lawyers as are present in other common law countries, and certain Mediterranean countries come even closer. Second, the common law countries are in the higher end of the distribution and except for the United States, operate within a fairly small range, with 380-450 persons per lawyer. Third, the United States still does have more lawyers than any place else, including the common law nations, and because the United States is a large country, its absolute numbers are quite impressive.

We can ask a less demanding question of this data than the usual one (the one Howard seems to assume the answer to): does the United States have too many lawyers? Instead, we can inquire whether the United States *might* have too many lawyers. There is no reason to believe that all of the above countries have (or don't have) precisely the right number of lawyers, because there is no powerful quantitative theory that tells us how to calculate this. When Magee proposed his theory of optimum numbers, he had an objective criterion based on the growth of GDP and a hypothesis that lawyer excess in a country retarded this measure of economic performance.⁴⁰ However, this hypothesis was widely seen as having not been supported, or at most showing only a weak effect.⁴¹

In the general spirit of inquiry, I used OECD data to take a look at the simple correlation between the lawyer numbers and growth rates over the last thirty years (1973-2006).⁴² The results are not very promising for using this method: for instance, the long term growth rates of Japan are only a little better than those of the U.S. when the whole period is considered. Overall,

³⁹ See Kenneth Lasson, *Lawyering Askew: Excesses in Pursuit of Fees and Justice*, 74 B.U. L. REV. 723, 731 (1994) (“The United States has nearly three times as many lawyers per capita as any other advanced industrial society -- including England, our closest jurisprudential counterpart.”); Sander & Williams, *supra* note 30, at 432 (same).

⁴⁰ See Magee, *The Optimum Number of Lawyers*, *supra* note 32.

⁴¹ See Frank B. Cross, *Lawyers, the Economy, and Society*, 35 AM. BUS. L.J. 477, 491 (1998)

⁴² OECD, *Levels of GDP per Capita: Catch-up and convergence in OECD income levels relative to the United States*, available at www.oecd.org/statistics/productivity

there was a slight negative correlation using the numbers above, but it was entirely driven by the presence of South Korea (which has had extremely high growth and a low number of formal members of the bar).⁴³ To some extent, a default presumption might be that the free market should usually provide the right number of lawyers for the amount of legal work, but for Howard and others, the true complaint about lawyer numbers is about a perceived inefficient and excessive *demand* for legal services, and whether the market works anything like perfectly in providing this at the right level seems harder to assess,⁴⁴ especially if we lack a benchmark based on its effects on GDP.

Japan is an interesting case study in this regard, because it has the lowest number of lawyers per capita in the Table, and going simply on this, presents the opposite problem to the one that might be present in the United States. That is, if any place has too few lawyers, it might be Japan, and that is in fact what the Japanese have determined, having made systematic efforts to increase their number over the last decade or so.⁴⁵ The goals of this increase are partly as a response to greater demand, but are also designed to stimulate that demand and undergird a shift to greater formality in business contracting as businesses have moved to a wider range of domestic and international partners.⁴⁶ As well, there is a new emphasis on helping individuals, especially in underserved areas, secure their rights and resolve their problems, and a general shift toward having people resolve issues on their own, rather than through the use of state administrative processes.⁴⁷

⁴³ This is easily replicable, using the figures above and the data in note 42, *supra*, and produces a negative correlation, $r = -7.6\%$ between the current percentage of the U.S. per capita rate (as a proxy of how “lawyer-up” a particular country is, and presumably, has been, relative to the U.S.), and the long-term difference in growth rates between the country and the U.S. If Korea is removed, the correlation actually becomes a positive one, of 18%. But, if the other “growth” outlier – Ireland – is removed, the correlation goes to 4.5% or close to no correlation at all, which is probably the safest conclusion one could draw. Naturally, a more subtle and sophisticated analysis could well disclose an effect, but the macroeconomic hazards of lawyers are not, at least, open and obvious ones.

⁴⁴ See Robert C. Clark, *Why So Many Lawyers? Are They Good or Bad?*, 61 *FORDHAM L. REV.* 275, 300-301 (1992) (discussing whether market imperfections account for excess demand and concluding this could be a factor, but not likely the dominant one).

⁴⁵ Mayumi Saegusa, *Why the Japanese Law School System Was Established: Co-Optation as a Defensive Tactic in the Face of Global Pressures*, 34 *LAW & SOC. INQUIRY* 365, 373 (2009). See also Tom Ginsburg and Glenn Hoetker, *The Unreluctant Litigant? An Empirical Analysis of Japan’s Turn to Litigation*, 35 *J. L. STUD.*, 31, 50 (2006) (showing increases in the bar and procedural changes to make litigation easier had the intended effect of stimulating more lawsuits).

⁴⁶ See Saegusa, *supra* note 45, at 373-377.

⁴⁷ See *id.*

The implications of the Japanese experience cut in two directions for Howard's argument. On the one hand, it does show a society might not (in its own terms and according to its own contemporary values) get it "right" when it comes to the amount of law and the number of lawyers. Moreover, it shows that this relationship between a society and legalism can be changed by deliberate policy, despite commitment to the status quo by elements of the legal profession, when there is consensus among the government, business and public that this needs to occur. These are perhaps rather minor points, but absolutely crucial ones for Howard's enterprise, since if there were something like a perfect market that always gave everyone all the law they needed (and no more), or if there was simply no way to alter legal demand, his effort at reform would become largely meaningless. However, it seems to be possible that some place could have too many lawyers, as well as too few. Given that the United States remains the highest per-capita user of legal professionals, if any place has too many lawyers, we would be the first country one might suspect as somewhere this could be true. And, if this could be shown to be true – which it certainly has not, and I do not claim to do so here – there are likely responses that could bring it more line with the levels people desire.

At the same time, it is notable the Japanese – and Japanese clients and potential clients, rather than lawyers themselves – were wanting, *pace* Howard, to have "life *with* lawyers" and are seeking to liberate themselves from "not enough law." This shows fairly clearly the benefits that law can bring, even if the new amount of law demanded would remain far below that which is demanded by the American system. In addition, given the substantive goals of Japanese legal reform, there is an implication that any legal reform in the United States in the opposite direction would have correspondingly opposite effects on the American population: there would have to be greater informality in business relationships, some greater percentage of people, particularly those currently underserved, would not have their problems professionally addressed, and if issues are to be resolved at all, there will necessarily be greater recourse to administrative agencies to handle them. There might be cost-efficiencies involved in making a shift along these lines, but to say the least, these are not uncomplicatedly good things, and they might be fearsomely hard to put in place.

What turns out to be the “optimum” is almost certainly – within some substantial range – a question of values; certain people (like Howard, seemingly) are going to prefer that relationships between people be governed by nonlegal norms of authority and trust, where even business relations are often carried forward on the basis of a handshake and reputation.⁴⁸ If people abuse that authority or trust, we would primarily respond with nonlegal sanctions of withdrawing our trust from them, and relieving them of their authority or our business. Others prefer a society where relationships are standardized and “objective”, and social and economic roles and responsibilities are enforceable through the courts and their remedies.⁴⁹ This is to say nothing of the values conflict inherent in deciding whether the courts or administrative agencies are more competent to resolve disputes over rights and compensation, or whether people have too many or too few legally enforceable rights. So debates about the proper amount of legalism are, to some extent, intractable and interminable, and in Part III, I revisit the issue of rival legal cultures and consider further its implications.

To partially overcome these disputes,⁵⁰ an objective metric of the value of the different alternatives would be needed. This was the purpose of the proposals surrounding GDP growth – a metric on the largest possible scale, summarizing performance in many different areas of the economy, supposedly a consequence in part of the amount of social resources devoted to law. As this does not seem likely to be very informative, the next step along these lines would have to become more fine-grained and look at, as suggested earlier, the performance of different areas of the economy and society, with appropriate criteria for each. If outcomes could be tied theoretically and empirically to different legal regimes – in this context, the amount of legalism, it would at least shift the terms of the debate, even if it could not settle it.

We can perhaps go a little bit farther at the macro level than simply saying there might be an excess lawyer problem in America, and ask something about what the potential scale of such a problem could be. In order to remove a couple of sources of uncertainty in making this

⁴⁸ See Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55, 58-61 (1963).

⁴⁹ See Cross, *Law and Trust*, *supra* note 11, at 1531- 1542, where he argues against small-scale trust as inherently parochial and exclusionary.

⁵⁰ It would only partially overcome the conflict, because not everyone would agree on the proper criterion or set of criteria, i.e. a welfare-based measure such as economic performance or a measure more oriented to equity and fairness.

comparison, first set aside those countries operating under divergent systems and focus solely on common law countries. Even if there is a “revolution” in American law, it is not going to convert the United States into a civil law nation, although it revealing that Howard shows a strong affection for the Code of Justinian and the Napoleonic Code, suggesting that “Washington needs a dramatic legal overhaul on the same order as these historic reforms” (p. 176). Second, in order to really look at the social resources expended, we can use GDP spent on legal services which, with some effort, can be obtained for most of this limited group.⁵¹

Table 2. *Economic Weight of Legal Services in the Common-Law World*

Country	GDP ⁵²	Legal Services	% of GDP	Date
Australia ⁵³	A\$ 921747	A\$10900	1.18%	2007
Canada ⁵⁴	C\$1225825	C\$13532	1.10%	2008
United Kingdom ⁵⁵	£1229196	£16600	1.35%	2006
United States ⁵⁶	\$13741600	\$198400	1.44%	2007

The comparison in Table 2 might well surprise legal reformers with the relatively small range among the common-law nations in the amount spent on legal services. The United States

⁵¹ Because there is no standard international definition of legal services, definitions vary from country to country, so these data should be approached with caution. This is an imperfect measure because it generally does not capture the in-house legal work or compliance costs that occur within industries, among other problems. See Sander & Williams, *supra* note 30, at 435. For the U.K. data, see IFSL Research, *supra* note 37, at 10 (noting a similar exclusion from British statistics of in-house work, which is credited to the sector of the lawyer’s employer).

⁵² GDP and expenditure on legal services is reported in the local currency in millions (taken from the original data sources). The absolute numbers can be converted to U.S. dollars in the same year by dividing the Australian figures by 1.20, the Canadian figures by 1.07 and the British figures by .54 (using the average foreign exchange rates for the year of data used).

⁵³ For Australia, see Australian Bureau of Statistics, *Report 8667.0 - Legal Services, Australia, 2007-08 and Report 1301.0 - Year Book Australia, 2008*, available at <http://www.abs.gov.au/AUSSTATS/>

⁵⁴ For Canada, see Statistics Canada, *Gross domestic product at basic prices, finance and services*, available at <http://www40.statcan.gc.ca/101/cst01/fin06-eng.htm>. The Canadian figure is an overestimate, because Canada includes accounting and tax preparation services in this total, along with legal services. One way to roughly estimate the difference is to assume that legal services constitute roughly the same percentage of “professional, scientific, and technical services” – which do have a similar definition in the U.S. and Canadian data. The more inclusive Canadian subcategory is 23.1% of such services. The smaller U.S. subcategory, including only legal services, is 19.7% of a similar group of services. Making this adjustment would estimate legal services as .94% of the Canadian economy.

⁵⁵ Figure for legal services in millions of pounds from IFSL Research, *Legal Services 2009*, *supra* note 37, at 2 (where a 1.4% contribution is reported; I used the official GDP figures to yield 1.35%). See Office for National Statistics, *United Kingdom National Accounts: The Blue Book, 2008 ed.*, at 23 (using “headline GDP” the chained volume measure) available at http://www.statistics.gov.uk/downloads/theme_economy/BB08.pdf

⁵⁶ Bureau of Economic Analysis, U.S. Department of Commerce, *Gross Domestic Product By Industry Accounts*

again stands out as having the most expensive legal system, but the latest figures from the United Kingdom are now 94% of the current American level, in terms relative to the overall size of the two nations' economies. In part, however, this is due to the much heavier involvement of U.K. lawyers in international work and the net export of British legal services. Although exported lawyering is counted as part of GDP, it is not likely to accurately track the concerns of Howard and other critics, who are focused on how much the domestic economy must pay to support its own law and lawyers. In order to determine "how much law" there is within a society, it is more appropriate to separate this out. For the United Kingdom, this involves taking out its net exports, 2.46 billion pounds,⁵⁷ and removing the net legal services exports of the United States, 4.86 billion dollars,⁵⁸ to yield comparable measures of domestic spending on law. The United Kingdom then has a GDP expenditure of 1.15% as compared to American spending of 1.41%.

Assuming that the United Kingdom (a system for which Howard occasionally voices approval) does not have "too much law" and spends 1.15% of GDP in comparison with our 1.41%, this helps frame and narrow the question to the following: What, if anything, do we get for the extra quarter of a percentage point of Gross Domestic Product? This is a non-trivial amount, involving between one fifth and one sixth of the money spent on law in the country, and it deserves a justification, or at least an explanation. It is also a first approximation of what one might call the American difference – what it costs to have an American system of law as opposed to some other plausible one.

It was not so very long ago that legal services in America consumed no more than they do in Britain today. It was the large scale change in this level that motivated the flurry of scholarship two decades ago on why there were (now) so many lawyers.⁵⁹ As shown in the accompanying figure, the amount of our economy devoted to legal matters did in fact undergo a meteoric rise during the 1980's, as Sander and Williams discussed at the time,⁶⁰ rising from

⁵⁷ See IFSL Research, *supra* note 37, at 11. This is an astounding 15% of the economic value generated by legal work in the U.K., and in dollar figures, close to the absolute amount of net exports of the United States.

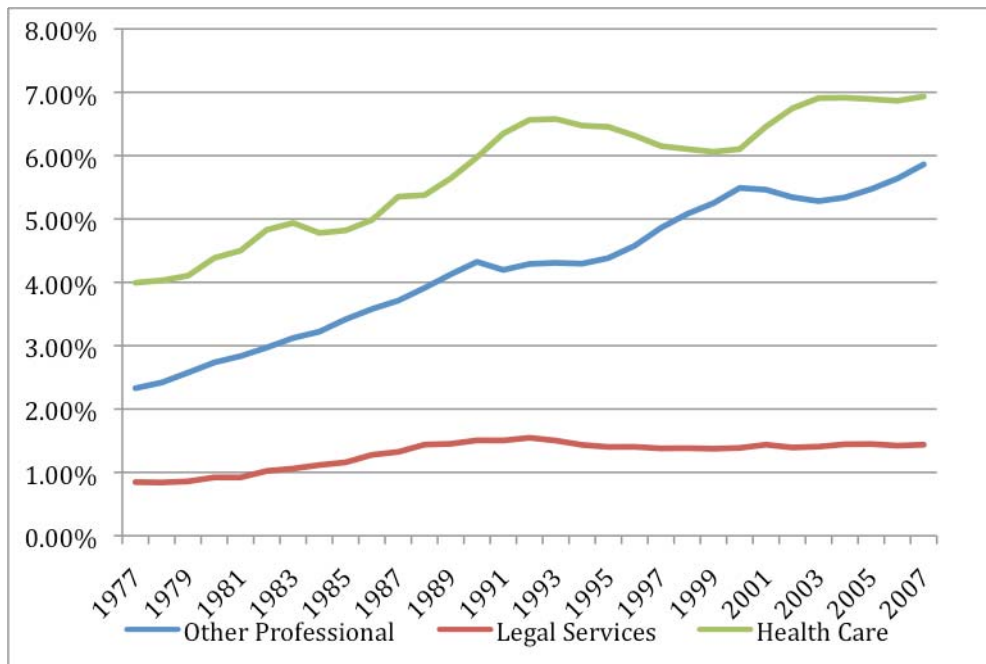
⁵⁸ Bureau of Economic Analysis, *Table 1, Trade in Services, 1992-2007*, available at www.bea.gov/international/intlserv.htm.

⁵⁹ Sander & Williams, *supra* note 30; Clark, *supra* note 44.

⁶⁰ Sander & Williams, *supra* note 30, at 431.

.85% of GDP to 1.44%, an increase of 70%, over a twelve year period (1977-1988).⁶¹ This was similar, however, to an apparent general shift to a service economy that reflected increased spending on other professional and technical services, which rose 68% during the same period. Health care services spending rose at about half that rate during this time (but unlike law, have kept rising and now surpassed law in terms of increase beyond its baseline.). So it is not surprising that a rapid change in legal cost and the accompanying increase in lawyers created concerns that were reflected in the push for various reforms during the early 1990s.

Figure 1: Share of GDP by Different Service Sectors⁶²



But the macroeconomic weight of legal services has essentially plateaued for the last twenty years, basically growing with the overall level economy, even while other sorts of professional services have continued to rise very substantially. Sander and Williams, writing in 1989, were reporting on a transformative event that had already largely concluded. The 2007 level of 1.44% (1.41% if one excludes exports) is precisely what it was in 1988, and about one-

⁶¹Marc Galanter, *Law Abounding: Legalisation Around the North Atlantic*, 55 THE MOD. L. REV. 1, 5 & n. 38 (1992) (noting 1960 GDP percentage as .59, which rose by 1985 up to 1.17 percent).

⁶² Bureau of Economic Analysis, Department of Commerce, *Gross Domestic Product By Industry Accounts*. “Other Professional” is derived from the BEA’s “Professional, scientific, and technical services”, subtracting Legal Services” which has its own subcategory. “Health Care” is the BEA’s “Health Care and Social Assistance” category.

tenth lower than law's "peak year" of 1992, when law and lawyers took up 1.55% of the economy, and when Dean Clark concluded "[t]he growth of law and lawyers in the last generation is real, dramatic, and pervasive."⁶³ GDP estimates may not take into account compensation paid to plaintiffs, or all the various "compliance costs" associated with responding to various legal risks. Nevertheless, to the extent these risks have grown, they should be reflected in a change to expenditure on the legal services to mitigate them, and for a long time, those expenditures have simply been flat when measured against the whole economy.

The inevitable conclusion is that Howard's critique is dated in certain important respects; he could have been written his book fifteen years ago, as indeed, he basically did.⁶⁴ This doesn't invalidate his points – a restructuring of the relationship between law and society took place in the United States in the 1970s and 1980s (likely precipitated by changes in legal doctrine that began somewhat earlier),⁶⁵ and this change was widely discussed and debated at that time. As Galanter explained (to an English audience), "the legal world has become larger and that it occupies or penetrates more of our social space."⁶⁶ The three decades after 1960 generated a "legalization" of whole spheres of life not previously "thought to be in need of close articulation with legal principles" like schools, other government institutions, health care and private employment relationships, creating both more lawsuits in these areas and great amounts of law-like administrative rule-making and decision-making.⁶⁷ This plethora of new and more pervasive law was complex and variably applied, leading to more rather than less certainty in those it presumably sought to guide and regulate in ever greater detail.⁶⁸ In other words, the fundamental concerns and complaints that animate *Life Without Lawyers* could be comfortably articulated by someone otherwise skeptical of legal reform a decade and a half ago.

⁶³ Clark, *supra* note 44, at 301.

⁶⁴ THE DEATH OF COMMON SENSE (1995). See also Stuart Taylor Jr., *Too Much Law Guarantees Unfairness*, NAT. J., December 20, 2008 (pointing out that LIFE WITHOUT LAWYERS essentially reprises the theme of the earlier book).

⁶⁵ In Kagan's recent account, the doctrinal changes that have expanded liability and drawn most of the ire of the tort reformers began "in the 1950s but especially in the 1960s and 1970s." Robert A. Kagan, *Do Conservative Tort Tales Matter?*, 31 LAW & SOC. INQUIRY 711, 715 (2006).

⁶⁶ Galanter, *Law Abounding*, *supra* note 61, at 2. Galanter presents a dense web of data and argument documenting the changes that occurred in American law, and to some extent elsewhere in the common law world, in the period 1960-1990.

⁶⁷ *Id.* at 13.

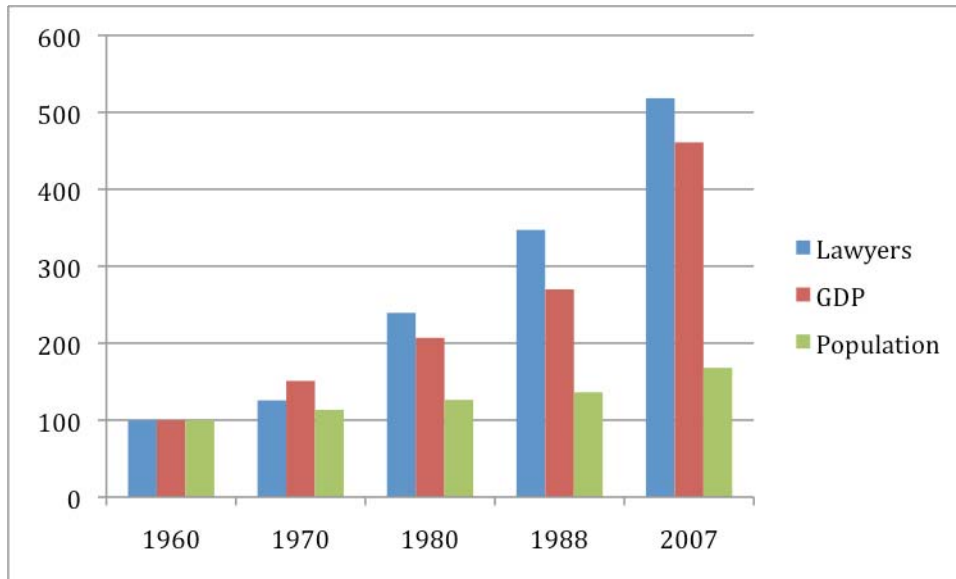
⁶⁸ See *id.* at 19 ("most observers would affirm that American law is far more uncertain and complex").

Given the ambivalence expressed contemporaneously during the “takeoff phase” of America’s new legalism, it is not surprising that many people have never reconciled themselves to these changes. Howard, as one of them, from his first book in 1994 to the current one in 2009, has been trying to explicate and mitigate the negative consequences of the shift (surely his “revolution” would be largely a counter-revolution). But the historical data undercut the urgency with which Howard makes his recommendations. “History tells us that social change occurs only in times of crisis[,]”⁶⁹ he writes (p. 199). “[W]e’re past due” for a big change, because “Americans are fed up with overbearing laws and legal threats.” (Id.) Grant that many people continue to be unhappy with the new (or newish) expanded role for law in society, but that role largely stabilized during the period of Howard’s long critique. This has no doubt meant that Howard himself has become rather frustrated by a lack of *progress* for his program,⁷⁰ but it has also attenuated any possible sense of “crisis” in the general population, for which Howard adduces no evidence.⁷¹

⁶⁹ Aside from being generally hyperbolic, this postulate appears to be refuted by the very changes Howard is most concerned with. With regard to tort law, the expansion of liability, in Schwartz’s persuasive account, occurred beginning in the late 1950s (not otherwise identified as a moment of crisis) and gradually built up steam as judges and other elements of the legal elite became increasingly comfortable with their ability, and perhaps duty, to implement rationalist and welfare-maximizing policy solutions through the mechanism of the courts. See Gary T. Schwartz, *The Beginning And The Possible End Of The Rise Of Modern American Tort Law*, 26 GA. L. REV. 601, 608-619 (1992).

⁷⁰ Kagan, *supra* note 65 at 723 (describing reformers as having failed to fundamentally reverse the changes of 1960s and 1970s, and as “nibbling at the edges” of these changes).

⁷¹ See endnotes for p.199, discussing only quotes from Kropotkin and Machiavelli. Endnotes, LIFE WITHOUT LAWYERS, at E.28, available at <http://www.philipkhoward.com/books/>. This may be a good place to note my strong objection to the practice of separating out sources from a published work and making them available only in a different location in electronic form. It is fine to have them there *as well*, and useful for following active hyperlinks if you are as curious about these matters as this reviewer. But if a writer is going to have endnotes, then quite apart from the difficulty separating them poses to critical evaluation of any of the statements in the text, if you pay \$24.95, you are, I would say, entitled to have the *whole* book.

Figure 2. Lawyers, GDP and Population as Percent of 1960 Baseline⁷²

In Figure 2, we can see more clearly the broad outlines of the change that occurred. For several decades at least, until 1960, the number of lawyers in the United States rose steadily with the population of the country: there were 782 people for each lawyer in 1880, and 823 of them in 1960⁷³ (somewhere between the proportions of contemporary Germany and Switzerland). From 1960 to 1970, the number of lawyers still tracked the increase in population more closely than the increase in economic growth (although with the hint of a possible slight acceleration). Between 1970 and 1980, there was substantial acceleration in lawyer numbers,⁷⁴ which began to rocket past the rise in GDP, and indeed corresponded to, as previously shown, legal services consuming an ever greater portion of the national wealth. The gap between the lawyer increase and the GDP increase kept widening after 1980, up to Sander and Williams' last year of 1988. In the period since then, while lawyer numbers have continued to grow, they have done so roughly in line with the growth in GDP, as one would expect from the previous figure, showing a flat line

⁷² Figures on population and lawyers up to 1988 are drawn from Sander and Williams, *supra* note 30. Statistics for 2007 are taken from American Bar Association, *supra* note 28, and the Bureau of the Census, *supra* note 29. GDP figures are from the Bureau of Economic Analysis, *supra* note 62.

⁷³ Sander and Williams, *supra* note 30, at 433(tbl.1). *See also* RICHARD ABEL, AMERICAN LAWYERS 280 (1991) (showing tracking of the population up to 1950, slight acceleration in the 1950s and 1960s and much more substantial acceleration in the 15 years thereafter).

⁷⁴ Naturally, this increase in lawyer numbers was created by a *prior* massive increase in law school enrollments in beginning in the 1960s. *See* ABEL, *supra* note 73, at 74-75. In turn, any social and economic forces that pushed American in the direction of greater legalization were presumably beginning to operate even before this.

for legal services as a percentage of GDP. Indeed, there has been a slight deceleration relative to GDP, which is closing the gap somewhat.

Until about 1970, the number of lawyers was intrinsically tied to the number of people. Individual clients were the dominant source of legal work,⁷⁵ and they had, on average, a certain rate at which they needed legal assistance. To take a simple example, each client could only die once and thus would have a maximum of one will to be probated, and thus the number of probate actions by necessity tracked population. Depending on social class, people might call in a lawyer when they purchased a home or a business, revise their wills when they married or had children, and so on through the life course. If unfortunate events – happening with a certain probability – occurred to the person, like a divorce, an accident, or a criminal accusation, lawyers might also be engaged. A more or less constant rate presumably also characterized business disputes with debtors, lenders or contractors that rose to the level where it was felt necessary to engage legal assistance. There were limited “social spheres” where lawyers were necessary, and the times they were necessary for any particular person was also limited, and changed little over the course of a century.

After 1970, the number of lawyers followed the intensity of economic activity. Lawyers became more deeply involved throughout the economy and social institutions, and a much greater range of interactions and transactions acquired an element of legal risk, inducing legal precautions as well as lawsuits. The dominant source of legal work became businesses,⁷⁶ which incorporated legal costs as a form of explicit or implicit insurance in their activities. The expansion of the law could have occurred because potential plaintiffs came to perceive a “justice” component in interactions where they had previously not done so, and used the law in order to validate this interest, having departed from a previous ethic of self-reliance and internalization of many risks to one more demanding of recompense for injury and state

⁷⁵ The share of the legal services industry purchased by individual persons was 55% in 1967. See Sander & Williams, *supra* note 30, at 441; Galanter, *Law Abounding*, *supra* note 61, at 5.

⁷⁶ By 1987, business accounted for 51% of legal services purchases (from 39%) a generation earlier. Galanter, *Law Abounding*, *supra* note 61, at 5 & n. 39.

protection.⁷⁷ It could be, in line with the declining social capital hypothesis, because interactions occur with a wider range of increasingly anonymous partners, with whom law is the necessary replacement for the trust that cannot be given to a stranger, and partly for technological reasons, these interactions with strangers occur at a greater rate.⁷⁸ Perhaps both of these explanations give part of the story – they are neither inconsistent with one another nor with the general account given by Howard, and there are no doubt other factors as well.

If the problem of “too much law” finds its root in the diffusion of law to every interaction, having made itself a component for good or ill of all exchanges, this poses a very severe problem for potential reformers. How does one go about putting this genie back into the bottle? Law’s involvement with economic activity is complex – it is far more than a straightforward extraneous cost, like a value-added tax that could simply be repealed. Over the last generation, it has integrated itself into the economy and helped structure transactions and behavior in ways that are the subject of widespread expectations and reliance, despite persistent grumbling about its costs. Even if people started relying on themselves and on their trust in others tomorrow, the laws and regulations of the last thirty years would be still be in place, and so too would the practices and habits that have built up around them. To *systemically* reduce legal costs in the current sociolegal environment would seem to require (a) either reducing the amount of interactions or type of person available for interaction – an economically disastrous course that would simply reduce GDP but do nothing to reduce legal services as a component thereof, or (b) not only restore a consensus about matters that should be handled without reference to law, but also sweep away the laws that reference these matters, the presence of which likely inhibits any re-emergence of a nonlegal alternative. When Howard writes, for instance, that we “must remake our legal structures so Americans are free again to make sense of everyday choices” (p. 18), he sometimes seems to be implying something like the latter course, which seems extraordinarily difficult on several levels, not least because it has a strong aspect of pulling oneself up by one’s bootstraps. In the next Part, I consider whether major reforms of the relation between law and society are reasonably possible, on Howard’s terms or otherwise.

⁷⁷ See LAWRENCE M. FRIEDMAN, *TOTAL JUSTICE* (1985). See also Joseph Sanders, *The Meaning of the Law Explosion: On Friedman’s Total Justice*. AM. B. FOUND. RES. J., 601, 601-615 (1987) (in part critiquing Friedman for ignoring variations in attitudes toward these legal views).

⁷⁸ See Clark, *supra* note 44, at 288- 290.

III. Legal Reform or Cultural Revolution

Plausible high-level reform is constrained by the events of the last several decades, and cannot realistically undo the fact that there will be legal dimensions of most social and economic relationships in this country, and must instead – at best – create alternative legal arrangements for those who desire to reinvent between themselves a less litigious connection more reflective of high social capital (and more conducive to its further formation). This is a modest goal when compared to a “revolution” of any kind. At least initially, it would mean “more law” (and more work for lawyers) rather than less, as parties contract out of the default system of detailed regulation and potential for civil litigation. In addition, a reform of this limited sort, relying on voluntary action by individuals, will only be possible (or cost-effective) for certain areas of activity, where it is feasible for the parties to communicate. This will leave many torts within the normal system, although the potential for interparty communication has radically increased since Huber proposed something like this twenty years ago under the rubric of “neocontractualism.”⁷⁹ There are many limitations to having parties choose their own law, legal forum, method of dispute resolution, and allocation of risk, mainly surrounding issues of limited information and relative bargaining power, and these efforts would encounter considerable opposition.⁸⁰

In addition, reform would have to leave behind any straightforward appeal of the sort Howard makes to “consensus” or getting everyone to recommit to the common good. There are distinct legal subcultures in this country, and Howard speaks for only one side of this divide. Whatever the flaws of a neocontractual approach (or on the level of the states, federalism), it acknowledges that within a diverse society, there will inevitably be some employees, some customers, some business partners, and so forth that will need the default system characterized by legalism and liability but also by objectivity and impersonality. To outright deny these people their “day in court” seems quite unattractive normatively given the expectations that have been created in this regard, and quite unlikely politically, given the economic and political interests that have been built up to support this approach. Howard’s solutions, instead of acknowledging

⁷⁹ PETER W. HUBER, *LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES* 195 (1988).

⁸⁰ See, e.g., Mark M. Hager, *Civil Compensation and Its Discontents: A Response to Huber*, 42 STAN. L. REV. 539, 577-578 (1990) (offering an extremely critical review of Huber generally, and neocontractual efforts in particular).

or making use of American diversity, are, unwisely in my view, focused on the nationwide introduction of both new norms and new laws, which inherently means that any feasible reforms are likely to be relatively minor in scope.

His overall approach to the problem of too much law is outlined in his “agenda for change” which is introduced, oddly enough, only in an appendix to the volume, and involves (1) restoring “the authority of judges to draw legal boundaries,” (2) replacing “the vocabulary of rights with the goal of balance” (3) liberating “teachers and principals from legal rules and processes” (4) restoring “responsibility to government by giving authority to identifiable officials” (5) providing “checks and balances for official decisions” in ways other than “legal proceedings by dissatisfied individuals” (6) reviving “personal accountability” (7) decentralizing “public services to the extent feasible” (8) organizing “a national civic leadership to propose a radical overhaul of government [because] Washington is paralyzed and must be recodified.” This list is not quite a miscellany, but many elements share the characteristic flaws of many of Howard’s proposals. They are rather vague, suggestive of his overarching theme without being explicitly tied together into a coherent whole, and not laid out in the detail necessary either to evaluate them as concrete policy proposals (if one is skeptical) or to carry them forward (if one intuitively understands Howard’s meaning and supports it). There may well be something to his suggestions about the bureaucracy (4, 5, and 7), but the relation between internal ossification in the executive branch and the “too much law” hypothesis is subtle and indirect. If there is a connection – probably due to the same background decline in social capital accounting for both phenomena – bureaucracy remains a separable problem, and Howard’s regular return to it distracts his focus from the more thorough analysis that ought to be applied to legalism in society (outside of government) and its potential solutions.

The books appended solutions are presented as components of a cultural renewal based on alterations in values and norms, for instance, replacing the vocabulary of rights and reviving personal accountability. As such, they might mobilize a certain level of assent, but no instructions for changing American culture are given or indeed, may be even be possible. If cultural change is to be a precondition of any legal reform, the prospect for the latter becomes quite dubious. If instead, they are what supposed to be guideposts for future legal reforms – and

I take this to be Howard's intent, then their value as leading principles needs to be assessed against the concrete proposals they are going to undergird. I can guess, based on examples through the book and Howard's complaints about the tort system, that one consequence of adopting these principles is a movement away from strict liability back toward something like contributory negligence. But why should I be compelled to guess? I understand Howard might not want his book to be thought to be "just" about a public appeal for defendant-friendly tort reform. It's not. But if a change in negligence standards is part of his meaning – and it is hard to see how this could not be true – he needs to say so, engage (even in a popular, explanatory way) the long debate on this topic, make his policy case, tie it to his broader concerns, and move forward.

Howard's most explicitly legal agenda involves the principle listed first in his "agenda," which would involve expanding judicial discretion to dismiss claims or entire complaints pretrial.⁸¹ Things may be going Howard's way as far as this goal is concerned.⁸² With the Supreme Court's recent decisions in *Iqbal*⁸³ and *Twombly*,⁸⁴ the requirements for pleading federal complaints have in effect been heightened and now require the laying out facts amounting to a "plausible" (to the judge) claim to relief; this gives judges the Howard-sought power to dismiss the more marginal (and/or creative) lawsuits. But part of discretion, of course, is that decisions will vary from judge to judge as to what is plausible, and this goes against what Howard claims to be the purpose of greater judicial authority, namely predictability of outcomes. For predictability to increase, these heightened standards would have to be applied with regularity, and whether that will occur remains to be seen.

Despite its emphasis on judicial discretion, *Life Without Lawyers* discusses pleading standards only implicitly. This contrasts with other legal reformers like Walter Olson who have made opposition to notice pleading central to their critiques of the modern plaintiff-friendly

⁸¹ See also Richard E Anderson *et al.*, *What single tort reform would have the most beneficial impact on reducing the cost of our civil justice system?* 38 BUS. INS. 18-19 (2004). Howard declared in this roundtable is that "The single most important legal reform: Restore the responsibility for judges to make rulings on who can sue for what. Today, law changes from jury to jury. People have no idea where they stand."

⁸² For Howard's own (as one might expect, highly supportive) take on recent developments, see Philip K. Howard, *Conley R.I.P.*, NEW YORK SUN, June 4, 2007.

⁸³ *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949-1950 (U.S. 2009).

⁸⁴ *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 554-555 (U.S. 2007).

system, explaining it and opposing it.⁸⁵ Howard clearly *supports* a change in pleading standards and views it as instantiating a central principle of his reform. Indeed, he would seem to go farther than just disallowing the implausible, and encourage dismissal (at some, presumably early stage) of the suit whenever the judge found the suit was not “reasonable” (p. 89).⁸⁶ And, he has written about pleading explicitly elsewhere; but not in his book, even though he went on record with his views prior to the book’s publication. The only conclusion that can be drawn from these facts is that Howard sometimes actively avoids engaging in criticizing specific legal rules, that his vagueness is at least in part a deliberate strategy.

This strategy has some short-term benefits. Anthony Lewis’s review in *The New York Review of Books*, which we have to assume will be the *bien-pensant* final word on *Life Without Lawyers*, is extraordinarily kind for a book premised on doing things like reversing the cultural and legal trends of the 1960s and limiting the right to sue. Lewis says Howard “can be forgiven for some of his hyperbole” largely because he seems to Lewis sincere and “does not come across as a stalking horse for the interests of large corporations, insurance companies and other frequent defendants.”⁸⁷ Although I would agree with this assessment, Lewis’s main evidence for it is that Howard does not endorse fee-shifting for prevailing parties, the so-called English Rule to recover attorney’s fees.

⁸⁵ See WALTER K. OLSON, *THE RULE OF LAWYERS* 7 (2003). There is an extended discussion of this in WALTER K. OLSON, *THE LITIGATION EXPLOSION*, ch. 5 (1991).

⁸⁶ Howard’s position, to the extent it can be discerned, is a self-confessedly radical one that goes well beyond pleading. See Phillip K. Howard, *‘Life Without Lawyers’: An Exchange* 56 N.Y. REV. BOOKS, no. 8 (2009). In addition to imparting a greater authority to judges for pretrial dismissal, Howard sometimes has a more specific innovation in mind. Howard’s goal seems to be to create a presumptive defense, in almost every case, that the activity in which the defendant was engaged inures to the public benefit, and that the lawsuit would interfere with this benefit. So, to take his example, (pp. 15-16), the collective benefits of people being able to swim in public parks would be tallied and create a reason against awarding liability to one injured swimmer, the consequence of liability being the closure of swimming prospectively to avoid further costs. This mainly applies in the tort context, where it goes under the usual heading of overdeterrence. See Stephen D. Sugarman, *Doing Away with Tort Law*, 73 CAL. L. REV. 558, 581 (1985) (where Sugarman also notes the application of this to malpractice liability potentially driving doctors out of medical practice). The defendant would have to make this argument, presumably, and proof of defense claims could only come, one must assume, after extensive discovery. As a consequence this sort of policy argument would be presented at trial or on summary judgment and would probably not shorten litigation, although all else equal it would produce more defense victories. To fully and fairly evaluate this idea, which is a frankly pro-defendant innovation, although motivated by public welfare, would require a more specific proposal and an understanding of how widespread this overdeterrence effect really is. However, it seems hard to equate the larger problem of legalization with the suppression of socially beneficial activity, and it is really only this latter category of tort effects that would be directly impacted by the specific version of Howard’s proposal.

⁸⁷ Lewis, *supra* note 17.

Fully compensating parties for the costs of litigation, according to Lewis, “transparently serve[s] conservative interests” because, although it “sounds fair”,⁸⁸ it would make it too risky for anybody but the wealthy to sue. It is far from clear that modern versions of the proposal for fee-shifting necessarily have this feature. The main problem with the English Rule in disincentivizing litigation involves the middle class, as opposed to the judgment-proof impoverished litigant.⁸⁹ And this issue of access can be largely mitigated by having plaintiffs insure against legal costs when filing suit,⁹⁰ which might be even more effective if the insurance were simply purchased by the plaintiff’s lawyers and incorporated into their contingency fee contract.⁹¹ In fact, Howard actually has discussed shifting attorney fees, and shown considerable sympathy for it in situations where losing claims or defenses were not “reasonable” – but again, this is proposed *outside* of the context of his book.⁹² For commentators like Lewis, the English Rule is apparently something deeply associated with their political enemies; by avoiding its endorsement, and generally, by tending to avoid any focus on specific rules that have interests

⁸⁸ *But see* Walter Olson & David Bernstein, *Loser-Pays: Where Next*, 55 MD. L. REV. 1161, 1161 (1996), noting that such cost-shifting is the almost universal (default) rule elsewhere in the world.

⁸⁹ *See* Herbert M. Kritzer, *The English Rule: Searching for Winners in a Loser Pays System*, A.B.A. J. 55, at 54 (1992); Charles W. Branham, III, *It Couldn’t Happen Here: The English Rule-But Not in South Carolina*, 49 S.C. L. REV. 971, 980 (1998). (“The middle-class plaintiff with a house, family, and savings has the most to lose from an adverse award of attorneys’ fees.”)

⁹⁰ *See* Marie Gryphon, *Greater Justice, Lower Cost: How a “Loser Pays” Rule Would Improve the American Legal System*. MANHATTAN INSTITUTE, 16-17 (2008).

⁹¹ *See* Kritzer, *supra* note 89.

⁹² *Would Loser-Pays Eliminate Frivolous Lawsuits and Defenses?*, New Talk, August 2008, available at <http://newtalk.org/2008/08/would-loser-pays-eliminate-fri.php>. The idea appears to be the rough equivalent of a lowered standard for frivolousness, making “unreasonable” claims or defenses, at judicial discretion, subject to an attorney-fee shifting sanction of the sort now available under FED. R. CIV. P. 11(c). But this would not really be the English Rule, but a quasi-punitive act applied occasionally by the judge. A perhaps more practicable version of cost-shifting would be to apply this as the presumptive rule (not a discretionary sanction) to only an early phase of the lawsuit. For instance, one could imagine the English Rule applied to the costs required to dismiss failed claims or complaints under FED. R. CIV. P. 12, and equitably, to the costs required to defeat failed motions to dismiss. This would reinforce compliance with new heightened pleading standards discussed *supra* notes 83-84. A proposal of this sort would seem to target cost-shifting at the least meritorious actions and provide protection against “nuisance” suits (whether or not technically deemed frivolous) without having a great impact on other claims, and might also deter dilatory motions to dismiss. Applying the English Rule strictly at the pleading stage has received surprisingly little attention. *But see* Lorraine Wright Feurstein, *Comment, Two-Way Fee Shifting on Summary Judgment or Dismissal: An Equitable Deterrent to Unmeritorious Lawsuits*, 23 PEPP. L. REV. 125, 163 (1995); David A. Root, *Note, Attorney Fee-Shifting in America: Comparing, Contrasting, and Combining the “American Rule” and “English Rule,”* 15 IND. INT’L & COMP. L. REV. 583, 611 (2004). These pieces propose cost-shifting for all actions terminated prior to trial, which would include all the substantial costs of discovery. *See also* Robert G. Bone, Twombly, *Pleading Rules and the Regulation of Court Access*, 94 IOWA L. REV., 873, 928-929 (2009) (suggesting that “incentive-shaping rules,” including the shifting of attorneys’ fees, could be applied to help screen out meritless filings).

defending them, Howard can keep himself from being labeled (and thus dismissed), and this has helped him manage to get a fair hearing in the public discourse.

Nonetheless, the cost to avoiding topics of this sort is a high one. If it avoids interests mobilizing against you, it also inhibits the formation of interests mobilizing for you. Beyond this practical concern, vagueness defies and frustrates the expectations, whether of skeptics like Lewis or more sympathetic readers, that at this point in his indictment of the legal system, Howard should be offering a brief explanation and opinion on loser-pays, damage caps, and a few other staples of the reform armamentarium. Whether or not Howard endorses them, rejects them or propounds his own versions, at this point the reader expects a de facto leader of American legal reform to have an opinion on these matters.

Moreover, such reforms often represent a kind of alternative solution to some of the problems which Howard recounts, and without consideration of these alternatives, it is difficult to know if Howard's is the best course of action. For instance, Howard spends some time discussing the now-favorite case of legal reformers, in which a lawyer sues pro se his dry-cleaner for \$54 million dollars for losing his pants (pp. 72-73).⁹³ Although the system reaches the "right" result of a defense verdict (after rejected settlement offers and a bench trial), the defendants were out-of-pocket by \$100,000 and are forced to close a store.⁹⁴ The result in such cases seems less than just, and it is hard to argue otherwise. However, under the English Rule the defendants' problems in this case would certainly have been much relieved (assuming the lawyer-plaintiff was not judgment-proof, the defendants would have had an opportunity to have been "made whole" and continue their business).⁹⁵ Under Howard's preferred remedy involving discretionary judicial power, a judge *might* have dismissed the lawyer's claim, after some period of time – and thus after largely unrecoverable financial loss to defendants. When it comes to the million-dollar pants, Howard's solution would be more incomplete and uncertain than a cost-shifting regime.

This issue of unconsidered alternatives remains even where Howard offers the most detail, the creation of specialized health courts for medical malpractice, which he promotes both

⁹³ *Pearson v. Soo Chung*, 961 A.2d 1067, 1070 (D.C. 2008)

⁹⁴ See *Gryphon*, *supra* note 90, at 2.

⁹⁵ Moreover, it seems manifestly unlikely the case would have been filed, or would have continued so long.

in the book and elsewhere.⁹⁶ Though there remains plenty of controversy, and many will disagree with Howard, it is in this area where he probably does best in constructing the kind of argument that he needs.⁹⁷ The growth of legal activity within a specific field is defined and quantified, tied to larger issues of declining social capital, and its current consequences for people (the profession of medicine and the health of patients) is presented, creating a presumptive inference that the expanded role of law is wasteful at best, and doing real harm at worst; then a solution is offered with some predictions about its effects on the problem. If Howard had done this consistently throughout *Life Without Lawyers* for education, employment, business relations and so forth, it would have been a far more compelling work. Its claims would no doubt have been thoroughly (and appropriately) attacked and scrutinized, but so framed and justified, would have needed to have been refuted in detail by its inevitable opponents.

The factual basis for a problem in medical malpractice is controversial, but it exists. Although malpractice litigation has now stabilized,⁹⁸ it underwent a massive increase during the 1970s and 80s, at least tripling.⁹⁹ It is of great concern to physicians,¹⁰⁰ even though most victims of medical error do not sue, and is likely both a cause and consequence of a decline in physician-patient trust.¹⁰¹ Medical liability is a genuine problem in the sense discussed above: exceptionally costly and frequent in America,¹⁰² with the gain in health outcomes from this extra

⁹⁶ Phillip K. Howard, *Just Medicine*, N.Y. TIMES, April 2, 2009; *Is the Medical Justice System Broken?* 102 OBSTET. GYNECOL. 446, 446-449 (2003).

⁹⁷ His argument is perhaps best presented in his recent piece in the New York Times, *supra* note 97.

⁹⁸ See National Center for State Courts, EXAMINING THE WORK OF THE STATE COURTS 2007 17 (2008) (showing, in selected states, largely stable pattern and net decline of 8% in filings between 1997-2006).

⁹⁹ See Donald N. Dewees, Michael J. Trebilock, & Peter C. Coyte, *The Medical Malpractice Crisis: A Comparative Empirical Perspective*, 54 LAW & CONT. PROBS. 217, 219 (1991)

¹⁰⁰ “Most physicians find the litigation system unfair, financially and psychologically burdensome, and unhelpful in promoting safety and quality.” Michelle Mello and Troyen A. Brennan, *The Role of Medical Liability in Federal Health Care Reform*, 361 N. ENGL. J. MED. 1, 2 (2009).

¹⁰¹ See Mark A. Hall, *Law, Medicine, and Trust*, 55 STAN. L. REV. 463, 495 (2002).

¹⁰² See Dewees, Trebilock and Coyte, *supra* note 99, at 219, using older data, show Canadian rates of claiming at 10% to 20% of those in the United States. More recent data shows the U.S. rates still at 350 percent of those in Canada. Anderson *et al.*, *Health Spending*, *supra* note 19 at 909 (2001 data). The main cost of medical liability, rather than direct tort claims or malpractice insurance, may arise out of “defensive medicine”; this by definition usually means actions taken by providers for legal reasons rather than to improve health outcomes. See *id.* at 910. However, estimates of the costs of this component vary widely, Cf. Department of Health and Human Services, CONFRONTING THE NEW HEALTH CARE CRISIS: IMPROVING HEALTH CARE QUALITY AND LOWERING COSTS BY FIXING OUR MEDICAL LIABILITY SYSTEM 7 (2002) (estimating a potential 5-9% cost savings could be achieved by reform) with Congressional Budget Office, LIMITING TORT LIABILITY FOR MEDICAL MALPRACTICE, 6-7 (2004) (projecting only a small gain from reduction in defensive medicine because it is unclear how many unnecessary procedures are ordered solely from fear of liability)

expenditure quite unclear,¹⁰³ and the distinct possibility that it may have net negative effects on health (if in no other way, by increasing costs of care such that it is less used by price-conscious consumers).¹⁰⁴ But is the solution necessarily specialized courts staffed by medical experts, where claims are mandatorily directed for screening and adjudication? Other possibilities including creating safe harbors for doctors who follow specific guidelines, and programs that disclose errors to patients immediately and attempt to “make it right” through free treatment and compensation; the latter reform has strong overtones of rebuilding social capital, and patients often voluntarily decline to sue when hospitals use these programs.¹⁰⁵ These and other reforms are not necessarily competitive with specialized courts, but Howard’s presentation would be more convincing if it encompassed some alternatives to his own proposal.

However, neither changes in pleading nor health courts really deliver on the promise of a “revolution”, which has the implicit meaning in *Life Without Lawyers* of a readjustment in the relation of law and society comparable to that which occurred 1960-1990, resulting in a reduced role for legalism and lawyers. Howard’s solution is that “America needs to rewrite its legal and regulatory codes. Bulldozing is not too strong a term” (p. 166). To achieve this will involve an extensive organizational and policy development effort that then starts “putting pressure on Washington to adopt the proposals.” For a man who speaks eloquently about Hayek, individual freedom and responsibility, and the law as an overreaching exercise of state power, Howard seems unduly focused on Washington D.C. This is peculiar, because he declaims, based on his own experiences, that “the culture of Washington will not change[,]” (p. 166), “Washington is legally dead,” (p. 180), and “Washington is paralyzed” (p. 204). If this is really true, though, even very excellent and detailed plans could easily find themselves going nowhere at the federal level. The more logical inference from this is that one might be better off abandoning the goal to change “America” all at once through the central government.

¹⁰³ See Congressional Budget Office, *supra* note 102, at 7 (expressing doubt that restrictions on malpractice claims would have an effect on medical injuries); see also Donald Dewees & Michael Trebilock, *The Efficacy of the Tort System and Its Alternatives: A Review of the Empirical Evidence*, 30 OSGOODE HALL L. J. 57, 83 (1992) (despite much lower rates of malpractice actions and malpractice premiums, there is “no evidence that Canadian physicians are more careless than their U.S. counterparts”).

¹⁰⁴ See Department of Health and Human Services, *supra* note 102, at 4-7 (describing some possible mechanisms by which liability could threaten patient safety or restrict access to quality care).

¹⁰⁵ See Mello and Brennan, *supra* note 100, at 2-3.

The more obvious place to go for a solution and major reform (if not perhaps quite a revolution) is back to the states and the people, for both support and consensus. Dan Kahan and his colleagues have identified major divisions within the American population regarding perceptions of risk and allocations of individual as opposed to collective responsibility for mitigating them.¹⁰⁶ Another way to characterize the changes in the institutional restructuring of lawyers discussed above, and the diffusion of legalized thought throughout the socioeconomic sphere, is to imagine that the place of law in society, once under control of “individualists” and their values came under control of segments of society with different values, and in particular, different views of harm, and its causal source in “the system” rather than the person.¹⁰⁷ “Solidaristic” people see society as responsible for individual flourishing or failure, and these are often allied with “egalitarian” people, who are prone to suspicion of corporations and other large entities and seek to use the law to control them or redistribute their wealth to weaker groups and persons.¹⁰⁸ The groups successively dominant in shaping legal culture likely map quite closely to the groups Kahan has identified. It also seems almost certain that the values and attitudes Howard is articulating are characteristic of the individualist group, and designed to appeal to them.

If it is true that these legal changes are somehow tied to changes in social capital, this leads to some interesting sociological questions about the causal relationship between the historical decline in the viability of high-trust social networks and that of the larger individualistic political culture. But the fact of cultural division remains, as does the forty-year ascendancy of an “egalitarian” and “solidaristic” model of legal compliance and liability. With these competing attitudes currently existing – but also the contrary attitudes – the choice for legal

¹⁰⁶See Dan M. Kahan *et al.*, *Fear of Democracy: A Cultural Evaluation of Sunstein on Risk*, 119 HARV. L. REV. 1071, 1091 (2006); Dan M. Kahan & Donald Braman, *Cultural Cognition and Public Policy*, 24 YALE L. & POL’Y REV. 149, 153-160 (2006) (reporting results from the National Risk and Culture survey about the primacy of cultural worldviews, over other demographic factors, as stable predictors of policy preference). See also MARSHALL S. SHAPO, *TORT LAW AND CULTURE* (2003) (discussing cultural views about the appropriate allocation of risk as the basis for divergent legal agendas).

¹⁰⁷ Kagan, *supra* note 65, at 719-720, makes this argument, following the work of Wildavsky, who also provides the structure for Kahan.

¹⁰⁸ See Kahan & Braman, *supra* note 106, at 153. They do not report results directly on views of the overall legal change in society, so these characterizations are slightly extrapolated. However, they have studied groups on the question of business regulation. “Unsurprisingly, egalitarians and solidarists perceived business regulation to be conducive to economic prosperity, hierarchists and individualists destructive of it.” *Id.* at 159 (“hierarchists” in their system are the opposite numbers of egalitarians, people who favor big and powerful organizations, or more generally the established order of society).

reform is clear: either attempt to mobilize the remaining “individualists” to reverse the changes they likely perceive as detrimental, or instead work toward a compromise position, where each side in what is likely to be an irreconcilably polarized polity can operate under the principles they deem most just.

Federalism offers one obvious response. To the extent that cultural divisions are not smoothly distributed over the landscape, certain jurisdictions will be more favorable to legal reform, which has been the historical experience, where significant reform has generally operated at the state level.¹⁰⁹ Aside from being more practical, and more democratic in shaping the reach of the law to the preferences of local majorities, state reforms have the obvious, if almost clichéd virtue of generating actual data on the effectiveness of various approaches. Indeed, a responsible set of policy proposals for de-legalization would explicitly ask for money set aside to evaluate what costs were truly avoided and benefits achieved. This would be valuable even if many states, due to the relative weakness of “individualist” culture in those places, would never accept reform, because other states open to the idea still would sorely need information about which reforms are actually effective. In addition, reforms should ideally be constructed in ways that appeal not just to individualists, but have attributes supported by “egalitarians” and their expectations.¹¹⁰ That seems more practical and in a way more respectful than attempting to simply convince egalitarians that they have wrong-headed. An obvious basis for an egalitarian component would be a reform resulting in an increase in the number of injured people who receive at least some care or compensation, in exchanged for a more streamlined system than the default system of tort adjudication.

Even a state level approach, though, is something of a blunt instrument that can only incompletely match our preferences for the amount of law we want in our lives. Where individuals are capable of choosing different levels of legalization, individual choice would seem to be a superior result to federalism. Imagine that the population consists of 50% individualists (which for this purpose are those who agree wholeheartedly with Howard’s basic message and want to liberate themselves from too much law). There is little they can do about the overall

¹⁰⁹ See Kagan, *supra* note 65, at 723-725.

¹¹⁰ This follows the policy model accommodating cultural differences proposed in Dan M. Kahan, *The Cognitively Illiberal State*, 60 STAN. L. REV. 115, 145-148 (2007).

legal environment. Yet they could attempt by contractual arrangement with other individualists to agree to be bound to something other than the default rules. Their agreed-upon rules might require, in case of dispute, resort to alternative dispute resolution, or even if in the court system, require all claims be “reasonable” at the stage of pleading, or perhaps that any claims must be proved to a “clear and convincing” standard;¹¹¹ they could agree for the prevailing party to be paid their attorney fees. They might adopt these procedural rules directly, or by referencing the law of a particular state, agree to substantive rules like contributory negligence or limits on noneconomic damages. All of these would be in the interest of limiting lawsuits, but would also indicate their trust of the other party, acknowledging and building the social capital between them, and would be reflective of their culturally-based willingness to bear the risks of all but egregious violations of their trust. If people in this notional society contracted equally with everyone else, then 50% of their transactions would be with other individualists, meaning that in 25% of transactions this type of arrangement might be voluntarily chosen by the parties.

If transactions were not random but preferentially directed toward those with congenial cultural attitudes, the percentage might be higher than this first approximation, and people might form whole groups that operate by delegalized norms, in a fashion Snyder has called “molecular federalism”¹¹² and has used to characterize the private lawmaking that occurs in existing pockets of high social capital like the diamond dealers of New York City.¹¹³ While adjudication methods of the diamond dealers arose from an environment of intense social capital, formed by centuries of religious affiliation and ethnic kinship, contemporary internet communications can rapidly facilitate arrangements between like minded individuals.¹¹⁴ If backed by a guarantee of state enforceability, we could even imagine the emergence of something like a social-networking site, in which people who know and trust each other publicly contract (mutually “friend”), by

¹¹¹ Cf. Robert J. Rhee, *Toward Procedural Optionality: Private Ordering of Public Adjudication*, 84 N.Y.U.L. REV. 514, 518 (2009) (Rhee focuses on parties agreeing after disputes have occurred, as they are about to enter litigation, but much of his reasoning applies, at least in contractual settings, to predispute situations where parties can operate behind a veil of ignorance as to whether they will be plaintiff or defendant, and choose a legal environment in accord with their values).

¹¹² David V. Snyder, *Private Lawmaking*, 64 OHIO ST. L. J. 371, 439 (2003).

¹¹³ See Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115 (1992).

¹¹⁴ See Snyder, *supra* note 112, at 444.

entering into a prospective limitation on their recourse to the default system of litigation.¹¹⁵ And although this might seem far-fetched when applied to average people protecting themselves from liability as they invite friends' children over to the swimming pool, the applications of this sort of structure could be more extensive if adopted by businesses. Private lawmaking and state-level initiatives represent much less than Howard's call for widespread change. In their way they represent a kind of revolution, but only for those who might *want* one, and it remains to be seen how many of those people there really are. Of the people who might think they need reduce law and lawyers in their life, how many will be willing to forego substantive or procedural rights to act on that belief? We may get a chance to see the answer to this interesting question.

Modern communications could also facilitate optimized legal environments for more "impersonal" and asymmetric relationships like those between those manufacturers and consumers. The capacity to offer contractual terms that structure legal rights, in exchange for consideration, has long been proposed as implementing a "consumer sovereignty norm" in allowing consumers to consensually accept conditions under which they buy or use products.¹¹⁶ However, the Internet now offers greater capacity to reach and offer contractual choices to consumers, and perhaps also greater capacity for consumers to understand and rationally assess those choices.¹¹⁷ These need not involve unilateral concessions by the buyer; a producer could offer more certain and more streamlined "no-fault" payment in the event of accidents, in exchange for waiver of tort.¹¹⁸ This sort of possibly trust-building guarantee resembles to some extent the "disclosure and offer" reform proposals for medical malpractice, briefly discussed above. Sellers could also offer different prices for those who want the default system of tort law

¹¹⁵ "Friends don't sue friends" might be the governing principle of such a network, and if a dispute arose during the time when parties were friends, they would be bound by the conditions they had entered into. Of course, if matters did deteriorate, it is likely they would "unfriend" each other.

¹¹⁶ See Alan Schwartz, *Proposals for Products Liability Reform: A Theoretical Synthesis*, 97 YALE L.J. 353, 357 (1988); Richard C. Ausness, "Waive" *Goodbye to Tort Liability: A Proposal to Remove Paternalism from Product Sales Transactions*, 37 SAN DIEGO L. REV. 293, 311 (2000). See also HUBER, *supra* note 79, at 215-216, arguing for a renewed emphasis on contract to more closely calibrate consumer preferences, mainly in the product liability context.

¹¹⁷ See Erin Ann O'Hara, *Choice of Law for Internet Transactions: The Uneasy Case for Online Consumer Protection* 153 U. PA. L. REV. 1883 1928 (2005) (offering reasons for "hope that online consumers will scrutinize the standard-form terms" given to them).

¹¹⁸ Jeffrey O'Connell, A "Neo No-Fault" Contract In Lieu of Tort: *Preaccident Guarantees of Postaccident Settlement Offers*, 73 CAL. L. REV. 898, 906-908 (1985).

and those who are comfortable with a less adversarial or more individualist alternative;¹¹⁹ or the transaction could occur at a wholly separate time, as after the sale, consumers are offered the chance to contract out of default rules in exchange for rebates or other consideration.

If one were desirous of advancing the legal interest of this “individualist” segment of the population, a strategy that sought legislative change mainly to facilitate individual choice, and largely at the state level, would seem the most promising. In all states, reformers could seek to strengthen the capacity of the parties to contract and particularly to privately order the legal system by contractual choice of law.¹²⁰ To avoid abuse of this system, any changes would also have to identify and encourage positive business practices that lead to a rational and deliberative choices of these matters (plain language agreements, websites offering honest, hyper-linked disclosures that discuss the cost and benefits of the choices, separate agreement to this clause after assuring the person agreeing actually read the disclosure, and so forth).¹²¹ The terms offered would be made knowing that if people really have a choice, and really do deliberate, they may very well say “no thank you.” Consequently, normally an ordinary contract (to be adjudicated under the default rules of the legal system) would be available as an alternative. At the same time, one would want to specifically encourage arrangements that in turn facilitate the development of more social trust, like offer and disclose in medical settings or no-fault guarantees of economic damages for goods and services.¹²² In a smaller number of states – those states to which choice-of-law or choice-of-forum provisions in many other states could refer – one might seek, first of all, rules that assure enforcement of contracts made in those other states, along with other changes in procedural or substantive law that might be desirable to parties elsewhere. These states might actively compete for the handling of disputes directed to them, by

¹¹⁹See Alan Schwartz, *supra* note 116, at 407; Mark Geistfeld, *The Political Economy of Neocontractual Proposals for Products Liability Reform*, 72 TEX. L. REV. 803, 821 (1994) (“two-price schemes’ ... may represent the most defensible information-based neocontractual proposals to date”).

¹²⁰ Erin A. O’Hara & Larry E. Ribstein, *From Politics to Efficiency in Choice of Law*, 67 U. CHI. L. REV. 1151, 1197-1198 (2000) (supporting the right of contractual parties to the law of their choosing, regardless of their contacts with the jurisdiction originating that law).

¹²¹ See, e.g. Gary T. Schwartz, *Assessing the Adequacy of State Products Liability Lawmaking*, 14 YALE L. & POL’Y REV. 359, 368-369 (1996) (“the consumer’s lack of information and/or bargaining sophistication is a major premise in both products liability theory and doctrine”).

¹²²See O’Connell, *supra* note 118; Mello and Brennan, *supra* note 100. For thoughts on other mechanisms that sustain or repair trust, see Larry E. Ribstein, *Law v. Trust*, 81 B.U.L. REV. 553, 581-582 (2001).

altering substantive law or shaping institutions, as appears to be currently occurring in the state of New York with regard to business disputes occurring throughout the country.¹²³

The above legal reform strategy, sketched in the barest of terms, would be quite controversial, and its elements would have to be more fully examined before I could be comfortable endorsing it personally. I offer it under the crucial caveat that *if* one were already committed to the notion that a major restructuring of legal system was necessary, along the lines of *Life Without Lawyers*, the foregoing seems to me a more plausible course than a pressure campaign on Congress to delegalize the nation and turn back the tide of history. Moreover, it is a strategy that has some attractive features, including some potential for social capital formation, and with some further development would be capable of being rationally debated on the merits, and if enacted, empirically assessed.

What it would not be is life without lawyers. Nor would it grant psychological emancipation from legal thinking. All of the contracts undergirding this model would require careful legal analysis to develop, and the parties choosing them would be taking responsibility for thinking about the law to a greater extent than is usual, and quite possibly to a greater extent than they do now. But it would be *their* law, a law that frees them from some anxiety going forward of the unpredictable intrusion of unjust – by their lights – liability, and disclaims (at least in part) the implicitly adversarial posture the default rules might be perceived to encourage with regard to their fellow contractors.

If the central task of the true revolutionary is, as Lenin said, “What is to be done?” then *Life Without Lawyers* has to be judged a failure. However, truly revolutionary books are rarely conducive to the social weal, so perhaps it is better for a book to not actually have this character. Nor is it truly a policy proposal, even one directed at a popular audience. To the extent it sometimes seems to want to become one, it probably deserves some of the critiques made above

¹²³ Geoffrey P. Miller & Theodore Eisenberg, *The Market for Contracts*, 30 CARDOZO L. REV. 2073, 2073 (2009) (finding that “New York law is chosen in over 45 percent of the material contracts of public companies ... and 41% of the contracts that specified a forum for resolving disputes.”). The reason for this specialization is that “New York is extraordinarily receptive to enforcing contracts that select New York as the provider of law or forum, even in cases where there are few or no other connections between New York and the contract or the parties. *Id.* at 2087. In addition, New York has introduced a specialized commercial court with expertise in business matters. *Id.* at 2093-2095.

and elsewhere, which are directed at weaknesses in policy analysis. But really, Howard is doing something else.

His book is a complaint. And it might be best treated as we treat other well-plead complaints that come over the transom: *Life Without Lawyers* need not be believed, but it cannot be simply dismissed. It has trenchant allegations that have some facial plausibility, even if discovery has not progressed to nearly the extent necessary to call them proved. It narrates incidents with flavor and verve that draw attention and make one think there may be something to this claim, although how much remains to be seen. Not unusually, its requests for relief and claims of damages are vague, probably a little inflated, and would need solid work by experts before they could be justly awarded. Indeed, the preliminary investigation attempted here suggests a fuller accounting of the facts will likely cause many counts to be withdrawn or be substantially amended. More importantly, *Life Without Lawyers* is like a legal complaint in that, although it pretends otherwise, its plea for liberation is not brought on behalf of the public at large, but is rather the class complaint of particular party-plaintiffs, that large and identifiable part of America culturally committed to the proposition that they (and everybody else) should bear more of their own risks, be bound more firmly by both their legal and non-legal relationships, sue and be sued less, and call in the lawyers as a last resort and not a first instinct. This class indeed has accumulated some grievances with the legal system over recent decades. Whether they should continue to bear them in the interest of the greater good is an irony Howard, with all his emphasis on our pursuit of the common weal, does not address.