

NELCO
NELCO Legal Scholarship Repository

University of Connecticut School of Law Articles
and Working Papers

University of Connecticut School of Law

1-1-2002

Risk, Insurance, and (the Social Construction of) Responsibility

Tom Baker

University of Connecticut, tbaker@law.uconn.edu

Follow this and additional works at: http://lsr.nellco.org/uconn_wps



Part of the [Insurance Law Commons](#)

Recommended Citation

Baker, Tom, "Risk, Insurance, and (the Social Construction of) Responsibility" (2002). *University of Connecticut School of Law Articles and Working Papers*. Paper 8.

http://lsr.nellco.org/uconn_wps/8

This Article is brought to you for free and open access by the University of Connecticut School of Law at NELCO Legal Scholarship Repository. It has been accepted for inclusion in University of Connecticut School of Law Articles and Working Papers by an authorized administrator of NELCO Legal Scholarship Repository. For more information, please contact tracy.thompson@nellco.org.

CHAPTER TWO
Risk, Insurance, and (the Social Construction of) Responsibility
Tom Baker *

Insurance, we all know, transfers risk. Yet, what we usually think of as a transfer of risk is also a transfer of responsibility. Without health insurance, I am responsible for my medical bills, my choice of doctor, and, in consultation with my doctor, my course of treatment. With health insurance, the insurer assumes some of that responsibility. Insurance, then, not only distributes risk (Abraham 1986), it also distributes responsibility.

This relationship between insurance, risk, and responsibility has great significance for the Aembrace of risk @that is the main subject of this volume. In an important sense, the proliferation of risks produces a proliferation of responsibilities. Put perhaps more controversially, risk *creates* responsibility, and not only through the risk -taking Jonathan Simon and William Nelson will explore in chapters 8 and 9.

Without knowledge of the potential for something good or bad to happen, we have no occasion to assume or assign responsibility for it. Once we have that knowledge Bonce we become aware of a risk Bthat risk becomes each individual =responsibility, unless or until it is assumed or assigned elsewhere. The identification of a new risk is unlikely to be experienced as a thrill or as an occasion for character -building, but rather as an added burden, and, if there is no

*Thank you to Les Boden, Carolyn Jones, Martha McCluskey, Jeremy Paul, Carol Weisbrod and, especially, Robert Rosen for helpful comments on an earlier draft. The essay also benefitted from a presentation to the New England Insurance and Society Study Group.

obvious new benefit that accompanies becoming aware of the new risk, with a destabilizing sense of losing control.

The promise of insurance and other forms of risk management is gaining a measure of control over an uncertain world. Indeed, it was just this promise of control that led some Calvinists to denounce insurance as a presumptuous interference with Providence. (Zelizer 1979) Yet, as we will see, reaching out to insurance institutions for protection cedes responsibility to them. Thus, risk not only *creates* responsibility, but also, through the means explored in this chapter, *socializes* that responsibility. Indeed, if we understand the *embrace* of risk to include the embrace of insurance and other aspects of risk management, then we might wonder whether the embrace of risk is *really* about individual responsibility, and we might think more about social control.

A comparison of two families in quite different circumstances begins to illustrate the relationship between insurance and responsibility. Imagine, first, a professional couple living in Avon, Connecticut, a small town outside of Hartford. If they are typical of others in their class, we can easily identify over sixteen forms of insurance that address various risks in their lives. Through payroll taxes, they have rights to a basic level of unemployment and disability insurance, as well as a modest retirement annuity, some life insurance, and generous health insurance for their old age or upon disability (all of which are provided under the Social Security and Medicare Acts). From the private insurance market, they have homeowners' insurance, automobile insurance, term life insurance, and an annuity. Through employment, they have health insurance, sick leave, life insurance, workers compensation, additional disability

insurance, pension plans with significant annuity features, and, possibly, employment severance arrangements that we can understand as a form of supplemental unemployment insurance.

All of this insurance transfers risk from the couple to an insurance fund and, therefore, changes the financial consequences of the events to which the insurance applies. A house fire remains a tragedy to the couple even with insurance (because of the risk to life and the loss of the irreplaceable) but the tragedy is not financial (at least as long as the insurance company comes through on its promise). Similarly, an extended illness remains an unhappy event for all the obvious reasons, but once again the financial effect is muted: sick leave provides short-term income, disability insurance provides longer-term income, and health insurance covers the medical expenses. Whether living beyond working age is a blessing or a ban depends on many circumstances, but financial need is unlikely to be one of them: the couple will have an income and health insurance for life.

Now imagine a second couple living in the nearby Hartford neighborhood of Frog Hollow. The wife cleans houses in the first couple's neighborhood, and the husband works for a painting contractor. What insurance pads the sharp corners in their lives? Like the Avon couple, the husband has rights to basic social insurance financed by payroll taxes (unemployment insurance, disability insurance, health insurance in old age or disability, an annuity, and a limited form of life insurance). The wife, however, is paid under the table, so her only forms of social insurance are means-tested, non-contributory programs that provide a very low level of disability insurance and, in old age or disability, health insurance. As long as her husband works, she is unlikely to qualify for these income-based benefits. Neither the husband nor the wife receive any private insurance through employment. They have purchased automobile and life insurance, but

their life insurance would pay only enough to cover the cost of a funeral and a few months rent, and their auto insurance provides the mandatory minimum coverage, which does not cover losses to their own car. They don't own their home, and renters' insurance is a hard-to-find extravagance in their neighborhood.

It takes little imagination to contrast the meaning that sickness has for the two couples. Unwelcome in both places, it is a financial disaster only in Frog Hollow. Because the Frog Hollow couple has less insurance, they bear more responsibility for the consequences of sickness and other unfortunate events. They have no health insurance, no sick leave, and no private disability insurance, and, as a result, all medical costs are their responsibility, as are the rent, the groceries, and the other routine expenses that must be paid in sickness and in health. In the Avon household, in contrast, health insurance, sick leave, and, depending on how long the illness persists, private disability insurance relieve the couple of much of that responsibility. Sickness, along with house fires, disabling injuries, old age, and perhaps even death have different meanings in the two households, according to the presence or absence of a collective health insurance that assumes responsibility for the financial consequences of those events.

Insurance as *Social* Responsibility

All these forms of insurance depend on the participation of many to share the burden of those with a qualifying need. Thus, extending insurance asserts a degree of social responsibility over the insured against events.

Thinking about insurance as a form of social responsibility often founders on the idea of the *social* in that term. One impediment is a maddeningly vague and confused notion of what a social @ B

is readily dealt with, by understanding it as a social arrangement, not as an abstract entity, but rather as the group of participants in any particular insurance arrangement. A second, more serious impediment is a vision of insurance as a series of independent, bilateral contracts that leaves out the collective dimension of insurance.

So hidden is this collective dimension in the American perspective toward insurance that many, perhaps most, people in the U.S. never realize that, if they are lucky, most of their premiums for most forms of insurance will go to pay other people's claims. (For an exception, see Stone 1993). In years of teaching law students about insurance, I have learned that one of their most common images of insurance is quite similar to that of a savings account. The students recognize that many forms of insurance differ from savings accounts in the degree of flexibility allowed in the timing of insurance withdrawals. Nevertheless, they often expect that over the course of a lifetime the deposits made by each person should roughly equal the withdrawal on that person's insurance account. Unless the insurance truly is a form of savings, however, (as in the case of annuities and accumulating life insurance) or a very close substitute (as in the case of Social Security retirement benefits), it rarely is desirable for the withdrawal to equal the deposits. Indeed, when it comes to health, disability, property, liability and term life insurance, if your withdrawal equals your deposits, you have had, in at least some respects, a very unfortunate life. If you are fortunate, your insured dollars go to pay other people's claims.

A discussion of insurance in a recent book on Islamic financial law nicely illustrates, by way of contrast, the absence of the social in the typical American understanding of insurance.

(Vogel&Hayes1998) ProfessorFrankVogelbeginsbydescribingthe"problem"thatinsurance appearedtopresentundertraditionalIslamiclaw:

Asasinglecontract,insuranceviolates *riba*[Ainterest@]and *gharar* [Agambling@]rules.Onepartypayscashpremiumsinreturnfor thepromiseof theotherpartytopayacashsumontheoccurrenceofacontingentfutureevent. Soviewed,itresemblesabet.Moreover,mostinsurancecompaniesinvesttheir premiumsinforbiddeninterest-bearinginvestments.(p.151)

Inotherwords, Westerninsurance,atleastasunderstoodfromaWesternperspective,appearsto violatetheIslamicprohibitionofgamblingandothercontractsbasedonchanceaswellasthe Islamicprohibitionofusury.¹

AsProfessorVogeldescribes,recentIslamic scholarshaveprovidedalegalsolutionto thisproblembyrethinkingthenatureofinsurance.TheirsolutionrevealsanIslamicperspective oninsurancethathighlightsthe"social"inordinaryinsurancearrangements.Thefirststepwas torecognizethat

throughthelawoflargenumbers,insurancecontractsintheaggregateinvolve verylittleuncertainty.Thepartiesaretransactinginsomething Bcoveragefora certainrisk Bwhichcanbeknownandvaluedquiteprecisely.(p.152)

¹The link between insurance and gambling is not unique to Islamic law. The mathematical underpinnings of insurance are often attributed to encounters between mathematicians and 18th century nobles who wished to improve their odds at the gaming tables. (Hacking 1975). Moreover, gambling and insurance were intertwined institutionally in England well into the 18th century, as reflected in a lively literature debating the "prudential" and "speculative" origins of insurance. (Pearson **need date** and Clark 1999).

Although this defense of insurance overstates the certainty involved in at least some forms of insurance (witness the recent troubles of Lloyd's), it accurately describes the inherently collective nature of any form of insurance that is based on the law of large numbers.

As Vogel observes,

[t]his defense, *interestingly*, shifts the focus from any particular contract and bilateral relationship to insurance viewed in the aggregate and as an institutional form. While individual contracts appear to lead to gross disparities of consideration determined by random events, in the aggregate they involve no unfairness, gambling, excess risk, or contention. (Id.)

This defense is "interesting" from an American perspective, because the typical American perspective focuses on individual bilateral relationships, not the collective. Yet, as the Islamic scholars recognized, insurance is inherently collective, because it depends on the existence of a large group through which the risks of unfortunate events are dispersed. At the aggregate level, random events like automobile accidents, diving injuries and even (as early social scientists were amazed to find out) suicides (Durkheim 1966) exhibit regular, predictable patterns. It is these patterns that allow insurance companies to charge premium in advance. Thus, the bilateral contract of the American vision of insurance rests on the participation of many others in the insurance institution.²

The second step in the legal solution to the Islamic prohibition of insurance points even more directly toward the collective aspect of insurance:

²Although this is true for contracts generally, which rest on shared understandings and the existence of a state willing and able to enforce them. (Isaacs 1934, Nietzsche 1967, Durkheim Division of Labor), the bilateral contract vision of insurance rests on a collectivity in a more specific sense as well. Insurance requires a group through which

In the 1970's, another tack was found, which also involves viewing insurance as an institution, but with an added twist. Proponents of a new "Islamic insurance" proposed that insurance be offered, not as a bilateral contract transferring a known risk, but as a charitable collective enterprise by which Muslims pool resources to aid each other in the event of a casualty or loss. (Vogel & Hayes 1998: 152)

In form, this new Islamic insurance differs from American insurance, as Vogel describes:

Employing this new justification, a new form of insurance company called *takaful* (lit., "solidarity") has been devised, offering a *takaful* contract. "By this contract, members in the company promise to make periodic payments, which the company maintains in accounts in their names and invests Islamically. Members agree that if one of their numbers should suffer a covered loss, each will make a proportionate gift from his account to cover that loss. The legality of this contract seems to depend on the general principle that gratuitous acts tolerate relative high degrees of *gharar* ["risk"], and also on a view that gift promises can be binding. (Id.)

Within the framework of Islamic law, the formal differences Vogel describes are crucial. But, within the framework of policy analysis employed by Vogel and other Western analysts they are far less so.

Indeed, the basic difference between the Islamic and American conceptions of insurance is one of perspective, not economics. ³From a secular American perspective, insurance appears

risks and responsibilities are shared.

³Keeping separate accounts is an accounting exercise that would be tedious, but certainly possible with the use of computers, to arrange in a Western insurance company. Under American contract law, the promises made by *takaful*

as a set of bilateral contracts that transfer risk for the benefit of the individuals who choose to make those contracts. From an Islamic perspective, however, insurance appears as an institution that reduces or eliminates risk for the benefit of the social group. Importantly, the institutions that result from either the American or the Islamic conception can also be described within the framework of the other: an Islamic insurance company is an institution that individuals use to shed risk, just as an American insurance company is a way that a group shares risk.

Insurance and the *Distribution* of Responsibility

The image of insurance as a bilateral contract tells us that individuals obtain insurance to lighten their responsibilities. Seen in that way, insurance can appear only to redistribute responsibility, and in only one direction: from individuals to insurance funds. Insurance institutions, in other words, only remove responsibility; they do not create it.

This is, of course, a baseline fallacy. (Hale 1923) At least in developed countries, there is no world without insurance on which insurance institutions subsequently act. There is, instead, a world that includes insurance institutions that assume some (but rarely all) financial responsibility for the consequences of some events (but not others), and for some people (but not others). A decision within an insurance institution about how much financial responsibility to

members would appear to be binding contracts, whether called "gifts" or not. Although the *takaful* ownership structure appears to differ from that of American insurance companies "owned" by shareholders, there are analogous corporate structures in the American insurance industry. Some American insurance companies are run on a nonprofit basis in which the company is formally understood to exist for the benefit of the class of people eligible to obtain insurance from the company (e.g., Teachers Insurance Annuity Company and the original Blue Cross companies); others are "mutuals" in which all profits are returned to the policyholders (e.g., State Farm Mutual Insurance Company, Prudential Insurance Company). Indeed, Vogel notes that "[s]ome proponents of [the *takaful*] approach also approve of conventional mutual insurance, since it is also based on mutual self-help." (p. 151) The investment limits in the *takaful* do differ in kind from the investment limits on an American insurance company, which are supposed to be directed solely at solvency concerns. These investment limits, however, do not implicate

assume for what and for whom parcels out the rest of that responsibility to individuals and other institutions.

Moreover, even if we were to imagine a world without insurance on which insurance institutions act, those institutions would "remove" responsibility from individuals in the same sense that a sculptor "removes" stone from a block. In the case of insurance and responsibility, there is no single artist with a grand design, nor is the medium a lifeless block of stone. There is, instead, an uncoordinated set of insurance institutions that act on and through individuals and other institutions that do not always do what is expected. Uncoordinated and imperfect though they may be, however, these institutions structure the risk transfer choices that we can make and, through those choices, the distribution of responsibility.

A second, more important stumbling block to understanding how insurance institutions distribute responsibility is the complexity of these ideas bound up in the concept of responsibility itself.

We can begin with the common sense notion that insurance is something that responsible people arrange to have. The link between insurance and this sense of responsibility was forged in the 19th century in response to strong moral and religious objections to insurance. (Baker 1996, Zelizer 1979 and 1985) If this history means that obtaining insurance is the responsible thing to do, then people with insurance should be *more* responsible than people without insurance, not less.

Part of what is going on here is wordplay: "responsible," in the sense of "trustworthy, loyal, helpful" and the rest of the Boy Scout Law, being played off against "responsible," in the

Vogel's bi-lateral contract vs. collective distinction.

sense of obligated to pay or accountable. It is responsible in the Scout Law sense to get insurance precisely because not having insurance makes one responsible in the financial accountability sense for any number of bad things that can happen. The linking of these two meanings in the context of insurance, however, extends beyond wordplay. Historically, insurance institutions have tried to become responsible and accountable primarily for people who are responsible and trustworthy and to keep the irresponsible out. In the private insurance arena, that effort is manifested in admonitions to agents and underwriters, and in opposition to efforts to curtail character underwriting (the latest being opposition to the use of credit scores in insurance underwriting). In the social insurance arena, that concern is manifested in the concept of the deserving poor -- the notion that children, the disabled, and the elderly poor deserve public support because their present need is not the result of irresponsibility on their part. (Handler & Hasenfeld 1991)

As this social insurance example suggests, there is a third, causal meaning to the word "responsible." The able-bodied poor are excluded from non-contributory social insurance programs in part because of a social judgment that they are responsible in this third, causal sense for their poverty, whether because of lack of effort or poor choices earlier in life.

"Responsible" also has a fourth meaning: free, self-determining or autonomous. "I'm responsible for X" means that X is my turf -- an area in which I am free to act or not. Admittedly this meaning is difficult to tease out from the first three. Self-determination can be an important element of what it takes to be a trustworthy person, and it can be hard to hold someone accountable for an act that was not self-determined. Yet, we do find self-determining people

who are not trustworthy and we do at times hold people accountable for acts that involved no autonomy or free choice. So, freedom is a distinct, if related, sense of the term.

Finally, there is a *relational* sense to the word "responsible" that is captured in the social insurance concept of solidarity. Although this relational meaning may be implicit in some of the other meanings of "responsible," it is also distinct. I can be responsible in this relational sense (solid with), whether I am trustworthy or not, for things that I did not cause, and this solidarity is not necessarily coextensive with my moral or legal accountability or my degree of self-determination. Indeed, a mismatch between popular understandings of accountability and solidarity can be a strong social force pushing accountability in a broader or narrower direction. (Cf., Simon 1988)

From these five meanings of the adjective, "responsible," we get five corresponding meanings of the noun "responsibility": trustworthiness, accountability, causality, freedom and solidarity.⁴ Can insurance be said to *distribute* all five types of responsibility?

⁴In an essay brought to my attention by Carol Heimer, the philosopher Richard McKeon develops a somewhat different analysis of the meaning of responsibility, which he describes as embodying three aspects: "accountability," "imputability," and "freedom and rationality." (McKeon 1957) His sense of responsibility as accountability is similar to mine, although he appears to confine accountability to the realm of law and punishment. By "imputability," he means that results can be imputed to causes and causal agents which is an analog to my "causality" sense of responsibility but within "imputability" he links causality with what I would call ethical or moral accountability. He argues that people are responsible in a moral or ethical sense only for harm that they voluntarily cause and includes this sense of moral responsibility as part of the imputation of a causal relationship. McKeon's sense of responsibility as embodying freedom and rationality is intended to perform a quite different task than my sense of responsibility as a character trait (trustworthy, loyal, helpful etc) and is more narrowly targeted than my sense of responsibility as freedom (though I derived that sense from him – my differences that I am not making a claim here that freedom and rationality are linked). Although it is quite possible he would have said I am hopelessly confused, he might also have said that freedom and shared rationality are necessary to the development of a world in which people can be judged to have the character trait, responsibility. (Interestingly, Nietzsche would have said that the opposite was true – that the freedom to contract required, first, the development of a responsible person. (Nietzsche, Essay 2.) These important philosophical details aside, it is clear that McKeon agreed with the fundamental point that responsibility involves social judgment in a social context and, accordingly, that the concept of responsibility provides a useful lens through which to view social relations:

The concept of responsibility relates actions to agents by a causal tie and applies a

A. Insurance and Accountability

My imprecise use of the word "responsibility" so far has focused on its "accountability" sense, and the kind of accountability I have addressed is financial. Admittedly, that is because I find the idea that insurance institutions distribute financial responsibility the easiest to understand.

Health insurance coverage for abortion provides a useful example. When we understand insurance as a form of social responsibility, it is perfectly plain why someone who is morally opposed to abortion would object to being included in a health plan that pays for abortions. A decision to include abortion assigns the financial responsibility to the insurance institution and, through the institution, to all the members of the institution. It is similarly plain why a person who regards access to abortion as a necessary element of women's emancipation would object to a health plan that refuses to pay for abortions. A decision to exclude abortion from the coverage offered by health insurance institutions assigns the financial responsibility for the procedure to individuals who have abortions, which, not only makes abortion more expensive for individuals, but also stigmatizes the procedure as outside the realm of ordinary healthcare.

The health insurance context also helps us to see that insurance institutions distribute accountability in a broader sense than who pays for healthcare are. As leading U.S. health insurance companies transform themselves into managed care organizations, they assert

judgment of value to both. It involves assumptions, therefore, about the agent and about the social context in which he acts. The agent may be an individual or a group acting in the context of a society or a political state, or an individual, group, or community acting in the looser association of free individuals or independent communities or states whose actions affect each other. In either situation, responsibility is a reflexive relation: the responsibility of the individual and the responsibility of the community of which he is a member are interdependent....

(McKeon, p. 82).

more control over medical care and they become more accountable — certainly in a moral sense and possibly also in a legal sense — for adverse medical outcomes.⁵

Other forms of insurance also assume significant accountability in an effort to control their financial obligations. For example, along with the growth of workers compensation insurance has come a proliferation of knowledge workers — workers compensation claims, benefits and risk managers — who assume responsibility for managing risk both *ex ante* (preventing injuries) and *ex post* (managing medical costs or getting workers back to work). These new professions represent "accountability centers" that would not exist in the form they do in the absence of workers compensation insurance.

At least potentially, these new professions distribute responsibility in all five senses of that term. They identify the location of causal agents — in organizational structures or networks; they assume accountability for monitoring the behavior of those causal agents; they define what behavior marks those agents as trustworthy, loyal, etc; they limit the freedom of those agents to act in undesirable ways; and they establish organizational procedures that may increase or decrease solidarity among members of the organization.

B. Insurance and Trustworthiness

⁵Here, because McKeon assigns moral accountability to his *imputation@sense of responsibility*, his account might differ. He might say that, as organizations assert greater control they become responsible in the *imputation@sense of that word*, but not necessarily in the *accountable@sense*.

To date, this organizational accountability does not appear to have lessened the formal legal accountability of doctors, though there have been serious proposals to that effect. In this context, it is worth noting how McKeon *sense of responsibility as freedom* help explain why doctors have resisted efforts to reduce their accountability. Because accountability in our legal culture is often based on the freedom of an agent to make a choice, removing accountability can easily be seen as a step toward the loss of the freedom to make the choice — with the resulting loss of professional autonomy.

Insurance institutions also mark people or organizations as responsible in the trustworthy sense. For example, it is nearly impossible in the United States to obtain financing for a home, a car, or other property without first obtaining insurance covering that property. Having insurance marks a potential borrower as responsible in a sense that is very important to lenders: the borrower can be trusted to repay the loan even if disaster strikes. ⁶This is the reason insurance are dlining@ (the practice of identifying geographic regions in which an insurance company prefers not to issue policies) is of such concern. (Squires 1997) A neighborhood redlined by insurance companies is a more risky place for banks to lend. Without good financing opportunities, fewer people invest in the neighborhood, and without investment the neighborhood becomes an even more risky place for banks, causing further decline.

Insurance also marks people as "trustworthy" in such seemingly unexpected fields as major league sports and the movie business. When so much depends on the health of stars, sport teams and producers manage that risk by securing life and disability insurance that protects some of their profits in the event of death or disability. Too public a relationship with illegal drugs, for example, may render a star "irresponsible," and, hence, uninsurable, and an uninsurable star may become a former star, or at least a less highly compensated one. (Hubbard 1997)

Insurance institutions also mark people as trustworthy (or not) at the claims end of the insurance relationship. In nearly any claim decision, deciding whether to pay involves a moral

⁶It may be more accurate to say that the insurance does not mark the borrower as trustworthy as much as provide an institutional replacement for an earlier requirement that the borrower (or a personal guarantor) be such. The replacement of informal networks with institutional commitments is the subject of Carol Heimer's essay in this volume. Indeed, her essay suggests that trustworthiness may sometimes be too moralistic a term.

evaluation of the claimant. For example, the question "does this worker have a repetitive stress injury?" invariably involves the question "can this worker's story be trusted?" If the answer to the second question is "yes," the claim will be paid with less investigation than if the answer is "no." (Baker & McElrath 1996, O'Malley 1991)

Finally, and perhaps most importantly, insurance institutions distribute trustworthiness by structuring situations so that people act in a more or less responsible manner. In the Scout Law sense (Erving Goffman touched on this power of institutions (and the limits of that power) in his study of "total institutions" such as asylums and prisons, (Goffman 1961) and Carol Heimer and Lisa Staffen have studied this explicitly in their effort to understand "the social organization of responsibility in the hospital and the home." (1998)

Workers compensation insurance provides a number of useful examples of how insurance institutions structure situations in this manner. One common approach is designing and maintaining workplaces so that it is difficult for workers to behave in an unsafe manner (and, conversely, easy to be safe). Workers compensation insurance does this in an indirect, command and control manner through teams of inspectors employed by insurance companies and consulting firms. It also does this in an indirect manner through experience-based premiums that give employers an incentive to prevent injuries.

A second common approach to fostering responsible behavior focuses on injured workers and their return to work. (E.g., Holland 1988) Here, the responsible behavior being fostered is following through with the doctor's or therapist's orders and returning to work as soon as it is physically safe to do so. Toward these ends, workers compensation develops rehabilitation

regimes and surveillance techniques that make it easier for the injured worker to complete the therapy needed to recover from the injury (and harder to avoid it).

A third, more difficult to document, approach to fostering a responsible behavior is suppressing workers compensation claims. (McCluskey 1998) From the perspective of the workers compensation regime, an accident is a problem only if it produces a claim, and the size of the problem turns on the amount of benefits paid on the claim. Accordingly, suppressing claims may be the responsible thing to do. As this suggests, and this is a very important point, the responsibility fostered by an insurance regime is defined with respect to the internal logic of that regime and not according to an external perspective. In other words, insurance institutions not only structure situations so that people behave in a responsible manner, they also define what behavior is (and is not) responsible. This is not to suggest that insurance institutions can define responsibility in a mechanistic, clockwork-like manner. Any given definition of responsibility is open to contestation in a multitude of ways. For example, the line between discouraging frivolous claims and suppressing legitimate claims is contested on a daily basis in workers compensation hearings across the country. (McCluskey 1998).

A final approach to encouraging people to act in a responsible (trustworthy, loyal, helpful, etc.) manner is making those who are injured share the responsibility (financial accountability) for their injuries. A detailed examination of this approach would take us deep into the economics and rhetoric of moral hazard, but the underlying idea is that insurance encourages people to behave less responsibly, because it relieves them of some of the negative consequences of their actions, leading them to take greater risks on the job and discouraging them from returning to work after injury in a timely fashion. (Baker 1996) The discussion above addressed three ways

to address this "moral hazard": designing safe workplaces, adopting back to work programs, and suppressing claims. Another way is to reduce workers compensation benefits. Of course, this approach undercuts the primary *compensation* purpose of workers compensation and, for that reason, it is contested.

C. Insurance and Causation

Insurance institutions can also mark people or organizations as "responsible" in the third, causal sense of the word.

Liability insurance, like the torts system upon which it depends, is of course inextricably bound up with questions of causation. (Hart & Honore 1985) In deciding when and whether to defend and pay claims, liability insurance claims personnel regularly decide who or what caused what. Workers compensation insurance also illustrates this dynamic. Each compensation payment reflects a judgement that an illness or injury was caused by the worker = employment. These judgements are affected by the nature of workers compensation benefits and the availability of other forms of compensation.

One demonstration of this comes from a study of doctors = judgements about whether an injury or illness resulted from employment. (Butler et al 1997) The study compared doctors in health maintenance organizations with those in private practice. The compensation incentives of the two groups differed in a crucial respect: private health insurance paid more for a given illness or injury than workers compensation insurance, but workers compensation insurance paid more than the HMOs. This meant that, if the illness or injury was work related, doctors in HMOs were paid more for treating the patient, while doctors in private practice were paid less than they would have been paid if the condition was not work related. Not surprisingly, the study showed

that the HMO doctors were more likely than the doctors in private practice to diagnose an injury or illness as work related. Of course the study tells us nothing about which doctors were right. What it shows is that payments systems affect judgements about causation. When the payment system favored the work-related diagnosis, more injuries were work-related. When the payment system favored a contrary diagnosis, fewer injuries were work-related.

Absent workers compensation, even fewer injuries would be caused by employment because there would be even less occasion to link employment to work. Thus, workers compensation produces injuries at work, not because of moral hazard (or at least not only because of moral hazard), but rather because it gives us a reason to link an event with a cause where otherwise that event might never have been linked to that cause.

Similar causal allocation decisions must be made with respect to potential overlaps between workers compensation and other payments systems, such as automobile insurance, disability insurance, and tort liability. In each situation, the compensation decisions depend on judgments about who or what caused the particular event, and those judgments will be affected by the way that the compensation systems are designed.

In addition to such case-by-case approaches to causation, insurance institutions are also involved in shaping public opinion regarding causation. Beliefs about who or what tends to cause what can have a significant impact on political decisions allocating financial accountability. For example, much of the rhetoric of moral hazard identifies people as "responsible" in a causal sense for their condition (and thus, not deserving of insurance support). (Baker 1996, McCluskey 1998) We can see this at work in such diverse fields as social insurance, workers compensation, and products liability.

D. Insurance and Freedom

Insurance can also affect responsibility in the freedom or self-determination sense. As Carol Heimer documented in *Reactive Risk and Rational Action*, insurance is intimately tied up with social control. The more that the insured loss lies within the control of the individual insured, the more strings an insurance company attaches to the promise to insure (Heimer 1985). What I described earlier as “structuring situations so that people act in a more or less responsible manner” in the Scout Law sense is a form of social control.

Insurance-based limits on freedom/autonomy/self-determination (none of these terms is exactly right) affect not only insurance beneficiaries, but also people and institutions that provide insured services, such as doctors and lawyers. Indeed, both the medical and legal professions currently are engaged in a struggle to maintain their professional autonomy in the face of cost control efforts by insurers. (E.g., Frankford, Minnesota Supreme Court 2000). Doctors and managed health care receive the most public attention, but the same dynamic affects tort defense lawyers and liability insurance. Liability insurance companies instruct defense lawyers whether and when to take depositions, whether and when to settle, whether and when to hire experts, and so on. Moreover, the legal expense accounting systems used by some U.S. liability insurance companies allow them to tell their law firms which lawyers within the firm are the most effective (from a cost efficiency perspective), thereby affecting compensation and promotion within the firms.

The connection between responsibility, freedom and insurance is also illustrated by the way that both professions have embraced their legal liability in response to insurance-based social control. One of the little known aspects of the initial Clinton health care proposal was to

eliminated doctor's liability for medical malpractice and to replace it with liability of managed care organizations. (Sage 1997) Organized medicine protested vigorously, recognizing that legal responsibility would help preserve their autonomy. "I can't do that or I will be sued for malpractice," is a powerful response to a cost-cutting effort by an insurance company. Because accountability in our legal culture is often based on the freedom of an agent to make a choice, removing accountability can easily be seen as a step toward the loss of the freedom to make the choice.

As Carol Heimer's research suggests, almost all of these social control efforts can be traced to the effect of insurance on incentives, commonly referred to as the problem of moral hazard (1985). Although the rhetoric of moral hazard can be turned to selfish ends (Baker 1996), the core insight—that, all other things being equal, people behaved differently when they bear the costs of their misfortune than when they do not—cannot seriously be questioned. Of course, all things usually are not equal, and insurance-based social control is one of the things that accounts for the fact that insurance does not necessarily lead to an explosion of costs. Indeed, as I have argued earlier, "the success of insurers in managing insurance incentives may well mean that the most important 'moral hazard' effect is not increased loss, but rather increased social control" (Baker 1996:282).

E. Insurance and Solidarity

Depending on the degree to which the premiums or benefits are linked to individual characteristics or choices, the fortunes of the members of an insurance group can be linked together to a greater or lesser extent. As the differences between individual life insurance and U.S. Social Security benefits show, there are great variations in the degree of solidarity insurance

institution embody. Individual life insurance, with its underwriting guidelines and risk classifications, epitomizes the individualistic end of the insurance spectrum and Social Security, with its mandatory participation and income-based premiums and benefits, the solidaristic end. A health care plan with community rating (everyone pays the same premium) and open enrollment (no one is turned away) is more solidaristic than a plan that charges the sick more than the healthy and turns the riskiest applicants away.

The choices we make among available insurance institutions reveal the limits of our sense of solidarity with others, as the current debate over the U.S. Social Security retirement system reflects. A choice to change Social Security from a guaranteed benefit, one-size-fits-all program to something that looks like an Individual Retirement Account (in which contributions are earmarked for, and invested according to the directions of, individual contributors) would signal that we understand Social Security to be more about self-protection (and less about solidarity) than we once did, and that we feel less responsibility for those who fall behind under the IRA approach.

Of course, the exercise of such choices does more than reveal preferences. It also shapes the further development of insurance institutions. The more our choices reveal that we understand insurance to be about self-protection, the more that insurance institutions will adapt to provide us the best individualized protection at the cheapest individualized price. For private insurance, this adaptation is relatively straightforward, as illustrated by the market-driven shift in the U.S. from a largely community-rated health insurance system to a more heavily risk-rated health insurance system. (Jacobi 1997) But even social insurance programs respond to preferences, albeit through the political process. The proponents of the proposal to add the IRA -

like component to Social Security clearly hope (and may even expect) that this self-protection intervention into a currently solidaristic domain will teach people to demand more of the same.

The development of insurance institutions shapes, in turn, what is imaginable about the meaning of participation in insurance institutions. The more that insurance institutions adapt to satisfy self-interest, the more the satisfaction of self-interest will seem to be a natural role of insurance institutions and the more far-fetched the idea of using insurance to achieve solidarity. The U.S. health care situation illustrates this point well. The debate over the government's role in U.S. health insurance is, in significant part, a debate over the nature of health insurance: does it exist to protect me and mine, or does it serve a greater good? This debate does not take place in a policy vacuum, but rather in a rapidly changing health care marketplace. The more that commercial insurance companies, HMOs, and third party administrators erode the market share of Blue Cross organizations (by offering lower risk groups lower prices and broader service), the more difficult it becomes for the Blues to maintain their historic policies of community pricing and open enrollment. The greater the competitive pressure on community pricing and open enrollment, the more a natural, individualist conception of self-interest appears as the foundation of health insurance, and the more that government efforts to promote affordable health insurance for everyone appear to be interventions in an otherwise neutral health care marketplace.

The development of four ideas about the meaning of participating in insurance institutions affects, in turn, the choices we make among available insurance institutions. If community pricing and open enrollment seemed doomed to failure, why waste precious resources propping them up? If openly linking insurance and solidarity is a vain hope, why not amend the Social

Security Act to allow segregated, IRA-type accounts? In this manner, insurance ideas and insurance institutions engage in the elaborated dance that is the social construction of responsibility.

Of course, it is possible to imagine different steps to this dance. If, like the organizers of Islamic *takafuls*, we understood insurance to be about solidarity, we might work to find ways of organizing insurance institutions around groups of people who feel some degree of responsibility for each other. If insurance institutions grouped together people who felt responsible for each other, it might become easier to imagine insurance as being about solidarity. If we understood insurance to be about solidarity, we might choose the best group over the best individualized protection at the cheapest price.

Might this be the trajectory of Islamic insurance? Only time will tell. The important point here is not to predict the future or idealize Islamic insurance, but rather to emphasize the interaction of insurance ideas and institutions in the social construction of responsibility.

CONCLUSION

Summing up, my argument has been that insurance is a form of social responsibility and that insurance institutions shape responsibility in five analytically distinct senses of that term: B accountability, trustworthiness, causation, freedom, and solidarity. Insurance shapes accountability through decisions about premiums and benefits, through subrogation and coordination of benefits, and through risk management techniques designed to reduce the exposure of insurance institutions to loss. Insurance shapes trustworthiness through decisions about whom to insure, what premiums to charge and whose claims to pay, as well as through risk

management techniques designed to foster responsible behavior. Insurance shapes causation through decisions about whose claim to pay, decisions about what kinds of benefits will be offered to cover what kinds of events, and, once again, through risk management techniques that identify who or what causes loss in order to minimize losses in the future. Insurance shapes freedom through efforts to control moral hazard. Finally, insurance shapes solidarity through decisions about risk classification and underwriting, and through risk management techniques that alter the structure of organizations. Seen in this way, insurance institutions cease to play only a passive, loss-spreading role and, instead, actively construct (and are constructed by) the world they inhabit.

References

- Abraham, Kenneth** (1986) *Distributing Risk* (New Haven: Yale U. Press).
- Baker, Tom** (1994) Constructing the Insurance Relationship: Sales Stories, Claims Stories and Insurance Contract Damages, *Tex. L. Rev.* 72:1395 -1433.
- _____ (1996) On the Genealogy of Moral Hazard, *Tex. L. Rev.* 75:237 -92.
- Baker, Tom & McElrath, Karen** (1996) Whose Safety Net: Home Insurance and Inequality, *Law & Social Inquiry* 21:229-64. Baker, Tom (1996).
- Butler, Richard J. et al** (1997) HMOs, Moral Hazard and Cost Shifting in Workers Compensation *J. Health Econ.* 16:191-206.
- Clarke, Geoffrey** (1999) *Betting on Lives* (Manchester: Manchester U. Press).
- Durkheim, Emile** (1933) *The Division of Labor in Society* (G. Simpson, trans.) (Glenree, Ill.: Free Press).
- Durkheim, Emile** (1966) *Suicide* (J. Spaulding and G. Simpson, trans.) (New York: Free Press).
- Goffman, Erving** (1961) *Asylums* (New York: Doubleday).
- Hacking, Ian** (1975) *The Emergence of Probability: A Philosophical Study of Early Ideas About Probability, Induction and Statistics* (London: Cambridge U. Press).
- Hale, Robert** (1923) Coercion and Distribution in a Supposedly Non-Coercive State, *Pol. Sci. Q.* 38:470.
- Handler, Joel F. and Hasenfeld, Yeheskel** (1991) *The Moral Construction of Poverty: Welfare Reform in America*, Newbury Park (Sage Publications).
- Hart, H. L. A. and Honore, Tony** *Causation in the Law* (2ded. 1985).
- Heimer, Carol A. and Staffen, Lisa R.** (1998) *For the Sake of the Children: The Social Organization of Responsibility in the Hospital and the Home* (Chicago: U. Chicago Press).
- Holland, Vicki** (November 1988), Step to Return to Work, Risk Management, at 25.
- Hubbard, Elizabeth** (1997) When Worlds Collide: The Intersection of Insurance and Motion Pictures, *Conn. Ins. L. J.* 3:267 -304.
- Isaacs, Nathan** Contracts, Torts and Trusts, *Legal Relations* 6:1, (Roscoe Pound et al, eds. 1934).
- Jacobi, John** (1997) The End of Health Insurance, *U. C. Davis L. Rev.* 30:311 -404.
- McKeon, Richard** (1957), The Development and the Significance of the Concept of Responsibility, reprinted in Richard McKeon, *Freedom and History and Other Essays* (1990). (Chicago: U. Chicago Press).
- Nietzsche, Friedrich** (1967) *On the Genealogy of Morals*, Second Essay, Sections 1 & 2 (Kaufmann and Hollingdale, Trans.) (New York: Random House).

- O'Malley, Pat** (1991), Legal Networks and Domestic Security, *Studies in Law, Policy and Society* 11:171 -199 (1991).
- McCluskey, Martha T.** (1998) The Illusion of Efficiency in Workers Compensation A Reform, *Rutgers L. Rev.* 50:657-941.
- Pearson, Robin** Thrift or Dissipation: The Business of Life Insurance in the Early Nineteenth Century, *Econ. Hist.* 43:236-.
- Rothschild, Michael & Stiglitz, Joseph** (1976) Equilibrium in Competitive Insurance Markets: An Essay on the Economics of Imperfect Information, *Q.J. Econ.* 90:629.
- Sage WM. (1997) Enterprise liability and the emerging managed health care system. *Law & Contemporary Problems* 60(2):159 -210.
- Simon, Jonathan** (1988) The Ideological Effects of Actuarial Practices, *Law & Soc. Rev.* 22:772 -800.
- Smith, Barry D., Trieschman, James S., Wiening, Eric A.** (1987) *Property & Liability Insurance Principles* (Malvern: Insurance Institute of America).
- Squires, Gregory D.** (1997) *Insurance Redlining* (Washington: Urban Institute Press).
- Stone, Deborah** (1993) The Struggle for the Soul of Health Insurance, *J. Health, Politics, Policy & L.* 18:287 -317.
- Vogel, Frank E. and Samuel L. Hayes, III** (1998) *Islamic Law and Finance: Religions, Risk and Return* (Boston: Kluwer Law International).
- Zelizer, Viviana** (1979) *Morals and Markets: The Development of Life Insurance in the United States* (New York: Columbia U. Press).