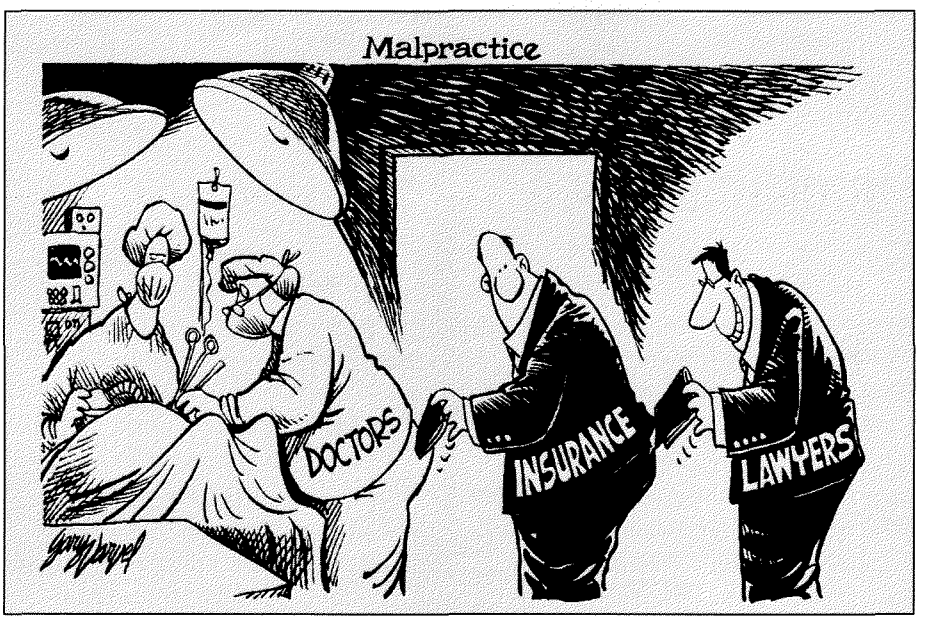
the Malpractice Economist

Liable to Suffer

By Iain Murray



As a Briton, I am used to health service in crisis. Britain now spends only 6 percent of its gross domestic product on health care; America spends 13 percent. British hospital wards are forced to close regularly, doctors work such long hours they are often unable to think straight, and long-term care for chronic illnesses is of a pitiably low standard. All these are clearly marks of a health care system in crisis, and quite obviously the fault of a system of socialized medical care that demands, in the name of fairness, that only the state may pay for medical care. Americans who visit Britain and have to deal with the National Health Service are glad that the same system does not exist here.

Yet a version of it does. The result is that across large areas of the United States, the American health care system is also in crisis. A few examples should suffice to explain the magnitude of the problem. As Fox News reported in May 2002, "On May 6, most of the obstetricians in Las Vegas adopted a policy of rejecting newly pregnant women as patients, even if the woman was an existing patient." The same month, the *Washington Times* presented this warning: "You are driving through Mississippi and you develop a serious pain in your side. What do you do? If you are smart, you keep on driving until you reach the border." MSNBC reported early this year that "More than two dozen orthopedic, general and heart surgeons in West Virginia's Northern Panhandle began 30-day leaves of absence Wednesday or planned to begin leaves in the next few days." Even our sports teams are having trouble finding medical care, reported the *Miami Herald* this spring: "With malpractice rates skyrocketing, many doctors are hesitant to care for professional athletes."

The common theme is the American tort system for medical malpractice. When people feel they have been treated wrongly by a doctor, they sue to redress their grievances. Doctors are therefore concerned about their potential liabilities, which is why the issue is often described in terms of liability rather than tort. Many people are aware of the economic cost of the medical tort system. It has been estimated as costing America $200 billion a year—roughly 2 percent of the nation's gross domestic product. Yet the tort defenders disdain such cold economic analyses. As Leo Boyle, president of the Association of Trial Lawyers of America, puts it, the tort system is all about fairness to the patient: "The negligence of bad doctors and the bad business decisions of insurance companies are not the fault of patients who are mistreated. Yet it is injured patients who will be punished if insurers and doctors succeed in limiting justice to help solve their self-inflicted troubles."

This is a powerful argument that knocks down the economic argument in the minds of the American public. If American tort reform is to succeed, it can only do so by convincing voters that it is in the best interests of patients.

Many of the nation's experts on the issue met at a conference on "Liability and Public Health," organized by the AEI-Brookings Joint Center for Regulatory Studies and the nonpartisan legal reform body Common Good on March 4. The most interesting aspect was the focus on the clinical effects of the liability issue rather than the problem of insanely huge jury awards against physicians, which is so often the focus of the economic argument.

When doctors are afraid they will be sued, there are direct practical consequences. Vast increases in insurance premiums caused the Nevada obstetrician crisis; there was the spectacle of Mississippi doctors moving across the river to Louisiana to escape their state's tort system. Sometimes, however, the

system breaks down because too *much* service is provided. Patients are subjected to unnecessary tests and examinations because doctors fear they will be sued if they miss anything, costing the country $70-120 billion each year.

And there is no room for good bedside manner: Any theory mentioned during conversation can provide the patient with fodder to sue the doctor if something goes wrong. Clinical decisions are rarely cut-and-dried, but a doctor's previous mention of a possible alternative course of treatment is something that a sharp lawyer will swoop down on. A culture of secrecy is therefore developing in the medical establishment that threatens doctor-patient relationships. This is an unintended consequence of the doctrine of informed consent. Brave is the physician who entrusts anything about a patient to e-mail.

These problems even affect the last days of life. Fear of being sued by the "daughter from California" (or New York, for those West of the Mississippi) leads to over-treatment, with the terminally ill being subjected to futile resuscitation attempts or other fruitless treatment, often involving physical restraint. Others will be moved from the nursing home they had liked to acute-care facilities on the principle, "If in doubt, ship 'em out." The reverse also happens, when a physician's fear of being accused of hastening a patient's death leads to insufficient attention to pain control with increased or stronger medication.

The system is plainly not delivering quality care to patients. One solution that seems to work is the imposition of caps on "non-economic" damages from jury awards. It is clearly right that patients who suffer terribly should have their consequent medical expenses (their "economic" costs) paid without limits, although the state of Virginia has imposed a cap on even those. But it is the ever-increasing awards to compensate people for their pain and suffering—the non-economic costs—that have inflated payouts and caused much of the increase in insurance premiums. States such as California that imposed such caps early on have nowhere near the problems that other states like Mississippi do with their health care systems.

Caps are not an ideal solution, however. There will always be disputes about the level, and they might even be thought of as tort-tinkering rather than tort-reform. Other approaches seem to be bearing fruit. The Vaccine Injury Compensation Program was introduced to tackle the particularly thorny problem of the small number of children seriously damaged by routine vaccinations. As a "no fault" system it is not career-threatening to physicians, and it makes payments directly to cover medical costs and caps non-economic damages at $250,000. Moreover, as the system is based on scientific evidence it gives much less leeway for simple emotional appeals.

"No fault" plans might therefore seem to present an excellent model for reform, but there are two main arguments against them. First, they have failed to engage the public, probably because of the name. David Studdert of the Harvard School of Public Health believes it suggests to the public that it is about freeing doctors to play golf rather than holding them accountable. Studdert suggests "Patients' Compensation Schemes."

The second concern is Constitutional, raising the issue of the Seventh Amendment and the right to settle disputes at civil law. This is a difficult area, but according to Common Good president Philip Howard it is a red herring. Courageous but appropriate legislation setting up such a system would be Constitutional, Howard argues, because it would set the boundaries necessary in a reliable system of law. It is certainly true that the current system of jury awards seems as "freakish and wanton" as the pre-1973 death penalty. The recent decision of the Supreme Court in *State Farm v. Campbell*, which reversed a jury award of $145 million punitive damages for a case where actual out-of-pocket expenses were a mere $900, certainly seems to be a step toward reigning in the power of juries in a Constitutional manner.

The consensus at the conference seemed to be that liability reform is possible and can be made attractive to the public. One area not covered, however, is of direct relevance to everyday treatment of patients. It relates to the role of doctors in our culture. We may, perhaps, expect too much of them. A young surgeon recently expressed his frustrations on the excellent Medpundit Web log: "No other business works solely on credit. When I perform a cholecystectomy I cannot demand payment up front (as a plumber or even a lawyer can do), I am at the mercy of the patient's insurance company or Medicare/Medicaid (if they have coverage)... If I am not paid, I cannot very well put the gallbladder back in. This is described as providing a 'service to the community.' However the community [does] not help me in paying my rent, salaries for my staff, or my liability insurance. Society has forced physicians to look at their practices through the lens of a business model, but then criticizes us severely when we do."

It is patients and potential patients—the electorate—who will decide the solution to America's current health care crisis. Those who support reform must remember that they will only get it if they cast the argument in terms of service to patients. There is plenty of evidence that the current system harms the very people it is supposed to protect. If the public alters its expectations of physicians so that they are thought of less as a community resource and more as practitioners of a beneficial profession, the specter of an American version of the continual British health care crisis may recede even further.

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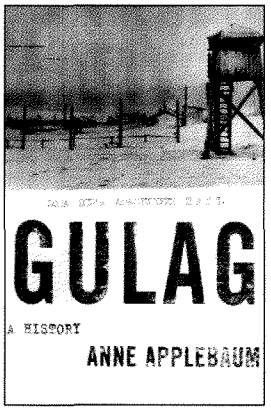
BookTalk

CAPTURING THE APOCALYPSE

By Juliana Pilon

Gulag: A History
By Anne Applebaum
Doubleday, 720 pages, $35



Anne Applebaum's *Gulag: A History* is nothing short of a masterpiece. Relying on official archives, personal stories, accounts by inmates, and reports by those who visited or heard about the inferno known as the Soviet labor camps, she captures the full dimensions of their monstrosity with numbing precision. The simplicity of her style, devoid of any melodrama or hyperbole, allows the stark reality to emerge in its unadorned, terrifying horror.

The USSR exterminated millions of its own citizens slowly and unsystematically, although hundreds of thousands were also mass-murdered, execution-style. "In Auschwitz you could die in a gas chamber, in Kolyma you could freeze to death in the snow." Like the mythical Cronos, the Soviet Union devoured its own children. The millions of victims may not be regurgitated. But they can be remembered, and the crime exposed.

Her massive book covers the origins of the gulag in 1917, life and work in the camps, and their demise from 1940 to 1986. Hardly a mere aberration, the camps were the bloodiest aspect of a revolution that had turned a society's values upside down, as "murder became an accepted part of the struggle for the dictatorship of the proletariat." Imprisoning thousands for the crime of having accumulated some property was in line with official ideology. Soon, "enemies" could be found everywhere: in national groups that Stalin wanted to exterminate, or simply people whose enemies denounced them falsely.

From 1929 to 1953 alone, there were 476 camp complexes; each could contain hundreds of smaller units. Most were closed upon Stalin's death, but in the '70s and '80s, several were redesigned as prisons, to accommodate a new breed of democratic activists—anti-Soviet nationalists—as well as ordinary criminals. How many died? While easy to print numbers on a page, the scale of terror is as impossible to digest psychologically as the age of the universe, and no less apocalyptic. The often-quoted figure (including by Khruschev) of some 17 or 18 million killed from 1937 to 1953 is misleading, as it excludes the many hundreds of thousands sentenced to forced labor without incarceration; prisoners of war; captives in post-war "filtration camps" (where POWs who had already suffered torments in German camps were kept for further "questioning" that often lasted years); the "special exiles," which included kulaks deported during collectivization; Poles, Balts, Caucasians, Tartars; and countless others.

How does one describe the pain of the living dead? How does one capture the systematic torture of women and children, their desperate attempts to survive, resorting even to cannibalism (often of family members) and gruesome self-mutilation? In that quintessential sense, *Gulag* is supremely successful pornography: It conveys the perverse obscenity of absolute evil stunningly well.

Most tragically, the story of *Gulag* has had no genuine resolution. Most Russians prefer not to think about it, embarrassed by what they perceive as one more stain on their reputation, taking them another notch down from their former pedestal as a "superpower." Moreover, the generation of political leaders who talked about the gulag and Stalinist repression, the so-called democratic reformers, managed to taint the sacred memory of the gulag, through corruption and chaos.

Many of those responsible for the crimes of the past are still around, of course. Most notably, President Putin made a point of visiting the KGB's headquarters on the anniversary of its founding, where he dedicated a plaque to the memory of henchman Yuri Andropov. No flowers were placed on the nonexistent graves of those whose lives were extinguished building the White Sea Canal, Stalin's mad road to nowhere.

But, concludes Applebaum with calm, analytic, understated eloquence no less effective than Solzhenitsyn's symphonic passion, the responsibility to honor the gulag's victims lies outside Russia as well. Unless the rest of the world learns a lesson