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# A SOCIALIST APPROACH TO RISK

RICHARD L. ABEL\*

All of us continually confront the risk of physical harm. We can respond to those inevitable risks in three ways. We can redress harm after it has occurred. We can punish those who cause harm. And we can control risk before it has resulted in harm. In a recent article I criticized our present legal regime for its failure to realize any of these goals.<sup>1</sup> Here I want to offer an alternative approach to risk, one that is consistent with the ideals of socialism. I begin by arguing that our primary objective ought to be to control risk; compensation and punishment must be subordinate. Then I propose two ideals that should inform a socialist approach to the allocation of risk: autonomy and equality. Building on this foundation, I consider what those ideals would entail in the spheres of production (work) and reproduction (consumption). I analyze why capitalism is hostile to those ideals and review some of the efforts to attain them: producer and consumer co-operatives within capitalism and worker ownership and control in existing socialist societies. I conclude that it is both desirable and possible to grant people greater autonomy and equality in their encounters with risk and that the effort to do so is inextricably associated with the struggle for socialism.

## I. THE PRIMACY OF CONTROL

The present legal regime fails to compensate the injured, punish wrongdoers, or control risk. Since I presented those criticisms at some length in my earlier article,<sup>2</sup> I will merely summarize them here. The law fails to compensate victims fairly because it does both too little and too much. It discriminates among victims on the basis of occupation, class, race, and gender. It preserves (and symbolically validates) the unequal distribution of income and wealth. It commodifies physical

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1. Abel, *A Critique of American Tort Law*, 8 BRIT. J.L. & SOC'Y 199 (1981). A shorter version of that article will appear in *THE POLITICS OF LAW* (D. Kairys ed. 1982).

2. See Abel, *supra* note 1.

integrity, emotional well-being, love, even life itself. The compensatory system is distorted because the same remedy simultaneously purports to punish and to control, but the three functions often are incompatible. Therefore, I urged that compensation be severed from punishment and control through the adoption of a system of universal minimum income maintenance and comprehensive medical care.<sup>3</sup> This also would allow the causal agent to show care and concern for the victim without fear of inviting civil or criminal liability.<sup>4</sup>

The law also fails to punish wrongdoers appropriately.<sup>5</sup> Again, it errs in both directions. It does too little because the state has appropriated the victim's injury and sense of grievance but lacks the latter's incentive to redress the wrong.<sup>6</sup> As a result, criminal penalties rarely are inflicted. It does too much because the state often inflicts punishment where it is not ethically justified, in pursuit of the goals of compensation and control. Therefore, I urged that punishment be inflicted separately. I advocate below that control be entrusted to those who are placed at risk. This should reduce the incidence of injury and thus the occasions when punishment might be appropriate. Furthermore, when someone is injured, punishment is less likely to be merited since the causal agent has been exposed to the same risks as the victim, and chance alone may explain who was hurt. If the causal agent expresses sympathy and regret (and fear of liability will not discourage anyone from doing so), nothing further may be required. But if the victim still seeks recognition for the wrong suffered, the collectivity of those exposed to and responsible for risk should impose the punishment, which might be limited to informal social sanctions but also might include job

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3. Harry J. Glasbeek and Terence Ison of Osgoode Hall Law School have noted that this recommendation might inadvertently have undesirable distributive consequences: to the extent that the working class and the poor are disproportionately the victims of traumatic injury — in the workplace, on the roads, or as a result of defective products — any reduction in the level of compensation they receive will be regressive.

4. Tort law has sought to promote this goal by excluding evidence of subsequent repairs when offered to prove prior negligence. *See, e.g., Smyth v. Upjohn Co.*, 529 F.2d 803, 805 (2d Cir. 1975) (per curiam). Recently, however, some jurisdictions have abrogated that rule in product liability cases where the plaintiff wishes to prove that a product has been redesigned in order to show that its prior design was defective. *See, e.g., Caprara v. Chrysler Corp.*, 417 N.E.2d 545, 52 N.Y.2d 114, 436 N.Y.S.2d 251 (1981).

5. *See, e.g., CENTER FOR LAW IN THE PUBLIC INTEREST, CRIMINAL ENFORCEMENT OF CALIFORNIA'S OCCUPATIONAL HEALTH LAWS* (1979); *CENTER FOR LAW IN THE PUBLIC INTEREST, CRIMINAL ENFORCEMENT OF CALIFORNIA'S OCCUPATIONAL HEALTH LAWS: A STATUS REPORT* (1980); *cf. C. GERSUNY, WORK HAZARDS AND INDUSTRIAL CONFLICT 1-2* (1981) (attempts to address the problem of exposure to risk in the workplace through the criminal justice system have met with strong opposition).

6. *See N. CHRISTIE, LIMITS TO PAIN* (1981); *Christie, Conflicts as Property*, 17 *BRIT. J. CRIMINOLOGY* 1 (1977).

rotation, suspension from work, temporary exclusion from the consumer cooperative, or ultimately expulsion. State punishment (fines and imprisonment) will be needed only when victim and causal agent belong to different collectivities — a residual category of injuries, if one that still is important.

But the greatest failure of the present legal system is its inability to control the risks to which people are exposed. Control must be our first priority, not compensation or punishment.<sup>7</sup> This view is asserted in popular maxims: safety first; an ounce of prevention is worth a pound of cure; better safe than sorry. It is the foundation of our criminal law: we do not wait for crimes to happen and then allow the wrongdoers simply to compensate the victims. And prevention is our immediate, spontaneous response to threats to ourselves or those we love: we are interested first in protection and security, and only if those fail are we concerned with compensation or punishment. Furthermore, if we conscientiously pursued the objective of control, the number of injuries would be reduced drastically and the need for both compensation and punishment would be minimized.

The present legal system seeks to control risk in two ways: through the imposition of civil liability to compensate victims (what Calabresi calls general or market deterrence) and through regulation (specific deterrence).<sup>8</sup> In my earlier article I advanced a number of reasons why market deterrence does not and cannot work.<sup>9</sup> There can be no *market* deterrence because there is no market for injury and illness, so that the evaluation of a wrong by a judge, jury, or legislature is both paternalistic and inherently inaccurate. Safety can be optimized only for an activity, but liability decisions necessarily focus on a temporally delimited act. Causality is probabilistic, multiple, and continuous, but liability decisions are dichotomous and individual. There is ines-

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7. A nice illustration of the preoccupation with cure at the expense of prevention is the following. Armand Hammer, chairman of the board of Occidental Petroleum Corp., has offered a million dollars to the scientist who discovers a "cure" for cancer. *L.A. Times*, Dec. 4, 1981, § I. Quite apart from the fact that cancer is not a single disease, so that there can be no "cure," this emphasis on medical research conveniently distracts attention from the fact that the petrochemicals that Hammer's company produces are known to be among the principal causes of cancer. See S. EPSTEIN, *THE POLITICS OF CANCER* (1978). Furthermore, Occidental owns the Hooker Chemical Co., which has polluted the notorious Love Canal, exposing the local populace to numerous carcinogenic substances. See M. BROWN, *LAYING WASTE*, Part I (1981); L. GIBBS, *LOVE CANAL: MY STORY* (1982).

8. G. CALABRESI, *THE COSTS OF ACCIDENTS* 68-69 (1970). To the very large extent that the present legal system is based on fault, it is even less effective in achieving optimum levels of safety because of the likelihood of erroneous factfinding and the enormous transaction costs introduced by the need to adjudicate fault in each individual case.

9. Abel, *supra* note 1, at 203-06.

capable tension between control and compensation, most clearly visible in the prevalence of insurance. The behavior of those held liable will not be altered (or will not be changed sufficiently) if liability costs are an insignificant proportion of the price they charge for goods or services, if demand for those goods or services is relatively price inelastic, or if the market in which they operate is oligopolistic. When the theory of market deterrence is applied to victims (doctrines of contributory or comparative negligence), it reduces the incentive of the tortfeasor to exercise care,<sup>10</sup> though there is little evidence that it increases the victim's concern for his own safety. Finally, and most important, market deterrence internalizes only a fraction of all accident costs;<sup>11</sup> it does so in a way that exposes people to different levels of risk on the basis of their class, race, and gender; and it motivates efforts to minimize *liability* not risk.<sup>12</sup> Because deterrence is at least as much a function of the certainty that sanctions will follow conduct endangering another as it is a function of the severity of those sanctions,<sup>13</sup> the extremely low

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10. For graphic descriptions of the use of these doctrines by employers to evade liability, see C. GERSUNY, *supra* note 5, ch. 3. This tactic did not cease with the passage of workers' compensation laws. In the trial of the first of more than 150 cases of occupational disease caused by exposure to asbestos, currently pending in Maine, the widow of a worker who died of mesothelioma in 1977 argued that the defendant firms had known of the dangers of asbestos since the 1930s but suppressed the research. The jury, however, found that the worker's own negligence in failing to protect himself from asbestos dust was equal to or greater than the combined negligence of the two firms and thus denied all recovery, in accordance with Maine's partial comparative negligence law. L.A. Times, Dec. 6, 1981, § I, at 14.

11. It has been estimated that prior to workers' compensation, when tort liability was predicated on fault, only 15% of all injured workers received any compensation, see C. GERSUNY, *supra* note 5, at 104, and even their recoveries were grossly inadequate, see *id.*, ch. 4. Furthermore, there is little or no evidence that the introduction of workers' compensation, which was intended to be a no-fault scheme and thus virtually automatic, actually reduced accident rates. *Id.* at 66; see Abel, *supra* note 1, at 200 n.160.

One index of the frequency of claims (though a very imperfect one) is the number of jury trials. In the 20 year period 1960-79, the number of jury trials in tort cases in Cook County, Illinois (including Chicago) declined by 50%, from 1200 a year in 1966-1968 to 814 in 1975-1979. M. PETERSON & G. PRIEST, *THE CIVIL JURY: TRENDS IN TRIALS AND VERDICTS, COOK COUNTY, ILLINOIS, 1960-1979 (EXECUTIVE SUMMARY)* 5 (1982).

12. Tortfeasors use coercion and deceit to evade or reduce legal responsibility, with considerable success. See C. GERSUNY, *supra* note 5, ch. 4. The agent of a cotton mill wrote to the company's insurer in 1902: "I am trying the Chicopee method of settlement, i.e., waiting till they get hungry for money before going to see them." *Id.* at 68; see generally H. ROSS, *SETTLED OUT OF COURT* (1970). Settlements, of course, reflect predictions about what the outcome would be if the case were tried. It is significant, therefore, that in the last 20 years the success rate of tort actions tried to a jury in Cook County, Illinois has remained a constant 51%, although the success rate of particular causes of action has changed, as well as the mix of tort claims. M. PETERSON & G. PRIEST, *supra* note 11, at 7.

13. See, e.g., F. ZIMRING & G. HAWKINS, *DETERRENCE: THE LEGAL THREAT IN CRIME CONTROL* 158-71 (1973).

probability of any sanction virtually nullifies the possibility of a general deterrent effect.

Recognizing the failure of market deterrence to control risk, the state has established a large and complex regulatory apparatus that promulgates precise standards of conduct, which it enforces by injunctions and ultimately by civil and criminal penalties.<sup>14</sup> Yet the bankruptcy of state regulation is so well known and has been demonstrated so often that a brief enumeration of the reasons for its failure should be sufficient.<sup>15</sup> Regulation is paternalistic: regulators are not as strongly motivated to implement regulations as are those whom the regulations ostensibly benefit.<sup>16</sup> For instance, regulators may focus on the catastrophic accident, because of its political ramifications, rather than on the daily risks and injuries, which cumulatively might be more serious.<sup>17</sup> Alternatively, they may devote their limited resources to enforce-

14. Between 1970 and 1979 the federal government created 20 new regulatory agencies, and the staff of all federal regulatory agencies increased threefold while their budgets grew sixfold. R. POOLE, *INSTEAD OF REGULATION* vii (R. Poole ed. 1982) [hereinafter cited as *INSTEAD OF REGULATION*]. Although most regulatory activity does not concern personal safety, the Occupational Safety and Health Administration (OSHA), the Environmental Protection Agency (EPA), and the Consumer Product Safety Commission (CPSC) have been visibly, if not always energetically, occupied with that goal.

That regulation is justified by market failure is strongly suggested by the evidence of declining accident rates following its introduction. See, e.g., J. MENDELOFF, *REGULATING SAFETY: AN ECONOMIC AND POLITICAL ANALYSIS OF OCCUPATIONAL SAFETY AND HEALTH POLICY* 117 (1979); Lewis-Beck & Alford, *Can Government Regulate Safety? The Coal Mine Example*, 74 AM. POL. SCI. REV. 745 (1980); Pearson, *Organizational Response to Occupational Injury and Disease: The Case of the Uranium Industry* 57 SOC. FORCES 23, 32-33 (1978).

15. Abel, *supra* note 1, at 204-05. Workers themselves certainly place little faith in regulation, even in an area like mining, where the safety rules and enforcement mechanisms are more developed. See Fitzpatrick, *Adapting to Danger: A Participant Observation Study of an Underground Mine*, 7 SOC. WORK & OCCUPATIONS 131, 143 (1980). Whereas in the past most of the criticism of regulation has come from the left, which sees it as ineffective and even deceitful, e.g., G. KOLKO, *RAILROADS AND REGULATION, 1887-1916* (1965); S. LAZARUS, *THE GENTEEL POPULISTS* (1974), today it is the right (old and new) that has unleashed torrents of vituperation on the regulatory agencies for "destroying" American capitalism, see, e.g., M. BARAM, *ALTERNATIVES TO REGULATION* (1982); *INSTEAD OF REGULATION*, *supra* note 14. That the last represents the position of special interests is strongly suggested by the list of those who supported the research and writing of the latter book: the Ford Motor Co. Fund, the General Mills Foundation, Abbott Laboratories, the American Board of Trade, Brown and Williamson Tobacco Corp., Gulf Oil Corp., Kellogg Co., and Pfizer, Inc. See *INSTEAD OF REGULATION*, *supra* note 14, at x. The ideological move to the right also can be seen in more balanced critiques. See, e.g., *THE POLITICS OF REGULATION* (J. Wilson ed. 1980); *SOCIAL REGULATION* (E. Bardach & R. Kagan eds. 1982); P. TEMIN, *TAKING THEIR MEDICINE: DRUG REGULATION IN THE UNITED STATES* (1980).

16. See, e.g., D. BERMAN, *DEATH ON THE JOB: OCCUPATIONAL HEALTH AND SAFETY STRUGGLES IN THE UNITED STATES* ch. 4 (1978).

17. Carson, *The Other Price of Britain's Oil: Regulating Safety on Offshore Oil Installations in the British Sector of the North Sea*, 4 CONTEMP. CRISES 239, 256 (1980).

ing safety rules at the less rather than the more dangerous worksites.<sup>18</sup> They fail to respond to known risks.<sup>19</sup> They may focus their efforts on more privileged workers.<sup>20</sup> Their powers frequently are inadequate to their responsibilities.<sup>21</sup> They often fail to use the powers they are given, preferring conciliation to formal adversary proceedings, seeking mild penalties rather than heavy fines or imprisonment.<sup>22</sup> They suffer from bureaucratization and a tendency to routinize their activities.<sup>23</sup> They necessarily are legalistic and constrained by cumbersome procedures; as a result, there are endless delays between complaint and response.<sup>24</sup> Increasingly they are held accountable to economic criteria and their regulations are overruled in the name of cost-benefit analysis.<sup>25</sup> Their

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18. Stearns, *Fact and Fiction of a Model Enforcement Bureaucracy: The Labour Inspectorate of Sweden*, 6 BRIT. J.L. & SOC'Y 1, 12, 14 (1979). *But see* Settle & Weisbrod, *Occupational Safety and Health and the Public Interest*, in PUBLIC INTEREST LAW: AN ECONOMIC AND INSTITUTIONAL ANALYSIS 285, 299 (B. Weisbrod, J. Handler & N. Komesar eds. 1978).

19. The Atomic Energy Commission (the predecessor of the Nuclear Regulatory Commission) knew of the dangers of uranium mining for 20 years before it took any regulatory action, Pearson, *supra* note 14, at 24.

20. Settle & Weisbrod, *supra* note 18, at 299-300.

21. *See, e.g.*, P. SCHRAG, COUNSEL FOR THE DECEIVED: CASE STUDIES IN CONSUMER FRAUD (1972). *See generally* Kelman, *Occupational Safety and Health Administration*, in THE POLITICS OF REGULATION 236, 255-63 (J. Wilson ed. 1980).

22. HEALTH RESEARCH GROUP, JOB SAFETY AND HEALTH: INADEQUATE ENFORCEMENT AND STALLED REVIEW 1 (c. 1975); Carson, *supra* note 17, at 259-60; Perkel, *A Labor View of the Occupational Safety and Health Act*, 23 LAB. L.J. 511 (1972); Stearns, *supra* note 18, at 7-9, 19-20. *But see* R. KAGAN & J. SCHOLZ, GOING BY THE BOOK (1982); Kagan & Scholz, *The "Criminology of the Corporation" and Regulatory Enforcement Strategies*, 7 JAHRBUCH FÜR RECHTSOZIOLOGIE UND RECHTSTHEORIE 352 (1980). The new director of OSHA, Thorne Aucther, has instructed inspectors to treat employers in a "cooperative nonadversarial manner" and to "emphasize positive findings in their reports." The Guardian, Dec. 2, 1981. For a comparison of the styles of American and Swedish occupational health and safety inspectors, see S. KELMAN, REGULATING AMERICA, REGULATING SWEDEN: A COMPARATIVE STUDY OF OCCUPATIONAL SAFETY AND HEALTH POLICY (1981).

23. Stearns, *supra* note 18, at 8 n.14.

24. On June 28, 1974, a maintenance employee at the Whirlpool Corp. factory in Marion, Ohio fell to his death because a guard screen was alleged to have been inadequate. The Secretary of Labor ordered an investigation and subsequently issued a citation requiring immediate abatement of the hazard and proposing a \$600 penalty. Nearly five years after the death, the Occupational Safety and Health Review Commission affirmed the citation but allowed Whirlpool another six months in which to correct the condition. Whirlpool appealed to the U.S. Court of Appeals for the District of Columbia Circuit, and that decision still was pending in February 1980. *See Whirlpool Corp. v. Marshall*, 445 U.S. 1, 6 n.4 (1980).

25. Settle & Weisbrod, *supra* note 18, at 305-08. *Compare* Indus. Union Dep't v. Am. Petroleum Inst., 448 U.S. 607 (1980) (Before promulgating a more stringent health standard, the Secretary of Labor must determine that the workplace is not safe — that it threatens the workers with a significant risk of harm) with *Am. Textile Mfrs. v. Donovan*, 452 U.S. 490 (1981) (OSHA not required to undertake cost-benefit analysis in promulgating standards under the Occupational Safety and Health Act — standards must only be "feasible" — i.e., capable of being done). *But see* Noble, *Cost-Benefit Analysis: The Regulation of Business or*

loyalties are divided between those they are directed to protect and the industries or enterprises they must regulate.<sup>26</sup> They share with the latter a common background, expertise, and daily work experience. This leads to particularistic relationships, an interweaving of career lines (the revolving door between industry and government), cooperation, and ultimately capture of the regulator by the regulated.<sup>27</sup> Inadequate funding adversely affects the level of regulatory activity and the competence and dedication of staff.<sup>28</sup> Finally, of course, they are subject to the political winds: if regulation may increase when labor or consumers grow more powerful or the state feels a need for legitimation,<sup>29</sup> it also can be curtailed drastically when capital is politically ascendant, as shown by the Reagan Administration's attacks on OSHA, the CPSC, and EPA.<sup>30</sup>

*Scientific Pornography?*, 11 HEALTH POL'Y ADVISORY CENTER BULL. 1 (July/Aug. 1980); Kelman, *Cost-Benefit Analysis: An Ethical Critique*, 4 REG. 33 (Jan./Feb. 1981).

26. M. CRENSON, *THE UN-POLITICS OF AIR POLLUTION* (1971); C. GERSUNY, *supra* note 5, at 30-51; J. KRIER & E. URSIN, *POLLUTION AND POLICY: A CASE ESSAY ON CALIFORNIA AND FEDERAL EXPERIENCE WITH MOTOR VEHICLE AIR POLLUTION, 1940-1975* (1977); Carson, *supra* note 17; Pearson, *supra* note 14, at 32-33.

27. M. BERNSTEIN, *REGULATING BUSINESS BY INDEPENDENT COMMISSION* 88-96 (1955); R. FELLMETH, *THE INTERSTATE COMMERCE OMISSION* (1970); M. GREEN, B. MOORE, JR. & B. WASSERSTEIN, *THE CLOSED ENTERPRISE SYSTEM* (1972); S. LAZARUS, *supra* note 15; J. TURNER, *THE CHEMICAL FEAST* (1970); Carson, *supra* note 17, at 251; Stearns, *supra* note 18, at 14. The ultimate form of capture is corruption: a physician recently was charged with giving \$30,000 to an official of the Food and Drug Administration to secure the latter's approval of DMSO, L.A. Times, Dec. 19, 1981, § 1, at 1.

28. The California Department of Health Services, for instance, has been able to issue final permits to only 18 of the 1,600 companies that handle hazardous wastes in the state. L.A. Times, Sept. 30, 1981, § 1, at 2. OSHA's 2,800 inspectors are responsible for health and safety at five million workplaces. Of the 4,000 standards OSHA is charged with enforcing, only 15% get cited even once a year, and 20 standards account for 40% of all citations. See Smith, *Protecting Workers' Health and Safety*, in *INSTEAD OF REGULATION*, *supra* note 14, at 311, 313-14; cf. C. GERSUNY, *supra* note 5, at 29-30 (inadequacy of early twentieth century state factory inspectors). But see Kelman, *supra* note 21, at 247-48.

29. J. PAGE & M.-W. O'BRIEN, *BITTER WAGES* ch. 8 (1975); Kelman, *supra* note 21, at 238-42; Stearns, *supra* note 18, at 3.

30. See Crawford, *OSHA: Court Saves Health Standard — For Now*, in *These Times*, July 15, 1981, at 5; *OCCUPATIONAL SAFETY & HEALTH WEEK* (Oct. 26, 1981); Randolph, *Mine Accident Rise Linked to Reagan Policy*, L.A. Times, Jan. 25, 1982, § 1, at 1; Shabecoff, *Environmental Charges Off Sharply*, N.Y. Times, Oct. 15, 1981, at A-16, col. 1. In mid-1979 the Environmental Protection Agency began seeking court enforcement of its orders against major polluters. It filed 7 cases that year and 43 in 1980. Under the Reagan administration, however, new filings dropped to 7 in 1981, and none were filed in the first three months of 1982. Furthermore, high agency officials made offers of leniency that undermined the efforts of enforcement personnel to negotiate satisfactory settlements. Randolph, *EPA Inaction on Hazardous Wastes Laid to Disruptive Reorganizations of Agency*, L.A. Times, Apr. 3, 1982, § 1, at 6. For an analysis of the ways in which opponents of regulation can dilute its efficiency, see T. MATHIESEN, *LAW, SOCIETY AND POLITICAL ACTION: TOWARDS A STRATEGY UNDER LATE CAPITALISM* (1980).

The Reagan administration has justified its attacks on federal regulatory agencies by



## II. TWO PRINCIPLES OF RISK ALLOCATION

### A. *Autonomy*

Each person ought to be able to control the risk to which he or she is exposed.<sup>31</sup> The very nature of risk — the fact that it can be described only statistically, that particular injuries cannot be predicted — makes it impossible to attain this goal completely. But at the very least no one ought to be subjected to a risk whose nature or level is determined by another. This ideal is affirmed by the most diverse ethical traditions. It is a derivation from the Kantian moral imperative.<sup>32</sup> It is consistent with the most uncompromising libertarianism.<sup>33</sup> And it is an inspiration for one of the “two participations” advocated by Mao Zedong — participation by workers in all administrative decisionmaking.<sup>34</sup> It is not just moral philosophers who embrace this principle; numerous ex-

claiming that it wants to hand over such responsibilities to the states. Yet the inadequacy of state regulation was precisely the reason for the creation of agencies like OSHA in the first place. See D. BERMAN, *supra* note 16, at 56-59; J. PAGE & M.-W. O'BRIEN, *supra* note 29; Settle & Weisbrod, *supra* note 18, at 310 n.91; Zalusky, *The Worker Views the Enforcement of Safety Laws*, 26 LAB. L.J. 224 (1975). That inadequacy is not surprising; students of federalism long have argued that state and local governments are more susceptible to influence by narrowly defined interest groups. See Scheiber, *Federalism and Legal Process: Historical and Contemporary Analysis of the American System*, 14 L. & SOC'Y REV. 663, 705 (1980).

31. I am not taking an absolutist position here. The risks that a person chooses to encounter necessarily affect others: intimates of the potential victim, friends and acquaintances, citizens of the social or political unit that ultimately may be asked to care for either the injured victim or the victim's dependents, or both. For it is the rare, and clearly abhorrent, society that leaves its ill or injured to care for themselves, or die. See C. TURNBULL, *THE MOUNTAIN PEOPLE* (1972). Contemporary law recognizes this interdependence in several ways. A person who endangers himself may be liable to someone who intervenes to prevent injury or to rescue. See, e.g., *Carney v. Buyea*, 271 A.D. 338, 65 N.Y.S.2d 902 (1946); *Talbert v. Talbert*, 22 Misc. 2d 782, 199 N.Y.S.2d 212 (1960). We also require hikers, mountain climbers, etc., to pay for the costs of their rescues. I would argue, therefore, that we have a duty to others to refrain from inappropriate or unnecessary risks to ourselves.

32. I. KANT, *Theory of Ethics*, in SELECTIONS 268, 309 (T. Greene ed. 1929). “[A]ct as to treat humanity, whether in thine own person or in that of any other, in every case as an end withal, never as a means only.”

33. M. FRIEDMAN & R. FRIEDMAN, *FREE TO CHOOSE* (1980). Bourgeois economists similarly insist that only the individual can decide correctly how much risk he wishes to encounter, e.g., M. BAILEY, *REDUCING RISKS TO LIFE: MEASUREMENT OF THE BENEFITS* (1980); Broome, *Trying to Value a Life*, 9 J. PUB. ECON. 91 (1978); Cook, *The Value of a Human Life in the Demand for Safety*, 68 AM. ECON. REV. 710 (1978); Linnerooth, *The Value of a Human Life: A Review of the Models*, 17 ECON. INQUIRY 52 (1979); Mishan, *Evaluation of Life and Limb: A Theoretical Approach*, 79 J. POL. ECON. 687, 703 (1971); Rhoads, *How Much Should We Spend to Save a Life?*, [1978] PUB. INTEREST 74, 78, 85. But see Etzioni, *How Much is a Life Worth*, 9 SOC. POL'Y 4 (Mar./Apr. 1979); Green & Waitzman, *Cost, Benefit, and Class*, 7 WORKING PAPERS FOR A NEW SOC'Y 39 (1980).

34. See Whyte, *Bureaucracy and Modernization in China: The Maoist Critique*, 38 AM. SOC. REV. 149 (1975). For a skeptical view about the degree of control that ordinary workers in Chinese industry exercise, see Walder, *Participative Management and Worker Control in China*, 8 SOC. WORK & OCCUPATIONS 224 (1981).

tant laws and policies also endorse it, as do the value preferences of ordinary people.

The doctrine of informed consent asserts that no one ought to be subjected to a risk in the course of either therapy or experimentation unless it has been fully disclosed and freely accepted by the patient or subject.<sup>35</sup> A physician who has not complied with this standard may be liable in tort.<sup>36</sup> Scholarly research now is similarly constrained, and we are outraged when deception or coercion are consciously employed: when drugs are tested on prisoners,<sup>37</sup> soldiers exposed to radiation,<sup>38</sup> or treatment withheld from patients known to be ill, as in the Tuskegee syphilis study.<sup>39</sup> The experiments by Nazi doctors on concentration camp inmates are the ultimate horror.<sup>40</sup>

The doctrine of assumption of risk is justified by invoking the right of people to choose danger rather than safety, but the very narrow interpretation courts have placed on it in recent years — often tantamount to abrogation — testifies to the paramount importance of assuring that risks are known thoroughly and chosen voluntarily.<sup>41</sup>

35. J. KATZ, *EXPERIMENTATION WITH HUMAN BEINGS* 523-49 (1972). Consent is necessary, of course, because these are intentional torts. Yet the distinction between intentional torts and negligence or even strict liability is of dubious value. Is conduct any less intentional when the capitalist entrepreneur knows that X percent of his employees or Y percent of the consumers of his products will suffer injury or illness?

36. *See, e.g.*, *Cobbs v. Grant*, 8 Cal. 3d 229, 502 P.2d 1, 104 Cal. Rptr. 505 (1972).

37. *See* J. KATZ, *supra* note 35, ch. 13.

38. H. ROSENBERG, *ATOMIC SOLDIERS: AMERICAN VICTIMS OF NUCLEAR EXPERIMENTS* (1980); H. WASSERMAN & N. SOLOMON, *KILLING OUR OWN: THE DISASTER OF AMERICA'S EXPERIENCE WITH ATOMIC RADIATION* (1982). Soldiers also have been exposed to dioxin, *see* M. OHL & T. ENSIGN, *GI GUINEA PIGS* (1980), and to LSD, *see* L.A. Times, Dec. 29, 1981, § I, at 18. In the latter case the army did not inform the victims of the experiments for more than 20 years. *Id.*

A former Army medic, Van R. Brandon, has alleged that in 1956 and 1957 he was ordered to keep two sets of records — one accurate and one deliberately falsified — of the levels of radiation to which soldiers were exposed during Army tests of nuclear weapons in Nevada. The accurate record was kept locked up; the false records shown to the men indicated that no one had received more than the approved dose. *Evening Outlook* (Santa Monica, Cal.), Feb. 8, 1982, at A-1; *id.*, Feb. 12, 1982, at A-1.

39. J. JONES, *BAD BLOOD* (1981). In the Tuskegee Study of Untreated Syphilis in the Negro Male, the U.S. Public Health Service in Macon County, Alabama, conducted a death-watch over 400 black sharecroppers from 1932-1972 in order to prove that Blacks and Whites responded differently to the disease.

Recently, it has seriously been suggested that the elderly should be used to handle the disposal of nuclear wastes and clean up after a nuclear war because they have less time to live and thus a lower probability of contracting cancer. L.A. Times, Dec. 2, 1981, § I, at 15.

40. J. KATZ, *supra* note 35, at 292-306.

41. In most American jurisdictions, whatever remains of assumption of risk has been assimilated to comparative negligence, so that it diminishes a plaintiff's damages but does not bar recovery. *See, e.g.*, *Gonzalez v. Garcia*, 75 Cal. App. 3d 874, 142 Cal. Rptr. 503

The difficulty of satisfying these conditions is one reason why the doctrine has been rejected categorically in the workplace.<sup>42</sup> A great deal of recent legislation is dedicated to ensuring that people are aware of the risks to which they are exposed: the labeling of food and drugs, warnings on household goods, and rules granting workers the right to know the dangers of the workplace, especially those deriving from toxic chemicals.

But the right to know the risk is only a prerequisite to the equally important right to control it. Consumers often appear to enjoy the latter simply by virtue of their capacity to choose between products or services and to choose whether to consume at all (although both choices often may be illusory). The Supreme Court recently declared that the Occupational Safety and Health Act of 1970 grants workers a similar right.<sup>43</sup> Noting that workers already are entitled to strike over safety issues<sup>44</sup> and can refuse to work under abnormally dangerous conditions without violating a no-strike clause,<sup>45</sup> the Court held that the Act protects a worker from employer discrimination if he chooses "not to perform his assigned task because of a reasonable apprehension of death or serious injury coupled with a reasonable belief that no less drastic alternative is available."<sup>46</sup>

Autonomous control over risk is not something forced upon reluctant consumers, workers, and citizens by an intrusive government. Americans of all classes, occupations, and backgrounds share the desire for autonomy in their work, whether this is expressed as the desire to be free from the foreman's surveillance, to go into business for oneself, or to be a professional.<sup>47</sup> Autonomy is valued no less strongly outside

(1977); *Kopischkev v. First Continental Corp.*, 610 P.2d 668 (Mont. 1980); *Farley v. M M Cattle Co.*, 529 S.W.2d 751 (Tex. 1975); *Brittain v. Booth*, 601 P.2d 532 (Wyo. 1979).

42. See 1 A. LARSON, *LAW OF WORKMEN'S COMPENSATION* § 4.50 (1952); see also *Federal Employers' Liability Act*, 45 U.S.C. §§ 53-54 (1976).

43. *Whirlpool Corp. v. Marshall*, 445 U.S. 1 (1980).

44. See *id.* at 16-18; see also Atelson, *Threats to Health and Safety: Employee Self-Help under the NLRA*, 59 MINN. L. REV. 647 (1975). The number of work-related stoppages increased greatly between 1966 and 1975. See C. GERSUNY, *supra* note 5, at 126. In 1976, 371 collective bargaining agreements gave the 1.9 million workers covered the right to refuse unsafe work. See U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, BULL. NO. 1425-16, *MAJOR COLLECTIVE BARGAINING AGREEMENTS: SAFETY AND HEALTH PROVISIONS* 19-20 (1976).

45. 445 U.S. at 16-18.

46. *Id.* at 3-4.

47. REPORT OF A SPECIAL TASK FORCE TO THE SECRETARY, DEP'T OF HEALTH EDUCATION AND WELFARE, *WORK IN AMERICA* 15-23 (1972) [hereinafter cited as *WORK IN AMERICA*]; E. CHINOY, *AUTOMOBILE WORKERS AND THE AMERICAN DREAM* 86 (1955). The desire for autonomy is especially strong with respect to danger. See Fitzpatrick, *supra* note 15; Haas, *Learning Real Feelings: A Study of High Steel Ironworkers' Reactions to Fear*

work: witness the consumer and environmental movements, the demand for safe streets and crime control, pressure for neighborhood governance, even the anti-busing campaigns (which is not to excuse their racist content). Outside the United States (as well as within) the extraordinary wave of opposition to American and Soviet nuclear weapons in England, Germany, Belgium, the Netherlands, Italy, Spain, and Portugal — hundreds of thousands of people demonstrated in each country in the fall of 1981 — indicates the anger of West Europeans at being held hostage by super-power politics.

Capitalism does not, and cannot, respect the right of each individual to choose his or her own level of risk. Because the owners of capital, by definition, control the means of production, they decide the risks that workers, consumers, and the victims of pollution will incur.<sup>48</sup> This relationship is not reciprocal: workers, consumers, and citizens rarely, if ever, determine the risks to which the owners of capital will be exposed. Although various mechanisms purport to redress this inequality of power, none succeeds in restoring autonomy to those placed at risk. Tort law claims to return victims to the “status quo ante”; but the remedy is not chosen by the victim but rather is set by a judge or jury. Workers’ compensation does not even pretend to achieve restitution; and its remedies are established by a legislature, which is even more remote from the victim. Acknowledging the inadequacy of “general deterrence,” the state has created regulatory agencies; but once again it is an administrator, not the potential victim, who decides what risks should be tolerated.<sup>49</sup> And just as those exposed to risk are deprived of

*and Danger*, 4 SOC. WORK & OCCUPATIONS 147, 162-66 (1977); *The Costs of Clean Air: How Much Should They Count?*, 2 REP. FROM CENTER FOR PHIL. & PUB. POL’Y 1, 5 (1982).

48. C. GERSUNY, *supra* note 5, ch. 2.

49. Because they criticize regulation as paternalistic, many economists have urged that OSHA adopt an injury tax as an alternative. See, e.g., J. MENDELOFF, *supra* note 14, at 24-31; R. SMITH, THE OCCUPATIONAL SAFETY AND HEALTH ACT: ITS GOALS AND ACHIEVEMENTS 78-85 (1976); Nichols & Zeckhauser, *Government Comes to the Workplace: An Assessment of OSHA*, 49 PUB. INTEREST 36 (1977); Smith, *The Feasibility of an “Injury Tax” Approach to Occupational Safety*, 38 L. & CONTEMP. PROBS. 730 (1974). But this solution would be no less paternalistic: the amount of the tax still would be set by administrators, not workers; and employers who could pay the tax and yet operate profitably would be able to subject workers to risk with impunity. It is not surprising, therefore, that workers are critical of such a tax. See McLean & Schneck, *Client Group Attitudes Toward Alternative Forms of Industrial Safety Regulation*, 8 POL’Y STUD. J. 392, 398 (1979). A historical antecedent of this critique can be found in a surprising, if highly respected, source:

According to the law, each death costs the company about \$5,000. . . and each cripple costs \$10,000. . . . These compensations are due so long as the company does not introduce certain precautionary measures. But they have calculated that the four hundred casualties a year cost less than would the necessary precautions. The company therefore does not introduce them.

Letter from Max Weber to his mother (1904), *quoted in* Stearns, *supra* note 18, at 1.

the power to decide what their own health is worth, so they are denied control over the safety precautions themselves. Each of the remedial mechanisms — tort litigation, workers' compensation, and regulation — leaves most decisions about safety in the hands of capital.

Bourgeois economists will object that choice is the foundation of capitalism.<sup>50</sup> But the choices that capitalism offers do not remotely resemble autonomous control over risk.<sup>51</sup> Workers sometimes may be able to choose the capitalist for whom they will work;<sup>52</sup> but they cannot choose whether to work for capital; and they do not control directly the level or nature of the risk to which they will be exposed.<sup>53</sup> Even under optimum conditions labor can only *offer* to trade wages, hours, or other benefits for greater safety; capital may, and frequently does, refuse to bargain over safety — reserving it as a management prerogative — and never relinquishes control over safety.<sup>54</sup> But it is just as important to

50. Smith, *supra* note 28, at 336 (“There is a substantial body of evidence indicating that the market for job safety does exist and that it functions about as it should.”).

51. Most of those who argue that the labor market ensures worker autonomy are academics (including the author of the quotation in the preceding footnote). Because I imagine that all of them value academic freedom, I would be interested in their responses to the following: Academics presently have considerable control over the courses they teach and the subjects on which they do research. Suppose this control were withdrawn. University administrators would dictate which courses were taught, the content of those courses, the manner of instruction, the way in which faculty related to each other and to students, the subjects on which research could be conducted, the methodology to be used, how and where the results of that research could be published, etc. Faculty still would retain the right to quit their jobs and look for others (though here the analogy becomes flawed, because the labor market for professors is different from that for manual workers). How many academics would view the hypothetical situation as equivalent to their present working conditions? How many would gladly exchange the latter for the former? That few would be eager to do so is suggested by the outrage most law teachers have voiced about the law school of Oral Roberts University, which requires faculty to sign a code of honor acknowledging Jesus Christ as the one true savior and agreeing to follow in his footsteps. *See* L.A. Times, July 4, 1981, § I, at 27; *id.* Aug. 13, 1981, § I, at 15.

52. Even this assumes something approaching full employment, whereas the present official rate of unemployment is 9% and rising, and the rate of unemployment among certain categories of the population, such as minority youth, is 30-40%. Furthermore, job mobility is hardly identical to risk mobility. *Cf.* Settle & Weisbrod, *supra* note 18, at 293 (low-skilled, low-wage workers have high *job* mobility).

53. If we had faith in the labor market there would be no reason to hold employers liable for employee injuries at all — indeed, to do so would incur unnecessary transaction costs. *Cf.* Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 2 (1960). Employees would simply bargain for a risk premium as part of their wages and then insure against loss; if the premium were too high employers would choose to make the work safer. Yet we do not allow this: employers are liable under workers' compensation laws and workers cannot assume the risk of injury at work. This suggests that even capitalism is uneasy about the total commodification of safety.

54. This is so even though safety is a mandatory subject of bargaining under the National Labor Relations Act. *See* Fibre Bd. Paper Prods. Co. v. NLRB, 379 U.S. 203, 222 (1964); NLRB v. Gulf Power, 384 F.2d 822, 824 (5th Cir. 1967).

note that "optimum conditions" rarely exist: three-quarters of American workers are unorganized, and many of the unions that represent the remaining quarter are weak or unrepresentative of worker demands, or both.<sup>55</sup> Capitalism makes workers the same kind of an offer about the level of risk that the Godfather made his adversaries — an offer that can't be refused.

Consumers and victims of pollution also are presented with the illusion of choice in lieu of control. They can choose only to buy more or less dangerous products and services, to live in more or less polluted environments. But under conditions of oligopoly or monopoly choosing the capitalist from which to buy is even less satisfactory as a surrogate for control over safety;<sup>56</sup> and consumers are even less organized and more ignorant about risk than workers.<sup>57</sup> Capitalism and professionalism (its equivalent in the realm of services)<sup>58</sup> foster dependence by consumers, thereby denying them the freedom to choose not to consume. Whether consumption is ostensibly voluntary or constraint is more readily apparent (as when people are forced to "consume" pollution), the terms of the transaction are dictated by capital, and courts will enforce it.<sup>59</sup>

Autonomy requires knowledge as well as volition; yet capital systematically withholds knowledge of the nature and magnitude of the risks it inflicts.<sup>60</sup> In order to retain control and maintain hierarchy,

55. The *individual* worker lacks adequate resources to make a thorough investigation into the safety of his working conditions. See Settle & Weisbrod, *supra* note 18, at 290. But there also is no correlation between the degree of unionization in an industry and its safety record. *Id.* at 295-97. One reason may be that American unions have been very slow to bargain over health and safety issues. See D. BERMAN, *supra* note 16, ch. 5. Furthermore, individuals in unionized industries rarely grieve over those issues. See C. GERSUNY, *supra* note 5, at 122.

An example of worker powerlessness is the four women at an American Cyanamid plant in West Virginia who agreed to be sterilized in order to save their jobs, which involved exposure to toxic chemicals that might endanger a fetus. One 26-year-old woman stated: "It was not a joint decision on our part. We made the decisions individually, and we did it because we were afraid." N.Y. Times, Jan. 5, 1979, at A-21, col. 1.

56. See, e.g., R. NADER, *UNSAFE AT ANY SPEED* (1965).

57. Evidence shows that the general population systematically underestimates the risks to which they are exposed. A recent survey revealed that 18% of the respondents believed there was a one in ten chance of being in an accident during the following year, and 50% thought the probability was less than one in three hundred. The actual probability was one in five. TEKNEKRON, INC., 1978 SURVEY OF PUBLIC PERCEPTIONS OF HIGHWAY SAFETY (1978).

58. M. LARSON, *THE RISE OF PROFESSIONALISM* (1977).

59. See, e.g., *Spur Indus., Inc. v. Del E. Webb Dev. Co.*, 108 Ariz. 178, 494 P.2d 700 (1972) (economic power of developer sufficient to force relocation of feed lot — and the court set the price).

60. Thorne Aughter, the businessman Reagan appointed as director of OSHA, quickly withdrew a pamphlet informing cotton industry workers of the dangers of brown lung, see

capital opposes legislation granting workers the right to know the dangers they confront; in one recent case it was alleged that Johns-Manville concealed the hazards associated with asbestos and even denied employees access to their own medical records, which contained diagnoses of progressive asbestosis.<sup>61</sup> Capital opposes labeling require-

In *These Times*, Apr. 22, 1981, at 4, and subsequently withdrew a film, *Can't Take No More*, about the history of the job safety and health movement from the industrial revolution to the present, *see* L.A. Times, Apr. 28, 1981, § II, at 1. One of the first acts of the Department of Labor after Reagan's inauguration was to withdraw a regulation promulgated by the Carter administration that would have guaranteed workers the right to know workplace hazards, N.Y. Times, Jan. 30, 1981, § I, at A-1, col. 6.

When I wrote to the Department to protest the withdrawal, I received an answer from Bailus Walker, Jr., Director of the Health Standards Programs of OSHA (May 7, 1981) in which he stated that OSHA was "currently in the process of reviewing options and determining an appropriate course for future action." He was particularly concerned about "the definition of what constitutes a hazardous substance" and "the kind of information that should appear on the label." A year later, OSHA apparently still is unable to resolve "the complex issues associated with the promulgation of such a standard."

Consumers fare no better. In a lawsuit brought by the widower of a woman who allegedly died from toxic shock syndrome (TSS) after using Rely tampons, the plaintiff offered in evidence several of the manufacturer's internal memoranda. A month before the woman's death, one such memo stated:

If a clear correlation between tampons and TSS is established and if the mortality rate on [sic] TSS increases, the tampon business could be in real trouble. However, it does not appear that this will happen.

I don't think we should put Rely in neutral for the next year or two — we have momentum behind our brand that we will never have again.

Other documents showed that Proctor & Gamble knew at the time of the above memorandum that a woman using Rely tampons had died, apparently from toxic shock syndrome. Two weeks after they learned this, however, a memo told company executives that, if asked about TSS, they should respond: "We have never been aware of a serious illness involving our product." *Evening Outlook* (Santa Monica, Cal.), Apr. 13, 1982, at A-2.

61. *Johns-Manville Products Corp. v. Contra Costa Superior Court*, 27 Cal. 3d 465, 612 P.2d 948, 165 Cal. Rptr. 858 (1980); *see also* L.A. Times, Aug. 24, 1981, § I, at 2; *id.*, Dec. 1, 1981, § I, at 3.

In a recent study of workers who had been exposed to asbestos at the Long Beach Naval Shipyard prior to 1961, 59% of a sample of 310 male workers had asbestosis; 25% of a sample of 40 women who worked in the shipyards briefly during the Second World War had the disease; and 10% of 305 relatives of those workers also had it, though they had no direct contact with the workplace. Nevertheless, the director of industrial relations at the shipyard continued to insist: "The shipyard is probably one of the safest environments in which an employee can work. I would say this environment is safer than being out in the normal community." L.A. Times, Oct. 3, 1981, § II, at 1.

Members of the Alabama Brown Lung Association recently charged that their employers had deleted or changed information in their medical records in order to conceal lung damage. Clearly these employers do not keep careful records. When Robert Lewis requested his from the Opelika Manufacturing Corp., they contained nothing about the results of his five tests for pulmonary function, but they did indicate that he had experienced menstrual bleeding and was pregnant. In *These Times*, Mar. 24-30, 1982, at 5.

Although the dangers of asbestos were known by 1931, *see* D. BERMAN, *supra* note 16, at 2, employers did little or nothing to protect workers until the 1970s. Thus commentators estimate that there will be 8,000-10,000 asbestos-related deaths and diseases a year from

ments that might allow consumers to exercise informed choice.<sup>62</sup> It tries hard, and with considerable success, to conceal the damage it does to the environment.<sup>63</sup> And the capitalist state, which is a major employer of labor, purveyor of services, and environmental polluter, also insists upon unilateral control and refuses to disclose the risks it creates.<sup>64</sup>

The choice that capitalism offers is actually a mystification of constraint concealed in the clothes of contract.<sup>65</sup> For it is capital that sets

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now until the end of the century (because the symptoms take 10-30 years to develop), which will generate legal claims in excess of \$80 billion. MacAvoy, *You, Too, Will Pay for Asbestos*, N.Y. Times, Feb. 14, 1982, § 3, at F-3, col. 1.

62. An outstanding example, of course, is the opposition of the tobacco industry to any warning about the dangers of smoking. See T. WHITESIDE, *SELLING DEATH: CIGARETTE SMOKING AND ADVERTISING* (1971). The Reagan administration recently withdrew a Treasury Department Regulation that would have required liquor manufacturers to disclose the contents of their products to consumers. Wall St. J., Nov. 6, 1981, § 1, at 12, col. 4. Richard Schweiker, Secretary of Health and Human Services, has ordered the Food and Drug Administration to drop a proposed requirement that drug manufacturers give consumers of 10 commonly prescribed drugs brochures describing their proper usages and side effects, L.A. Times, § I, at 2, although a contemporaneous study showed that 70% of those who received such leaflets in a pilot project read them, D. KANOUSE, S. BERRY, B. HAYES-ROTH, W. ROGERS & J. WINKLER, *INFORMING PATIENTS ABOUT DRUGS* (1981).

63. For example, institutional advertisements insistently argue that strip mining of coal and deep sea oil drilling actually enhance the environment. Weyerhaeuser calls itself The Tree Growing Company. And a demolition contractor recently mixed eight truckloads of asbestos with other wood and concrete debris in order to disguise it and then dumped it in a landfill unsuitable for hazardous waste. L.A. Times, July 9, 1981, § II, at 7.

64. The Supreme Court has ruled that the federal government need not disclose the location of nuclear bombs that may expose nearby residents to dangerous radiation. Weinberger v. Catholic Action of Hawaii/Peace Educ. Project, 102 S. Ct. 197 (1981); see also L.A. Times, Jan. 19, 1982, § I, at 2 (neighbors of Seal Beach Naval Weapons Station seeking federal district court order that Navy disclose whether nuclear weapons are stored there); L.A. Times, May 18, 1982, § II, at 1 (Judge Hauk dismissed the suit, stating: "Why should [the Navy] have to tell our enemies what's going on? Keep them Guessin [sic] . . . . That keeps the public guessing, too, but so what?").

A pending lawsuit seeks to demonstrate that the Atomic Energy Commission suppressed information that might have connected the deaths of several thousand sheep in Utah in 1953 with fallout from atomic weapons tests in Nevada. In the original action brought by the sheepowners 25 years ago, the government testified: "We do not know of anyone connected with the Atomic Energy Commission's investigation of the alleged sheep losses who has now concluded that radioactive fallout was a possible or probable cause of the injury to the sheep." But in fact two Army investigators had made that causal connection, and one still adheres to his opinion. The results of experiments at Hanford, Washington, revealing similar symptoms were withheld. And a former county extension agent who had helped AEC scientists examine the sheep said that two of them had told him they were ordered to rewrite reports linking the animals' deaths to radioactivity. L.A. Times, May 16, 1982, § I, at 6; Evening Outlook (Santa Monica, Cal.), May 11, 1982, at A-5.

65. As both Pashukanis and a number of recent commentators have shown, this is an extension to legal rights of the commodity form that capitalism imposes on labor and liberal democracy imposes on citizens. The subject of the legal right is told that he is free because, even though he experiences constraint, he is formally empowered to seek redress for inva-



the terms of the contract. The paradigm of the autonomous individual is the consumer. Yet many purchases are either necessities or consumed involuntarily. Often there is little variation in the levels of risk among "competing" products and services, and the purchaser has no control over the nature of the risk, other than by participating in the (largely fictitious) "free" market. When the worker incurs risk by selling his labor power to the capitalist, the commodity form that the transaction assumes becomes doubly mystifying. The worker has no choice whether to engage in that transaction; and the package of wages, benefits, and risk is not a fair return for the worker's labor power.<sup>66</sup> To characterize the transaction as a free exchange of commodities equates individual decisions about what risks to incur in the expenditure of discretionary income and leisure time — e.g., whether to go hang gliding or read a book — with decisions about what kind of risk to experience at work — e.g., whether to be an accountant or a miner. The former choice may be real; the latter is not. It is noteworthy that those in low-risk occupations — law professors, for instance — defend their privileged safety by reference to the freedom of choice they experience themselves and therefore impute to others. Those who incur high risks, by contrast, perceive both their work and its concomitant risks as coerced.<sup>67</sup>

### B. *Equality*

Risk is part of life. Even if people were not subjected to dangers controlled by others, they still would not be able to eliminate risk altogether. The second principle underlying a socialist approach to risk, therefore, is that those risks we collectively choose to encounter ought to be shared equally. But whereas the principle of autonomy elicits support from a broad political spectrum (even if some of the enthusiasm may be superficial or hypocritical), the principle of equality is much more controversial. Yet it, too, can mobilize diverse sources of allegiance.

One of these is John Rawls's first principle of justice: "each person is to have an equal right to the most extensive basic liberty compatible

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sions of that right. See E. PASHUKANIS: *SELECTED WRITINGS ON MARXISM AND LAW* (P. Beirne & R. Sharlet eds. 1979); Balbus, *Commodity Form and Legal Form: An Essay on the Relative Autonomy of the Law*, 11 L. & SOC'Y REV. 571 (1977); Jessop, *On Recent Marxist Theories of Law, the State, and Juridico-Political Ideology*, 8 INT'L J. SOC. L. 339 (1980); Warrington, *Pashukanis and the Commodity Form Theory*, 9 INT'L J. SOC. L. 1 (1981).

66. Young, *Marx on Bourgeois Law*, 2 RESEARCH L. & SOC. 133 (1979).

67. WORK IN AMERICA, *supra* note 47, at 13-17.

with a similar liberty for others.”<sup>68</sup> As I will argue below, freedom from risk is one of the most basic of liberties. Furthermore, it is particularly difficult to claim that “an unequal distribution of [risk] . . . is to the advantage of the least favored.”<sup>69</sup> George Fletcher’s proposed theory of tort reflects a similar principle: “a victim has a right to recover for injuries caused by a risk greater in degree and different in order from those created by the victim and imposed on the defendant — in short, for injuries resulting from nonreciprocal risks.”<sup>70</sup> Fletcher predicates liability on nonreciprocal risks because he views the infliction of such risks as morally reprehensible.

A very different philosophical tradition, marxism, directs its criticism at the primary sources of unequal risk — the division of labor and private property. The previous section already has argued that private ownership of capital deprives all who are not capitalists of autonomous control over risk. Bertell Ollman, paraphrasing Marx, writes:

The division of labor whereby people do only one kind of work and rely upon others to do whatever else is necessary to keep them alive is a more inclusive social expression of man’s alienated productive activity. . . .

The further it develops, that is the smaller the task assigned to each individual, the more alienation approximates the full-blown form it assumes in capitalism.<sup>71</sup>

Not only does the division of labor alienate men and women from their labor, it also is related to both the emergence of the class structure of capitalism and the growth of private property.

Division of labor and private property are . . . identical expressions: in the one the same thing is affirmed with reference to activity as is affirmed in the other with reference to the product of the activity.

. . . The division of labor implies from the outset the division of the conditions of labor, of tools and materials, and thus the splitting up of accumulated capital among different owners, and thus, also, the division between capital and labor, and different

68. J. RAWLS, *A THEORY OF JUSTICE* 60 (1971); *see also* WORK IN AMERICA, *supra* note 47, at 302-03.

69. WORK IN AMERICA, *supra* note 47, at 303.

70. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537, 542 (1972). Fletcher explicitly reserves judgment on whether his analysis should apply to situations in which the victim and causal actor are in a contractual relationship. *Id.* at 544 n.24, 546 n.38, 548 n.43. But I see no reason to exclude such situations.

71. B. OLLMAN, *ALIENATION: MARX’S CONCEPTION OF MAN IN CAPITALIST SOCIETY* 158-59 (2d ed. 1976).

forms of property itself.<sup>72</sup>

Because class differences determine the risks that members of each class experience, as both producers and consumers, Maoism condemned the division of labor and sought to eliminate not only class but also the differences between headwork and handwork,<sup>73</sup> and between city and country.<sup>74</sup> The second of Mao's two participations therefore exhorted technicians and cadres to join in the manual labor for which they were providing scientific and political guidance.<sup>75</sup>

But if the principle of equality is consistent with varied political philosophies, its claims are just as visible in daily thought and action. Most people feel that physical well-being — our own and that of those we love — is the highest good. We express that belief in numerous mundane ways: when we toast someone's health or inquire about the health of those we meet; in the order of blessings in the phrase "healthy, wealthy, and wise." Because people take their health less for granted as they grow older and consequently value it more, they say: "At least I've got my health; that's all that matters." The extraordinary amount of money that Americans spend on health care offers further evidence.<sup>76</sup> Indeed, when we learn that a specific individual is suffering from a rare illness or is threatened by a transitory catastrophe we are willing to spend almost unlimited resources to save the victim.<sup>77</sup> Similarly, we feel some collective responsibility to ensure that every member of society receives at least minimal health care: most advanced capitalist nations (except our own) and all socialist states provide health services to their citizens, and many contribute foreign aid to improve health in other countries. Even the United States, one of the most backward regimes in the capitalist world, provides health care to the very young, the very old, and the very poor. Capitalism thus distin-

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72. K. MARX, *THE GERMAN IDEOLOGY* 22, 65 (1942), *quoted in* B. OLLMAN, *supra* note 71, at 158, 160.

73. Sohn-Rethal, *Mental and Manual Labour in Marxism*, in *SITUATING MARX* 44 (P. Walton & S. Hall eds. 1972).

74. C. BETTELHEIM, *CULTURAL REVOLUTION AND INDUSTRIAL ORGANIZATION IN CHINA: CHANGES IN MANAGEMENT AND THE DIVISION OF LABOR* 78, 87 (1974); Whyte, *supra* note 34.

75. *See* Whyte, *supra* note 34, at 152.

76. In 1980, Americans spent \$247 billion on health services. Gibson & Waldo, *National Health Expenditures, 1980*, 3 *HEALTH CARE FINANCING REV.* 1 (Sept. 1981). In 1981 they spent \$274 billion, according to the Federation of American Hospitals. *Evening Outlook* (Santa Monica, Cal.), Mar. 25, 1982, at A-6.

77. *See* G. CALABRESI, *supra* note 8, at 25 & n.3. One reason we do this may be that knowledge of the identity of the person at risk shortcircuits the social distance that ordinarily separates us from the anonymous victims in our mass society, forcing us to recognize the victim's essential humanity. Once we do this we are compelled to treat all victims as equal and to reject the notion that some are more worth saving than others.

guishes health from income or wealth: there is a right to the former (if one that is imperfectly protected), even though there is no entitlement to the latter. The state takes custody of children whose parents abuse or neglect them; it does not interfere when parents simply reproduce their class position in the next generation.

Thus far I have talked about the preeminent value of health and our commitment to setting a floor below which no one may fall. But the argument for equal allocation of risk can be made more directly. We insist that certain high but unavoidable risks be shared: universal military service is the clearest example.<sup>78</sup> We feel that if anyone must be threatened with loss of life or serious injury, everyone should be (or at least should stand an equal chance of being threatened, as in the draft lottery). Having embraced that principle, we emphatically reject the practice, common in nineteenth-century Europe and even in our own Civil War, by which the privileged could buy exemptions from, or substitutes for, their military service.<sup>79</sup> We recognize, of course, that even now some men are able to translate social and economic advantage into medical, educational, occupational, or other deferments;<sup>80</sup> but many are critical of the unequal burden of the draft. Today we are even uncomfortable with the categorical exclusion of women,<sup>81</sup> and other countries, such as Israel, make military service truly universal,

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78. Our responses to natural disasters — floods, earthquakes, fires, blizzards, hurricanes, tornados — as well as to man-made tragedies — crime and war — also reveal we are predisposed to equalize risk.

79. When conscription was introduced in the North in 1863 draftees were allowed to purchase an exemption for \$300. This created such anger that it led to three days of rioting in New York, leaving an estimated 400 to 2,000 people dead, 50 buildings destroyed, and \$2,000,000 in damage. As a result the cash commutation eventually was repealed. Nevertheless, 99 federal registrars were killed or injured during the first four months of conscription. And of the 1.3 million drafted, all but 46,347 who served were volunteers who accepted bounties or were coerced by local pressures. See 7 *ENCYCLOPEDIA AMERICANA Conscription* 541, 544 (1963); 20 *ENCYCLOPEDIA AMERICANA New York, N.Y.* 214b, 232 (1963). The South, which had adopted the draft a year earlier, followed pure market principles and allowed draftees to purchase substitutes, who might charge as much as \$10,000 in Confederate currency. This, too, engendered severe class antagonism and subsequently was repealed. R. CURRENT, T. WILLIAMS, F. FREIDEL & W. BROWNEE, *THE ESSENTIALS OF AMERICAN HISTORY* 152-53, 156-57 (2d ed. 1976).

If we still believed that the market should allocate the risks of warfare we simply would increase the pay and benefits offered volunteers until we obtained a military force of sufficient size and quality. That we have not done so during any war in the present century and that both Democratic and Republican presidents have maintained compulsory *peacetime* registration after a brief flirtation with an all-volunteer army, suggests that we have strong doubts about both the efficiency and the morality of a market mechanism for this purpose.

80. L. BASKIR & W. STRAUSS, *CHANCE AND CIRCUMSTANCES: THE DRAFT, THE WAR, AND THE VIETNAM GENERATION* (1978).

81. *But see* *Rostker v. Goldberg*, 453 U.S. 57 (1981) (plurality opinion) (Provisions of

although women still do not engage in combat.<sup>82</sup> Our discomfort with inequality of risk is intensified when the distribution of risk is isomorphic with other suspect ascriptive categories, such as race, class, gender, and nationality.<sup>83</sup> Thus many are uneasy about the overrepresentation of the poor and ethnic minorities in both our conscript army during the Vietnam War and our volunteer army today.<sup>84</sup> And our willingness to provide foreign aid and to contribute to charities is at least partly attributable to our belief that the likelihood of suffering malnutrition or illness should not turn on accidents of birth.<sup>85</sup>

Our interest in promoting a proper distribution of risk also is revealed by our refusal to allow risk to be allocated solely by the market.<sup>86</sup> The criminal law prohibits many actions threatening bodily

the Military Selective Service Act authorizing the President to require the registration for possible military service of males but not females are not unconstitutional).

82. Kempster, *To Israeli Women, Equality is an Old Myth, Male Domination the Reality*, L.A. Times, Jan. 21, 1982, § I, at 16.

83. The same principle of equality of burden underlies the one other service the United States requires of its citizens: jury duty. Granted that all are required to serve because the Constitution guarantees a trial by one's peers. Still, we also feel that the sacrifice of time ought to be borne equally, and we find suspect the claims advanced by some that jury duty is more onerous for them because their time is more valuable (if we do not always reject the argument). See Alker, Hosticka & Mitchell, *Jury Selection as a Biased Social Process*, 11 L. & SOC'Y REV. 9 (1976); Levine & Schweber-Koren, *Jury Selection in Erie County: Changing a Sexist System*, 11 L. & SOC'Y REV. 43 (1976).

84. L. BASKIR & W. STRAUSS, *supra* note 80.

85. Our commitment to equality of risk is tested more pointedly by the actions of American enterprises that seek to export to third-world countries risks that we have decided are unacceptable at home. See T. MELLER, *POOR HEALTH, RICH PROFITS: MULTINATIONAL DRUG COMPANIES AND THE THIRD WORLD* (1977); D. WEIR & M. SCHAPIRO, *CIRCLE OF POISON* (1980); Shue, *Exporting Hazards*, in *BOUNDARIES: NATIONAL AUTHORITY AND ITS LIMITS* (P. Brown & H. Shue eds. 1981).

Statistics on the cost to save an additional life in different social settings dramatically reveal this inequality. One commentator estimated that it would cost an additional \$22 million to do so in an American coal mine but only \$100 to do so by immunization in Indonesia. Another study reports that England spends \$10,000 to prevent life-endangering accidents to agricultural workers but \$20 million to save high-rise apartment dwellers. *What is the Dollar Value of a Human Life?*, 2 UCLA THIS WEEK 1, 4 (Mar. 8-14, 1982).

86. The Reagan administration, however, may not be adverse to allowing risk to be bought and sold. The Environmental Protection Agency recently promulgated rules that allow a firm presently violating clean air laws to continue to pollute if it can find another firm that exceeds its clean air requirements and buy the latter's entitlement to pollute up to the limits of the law. L.A. Times, Dec. 17, 1981, § I, at 12. This "bubble policy" has been extended from the few areas that already meet national standards to virtually the entire nation. The EPA also will delegate approval of the so-called "emission trading banks" to the states. L.A. Times, Apr. 3, 1982, § I, at 7. This is an extension of the market for tax losses available to businesses; note that individuals (except married couples) cannot pool their incomes and thereby average them for tax purposes.

Even those who staunchly advocate cost-benefit analysis as the necessary basis for regulatory efforts to cure market failure repudiate it when there are distinct groups that

integrity, and individuals are not allowed to consent to crimes, much less sell their right to be protected from such injuries.<sup>87</sup> We have a large regulatory apparatus designed to protect workers, consumers, and others who cannot waive those protections in return for a job, higher wages, cheaper goods or services, or other benefits. We do not allow people to sell themselves into slavery. These beliefs are so fundamental that they rarely are tested and thus rarely exhibited. Yet when they are challenged our reaction is immediate and strong. The *Los Angeles Times* recently reported that newspapers in Brazil routinely carry advertisements from people offering to sell their eyes or kidneys and that several people have died of blood loss after selling too much blood to commercial blood banks.<sup>88</sup> This story elicited universal horror at the notion that bodily integrity might be treated as a commodity to be bought and sold. Yet what is the difference between accepting a probability of illness or injury at work as part of the sale of one's labor power, and selling a specific organ? If we feel that all have an equal obligation to donate blood or organs to those in need,<sup>89</sup> do we not have an equal obligation to share other risks?

According to capitalism, we do not. Notwithstanding the presence of contradictory strands, bourgeois ideology as a whole does not endorse equality of risk.<sup>90</sup> Liberalism, the political philosophy of capitalism, advocates equal opportunity, not result. Indeed, capitalism demands that results be unequal in order to motivate individuals to maximum effort in the competitive struggle for personal advancement. In the present context this means that each will strive to minimize the risks to which he is exposed, usually increasing the risks that others must incur. Liberalism explains the resulting distribution of rewards (and disadvantages) as an accurate reflection of individual worth — a meritocracy — typically by reference to a system of education and cre-

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suffer disproportionate costs or enjoy unique benefits. See Adams, . . . *And How Much for Your Grandmother?*, 6 ENV'T & PLAN. 619 (1974).

87. However, we tend to be hypocritical about enforcement when, for instance, we punish women who sell their bodies but not the men who buy them. See J. WALKOWITZ, PROSTITUTION AND VICTORIAN SOCIETY (1980).

88. Freed, *Desperation: Selling Your Eye, Kidney*, L.A. Times, Sept. 10, 1981, § I, at 1.

89. Cf. R. TITMUSS, THE GIFT RELATIONSHIP: FROM HUMAN BLOOD TO SOCIAL POLICY (1971) (relating societal characteristics to duty of altruism).

90. Capitalist tort law, for instance, takes it for granted that consumers are entitled to whatever level of safety they can buy. A cheap used car need not be as safe as an expensive new one — indeed, the brakes may fail the day it is bought and still courts will not find it defective. See *Cornelius v. Bay Motors, Inc.*, 258 Or. 564, 484 P.2d 299 (1971); cf. *Cooper v. Goodwin*, 478 F.2d 653 (D.C. Cir. 1973) (owner of premises may have lower duty of care to social guest if owner is poor and unable to repair); *Robbins v. Footer*, 553 F.2d 123 (D.C. Cir. 1977) (physician's duty of care in medical malpractice case may depend on available facilities, which in turn are a function of patient's ability to pay).

dentials. Thus differential exposure to risk is justified on the ground that, though all people are valuable, some are more valuable than others.<sup>91</sup> Those who are privileged under the system by being protected from harm clearly come to think of themselves as more deserving. When I have advanced my ideas to law school colleagues (who are exposed to minimal risks as both producers and consumers) most respond with incredulity and outrage. It is "obvious" to them that a famous violinist should not have his hands endangered by a punch press; it clearly is "better" that this risk be inflicted on an unskilled worker who is readily replaceable and who uses his hands, outside work, only to repair his car, throw around a football, and lift a glass of beer.

Law under capitalism expresses, and thereby reinforces and implements, these judgments about differential value. It takes the income loss of a victim as the measure of the victim's worth; it further distinguishes between manual workers (who are more likely to be injured on the job and thereby relegated to the inadequate remedy of workers' compensation) and others (who are likely to be injured, if at all, outside work and thus entitled to much more generous tort remedies). Capitalist law discriminates in this fashion because capitalism views workers as pure labor power. By making it cheap to injure some and expensive to injure others, capitalist law ensures that risk will be unequally distributed. This distribution, by definition, then becomes the "efficient" allocation of risk, the allocation that bourgeois legal theoreticians endorse because they are concerned with efficiency, not distribution.

But even in societies, like Sweden, that seek to equalize the distri-

91. Recent discussions of civil defense and nuclear warfare have highlighted the differential values placed on human lives. Some have suggested that the elderly be used to clean up radioactivity after an attack because they have fewer years in which to contract cancer and no longer are reproducing. The director of the Los Angeles County Department of Military and Veterans Affairs proposed a solution to the problem of relocating the 18.5 million urban population of Southern California to rural areas in the event of a nuclear war: [I]t is my opinion that the pre-selection of priority evacuees according to their value to the society that would survive the nuclear strike is absolutely essential.

High priority evacuees would include the young and physically fit, skilled specialists of all sciences, trades, occupations, and a well-balanced labor force.

On the low end of the priorities would be the elderly, the infirm, the unskilled, the unessential, and those whose presence in the relocation area would serve only to place a burden on the survivors.

Kendall, "Noah's Ark" *Theory for County Nuclear Attack Proposed*, L.A. Times, May 12, 1982, § II, at 1.

Capitalist law typically values life by measuring discounted future earnings (DFE). This can result in such disparities as the following: \$103,935 for an infant, \$244,155 for a young adult, and \$31,700 for a senior citizen. See B. FAIGIN, 1975 SOCIETAL COST OF MOTOR VEHICLE ACCIDENTS 5 (1976). One study calculated the DFE of an 85-year-old black woman at \$123. J. HAMILTON & S. SCOTCHMER, ASSESSING THE ECONOMIC EFFECTS OF IMPLEMENTING AIR QUALITY MANAGEMENT PLANS IN CALIFORNIA 134 (1979).

bution of advantage in other respects, the allocation of risk through the labor market produces a strong correlation between socioeconomic status and the level of danger encountered on the job.<sup>92</sup> This is inevitable — no matter how enthusiastically a capitalist state embraces welfare principles, no matter how far it goes along the road toward social democracy, workers and capitalists both retain the legal right to buy and sell risk and must engage in such transactions. Some approach this market in risk with greater resources than others. Such antecedent advantage can be exchanged for a low-risk work environment and low-risk consumer goods and services.

Welfare capitalism and social democracy can soften the rigors of a pure laissez-faire approach to risk. Regulation can set a floor that forbids certain extreme risks. But this leaves untouched the vast inequalities that remain above that floor and indeed legitimates them by suggesting that what is not regulated represents an acceptable level of inequality. The state could ignore wealth in compensating injuries, thereby achieving equality of remedy. But though this would remove the strong incentive generated by capitalist law to place disproportionate risk on those whom it is cheapest to compensate, it would not equalize the incidence of risk, for those who could buy out of danger by virtue of their superior wealth, income, status or education still would do so.<sup>93</sup> Such a reform would equalize the cure but not the disease. For welfare capitalism and social democracy preserve, and depend upon, the division of labor and the individualization of rewards, which, as I argued earlier, entail an unequal distribution of risk in both production and consumption.

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92. Karlsson, *Industrial Democracy in Sweden*, in *WORKERS' CONTROL: A READER ON LABOR AND SOCIAL CHANGE* 176, 186 (G. Hunnius, G. Garson & J. Case eds. 1973). The strength of this correlation increases as the labor market is "freed" from government control. President Reagan, in his State of the Union address on January 27, 1982, proposed to create "free enterprise" zones in American inner cities. It is said that he intended to recommend that Congress relieve businesses who invest in those zones of the obligation to comply with minimum wage laws and OSHA regulations. *Evening Outlook* (Santa Monica, Cal.), Jan. 26, 1982, at A-7. Thus minority youth would have the "opportunity" to encounter risks from which all other American workers are protected, at wages below those earned by any other American worker. In response to criticism by labor, Reagan subsequently revised this proposal, eliminating changes in health and safety laws and preserving the minimum wage. *L.A. Times*, Mar. 24, 1982, § I, at 17.

93. Similarly those who are able to do so buy out of the public sector wherever it presently provides services, e.g., public transportation, education, pensions, the mail service, police, campgrounds, and legal and medical services. This, of course, is encouraged by the new right. In England, 3 million people, or 6% of the population, now are covered by private health insurance. The number of private hospital beds is growing at the rate of 20% a year, whereas the number of public hospital beds declined by 15% during the last decade. Rattner, *Private Health Care Making New Inroads in Britain*, *N.Y. Times*, Nov. 2, 1981, at A-14, col. 1.



### C. *Autonomy and Equality*

These two principles must be realized together, not in isolation from each other. One person should not pursue autonomous control over his own risk by seeking to inflict unequal risk on another, and risk should not be equalized by depriving anyone of autonomous control over his own risks. Are these principles in conflict? I do not think so.<sup>94</sup> There are two possible tensions. First, one person might claim that autonomy meant striving to reduce his own risk by increasing that of another. I believe that such behavior expresses a false or unsocialized autonomy because it denies the autonomy of the other person. Do we act this way toward those whose autonomy we recognize and respect, i.e., those we love? Second, one person might wish autonomously to increase his own risk beyond that experienced by others and therefore view equalization of risk as a violation of that autonomy. I believe this possibility is largely a figment of the imagination of bourgeois economists, whose animus against paternalism takes the form of a solicitude for the freedom of *others* (never they themselves) to incur high risks. I do not deny that people presently accept extraordinary risks, either because they have no choice (they can find no other jobs, they can afford no other goods, services, or places to live) or because they are striving for the rewards that capitalism confers on others without exacting a similar cost.<sup>95</sup> But in neither instance is the individual acting autonomously. Construction workers may choose to assemble the superstructures of skyscrapers, but surely they prefer to do so with the minimum possible risk of falling to their deaths; certainly no one chooses to work with carcinogenic chemicals because he is risk preferential. Autonomy is not ensured by eliminating political restraints. That is the great myth of liberalism. Economic, social, and psychological constraints are just as important and often more powerful. Thus true autonomy, for oneself and for others, not only is consistent with equality of risk but actually requires it.

In the following two sections I will explore the implications of these principles for the allocation of risk in the spheres of production and reproduction (both voluntary and involuntary consumption, i.e.,

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94. *But see* A. OKUN, *EQUALITY AND EFFICIENCY: THE BIG TRADE-OFF* (1975).

95. It is essential to distinguish sharply between risks encountered at work and in leisure-time activities. I readily grant that people voluntarily incur numerous risks, many of them extreme, in their recreational pastimes: skiing, mountain climbing, scuba diving, even car driving. I agree that it is important to preserve the freedom to engage in such activities. But even here self-destructive behavior generally affects others — families, friends, social units that feel an obligation to care for the ill or injured — and therefore these have the right to try to persuade the participant not to incur the risk and perhaps even to curtail his or her ability to do so.

pollution). I will concentrate on the former sphere for two reasons: reallocation of risk is more difficult to achieve there; and its attainment, even in part, significantly will advance reallocation in the latter sphere.<sup>96</sup>

### III. RISK IN PRODUCTION

#### A. *The Ideals of Autonomous Control and Equal Exposure*

Significant progress toward these goals requires a total restructuring of the relations of production — the displacement of capitalism by decentralized socialism. Workers must have the fullest information possible about the risks to which they are exposed. They must control those risks, which means they must control the productive process. But workers can make correct decisions about how much risk to accept only if they also have the right to control and enjoy the benefits of their productive activity, which have to be balanced against those risks. This requires worker control over the entire enterprise, since production, sales, distribution, financing, wages, allocation of profits, etc. obviously affect and are affected by decisions regarding risk. Control, in turn, implies undiluted ownership; it would be unrealistic to expect those who presently stand to gain or lose from these decisions (i.e., capitalists) to refrain from seeking to influence them. Anything less than full worker control (e.g., worker participation in safety committees or even in management broadly defined) is inadequate, for it still allows those exempt from risk to have a say in determining the risks that others must endure.<sup>97</sup> On the other hand, ownership without control also is unacceptable, especially if ownership is only partial: it is not sufficient that employees own some stock in the corporation. Control similarly must be more than a paper right: every worker must not only be entitled to participate, but must participate in fact.<sup>98</sup>

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96. Accidental deaths and injuries at work were estimated to have caused personal injury losses of \$17.8 billion in 1976, compared with \$24.7 billion for automobile accidents and \$6.3 billion for home injuries (all excluding property damage), NATIONAL SAFETY COUNCIL, ACCIDENT FACTS 2-8 (1977). It is important to note that the first figure omits occupational disease, which separately has been estimated to cause 300,000 new cases of disability and 100,000 deaths a year. P. BARTH & H. HUNT, WORKERS' COMPENSATION AND WORK-RELATED DISEASES 15-27 (1980). It has been estimated that the total annual cost to society of occupational injury and illness is on the order of \$30-50 billion. See M. GREEN & N. WAITZMAN, BUSINESS WAR ON THE LAW: AN ANALYSIS OF THE BENEFITS OF FEDERAL HEALTH/SAFETY ENFORCEMENT 96 (rev. 2d ed. 1981).

97. Johnson & Whyte, *The Mondragon System of Worker Production Cooperatives*, 31 INDUS. & LAB. REL. REV. 18, 25 (1977); Silver, *Worker Management: A Power-Dialectic Framework*, 8 SOC. WORK & OCCUPATIONS 145 (1981); Stearns, *supra* note 18, at 15-18.

98. A recent study of worker ownership in the United States revealed that it usually is limited to a minority interest and, even then, often has no voting rights. See ECONOMIC

Risk must be equally distributed. This is a logical corollary of collective control, for otherwise some of those who participate in deciding the kind and magnitude of risks will be subjecting others to risks they do not experience themselves — a violation of the principle of autonomy. Equalization of risk requires reduction in the division of labor, job sharing, and job rotation. I recognize the numerous obstacles such changes must overcome under capitalist relations of production, and I deal with these in some detail below. Here let me just note some of the issues that must be addressed: How will risk equalization affect efficiency and productivity? How will it be viewed by the workers involved, both those who gain new skills and those who suffer new constraints on the extent to which they can exercise skills they have worked hard to acquire?<sup>99</sup> Is it sufficient to redistribute risk (and work) within each enterprise, or should workers be rotated among enterprises or even between industries? A concomitant of the redistribution of tasks and the elimination of distinctions between workers and managers/owners may be the equalization of income from work, because many of the justifications for inequality will disappear. How will this change from individual to collective incentives affect work behavior?<sup>100</sup>

### B. *The Impact of Capitalism on the Allocation of Risk*

Some pre-capitalist relations of production respected both principles of risk allocation.<sup>101</sup> The farmer and the craftsman worked autonomously, though the market for their goods and services (not their labor power) affected the nature and kind of risk they experienced. Although there was division of labor, it was social (by craft) rather than detailed (by task) and therefore increased the skills of those who specialized.<sup>102</sup> All who engaged in a given trade encountered similar risks, though of course there were differences in the dangerousness of each occupation. These relations of production persisted during the early phases of capitalism. Under the system of manufactures and through the practices of putting-out and subcontracting work to skilled

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DEVELOPMENT ADMINISTRATION, U.S. DEPARTMENT OF COMMERCE, *EMPLOYEE OWNERSHIP: EMPLOYEE STOCK OWNERSHIP PLAN (ESOP)* (1978); see also Woodworth, *Forms of Employee Ownership and Workers' Control*, 8 SOC. WORK & OCCUPATIONS 195 (1981).

99. Rothschild-Whitt, *The Collectivist Organization: An Alternative to Rational-Bureaucratic Models*, 44 AM. SOC. REV. 509, 524 (1979).

100. See MacEwan, *Equality and Power in Revolutionary Cuba*, 20 SOCIALIST REVOLUTION 87, 91-94 (1974) (this also is numbered volume 4, number 2; journal since has been retitled SOCIALIST REVIEW).

101. This obviously is not true of slave societies, nor of others to the extent that the division of labor parallels differences of gender, ethnicity, or class.

102. H. BRAVERMAN, *LABOR AND MONOPOLY CAPITAL: THE DEGRADATION OF WORK IN THE TWENTIETH CENTURY* 71-73 (1974).

craftsmen — in the iron industry, for instance — workers retained control over the process and pace of production.<sup>103</sup>

Capitalism changes all this. The technological developments associated with capitalism are not responsible; a high level of technology is consistent with both principles of risk allocation,<sup>104</sup> as I will try to demonstrate below. Rather, it is capitalist relations of production that actively undermine both ideals. Capitalism collects the previously autonomous craftsmen in central workplaces in order to subordinate them to management control.<sup>105</sup> It introduces the division of labor *within* a specialized skill.<sup>106</sup> Whereas every craftsman necessarily analyzes his functions into their constituent elements, capitalism separates those subtasks and allocates them to different workers.<sup>107</sup> It thereby reduces the level of skills to the bare minimum necessary to perform each fragmented motion. This allows the employer to exercise maximum control over the worker while paying the latter the lowest possible wage.<sup>108</sup> The result is to destroy skills, to create what Durkheim,<sup>109</sup> as well as Marx,<sup>110</sup> condemned as an abnormal division of labor. Hundreds of thousands of skilled craftsmen who emigrated from Europe to America at the turn of the century were forced to abandon their trades and become unskilled laborers, wasting immeasurable amounts of talent.<sup>111</sup> Such a detailed division of labor is not dictated by technological complexity: all factories maintain a category of employee who can fill in for absences in a large number of jobs.<sup>112</sup> Nor were all workers equally deskilled, for reductions in the skill required to perform the large majority of tasks augmented the expertise demanded by the remainder — in order to degrade most workers to the status of machine minders, capitalism had to elevate a few to become highly skilled tool and die

103. *Id.* at 60-61; D. MONTGOMERY, *WORKERS' CONTROL IN AMERICA* 11-12 (1979).

104. Carson, *supra* note 17, at 239-44.

105. H. BRAVERMAN, *supra* note 102, at 65. For an overview of the impact of American capitalism on labor, see D. GORDON, R. EDWARDS & M. REICH, *SEGMENTED WORK, DIVIDED WORKERS: THE HISTORICAL TRANSFORMATION OF LABOR IN THE UNITED STATES* (1982).

106. *Id.* at 70-73.

107. *Id.* at 77; see also R. BLAUNER, *ALIENATION AND FREEDOM: THE FACTORY WORKER AND HIS INDUSTRY* 172-73 (1964).

108. H. BRAVERMAN, *supra* note 102, at 79-80.

109. E. DURKHEIM, *THE DIVISION OF LABOR IN SOCIETY* bk. 3 (G. Simpson trans. 1933).

110. 1 K. MARX, *CAPITAL* 475-77 (B. Fowkes trans. 1976).

111. D. MONTGOMERY, *supra* note 103, at 34. This should give pause to those who claim that the capitalist imposition of a "free" market for labor allows individuals to make optimum use of their capacities. For a similar criticism, see generally K. POLANYI, *THE GREAT TRANSFORMATION* (1944).

112. D. MONTGOMERY, *supra* note 103, at 35-36.

cutters.<sup>113</sup> Both changes accentuated hierarchy within the work force, fracturing labor solidarity and facilitating control by capital.<sup>114</sup>

At the end of the nineteenth century, Frederick Taylor observed the changes sketched above and formulated a coherent, influential program for the reorganization of labor. He argued that "scientific management" required capital to revolutionize production in three ways. First, it had to collect and systematize all that the workers knew about the production process, for Taylor recognized that workers collectively possessed a great deal more technical expertise than their supervisors. Braverman calls this the dissociation of the labor process from the skills of the workers.<sup>115</sup> Second, capital had to remove all brain work from the shop and centralize it in planning — consciously divorcing head and handwork, separating conception from execution, reducing workers to the condition of obedient animals.<sup>116</sup> Third, it had to use its monopoly of knowledge to control each step of the productive process.<sup>117</sup> The cumulative effect of these strategies was to deny workers any control over their working conditions (including the risks to which they were exposed) and to create gross inequalities in the kind and degree of the risks they experienced — greatest between labor and management but also large, and increasing, within the workforce.

Workers in the first half of the twentieth century did not acquiesce passively in these forms of manipulation, exploitation, and oppression. At first they refused to work under supervision, rejected management production quotas, and insisted on setting their own "stints," which they enforced against fellow workers who were tempted to overproduce.<sup>118</sup> As unions grew stronger they unilaterally imposed their own work rules on the production process, enforced them by strikes, and were supported by other unions who conducted sympathy strikes.<sup>119</sup> Unions also opposed incentive pay, which they saw as a covert means of undermining worker autonomy, and a few unions of skilled workers explicitly sought control over working conditions and struck to back their demands.<sup>120</sup> Yet if these tactics delayed and obstructed implementation of the principles of scientific management, the latter ulti-

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113. *Id.* at 118.

114. H. BRAVERMAN, *supra* note 102, at 83.

115. *Id.* at 112.

116. *Id.* at 113-14.

117. *Id.* at 119.

118. D. MONTGOMERY, *supra* note 103, at 12-13.

119. *Id.* at 15-16, 18.

120. *Id.* at 98-101, 116, 122-23; *cf.* C. EASTMAN, *WORK ACCIDENTS AND THE LAW* 94 (1910) (demand for worker ownership of dangerous enterprises advanced by early socialist feminist).

mately triumphed. Union militance declined, for as unions grew in size and strength they became more bureaucratic. Union leadership, emphasizing the tangible material rewards of wages, hours, and fringe benefits, conceded control over working conditions to management.<sup>121</sup> Individual resistance became less effective as the mechanism of control shifted from personal relationships within the firm to the impersonal mechanisms of technology (the assembly line) and bureaucracy (rules and grievance procedures).<sup>122</sup> Some workers turned to guerilla action, engaging in pilferage and sabotage.<sup>123</sup> Many voted with their feet. Labor turnover grew to staggering proportions: rates of 100 to 250 percent a year were common, and one Ford factory in 1912-1913 had to hire 54,000 workers to maintain a workforce of 13,000, a turnover of 416 percent!<sup>124</sup> Absenteeism also was high. Yet if these tactics allowed workers temporary respite from intolerable conditions, those who left one factory had little choice but to seek work at another that was virtually indistinguishable. The low levels of skill required and the large reserve army of unemployed allowed capital to tolerate high levels of labor turnover. Indeed, the callous disregard of capital for worker safety contributed to such turnover, because there were plenty of workers waiting to take the place of anyone who was injured.<sup>125</sup>

If capitalism deprives workers of control over risk and imposes unequal risks on them, how does it justify doing so? I already have discussed two responses — legal liability (in tort or workers' compensation), both to compensate and to control, and government regulation — and I have argued that both are inadequate.<sup>126</sup> Apologists for capitalism offer two other justifications. The first claims that wages themselves are adequate remuneration for the risks workers incur.<sup>127</sup> I find

121. D. MONTGOMERY, *supra* note 103, at 26, ch. 7; *see also* Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 MINN. L. REV. 265 (1978).

122. R. EDWARDS, *CONTESTED TERRAIN: THE TRANSFORMATION OF THE WORKPLACE IN THE TWENTIETH CENTURY* 111-29, 181-83 (1979); *cf.* Burawoy, *Terrains of Contest: Factory and State under Capitalism and Socialism*, 58 SOCIALIST REV. 83 (1981) (critique and revision of Edwards and Braverman).

123. D. MONTGOMERY, *supra* note 103, at 102.

124. *Id.* at 41.

125. *Id.* at 35-36.

126. *See supra* text accompanying notes 2-30; *see also* R. CONLEY & J. NOBLE, JR., *WORKERS' COMPENSATION REFORM: CHALLENGE FOR THE 80'S* (1980); *SUPPLEMENTAL STUDIES FOR THE NATIONAL COMMISSION ON STATE WORKMEN'S COMPENSATION LAWS* (P. Barth ed. 1973); Thompson, *State Compliance with Workmen's Compensation Recommendations*, 8 POL'Y STUD. J. 417 (1979).

127. *See* Smith, *supra* note 28, at 321-22. Others have asserted that high risk is accompanied by low pay. *See, e.g.*, J. GALBRAITH, *ECONOMICS AND THE PUBLIC PURPOSE* (1973); Stearns, *supra* note 18, at 17.

the evidence for this insubstantial and unpersuasive.<sup>128</sup> And I think it noteworthy that those who make the argument never seem eager to exchange their low-risk jobs for more dangerous ones — which presumably would pay better. But even if the correlation between risk and salary were stronger, the worker would be confined to a choice among jobs — a choice that is limited by the worker's background (and thus cannot be equal) and, in any case, is *not* the same as control over working conditions. It is interesting that capitalist utopias that seek to dispense with money — for instance by substituting hours worked as the medium of exchange, as in B.F. Skinner's *Walden Two* — reproduce both inequality and the denial of autonomy.<sup>129</sup> The remaining capitalist solution to the problem of risk is to allow workers a limited role in decisionmaking, whether through safety representatives, labor-management committees, participation in programs to humanize work, employee stock option plans, or even membership on the board of directors.<sup>130</sup> Yet in each of these schemes management retains ultimate control and labor obtains at most a minority voice, bargaining from a position of weakness.<sup>131</sup> None of the reforms either confers autonomy

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128. See R. SMITH, COMPENSATING WAGE DIFFERENTIALS AND HAZARDOUS WORK (1973); McLean, Wendling & Neergaard, *Compensating Wage Differentials for Hazardous Work: An Empirical Analysis*, 18 Q. REV. ECON. & BUS. 97 (1978); Settle & Weisbrod, *supra* note 18, at 298-99; Thaler & Rosen, *The Value of Saving a Life: Evidence from the Labor Market*, in HOUSEHOLD PRODUCTION AND CONSUMPTION 265 (N. Terleckyj ed. 1975); K. Gordon, Accident Rates and Wages on U.S. Class-1 Railroads (1973) (Ph.D. dissertation, University of Chicago).

Indirect evidence tending to challenge the alleged correlation between wages and risk emerged in the recent raids by the U.S. Immigration and Naturalization Service on businesses suspected of employing undocumented workers. One such employer, Trees, Inc., of Houston, paid starting tree trimmers only \$4 an hour to climb trees and cut branches near telephone and high voltage power lines. The company vice-president admitted that the work was hard, dangerous, physically taxing, and complicated by bad weather, poison ivy, and poison oak. "We have some of the worst working conditions around." The 86,000 unemployed American citizens in the greater Houston metropolitan area apparently agreed, because he was unable to fill the 135 positions left vacant by the raids. Indeed, the Texas Employment Commission made only 42 job referrals for the 1,105 positions vacated by those seized. L.A. Times, May 1, 1982, § I, at 30.

Note also that the common law doctrine of respondeat superior is predicated on the fact that wages do *not* reflect risk to others; for, if they did, responsibility for compensating the victim could be placed on the employee alone.

129. B.F. SKINNER, WALDEN TWO (1948); cf. R. HOURIET, GETTING BACK TOGETHER ch. 7 (1971) (description of actual commune inspired by Skinner's book).

130. D. ZWERDLING, WORKPLACE DEMOCRACY 2-8, 65-79 (1980).

131. See P. BERNSTEIN, WORKPLACE DEMOCRATIZATION: ITS INTERNAL DYNAMICS 31 (1976); see also Karlsson, *supra* note 92, at 182 (attempted reforms in Sweden, including shared decisionmaking by labor and management, have provided minimum levels of security and material well-being but not equalization of living standards); Mandel, *The Debate on Workers' Control*, in WORKERS' CONTROL 344, 348 (G. Hunnius, G. Garson & J. Case eds. 1973) (workers' control can be accomplished by nothing short of absolute anticapitalist

or ensures equality.

Two other proposals sometimes are advanced that would make a more dramatic break with existing capitalist relations of production. The first is a draft. (similar to selective service for the military) to perform tasks that entail particularly high risks.<sup>132</sup> This seems unsatisfactory for several reasons. It would equalize risk only for a very small number of jobs. Our experience with the draft does not inspire confidence that even this limited obligation would be shared fairly,<sup>133</sup> and to the extent that service were *selective* it would not be shared widely. Nothing in the plan guarantees that those drafted would have autonomous control over the risks they encountered, and again the model of the military strongly suggests otherwise.<sup>134</sup> Finally, the administrative costs and loss of efficiency incurred by rotating people in and out of such work for short periods of time would be very high. The second alternative is nationalization. But whether this is partial, leaving all but the most dangerous enterprises in the hands of private capital (in which case it is no solution) or total, i.e., state capitalism, it is wholly consistent with continuing to deny workers autonomy and exposing them to unequal risks.<sup>135</sup> What we know about nationalized industries

structural reform); Schauer, *Critique of co-Determination*, in *WORKERS' CONTROL* 210, 211 (G. Hunnius, G. Garson & J. Case eds. 1973) (co-determination in Germany contemplates persistence and protection of the hierarchic decisionmaking structure with its concomitant principles and social conditions).

132. S. PERRY, *SAN FRANCISCO SCAVENGERS: DIRTY WORK AND THE PRIDE OF OWNERSHIP* (1978); cf. F. MARKS, K. LESWING & B. FORTINSKY, *THE LAWYER, THE PUBLIC AND PROFESSIONAL RESPONSIBILITY* 288-93 (1972) [hereinafter cited as F. MARKS] (exploring the arguments for drafting lawyers to serve the poor).

133. See *supra* note 80. It sometimes is argued that the equalization of burdens leads to their removal. But significant elements of the middle class always have been able to avoid military service, and it was not the threat of the draft that ended the Vietnam War.

134. There may have been some connection between the use of young conscripts in the Vietnam War and the lowering of the voting age to 18, but the latter certainly did not give draftees autonomous control over their lives. Rather, short-term conscription ensures that those who serve lack expertise, thus confirming their subordination to career officers. Finally, the use of a draft would be likely to aggravate intergenerational conflict, which already seems on the rise, as suggested by the repeated refusal of voters (who no longer have school-age children) in several Michigan towns to approve tax increases in order to preserve the public school system. Consider also the anger of the Grey Panthers at the suggestion that the elderly be used to dispose of radioactive waste. See *supra* note 39.

135. See P. BERNSTEIN, *supra* note 131, at 60; Abel, *supra* note 1, at 208 n.137; Barratt-Brown, *Alternative Structures for Mining Industry*, 30 *WORKERS' CONTROL BULL.* 8-9 (Dec. 1975). See generally W. CARSON, *THE OTHER PRICE OF BRITAIN'S OIL* (1982); S. MALLET, *BUREAUCRACY AND TECHNOLOGY IN SOCIALIST COUNTRIES* (1972); Carson, *supra* note 17; Stearns, *Pitfalls in the Struggle for Humanized Labor Conditions* (1981) (unpublished manuscript). The treatment of public employee unions — the Professional Air Traffic Controllers Organization, for example — confirms this. The total lack of autonomy of employees in the military (where unions are forbidden) is even stronger evidence.



and state capitalist regimes amply demonstrates that, though they may be more solicitous of workers (at least at first), they generally adhere to principles of "scientific management" and seek to maximize production, often at the expense of worker safety.<sup>136</sup>

### C. *Decentralized Socialism and Risk Allocation*

1. *Case Studies* — Autonomous control over and equal exposure to the risks arising in production can be achieved only under a decentralized socialism in which workers own and control the means of production.<sup>137</sup> If no existing society fully realizes this ideal, many productive arrangements have made significant progress toward it.<sup>138</sup> These include such diverse phenomena as: utopian societies and intentional communities,<sup>139</sup> Israeli kibbutzim,<sup>140</sup> producer cooperatives

136. Stearns, *supra* note 135, at 7; see also McCormack, *Lead Poisoning in Yugoslavia called "Worst"*, Evening Outlook (Santa Monica, Cal.), Feb. 17, 1982, at A-4.

137. After completing this article, I discovered the following quotation by a prominent activist for health and safety at work:

Industrial democracy in the United States may well result more as an outgrowth of the demand for improved health and safety than as an outgrowth of generalized job dissatisfaction related to the meaningless nature of work.

Ashford, *The Role of Occupational Health and Safety in Industrial Relations: Where We Are and Where We're Going*, 15 INST. LAB. REL. REP. 24, 28 (Spring 1978).

There is evidence that the growth of worker participation in Sweden in the last two decades was significantly motivated by worker discontent with the hazards and stress of the workplace. Albrecht, *Preconditions for Increased Workers' Influence: Factors in the Swedish Case*, 8 SOC. WORK & OCCUPATIONS 252, 264 (1981).

138. It has been estimated that there are 3,000 worker-owned industries in the United States. See INSTITUTE FOR SOCIAL RESEARCH, UNIVERSITY OF MICHIGAN, *EMPLOYEE OWNERSHIP* (1978). See also Carnoy & Levin, *Workers Triumph: The Meriden Experiment*, WORKING PAPERS NEW SOC'Y (Winter 1976); Gunn, *The Fruits of Rath*, WORKING PAPERS NEW SOC'Y (Mar./Apr. 1981); Gunn, *Toward Workers' Control*, WORKING PAPERS NEW SOC'Y (May/June 1980); Herman, *Workers, Watches and Self-Management*, WORKING PAPERS NEW SOC'Y (Winter 1974); *Alternative Institutions*, 9 J. APPLIED BEHAVIORAL SCI. 218 (May/June 1973) (special issue); Rothschild-Whitt, *Private Ownership and Workers' Control in Holland*, WORKING PAPERS NEW SOC'Y (Mar./Apr. 1981); Woodworth, *Workers as Bosses*, 11 SOC. POL'Y 40 (Jan./Feb. 1981); Zwerdling, *Employee Ownership: How Well is it Working?*, WORKING PAPERS NEW SOC'Y (MAY/JUNE 1979). For overviews of worker ownership in the United States see generally M. CARNOY & D. SHEARER, *ECONOMIC DEMOCRACY* (1980); D. ZWERDLING, *supra* note 130; WORK & POWER: THE LIBERATION OF WORK AND THE CONTROL OF POLITICAL POWER (T. Burns, L. Karlsson & V. Rus eds. 1979); WORKPLACE DEMOCRACY AND SOCIAL CHANGE (F. Lindenfeld & J. Rothschild-Whitt eds. 1982); Garson, *The Politics of Workers' Control: A Review Essay*, in WORKERS' CONTROL 469 (G. Hunnius, G. Garson & J. Case eds. 1973).

139. See, e.g., B. BERGER, *THE SURVIVAL OF A COUNTERCULTURE* (1981); F. MANUEL & F. MANUEL, *UTOPIAN THOUGHT IN THE WESTERN WORLD* (1979). Well-known American examples of self-supporting intentional communities include Oneida, see M. CARDEN, *ONEIDA* (1969), the Hutterites, see J. HOSTETLER, *HUTTERITE SOCIETY* (1974), and the Bruderhof, see B. ZABLOCKI, *THE JOYFUL COMMUNITY* (1971). These communities vary in the degree to which they equalize risk among their members.

within the capitalist economies of the United States, England, and Spain; and self-managed socialism in Yugoslavia and briefly in other socialist regimes, such as Poland and Chile.<sup>141</sup> This section will present brief synopses of two such arrangements; the next will discuss selected aspects of worker control in greater detail. I must stress at the outset, however, that control and allocation of risk are never more than subordinate issues.<sup>142</sup> Some of these enterprises are creatures of necessity; all, rightly, are concerned with more fundamental features of worker ownership and control; and many are preoccupied by the struggle for survival in what is generally a hostile environment. Indeed, the major studies of worker control ignore the issue of risk or barely mention it.<sup>143</sup>

(a) *Pacific Northwest Plywood Cooperatives* — Sixty years ago workers in a plywood factory in the Pacific Northwest, confronted with the threat of plant closure, bought the enterprise.<sup>144</sup> Others followed their example (in a few instances creating the firm from scratch), and now there are sixteen such producer cooperatives in the Pacific Northwest. Each member owns one share in the enterprise, which entitles him to an equal portion of the profits and an equal vote for the board of directors and in those major management decisions made directly by the workers (e.g., capital expenditures exceeding a certain amount). Workers, as owners, have absolute job security as long as the plant is open, although some voluntarily take leaves when demand falls and profits decline because they can make more money as employees elsewhere; however, they have a right to return whenever they wish. The profits distributed generally have been substantially higher than the

140. F. ZWEIG, *THE ISRAELI WORKER* (1959); Fine, *Worker Participation in Israel*, in *WORKERS' CONTROL* 226 (G. Hunnius, G. Garson & J. Case eds. 1973).

141. For a comparison of worker control in Chile, Peru, and Mexico, see Marquez, *Politics, Bureaucracy, and Industrial Democracy: A Comparative Framework for the Analysis of Worker Control in Latin America*, 8 *SOC. WORK & OCCUPATIONS* 165 (1981).

142. See Deutsch, *Work Environment Reform and Industrial Democracy*, 8 *SOC. WORK & OCCUPATIONS* 180, 189 (1981).

143. See *supra* notes 136-40; see also C. BELLAS, *INDUSTRIAL DEMOCRACY AND THE WORKER-OWNED FIRM: A STUDY OF TWENTY-ONE PLYWOOD COMPANIES IN THE PACIFIC NORTHWEST* (1972); K. BERMAN, *WORKER-OWNED PLYWOOD COMPANIES: AN ECONOMIC ANALYSIS* (1967); P. BERNSTEIN, *supra* note 131; P. BLUMBERG, *INDUSTRIAL DEMOCRACY: THE SOCIOLOGY OF PARTICIPATION* (1968); H. BRAVERMAN, *supra* note 102; J. VANEK, *THE LABOR-MANAGED ECONOMY* (1977); J. VANEK, *THE PARTICIPATORY ECONOMY* (1971); J. VANEK, *THE GENERAL THEORY OF LABOR-MANAGED MARKET ECONOMIES* (1970); *WORKERS' CONTROL* (G. Hunnius, G. Garson & J. Case eds. 1973).

144. The sources for this overview of the Pacific Northwest plywood industry are K. BERMAN, *supra* note 143; C. BELLAS, *supra* note 143; P. BERNSTEIN, *supra* note 131; D. ZWERDLING, *supra* note 130, at 95-104.

wages paid unionized workers in comparable capitalist enterprises because productivity has been higher and costs lower; for example, there has been less waste and fewer management salaries to pay. Participation in governance is high, a good deal higher than in most political democracies, not only because decisions have a more immediate impact on the workers but also because membership is small enough (less than 400) that each worker can feel that his voice counts. There is a good deal of job rotation: when a job falls vacant any member can bid for it; the job will be awarded on the basis of seniority, but the person who obtains it then loses all seniority and must begin accumulating it again.

Certain distinctive characteristics of plywood production contributed to the success and longevity of these enterprises. First, although financing usually is a problem for cooperatives, this industry is relatively labor-intensive, so that workers did not need to raise a great deal of capital in advance. Second, because plywood manufacture demands only a narrow range of skills that are relatively easy to acquire, job rotation is possible.

Nevertheless, even these cooperatives have encountered obstacles that have caused them to deviate from the principles of worker control over, and equal distribution of, risk. As capital costs have risen with technological change, fewer cooperatives have been founded — none has been launched within the last twenty-five years. The growth in the value of the enterprise has increased the price of its shares so that few can afford to buy into a cooperative when a share becomes available; thus, the number of members has declined, their places taken by non-owner employees. The same phenomenon has made the plywood plants an attractive investment for capitalist enterprises, which have offered so much for the shares that several cooperatives have voted to sell out. Although job rotation is technologically feasible, not all jobs are rotated: women are restricted to office work, and some of the least pleasant tasks are assigned to employees who are not members. The wages of the latter generally are lower than the profits earned by members, and this disparity creates tensions. Management, like dirty work, also is not performed by the members but rather is entrusted to supervisory employees. This generates additional contradictions: managers who give orders to their employers and disagreements between management and ownership with respect to such questions as the distribution or reinvestment of profits. Nevertheless, these producer cooperatives demonstrate the possibility of achieving a much higher degree of control over, and a far more equal distribution of, risk even within a capitalist economy.

(b) *Sunset Scavenger Company* — In 1920, ninety-two Italian-

Americans incorporated the Sunset Scavenger Co. as a cooperative to collect garbage from residences in San Francisco.<sup>145</sup> By 1975 Sunset had expanded into a conglomerate, Envirocal, Inc., which ranked fifth among refuse collection companies in the United States in terms of sales (\$25 million), had \$6.5 million in assets, and managed 23 industrial/commercial and 175 residential accounts.<sup>146</sup> Although the number of partners had grown to 320 by 1966, the membership still was ethnically homogeneous and closely bound by family ties.<sup>147</sup> After 1968 the number of partners began to decline as the company deliberately bought back the shares of everyone who quit or retired; at the same time, additional paid helpers were hired, producing a workforce of more than 600 in 1976, more than half of whom were employees.<sup>148</sup> All members receive the same wages, together with an equal share of profits at the end of the year, and enjoy security of employment.<sup>149</sup> Helpers, by contrast, are paid less and can be fired at will. All workers do basically the same tasks, although there is some minimal differentiation within the teams of three or four who man each truck. The head of the team, for instance, also is responsible for collecting bills from customers.<sup>150</sup> Workers control the pace of their work (often pushing themselves in order to finish early), choose when to take breaks, and establish their own work rules.<sup>151</sup> The routes for which the teams are responsible are equalized each year.<sup>152</sup> Although the work is hard and dirty it has several advantages: it is out-of-doors and varied; a crew gets to know its neighborhood intimately and feels part of it; and workers often can increase their incomes by scavenging.<sup>153</sup> Managers are elected from among the workers; although management increasingly demands specialized skills, every manager has worked the trucks. In

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145. The source for all the information about the Sunset Scavenger Company is S. PERRY, *supra* note 132.

146. *Id.* at 161.

147. *Id.* at 118. Homogeneity may be essential to the success of such an enterprise, at least at the beginning. Common residence and membership in the Dutch Reformed Church clearly were strong forces for cohesiveness in the Breman group of enterprises in northwestern Holland, which now involves 600 workers. See Rothschild-Whitt, *There's More than One Way to Run a Democratic Enterprise: Self-Management from the Netherlands*, 8 SOC. WORK & OCCUPATIONS 201, 204 (1981).

148. S. PERRY, *supra* note 32, at 13, 149, 162.

149. Most of the profits are reinvested. In recent years there has been some graduation in pay. *Id.* at 32, 48, 119.

150. Teams recently have been relieved of responsibility for collecting bills. At the same time, there has been some differentiation of the work of non-partner helpers in order to justify their lower pay. *Id.* at 33, 175.

151. *Id.* at 60, 84, 89.

152. *Id.* at 152.

153. *Id.* at 115-17.

1976 there were only 11 managers for a workforce in excess of 600.<sup>154</sup> They receive the same pay as other workers, have little authority over the day-to-day work, and enjoy few other perquisites.<sup>155</sup>

Garbage collection is one of the most dangerous jobs in the United States today: on-the-job injuries occur nine times more frequently than the national average, and no other job category has a higher rate.<sup>156</sup> Each worker carries a barrel weighing 60-150 pounds and lifts many tons a day.<sup>157</sup> Back strain thus is the single greatest source of disability.<sup>158</sup> But workers also are routinely cut, scratched, and bruised by dangerous objects left in the trash, because protective clothing is cumbersome and uncomfortable.<sup>159</sup> And they are in constant danger from traffic.<sup>160</sup> Sunset was not immune from these problems. In order to reduce its workers' compensation insurance rates, it took several remedial measures: fining and suspending injured workers and granting no sick leave.<sup>161</sup> But the cooperative nature of the enterprise also encourages safety; workers are highly motivated to avoid injuries, for fellow-workers must take over one's responsibilities, and productivity affects everyone's profits.<sup>162</sup> Therefore, it is noteworthy that the workers' compensation rate at Sunset presently is forty percent lower than the industry average.<sup>163</sup> Workers also show concern for each other after an injury has occurred.<sup>164</sup> Some may be assigned trucks with shorter routes; others may be given one of the limited number of jobs in the office and yard that make fewer physical demands.<sup>165</sup> Here, again, worker ownership appears to be associated with greater control over, and equalization of, risk.

Both the statement of the principles that should govern risk allocation and the brief sketches of two functioning systems that approximate those ideals have suggested the general contours of a socialist approach

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154. *Id.* at 162, 166. This ratio of one manager/inspector for every 60 workers should be compared with the overall American ratio of 1:10 and the Japanese ratio of 1:200. See Thurow, *Death by a Thousand Cuts*, N.Y. REV. BOOKS 3, 4 (Dec. 17, 1981).

155. S. PERRY, *supra* note 132, at 137-39. There now is some pay differential. *Id.* at 48.

156. *Id.* at 8-9, 216-17.

157. *Id.* at 54.

158. *Id.* at 99. Half of all injuries are sprains and strains.

159. *Id.* at 66-68.

160. *Id.* at 104.

161. *Id.* at 45-46. Penalties since have been abolished, but sick leave still is not granted.

162. *Id.* at 96, 199.

163. *Id.* at 9.

164. *Id.* at 99-100.

165. *Id.* at 167, 170-71. Kibbutzim also reserve lighter jobs for older workers. See Melman, *Industrial Efficiency under Managerial vs. Cooperative Decision-Making: A Comparative Study of Manufacturing Enterprises in Israel*, 2 REV. RADICAL POL. ECON. 9, 27 (Spr. 1970).

to the problem of risk in production. The remainder of this section will draw upon a wide range of examples to elaborate the conditions for, consequences of, and problems associated with pursuing autonomous control over, and equalization of, risk. These three categories are merely heuristic; conditions not only are instrumental prerequisites but also may be ultimate goals, and consequences may be preconditions for other results.

2. *Conditions* — (a) *Autonomous work groups* — The day-to-day operations of the enterprise are performed by small groups of workers (usually less than a dozen) who have considerable autonomy in determining their conditions of work. The ratio of managers to workers is much lower than it is in the capitalist firm.<sup>166</sup> This structure is found in extremely diverse settings: Chinese factories;<sup>167</sup> certain coal mines in both the United States<sup>168</sup> and England;<sup>169</sup> a dog food plant in Topeka, Kansas;<sup>170</sup> a multipurpose crisis counselling center;<sup>171</sup> and the Sunset Scavenger Co.<sup>172</sup> Work groups typically exercise control not only over production but also over maintenance, and sometimes over discipline, hiring, and firing.<sup>173</sup>

(b) *Democratic participation in the control of the enterprise* — This may be the single most fundamental condition, for everything else flows from it.<sup>174</sup> Indeed, some alternative organizations view it as so important that, when participation in governance declines, they prefer to dissolve rather than lapse into a more traditional hierarchic mode of

166. See *supra* note 154 and accompanying text; see also WORK IN AMERICA, *supra* note 47, at 96-97; Melman, *supra* note 165.

167. See C. BETTELHEIM, *supra* note 74, at 87; Lockett, *Bridging the Division of Labour? The Case of China*, 1 ECON. & INDUS. DEMOCRACY 447, 472-74 (1980).

168. See D. ZWERDLING, *supra* note 130, at 31-40; Trist, Susman & Brown, *An Experiment in Autonomous Working in an American Underground Coal Mine*, 30 HUM. REL. 201 (1977).

169. E. TRIST, G. HIGGIN, H. MURRAY & A. POLLOCK, ORGANIZATIONAL CHOICE: CAPABILITIES OF GROUPS AT THE COAL FACE UNDER CHANGING TECHNOLOGIES: THE LOSS, RE-DISCOVERY AND TRANSFORMATION OF A WORK TRADITION (1963) [hereinafter cited as E. TRIST].

170. D. ZWERDLING, *supra* note 130, at 23.

171. See Mansbridge, *Acceptable Inequalities*, 7 BRIT. J. POL. SCI. 321 (1977). For a fuller exposition of the political philosophy of this author see also J. MANSBRIDGE, BEYOND ADVERSARY DEMOCRACY (1981).

172. S. PERRY, *supra* note 132, at 55.

173. D. ZWERDLING, *supra* note 130, at 23.

174. The collectivity as a whole is the only source of legitimate authority. See Rothchild-Whitt, *supra* note 99, at 513-18; see also WORK IN AMERICA, *supra* note 47, at 98, 103-05.

decisionmaking.<sup>175</sup> At a minimum, every worker should have an equal vote in the selection of management.<sup>176</sup> But most enterprises go beyond this. Some may involve a limited number of workers directly in management: twenty percent of the workers in the General Knitwear Factory in Peking performed managerial tasks, in accord with Mao's two participations.<sup>177</sup> Finally, a few strive for a direct democracy in which the more important decisions, at least, are made by the workers as a whole. Such a structure must overcome apathy<sup>178</sup> and seek to counteract the influence of pre-existing status and personality differences on levels of participation.<sup>179</sup> It may do so by *requiring* every worker to voice an opinion<sup>180</sup> and may enhance sensitivity to process through mutual and self-criticism.<sup>181</sup> Even then some areas of decisionmaking may be excluded — financial planning, for instance.<sup>182</sup> And the process inevitably will be very time-consuming:<sup>183</sup> the multi-purpose crisis counselling center found that its members spent seven hours a week in meetings.<sup>184</sup> Yet the time demanded by meetings must be viewed against the background of the capitalist firm. If production workers presently spend virtually no time on governance, managers devote *half* their time to talking to each other. Worker control thus may not increase the time spent in decisionmaking but simply redistribute it.

Participatory democracy is not easy to achieve.<sup>185</sup> Success appears to vary inversely with size; because the upper limit is about 300, larger plants must be broken down into relatively autonomous subunits.<sup>186</sup> But the smaller the enterprise the weaker it will be when interacting

175. Rothschild-Whitt, *Conditions for Democracy: Making Participatory Organizations Work*, in *CO-OPS, COMMUNES & COLLECTIVES: EXPERIMENTS IN SOCIAL CHANGE IN THE 1960S AND 1970S*, at 219-21 (J. Case & R. Taylor eds. 1979).

176. This is true in all the Pacific Northwest Plywood cooperatives. See *supra* note 144.

177. C. BETTELHEIM, *supra* note 74, at 77; Lockett, *supra* note 167, at 471.

178. D. ZWERDLING, *supra* note 130, at 12, 79. At the Berman group of enterprises in the Netherlands, about 80% of the members participated in elections for the workers' councils. See Rothschild-Whitt, *supra* note 175, at 215.

179. Mansbridge, *supra* note 171, at 323. Employee associations also may seek to educate their members in their new rights and responsibilities. See Rothschild-Whitt, *supra* note 175, at 216-17.

180. D. ZWERDLING, *supra* note 130, at 87.

181. Rothschild-Whitt, *supra* note 175, at 221.

182. D. ZWERDLING, *supra* note 130, at 125.

183. Rothschild-Whitt, *supra* note 99, at 519-20.

184. Mansbridge, *supra* note 175, at 323.

185. For a skeptical view by a socialist writer, see Walzer, *A Day in the Life of a Socialist Citizen*, in *RADICAL PRINCIPLES: REFLECTIONS OF AN UNRECONSTRUCTED DEMOCRAT* 128 (1980).

186. P. BERNSTEIN, *supra* note 131, at 25-26; D. ZWERDLING, *supra* note 130, at 101, 160-61; Johnson & White, *supra* note 97.

with other larger firms (although cooperation among worker-controlled enterprises may compensate for this).<sup>187</sup> Worker homogeneity, whether derived from common ethnic origins or a shared ideological commitment, also facilitates self-governance.<sup>188</sup>

(c) *Job rotation* —

In communist society, however, where nobody has an exclusive area of activity and each can train himself in any branch he wishes, society regulates the general production, making it possible for me to do one thing today and another tomorrow, to hunt in the morning, fish in the afternoon, breed cattle in the evening, criticize after dinner, just as I like, without ever becoming a hunter, fisherman, herdsman, or a critic.<sup>189</sup>

Job rotation is mandated by the second principle of risk allocation — equality. But it is considerably more controversial and problematic than autonomy, both as an ideal and in practice. Indeed, some worker-controlled enterprises do not rotate jobs at all.<sup>190</sup> Many do, however, and they represent a broad range of enterprises: mining;<sup>191</sup> motorcycle production;<sup>192</sup> food cooperatives;<sup>193</sup> dog food processing;<sup>194</sup> and the plywood manufacturing and garbage collection examples discussed earlier.<sup>195</sup> Not all jobs may be rotated: the plywood cooperatives limit women to office work.<sup>196</sup> Salient physiological differences of strength or dexterity may place restrictions on job rotation.<sup>197</sup> So may differences of skill and knowledge — rotation can be implemented most fully where the various skills are related and easily acquired. Some of the most highly skilled jobs may have to be excluded; but

187. D. ZWERDLING, *supra* note 130, at 15; Melman, *supra* note 165.

188. S. Perry, *supra* note 132, at 118; D. ZWERDLING, *supra* note 130, at 133-34; Melman, *supra* note 165; Rothschild-Whitt, *supra* note 99, at 513-18.

189. K. MARX & F. ENGELS, *The German Ideology*, in WRITINGS OF THE YOUNG MARX ON PHILOSOPHY AND SOCIETY 403, 424-25 (L. Easton & K. Guddat trans. & eds. 1967); see also Gorz, *Workers' Control is More Than Just That*, in WORKERS' CONTROL 325, 338 (G. Hunnius, G. Garson & J. Case eds. 1973).

190. See Johnson & Whyte, *supra* note 97.

191. See *supra* notes 168-69.

192. D. ZWERDLING, *supra* note 130, at 147-48.

193. *Id.* at 81-94.

194. *Id.* at 20.

195. See *supra* notes 144-64; see also WORK IN AMERICA, *supra* note 47, at 101-03. Kibbutzim also rotate jobs, see Melman, *supra* note 165, at 26, as do some intentional communities, e.g., B. ZABLOCKI, *supra* note 139, at 133.

196. K. BERMAN, *supra* note 143, at 148. This kind of sex-discrimination, of course, no longer is legal.

197. But these should not be exaggerated. See 5 FEMINIST STUDIES 233-329 (1979) (seven essays on women's health and safety in the workplace).



these usually carry lower risks; and their privileged occupants still may be required to perform other, more dangerous, tasks. Some enterprises rotate only the most unpleasant or most routine jobs;<sup>198</sup> by analogy, workers might decide to rotate only those entailing unusually high risks. Job rotation is more attractive when each task is intrinsically interesting, usually because it allows the worker to exercise skill — where the work is artisanal or at least a continuous process rather than assembling component parts or working on an assembly line.<sup>199</sup> Alternating between several dull jobs does not greatly reduce the boredom of each, although changing tasks every few hours may afford some relief.<sup>200</sup>

Studies have shown that workers prefer job rotation,<sup>201</sup> although it is important to note the cost to those who are prevented from exercising some particular talent to the fullest. Even enterprises that are not worker-owned may offer employees incentives to participate in job rotation — for instance, by increasing the rate of pay for each additional task mastered.<sup>202</sup> Quite apart from its intrinsic value to the worker, job rotation increases the flexibility of the work force in responding to labor demands within the enterprise and thereby alleviates problems caused by labor shortage and absenteeism.<sup>203</sup> The principles of autonomy and equality even may be taken a step further: producers may share their skills not only with each other<sup>204</sup> but also with consumers (especially consumers of services), thereby liberating consumers from dependence on specialist producers.<sup>205</sup> Finally, job rotation not only may equalize risk but actually may reduce it. Many dangers increase as the individual is continuously exposed to them, for reasons that may be either psychological (stress, boredom, fatalism)<sup>206</sup> or physiological

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198. See, e.g., M. SPIRO, *KIBBUTZ, VENTURE IN UTOPIA* 77 (1963); Mansbridge, *supra* note 171, at 323 (crisis center).

199. See P. BERNSTEIN, *supra* note 131, at 107; R. BLAUNER, *supra* note 107; J. ESPINOSA & A. ZIMBALIST, *ECONOMIC DEMOCRACY: WORKERS' PARTICIPATION IN CHILEAN INDUSTRY 1970-1973*, at 167 (1978).

200. D. ZWERDLING, *supra* note 130, at 86.

201. See, e.g., P. BLUMBERG, *supra* note 143, at 66-69 (here referred to as job enlargement).

202. D. ZWERDLING, *supra* note 130, at 20; cf. Trist, Susman & Brown, *supra* note 168, at 206 (miners in experimental work group encouraged to learn as many jobs as possible).

203. Lockett, *supra* note 167, at 473; see also Trist, Susman & Brown, *supra* note 168, at 211 (diversification of job skills minimizes delay because workers closest to a problem can take corrective action rather than waiting for specialists).

204. Rothschild-Whitt, *supra* note 99, at 517-18; Rothschild-Whitt, *supra* note 175, at 230-32.

205. D. ZWERDLING, *supra* note 130, at 85, 89.

206. See E. TRIST, *supra* note 169, at 123, 175; Fitzpatrick, *supra* note 15, at 132; Hale &

(accumulations of toxic chemicals, exposure to radiation).<sup>207</sup> On the other hand, some risks will increase because of inexperience (although the reduction in turnover and absenteeism, discussed below, will expose fewer novices to danger). But if risk rises, for the privileged few whose jobs or managerial status previously protected them, it drops for the vast majority.

(d) *Equal income* — This appears to be logically entailed by each of the previous conditions: if all workers simultaneously are owners and managers, if they own the enterprise, and if skills are widely disseminated so that jobs and risks can be shared, what justification remains for wage or profit differentials?<sup>208</sup> Indeed, all of these enterprises have taken enormous steps toward income equalization. It is not uncommon for wages within the capitalist enterprise to vary by as much as 100:1 (and of course profit, income, and wealth differentials within capitalist society are even greater). In China, Cuba, Poland, Yugoslavia, and Chile under Allende a broad spectrum of socialist enterprises reduced wage differentials to two or three to one.<sup>209</sup> A few producer cooperatives have sought complete equality: a coal mine,<sup>210</sup> a motorcycle manufacturer,<sup>211</sup> the plywood factories,<sup>212</sup> Sunset Scavenger Co.,<sup>213</sup> and the multipurpose crisis center.<sup>214</sup> Such an income distribution obviously is attractive to the majority whose wages rise as a result, but it does require sacrifices by the few whose salaries decline.<sup>215</sup> In order to achieve equality, firms have eliminated piecework rates and production

Perusse, *Attitudes to Safety: Facts and Assumptions*, in SAFETY AT WORK 73 (J. Phillips ed. 1977).

207. P. BARTH & H. HUNT, *supra* note 96; S. EPSTEIN, *supra* note 7, at ch. 5.

208. Most intentional communities also share income equally and generally make purchases collectively rather than distribute profits to members. See M. CARDEN, ONEIDA (1969); R. HINE, CALIFORNIA'S UTOPIAN COLONIES (1973); F. MANUEL & F. MANUEL, *supra* note 139; M. SPIRO, *supra* note 198; B. ZABLOCKI, *supra* note 195; Melman, *supra* note 165, at 25.

209. C. BETTELHEIM, *supra* note 74, at 15-16; J. ESPINOSA & A. ZIMBALIST, *supra* note 199, at 138-41; Lockett, *supra* note 167; MacEwan, *supra* note 100, at 95; see also Johnson & Whyte, *supra* note 97 (not a socialist society).

A worker-controlled enterprise inspired by Christian rather than socialist principles reduced the overall income differential (combining wages and profits) to about 3:1. See Rothschild-Whitt, *supra* note 147, at 203, 213.

210. Cf. Trist, Susman & Brown, *supra* note 168, at 205 (experimental autonomous work groups in American coal mine).

211. D. ZWERDLING, *supra* note 130, at 147.

212. K. BERMAN, *supra* note 143, at 151.

213. S. PERRY, *supra* note 132, at 32. But inequalities now are emerging. *Id.* at 48.

214. Mansbridge, *supra* note 171, at 323.

215. D. ZWERDLING, *supra* note 130, at 28.

quotas.<sup>216</sup> This has the important side effect of decreasing accidents.<sup>217</sup> It also increases reliance on collective rather than individual incentives to motivate workers.<sup>218</sup> The elimination of wage differentials almost always is accompanied by the erosion of other status distinctions, such as the symbols of dress and address.<sup>219</sup>

3. *Consequences* — (a) *Attitude* — Alienation in work is the hallmark of capitalism. This is not just an axiom of marxist theory<sup>220</sup> but also has been confirmed repeatedly by numerous empirical studies conducted by both marxist and non-marxist social scientists.<sup>221</sup> Indeed, capitalists, workers, and even labor unions long accepted such alienation as inevitable and focused their energies on consumption as the reward for performing work that was viewed as inescapably dehumanizing. Worker control thus revolutionizes culture as well as productive relations by refusing to accept alienation, insisting on making work intrinsically valuable.<sup>222</sup> Virtually every experiment has increased worker involvement in, and enthusiasm for, work,<sup>223</sup> although the short-term effects of innovation quickly wear off if workers are not truly empowered to control their environment and to benefit from the decisions they make.<sup>224</sup> Workers relish the sense of autonomy, the feeling that they are their own bosses.<sup>225</sup> The solidarity naturally created by shared experience and collective work toward a common goal<sup>226</sup> is strengthened by participation in decisionmaking, both in daily events

216. *Id.* at 13-14; J. ESPINOSA & A. ZIMBALIST, *supra* note 199, at 169.

217. Stearns, *supra* note 18, at 22.

218. MacEwan, *supra* note 100, at 91.

219. *Id.* at 102; *see also* WORK IN AMERICA, *supra* note 47, at 98; D. ZWERDLING, *supra* note 130, at 22; Lockett, *supra* note 167, at 474.

220. H. BRAVERMAN, *supra* note 102; B. OLLMAN, *supra* note 71, at 131-233; Gorz, *supra* note 189.

221. WORK IN AMERICA, *supra* note 47, at 11-23; R. BLAUNER, *supra* note 107; E. CHI-NOY, *supra* note 47; D. MONTGOMERY, *supra* note 103.

222. There is a merging of work and non-work, which capitalism strictly segregates. *See* D. ZWERDLING, *supra* note 130, at 49-50; Melman, *supra* note 165, at 29.

223. *See* Carnoy & Shearer, *supra* note 138, at 177; Harrison, *The Owenite Socialist Movement in Britain and the United States*, in I MANY PASTS (H. Guttman & G. Kealey eds. 1973); Rothschild-Whitt, *supra* note 147, at 210-11, 215-16. *But see* D. ZWERDLING, *supra* note 130, at 133-34 (International Group Plans, a top-down innovation by the owner/director, produced widespread disaffection and high absenteeism and turnover).

224. P. BLUMBERG, *supra* note 143, at ch. 3; D. ZWERDLING, *supra* note 130, at 28, 162.

225. S. PERRY, *supra* note 132, at 84. *See generally* D. ZWERDLING, *supra* note 130.

226. The combination of goal-directed activity and risk appears to generate a high degree of integration, expressed in the form of mechanical rather than organic solidarity. *See* Haas, *supra* note 147; Vaught & Smith, *Incorporation and Mechanical Solidarity in an Underground Coal Mine*, 7 SOC. WORK & OCCUPATIONS 159 (1980). If so, it fosters precisely the social structural characteristics described above: autonomous work groups, job-sharing, and equal income.

on the shop floor and in periodic meetings called to resolve larger issues. The intensity of emotional interaction increases; workers' concern for each other is visible in their cooperation and comraderie, their efforts to teach each other, and their concern for those who are hurt.<sup>227</sup> The experience of being an embattled vanguard in a hostile environment further accentuates commitment to the idea of worker control.<sup>228</sup>

(b) *Labor turnover and absenteeism* — The flight from work is perhaps the clearest expression of the depth of alienation under capitalism: studies suggest that present rates of turnover and absenteeism have not declined appreciably from those at the beginning of the century.<sup>229</sup> But both drop dramatically under workers' control.<sup>230</sup> First, worker ownership affords true security of employment: no one can lay off owners; if demand falls, workers reduce the hours or production of each and share whatever work remains.<sup>231</sup> Voluntary turnover is extraordinarily low: three percent a year at one factory, much of it consisting of women taking temporary maternity leaves.<sup>232</sup> In many cases participation in ownership becomes tantamount to lifetime employment. Transitory turnover, i.e., absenteeism, also declines. In one firm, sick leave dropped fifty percent and unexcused absences ninety percent;<sup>233</sup> in another, the absentee rate was only 1.5% of the workforce.<sup>234</sup> Low turnover and absenteeism also should contribute to greater productivity and enhanced safety, because workers do not have to assume as many additional, often unfamiliar, tasks or cooperate with new partners, and fewer of them are inexperienced.<sup>235</sup>

227. S. PERRY, *supra* note 132, at 96, 99-100; D. ZWERDLING, *supra* note 130, at 27; Rothschild-Whitt, *supra* note 99, at 513-18.

228. D. ZWERDLING, *supra* note 131, at 133-34; Rothschild-Whitt, *supra* note 175, at 233.

229. See WORK IN AMERICA, *supra* note 47, at 100-01; P. BLUMBERG, *supra* note 143, at 63 (study showed annual turnover of 55-75% in one office); J. ESPINOSA & A. ZIMBALIST, *supra* note 199, at 20; cf. Ferrari, *Absenteeism and Legal Reform*, 1978 EUROPEAN YEAR-BOOK L. & SOC. 97 (1979) (Italy).

230. M. CARNOY & D. SHEARER, *supra* note 138, at 180; Rothschild-Whitt, *supra* note 147, at 215.

231. D. ZWERDLING, *supra* note 130, at 48.

232. Johnson & Whyte, *supra* note 97, at 24; cf. S. PERRY, *supra* note 132, at 119 (low turnover); P. BLUMBERG, *supra* note 143, at 111-12 & passim (low turnover).

233. See E. TRIST, *supra* note 169, at 123; see also M. CARNOY & D. SHEARER, *supra* note 138, at 180; J. ESPINOSA & A. ZIMBALIST, *supra* note 199, at 144; Trist, Susman & Brown, *supra* note 168, at 218.

234. D. ZWERDLING, *supra* note 130, at 24.

235. C. GERSUNY, *supra* note 5, at 64. Involuntary turnover also is extremely traumatic; layoffs and unemployment cause hypertension, coronary illness, ulcers, diabetes, and suicide. See INSTITUTE OF SOCIAL RESEARCH, UNIVERSITY OF MICHIGAN, EMPLOYEE OWNERSHIP (1978).

(c) *Productivity* — Virtually every study has shown that worker control increases productivity, no matter how the larger economy is structured, how production is organized, or what is produced: whether in kibbutz factories,<sup>236</sup> Pacific Northwest plywood companies,<sup>237</sup> a plant that assembles rear-view automobile mirrors,<sup>238</sup> a truck farm in California,<sup>239</sup> a motorcycle assembly plant in England,<sup>240</sup> coal mines in both the United States and the United Kingdom,<sup>241</sup> Polish factories during the brief period when they were governed by workers' councils,<sup>242</sup> and in the "social area" of production in Chile under Allende.<sup>243</sup> In a dog-food plant, seventy workers operating in autonomous teams achieved a production goal that management had estimated would require 110 workers organized in a traditional hierarchy, and they lowered materials costs five percent as well.<sup>244</sup> The improvement in worker attitude and the decline in turnover and absenteeism are part of the explanation for higher productivity, but another factor may be even more important. One of the principal contradictions of capitalism is that it requires worker creativity in order to achieve high levels of production, while hierarchic structures of control simultaneously deny the worker the requisite autonomy.<sup>245</sup> Autonomous control releases the creativity inherent in workers, allowing them to resolve routine hitches in production — fixing a broken machine rather than standing idle waiting for the repairman to appear<sup>246</sup> — and to restructure that process in more fundamental ways.<sup>247</sup> It also

236. Fine, *supra* note 140, at 253; Melman, *supra* note 165, at 17.

237. C. BELLAS, *supra* note 143, at 29; K. BERMAN, *supra* note 143, at 188-89.

238. D. ZWERDLING, *supra* note 130, at 46.

239. *Id.* at 109-10.

240. *Id.* at 147-48.

241. E. TRIST, *supra* note 169, at 124-25; Trist, Susman & Brown, *supra* note 168, at 211, 219-20.

242. For a general discussion of increased productivity under worker control, see J. ESPINOSA & A. ZIMBALIST, *supra* note 199, at 128.

243. *See id.* at 159-62; *see also* WORK IN AMERICA, *supra* note 47, at 27 (worker control resulted in productivity increases of 5-40%); P. BLUMBERG, *supra* note 143, at 97-98 (worker control of some aspects of production in toy assembly plant resulted in productivity increase of 30-50%); M. CARNOY & D. SHEARER, *supra* note 138, at 179; Johnson & Whyte, *supra* note 97, at 27.

244. D. ZWERDLING, *supra* note 130, at 24.

245. *See generally* H. BRAVERMAN, *supra* note 102; M. BURAWOY, MANUFACTURING CONSENT: CHANGES IN THE LABOR PROCESS UNDER MONOPOLY CAPITALISM (1979); R. EDWARDS, *supra* note 122; D. MONTGOMERY, *supra* note 103. For support from a non-Marxist point of view, see J. O'TOOLE, MAKING AMERICA WORK: PRODUCTIVITY AND RESPONSIBILITY (1981). But perhaps the best evidence of the need for worker autonomy is provided when employees work to rule. *See, e.g.*, R. EDWARDS, *supra* note 122, at 154-55.

246. D. ZWERDLING, *supra* note 130, at 45-46; Trist, Susman & Brown, *supra* note 168, at 211.

247. J. ESPINOSA & A. ZIMBALIST, *supra* note 199, at 150.

reduces the guerilla forays of capitalist class warfare — the attacks on productivity in the form of defective products, theft, and industrial sabotage.<sup>248</sup>

(d) *Safety* — I have left this issue for last, even though it is the subject of the present article, because it is *not* the principal inspiration for worker control. Workers are motivated by other intrinsic goals (autonomy, participation, equality, enhancing the value of work), by other consequences (security of employment, increased productivity and its material rewards), or by necessity (plant closures). Nevertheless there is some evidence that workers, granted responsibility for controlling their own risks, are strongly committed to improving and equalizing safety.<sup>249</sup> Safety is one of the first issues that engages workers when they begin to exercise their new autonomy,<sup>250</sup> whether in the “social area” of Allende’s Chile<sup>251</sup> or elected workers’ councils in Yugoslavia.<sup>252</sup> Workers at Harmon Industries attacked the problems of excessive heat, cold, and air pollution.<sup>253</sup> Mexican-American farmers at the Cooperativa Central voted to limit the use of pesticides.<sup>254</sup> Reporters and editors at the Minneapolis Star Tribune investigated the dangers of visual display units.<sup>255</sup> And the Sunset Scavenger Co. discouraged employees from taking unnecessary risks by means of fines, suspensions, and the denial of sick pay.<sup>256</sup> Safety precautions adopted by workers themselves are implemented more thoroughly than those imposed by management.<sup>257</sup> Workers who depend on each other to maintain production (and thus profits), and who are united by strong bonds of solidarity, also are more concerned for the safety of others.<sup>258</sup> At the same time, there is a real danger that workers may sacrifice safety for short-

248. *Id.* at 147.

249. Both Norway, and to a lesser extent Sweden, consciously sought to involve workers in controlling their own environments in order to improve their health and safety; the available empirical data confirm the success of this strategy. See Deutsch, *supra* note 142, at 184-88. Workers even can take the initiative without enjoying control. See, e.g., Howard, *Health and Safety: One Man Scoops the Experts*, In *These Times*, Mar. 18-31, 1981 (journeyman pipefitter at GM body plant conducted epidemiological study of fellow workers, demonstrating mortality rates significantly higher than national average).

250. P. BERNSTEIN, *supra* note 131, at 52; M. CARNOY & D. SHEARER, *supra* note 138, at 176; Rothschild-Whitt, *supra* note 147, at 206-07.

251. J. ESPINOSA & A. ZIMBALIST, *supra* note 199, at 131.

252. P. BLUMBERG, *supra* note 143, at 203.

253. D. ZWERDLING, *supra* note 130, at 45.

254. *Id.* at 108. The manager of the Cooperativa Central insisted that he was going to defy the farmers and use the pesticides, even though he was their employee!

255. *Id.* at 177.

256. S. PERRY, *supra* note 132, at 45-46.

257. See Hale & Perusse, *supra* note 206; Stearns, *supra* note 18, at 22.

258. S. PERRY, *supra* note 132, at 199; Fitzpatrick, *supra* note 15, at 146, 150-51.

term economic self-interest. They certainly may do so to preserve their economic livelihoods. For example, when the employees of the Vermont Asbestos Group bought their mine from the conglomerate that wanted to shut it down, they strenuously resisted the Environmental Protection Agency's order to improve ventilation, arguing that "their" asbestos did not cause lung damage or cancer — a position for which there was absolutely no scientific support.<sup>259</sup> More often workers, like the owners of small businesses, will drive themselves too hard, increasing the pace of work, working longer hours, or ignoring safety rules.<sup>260</sup> Of course, this is partly attributable to capitalist pressures (economic, political, sociocultural) on the socialist experiment. Yet self-imposed stress does not appear to increase accidents, at least not as much as speedups ordered by management.<sup>261</sup>

Worker control and job rotation, by definition, serve the two principles of risk allocation I have advanced: autonomy and equality. Therefore whatever level of risk workers may choose is *axiomatically* the right level. But one still would like to know whether rates of work injury and illness decline. The very limited data available suggest they do.<sup>262</sup> I noted above that Sunset Scavenger Co. pays a workers' compensation insurance premium forty percent lower than the industry average.<sup>263</sup> One reason may be that ownership and control endow members with a pride that counterbalances their extremely low status as garbage collectors and thus overcomes the strong tendency of low-status work to have high rates of illness and injury, apparently because poor self-esteem translates into disregard for safety.<sup>264</sup> Several other case studies show similar results. The General Foods dog food plant in Topeka, Kansas had no lost-time accidents among its seventy employees during a four-year period, a total of 280 worker years.<sup>265</sup> In the Rushton Mining Co. in Occola Mills, Pennsylvania, time lost due to

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259. D. ZWERDLING, *supra* note 130, at 54-55, 60. The asbestos mine is the only employer in the area, which explains why these workers "choose" dangerous jobs: "They say you can die of cancer from asbestos after 30 years . . . but you can starve to death in a year." *Id.* at 60.

260. *Id.* at 12; S. PERRY, *supra* note 132, at 60, 93.

261. E. TRIST, *supra* note 169, at 138-40.

262. Traditional firms are likely to understate official accident rates. Firms often try to keep down lost-time rates (and thus workers' compensation insurance premiums) by using a "wounded brigade" of employees who clock in for a full day, although they are disabled from doing any work. See Moberg, *The Steelworkers Take on a Tough One*, In *These Times*, Dec. 16-22, 1981, at 5-6. Unions may even collude in this practice. Stearns, *supra* note 135, at 14.

263. S. PERRY, *supra* note 132, at 8-9.

264. *Id.*

265. D. ZWERDLING, *supra* note 130, at 24.

injuries in the work group composed of autonomous teams practicing job sharing stayed constant, while lost time in the traditional work group more than doubled.<sup>266</sup> And in a comparable experiment in a mine in Durham, England, the accident rate was cut in half.<sup>267</sup>

4. *Problems* — In describing how worker control promotes an autonomous and equal allocation of risk, I naturally have stressed its advantages. But I do not wish to minimize the obstacles that confront any attempt to create socialist relations of production, especially within an alien and hostile capitalist environment. One is the problem of expertise. Both capitalism and particular capitalist enterprises systematically deny production workers knowledge about essential aspects of running a business: cost accounting, pricing, marketing, financing, etc.<sup>268</sup> Workers may feel they cannot learn these functions, even given time and training.<sup>269</sup> A common solution is to hire an outside manager who does not participate in ownership or decisionmaking but rather carries out the policies of the worker-owners.<sup>270</sup> The danger, however, is that the manager progressively will assume control, especially as the enterprise expands, either because he or she seeks power or because the workers relinquish it.<sup>271</sup> After all, we have known for half a century that ownership of the capitalist enterprise can be divorced from management;<sup>272</sup> it should not be surprising to find that same tendency accentuated in worker-owned enterprises.<sup>273</sup> But even if workers do retain control, tensions persist: managers feel threatened by the ambiguity of their roles;<sup>274</sup> there often is controversy over long-range planning because workers seek to maximize immediate gain;<sup>275</sup> and the

266. Trist, Susman & Brown, *supra* note 168, at 217.

267. E. TRIST, *supra* note 169, at 123.

268. Worker ownership does not eliminate, and may indeed aggravate, the problems of coordination *among* enterprises. If the worker-owners choose the market to solve coordination problems, management may regain significant control, J. ESPINOSA & A. ZIMBALIST, *supra* note 199, at 26.

269. D. ZWERDLING, *supra* note 134, at 15.

270. *Id.* at 105-17; C. BELLAS, *supra* note 143, at 53.

271. K. BERMAN, *supra* note 143, at 162; S. PERRY, *supra* note 132, at 163-64; *see supra* note 46.

272. A. BERLE & G. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* (1932).

273. P. BERNSTEIN, *supra* note 131, at 39. The enterprises owned by Histadrut, the Israeli Federation of Labor, illustrate this. *Id.* at 58; J. TAUB & A. GOLDFARB, *WORKERS' PARTICIPATION IN MANAGEMENT: EXPECTATIONS AND EXPERIENCE* (1970).

274. K. BERMAN, *supra* note 143, ch. 10.

275. *See* P. BERNSTEIN, *supra* note 131, at 18. *Compare* D. ZWERDLING, *supra* note 130, at 61, 99 *with* K. BERMAN, *supra* note 143, at 152. *See generally* M. CARNOY & D. SHEARER, *supra* note 138, at 146, 172. It may be possible to reduce this tension if every worker serves as a manager, however briefly.



result may be high management turnover.<sup>276</sup>

Just as there is a danger of re-creating hierarchy at the top, so it also may be reproduced at the bottom. Producer cooperatives almost always begin with every worker owning an equal share of the enterprise. Yet, for a variety of reasons, many cooperatives soon hire employees who are not, and cannot become, owners. Worker-owners may shirk the jobs that are dirtiest, physically most taxing, or least skilled and therefore most boring; rather than rotate these tasks they hire outsiders to perform them.<sup>277</sup> Employees give the producer cooperative (like its capitalist counterpart) a flexible labor supply; whereas owners have a right to work, employees can be hired and fired at will.<sup>278</sup> The very success of the enterprise fosters reliance on hired labor, for as profits are reinvested, each worker's ownership share grows in value, making it increasingly difficult for new employees to buy in. As a result, workers who retire or depart either retain their shares or else they sell them to the enterprise or to an outside investor.<sup>279</sup> In each case owners must be replaced by nonowning employees. Ultimately, this process will transform the cooperative into a capitalist firm.

The suspicion and hostility that socialist relations of production elicit in a capitalist environment reinforce the pressures on the producer cooperative to abandon its principles and drift back toward capitalism. First, cooperatives have enormous difficulty securing external financing, which is, if anything, more essential than it is for the traditional firm, because the workers themselves can contribute very little working capital.<sup>280</sup> When financial institutions make loans, they frequently impose onerous conditions, insisting, for instance, that workers relinquish control to managers.<sup>281</sup> Second, cooperatives must compete with capitalist enterprises, which not only have superior access to

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276. C. BELLAS, *supra* note 143, at 53-54.

277. *E.g.*, M. CARDEN, *supra* note 208, at 42 (Oneida); D. ZWERDLING, *supra* note 130, at 102 (Pacific Northwest plywood cooperatives). *But see* M. SPIRO, *supra* note 198, at 15 & n.10 (Israeli kibbutz).

278. K. BERMAN, *supra* note 143, at 147-48; S. PERRY, *supra* note 132.

279. D. ZWERDLING, *supra* note 130, at 103-04; S. PERRY, *supra* note 132, at 150. It is possible to construct a legal form for the enterprise that makes this impossible by giving the enterprise itself or its members a right of first refusal when membership shares are offered for sale, or by requiring any purchaser to accept the principle of workers' control. *See* Rothschild-Whitt, *supra* note 147, at 221.

280. Workers at a roller bearing plant in Clark, New Jersey, recently negotiated an agreement to buy the factory from GM, which had planned to close it. But when they sought a \$15 million loan to keep the plant in operation, both the U.S. Department of Commerce and the U.S. Department of Housing and Urban Development turned them down because the loans were intended to create new jobs, not preserve existing ones. *L.A. Times*, Dec. 16, 1981, § IV, at 1.

281. D. ZWERDLING, *supra* note 130, at 107.

finance capital but also possess advantages of size. Producer cooperatives start small and cannot grow beyond 300-400 workers, although they can gain some economies of scale by collaborating with other similar enterprises.<sup>282</sup> Individual corporations, conglomerates, and multinationals can be hundreds, even thousands of times larger and can use that power to crush a worker-owned competitor.<sup>283</sup> Furthermore, corporations can distribute risk unequally and compel employees to accept it, thereby externalizing accident costs as an element of the cost of production and gaining a competitive advantage. But if it is axiomatic that capital will be antagonistic to worker ownership and control, it may be surprising that organized labor also is resistant.<sup>284</sup> American unions have harbored many suspicions about such experiments: worker control may be merely a smokescreen for management-directed speedups intended to increase production; if workers do not own the enterprise, management always can withdraw whatever benefits it confers; worker participation dilutes the essentially adversary relationship between labor and management and can become a covert form of union-busting.<sup>285</sup> Indeed, the cumulative effect of these fears may persuade workers voluntarily to terminate experiments in job sharing and control.<sup>286</sup> Yet if such suspicions ever are justified, it is only because worker control and ownership have been realized imperfectly, not because they are inherently subversive of the interests of labor.

The final problem may be the most intractable, for it is inherent in decentralized socialism. Worker ownership and control grants workers *within* each enterprise autonomy in managing production risks, and it equalizes their exposure to those risks. It does not ensure autonomy or equality for non-workers who may be endangered by the enterprise, a problem I deal with below. It also fails to equalize exposure among workers at different enterprises.<sup>287</sup> In order to achieve such equality it

282. Melman, *supra* note 165, at 28; Rothschild-Whitt, *supra* note 147, at 220.

283. Rothschild-Whitt, *supra* note 175.

284. See Rothschild-Whitt, *supra* note 147, at 217-18. Cf. Woodworth, *supra* note 138, at 43-44 (International union decided not to assist local in its effort to purchase plant for workers' benefit, referring to such activity as outside the bounds of organized labor's traditional role).

285. H. CLEGG, *INDUSTRIAL DEMOCRACY AND NATIONALISATION* (1951); D. ZWERDLING, *supra* note 130, at 167-82; H. CLEGG, *A NEW APPROACH TO INDUSTRIAL DEMOCRACY* (1960).

286. Trist, Susman & Brown, *supra* note 168, at 228.

287. Discussions with colleagues have suggested additional difficulties. First, workers within an enterprise will have to agree on a level of risk acceptable to all, for otherwise the autonomy of the dissenting workers will be violated. I believe that such a consensus can be attained through reasoned discussion when workers confront a common danger and common incentives. Furthermore, the dissenters should have the option of either starting their own enterprise or looking for another enterprise in the same area of production where the

would be necessary to rotate workers not only among jobs within an enterprise but also among different kinds of enterprises.<sup>288</sup> Although I thought about this possibility, I have concluded that its drawbacks simply are too great. Whereas job rotation within the enterprise enhances group solidarity and increases productivity, the transfer of workers from one enterprise to another would undermine the integration of each and reduce its efficiency. Movement between industries would erode a worker's skills rather than expand his repertoire. It is either inconsistent with worker ownership or would require frequent transfers of shares, undermining the worker's commitment to any one enterprise. It would significantly undercut the capacity of workers to participate in governance. It would disrupt their lives. And it would require an enormous administrative apparatus endowed with awesome coercive powers.<sup>289</sup> Therefore, though I am painfully aware of the enormous differences in risk between, say, publishing and mining (and in the other characteristics that make work more or less attractive), I now believe that the choice of an enterprise must be left to the worker. *If* enterprises were vertically integrated (so that mining included sales and publishing included printing); if jobs were equally shared within the enterprise; if members of the society really had equal opportunities before making their choices of where to work; and if the enterprises themselves competed freely for labor and sales so that enterprise profits actually reflected the risks borne by workers; *then* it might be reasonable to view the composite of risk and income as equal across enterprises and to allow idiosyncratic preferences for or aversions to risk to influence career choice.

#### IV. RISK IN REPRODUCTION

##### A. *The Problem*

The sphere of reproduction — by which I mean primarily the con-

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level of risk more closely resembles their own preferences. Second, it has been argued that worker-controlled enterprises operating within a market economy will engage in a self-destructive competition to see which can achieve the highest levels of production at the lowest direct costs through the sacrifice of safety. I believe there are sound structural reasons why this parody of capitalism will not occur under decentralized socialism. Whereas the capitalist has strong incentives to endanger the worker but few reasons to protect him or her, the worker must balance higher income against the countervailing attraction of greater safety. Enterprises will strike that balance differently. But there is no reason why various enterprises cannot produce a particular good at the same price even though the enterprises place varying emphasis on higher profits, shorter hours or greater safety.

288. This happened to some extent during the Chinese Cultural Revolution. See Lockett, *supra* note 167, at 470-75.

289. Compulsory military service illustrates many of the problems.

sumption of goods and services (I deal below with “involuntary consumption,” i.e., pollution) — presents problems of risk allocation that almost are the mirror images of those found in the sphere of production. I will have less to say under this heading both because the level of risk arguably is lower and because the remedies I propose are less radical — reform rather than abolition of capitalist relations of exchange.<sup>290</sup> I also think it is plausible that any progress in rendering people autonomous and equal with respect to risk in production will affect risk in reproduction: reducing risk in one sphere will reduce it in the other (although there still will be externalities),<sup>291</sup> and people accustomed to autonomy and equality at work will not readily tolerate being subjected by others to unequal risks at home.

Risk at work is collective: workers experience dangers that are identical or at least similar; risk, injury, and illness are visible to others; co-workers often have close, enduring social relationships; and of course many workers are organized into trade unions. Consumers, by contrast, encounter risk individually: although others are exposed to similar (if not identical) risks, those endangered rarely are visible, much less known; and the “free market” disorganizes consumers into atomistic individuals.<sup>292</sup> Although scientific management seeks to transform workers into automatons, they still remain creative partici-

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290. At the beginning of 1978, it was estimated that injuries attributable to unsafe products cost \$9.5 billion per year (excluding illnesses). See M. GREEN & N. WAITZMAN, *supra* note 96, at 156. This figure obviously has to be increased to take account of automobile accidents. However, these are less clearly associated with the sphere of reproduction than might appear. Many accidents occur during work or on the way to or from work. Many are attributable to the design of automobiles or to the efforts of automobile manufacturers to encourage driving by opposing mass transit alternatives. Subsidization of the latter and the withdrawal of subsidies from the former would do much to reduce this source of risk. One problem with my emphasis is a societal one. Because a larger percentage of men than women work outside of the home, men are disproportionately victims at the workplace. On the other hand, women (and children) encounter more risk in the home than men. See ROYAL COMMISSION ON CIVIL LIABILITY AND COMPENSATION FOR PERSONAL INJURY, I REPORT (Cmd. 7054, 1978) [hereinafter cited as ROYAL COMMISSION REPORT]; Burman, Genn & Lyons, *The Use of Legal Services By Victims of Accidents in the Home—A Pilot Study*, 40 MOD. L. REV. 47 (1979); H. Genn, *The Use of Legal Services by Victims of Accidental Injury* 24 (1980) (unpublished manuscript).

291. This is not because workers who also are owners and share risk within the enterprise will be more altruistic. If anything, they have a greater incentive (profit) than they do presently to seek to externalize accident costs. My argument is more modest: workers and consumers *share* many risks (though by no means all). Toxic chemicals are a good example: a constituent of a product that endangers the ultimate consumer also will endanger the producer, who usually will be exposed to greater concentrations for longer periods. If the worker can control his own exposure (which he cannot do under capitalism), his pursuit of simple self-interest also will benefit the consumer.

292. When the U.S. Department of Transportation discovered that consumers were making frequent use of the results of its tests of cars for crashworthiness, which were published

pants who define their own tasks — and must do so if the capitalist enterprise is to function. Consumers, on the other hand, often are truly passive. Workers are knowledgeable about the functions they perform and the risks they run (usually more so than management, Taylorism notwithstanding), whereas consumers believe themselves to be ignorant — and generally are. Because workers experience a limited number of relatively high risks, they are specialists in danger and therefore have a considerable investment in doing something about it. Consumers, however, are exposed to an infinite variety of risks, many of which are quite small; as generalists, their interest in reducing any particular risk is greatly diluted.<sup>293</sup> Thus, whereas it appears to be more difficult to equalize the risks experienced by workers than to give them autonomous control, the reverse may be true for consumers.<sup>294</sup>

The characteristics of consumers that deprive them of autonomy and subject them to unequal risks are intimately associated with capitalism. The enormous increase in the division of labor and the rise of professionalism render consumers dependent on others for both goods and services. Class differentiation in income, education, leisure, etc. creates huge differences in the risks to which consumers are exposed. Capitalism makes two responses to the charge that it fosters dependence and inequality. The first is the “choice” that the “free market” purports to offer the consumer. But the prerequisites for meaningful choice are not satisfied: many consumers have inadequate resources; capitalists and professionals systematically conceal the information a

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in *THE CAR BOOK* (1980), it decided to withdraw some of the information — presumably under pressure from the manufacturers of those automobiles that performed poorly.

293. See M. FRIEDMAN, *CAPITALISM AND FREEDOM* 143 (1962). Compare Kafka, *A Hunger Artist*, in *FRANZ KAFKA: THE COMPLETE STORIES* 268 (N. Glatzer ed. 1971) with the ordinary person who simply is hungry. In Isaiah Berlin's metaphor, the consumer is a fox, the worker a hedgehog.

294. I have discussed the difficulty of justifying equal risk at work and of implementing such a principle. See *supra* text accompanying notes 59-89 & 144-267. Even when workers secure autonomy they do not always seek to share risk equally. I believe that a larger number and a broader spectrum of people would accept the ideal that consumer goods and services should carry equal risks — that a Cadillac and a Datsun should be just as crash-worthy, that the danger of medical malpractice should not turn on whether the patient is rich or poor. Most people are taken aback when the opposite position is championed explicitly, as when James C. Miller, III, the new chairman of the Federal Trade Commission, argued in his inaugural press conference for “imperfect products” in order to allow “those who have a low aversion to risks — relative to money” to buy “cheap, unreliable products.” *Quoted in* West Coast Ass'n of Marxist Historians Newsletter, Jan. 1982, at 2. But I doubt that all who share my abhorrence for that view would agree that the consumer ought to *determine* the level of risk. Furthermore, efforts to achieve consumer autonomy encounter considerable political and structural obstacles. See, e.g., Wilson & Brydolf, *Grass Roots Solutions: San Francisco Consumer Action*, in *NO ACCESS TO LAW* (L. Nader ed. 1980).

consumer would need to exercise choice;<sup>295</sup> and producers of both goods and services may conspire to deny consumers a choice. Acknowledging market failure, the capitalist state creates regulatory agencies to protect consumers from risk: the Food and Drug Administration, the Consumer Product Safety Administration, the Federal Aviation Administration, licensing boards for physicians, lawyers, and other professionals; the list is endless. Yet the criticisms of regulation are too well known to require rehearsal here.

### B. *A Solution*

Consumers must regain autonomous control over the risks to which they are exposed. Regulation merely exchanges ignorant dependence on capital for ignorant dependence on the capitalist state. Is there an alternative? I believe that the market still offers the greatest potential for consumer autonomy if it can be restructured to approximate more closely the assumptions of neoclassical economics.<sup>296</sup> This will require the disorganization of the units of production so that (singly or in combination) they are less able to dominate consumers. Worker ownership and control is consistent with this objective because producer cooperatives have inherent limitations on their size. Recreating a "free market" for commodities (other than labor) also will require the organization of consumers through consumer cooperatives. Whereas the producer cooperatives of the nineteenth and early twentieth centuries largely had died out before the recent revival,<sup>297</sup> consumer cooperatives have enjoyed greater continuity: there were 3,300 farm supply rural cooperatives, 1,000 rural electric cooperatives, and 1,050 cooperative stores in 1957,<sup>298</sup> and the numbers have grown since then.<sup>299</sup>

The consumer cooperative has a number of objectives. It seeks to transform consumption from the parallel behavior of an anonymous mass of atomized individuals into an occasion for building community.

295. The thalidomide tragedy vividly illustrates the potential consequences for consumers who are poorly informed. See INSIGHT TEAM OF THE SUNDAY TIMES OF LONDON, *SUFFER THE CHILDREN: THE STORY OF THALIDOMIDE* (1979); D. MASON, *THALIDOMIDE: MY FIGHT* (1976); H. TEFF & C. MUNRO, *THALIDOMIDE: THE LEGAL AFTERMATH* (1976); see also R. HARRIS, *THE REAL VOICE* (1964) (consumer information and prescription drugs generally); I. PAULUS, *THE SEARCH FOR PURE FOOD: A SOCIOLOGY OF LEGISLATION IN BRITAIN* (1975) (consumer information — food).

296. My proposal thus concedes both the continued differentiation of producers and consumers and the inevitability of antagonistic relations between them.

297. K. BERMAN, *supra* note 143, at 10-15.

298. COOPERATIVE LEAGUE OF THE U.S.A., *FACT BOOK ON COOPERATIVES* (2d ed. 1959).

299. W. RONCO, *FOOD CO-OPS* (1974); Zwerdling, *The Uncertain Revival of Food Cooperatives*, in *CO-OPS, COMMUNES & COLLECTIVES* (J. Case & R. Taylor 1979).

It seeks to empower the consumer through the economic leverage gained by buying collectively. It also allows (and may require) the consumer to substitute his or her own labor for some of the overhead costs of merchandising. And of course it gives consumers the benefit of what would have been retailer profits. As a result prices in cooperative stores generally are lower than those charged by capitalist enterprises, sometimes by as much as a third.<sup>300</sup> Cooperatives also may free consumers from reliance on others for goods and services: one *worker*-owned auto-repair shop, for instance, instructed customers in how to fix their own cars.<sup>301</sup> Finally, and most pertinent to this article, cooperatives may use their collective power and knowledge to reduce consumer risk: by seeking to persuade their members to switch to healthier diets, by refusing to carry junk foods (which often bring the highest profit margins), or by placing warnings on dangerous foods like bacon.<sup>302</sup>

Cooperatives foster consumer autonomy. By themselves, however, they do not solve the problem of unequal risk. The additional condition, which is both necessary and sufficient, is equalization of income. Such equalization is needed to make cooperatives attractive to people other than the middle class professionals who presently have the time and disposable income to devote to consumer choice. Producer cooperatives would do a great deal to equalize income, as I discussed in the previous section. But just as workers would retain the power to trade-off increases in the average risk of their workplaces in exchange for greater income, so consumers would be free to incur more or less risk in the goods and services they buy.<sup>303</sup>

Consumer cooperatives will have to overcome many hurdles. Like their analogues in the realm of production, their very survival constantly is threatened by lack of access to finance, competitors with vastly greater market power, the inadequacy of members' business skills, etc. One of the greatest problems is to inspire and maintain member participation. A retail enterprise in which members own shares and merely elect a board of directors that hires managers who actually exercise control is no more cooperative than a capitalist enterprise nominally owned by its employees through a stock-option plan.<sup>304</sup> Yet the consumer cooperative faces obstacles to participation even

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300. D. ZWERDLING, *supra* note 131, at 84. *But see* Zwerdling, *supra* note 299, at 92.

301. D. ZWERDLING, *supra* note 131, at 85. This example, of course, is a producer not a consumer cooperative, but the principle is equally applicable to both.

302. *Id.* at 84, 88.

303. Indeed, the trade-offs are related. A producer who opted for a workplace that was less dangerous also would receive a lower income and thus have less money to spend on avoiding risk as a consumer.

304. Cooperative stores associated with universities often are examples.

greater than those confronting the producer cooperative: whereas workers simply can take time off from production to engage in governance (they are on the premises already and can be "paid" for the time they expend), consumers have to juggle numerous competing demands on their time and leave their homes in order to travel to the cooperative.<sup>305</sup> Consumers are more inclined than workers to relinquish control to hired staff, especially since consumers lack the relevant expertise.<sup>306</sup> But this not only forfeits autonomy, it also may lead to the exploitation of staff who, after all, remain employees of a capitalist enterprise (if one that extracts its profits in savings), especially since consumer cooperatives generally pay their workers poorly.<sup>307</sup> For this reason staff should be kept to a minimum by requiring all members to contribute time to the cooperative and refusing to allow that obligation to be commuted to a money payment.<sup>308</sup> Each member would be obligated to become familiar with a range of products or services in order to advise the cooperative about the price, quality, and risks associated with its purchases. Because each member would be mutually dependent on every other, it would not be necessary to rotate this responsibility (nor would it be desirable, for that would interfere with the acquisition of expertise), although other tasks might be shared.

Meaningful participation in cooperative decisionmaking imposes limitations on the size of consumer as well as producer cooperatives.<sup>309</sup> This detracts from the capacity of the cooperative to attain other objectives. It decreases the cooperative's economic leverage in bargaining with producers over price, product design, quality, and safety, although several cooperatives could collaborate to aggregate their purchasing power. It also restricts the range of goods that can be stocked, thereby reducing consumer choice. Consumers could increase their alternatives by joining several cooperatives (each of which specialized in an area of goods or services), but that would dilute still further the time and energy a member could invest in each. Consumers simply may have to curtail the variety of goods and services among which they can choose if they wish to make these choices autonomously. Would that be a major sacrifice? Capitalists certainly think so: they spend extraordi-

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305. Rothschild-Whitt, *supra* note 99, at 519-20.

306. D. ZWERDLING, *supra* note 130, at 86.

307. *Id.* at 292.

308. The same reasons that prohibit substitute payment for the obligation of military service apply here. *See supra* note 79. Interestingly, as the legal profession examines more seriously the idea of mandatory pro bono public service, it also has begun to consider in-lieu payments. *See* F. MARKS, *supra* note 132; Brill, *The ABA Revolution*, AM. LAW., Dec., 1981, at 5.

309. D. ZWERDLING, *supra* note 130, at 87.



nary amounts on advertising to convince consumers that the superficial differences between competing products present them with truly momentous decisions and that the right to make those choices is the core meaning of the "freedom" that liberal political theory proclaims as its paramount value. The capitalist state recently has endorsed that message: the Supreme Court has extended limited first amendment protection to some forms of commercial speech.<sup>310</sup> The capitalist equation of liberty with commodity exchange is so powerful that it has even persuaded youth in Eastern Europe and Russia to define freedom as the right to purchase Western consumer goods,<sup>311</sup> and many of the recent refugees from Cuba acknowledged that they were motivated by similar desires. Yet political freedom must not be trivialized by identifying it with the purchase of goods and services; we can be uncompromising in demanding the former and still accept limitations on what we consume. We are *not* what we eat or what we wear. This is not to argue that consumption is irrelevant to autonomy. But individuals who passively accept the choices that capitalist producers construct never enjoy meaningful consumer autonomy. They can only pursue it through collective (i.e., political) action, voluntary constriction of the choices to be made, and greater self-reliance.

If consumers are to seek autonomy through collective action, what should be done about those risks that resist aggregation? Surely it would be too difficult to organize the consumers of many services: travel (airplane passengers, but also car drivers concerned about highway design), sports (participants, for instance skiers, and spectators, for instance hockey fans), food and drink (restaurant and bar patrons), etc. The transaction costs of creating additional collectivities, the likelihood of apathy, and the free-rider problem present substantial, and probably insuperable, obstacles. One solution might be to internalize all accident costs in the price of those goods and services (i.e., strict liability). This, however, would introduce the transaction costs of shifting the loss from consumer victim to producer or seller, and we know from our experience with both negligence and strict liability that a very large proportion of victims would fail to secure compensation.<sup>312</sup> Another

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310. See, e.g., *In re R.* — M.J.—, 102 S. Ct. 929 (1982); *Consolidated Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980); *Consolidated Edison v. Public Serv. Comm'n*, 447 U.S. 530 (1980); *Bates v. State Bar*, 433 U.S. 350 (1977); *Linmark Ass'n v. Willingboro*, 431 U.S. 85 (1977); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976); *Bigelow v. Virginia*, 421 U.S. 809 (1975). For a critique of the "commercial speech" doctrine, see Tushnet, *Corporations and Free Speech*, in *THE POLITICS OF LAW* (D. Kairys ed. 1982).

311. A. LEE, *RUSSIAN JOURNAL* (1981).

312. ROYAL COMMISSION REPORT, *supra* note 290, at 11-13; P. BARTH & H. HUNT, *supra*

possibility would be to treat the accident cost as a cost of consumption (rather than production) and leave it on the victim, but there is little reason to believe that this would encourage autonomous, informed decisions about risk. Furthermore, we no longer tolerate the inhumanity of abandoning victims to their own resources and, if these are inadequate, to poverty and misery (nor should we) but instead provide minimal income maintenance and medical care. This may reduce, if it does not entirely vitiate, the effect of internalizing the loss in the victim. I will return below to this question of externalized risk.

## V. CONCLUSION

In advocating producer and consumer cooperatives as the institutional forms through which a decentralized socialism might advance autonomous control over and equality of risk, I conceded that significant problems remain, both structural and political. Efforts to equalize risk between enterprises seem inconsistent with worker control over risk within each enterprise. Organizing consumption through cooperatives engenders its own problems: sustaining member involvement, constricting the range of choice, and dealing with those goods and services whose consumers cannot easily be aggregated. This last is just one instance of the recurrent problem of externalities — risks created by one activity or enterprise but inflicted on those outside it. Decentralized socialism does not eliminate externalities. Producer cooperatives may generate noise, air, or water pollution that affects workers in other cooperatives, nearby residents, or even remote environments. Consumer cooperatives and neighborhoods may produce sewage that pollutes other neighborhoods. Certain activities common to both production and consumption endanger not only the actor but also others, who may belong to a different collectivity — car driving is the best example. There are several ways to handle the problem of externalities. One would be to rotate people among various producer and consumer cooperatives so that the risks no longer were so clearly external: a person whose collectivity generated the risk might simultaneously be suffering it elsewhere, or care about those endangered, or have been in that situation in the past, or expect to be in the future. But, as I discussed earlier, such rotation would undermine group solidarity, dis-

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note 96, at 161-87; A. CONARD, *AUTOMOBILE ACCIDENT COSTS AND PAYMENTS* (1964); R. HUNTING & G. NEUWIRTH, *WHO SUES IN NEW YORK CITY? A STUDY OF AUTOMOBILE ACCIDENT CLAIMS* (1962); T. ISON, *THE FORENSIC LOTTERY* (1967); J. O'CONNELL, *THE LAWSUIT LOTTERY* (1979); Burman, Genn & Lyons, *supra* note 290; Franklin, Chanin & Mark, *Accidents, Money and the Law: A Study of the Economics of Personal Injury Litigation*, 61 COLUM. L. REV. 1 (1961); H. Genn, *supra* note 290.

rupt individual lives, and require a large, coercive administrative apparatus.

Another solution is for the person placed at risk to bargain with the person or entity responsible for generating it. Neoclassical economists who advocate this approach make a number of extremely dubious assumptions about the transaction costs involved in such negotiations, access to information, bargaining power, etc.<sup>313</sup> Organizing producers and consumers into collectivities, however, might make negotiation a more realistic possibility. An individual consumer today can hardly bargain with General Motors about the safety of the car she wishes to buy. But it is quite possible that a consumer cooperative, or even better several of them together, could negotiate over product safety with producer cooperatives of roughly comparable size.

Nevertheless, numerous situations would remain in which those who generate risk and those who suffer it are not negotiating and cannot readily do so — because they cannot be identified in advance, or because they cannot be aggregated without excessive cost, etc. That is one of the reasons why we have governments.<sup>314</sup> Some decisions about risk have to be made by collectivities larger than producer or consumer cooperatives (or even groups of cooperatives) — some require action by the state, or even the region or the world. And these decisions have to be backed by civil sanctions or criminal penalties. In other words, it is not possible to dispense entirely with litigation and regulation; the state may never wither away altogether. But we may be able to limit its functions substantially if producers and consumers gain autonomy through collective action. Furthermore, just as the organization of producers and consumers into units of roughly equivalent size will help to achieve the free market of neoclassical economics (and thus the “efficient” allocation of risk through negotiation), so it will advance the ideals of liberal pluralism by equalizing political power, with the result that the allocation of risk through state action (legislation, regulation, and adjudication) can more plausibly be viewed as expressing a con-

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313. For critiques of the Coase theorem, see Heller, *The Importance of Normative Decisionmaking: The Limitations of Legal Economics as a Basis for Liberal Jurisprudence — as Illustrated by the Regulation of Vacation Home Development*, 1976 WIS. L. REV. 385; Kelman, *Consumption Theory, Production Theory, and Ideology in the Coase Theorem*, 52 S. CAL. L. REV. 669 (1979); Kelman, *Choice and Utility*, 1979 WIS. L. REV. 769; *Symposium on Efficiency as a Legal Concern*, 8 HOFSTRA L. REV. 485 (1980); *A Response to the Efficiency Symposium*, 8 HOFSTRA L. REV. 811 (1980).

314. Only government could make the decision to reduce risk to both producers and the environment by curtailing production, as environmentalists in the United States and Europe have been urging for some time. Government also must decide who has the initial entitlement (e.g., to pollute or to be free from pollution) before negotiation can take place.

sensus of the wishes of the constituent groups and their members (whose fundamental antagonisms have been eliminated).<sup>315</sup>

If decentralized socialism cannot perfectly realize the ideals of autonomy and equality in the allocation of risk, it certainly is an enormous improvement over the existing system, which renders both workers and consumers powerless and unequal. Can it be implemented? Obviously that question cannot be answered simply by weighing the merits of my proposals against those of the allocation of risk under contemporary capitalism.<sup>316</sup> Decentralized socialism requires revolutionary change. It will be championed by those who are most oppressed and who best are able both to perceive their oppression and to believe in the possibility of change. Certainly, involuntary subjection to unequal risks is only one element of capitalist oppression; but the salience and volatility of these issues are suggested by union and rank and file agitation over the issue of worker health and safety and by the consumer and environmental movements.<sup>317</sup> Yet if decentralized socialism is revolutionary, it also, by definition, is gradual. It does not require an initial cataclysm, and partial advances need not await total victory. Producer and consumer cooperatives can be created within the framework of the capitalist economy and state; they can co-exist (though uneasily) with bourgeois society and its ideological hegemony. These are exemplary rather than confrontational institutions.<sup>318</sup> Indeed, there is evidence that capitalism itself, in its struggle

315. C. PATEMAN, *PARTICIPATION AND DEMOCRATIC THEORY* (1970). This hardly is an original idea; compare G. COLE, *GUILD SOCIALISM RESTATED* (1920).

316. For accounts of the political struggle, see *WORKERS' CONTROL, PART IV* (G. Hunnius, G. Garson & J. Case eds. 1973).

317. See D. BERMAN, *supra* note 16, ch. 5-6; A. DALTON, *ASBESTOS KILLER DUST: A WORKER/COMMUNITY GUIDE: HOW TO FIGHT THE HAZARDS OF ASBESTOS AND ITS SUBSTITUTES* (1979); *BRITISH SOCIETY FOR SOCIAL RESPONSIBILITY IN SCIENCE, HAZARDS BULLETIN* (1976 to date).

The numerous Committees on Occupational Safety and Health that have emerged around the country in the last few years indicate the workers' concern. Furthermore, the threat of toxic wastes in the environment has stimulated community action. See, e.g., P. BLANC, *STOP ENVIRONMENTAL CANCER: AN EPIDEMIC OF THE PETROCHEMICAL AGE: A CITIZEN'S GUIDE TO ORGANIZING* (1980); M. BROWN, *supra* note 7; L. GIBBS, *supra* note 7; A. LEVINE, *THE LOVE CANAL* (1982).

318. Starr, *The Phantom Community*, in *CO-OPS, COMMUNES & COLLECTIVES* 245 (J. Case & R. Taylor eds. 1979); Gorz, *supra* note 189, at 342-43. Because I believe that the greatest obstacle to socialism in the United States is the workers' inability to visualize decentralized socialism as a realistic alternative — by reason of a strong (and proper) aversion to the authoritarian regimes in the Soviet Union and Eastern Europe — the importance of creating exemplary socialist experiments within our own society cannot be exaggerated. This is not to diminish the value of electoral campaigns — witness France and Greece — workplace struggles, or other counter-hegemonic efforts to demonstrate the way in which capitalism produces injury and illness — for instance, through criminal prosecution of capi-

to resolve awesome internal and external contradictions, is fostering the proliferation of such institutions. Witness the growth of worker ownership through employee stock-option plans, pension fund investments, and purchases of failing enterprises;<sup>319</sup> capitalist concessions of control to workers in order to remedy the high levels of apathy and alienation that reduce productivity and render American industry uncompetitive with its Japanese or European counterparts;<sup>320</sup> and attempts to resolve the crisis of underconsumption by restoring consumer autonomy and confidence. This is not to suggest that producer and consumer cooperatives will have an easy path: they have elicited, and will continue to stimulate, opposition from capital (both enterprise and finance), the state apparatus it controls, and the bourgeois culture it spawns.<sup>321</sup> But the benefits of decentralized socialism will continue to be obvious and overwhelming to those who participate in efforts to create it and increasingly to others still oppressed by capitalist relations of production and reproduction.

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talist officials who consciously disregard risk to producers and consumers in their drive for profits. See Glasbeek & Rowland, *Are Injuring and Killing at Work Crimes?*, 17 OSGOODE HALL L.J. 506 (1979).

319. P. DRUCKER, *THE UNSEEN REVOLUTION: HOW PENSION-FUND SOCIALISM CAME TO AMERICA* (1976).

320. *WORK IN AMERICA*, *supra* note 47, ch. 4; J. O'TOOLE, *supra* note 245.

321. Rothschild-Whitt, *supra* note 99, at 522-23.