Recasting the Workers' Compensation Grand Bargain

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Nate Holdren, Injury Impoverished (2020).

In his excellent book, *Injury Impoverished: Workplace Accidents, Capitalism, and Law in the Progressive Era*, Nate Holdren satisfyingly scrutinizes the "Grand Bargain," through which workers are said to have traded tort rights for workers' compensation statutory rights. It has always been a little difficult to swallow the idea that in 1911—the year of enactment of the first U.S. workers' compensation statutes—American workers were sufficiently organized nationwide to compel employers and Government to make this trade. Still, as Holdren makes clear, American workers had every incentive to be interested in supplanting a negligence system that defeated worker injury claims through operation of the dreaded "unholy trinity" of contributory negligence, assumption of the risk, and the fellow servant rule. But the Grand Bargain may have been more about what industry and Government wanted than what workers wanted.

Holdren retells the story of how national employers' associations like the National Association of Manufacturers, the National Metal Trades Association, and the National Civic Federation threw their support behind workers' compensation laws during the first decade of the 20th century. (P. 110.) In so doing, he repeatedly and appropriately problematizes the familiar, and in some ways too comfortable, Grand Bargain narrative, that employees happily gave up tort rights because they were always losing. As it turns out, workers were beginning to win negligence suits by around 1910, and the costs of employer third-party tort liability insurance were steadily rising during the early 20th century (Pp. 95-97). The truth of the matter seems to be that courts of the era were becoming increasingly unpredictable by rendering decisions in favor of *workers*, a fact independently true even before considering proliferating federal and state employer liability statutes that deprived employers of some traditional affirmative defenses to negligence claims. (Pp. 102-03.)

Workers' compensation models developed in the U.K. and Europe before they developed in the US, and *Injury Impoverished* effectively sketches out U.S. players (Pp. 53-56) who travelled to Europe in the first decade of the 20thcentury to, in effect, select between the English and German workers' compensation models that had recently emerged. Bismarck and the Prussians had enacted a state Railroad Law in 1838, implementing a strict liability regime in connection with railroad injuries, and Bismarck led Germany in enacting the first major national workers' compensation law in 1884. (Some scholars argue that the law of negligence was at bottom a mid-19th century subsidy in favor of the railroad industry and that strict liability was the early 19th century default.) Parallel developments took place in the U.K, with the U.K. Employer's Liability Act in 1880, and the U.K. Workers' Compensation Act in 1897. (*See* David G. Hanes, *The First British Workmen's Compensation Act*, 1897 (1968)).

Eventually, the U.S. selected the English model in 1911. Indeed most U.S. workers' compensation and employer-liability law developments were presaged in the U.K. during the 1880s, as the British electorate was expanding, and its labor movement was becoming more militant. (*See* P. W. J. Bartrip & S. B. Burman, *The Wounded Soldiers of Industry* (1983)). (Ironically, if either of the work injury models had been selected *in full,* we might have had a universal health care system in the U.S. by the early 20th century; Germany implemented de facto national health in 1884; the U.K. in 1911, *see* John Henry Watt, *The Law Relating to National Insurance: With an Explanatory Introduction*, 76 (1913)).

Where Holdren really shines is in his extended discussion of actual (as opposed to professed) policies behind the Grand Bargain. One fascinating postulate is that workers' compensation was a sublimation of the legal conflict that often emerges when badly injured employees have an opportunity to tell their stories in open court. Outrageous exposes of worker injury and disease, as related by contemporary chroniclers like Crystal Eastman, the Pittsburgh activist, lawyer, journalist, and expert, when coupled with bitter court cases, had the effect of generating bad feelings of a type that could lead to labor and class conflict. (Pp. 103-07.) But in the no-fault environment of workers' compensation there was no tale of employer negligence to tell because breach of a duty of ordinary care was irrelevant. Provided an injury arose out of and in the course of employment, a case could be quickly and quietly resolved: 400 weeks of compensation for the loss of both hands—forget about telling a jury how the hands were lost. (P. 111.) This knocks an account of law as agent of social order a bit askew: law might paradoxically provoke; administrative adjudication governed by "tables" determining compensation might mollify or at least conceal. On this telling, workers' compensation may have been an anti-union/anti-radical initiative, (P. 104), which was all well and good for those whose chief desideratum was stability.

Holdren focuses on the habit of assessing the Grand Bargain in relentlessly distributive terms: is a workers' compensation statutory remedy monetarily adequate, or sufficiently proportional, when compared to foregone tort damages? (Indeed, I have a difficult time not thinking of workers' compensation adequacy in these terms.) To be sure, and as powerfully revealed in the 1972 Report of the National Commission on Workmen's Compensation Laws, workers' compensation remedies have probably been inadequate in the distributive sense for a long time; compliance with the Commission's 19 essential recommendations for operation of a minimally adequate workers' compensation system has not even been tracked since the early 2000s. But as *Injury Impoverished* notes, "[t]he overly narrow and exclusively distributive perspective written into those [workers' compensation] laws is inattentive to recognition and bound up with—or at least uncomfortably close to—commodification." (P. 113.)

Early 20th century critics of the system thought it was "too cheap" in monetary terms; but implicit in that assertion was that there was some "just right" quantum of benefits that would make surrender of negligence damages acceptable. (P. 113.) Holdren shares that he has a blue-collar background and has had personal experience of workplace injury. (Pp. 4-5.) I have the same kind of background and have always been struck by the fact that those rendering grim assurances of "just right" commodification of the human body are typically at a far remove from the risk of suffering bodily misfortune. I suspect Holdren agrees.

In the end, financial remuneration could at least be (though it is not presently) "recognitional": American workers' compensation could at least *fully* "recognize" that a living human being has suffered economic loss and compensate the loss in a way that is "not too cheap." (P. 112.) But what *has* a worker suffered in a workplace injury? As Holdren states, "[t]he body, the person, and the self-overlap, and so the body is laden with meaning and feeling." (P. 2.) This is common sense to anyone who has been hurt or has even been at real risk of being hurt. As I used to think in law school, workers care as much about losing their right arms as landowners care about losing Blackacre. What a brave and unusual book *Injury Impoverished* is to be asking questions of such fundamental importance to the working class—particularly during a period of pandemic when public policy in many states appears comfortable in dispossessing a variety of workers of both workers' compensation and negligence remedies.

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