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Insurance and the Utopian Idea

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INSURANCE AND THE UTOPIAN IDEA

Carol Weisbrod*

TABLE OF CONTENTS

INTRODUCTION	381
I. RELIGION AND INSURANCE	384
II. POLITICAL DIMENSIONS AND DYSTOPIAN POSSIBILITIES	397
III. THE STORY OVER TIME	410
CONCLUSION	421

INTRODUCTION

In 1887, Reverend R. Heber Newton¹ produced a list of enterprises under the heading "American Co-operation."² The list included fire and life insurance companies, Brook farm and Owenite and Fourierite groups, and building and loan associations.³

* Ellen Ash Peters Professor of Law, University of Connecticut. This work was supported by a grant from the Insurance Law Center of the University of Connecticut School of Law. One version of this paper was prepared for a conference ('A Millenium of Utopias') held at the University of East Anglia, June, 1999. In the event, the paper was not delivered as I was unable to attend the conference. Another version of the paper was given as part of a panel discussion of Insurance as a Site of Historical Research at the annual meeting of the American Society for Legal History, October, 1999 held in Toronto. I am grateful for the comments offered there. Thanks are also due to Tom Baker, Brian Glenn, Carolyn Jones, Richard Kay, Lyman Tower Sargent, Aviam Soifer, and Stephen Wilf; to the participants in the discussion at the New England Insurance and Society Reading Group; and to the seminar in Religion, Risk and Responsibility (Spring 2000).

1. Rev. Newton (Protestant Episcopal) was the Rector of All Souls' Church in New York. His entry in D.A.B. notes the range of his interests.

2. See R. HEBER NEWTON, *SOCIAL STUDIES* 86 (1887).

3. See *id.*

The chief entries now to be recorded in the annals of American co-operation may be tabulated as follows: Share System introduced into New England Fisheries (about 1730); Fire Assurance introduced in

By 1897, when the list was published as an "interesting table" in the Bliss Encyclopedia of Social Reform, the writer of the article on cooperation was able to say first, that some of the enterprises on the list had failed, and second, that the list had been broken down in the encyclopedia. Utopias were discussed under the heading Utopias and Insurance companies were discussed under the heading insurance.⁴ This division remains standard.

At the moment, the history of insurance is often told with an emphasis on its connections to commercial activity, to risk and to the actuarial approaches that have made risk more ascertainable and controllable. The theme of risk and the management of risk identified with modernity, can be seen as central to twentieth century life. Thus, we see a reference to "the popular contemporary theme that late modernity is characteri[z]ed by the rise of the risk or insurance principle."⁵

Philadelphia (1752), "The Philadelphia Contributionship for the Insurance of Houses from Loss by Fire," Benjamin Franklin, First Director (the corporation is still prospering); Life Insurance introduced in Philadelphia (1767), "The Corporation for the Relief of Widows and Children of Clergymen in the Communion of the Church of England in America," composed of clergymen and still flourishing; Mutual Assurance bodied in a national order called The Odd Fellows (1819); Owen's Movement, which was Socialistic (1820-1830); Loan and Building Societies formed in Philadelphia, New England Association of Farmers and Mechanics agitate the formation of stores, Labor Organizations in New England open some stores (1830-1840); Brook Farm, Hopedale, etc., Pourierite Phalanxes, New England Protective Union builds up a system of stores which, at their height, did a business of about \$2,000,000 per annum, and some of which still survive (1840-1850); The earliest essay in Co-operative Production, Tailors' Association in Boston (1849); Loan Associations arise in Massachusetts, Associate Dairies started in New York, Anaheim (1850-1860); Stores and Productive Societies started in several states, Revival of Building and Loan Associations in Pennsylvania, Mutual Assurance assumes business forms, Renewed attempts at Co-operative Production, (1860-1870); Ship-yard in Baltimore (1865); Ship-yard in Boston (1866); Machine Shop in Philadelphia (1866); Foundries in various cities; Shoe Manufactory in Lynn and in North Adams (about 1868); Cigar Manufactory in Westfield, Mass (1869).

Id. at 86-87.

4. See THE NEW ENCYCLOPEDIA OF SOCIAL REFORM 366 (William D.P. Bliss et al. eds., 1970).

5. ALAN HUNT & GARY WICKHAM, *FOUCAULT AND LAW* 66 (1994).

This article is an attempt to suggest an outline of the connections that Reverend Newton saw. The first steps in the reconnection involve seeing the links between insurance and political thought, particularly utopian and religious political thought.

If we say that insurance is a political metaphor, we might mean the modern liberal, and even consciously secular politics of the modern West. But we might also include the politics of religious orientations, which may or may not be modern. That churches have social and political views is not a new idea. It is strange only if one adopts a fairly narrow view of religion, which focuses on individual belief and ritual observances. Because there are such things as religiously-based politics and economics, however, we can appropriately include material on insurance and religion in a review of the metaphoric uses of insurance.

The religious and secular treatments can perhaps be linked through the idea of utopia.⁶ The rhetoric of utopia is invoked by writers on risk, or insurance, operating from different political orientations. Thus, François Ewald writes: "The 19th century's dream of security becomes a utopia of a science always ever more capable of controlling risks."⁷ Anthony Giddens speaks of utopian realism.⁸ The idea of Utopia as substantive may also overlap with the description of Germany as Eldorado, a place of wealth and caution, as offered by Ulrich Beck.⁹ Some of these descriptions see a society as a utopia in practice precisely because of insurance, and particularly state insurance.¹⁰

The rhetoric of the projected utopia, the planned ideal society may invoke insurance from various orientations. Thus, as noted below, Edward Bellamy conceived his future State in terms of insurance. Today, from the

6. "Utopia" is used here evocatively and not with definitional precision. See Lyman Tower Sargent, *Utopia: The Problem of Definition*, EXTRAPOLATION, Vol. 16, May 1975, at 137-48.

7. François Ewald, *The Return of the Crafty Genius: An Outline of a Philosophy of Precaution*, 6 CONN. INS. L.J. 47, 58 (1999). "While one cannot eliminate them (there is never zero risk), they will have been sufficiently reduced to be able to be dealt with collectively: accidents are the waste aspect, necessary although always more marginalized, of scientific and technical progress." *Id.*

8. See ANTHONY GIDDENS, *THE CONSEQUENCES OF MODERNITY* 154-58 (1990).

9. See Ulrich Beck, *From Industrial Society to the Risk Society; Questions on Survival, Social Structure and Ecological Enlightenment*, in 9 THEORY, CULTURE AND SOCIETY 97 (1982).

10. Another view might be that in utopia no insurance would ever be needed.

libertarian side, Murray Rothbard, in a scheme for a future libertarian society, sees a policing role for insurance companies.¹¹

Beyond rhetoric, we can connect insurance and utopia in their discrete historical incarnations. One way of suggesting the connections is to follow the lead of Morton Keller and see insurance companies as voluntary associations, alternative to the state, which provide social benefits.¹² We may also invoke that smallest state, the family. The Oneida community was, as an observer said, a family of two hundred.¹³ And the Metropolitan Life Insurance Company was a "family of thirty million."¹⁴

This paper is a sketch of an answer to the question: What relations might there be between insurance and the vision of an ideal society? Two approaches are outlined here, one based on a reading which stresses continuity and sees insurance as a form of mutual aid. This approach may include the idea of insurance as a meliorist alternative to collective or state-sponsored forms of protection and security. A second perspective sees insurance, and the insurance idea, (whether embodied in official or unofficial forms) as a distortion and corruption of the communitarian idea. The third section of the paper raises some issues which might be explored in work which tried to research this kind of question over time.

The effort here is not to offer a history, but to suggest some of the background which might be relevant to the historical inquiry.

I. RELIGION AND INSURANCE

You have no need to pray to God any more when the thunderclouds stand overhead; but you must be insured.¹⁵

11. See MURRAY N. ROTHBARD, *FOR A NEW LIBERTY: THE LIBERTARIAN MANIFESTO* 217-19 (1989). Some libertarian arguments reject insurance. See, e.g., LUDWIG VON MISES, *SOCIALISM: AN ECONOMIC AND SOCIOLOGICAL ANALYSIS* 475-78 (1951). Von Mises writes: "Social insurance has thus made the neurosis of the insured a dangerous public disease. Should the institution be extended and developed, the disease will spread. No reform can be of any assistance. We cannot weaken or destroy the will to health without producing illness." *Id.* at 478.

12. See generally MORTON KELLER, *THE LIFE INSURANCE ENTERPRISE, 1885-1910: A STUDY IN THE LIMITS OF CORPORATE POWER* (1963).

13. See CAROL WEISBROD, *THE BOUNDARIES OF UTOPIA* 177 (1980) (T.W. Higginson referred to the Oneida community as "a family of two hundred living in apparent harmony and among the comforts which associated life secures." *Id.*).

14. LOUIS I. DUBLIN, *A FAMILY OF THIRTY MILLION* (1943).

15. BERTOLT BRECHT, *THE MOTHER* 115 (1965).

There are some familiar connections between religion and insurance. In telling the story of insurance we invoke images of London underwriters, sitting in coffee houses while they consider maritime risks. We recall Pascal, working out the answer to a question posed by a French nobleman: how could one assess winnings in a card game which was not yet completed? The answers given by Pascal as mathematician continue to be important to us in connection with the risks involved in calculating premiums for modern insurance. Both the London coffeehouses and Pascal are used by Peter Bernstein in *Against the Gods*¹⁶ with the implicit idea that Pascal's most famous comment on risk and uncertainty – his wager on the existence of God – exists in an altogether different dimension from that of his mathematical inquiry.¹⁷ This is not, however, the only way to look at the issue.

Thus affinities between religion and insurance have sometimes been suggested. Franz Kafka, whose connection to insurance is well known, said of the enterprise that "insurance is like the religions of primitive peoples who believe they can ward off evil by all kinds of manipulations."¹⁸ William Sumner suggested that religion was a kind of insurance,¹⁹ with insurance was described as: "a generic conception covering the methods of attaining security, of which the modern devices are but specific, highly elaborated, and scientifically tested examples..."²⁰ Insurance "is a grand device" Sumner said, with very old roots, since mankind "has tried in all ages somehow to insure himself – to take out a

16. See generally Peter L. BERNSTEIN, *AGAINST THE GODS: THE REMARKABLE STORY OF RISK* (1996).

17. See *id.* Pascal is viewed as having been torn between "pursuing a career in mathematics and yielding to religious convictions that were essentially anti-intellectual." *Id.* at 58.

18. MAX BROD, *FRANZ KAFKA: A BIOGRAPHY* 79-80 (G. Humphreys Roberts & Richard Winston trans., Schocken Books 2d. ed. 1960) (discussing Kafka's daily work). Kafka worked first for the Assicurazioni Generali, then the Workingman's Accident Insurance Institute in Prague. See *id.* Ernest Pawel described the Workingman's Accident Institute in Prague as "semi-governmental." See ERNEST PAWEL, *FRANZ KAFKA: THE NIGHTMARE OF REASON* 183 (1984).

19. See Spencer L. Kimball, *The Purpose of Insurance Regulation: A Preliminary Inquiry in the Theory of Insurance Law*, 45 MINN. L. REV. 471, 479-80 (1961) (quoting SUMNER & KELLER, *THE SCIENCE OF SOCIETY* 749 (1927)).

20. *Id.* at 479.

"policy" of some sort on which he has paid regular premiums in some form of self-denial or sacrifice."²¹

Some historical work on the insurance/religion nexus has been done in the United States and also in other countries. As Viviana Zelizer has indicated, religious values opposing insurance were evident in the nineteenth century American discussion.²² The insurance industry responded to those arguments by insisting that insurance was an aspect of responsibility.

Move and countermove were clear at the end of the nineteenth century. William Standen wrote in 1897, "[t]ime was...that life insurance could only be availed of by the impious and ungodly."²³ There was a time, "when even ministers of the gospel of grace and peace put themselves on record against the benefits of life insurance, by claiming that it was a defiance of divine power"²⁴; At that time, "a man who insured his life was betting against his God," and the divine being, who is the protector of the widow, the orphan and the fatherless, would resent and punish as a crime the natural protection that life insurance alone can give."²⁵

But at the end of the nineteenth century, "[T]hanks to the change wrought by time, such an absurdity is rarely uttered to-day."²⁶ Standen continues: "[L]ife insurance instead of being denounced as something intolerable to the religious man, is now regarded as the bounden duty of all."²⁷

The good father would protect his family. Zelizer quotes Henry Ward Beecher, on the responsibilities of a Christian father, seeing the religious struggle as fundamentalists against liberals, and particularly liberal Protestants.²⁸ As Tom Baker has summarized the issue: "Eventually, the

21. *Id.* at 480.

22. See generally VIVIANA ZELIZER, *MORALS AND MARKETS: THE DEVELOPMENT OF LIFE INSURANCE IN THE UNITED STATES* (1979). Zelizer describes her study as one which "analyzes life insurance as a social mechanism to cope with the uncertainty of the time of the time of an individual's death." *Id.* at 73. She suggests a somewhat more precise question in her conclusion: the study in part responds to the question left open by Stalton and others as to why aggressive tactics were needed to sell life insurance particularly. See *id.* at 149-50. Zelizer also refers to cooperative and mutual aid ideas. See *id.* at 91, 95.

23. WILLIAM T. STANDEN, *THE IDEAL PROTECTION* 119 (1897).

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. See generally ZELIZER, *supra* note 22.

objection that insurance interfered with the Divine Plan was turned on its head as the insurance men turned calamity into chance and linked insurance to the cultural values of self-reliance, thrift, and acquisitiveness.²⁹ Indeed, insurance became one of the protective devices through which Providence works, and it was immoral to fail to get insurance.

The relation between insurance and the history of Christianity, and particularly Christian post millennial thinking was also noted. Charles Loring Brace, writing in 1882, addressed the question of insurance as “the greatest practical benevolent discovery of modern life, and one destined yet to produce enormous effects in diminishing poverty and relieving misfortune.”³⁰ He conceded that the “application of insurance to human ills is not directly a fruit of Christianity,”³¹ and yet he saw the stimulus which Christianity gave to benevolence as an indirect source. He described insurance as “the application of the savings of the fortunate to the assistance of the unfortunate, and yet not necessarily through benevolent motives.”³² He noted that insurance, whether to alleviate problems of the working class through government programs or private insurance “will be one of the greatest blessings of modern society, and will undoubtedly be stimulated, if not caused by the influence of Christ in the world.”³³

Jean Halpérin, working from European materials, noted that insurance has been both discouraged and encouraged by religious issues and questions. It was discouraged in the sense that the Orthodox saw in insurance an attempted interference with the Divine Plan and a kind of “insult to Providence.”³⁴

Halpérin also noted that, in Germany, even in the first decades of the nineteenth century, there was opposition by clerical parties to private companies which were insuring against fire. These efforts were attacked on the grounds that they deprived God of the means of punishing men.³⁵

29. Tom Baker, *The Genealogy of Moral Hazard*, 75 TEX. L. REV. 237, 255 (1996).

30. CHARLES LORING BRACE, *GESTA CHRISTI: A HISTORY OF HUMANE PROGRESS UNDER CHRISTIANITY* 416 (1882).

31. *Id.*

32. *Id.*

33. *Id.*

34. See JEAN HALPÉRIN, *LES ASSURANCES EN SUISSE ET DANS LE MONDE* 116 (1946). Thanks to Laura Schwartz for assistance with the French materials.

35. See *id.* Halpérin notes that similar arguments were made concerning the umbrella in England. Certain religious figures opposed this, saying that according to the bible, God let the rain fall on the just as well as the wicked. *Id.* (citing A.A. READE, *THE STORY OF LIFE ASSURANCE* 30 (1903)).

Halpérin describes a pamphlet he found in the Swiss Economic Archive called *Insurance and Religion: a Question of Political Economy*. It was dedicated to demonstrating that insurance was an honorable thing in the eyes of religion and to reassure people of the morality of insurance.³⁶ Halpérin writes that Abbé, who wrote the pamphlet, concluded by saying that insurance was a religious and social necessity.³⁷

But Halpérin also discusses religion as a positive factor in the development of insurance. He describes the efforts of the theologians to show that the universe was not arbitrary or magical.³⁸ Halpérin notes that: the first statistical and demographic work was encouraged, indeed sometimes undertaken by the theologians.³⁹ Statistical regularity proved the errors of superstitions and the orderliness of the universe.⁴⁰

Alexander Welsh, discussing the Religion of Life Insurance, wrote that "life insurance is the characteristic institution of a Christian society whose faith in immortality had decayed or is declining."⁴¹ He suggested that "if

The umbrella of the insurance advertisements may be compared to the sheltering cloak of Mary. See JAMES HALL, *DICTIONARY OF SUBJECTS & SYMBOLS IN ART* 325 (rev. 1974). The entry begins: "The disasters that befell medieval man, such as war and disease, especially the plague, were seen as the workings of divine judgment. He might mitigate them however by placing himself under the protection of a tutelary figure, a saint or, to even greater purpose the Virgin herself." *Id.* (thanks to Pamela Sheingorn for calling my attention to the sheltering cloak). Tom Baker, using a Melville short story, indicates that objections to life insurance on the theory that interference with divine providence could have a broader reach than insurance. In the Melville story it reached the issue of lightening rods. See Baker, *supra* note 29, at 255. The idea also occurred to others. An Amish ordnung (discipline) of 1865 is translated by Harold S. Bender this way: "decided not to . . . enroll our material possessions in companies (insurance?) or to put up lightning rods on our buildings..." Harold Bender, *Some Early American Amish Mennonite Disciplines*, 8 *MENNONITE Q. REV.* 90 (1934).

36. See HALPÉRIN, *supra* note 34, at 117.

37. See *id.* Halpérin dates this as early 19th century. Geoffrey Clark discusses similar arguments in 18th century England. See generally GEOFFREY CLARK, *BETTING ON LIVES: THE CULTURE OF LIFE INSURANCE IN ENGLAND, 1695-1775* (1999). Since the Catholic Church was not opposed to gambling per se (but only when inappropriate), the opposition based on gambling may have been essentially Protestant. See generally LEO PFEFFER, *CREEDS IN COMPETITION* (1958). Gambling was historically associated with attempts to know the Divine will. The Amish, who often oppose insurance (see below), use lots to choose their bishops, cf certain biblical practice. See, e.g., 1 *Chronicles* 24:5; *Acts* 1:26.

38. See HALPÉRIN, *supra* note 34, at 117.

39. See *id.*

40. See *id.* at 117-18.

41. ALEXANDER WELSH, *The Religion of Life Insurance, in THE CHRISTIAN CENTURY* 1541 (1963).

our belief in immortality had the original Christian force and literalness we would have no need for life insurance, [since] if we truly felt the next life to be more important than this, we would hold the same to be true for our heirs."⁴² The institution of life insurance has "inherited and transformed the religious hope of immortality in an age that has lost religious assurance."⁴³

Welsh found confirmation of his view in the rhetoric of the industry. The religious heritage survives in the everyday idiom of the insurance world: witness the calls to renew our "faith" in life insurance, the eagerness to "tell the story" of life insurance. And, he noted, a patriotic and biblical idiom is often heard in combination: "Our democracy was founded on spiritual foundations," says one agent, "we must help others help themselves by building their future upon the rock, not upon the shifting sands."⁴⁴

A discussion by Miles Tracy, the work of a Professor of Business, views issues of insurance and religion from outside the framework of any specific religion. His work is addressed to something called "the insurance community" and considers the historical position of a number of religious groups on insurance.⁴⁵

The Tracy article then moves to the modern situation and the argument that life insurance has itself become a religion. There is also a discussion of the position of the Christian Scientists, who see the problem in terms of possible discrimination against Christian scientists (by the carriers) because the scientists rely on spiritual healing. (This material is a variation on such questions as whether Christian Science practitioners are engaged in the practice of medicine, can sue for fees as doctors etc.) There are additional comments on the Jehovah's Witnesses and the Mormons, and a concluding reference to non-Christian groups.

42. *Id.* at 1542.

43. *Id.*

44. *Id.*

45. See Miles A. Tracy, *Insurance and Theology: The Background and the Issues*, in J. OF RISK & INS. 85 (1966). Tracy's comments on the early life insurance documents – that they are curiously silent on the theological implications of the plan – raise the question: what sort of theological discussion would we expect in such a document? Why would one "posit an elaborate theology" if one was acting on an existing and adequate theology? Tracy is looking for "discourses based on the scriptures" (Why? Why "scriptures"? And what groups are omitted from his mental map of religion?) Tracy draws on the piece from the Mennonite encyclopedia, (see *id.* at 85-87), reading it as describing a system of property insurance based on "the principle of sharing losses." *Id.* at 86.

The Welsh articles evoked a response in 1965 by a representative of the insurance industry – Roger Hull, of New York Mutual. Hull argued in religious terms, including quotations from Dietrich Bonhoeffer, and concluding with a sermon preached in the 1880's by T. De Witt Talmadge:

It is meanly selfish for you to be so absorbed in the heaven to which you are going that you forget what is to become of your wife and children after you are dead. if you could pay the premiums on a policy, and neglect then, it is a mean thing for you to go up to heaven while they go into the poorhouse.⁴⁶

In short, Hull believed that the argument of the late nineteenth century in relation to the discussion was still useful in the mid-twentieth century.

But, of course, religion is not one thing. Rousas Rushdoony, for example, places the whole subject in the context of a society that has rejected the principles of restitution and therefore has forced responsible people to take out insurance as a second best solution to a serious problem. Rushdoony, a Christian conservative, wrote in 1970 that "The failure of a society to ground itself on restitution, or its departure from this principle, means a growing necessity for costly protection by means of *insurance*."⁴⁷ Insurance, as he saw it, was a kind of "self-restitution," since the insured is protecting himself against those "irresponsible people who will not make restitution," and from "the failure of the law to require restitution."⁴⁸

The history of the Mennonites and insurance captures the essentials of the argument opposing insurance. An account in the Mennonite Encyclopedia explains that opposition to life insurance was originally very strong, with excommunication as the sanction. "Applicants for membership were required to surrender their insurance policies before being received."⁴⁹ This opposition covered all forms of insurance, but by the beginning of the twentieth century, "opposition to fire and auto accident insurance had greatly diminished."⁵⁰ Workmen's compensation "created

46. Roger Hull, *Immortality Through Premiums? Rebuttal from the Life Insurance Center*, THE CHRISTIAN CENTURY, February 19, 1964, at 239 (quoting a sermon of T. DeWitt Talmadge).

47. ROUSAS JOHN RUSHDOONEY, THE INSTITUTES OF BIBLICAL LAW 227 (1973).

48. *Id.*

49. THE MENNONITE ENCYCLOPEDIA: A COMPREHENSIVE REFERENCE WORK ON THE ANABAPTIST MENNONITE MOVEMENT 343 (1957).

50. *Id.*

serious problems for conservative Mennonites at first, but ultimately this was generally accepted.”⁵¹

Eventually, even the absolute prohibition on life insurance was changed, with only certain parts of the denomination prohibiting it altogether. Finally “in the General Conference Mennonite Church, the Mennonite Brethren Church, and certain related groups, whatever minor opposition there once may have been has completely disappeared, although such opposition apparently never was very strong.”⁵²

The Mennonite opposition to insurance had several dimensions. They believed that “it reflects trust in man rather than in God”;⁵³ and it meant becoming “unequally yoked together with unbelievers”;⁵⁴ insurance was “equivalent to merchandising in human life”;⁵⁵ it is putting a monetary price on human life, which is considered unscriptural since man is the “temple of the Holy Ghost”⁵⁶

Further, many Mennonites “also objected to taking out life insurance because it was contrary to the spirit of genuine mutual aid and brotherhood”⁵⁷ and finally, “the corrupt practices of many earlier life insurance companies were often cited as objections to all life insurance.”⁵⁸ The corrupt history of the industry “greatly fortified the theological arguments.”⁵⁹

This article in *The Mennonite Encyclopedia* then goes on to describe forms of mutual aid within the group. “A form of mutual brotherly aid insurance has developed among Mennonites in North American in recent decades in the form of death and burial and benefit associations, which are

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.* at 344.

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.* One American court wrote in the late nineteenth century that: “Some companies, chartered by the legislature as insurance companies, were organized for the purpose of providing one or two of their officers, at head-quarters, with lucrative employment, – large compensation for light work, – not for the purpose of insuring property; for the payment of expenses, not of losses.” *Delancy v. Insurance Co.*, 52 N.H. 581 (N.H. 1873). It may be noted, however even this can be defined as an aspect of community of a particular social class. See ANTHONY F.C. WALLACE, ROCKDALE 49-50 (Norton 1980) (1972).

in effect life insurance arrangements.”⁶⁰ Nonetheless, the position is that these are substantially and significantly different from ordinary insurance. Five factors are listed: (1) the benefit payments are small, intended to cover only the cost of the burial,⁶¹ or also medical bills attendant upon the last illness; (2) the system is entirely and truly mutual; (3) salary payments to officials are nonexistent or very low; (4) no agents’ premiums are paid; (5) membership is limited to church members.⁶²

* * *

There is a widely recognized disparity in response between issues of insurance as to property (fire, theft, maritime insurance) and issues of life insurance.⁶³ All insurance is not the same.⁶⁴ Rushdoony’s emphasis on restitution—preceded in his *Institutes of Biblical Law* by an extensive discussion of restitution/restoration—allows us to reopen the question of why life insurance was different, sometimes opposed, even when other forms of insurance were accepted.

While we tend to assume a world with insurance,⁶⁵ we have, in the world of imagination and literary reference, another idea. It is precisely a world without insurance that is associated in the Western tradition with the story of catastrophic and inexplicable affliction represented by Job.

1 There was a man in the land of Uz, whose name was Job; and that man was blameless and upright, one who feared God, and turned away from evil. 2 There were born to him seven sons and three daughters. 3 He had seven thousand sheep, three thousand camels, five hundred yoke of oxen, and five hundred she-asses, and very many servants; so that this man was the greatest of all the people of the east⁶⁶

60. THE MENNONITE ENCYCLOPEDIA, *supra* note 49, at 344.

61. Life insurance may be conceived as burial insurance at times.

62. See THE MENNONITE ENCYCLOPEDIA, *supra* note 49, at 344.

63. See, e.g., ZELIZER, *supra* note 22, at 123 (1979); see generally VIVIANA A. ZELIZER, *THE SOCIAL MEANING OF MONEY* (1997) (noting that all money is not the same).

64. See ZELIZER, *supra* note 22 (discussing the social meaning of money).

65. See generally Tom Baker, Insurance, Risk, and (the Social Construction of) Responsibility (unpublished manuscript, on file with the Insurance Law Center at the University of Connecticut School of Law) (noting that a world with insurance is usually assumed in the Western discussion).

66. Job 1:1-10 (Revised Standard).

The story continues with a wager between God and Satan, in which Satan says: "Thou hast blessed the work of his hands, and his possessions have increased in the land. But put forth thy hand now, and touch all that he has, and he will curse thee to thy face."⁶⁷ And the LORD said to Satan, "Behold, all that he has is in your power; only upon himself do not put forth your hand."⁶⁸ Satan causes Job to lose everything he has; camels, servants, children.

The book of Job concerns itself with the problem of Job's suffering, and its lack of justification. Of interest here is not the major part of the text, but only the epilogue, the so-called happy ending.⁶⁹

And the LORD restored the fortunes of Job, when he had prayed for his friends; and the LORD gave Job twice as much as he had before. . . . And the LORD blessed the latter days of Job more than his beginning; and he had fourteen thousand sheep, six thousand camels, a thousand yoke of oxen, and a thousand she-asses. He had also seven sons and three daughters . . .⁷⁰

The restoration given to Job is provided by the same God who originally permitted/caused Job's suffering. But what if it had been provided by an insurance company? What if the first question for Job was not "Why Me?" or "Why should the Righteous Suffer?" but "Am I insured for This?" Of course, if Job had been insured, the afflictions could have included the insolvency of the Insurer.⁷¹ But the idea that Job might have insured his wealth, or the lives of his children seems to change the story.

To the extent that it mitigates, insurance influences the meaning of human suffering in relation to certain events.⁷² It is in that sense, like all

67. *Job* 1:11.

68. *Job* 1:12.

69. See MARTIN COPENHAVER, *Risking a Happy Ending*, in *CHRISTIAN CENTURY* 923 (1994) "It is not difficult to see why many commentators have concluded that the epilogue comes from a different source and was simply tacked on. After the bold cadences of the poetry that has gone before, the epilogue is told in prose – and it seems, well, prosaic. It is the happily-ever-after ending of a fairy tale." *Id.*

70. *Job* 42:10 ff.

71. See TERENCE O'DONNELL, *HISTORY OF LIFE INSURANCE: IN ITS FORMATIVE YEARS* 751-52 (1936) (quoting William Penn who after an unsatisfactory experience wrote "Ensurers fail much." *Id.*).

72. If we compare the restoration of God, with an insurance ending, we get several issues. First, the insurance company may or may not pay, according to its reading of the contract. Second, it will not pay more than the loss (let alone double the loss), and in some

other social reforms, which, when successful, have the effect of leaving us with the question of love and death in ideal conditions.

The story of Job concludes on a note of restoration, if not quite of the status quo ante, at least something quite close. Job has more money, no children, but the expectation of future children, presumably by way of substitution. As a commentator on Job wrote, modern values as to children are quite different from the ancient ones.⁷³ That there should have been changes on this point is no surprise. Compare modern western values with the tribal values described by Ruth Benedict as to tribe in which restitution – a new spouse for a murdered spouse – was considered an appropriate remedy.⁷⁴

It seems possible that to the extent that insurance is restitutionary or restorative, it is aligned with a religious tradition that reaches the ultimate point in the idea of Messianic restoration. To the extent that it attempts to project future earnings (for example) insurance is more problematic.

The usual explanations hold that the hostility to life insurance has roots in concern with commodification of human life, that it reflects a lack of trust, a betting against God.⁷⁵ But, perhaps the idea of restitutionary remedies also has a role here. Certainly on this point we must first say something about the ending of Job, which involves more than restitution. Rushdoony reads Leviticus 5:14-16 as referring to “a case of sin where God was directly involved,” in which case a fifth part was added to the restoration.⁷⁶ These are sins against God. But is this kind of statement a

instances, the company may have subrogation rights under what is understood as an indemnity arrangement. Finally, it will pay because of the loss, not, for example, because Job has defended his friends.

73. See INTERPRETER'S BIBLE Vol. III 1196 (1954) (quoting A.S. PEAKE, THE CENTURY BIBLE (1904)); see also Cynthia Ozick, *The Impious Impatience of Job*, 67 AMERICAN SCHOLAR, Autumn 1998, at 15. Ozick seems to think that the children are also doubled. See generally ARCHIBALD MACLEISH, “J.B.”: A PLAY IN VERSE (1976). Macleish attacks the idea that Job would start again. “Wife back! Balls! He wouldn’t touch her. He wouldn’t take her with a glove! After all that filth and blood and Fury to begin again. . . After life like his to take the seed up of a sad creation planting the hopeful world again – He can’t! . . he won’t. . he wouldn’t touch her! And Mr. Zuss replies: “He does though.” (Steven Wilf has called my attention to a medieval Jewish reading in which the original children were not dead, but have been taken to the wilderness. Messengers were misinformed so that they could report back to their death. These original children were subsequently retrieved and returned to Job.).

74. See RUTH BENEDICT, PATTERNS OF CULTURE 256 (1934).

75. See WILLIAM T. STANDEN, THE IDEAL PROTECTION 119 (1897).

76. RUSHDOONY, *supra* note 47, at 276 (not discussing Job):

possible explanation for the double portion in Job?⁷⁷ Midrashic material contains a long description of Job's charity, including pledges to provide for widows and orphans if a sick husband should die.⁷⁸ The double portion, perhaps, balances an earlier account of generosity.

However, life insurance, as has been noted, is not really about restitution. It is not, as Jerry writes, focused on indemnification,⁷⁹ though it is sometimes described as having some component of indemnity.⁸⁰ Job does not receive lost profits.⁸¹ It may be that here we have some sense of the answer to the question of why life insurance is different. It is not restitution, contrary to an assumption of economic theory, which considers an expectation interest as the equivalent of money in the bank. Further, life insurance, and the amount of insurance, is not – except at a psychological or rhetorical level – geared to a specific calculation about future support. It simply takes a number. Moreover, if life insurance is a projection of future support, it assumes that level of support through the individual life, which assumes a future and thus limits the Divine Plan.⁸²

If there are problems specific to life insurance, there may also be positive features. A positive value, unique to life insurance, was said to be altruism. It is a transaction in which the insured receives nothing, except of course, the knowledge that the family's future was secure.⁸³ This private

77. Is it, as Peake suggests through his citations, linked to a double portion for shame? (citing doubling in Isaiah 61:7 and Zachariah 9:12). See PEAKE, *supra* note 73, at 345.

78. See LOUIS GINZBERG, LEGENDS OF THE JEWS 230-31 (1983).

79. "Under the principle of indemnity, the insured's recovery should not exceed the loss. Life insurance, although it has some indemnity aspects (such as reimbursing the beneficiaries for the loss of income caused by the insured's death), is not indemnity insurance in the strictest sense. In most cases, no effort is made to place a value on the insured's life; an individual can purchase an unlimited amount of insurance on his or her own life." ROBERT JERRY II, UNDERSTANDING INSURANCE LAW 628 (1987); see also Spencer L. Kimball & Don A. Davis, *The Extension of Insurance Subrogation*, 60 MICH. L. REV. 841 (1962).

80. See STANDEN, *supra* note 75, at 70.

81. Unless that idea explains the doubling, i.e., doubling makes up for lost profits.

82. The Divine Plan is limited in that the worker might lose his position in the labor market at any time. Note that the Divine Plan can be seen as extending over generations. See C.S. LEWIS, THAT HIDEOUS STRENGTH 278 (1946) (referring to contraception as an attack on the Divine Plan).

83. Compare viatical transactions. A viatical settlement is an "act by a person who is terminally ill of cashing in a life insurance policy to pay for the necessary associated illness, medical expenses and final wishes." HARVEY W. RUBIN, BARRON'S DICTIONARY OF INSURANCE TERMS 512 (3d ed. 1995).

altruism can be linked to a much larger community. Thus, in the writings of Josiah Royce, we find a stress on the point that "the greatest social power" of insurance "depends upon the fact that a man does not in general purchase an insurance policy merely for the transient creature of to-day called 'himself.'"⁸⁴ Rather, a "man purchases insurance for his 'beneficiary.'" The beneficiaries may include people or corporations of whose very existence he, the individual, is little aware. But his linkages with such beneficiaries may join him to the whole social order."⁸⁵

Life insurance, perhaps all insurance, should be well-regarded for this reason. Yet a certain ambivalence may continue to be entertained about insurance, including life insurance, by quite mainstream religious groups. The Lutheran Encyclopedia article on insurance is positive along conventional lines, arguing for insurance as a way to protect loved ones. But it ends on a quite different note: "A warning: The Christian remains mindful of the fact that all forms of material security have their limitations and that they dare not become a form of idolatry. Ultimately the believer entrusts his material as well as his spiritual and eternal security to God."⁸⁶

Harold Kushner's treatment of insurance in *When Bad Things Happen to Good People* begins with the position that insurance ultimately cannot compensate for the true, emotional, nonfinancial loss.⁸⁷ In short, financial compensation at its best is not enough. We are not indifferent between the thing or person (lost or injured) and the financial equivalent of what we have lost.

Another comment on insurance relates to the practice of the companies in discussing natural disasters as Acts of God. Kushner suggests that these are simply events in nature.⁸⁸ It is the human cooperation after the disaster that is the act of God.

It is not only the radical separatists, like the Amish who worry about certain tendencies which insurance might intensify; beyond this, there is a conception of insurance and its limitations, which is focused quite

84. JOSIAH ROYCE, THE BASIC WRITINGS OF JOSIAH ROYCE 1136 (John J. McDermott, ed., 2d ed. 1969).

85. *Id.*

86. E.C. KNORR, *Insurance*, in ENCYCLOPEDIA OF THE LUTHERAN CHURCH, 1152 (1965).

87. See generally HAROLD S. KUSHNER, *WHEN BAD THINGS HAPPEN TO GOOD PEOPLE* (1981).

88. See *id.* at 59.

differently, largely on political and communitarian issues. Part II turns to these questions.

II. POLITICAL DIMENSIONS AND DYSTOPIAN POSSIBILITIES

It may seem unkind to a candidate to be rejected as a 'bad' life, but Insurance Companies are commercial undertakings, not charitable societies. If insurance were universal, Companies would probably be quite willing to abolish the medical examination and provide insurance protection for all ranks and conditions of men. As it is, they are obliged to discriminate between good and bad lives; and an Office is successful in proportion to the care with which it accepts lives. Let us drop the subject.⁸⁹

Some aspects of the insurance enterprise can be viewed as dystopian. This section reviews several of these; It focuses on the exclusion of the uninsurable; the artificial nature of the community of the insured; the idea that insurance companies want people to buy insurance and also want not to pay claims and the related tendency of the insurance industry to focus on the darker more deceitful side of human nature.

At the heart of modern insurance there is a decision about inclusion and exclusion which cuts against the idea of mutual aid as understood by those groups which define themselves in terms other than insurability. For such groups, insurability is a consequence of inclusion in the group. Exclusion from the group results in withdrawal of mutual aid. Here, too, we may see the function of social control as described in some recent work.⁹⁰ To the extent that utopian goals are viewed as desirable, it becomes necessary to shape people so that they are within the average risk pool, people who avoid hazardous activity and whose behavior generates good health. It is only through coercion that they can be insurable.⁹¹

89. ARTHUR READE, *THE STORY OF LIFE INSURANCE* 44 (1905).

90. See, e.g., Pat O'Malley, *Imagining Insurance Risk: Thrift and Industrial Life Insurance in Britain*, 5 CONN. INS. L.J. 675 (1998).

91. See RICHARD TITMUS, *ESSAYS ON THE WELFARE STATE* 66-67 (1959) ("The long-term and foreseeable dependencies of old age should be shouldered by progressive taxation just as the long-term dependencies of childhood are." *Id.*); see also *Tennessee Talks of Paring Plan for Uninsurables*, N.Y. TIMES, May 7, 1999 (discussing uninsurability in state context).

Spencer Kimball noted as a feature of German insurance history that it referred to an "insured community" in an "almost mystical" term.⁹² Yet there are ways in which the links between insurance and community, the community of the insured, are highly problematic. If it is a community, then it is one radically different from those which saw themselves as sharing beliefs or ethnicities and offering protection to those affiliated.⁹³

In the context of commercial insurance, the insurability defined the group. Those who were uninsurable were excluded from the group because of their uninsurability. This was one of the reasons the Mennonites gave for their objections to insurance. Their objections to insurance were bolstered by a "powerful practical argument, namely, that the commercial insurance companies did not really help the needy, but sought only to protect the healthy and rejected as poor risks the weak and the ill who really needed protection."⁹⁴ The Mennonites considered it a practical, rather than religious argument. But it seems to have theoretical aspects if we say that it is the existence of the excluded which makes possible happiness of the others.⁹⁵

92. Spencer L. Kimball, *The Purpose of Insurance Regulation: A Preliminary Inquiry in the Theory of Insurance Law*, 45 MINN. L. REV. 471, 477 n.35 (1961).

93. Here, the risk is expulsion. See FREDERICK L. HOFFMAN, HISTORY OF THE PRUDENTIAL INSURANCE COMPANY OF AMERICA 7 (1900) (quoting Sidney Webb on fraternal insurance: "A member who has paid a whole life-time to the sick and superannuation funds may at any moment be expelled and forfeit all claims for reasons quite unconnected with his desire for insurance in old age. Against the decision of his fellow-members there is in no case any appeal; moreover, the scale of contributions and benefits may at any time be altered even to the extent of abolishing the benefits altogether; and such alterations do, in fact, even take place in spite of all the protests of the minorities of old members." *Id.*).

94. THE MENNONITE ENCYCLOPEDIA, *supra* note 49, at 344.

95. See WILLIAM JAMES, THE WILL TO BELIEVE 188 (1897) ("...[I]f the hypothesis were offered us of a world in which Messrs. Fourier's and Bellamy's and Morris's utopias should all be outdone, and millions kept permanently happy on the one simple condition that a certain lost soul on the far-off edge of things should lead a life of lonely torture, what except a special and independent sort of emotion can it be which would make us immediate feel, even though an impulse arose within us to clutch at the happiness so offered, how hideous a thing would be its enjoyment when deliberately accepted as the fruit of such a bargain?" *Id.* at 188.). See also URSULA K. LE GUIN, *The Ones Who Walk Away From Omelas*, in THE WIND'S TWELVE QUARTERS 275 (1975) (described as "variations on a theme by William James." *Id.*).

Another version of the exclusions of insurance is suggested by Ulrich Beck, who, as previously noted, uses the term "risk" to mean controllable limited calculable and then insurable and risk and the word "threat" to refer to global meta threats. The line between the minor technical risk and the threat or hazard is, finally, established by the market,

The image of insurance in connection to the social order is evident in general discussions of the function of the state. Thus, John Finnis notes that "political community exists partially (and sometimes primarily) as a kind of business arrangement between self-interested associates."⁹⁶ This, however, was "the kind of mutual insurance association or 'social contract' derided by Aristotle and all the classics for its meagerness as a form [or account] of community"⁹⁷

In the current discussion, uncertainty – at least as experienced by some people – is the central theme of insurance. "Under the present capitalistic organization of society," Edward Woods wrote in 1928, "there are certain risks which every individual must face in everyday life, the untimely incidence of any one of which might transform him from a self-supporting producer in comfortable circumstances to-day into a dependent cripple or pauper to-morrow."⁹⁸ The emphasis is on the untimeliness of the risk as much as the risk itself. So that life insurance is linked to the idea of premature death of the wage earner, since the fact of death is certain. The reduction of the risks of life is linked to a story of the expansion of rights. The American version of this story is offered by Roosevelt.

"This Republic had its beginning and grew to its present strength, under the protection of certain inalienable political rights"⁹⁹ which more rights to life and liberty and as the nation grew, it became clear that "these political rights proved inadequate to assure us equality in the pursuit of happiness."¹⁰⁰ Finally Roosevelt said, "We have come to a clear realization of the fact that true individual freedom cannot exist without economic security and independence."¹⁰¹ He quoted the language of an old English case "'Necessitous men are not free men."¹⁰² People who are hungry and

through the question of what will be insured by commercial insurance companies. See ULRICH BECK, *RISK SOCIETY* 103, 106 (Mark Ritter trans., 1992) (1986).

96. JOHN FINNIS, *NATURAL LAW* 149 (1991).

97. *Id.* Finnis quotes Aristotle to the effect that the *polis* was formed "not for the sake of life only but rather for the good life" . . . "it does not exist [merely] for the sake of trade and of business relations . . . any *polis* which is truly so called, and is not one merely in name, must devote itself to the aim of encouraging excellence [*arete*]." *Id.*

98. EDWARD A. WOODS, *THE SOCIOLOGY OF LIFE INSURANCE* 1 (1928).

99. Franklin D. Roosevelt, *State of the Union Message*, 90-1 Cong. Rec. 55, 57 (1944) reprinted in FRANK NEWMAN & DAVID WEISSBROT, *INTERNATIONAL HUMAN RIGHTS* 362 (1990) (quoting *Vernon v. Bethell*, 2 Eden 110, 113 (1762)).

100. *Id.*

101. *Id.*

102. *Id.*

out of a job are the stuff of which dictatorships are made.”¹⁰³ The risk here is unexpected loss of economic security. Again, uncertainty, as much as loss, is the theme.

Quite correctly, Roosevelt’s message is included in a book on human rights, a field which has come to see the ideas of social security and industrial insurance in terms of fundamental rights. And certainly the emphasis on the issues of large scale risks is global. In Beck’s usages these are not called risks at all, but rather threats or hazards.¹⁰⁴ They are, in a “risk” society, uninsurable threats, beyond risk, and in fact defined by their uninsurability by private insurance companies.

Insurance as protection and security is a powerful idea, visible at international and national levels and it can be also seen against the background of small communities, and the utopian discussion of the nation-state. When Bellamy described his program, invoking the great capitalist forms of his world of the corporation, the trust, adapting them to his utopian goals, he also included insurance: “...In effect the nation will then have become a universal insurance company for the purpose of assuring all its members against want, oppression, accident, or disability of whatever sort.”¹⁰⁵

While one convention distinguishes utopia from the real world, so that an acre in Middlesex is better than a principality in Utopia,¹⁰⁶ another sees that utopia is something to be achieved in the world. In the American setting, this approached a vision of progress which linked those Christian post millennialists and those who call themselves progressives or secular reformers. While certain real life proposals are called utopian—meaning that they are visionary, or unrealistic—that is a comment about the likelihood of success, not about the real context of the objectives. Utopian proposals are often directed at the world. The nineteenth century American utopias were of this type, communities in the world which provided models of the good, all but perfect life.

One part of that vision of the good life was often equality, and particularly equality of goods. Another was security, an idea which has a

103. *Id.*

104. See BECK, *supra* note 95, at 47. As to globalization of risks (including new risk of extinction of human life altogether), Beck notes that when a class of societies can be nation states, risk societies, “communities of danger,” must be international. See *id.*

105. EDWARD BELLAMY, *EDWARD BELLAMY SPEAKS AGAIN* 44 (1937).

106. See LORD MACAULAY, *Lord Bacon*, in *CRITICAL, HISTORICAL, AND MISCELLANEOUS ESSAYS* 460 (Cambridge, Sheldon & Co. 1860).

clear relation to the idea of community. A community is for something, friendship, support, mutual aid. Thus Charles Nordhoff, describing the American utopian communities, said that he thought it important that these societies, had accumulated enough money to offer "a satisfactory provision for their own old age and disability, and for the education of their children or successors."¹⁰⁷

The very idea of community has in it a link to risk, hazard, insecurity, and, in fact, everything we summarize in the words "After the Fall." It is caught in the utopian novel *Looking Backward*, in Bellamy's famous image of the human condition a coach on which some sat while others pulled the coach. The role of risk and accident is explicitly put on the description of the coach. "By the rule of the coach a man could leave his seat to whom he wished, but on the other hand there were many accidents by which it might at any time be wholly lost."¹⁰⁸ Then they would "help to drag the coach on which they had before ridden so pleasantly." The result was that "the apprehension that this might happen to them or their friends was a constant cloud upon the happiness of those who rode."¹⁰⁹

There seems to be no risk in Eden, except the risk of expulsion. And this is true in some ways also of any mutual aid society. Such groups cannot eliminate death and disease but they offer help.¹¹⁰ But they do not base their system on the idea of insurable (and then uninsurable) risks as presented by individual applicant and do not reject "bad" risks. A member is covered, while a member, at whatever level is generally available to members, regardless of the risk factors the individual may present.

Sumner and Keller noted that socialism was a way to deal with the aleatory element in life and this was no less true of Communitarianism.¹¹¹ And Sumner and Keller saw that this was also true of the idea of

107. CHARLES NORDHOFF, *THE COMMUNISTIC SOCIETIES OF THE UNITED STATES* 18 (1875).

108. EDWARD BELLAMY, *LOOKING BACKWARD* 7 (Robert C. Elliot ed., Houghton Mifflin Co. 1966) (1888). Bellamy's work was well known. See Aviam Soifer, *The Paradox of Paternalism and Laissez-Faire Constitutionalism: United States Supreme Court, 1888-1921*, 5 LAW & HIST. REV. 260 (1987) (discussing a reference by the United States Supreme Court to Bellamy).

109. BELLAMY, *supra* note 106, at 7.

110. See generally GEOFFREY CLARK, *BETTING ON LIVES: THE CULTURE OF LIFE INSURANCE IN ENGLAND, 1695-1775* (1999).

111. See WILLIAM GRAHAM SUMNER & ALBERT GALLOWAY KELLER, *THE SCIENCE OF SOCIETY* 748 (4th ed. 1945).

insurance.¹¹² The point is clear in the nineteenth century French statement which François Ewald uses as the motto of *L'Etat Providence*. The motto argues that "the system of our society is nothing other than insurance, insurance against weakness, insurance against unhappiness, insurance against ignorance."¹¹³

The area of international human rights stresses a global community, a world-space framework, in which the aspirations of the good life are worked out, maximally or minimally, in terms of certain western style rights e. g. participation in political regimes without discrimination on the basis, for example, of religion or gender. Here Utopian liberty goals are seen as extended to individuals regardless of their national affiliations. Some other human rights documents move also to the consideration of economic rights, or welfare rights may assume ideas of redistribution. The idea of material rights is sometimes conceived in terms of some "adequate" level of support, freedom from want. The conflict between this idea and religious liberty goals is parallel to a conflict in the area of women's equality rights. For example, some may want to reject social security and may refuse to participate in it. And of course for those associated with the green movement, there is something about a right to continued existence on the planet as something which might be thought of as a right.

The idea of insurance as compensation for losses resulting from various ascertainable risks can be viewed as building on utopian security goals.¹¹⁴ The questions in their largest formulation involve the relation between freedom and security. In contract terms, the questions relate to the idea of solidarity and the nature of the commitments which individuals make to

112. See *id.* at 749.

113. FRANÇOIS EWALD, *L'ETAT PROVIDENCE* 13 (1986) (quoting M. Le Baron de Beauverger, comment in legislative session, May 30, 1868).

114. Utopian goals might not include security, of course. The security/liberty issue is perennial. Note also that while at least certain kinds of communities in the United States did stress mutual responsibility and mutual aid, they were also sometimes interested in the utopian insurance. We find, for example, that the Rappites were unable to get fire insurance because they were considered a bad risk. They did however want it. See KARL ARNDT, *GEORGE RAPP'S HARMONY SOCIETY (1785-1847)* 507, 550 (1975). The Amana community, however, did not have insurance because it was cheaper to rebuild than to buy insurance protection. See BERTHA M.H. SHAMBAUGH, *AMANA THAT WAS AND AMANA THAT IS* 87 (1976).

Clearly, the Amish stance on social security and insurance is different, reflecting perhaps an intensity of concern at a theological level which other groups do not necessarily share. It should also be noted that the level of government activity confronting the Amish is quite different from that facing earlier separatist communities.

each other, whether a commitment is to a global framework or to a legal system which recognizes individual insurance contracts.

The utopian idea has a clear connection to fraternal organizations as providers of insurance, as it does to the history of immigration and the attempts by social agencies to assist them. Both the insurance agent and the "friendly visitor"¹¹⁵ (as well, one assumes, as the parish priest) visited the homes of the poor.¹¹⁶

But it is also linked to the history of these independent insurance companies that stressed service goals. A report from the Metropolitan Life Insurance Company in 1914 indicates that, for that enterprise at least, the Temple of Insurance image suggested by the architecture of its New York office had substance.¹¹⁷ It was reflective of a program of activities, some directed to employees, some to policyholders, some to the general community, which went far beyond our idea of a relationship based on the contractual obligation to pay claims. The tone of the 1914 volume is optimistic, progressive, paternalistic.

But not all solidarity or associated ideas end with either religion or communitarianism. D.R. Jacques' formulations of 1849 relate to the expanded list of risks that insurance might cover, enlarged¹¹⁸ but still finite, creating a contrast between insurance and Fourier and the socialists.¹¹⁹ Jacques position, that one must begin with things as they are, is a clear statement of a reformist position: "if society needs something more effectual than the forms of civil government, and the guarantees of civil liberty" to secure the welfare of the masses, it also needs something more feasible than new theories of society.¹²⁰

115. See MARY WILCOX BROWN, *THE DEVELOPMENT OF THRIFT* 16 (1900) (discussing the "friendly visitor.").

116. See WALTER NICHOLS, *Fraternal Life Insurance*, in *YALE READINGS ON INSURANCE* 132 (Lester Zartman ed. 1909).

117. See METROPOLITAN LIFE INSURANCE COMPANY REPORT, *ITS HISTORY, ITS PRESENT POSITION IN THE INSURANCE WORLD, ITS HOME OFFICE BUILDING AND ITS WORK CARRIED ON THEREIN* 30 (1914).

118. See JOHN D. LONG, *ETHICS, MORALITY, AND INSURANCE: A LONG-RANGE OUTLOOK* 264 n.36 (1971) (referring to an expanded list of risks, including "bizarre" idea of divorce insurance).

119. D.R. Jacques, *Society on the Basis of Mutual Life Insurance*, 16 HUNT'S MERCHANTS' MAG. 152, 153 (1849) (discussed in Tom Baker, *On the Genealogy of Moral Hazard*, 75 TEX. L. REV. 237, 247 n.38 (1996)).

120. *Id.*

Jacques' basic attack was on these new theories of society. He seems to be a social conservative. Jacques echoes a line for which we often cite DeToqueville. "The great and growing inclination to associated action which pervades society in this age, has been often remarked."¹²¹ The associated action takes the form of partnerships, "incorporation, joint stock companies, lodges, and clubs. And of course "the principle of associated action" has also done a good deal for insurance.¹²²

Jacques urges that these facts force us to consider this question "May not this plan, which has done so much in the form of insurance, do far more by means of insurance?" Insurance "does not pretend to diminish the aggregate of human misfortunes," Jacques said.¹²³ Rather, "it assumes that aggregate amount as a fixed fact." But it also assumes the larger aggregate of prosperity as equally certain."¹²⁴ Insurance "presents society a union for mutual aid, of the fortunate and unfortunate, where those only who need it receive aid, and those only who can afford it are put to expense."¹²⁵ Even then if it is true that suffering is undiminished and uncertainty continues to exist, still the aggregate of "human ingenuity and co-operation equalize the distribution of this fearful aggregate, and alleviate the terrors of uncertainty."¹²⁶

Ewald has noted that as a society becomes secularized, the orientation of a speaker associated with the general social orientation here has less to do with God or morals and more to do with ethics. Thus, in discussing the current cautionary paradigm, he writes that

The new paradigm of *safety* . . . bears witness to a deeply disturbed relationship to a science that is questioned less for the knowledge that it offers than for the doubts that it insinuates. Here, moral obligations take the shape of ethics, and the principle of responsibility is seen as a reflection of the new notion of *precaution*.¹²⁷

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. François Ewald, *The Return of the Crafty Genius: An Outline of a Philosophy of Precaution*, 6 CONN. INS. L.J. 47, 48 (1999). Ewald writes as to these that they are not those worlds which succeed each other (responsibility replaced by solidarity replaced by precaution) but are rather "three attitudes with regard to uncertainty, assessed and developed at three moments in time." *Id.* at 76.

One idea is that the community created by actuarial insurance practices involves a distortion. Thus, Jonathan Simon has noted that "the shift toward actuarial practices alters the way we understand our status as subjects, both individual and group. Simon argues that "[b]y placing people in groups that have no experienced meaning for the members, and therefore lack the capacity to realize common goals or purposes, actuarial methods imply a particular view of individuals and their communities."¹²⁸ The clear risk, as Jonathan Simon perceives it is that people will understand themselves in terms of these representations "they may be stripped of a certain quality of belongingness to others that has long played a role in our culture."¹²⁹

Insurance and an economic analysis can substitute one view of reality for another. Someone says "God is my insurer" and we call that person a "self-insurer." But is it really substitution? Is it more like saying that a violin is a piece of wood? Another example of the contrast is between what others call you, what you call yourself, and what you are.

To the extent that the insurance relationship is rooted in contract, it presents issues of commercialization and a potential flattening of human relationships similar to those debated in family law.¹³⁰ It is worth recalling that what is taken to be the first reference in an American law journal to the word "adhesion" is found in Patterson's article on life insurance,¹³¹ published several years before Nathan Isaacs' well-known piece on adhesion contracts.¹³² The contract emphasis resulted historically in an overreaching by insurance companies, followed by interventions by state authorities to protect the individual insured.¹³³ It is, in part, the contracts emphasis which makes possible the painful disparity between representations of insurance companies which relate to full security and

128. Jonathan Simon, *The Ideological Effects of Actuarial Practices*, 22 L. & SOC'Y REV. 771, 774 (1988).

129. *Id.*

130. See generally CARL E. SCHNEIDER & MARGARET BRINIG, AN INVITATION TO FAMILY LAW: PRINCIPLES, PROCESS AND PERSPECTIVES (1995) (reviewing a family law discussion of contract and domestic relations).

131. See Edwin W. Patterson, *The Delivery of a Life-Insurance Policy*, 33 HARV. L. REV. 198, 222 (1919) ("Life-insurance contracts are contracts of 'adhesion.'" *Id.*).

132. See Nathan Isaacs, *The Standardizing of Contracts*, 27 YALE L.J. 34 (1917). That piece is treated as foundational in the contracts literature.

133. See the treatment of this question in FRIEDRICH KESSLER & GRANT GILMORE, et al, CONTRACTS: CASES AND MATERIALS 627-34 (3rd. ed. 1986).

fact of coverage of certain risks, and even then only under certain circumstances in accordance with the insurance contract.¹³⁴

The description Patterson offers of the life insurance purchase, a contractual transaction in which the buyer has no idea of what limits there are on what is being bought, remains important throughout the field, as it relates at least to consumers.

But an even more important point is that perhaps almost no one can understand the contract. This has implications for our judgment on the behavior of agents. "It is hard to accuse the agent of deliberate fraud,"¹³⁵ Lord Passfield (Sidney Webb) wrote. "He is perpetually driven – driven by the system itself, by the method by which he is paid, and by the ever-grinding pressure to replace lapses – to obtain a continual succession of new policies."¹³⁶ And "the people whom he has to canvass simply cannot understand the nature of the commodity that he is pressing them to purchase."¹³⁷ Finally, Lord Passfield asks, "[w]ho shall subsequently discover how much the agent actually said, how much he deliberately implied, and how much was honest misunderstanding that he suspected to exist, or was aware of, and merely neglected to dispel?"¹³⁸

Even for professional buyers and sellers the insurance transaction is characterized, if not by gross disparity of bargaining power, at least by that willingness to put the details off until another day, which makes the "bargain," as in all standard form transactions, somewhat fictional. Then, too, there is the issue of the shifting "we" as used by the agent.

One answer suggests that this is not really a problem. Thus, it has been noted that perhaps "the greatest source of ethical concern for many agents and brokers is the feeling that they are caught in the middle between two parties who have conflicting interests."¹³⁹ The difficulty is that "on the one hand, an agent's primary responsibility is to serve the insurer."¹⁴⁰ But it is also the case that the agent is the consumer, to "owes, dedication, loyalty

134. The legal perspective on insurance has for some time been reviewed in terms of the idea of contract. This contract optic is appropriate, whether we see that contract as one in which the risk holders have a stake in each other and have a contract with each other, or whether that contract is seen as a contract between individuals and insurance companies.

135. *Special Supplement on Industrial Insurance*, THE NEW STATESMEN, Mar.13, 1915, at 24.

136. *Id.*

137. *Id.*

138. *Id.*

139. ETHICS FOR THE INSURANCE PROFESSIONAL 19 (Rick Paszkiet ed., 2d ed.1996).

140. *Id.*

and service to the consumer."¹⁴¹ "How can an agent reconcile this conflict? Actually, it is quite simple. By acting in the best interests of the insurer, the agent best serves the consumer."¹⁴²

Ambrose Bierce thought that insurance is "[A]n ingenious modern game of chance in which the player is permitted to enjoy the comfortable conviction that he is beating the man who keeps the table."¹⁴³ The view of the writer of *The Devil's Dictionary* has resonances. One might compare the comments of Mark Twain, in *An inquiry about Insurance*,¹⁴⁴ which takes the form of a conversation with an insurance agent:

A man is told that a company has "issued over sixty thousand policies, forty-five of which have proved fatal and been paid for."¹⁴⁵ He responded that the presentation reveals a problem. "You appear to have it pretty much all your own way, you see. It is all very well for the lucky forty-five that have died 'and been paid for,' but how about the other fifty-nine thousand nine hundred and fifty-five?"¹⁴⁶ The bottom line is "You have got their money, haven't you? but somehow the lightning don't seem to strike them and they don't get any chance at you."¹⁴⁷

This argument, one of the two which Rubinow identified as the basic arguments against insurance, has particular force in relation to profit making institutions. In pursuing his case for social insurance, Rubinow comments as to this point and as to the "moral hazard" argument, that one should assume for the sake of the discussion that they are true, and then go on to consider the benefits of insurance in terms of the security offered those who will, in fact, suffer losses.¹⁴⁸

The idea of insurance carries a mixed message. On the one hand, one has the dictionary definitions of security and certainty (reinforced by the selling practices of the insurance companies themselves). On the other hand, the public image in which the insurance company signifies someone

141. *Id.*

142. *Id.*

143. AMBROSE BIERCE, *THE DEVILS DICTIONARY* 63 (1993).

144. MARK TWAIN, *An Inquiry about Insurance*, in *THE COMPLETE HUMOROUS SKETCHES AND TALES ON MARK TWAIN* 78, 80 (Charles Neider ed., 1961).

145. *Id.*

146. *Id.*

147. *Id.*

148. See I.M. RUBINOW, *SOCIAL INSURANCE* 5 (1913); see also JOHN H. LANGBEIN AND BRUCE A. WOLK, *PENSIONS AND EMPLOYEE BENEFITS* 4 (1995) (noting that Bismarck's scheme was not properly a pension system since it began at age 65, beyond what was then the normal life expectancy).

who will not pay a claim. The grim account of John Grisham's *The Rainmaker* reflects a common perception. It is not merely that there is a contractual argument in favor of the companies – that they have assumed only a particular responsibility under their contract – it is that they are rich, untrustworthy, insensitive and corrupt.¹⁴⁹

We can, perhaps, assume that the reputation of the insurance industry is a response to something real, a defect in human nature. In his short story *Hunted Down*, Dickens wrote that “a Life Assurance Office is at all times exposed to be practised upon by the most crafty and cruel of the human race.”¹⁵⁰ Even Bob and Margaret on Comedy Central are less than strictly honest in their approach to insurance. “When their home is burgled and it’s time to fill out the insurance forms, they enthusiastically list elaborate electronics they never owned.”¹⁵¹

But are these aspects of human nature, with which the companies must deal, manage or limit, or are they also a kind of resistance to the rationalizing tendencies of insurance?¹⁵² Scott identified a number of leveling or flattening tendencies in early modern western society, from maps of land to permanent family names, to census and population counts.¹⁵³ Max Weber stressed the significance of double entry

149. See *THE RAINMAKER* (Paramount Pictures 1998) (presenting a more hostile view of the insurance company than the book upon which the film is based).

150. Charles Dickens, *Hunted Down*, in *VICTORIAN TALES OF MYSTERY AND DETECTION* 48, 49 (Michael Cox ed., 1992).

151. *THE GUARDIAN*, July 10, 1998, at 72. On another possible link between insurance and social deviance, see J. OWEN STALTON, *MARKETING LIFE INSURANCE* 660 (1942) (noting the suggestion that the beneficiary might sometimes be a “friend”); cf. Tom Baker, *On the Genealogy of Moral Hazard*, 75 *TEX. L. REV.* 237, 252 (1996) (discussing *Vanity Fair*).

The skeptical view of the insurance contract is reflected in a discussion in a recent mystery. The character, himself an insurance agent once, says that the insurance contract is like other contracts, fine if you have a loss, understand what is covered, can pay the premiums. In short, it is *Caveat Emptor*. See MINETTE WALTERS, *THE BREAKER* 194-95 (1998).

152. Not all scholars focus on issues of resistance. Foucault’s work, as has been noted by Said and Walzer, is disinterested in this issue. See MICHAEL WALZER, *THE POLITICS OF MICHEL FOUCAULT*, in *FOUCAULT, A CRITICAL READER* 54, 66 (David Louzrus Hoy ed. 1986); see also Edward W. Said, *FOUCAULT AND THE IMAGINATION OF POWER*, in *FOUCAULT, A CRITICAL READER* 151 (David Louzrus Hoy ed. 1986).

153. See JAMES C. SCOTT, *SEEING LIKE A STATE* 87-88 (1998).

bookkeeping.¹⁵⁴ Should the actuarial methods of insurance be added to this list?

Associations with the idea of insurance are, then, sometimes negative and critical. One criticism is that insurance is, in fact, dystopian. The security is seen as illusion, and the community as either non-existent or involving definitions of the group which defeat true solidarity. Insurance is seen as less a community and more a business – and a big business at that.¹⁵⁵ The criticism advanced by the Mennonites is not fixed on a marginal point. It is not about a particular debate over a detail about premiums or coverage (how much time in the hospital for maternity stays, for example). It is not an argument that certain kinds of transactions are intrinsically immoral, while the main enterprise is appropriate. Rather, the critique is focused on the fundamental concept which underlines the enterprise: the distinction between insurability and uninsurability and the related ideas of insurable risk and uninsurable risk.¹⁵⁶

Our ambivalence towards insurance is captured in the odd tone of an address by Mark Twain. When Mark Twain was associated with an insurance company, he gave a speech containing the following paragraph:

I have seen an entire family lifted out of poverty and into affluence by the simple boon of a broken leg. I have had people come to me on crutches, with tears in their eyes, to bless this beneficent institution. In all my experience of life, I have seen nothing so seraphic as the look that comes into a freshly mutilated man's face when he feels

154. Weber had defined his project as considering religious ideas as a cause of certain economic forms. Weber's book engendered much discussion as to the characterization of particular religions and their particular links to capitalist forms. The controversy tended to concede the legitimacy of the basic inquiry concerning relations between religion and economic development. See Anthony Giddens, *Introduction to THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM* (Max Weber & Talcott Parsons trans., Routledge 1992).

155. See generally STALTON, *supra* note 151.

156. Definitions from a dictionary of insurance suggest the major point: "underwriting: process of examining, accepting, or rejecting insurance risks, and classifying those selected, in order to charge the proper premium for each. The purpose of underwriting is to spread the risk among a pool of insureds in a manner that is equitable for the insureds and profitable for the insurer." BARRONS DICTIONARY OF INSURANCE TERMS 497 (3d ed. 1991). See *id.* at 414-15 (defining "risk management" and "risk selection"). "Insurability: circumstance in which an insurance company can issue life or health insurance to an applicant based on standards set by the company." *Id.* at 227.

in his vest pocket with his remaining hand and finds his accident ticket all right.¹⁵⁷

The paragraph is unsettling. Presumably the problem is the juxtaposition of the idea of physical mutilation with the picture of a man beaming as he establishes that he is insured. Is this Mark Twain as Ambrose Bierce? But the company reprinted the paragraph in a pamphlet. Is that because there is something in this uncomfortable juxtaposition that is true? that finally, it is better to be insured than to be uninsured?

III. THE STORY OVER TIME

Smokey the Mayor: In an early example of fire insurance, the first Lord mayor of London rules [in 1189] that all houses have to be equipped with a ladder and, during tinder-dry summers, a barrel of water by the front door.¹⁵⁸

The opening section of Spencer Kimball's casebook on insurance makes a fundamental point about the various definitions of insurance. There is no single definition that will work for all contexts and purposes.¹⁵⁹ The contexts in which insurance operates and has operated are so varied, and the institution itself exists in so many forms, that a comprehensive definition is essentially impossible. Kimball moves from this rejection of a single definition to a list of the typical insurance coverages of middle class existence in this society, including of course the idea "at this time."

The need for historical work on insurance is as obvious now as it was when Kimball addressed the issue several decades ago, referring to the need for state by state inquiry in the American context.¹⁶⁰ William Vance,

157. JUSTIN KAPLAN, MR. CLEMENS AND MARK TWAIN 303 (1966).

158. Stephen Mihm, *Once Upon a Time, Only Kings had Clothes; Milestones, Millstones as Design Marches On*, N.Y. TIMES, Dec. 30, 1999, at F1, Column 6.

159. See generally SPENCER KIMBALL, INSURANCE LAW (1942); see generally Lawrence Friedman, *Social Welfare Legislation: An Introduction*, 21 STAN. L. REV. 217 (1969) (discussing definitional problems in terms like "social legislation" or "social insurance").

160. See KIMBALL, *supra* note 159; see also LAWRENCE FRIEDMAN, CONTRACT LAW IN AMERICA 61-69 (1965) (discussing insurance law).

in 1904, referred to 30,000 cases in "English print" on the subject of insurance.¹⁶¹ And now?

Then, it is clear that religion has relevance to the story. But the accounts suggest certain methodological issues. To the extent that religious values are rooted in ancient texts or medieval interpretations, it is reasonable to ask whether these texts are to be understood as controlling in the same way over time and in all places. Perhaps, for example, the Canonist concern with usury in relation to insurance was not of particular importance in nineteenth century America. Perhaps it can more usefully be related to the problem in twentieth century Iran, where the Koranic injunctions against usurious contracts influence state law.¹⁶² Issues of gambling, which in nineteenth century America are understood in terms of frivolity and general immorality, may or may not retain an older association with divination. Clark, for example, relates gambling to the issues of knowing God's will, as do materials on Islamic law.¹⁶³

Further, the idea that insurance goes against God's providence is an idea which has different components. For some, it is thought to be something that averts injury, in which case the twelfth century precautions and safety devices are presumably vulnerable.¹⁶⁴ For others, insurance is about mitigation, averting the consequences of the injury. The argument, against insurance is for some, rebutted by a comparison to savings accounts, investment, umbrellas, as if the religious argument against life insurance assumed that the only appropriate religious stance is in effect, quietism and passivity as one simply accepts that happens.

Some of the links to religion are visible as links,¹⁶⁵ though their substance remains to be fully explored. What, for example, was the impulse behind the 1986 Connecticut Mutual study on societal religious values?¹⁶⁶ Would insurance companies have achieved their ideal condition when everyone could be covered by insurance because everyone was

161. See generally William REYNOLDS VANCE, *Preface to HANDBOOK ON THE LAW OF INSURANCE* (1904).

162. See generally STEPHEN M. PASSAMANACK, *INSURANCE IN RABBINIC LAW* (1974) (discussing Canonist and Jewish law approaches).

163. See generally GEOFFREY CLARK, *BETTING ON LIVES: THE CULTURE OF LIFE INSURANCE IN ENGLAND, 1695-1775* (1999).

164. See *supra*, Part III Motto.

165. See e.g., WALTER B. WEARE, *BLACK BUSINESS IN THE NEW SOUTH* 87 (1973).

166. See generally, JOHN D. LONG, *ETHICS, MORALITY, AND INSURANCE: A LONG-RANGE OUTLOOK* (1971).

subject only to average risks?¹⁶⁷ What drives "social control" efforts by private insurance companies aimed at those outside their "community of insured?" Some of this activity may be about making the world less risky for their insured. Is some motivated by the idea of making those outside the existing community insurance-worthy?¹⁶⁸

As the earlier discussion of the Mennonites makes plain, some groups may refuse insurance.¹⁶⁹ The modern Amish distinguish sometimes between liability insurance and other kinds of insurance. In one such discussion stressing issues of liability insurance, (insurance sometimes justified as "for the other person"), the writer says: "If Jesus were here today, can we imagine him worrying about his earthly possessions to the degree that he would have some insurance plan in case he had a loss?"¹⁷⁰ The emphasis is on not worrying about the future unduly. Presumably it was right to worry some. In this discussion, insurance was on the wrong side of the line. It makes clear that the argument that insurance is the same as saving, or is simply another way of being careful and prudent does not answer the objection which is that some care is enough and other care is too much.¹⁷¹ The issue of adaptations, when it arises at the national level, as in the case of Islamic states, may result in a variety of mechanisms to achieve the requisite objectives.¹⁷² When it arises within a state which is not opposed to insurance in principle, it may either involve adaptations on

167. The price of this might be high. Everyone average might mean everyone the same. But then mutual aid, among the utopians, e.g. Oneida, was joined to mutual criticism. See WEISBROD, *supra* note 13, at 96-7.

168. Insurance worthy, or insurable, as a way of fulfilling an unarticulated utopian-universalist goal and not merely by the desire to increase profits by increasing the number of buyers of insurance policies?

169. See generally PETER FERRARA, *The Amish and Social Security*, in THE AMISH AND THE STATE (Donald Kraybill ed. 1993) (presenting arguments of the Amish on insurance). Ideas of stewardship also have relevance here, since the position of the insured regarding property may not be the conventional one. Thus, in an Anabaptist discussion of dealing with what seems to be a delinquency issue, the question of responsibility to/for property is put in effect this way: What would God want his steward to do? See J. CRAIG HAAS, READINGS FROM MENNONITE WRITINGS NEW & OLD 228 (1992).

170. See Elmo Stoll, *Is Insurance Right or Wrong?*, FAMILY LIFE, April 1984, at 8-11.

171. See *id.*

172. See FRANK E. VOGEL & SAMUEL L. HAYES, ISLAMIC BANKING ISLAMIC LAW AND FINANCE: RELIGION, RISK AND RETURN 150-53 (1998).

the religious side¹⁷³ and/or requests for exemption from public insurance programs.

If one tries to tell the history through time, one runs up against the serious definitional problem identified by Vance in his essay on the early history of insurance: shall we take the broad reimbursement ideas of the ancient trading societies as the start of insurance, or shall we restrict ourselves to a more modern understanding based on risk and risk spreading?¹⁷⁴ Shall we adopt for historical research the distinction offered by Ulrich Beck, between pre-industrial dangers, and "risk," defined now as the result of industrially-related decisions, so that risk is defined as "modern?"¹⁷⁵ Shall we follow the lead of Mary Douglas and assume that perceptions of risk are culturally specific,¹⁷⁶ or expand some suggestions in Giddens, that, as rooted in trust, they may also be individually specific?¹⁷⁷

And if we decide to research insurance through a focus on the "modern" or "post-modern", where shall we begin? In what country? In what legal system? Under what ideological (including theological) frameworks?

Perhaps the question is not "what is insurance," as if it is a word with one meaning, but something more like: "how many meanings, and how large are the meanings, attached to the idea of insurance?"¹⁷⁸ Spencer Kimball, in seeing clearly that the issue between the European and American perspectives on the subject had precisely to do with the issue of the involvement of government, saw also the tendency of the American

173. For example, subjects of inquiry might include insurance in Islamic law and insurance in Jewish law.

174. WILLIAM REYNOLDS VANCE, *Early History of Insurance*, in *ANGLO AMERICAN LEGAL ESSAYS* 100 (1909).

175. See ULRICH BECK, *RISK SOCIETY* 21 (Mark Ritter trans., 1992) (1986).

176. See generally MARY DOUGLAS, *PURITY AND DANGER: AN ANALYSIS OF THE CONCEPTS OF POLLUTION AND TABOO* (1966).

177. See ANTHONY GIDDENS, *THE CONSEQUENCES OF MODERNITY* 92 (1990). Giddens' discussion of ontological insecurity and trust includes reference to R. D. Laing and Erickson.

178. This subject might be engaged comparatively. "The theoretical treatment of insurance in American economic literature differs from that in European, particularly German, literature. Many outstanding American writers consider insurance as only one of the numerous risk covering agencies and therefore give inadequate or primarily legalistic definitions of its functions. Elsewhere this point of view is not generally held; with Germany as its center of growth, insurance has developed as an independent discipline distinct from other fields of economics and as such has received separate and extensive treatment." *ENCYCLOPAEDIA OF THE SOCIAL SCIENCES* 95 (1937).

professional discussion to focus on a narrow definition. He noted that in 1959, representatives of the industry could argue against the use of the word insurance for government pension plans.¹⁷⁹

The question how is insurance distinguishable from investment or saving – is this self-insurance? – or from warranty¹⁸⁰ – becomes important because of the American (technical) approach to insurance. It is also important if we examine the rhetoric of insurance. Certain definitions may eliminate large issues, as when a short nineteenth-century discussion of the morality of life insurance says “life insurance is an investment of funds for the benefit of heirs, it is nothing more or less.”¹⁸¹

If, we consider the seller’s warranty on a product, we could easily think that the buyer was somehow insured against injury by the seller. But the transaction seems to omit the critical element in those definitions of the insurance transaction which stress risk by a group of people, all of whom might be injured unexpectedly in the same way. That a legal contract can be a foundation for formal communitarianism seems clear.¹⁸² The basic American understanding of insurance is that it is a contract, and moreover, a contract with a commercial insurance company,¹⁸³ which also involves other people, and even creates a certain relationship between them to the extent that they are sharers of a common risk and must pay in one category.¹⁸⁴

179. See Spencer L. Kimball, *The Purpose of Insurance Regulation: A Preliminary Inquiry in the Theory of Insurance Law*, 45 MINN. L. REV. 471, 512-13 (1961).

180. Either one of which would reduce the injury from an unanticipated accident for the person injured.

181. Brewster, *The Morality of Life Insurance*, 22 HUNTS MERCHANT MAG. & COM. REV., Jan. 1850, at 117.

182. See CAROL WEISBROD, *THE BOUNDARIES OF UTOPIA* 75 (1980).

183. See THOMAS ERSKINE HOLLAND, *THE ELEMENTS OF JURISPRUDENCE* 200 (1880) (emphasizing contract in a description of insurance: “Insurance is a contract by which one party, in consideration of a premium, engages to indemnify another against a contingent loss, by making him a payment in compensation if, or when, the event shall happen by which the loss is to accrue.” *Id.*). The company appears pervasively, e.g. “Adverse Selection: ‘process in life insurance by which an applicant who is uninsurable, or is a greater than average risk, seeks to obtain a policy from a company at a standard premium rate. Life insurance companies carefully screen applicants for this reason, since their premiums are based on policyholders in average good health and in non-hazardous occupations.’” HARVEY W. RUBIN, *BARRON’S DICTIONARY OF INSURANCE TERMS* 17 (3d ed. 1995).

184. And again, “a contract of insurance is an agreement in which one party (the insurer), in exchange for a consideration provided by the other party (the insured), assumes the other party’s risk and distributes it across a group of similarly situated persons, each of

As noted, the history of insurance is going to be different in different countries. It should presumably be connected to the history of commerce, generally.¹⁸⁵

For François Ewald, writing about France, a critical date is 1898, when the adoption of a French scheme of insurance for industrial accidents ushered in the modern age. Following an emphasis on assistance in the form of charity, France moved to a regime that Ewald describes in terms of solidarity: "The paradigm of *solidarity*, which corresponds to the welfare state, considerably extends the proportion of legal obligations."¹⁸⁶ These legal obligations tend to overlap moral obligations. Solidarity, as Ewald sees it, involves "a sort of general right to compensation when faced with any mishap of living."¹⁸⁷

It is far from clear that this is a description of the United States. At the simplest level, the time frame in the United States would be different. In America, in 1901, relief from mining accidents was conceived within the context of private charity. A book on the Scofield Utah mine disaster, published for the benefit of widows and orphans, makes plain the private locus of social responsibility.¹⁸⁸

whose risk has been assumed in a similar transaction." ROBERT H. JERRY II, UNDERSTANDING INSURANCE LAW 17 (2d ed. 1996).

185. See JACOB VINER, *THE ROLE OF PROVIDENCE IN THE SOCIAL ORDER: AN ESSAY IN INTELLECTUAL HISTORY* (1972) (discussing religious objections to commerce in the ancient world). "Commerce by ships was itself an impious activity . . . an affront to providence, which intended the seas to be barriers to the contact of peoples. . . ." *Id.* at 34. He traces the development of pro-commerce position found in a religious form as late as 1894: "God made this world so that every nation in it has got to depend for something upon some other nation." *Id.* at 40.

186. François Ewald, *The Return of the Crafty Genius*, 6 CONN. INS. L.J. 47, 48 (1999).

187. *Id.* "It is contemporary with a scientific and technical utopia, where society would have the possibility of controlling itself, where knowledge would have an indeterminate control over power. In its philosophical foundations, it is inseparable from the imperative of prevention: prevention of illnesses (with Pasteur's discoveries), prevention of crimes (with the system of social defense), prevention of accidents (with the sciences of safety), prevention of poverty and social insecurity (with social insurances)." *Id.*

188. After the disaster, public officials sent condolences. See J.W. DILLEY, *HISTORY OF THE SCOFIELD MINE DISASTER* 204-05 (1901). A researcher looking for a commemorative song wrote that "sympathy and charity poured into stricken families." LA VERNE J. STALLINGS, *The Scofield Mine Disaster*, in *WESTERN FOLKLORE* 173 (1959). Even the expansion of the welfare state and social programs in the United States through the Great Society period would not result in a description of the sort that the European sociologists are taking as their point of reference. Lawrence Friedman's characterization of workman's

While some discussion merges state and private insurance in a general idea of the "risk society," other discussions, and perhaps particularly American discussions, keep these elements separate.

Vance, for example, clearly distinguished the two in his treatment of the German efforts and their possible applicability to the American situation. "These experiments in Europe are being tried along the same lines as those pursued by the larger corporations" in the United States, Vance said. These experiments "may well be watched by us with great interest, with a view to their extension by corporate employers, and possibly to the ultimate adoption of such insurance as a governmental function."¹⁸⁹

And Vance's introductory remarks make plain that insurance is, in his view, a theory which can be put into practice by any institution: "The student must observe that there is no reason why a contract of insurance shall not be made in any case where an actual loss may be suffered."¹⁹⁰ Vance indicated that whatever the contract may be called, or through whatever agencies it may be made, or whatever other incidents it may have associated with it, the agreement is still one of insurance, and subject to the rules of insurance law, if the requisite elements are present."¹⁹¹

Within the American materials, the stance of the Amish on the insurance issue¹⁹² is almost as well known as its position on the familiar question of compulsory education. This results in a conversation on

compensation as a "compromise system" makes the basic point. See LAWRENCE FRIEDMAN, HISTORY OF AMERICAN LAW 682 (2d ed. 1985).

On the theme of American exceptionalism, compare JAMES HARRINGTON BOYD, A TREATISE ON THE LAW OF COMPENSATION FOR INJURIES TO WORKMEN UNDER MODERN INDUSTRIAL STATUTES 6 (1913) ("Every civilized nation in Europe and many other nations in other parts of the world except the United States have discarded the old system of Employer's Liability based upon fault and substituted a system under which every industry bears the burden of relieving the distress caused by injuries to workers in any given industry practically without litigation.") with BARRY R. FURROW ET AL, HEALTH LAW 102 (1995) ("Unlike virtually every other industrialized nation, the United States has not, as of this writing, developed a program for making health care comprehensively available to its citizens.").

189. VANCE, *supra* note 161, at 25-26.

190. *Id.* at 24.

191. *Id.*

192. See Brian J. Glenn, Collective Precommitment Against Temptation: The Case of the Amish (1999) (unpublished manuscript, on file with the University of Connecticut School of Law Library) (permission to cite). See also THE AMISH AND THE STATE (Donald B. Kraybill, ed. 1993).

insurance between the religious group and the representatives of the larger society through the courts.¹⁹³

United States v. Lee held that an exemption for the Amish from the Social Security System was not constitutionally required.¹⁹⁴ The argument of the plaintiff in the case was built on an opposition to insurance on religious grounds, although as William Ball makes plain, the *Lee* case was not necessarily "an Amish case" in which a clear group position was at stake. "No Amish teachings has declared that the Amish religion forbade the payment of the employee's share of social security taxes."¹⁹⁵

The opinion by Justice Burger reviews the District Court opinion: "the [district] court noted that the Amish believe it sinful not to provide for their own elderly and needy and therefore are religiously opposed to the national social security system."¹⁹⁶

The district court also found that the Amish reject state insurance, as well as commercial insurance, because of their religious commitments. A critical point in the decision is that "the Amish religion not only prohibits the acceptance of social security benefits, but also bars all contributions by Amish to the social security system."¹⁹⁷

A footnote in the Supreme Court opinion adds that, the Amish man complaining in *Lee* said that his scriptural basis for this belief was: "But if any provide not...for those of his own house, he hath denied the faith, and is worse than an infidel" (I Timothy 5:8).¹⁹⁸ Justice Burger commented on the Amish position, beginning with the point that while the statute mandated contributions it did not compel the acceptance of benefits. Thus, "it would be possible for an Amish member, upon qualifying for social

193. For rejection of an individual's claim to a religious exception based on his "Christian beliefs," see *Bucklund v. Bd. of Comm'rs of King County Hosp. Dist. No. 2*, 106 Wash. 2d 632, 633 (1986), *appeal dismissed*, 481 U.S. 1034 (1987) (upholding hospital's bylaws requiring doctors to carry professional liability insurance).

194. See *United States v. Lee*, 455 U.S. 252 (1982).

195. *THE AMISH AND THE STATE* 257 (Donald B. Kraybill ed. 1993). Ball, the attorney for the Amish in *Wisconsin v. Yoder*, 406 U.S. 205 (1972) in which the community won an exemption from two years of high school, suggests that Lee's position may not have represented the position of the judgment of the Amish bishops or a consensus of even his own Amish community. The Amish do not suggest that they themselves would necessarily find it impossible to contribute to social security without collecting it. Their stated concern in their legislative testimony was for ability of the next generation to resist temptation. *Id.*

196. *Lee*, 455 U.S. at 255.

197. *Id.*

198. *Id.* at 256 n.3. Note the direct invocation of a biblical authority, as against a discussion of authoritative interpretative material.

security benefits, to receive and pass them along to an Amish fund having parallel objectives.”¹⁹⁹ But Justice Burger commented “It is not for us to speculate whether this would ease or mitigate the perceived sin of participation.”²⁰⁰ Justice Burger was, in effect, suggesting the possible use by one Amish of the sort of accommodation that makes insurance possible for other groups.

In the United States the idea of progress suggested utopian goals rather than utopian achievements at the national level. It seems entirely possible that the aspiration of social insurance in America, from the New Deal forward, was not as wholehearted as those Ewald describes, and the belief in salvation through science not so completely pervasive. Ulrich Beck’s description of a shift from a society of assumptions of knowability and certainty to one in which uncertainty has returned, may or may not describe America as a whole.²⁰¹

There are other questions which might be explored comparatively. Ewald’s description of the solidarity paradigm identified with the welfare state fits some countries in the world, but as suggested, the United States may not be among them. The language of solidarity is itself odd when used to describe American society. Insurance as solidarity is, in the United States, an idea which may reflect the historic connections between industrial insurance and the labor movement. It seems artificial with reference to the contemporary use of insurance by the middle class. (The class which is the subject of Kimball’s list of various kinds of insurances, in his insurance casebook).²⁰² Insurance may seem less a matter of solidarity than a matter of class-status maintenance for individuals. The demand for *Total Justice* (the suggestive title of Lawrence Friedman’s book), includes the demand for long and healthy life, and perfect and perfectly formulated infants and may thus reflect a continuing commitment to the scientific utopian model.²⁰³ But we also see something else in Europe and also in America. Science and technology are widely understood as having incalculable side effects. The risk of becoming

199. *Id.* at 261 n.12

200. *Id.*

201. See generally ULRICH BECK, *The Reinvention of Politics: Towards a Theory of Reflexive Modernization*, in REFLEXIVE MODERNIZATION: POLITICS, TRADITION AND AESTHETICS IN THE MODERN SOCIAL ORDER 1 (1994).

202. See SPENCER KIMBALL, *INSURANCE LAW* xxv (1942).

203. See generally LAWRENCE FRIEDMAN, *TOTAL JUSTICE* (1985).

uninsurable, through, for example, early detection of cancer, may be as great a risk for the middle class as the risk of unemployment or accident.

This awareness of the limits of science might be associated (and not only in America) with the irrationalities and failures of a world which we often call Kafkaesque. It is appropriate, therefore, to end this section with a reference to material by Franz Kafka when he was working as a clerk at the Accident Insurance Institute in Prague on precisely this sort of question. The annual report for the Institute is included by Max Brod in his biography of Kafka.²⁰⁴

Kafka was considering the "difference between square spindles and cylindrical spindles as it affects the technique for the prevention of accidents."²⁰⁵ He described the machinery in some detail. "The cutters of the square spindle are connected by means of screws direct to the spindle and rotate with exposed cutting edges at speeds of 380 to 400 revolutions per minute. The dangers to the operator, presented by the large space between the cutter spindle and the surface of the table, are obvious."²⁰⁶

These spindles were used, Kafka explained, either because the danger was not recognized, which may incidentally have increased the danger, or with the knowledge of the presence of a permanent danger which could not be avoided.

Although an extremely cautious operator could take care not to allow any joint of his fingers to project from the timber when guiding it over the cutter head, the main danger defied all caution. . . . Not only every precaution but also all protecting devices seemed to fail in the face of this danger, as they either proved to be totally inadequate or, whereas they reduced the danger on the one hand (automatic covering of the cutter slot by a

204. See MAX BROD, *FRANZ KAFKA: A BIOGRAPHY* 82-83 (G. Humpreys Roberts & Richard Winston trans., Schocken Books 2d ed. 1960). Brod provides this account of the 1909 document: "The annual report of the accident institute for the year 1909 contains an article I give below which Kafka wrote as a clerk of the office. Naturally, Kafka is not mentioned by name in the report itself. But I remember exactly Kafka bringing me the annual report that year, and telling me this article was his work. His boss had corrected his draft, but Kafka's style can be seen unmistakably in passages here and there even in this technical work. The high official who was kind enough to see me also pointed out the passage, as well as another one in the annual report for 1910, and told me they were Franz Kafka's work." *Id.*

205. *Id.*

206. *Id.*

protecting slide, or by reducing the width of the cutter space), they increased it on the other by not allowing the chippings sufficient space to leave the machine, which resulted in choked cutter spaces and in injured fingers when the operator attempted to clear the slot of chippings.²⁰⁷

The idea that danger that is decreased on one side is increased on another side is an aspect of the description of the postmodern

207. *Id.* at 83-84. Brod follows this with an outline of a working men's community which Kafka wrote at the end of his life: It was called the "Guild of Workmen Without Possessions." For Brod, at least, there seems to have been a relationship link between the impossibility of eliminating risk and the social or communitarian solution to the problem of the workers.

Duties. – (1) To own or accept no money, no valuables. The following the only possessions allowed: the simplest clothing (details to be settled), materials necessary for work, books, food enough for one's own needs. Everything else belongs to the poor. (2) To earn one's keep only by work. To shrink from no work for which one has the strength without damage to one's health. Either to choose one's work oneself, or if that is not possible, to submit to the orders of the work committee, which is under the orders of the government. (3) To work for no other reward than one's keep (to be settled according to the district, for two days). (4) The most temperate life. To eat only what is absolutely necessary, for example, as minimum recompense, which is in a certain sense also maximum recompense; bread, water, dates. The food of the poorest, the lodgings of the poorest. (5) To treat the relationship with one's employer as one of trust, never to demand the intervention of a law court. Any work taken on to be finished under all circumstances, except when serious considerations of health prevent it.

Rights. – (1) Maximum period of work, six hours; for manual labor, four to five. (2) In the case of illness, and when a man is too old to work, acceptance in a state home for old people, hospitals. The working life to be a matter of conscience and faith in one's fellow-man.

Property a man [sic] brings with him to be given to the state for building hospitals and homes.

For the present at least, exclusion of married men and women.

Advice – heavy responsibility – to be given by the government.

Where a man can help, in forsaken districts, workhouses, as teachers .

...

Limit 500 men.

One year's novitiate. *Id.* at 84-85.

understanding of risk. Here, too, Franz Kafka stands at the center of certain concerns of the contemporary world.

CONCLUSION

Presumably, Kafka believed in the utility of insurance. In general, he might have thought that it was better to have it than not to have it. The reservation which Kafka expressed is to the effect that the workers requested relief when they should demand it. "How modest these men are," Brod recalls Kafka saying. "They come to us and beg. Instead of storming the institute and smashing it to little pieces, they come to us and beg."²⁰⁸ The link between insurance, at least in the industrial insurance context, and the idea of social reform and moral obligation to one's fellows is clear.

Such linkages are presented again in the work of the philosopher Josiah Royce. At the time of the First World War, Royce published a book called *War and Insurance*, which he described as urging that "the cause of the world's peace would be aided if in the future the principle of insurance were gradually and progressively introduced into international business."²⁰⁹ Royce noted that "[I]nsurance has already proved to be, in the modern life of individual nations, a cause of no little growth in social organization, in human solidarity, in reasonableness, and in peace."²¹⁰ Royce believed that the "best workings of the insurance principle have been, on the whole, its indirect workings. It has not only taught men, in manifold ways, both the best means and the wisdom of 'bearing one another's burdens,'²¹¹ but it has also established many indirect, and for that very reason all the more potent, types of social linkage. . . ."²¹²

We might also illustrate with the work of John Commons who visited the Amana Community and rejected what he saw there, and, in response to that form of religious communitarianism, developed his own program of

208. *Id.* at 82.

209. ROYCE, *supra* note 84, at 1135.

210. *Id.*

211. *Galatians* 6:2; cf 6:5 "Everyone shall fear his own burden." Both are used as mottos in Levy and Wilson, with the suggestion that "burdens" in 6.2 means misfortune while in 6:5 it means liability. See HERMANN LEVY and ARNOLD WILSON, *INDUSTRIAL ASSURANCE* (1937).

212. ROYCE, *supra* note 84, at 1135.

industrial economics, rooted, as he said, in debt rather than love.²¹³ In the figure of Commons, we can link labor history to utopian history, including labor organizations and workers industrial insurance.²¹⁴ If we can take a hint from the English history, we can connect the English friendly societies (early and somewhat covert forms of unionism, we are told)²¹⁵ and fraternal organizations as insurance enterprises. These groups, often ethnic and overlapping with Communitarian Utopias in stressing mutual aid, are rooted in communal affiliation. They are also a piece of the story of insurance and thinking about its link to visions of the ideal society.

This article has tried to offer an overview of some issues which might be explored in considering a social history of insurance. It has also, indirectly, suggested some of the materials, legal and non-legal, institutional and journalistic, which might be used in such exploration. Some of the perceptions offered are entirely impressionistic. Thus, Metropolitan Life at one time reminds one both of a vertical company town and of a utopian community. Perhaps the idealistic images (in language and photographs) are simply devices to sell insurance. But it seems more as though having insurance, which means being insurable, is a ticket to the good life. Insurance, on this reading, becomes one of the paths to utopia.²¹⁶

213. In his autobiography, John Commons wrote: "I became suspicious of Love as the basis of social reform. I visited the Amana Community of Christian Communists in Iowa. They distinguished rigidly between love of man and love of woman. I studied Mazzini, the great Italian leader of Christian Socialism fifty years before. He founded Christian Socialism on the Duties of Man, including duties to wife and family. Eventually, after many years, in working out my institutional economics, I made Duty and Debt, instead of Liberty and Love, the foundations of institutional economics." JOHN R. COMMONS, MYSELF: THE AUTOBIOGRAPHY OF JOHN R. COMMONS 51-52 (Univ. of Wisconsin Press 1964) (1934).

214. See generally JOHN R. COMMONS, HISTORY OF LABOUR IN THE UNITED STATES (1918).

215. See G.D.H. COLE & RAYMOND POSTGATE, THE COMMON PEOPLE 232 (1966).

216. See generally RICHARD RUSSO, THE RISK POOL (1998). *The Risk Pool* (called to my attention by Tom Baker) could be presented as a novel which describes the progress of a man who is a danger to himself and others ("People who hang around your father often require hospitalization;" *id.* at 33; who is "mired in the lowest depths of the risk pool;" *id.* at 23; and then, just before his death, is classified "eligible for insurance outside the risk pool." *Id.* at 470.).