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Beyond No-Fault

By Allan C. Hutchinson†

"[A]ll fortune, good and bad, is to be shared in common by the community as a whole."

—Lysias¹

The debate between the "faulters" and the "no-faulters" continues unabated.² Indeed, in the last few years, discussion has become even more furious and partisan. Only recently in retreat, the "faulters" seem to have experienced something of a sudden renaissance; they have regrouped and launched a fresh defence of the "fault" status quo. This articulation of tort theory represents a major part of contemporary legal scholarship.³ Unfortunately, there is little new on offer, and the debate seems well past the point where further argument or evidence might affect its resolution. Its participants cannot agree on what systemic aims the law should pursue, let alone on the relative priorities of these aims.

As with most legal debates, the problem is as much ideological as intellectual. Both the "faulters" and "no-faulters" can claim some analytical and statistical support for their interpretations of the arguments and the evidence. At bottom, the categories of "fact" and "truth" cannot be divorced from the ideological presuppositions of the categorizer. We cannot discard our ideological presuppositions and achieve some ahistor-

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1. *Quoted in* K. FREEMAN, *THE MURDER OF HERODES AND OTHER TRIALS FROM THE ATHENIAN LAW COURTS* 167 (1946).

2. By "faulters," I mean those who favour retaining the torts system, albeit in some reformed state, whether under a negligence or strict liability regime. These include Epstein, Posner, Priest, Rosenberg, Shapo, and Weinrib. By "no-faulters," I mean those who would abandon the tort system, at least in part, and introduce some no-fault accident scheme, whether comprehensive or tailored, in its place. These include O'Connell, Keeton, Calabresi, Henderson, and Havinghurst. I do not necessarily include those who favour a universal disability scheme, such as Ison, Abel, and Franklin. As regards Sugarman, despite his irresistible assault on the tort system and his commendable desire for an integrated scheme of income support and medical care, he places undue reliance on the example of "the progressive employer." Furthermore, he tacitly accepts the economic and political substructure of modern liberal society. See Sugarman, *Doing Away With Tort Law*, 73 CALIF. L. REV. 642-50 (1985). Also, in contrast to the democratic proposals I make, Sugarman allows very little room for increased citizen participation in his suggested reforms. *Id.* at 658.

3. For a critical, if idiosyncratic, summary of the literature, see Hutchinson & Morgan, *The Canengusian Connection: The Kaleidoscope of Tort Theory*, 22 OSGOODE HALL L.J. 69 (1984).

ical or universal standpoint.⁴ Each view, "no-fault" and "fault," depends on rarely articulated foundational assumptions about the nature of human personality and social organization. Proposals to provide health care and income support to the injured and unhealthy reflect a commitment to deep normative principles and raise important questions about social justice and political obligation. How we take care of the social victims of bad fortune is (or ought to be) an integral part of our collective and individual self-image and self-understanding. It speaks to the kind of individuals and community we aspire to be. The tort system is merely a part of a larger societal problem—entitlement to and provision of health care and income support benefits. This essay will focus as much on the welfare forest as on the tort trees.

Insofar as the debate has dealt with these issues, the general view seems to be that the "faulters" adopt a conservative ideology of individualism.⁵ Their ambition is to facilitate individual freedom and choice. On the other hand, the "no-faulters" are depicted as supporting a more collectivistic political morality. They emphasize the universalization of compensation benefits.⁶ In this short essay I contend that, contrary to the conventional wisdom, these characterizations are misleading. *Both* groups are beholden to a liberal credo; they share an individualistic vision of social arrangements and political justice. Although there are degrees of orthodoxy within each group, the difference between the groups is much less than meets the eye. We should not mistake their social accoutrements and political trappings for their substantive views.

I agree with Holmes's belief that "[t]orts is not a proper subject for a law book"⁷ and, between the two, I would undoubtedly prefer a move to some no-fault scheme of accident compensation. But I do not think that there can be any real improvement unless there is a crucial shift in the

4. See Hutchinson, *From Cultural Construction to Historical Deconstruction* (Book Review), 94 YALE L.J. 209, 211-14, 227-32 (1984). This point is succinctly made by David Lewis: "Philosophical theories are never refuted conclusively. . . . The theory survives its refutation—at a price. . . . Our 'intuitions' are simply opinions; our philosophical theories are the same. . . . Once the menu of well-worked out theories is before us, philosophy is a matter of opinion. . . ." A. MACINTYRE, *AFTER VIRTUE* 267 (2d ed. 1984) (quoting 1 D. LEWIS, *PHILOSOPHICAL PAPERS* x-xi (1983)).

5. England, *The System Builders: A Critical Appraisal of Modern American Tort Theory*, 9 J. LEGAL STUD. 27, 32-33, 68 (1980). Of course, there are many self-proclaimed exceptions to this general trend. For instance, Guido Calabresi portrays tort as the paradigmatic law of the politically mixed society. See Calabresi, *Torts—The Law of the Mixed Society*, 56 TEX. L. REV. 519 (1978). However, it would not be unfair to characterize him as a liberal, albeit as one sensitive to communal responsibilities. See, e.g., G. CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* (1982).

6. See J. FLEMING, *THE LAW OF TORTS* 369-77 (6th ed. 1983). One judge went so far as to condemn enterprise liability and risk spreading as "socialistic." *Markle v. Mulholland's, Inc.*, 265 Or. 259, 296-97, 509 P.2d 529, 546 (1973).

7. Holmes, Book Note, 5 AM. L. REV. 340, 341 (1871). Of course, Holmes's opinion as to why that is the case and what ought to replace tort is very different from my own. See O.W. HOLMES, *THE COMMON LAW* 94-96 (1881).

way people think about themselves as members of a community. Individuals must comprehend that life in a community entails mutual obligations and interdependence. The liberal attitude toward health and misfortune reveals its impoverished sense of community and its modern tendency to centralised bureaucracy. The maldistribution of risk, injury, and care is a necessary consequence of this attitude and is deplorable.⁸

This essay makes a modest attempt to connect the compensation debate with political and social theory. In so doing, it will expose and criticise the debate's ideological structure and substance.⁹ Although history shows a general movement from charity to citizen rights, from special to universal schemes, from minimal to optimal payments, from private to public sources, the efficiency dictates of a market economy have always constrained this progress. This essay will outline liberal theory's response to the creation of the welfare state. It will then criticise its individualistic foundations, normative ambivalence and bureaucratic consequences. This essay will go on to suggest a democratically-based alternative and outline its implications for a system of compensation for bad fortune.

I

THE LIBERAL APPROACH TO ACCIDENT COMPENSATION

While there is little political theorizing that directly and overtly connects up with the compensation debate, there is a vast literature on the right to well-being. If there does exist a related right to compensation, embracing some provision of income security and health care, it would demand the same type of moral and political justification as the right to well-being itself. Theorists have begun to accept the need for *some* scheme of welfare support. Discussion centers on the questions of how much and to whom. Nevertheless, it is worthwhile to canvass the foundational arguments used to justify even a minimal right to well-being. The central issue, of course, is one of political legitimacy—when is the state justified in coercing one person to alleviate the distress or suffering of another? If liberalism is to make a convincing claim that it provides a workable and principled program for social justice, it must offer a coherent and not simply an expedient explanation for any rights to well-being.

8. In Canada, there is ample evidence of the direct correlation between wealth and health. See NATIONAL COUNCIL OF WELFARE, *MEDICARE: THE PUBLIC GOOD AND PRIVATE PRACTICE* 16 (1982) (a report on Canada's health insurance system) ("Low-income Canadians face higher than average risks of premature death, illness and disability.").

9. This essay owes much to the influence of Richard Abel's work. See Abel, *A Critique of American Tort Law*, 8 BRIT. J.L. & SOC'Y 199 (1981); Abel, *A Socialist Approach to Risk*, 41 MD. L. REV. 695 (1982) [hereinafter cited as Abel, *A Socialist Approach*]. However, my thesis and conclusions are different from Abel's and ought not to be confused with them. Nevertheless, my debt is a substantial one and I gladly acknowledge it.

I will sketch the kind of arguments that a utilitarian, rights-theorist, and libertarian, representatives of three different strains of liberalism, might plausibly make to ground a claim by one person against another for her support.¹⁰

A. *The Utilitarian Approach*

For the utilitarian, no state of affairs is intrinsically better or worse than another. Its moral rightness depends on the extent to which it maximises social utility. Moral rightness is evaluated by the optimality of consequences as determined by the felicific calculus. Thus, a right to well-being is derivative, and society will acknowledge it only if it improves rather than reduces overall social utility. Assuming the declining marginal utility of wealth and money,¹¹ a shift of resources from the rich and healthy to the poor and unhealthy would arguably result in benefits to the latter that would outweigh the costs to the former. In more obvious moral language, Peter Singer insists that "we ought to prevent what is bad when we can do so without sacrificing anything of comparable moral significance"¹² In making this calculation, the greater productivity of the many individuals who would be restored to working health would offset the putative disincentive effects of unearned income and "free riders."¹³

The utilitarian accounts of costs and benefits must balance. While individualized transfer payments would strike this balance ideally, such a delivery system would have prohibitive costs. Accordingly, society would do better to establish a general taxation-welfare scheme. Importantly, however, within such a regime of well-being rights, "transfers . . . [would be] undertaken for the sake of a maximizing interest ascribed to the populace as a whole, and not for the sake of any acknowledged claim of justice or right on the part of the disadvantaged claimant as an

10. Of course, these are highly stylized and generalized arguments. However, I have tried to avoid caricature and to present them in their most credible form. In writing this section, I have benefited immensely from the excellent materials put together by David Beatty at the University of Toronto Law School. See *Personal Income Security in a Liberal Democracy* (D. Beatty ed. Sept. 1982) (collected course materials and readings). The work of Ernie Weinrib has also been very suggestive. See Weinrib, *The Case for a Duty to Rescue*, 90 *YALE L.J.* 247 (1980). Neither person would necessarily subscribe to my presentation of liberal arguments. Indeed, the latter likely would disagree strongly. Another set of influential essays is contained in *INCOME SUPPORT: CONCEPTUAL AND POLICY ISSUES* (P. Brown, C. Johnson & P. Vernier eds. 1981).

11. See W. BLUM & H. KALVEN, *THE UNEASY CASE FOR PROGRESSIVE TAXATION* 56-63 (1953). Not all utilitarians would agree with this assumption. For instance, Posner seems to make no distinction between the "value" of a dollar in the hands of a billionaire or a beggar. See R. POSNER, *THE ECONOMICS OF JUSTICE* 60-61 (1981).

12. P. SINGER, *PRACTICAL ETHICS* 169 (1979). See generally *id.* at 158-81.

13. See generally W. GODWIN, *ENQUIRY CONCERNING POLITICAL JUSTICE AND ITS INFLUENCE ON MODERN MORALS AND HAPPINESS* (I. Kramnick 3d ed. 1976).

individual."¹⁴

B. *The Rights-Based Approach*

The rights-theorists reject the accounting mentality of the utilitarians. They insist on taking the individual seriously and not as a costing item on a political ledger. They argue that life and health cannot be reduced to one more set of goods allocated or expended in the name of increased social efficiency. For the rights-theorist, life and health are constitutive of the person. Each individual is entitled to be treated with dignity and as an entity of intrinsic moral worth. Insofar as a society is best organized to allow individuals to design and pursue their own life plans, it is axiomatic that physical well-being is a vital precondition to that goal.¹⁵ All healthy persons, therefore, have a duty to contribute to the well-being of the less healthy in society. However, that duty of benevolence is not unbounded. The universal concept of personhood also encompasses healthy people who have no obligation to forego their own welfare. To expect benevolence is not the same as to demand a self-defeating commitment to selfless altruism.¹⁶ Like the utilitarian, however, the rights-theorist recognizes that as a matter of efficiency *and* fairness, it is necessary to coordinate these rights and obligations through a generalized welfare scheme.¹⁷

Although libertarians are but a special kind of rights-theorist, their case merits separate discussion. The basic libertarian stance opposes all forms of distributive justice. Libertarians advocate absolute and inviolable moral entitlements to property, provided it was not obtained by force or fraud. While some moral obligation of philanthropy may exist, the government must leave the provision of welfare benefits to private charity. However, even these apparently uncompromising precepts do not preclude the establishment of some right to well-being, albeit a weak one.

14. Michelman, *Constitutional Welfare Rights and A Theory of Justice*, in *READING RAWLS: CRITICAL STUDIES ON RAWLS' A THEORY OF JUSTICE* 319, 326 (N. Daniels ed. 1975).

15. See I. KANT, *THE DOCTRINE OF VIRTUE* 112 (M. Gregor trans. 1964) (Part II of *The Metaphysic of Morals*); C. FRIED, *RIGHT AND WRONG* 108-28 (1978). Although there is social responsibility for the less well-off, Fried argues that there is no right to well-being. He argues that there is only a right to a fair share of money income, so that such individuals can engage in voluntary risk-pooling. Michelman contends that, even on his own terms, Fried is obliged to recognize a right to well-being. See Michelman, *Welfare Rights in a Constitutional Democracy*, 1979 WASH. U.L.Q. 659.

16. See Weinrib, *supra* note 10, at 288-92.

17. These arguments do not exhaust the fecundity of the rights-theorizer's arguments. For instance, although Rawls does not list health care as a primary social good, a plausible argument can be made for its inclusion in such a category. For a discussion of Rawls' notion of a primary social good, see J. RAWLS, *A THEORY OF JUSTICE* 90-95 (1971). Also, those in the Rawlsian original position would more than likely agree to a universal welfare scheme. For further arguments, see Daniels, *Health-Care Needs and Distributive Justice*, 10 PHIL. & PUB. AFF. 146 (1981) and Buchanan, *The Right to a Decent Minimum of Health Care*, 13 PHIL. & PUB. AFF. 55 (1984).

For instance, Robert Nozick argues that the use of property is subject to the Lockean proviso that absolute rights can be exercised only so long as there be " 'enough and as good left in common for others.' " ¹⁸ He accepts that a person cannot acquire exclusive title to "the total supply of something necessary for life." ¹⁹ Yet, once this concession is made, moral intuition suggests that a right to a relatively healthy life justifies qualifications to property use. ²⁰ Further, James Buchanan maintains that minimal rights to well-being can be established based on the need to reduce blatant inequalities in the effective opportunities to exercise libertarian rights. He prefers to characterize these rights as accruing through a person's status as a citizen and not as a victim. Moreover, he argues that the foundational right to property acts as a powerful fetter on the tendency to enlarge such rights so as to effect a total redistribution of wealth. ²¹

II

THE FAILURE OF THE LIBERAL APPROACH

A. *Indeterminacy and Alienation*

The liberal response to the needs of the poor and unhealthy reflects liberalism's moral ambivalence and political plasticity. As with any attempt to apply its theoretical precepts to concrete situations, liberalism's approach to well-being founders on the reefs of indeterminacy and contingency. In all its forms, liberalism begins and ends with the individual; a thing or state of affairs is only estimable if it is valuable to a particular individual as actual human experience. Liberalism maintains that the self-interested actions of individuals represent the most appropriate and effective principled basis for society's economic and political organization. However, liberalism cannot fulfill its promise to provide a neutral or objective algorithm by which to mediate the contradictory forces of individual interest and collective concern. ²² Liberal theory is at a crossroads. Indeed, liberal theory is always at a crossroads. This quality is what identifies a theory as liberal. Liberalism possesses "no rational criterion for deciding between claims based on legitimate entitlement against claims based on need." ²³ Most social arrangements can

18. R. NOZICK, ANARCHY, STATE AND UTOPIA 175 (1974) (quoting J. LOCKE, TWO TREATISES OF GOVERNMENT, Second Treatise, sect. 27 (P. Laslett 2d ed. 1967)).

19. *Id.* at 179.

20. For a development of this line of argument, see Grey, *Property and Need: The Welfare State and Theories of Distributive Justice*, 28 STAN. L. REV. 877, 888-91 (1976).

21. See Buchanan, *Deriving Welfare Rights from Libertarian Rights*, in INCOME SUPPORT: CONCEPTUAL AND POLICY ISSUES 233, 236-45 (P. Brown, C. Johnson & P. Vernier eds. 1981).

22. See Hutchinson & Monahan, *The "Rights" Stuff: Roberto Unger and Beyond*, 62 TEX. L. REV. 1477, 1482-85 (1984).

23. A. MACINTYRE, *supra* note 4, at 246.

generate a liberal theory of justification. Moreover, modern society tends to present the choice, for example, between arms and alms as a "tragic choice." It constructs ever more complex institutional structures to obfuscate the moral nature and political consequences of such choices.²⁴

While they disagree about the redistributive role of the state, both "faulters" and "no-faulters" envision a similar kind of just society. The basic dynamic is individualistic and competitive. The only shared experience is one of alienation. Although liberalism fetes the individual and celebrates personal freedom and action, it recommends a set of social organizing principles that rest on a pessimistic notion of human personality. Individuals are, at best, ambivalent to others; at worst, they are distrustful of others. By expecting the worst of human nature, liberalism establishes a collective lifestyle that stifles the ameliorating potential in individuals: "The limits of liberal democracy are the limits of the self-preoccupied imagination."²⁵ In a liberal regime, individuals unite only in their separateness and self-interestedness. They become exiles in their own society. The dominant motif of liberal society is its tendency towards anomie and communal disintegration. Bereft of any sense of community, "[o]ur society may have become so anomic that explicit occasions for mutual recognition among strangers on public streets are more feared than sought."²⁶

The attitudes of both "faulters" and "no-faulters" toward compensation exemplify the full force of this political scenario. The common law task is to restore individuals to the position they were in before the accident. In its more grandiloquent moments, tort insists on the "general underlying principle . . . that whoever unlawfully injures another shall make him whole."²⁷ The "no faulters" do not object to this standard. However, they want all of society to bear this burden and to make compensation available regardless of the injury's particular cause. In short, they seek to universalize the compensation standards of the "faulters." The traditional requirements of an accident and some identifiable and isolatable cause remain central.

Clearly, the "no-fault" proposals represent a substantial improvement over the prevailing "fault" status quo. Yet, even these proposals are much too limited in their remedial and distributive ambitions. The "no-faulters" share with the "faulters" the same liberal objective: to ensure through the payment of money and the provision of institutional health care that victims are reconstituted. Victims can then reassume their roles as rugged operatives in the bruising market of individual com-

24. See G. CALABRESI & P. BOBBITT, *TRAGIC CHOICES* (1978).

25. B. BARBER, *STRONG DEMOCRACY* 18 (1984).

26. R. BURT, *TAKING CARE OF STRANGERS* 41 (1979).

27. *Bullerduck v. Pritchard*, 90 Colo. 272, 275, 8 P.2d 705, 706 (1932).

petition. Where the misfortune is too great to allow such reconstruction, the aim is to ensure that the individual is able to live out her days in reduced physical discomfort, at a minimal level of material satisfaction. Economics and efficiency always temper care and concern.

Like their "fault" counterparts, most "no-faulters" are too easily content with the prevailing malapportionment of wealth and its accompanying liberal ideology. Indeed, the correlation between wealth and health is so marked that any genuine attempt to improve the quality of health and health care must deal with the maldistribution of wealth and its institutional structure.²⁸ Enforcing stricter rules on collateral benefits and placing a ceiling on compensation payments might reduce that part of the maldistribution due to the tort system. However, these measures, while useful,²⁹ do not tackle the problem directly. They do not address the urgent need to establish a democratic and communal responsibility for the control of health risks and the provision of health care.

B. *Health as a Commodity: The Tragedy of the Disabled*

In pursuing the liberal approach, the market has converted health into another commodity to be traded for and traded off. Human life and suffering represent just one more variable in the production-consumption equation. Even "no-faulters" like Bernzweig and Conard talk in terms of restoring individuals to their fullest usefulness. They indirectly (and, no doubt, unintentionally) present the unhealthy as defective goods.³⁰ In a chilling assessment, Blumstein and Zubkoff argue that "[t]he 'specialness' of medical care exists only up to a certain threshold; beyond that it becomes just another consumer item."³¹ Health is business and health care is big business.³² Drug manufacturers are some of the wealthiest corporations and doctors one of the highest-paid professions. Yet, surely "[p]rofitteering [from ill-health] reflects exploitation in its most egregious form."³³ The rapid growth of public health-care programs has created increased opportunities for the private health care industry to exploit. The expansion of social compensation schemes will almost certainly exacerbate that situation.

28. See *supra* note 8.

29. It can be argued that a ceiling on compensation payments would aggravate existing income maldistribution. See Abel, *A Socialist Approach*, *supra* note 9, at 696 n.3.

30. See E. BERNZWEIG, BY ACCIDENT, NOT DESIGN 163 (1980); Conard, *The Economic Treatment of Automobile Injuries*, 63 MICH. L. REV. 279, 294-95 (1964).

31. Blumstein & Zubkoff, *Perspectives on Government Policy in the Health Sector*, 51 MILBANK MEMORIAL FUND Q. 395, 411 (1973).

32. See Å. BLOMQUIST, THE HEALTH CARE BUSINESS (1979); S. LAW, BLUE CROSS: WHAT WENT WRONG 1-2 (2d ed. 1976).

33. H. WAITZKIN & B. WATERMAN, THE EXPLOITATION OF ILLNESS IN CAPITALIST SOCIETY 108 (1974); see also Kehnan, *Toward the Political Economy of Medical Care*, INQUIRY, Sept. 1971, at 30.

The attitude of health as a commodity is reflected throughout society. The victims of bad fortune face severe systemic and personal obstacles to a full integration into communal life. The victim's agony is not merely the physical pain, but the frightening realization that she has been destroyed as a person. Accident victims' self-esteem and confidence in the community "become as ashes in [their] mouth[s]."³⁴ People's responses to the disabled and unfortunate comprise a mixture of contradictory feelings, combining pity and compassion with embarrassment and revulsion. Disability forces persons to face some uncomfortable facts about their own fragile vulnerability and the aleatory unpleasantness of their environment. Yet this insecurity also inhibits others from offering the communal support victims so vitally require to come to terms with their bad fortune. As a result, people close their eyes, if not their hearts, to the plight of the disabled, who become " 'a hidden population . . . unknown to the communities and individuals around them.' "³⁵

Although social rehabilitation must take precedence over job placement, the opportunity to work and make a meaningful contribution to the community must rank high in any list of priorities, no matter what the political affiliation of the society.³⁶ In North America, however, the unemployment rate among the disabled exceeds the general average of 10% more than five fold.³⁷ Also, many disabled who do work are part-time employees who receive low pay. Those who become disabled while in full-time employment often have a reduced earning capacity and face imposed early retirement.³⁸ However, evidence shows that, if given the chance, the disabled can and do work extremely well.³⁹ They often are refused jobs merely because they are disabled rather than because they

34. R. LEWISTON, *HIT FROM BOTH SIDES* 32 (1967).

35. UNITED STATES COMM'N ON CIVIL RIGHTS, *ACCOMMODATING THE SPECTRUM OF INDIVIDUAL ABILITIES* 17 (1983) (quoting 118 CONG. REC. 3320-21 (1972) (statement of Sen. Williams)). For a powerful examination of the plight of the disabled child, see J. GLIEDMAN & W. ROTH, *THE UNEXPECTED MINORITY: HANDICAPPED CHILDREN IN AMERICA* 380 (1980).

Even the relatively sensitive and sophisticated New Zealand scheme spends less than one percent of its budget on social-rehabilitation programs. See T. ISON, *ACCIDENT COMPENSATION* 156 (1980).

36. My colleague Terry Ison has pointed out to me that this lament about the absence of employment opportunities smacks of 'liberalism,' especially its incorporation of the work ethic. My view, like his, is that while work opportunities for the disabled should be increased, we should make it much more respectable and acceptable for disabled people not to work. As Ison states, "[f]o expect them to work while the opportunities are lacking creates the worst of both worlds, and is probably a significant cause of distress." Memorandum from Terry Ison to Allan Hutchinson 3 (March 11, 1985) (discussing this essay as a work-in-progress).

37. See UNITED STATES COMM'N ON CIVIL RIGHTS, *supra* note 35, at 29 (1983); CANADA HOUSE OF COMMONS SPECIAL COMM. ON THE DISABLED AND THE HANDICAPPED, *OBSTACLES* 31 (1981).

38. See D. HARRIS, M. MACLEAN, H. GENN, S. LLOYD-BOSTOCK, P. FENN, P. CORFIELD & Y. BRITTAN, *COMPENSATION AND SUPPORT FOR ILLNESS AND INJURY* 270-72, 274-78 (1984).

39. See UNITED STATES COMM'N ON CIVIL RIGHTS, *supra* note 35, at 30.

cannot perform the job satisfactorily.⁴⁰ Unless and until there is a substantial change in society's attitude to the disabled and unfortunate, the situation will remain bleak.

C. *Bureaucracy and the Welfare State*

Whatever the good intentions of some 'no-faulters', they suffer from a certain liberal myopia. They do not seem to grasp that the universalization of health care in modern liberal society carries with it the very real threat of increased bureaucratization and the further institutionalization of human values. Even when a compensation scheme is sufficiently comprehensive and adequately financed,⁴¹ it requires a massive regulatory structure to administer the available benefits. Yet the experience of the last two decades strongly suggests that the growth of a sprawling welfare bureaucracy has created a troubling paradox. The bureaucracy relieves individuals of the anxiety borne of the struggle to maintain a basic standard of health and living. However, they still suffer the debilitating effects of powerlessness, dependence, and loss of self-respect. The modern welfare state places individuals in a state of "bondage to the bureaucratic machine."⁴²

As individuals become enmeshed within the ample embrace of the welfare system, they lose a sense of their own individuality and see themselves as administrative charges on the common purse. Contemporary society demeans and dehumanizes recipients of state assistance. Moreover, the pervasiveness of the welfare bureaucracy discourages self-help and communal support. The bureaucracy tends to buttress the hierarchical structure of modern society and to engender hostility to the "undeserving poor."⁴³ The hopeful ethic of social work has succumbed to the intrusive ideology of law and bureaucracy.

The concerns of law and management have converged in the three basic themes of the recent literature and practice of welfare administration: first, the formalization of entitlement, by which I mean the formulation of the eligibility norms as rules; second, the bureaucratization of administration, by which I mean the intensification of formally hierarchical organization; and third, the proletarianization of the work force, by which I mean the diminution of the status, skill, education, and reward

40. See McGarity & Schroeder, *Risk-Oriented Employment Screening*, 59 TEX. L. REV. 999, 1008-13 (1981).

41. For instance, the British welfare system suffers in both these respects. See F. FIELD, *INEQUALITY IN BRITAIN* 68-91 (1981). Also, the need for ever greater public funding is in large part due to the private cost of drugs and medical care. See *supra* notes 30-32 and accompanying text.

42. M. WALZER, *RADICAL PRINCIPLES* 33 (1980).

43. See J. HANDLER & E. HOLLINGSWORTH, *THE DESERVING POOR: A STUDY OF WELFARE ADMINISTRATION* (1971); Mashaw, *Welfare Reform and Local Administration of Aid to Families with Dependent Children in Virginia*, 57 VA. L. REV. 818 (1971).

associated with the frontline welfare worker's job.⁴⁴

Even the crucial encounter between doctor and patient reflects the destructive and hierarchical nature of the contemporary regimes for health care and general welfare. What should be an intimate occasion often becomes a clinical, remote exchange. As health care becomes increasingly technological and bureaucratic, medical treatment reduces individuals to "limp and mystified voyeur[s]"⁴⁵ of the treatment of their own bodies. The medical establishment expects patients to be the passive objects of therapy rather than active participants. The demise of home visits ensures that consultation occurs on the doctor's own professional turf. Indeed, the asymmetrical relation between doctor and patient depends on the patient's continuing ignorance.

Doctors' ability to control and manipulate the distribution of technical knowledge maintains the power of the medical profession. Indeed, the medical and welfare establishment has assumed for itself the considerable privilege of defining 'health' and 'disability.' Of course, health is a contested concept and it has been the target of sustained attempts at ideological appropriation. Descriptive and scientific language dominates medical discourse. This technical veneer conceals loaded values and commitments.⁴⁶ Economic and political interests have largely determined the historical development of the concepts of "need" and "welfare."⁴⁷ Health care thus remains inseparable from the political struggle to regulate individual and social conduct. It forms part of the carceral framework through which professionals effect "the universal reign of the normative."⁴⁸ In contemporary society, ill-health has become a type of deviancy and doctors the high priests of absolution.

If "no-fault" schemes are grafted on to the existing political organisation and economic conditions of modern liberal life, they will operate as much as a crutch for a crippled society as a means for social improvement. The dark side of proposals by "no-faulters" is further bureaucratic alienation and loss of personal involvement in health care. However, we need not throw out the remedial baby with the harmful bathwater. Provided they integrate their proposals into a broader program of social reconstruction, "no-faulters" can act as a catalyst for a "revolution in

44. Simon, *Legality, Bureaucracy, and Class in the Welfare System*, 92 YALE L.J. 1198, 1199 (1983).

45. See I. ILLICH, *MEDICAL NEMESIS: THE EXPROPRIATION OF HEALTH* 53 (1975); see also S. LAW, *supra* note 32, at 143.

46. See Edelman, *The Political Language of the Helping Professions*, 4 POL. & SOC'Y 295 (1974).

47. See D. STONE, *THE DISABLED STATE* (1984).

48. M. FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* 304 (1977); see also M. FOUCAULT, *THE BIRTH OF THE CLINIC* (1973); M. FOUCAULT, *THE ARCHAEOLOGY OF KNOWLEDGE* (1972).

democratic consciousness."⁴⁹ By making good on the presently lame and ambivalent commitment to democracy, society could generate the sense of community necessary to ground the terms for collective life, a life in which all might achieve their individual potential. After outlining my response to this dilemma, I will canvass its implications for compensation and treatments of accidents and their social consequences.

III

A RADICAL PRESCRIPTION

A. *Elimination of Domination and Hierarchies*

Any radical program must aim to rid society of the prevailing conditions of social oppression which subvert individual emancipation and self-determination.⁵⁰ The achievement of any such program is conditional on an understanding that individuals only exist in and are constituted by a social milieu. "Individual liberty is meaningless until it is incorporated within particular forms of social life. . . ."⁵¹ Any plausible political theory must accept two related insights about what individuals share: a common vulnerability to injury and domination, and a common capacity to envisage a better life beyond their present condition. The only way for individuals to respond to these human traits is to move beyond individual interest to communal solidarity. Individuals' shared vulnerability and frustrated potential are the basis for hope, not despair. These frailties present an occasion for expressing and showing our common humanity.

By developing a moral sense and practical experience of community, individuals could better contribute to the growth of a shared set of values in accordance with which social and individual life would be organized. The challenge is to establish an informed and democratic balance between the availability of personal choices and the existence of communal bonds. Society would respect people as people, and not simply as rights holders. In this way, society could develop a *modus vivendi* that encourages caring and sharing and actualises the possibility for meaningful connection with others. Communal concern would help assuage anx-

49. C. MACPHERSON, *DEMOCRATIC THEORY: ESSAYS IN RETRIEVAL* 184 (1973).

50. These arguments and ideas are developed and explored further in Hutchinson & Monahan, *supra* note 22, at 1528-37, and Hutchinson, *Of Kings and Dirty Rascals: The Struggle for Democracy*, 9 *QUEENS L.J.* 273 (1984). These proposals, like much of the earlier critique, fall within the intellectual parameters of the Critical Legal Studies movement. In response to recent allegations and condemnations, I want to suggest that these proposals are not "nihilistic" nor are they likely to "result in the learning of the skills of corruption, bribery and intimidation." See Carrington, *Of Law and The River*, 34 *J. LEGAL ED.* 227 (1984). For a journalistic account of the heated exchange Carrington's charges have provoked, see *A Scholarly War of Words over Academic Freedom*, *Nat'l L.J.*, Feb. 11, 1985, at 1, col. 1.

51. M. WALZER, *supra* note 42, at 12.

ity over vulnerability, ensure that risks were distributed equally, and provide care for the unhealthy. Communal support would maximise the genuine opportunities for individual freedom of action within a context of social stability.

We need a rejuvenated commitment to a strong democratic imperative. Those affected by institutional decisions and policy must participate in their making. Democracy's pale and perverse contemporary practice is anathema to its full-blooded ideal. In modern society, participation is reduced to a formal and sporadic ritual. Economic inequality undermines political equality. Democratic practice represents an accommodating public screen behind which the political drama of private power is played out. A substantive and just version of democratic life must replace the offensive and empty symbolism of modern democracy. Efforts to mobilize the presently lethargic energies of individuals must accompany a devolution of bureaucratic power. Democracy is not a formal theory of political organisation, it is a potent way of daily life.

Democracy entails the greatest possible engagement by individuals in the greatest possible range of communal tasks and public action. Where feasible, individuals must directly confront one another without any bureaucratic mediation. As individuals reclaim control over their own lives, they will develop an appetite and a talent for even greater communal determination. Increased political engagement will exploit the vast untapped resources of popular power and sustain its own momentum.⁵² While democracy promotes the common and communal, it also provides a structure within which to enhance the unique and the individual. In time, a profound and sensitive understanding of the dialectical tension between individual and community will emerge. The design is not to develop a romantic or utopian harmony, but a political order which facilitates individual participation in the continuing social deliberation over political ends.⁵³

The benefits and freedom that come with democratic solidarity are not costless. Apart from demanding a gracious humility and an unrelenting magnanimity, democrats must make a major personal commitment to the maintenance and improvement of the participatory structure and process. The required commitment is an exhausting, but exhilarating experience. However, individuals would defeat the purpose of social change if they engaged in mindless masochism, expending all their energies in perfecting the democratic process without living the life it is intended to make possible.⁵⁴ Also, a democratic society must always

52. B. BARBER, *supra* note 25, at 272; *see also id.* at 158.

53. *See generally* J. COHEN & J. ROGERS, *ON DEMOCRACY: TOWARD A TRANSFORMATION OF AMERICAN SOCIETY* 146-83 (1983).

54. *See* M. WALZER, *supra* note 42, at 130.

guard itself against the error of freezing its own structures, and thereby institutionalizing another mode of domination. Society must therefore constantly redraft the agenda of political debate and action. Gerald Frug succinctly states the fundamental challenge as follows:

New forms of human association designed to take the place of bureaucracy must themselves be subject to the same critique. But this critique has its limits—there is a stopping place. This would be reached when people abandoned abstract arguments that seek to defend some form of life as a structure that can protect human individuality—when people jointly recognize that no structure can protect us from each other given the variable, intersubjective, interdependent nature of human relationships. The forms of organization that would then be created would not be understood as an answer to the human predicament. They would be transparently open to transformation (no form of organization is necessary) and always in need of transformation (all forms of organization create forms of domination that need to be combatted).

. . . Only by creating these forms together can people confront the intersubjective nature of social life. . . . In this view, the term “participatory democracy” does not describe a fixed series of limited possibilities of human organization but the ideal under which possibilities of joint transformation of social life are collected.⁵⁵

B. *Planning for Social Change*

The problem facing any radical program is to translate its theoretical postulates into attainable dimensions of concrete human experience. We must not overlook or underestimate this task. Yet, in dealing with questions of health care and income support, the challenge is perhaps not as hopeless as it might first appear. Indeed, the present state of affairs manages both to highlight the dismal record of liberal democratic practices, and to suggest the exciting possibilities for democratic participation. The centralized bureaucratization of welfare places a divisive barrier between individuals and distances people from the making of decisions about their own lives. Yet this very process opens up opportunities for democratic involvement. As *both* the powerful and the powerless come to rely on the state provision of welfare, there emerges a shared focus for their opposing claims and objectives. As long as care is taken to avoid replicating the competitive and elite pluralism of representative democracy, popular involvement in the administrative process is the shortest and most effective route to a more just society. Popular participation will thus help to bridge the gap between administrators and citizens. In the context of compensation schemes, the actual and potential

55. Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1276, 1295-96 (1984).

victims of bad fortune (i.e., everyone) must take responsibility for their own exposure to risk.

The democratic society must aim to entrench individuals within the local centres of the policymaking process. "Social policies cannot be imposed by beneficent social administrators; people must be involved in their provision and experience them as part of their local society."⁵⁶ Most importantly, individuals must be able to participate fully in their own treatment and recovery. We must break down the strict division and characterization of medical and nonmedical roles. Individuals need to educate themselves as to the value of personal preventive medicine and the contribution they can make to their own healing. Patients must involve themselves in the formulation of any rehabilitation or treatment program.⁵⁷ We must not relegate the welfare recipient to the status of client or claimant. The need for a sense of belonging is never more urgent than when misfortune strikes. Although society will continue to maintain a corps of professional carers,⁵⁸ each individual must become a "welfare worker," contributing to her own personal health and to that of the overall community. As Alastair Campbell rightly warns: "The notion of health *care* involves mutual learning, mutual help and mutual responsibility. A society which ignores this may stave off, for a time, the effects of illness and injury, but only to pave a better road to ill-health."⁵⁹

When individuals begin to realize the benefits of active participation and acquire a taste for further communal involvement, they will appreciate the contingent character of social life. Communal attention will turn toward setting appropriate standards for health and health care. Even the fully democratic society will have to make "tragic choices" about the allocation of scarce resources.⁶⁰ Yet the visible and personal hand of democracy is preferable to the invisible and impersonal hand of the market. Although the community of informed individuals will decide the issue, they might think it appropriate to designate health care as a nonmarket good, taking it out of the distributive forum of competitive choice. Neighborhood boards of doctors, patients, and local residents will govern hospitals and local clinics. Medical research funding can be wrested from the exclusive control of medical experts and private corporations, and placed under greater public scrutiny. While medical technology advances apace, its direction is not presently open to direct public control. For instance, much medical research has been devoted to the

56. Glennerster, *The Need for a Reappraisal*, in *THE FUTURE OF THE WELFARE STATE* 1, 8 (H. Glennerster ed. 1983); see also S. LAW, *supra* note 32, at 149-52.

57. For a series of depressing examples on this point, see T. ISON, *supra* note 35, at 143-45.

58. See D. HORROBIN, *MEDICAL HUBRIS: A REPLY TO IVAN ILLICH* 106-43 (1977).

59. A. CAMPBELL, *MEDICINE, HEALTH AND JUSTICE: THE PROBLEM OF PRIORITIES* 88 (1978).

60. See G. CALABRESI & P. BOBBITT, *supra* note 24.

reduction of mortality, but this has meant a corresponding increase in morbidity, especially among the elderly.⁶¹ Society must address questions about the treatment of malformed babies, geriatrics, paraplegics, and other afflicted individuals. The choice for continuance of life as opposed to quality of life has been made by default. This choice deserves to be the subject of a more thoroughgoing democratic debate so that an informed communal consensus might be developed.

Society must aim for communal health-care services which work toward a local, supportive environment for recovery or readjustment. Of course, some provision for domestic health care already exists, but these programs receive inadequate funds and half-hearted community support. Furthermore, in an individualistic society, these programs place a heavy burden on family care-givers, especially women kin.⁶² Lacking any real community support, carers and cared-for are trapped in a mutually suspicious and destructive relationship. Existing community and home-care programs utilise their idealistic image in order to justify and excuse limited public action.⁶³ Before any substantial improvement can take place, society must thoroughly change its thinking about health and health maintenance.

We must develop a greater appreciation that health and welfare are as much socially caused as individually experienced. To develop this appreciation we must foster a more holistic approach to well-being. Health care should not merely treat individual symptoms. It should concern itself with the total environment in which people live, work, play, and die. The control of risk would be of at least the same importance as the treatment of injury and misfortune.⁶⁴ In a vigorously democratic society, citizens would determine assumption and allocation of risk democratically. The presumption would be that all of society should share risk collectively and equally.⁶⁵ In short, the maxim that an ounce of prevention is better than a pound of cure would be taken seriously and acted upon.

61. See D. HORROBIN, *supra* note 58, at 24; Hacker, *'Welfare': The Future of An Illusion*, N.Y. REV. BOOKS, February 28, 1985, at 37, 38.

62. See Note, *Home Health Care for the Elderly: Programs, Problems, and Potentials*, 22 HARV. J. ON LEGIS. 193, 213-15 (1985).

63. Some countries have progressed in this area. On the available evidence, Sweden *seems* like a good example. See Liljeström, *Sweden*, in FAMILY POLICY 19 (S. Kamerman & A. Kahn eds. 1978).

64. In current capitalist society, individuals are unable to control their exposure to risk, especially at work. For a discussion of the problem of work-related illness and death, see Glasbeek & Rowland, *Are Injuring and Killing at Work Crimes?*, 17 OSGOODE HALL L.J. 506, 507-11 (1979).

65. See Abel, *A Socialist Approach*, *supra* note 9.

CONCLUSION

In this short essay, I have sought to expose and criticize the individualistic foundations of both the "fault" and "no-fault" contributions to the modern compensation debate. Only by struggling to establish a democratic community of respectful beliefs and shared practices can society develop a humane response to death and injury. "There is a difference . . . between what we would do as individuals competing in a market and what we would do as members of the public building a conception of ourselves as a community."⁶⁶ Whereas the democratic society takes an integrated and coherent stance on risk and well-being, the liberal society adopts a divided and contradictory position. Many will no doubt deride and dismiss my suggestions as hopelessly utopian. But, since these suggestions only involve making good on our preexisting commitment to democracy, such criticism reveals liberal theory's fearful lack of vision and the extent of its enslavement to the status quo. Of course, theorizing is insufficient by itself; it must be accompanied by appropriate action. Yet efforts to change our ways of thinking about ourselves and efforts to change society "are profoundly interconnected, if for no other reason than that [theorizing] is a *part* of the social world as well as a *conception* of it."⁶⁷ There is nothing so practical as a good theory.

66. Sagoff, *On Markets for Risk*, 41 MD. L. REV. 755, 773 (1982).

67. A. GOULDNER, *THE COMING CRISIS OF WESTERN SOCIOLOGY* 13 (1970).