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Fifty More Years of Ineffable Quo? Workers' Compensation and the  
Right to Personal Security

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# FIFTY MORE YEARS OF INEFFABLE QUO? WORKERS' COMPENSATION AND THE RIGHT TO PERSONAL SECURITY

*Michael C. Duff\**

## INTRODUCTION

The year 2022 marks the fiftieth anniversary of the issuance of the report of the first and only United States National Commission on Workmen's Compensation.<sup>2</sup> The National Commission, convened as part of the enactment of the Occupational Safety and Health Act of 1970, broadly concluded that workers' compensation in the United States—a state run system—was inadequate and unfair.<sup>3</sup> The Commission also recommended a series of changes to improve the system, under implicit threat that workers' compensation could be federalized in the absence of reform.<sup>4</sup> For a short time, states appeared to “comply” with some of the Commission's recommendations, and the United States Department of Labor<sup>5</sup> tracked some of that compliance.<sup>6</sup> Eventually, though, state efforts to comply cooled, and the DOL stopped tracking compliance in 2004.<sup>7</sup> There is little reason to suppose that continued tracking would have revealed that workers' compensation had become better or fairer in the intervening fifty years. This history was summarized in a 2016 DOL report titled, “Does the Workers' Compensation System Fulfill Its Obligations to Injured Workers?”<sup>8</sup> That report answered its own animating question in the negative,<sup>9</sup> and also quoted a letter written by eleven members of Congress to the U.S. Secretary of Labor in 2015: “the erosion of workers' protections has snowballed as states reduced workers' compensation . . . the race to the bottom now appears to be nearly bottomless . . . .”<sup>10</sup>

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<sup>2</sup> The Commission was established as part of the Occupational Health and Safety Act of 1970. *See infra* Part II.

<sup>3</sup> *See infra* Part II.

<sup>4</sup> *See infra* Part II.

<sup>5</sup> [Hereinafter DOL].

<sup>6</sup> *See infra* Part II.

<sup>7</sup> *See infra* Part II.

<sup>8</sup> U.S. DEP'T OF LAB., DOES THE WORKERS' COMPENSATION SYSTEM FULFILL ITS OBLIGATION TO INJURED WORKERS? (2016), <https://www.dol.gov/sites/dolgov/files/OASP/files/WorkersCompensationSystemReport.pdf> [<https://perma.cc/95RC-7VUB>].

<sup>9</sup> *Id.* at 24.

<sup>10</sup> *Id.* (quoting letter signed by Senators Murray, Sanders, Wyden, Franken, Brown and Representatives Scott, Van Hollen, Levin, Wilson and Becerra).

This article discusses whether workers' compensation benefits are too low and access to those benefits too unpredictable, as the 1972 Commission argued in detail; and whether there is a constitutional lower limit to the race to the workers' compensation bottom that the 2016 DOL report described.<sup>11</sup> COVID-19 provoked renewed general discussion of workers' compensation's adequacy,<sup>12</sup> but the narrower question of benefit adequacy has been present from the time of workers' compensation's inception. From a reformer's perspective, improving workers' compensation is difficult because it is state based, and states have broad authority within their borders over health policy and injury law. States usually escape Federal scrutiny in these areas of law and policy.<sup>13</sup> So, if a state decides to provide pauper-level benefits, and the state's supreme court authorizes the effort,<sup>14</sup> there is little else left for a reformer to do.

Workers' compensation was designed to be a form of no-fault workplace injury insurance providing predictable and thrifty, but adequate, benefits.<sup>15</sup> The original theory, imported from Europe—England in particular—in the early 20th century,<sup>16</sup> was that employers would be spared from potentially crippling negligence lawsuits and, in exchange, employees (or their survivors) would receive statutory benefits for injury (or death) without having to endure the rigors of lengthy and often unsuccessful tort litigation.<sup>17</sup> The scheme was conceived as a “quid pro quo,” a “this for that,” and is sometimes referred to as “the Grand Bargain.”<sup>18</sup> From the perspective of employees, the “quid” of negligence damages was exchanged for the “quo” of benefits.<sup>19</sup> An eventual, important American innovation was that workers' compensation became an employee's exclusive remedy for workplace

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<sup>11</sup> See *infra* Part II.B.

<sup>12</sup> See Michael Dworsky & Bethany Saunders-Medina, *Should COVID-19 Be Covered by Workers' Compensation? Some Considerations*, RAND BLOG (Aug. 31, 2020), <https://www.rand.org/blog/2020/08/should-covid-19-be-covered-by-workers-compensation.html> [<https://perma.cc/7EUV-MS25>].

<sup>13</sup> *N.Y. Cent. R.R. Co. v. White*, 243 U.S. 188, 203–04 (1917) (underscoring the legitimacy of the state in trying to establish a system devoted to remedying the scourge of workplace injury); *Jacobson v. Massachusetts*, 197 U.S. 11, 38–39 (1905) (upholding right of Massachusetts to enforce smallpox vaccine against dissenting citizen). Most employee benefits are not derivative of an established common law right and are completely discretionary and exclusively regulated by the Employee Retirement Income Security Act of 1974. See *Shaw v. Delta Airlines*, 463 U.S. 85 (1983) (describing ERISA's Federal regulation of most employee benefits).

<sup>14</sup> When discussing the potential of constitutional limits of deprivations on workers' injury remedies, the conversation will center exclusively on the Federal constitution. To the extent state constitutional law resembles federal constitutional law, state law may be indirectly implicated.

<sup>15</sup> *N.Y. Cent. R.R. Co. v. White*, 243 U.S. at 202–203.

<sup>16</sup> Joseph LaDou, *The European Influence on Workers' Compensation Reform in the United States*, ENV'T HEALTH 2011, at 1–2, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3267658/> [<https://perma.cc/4TSG-M93M>].

<sup>17</sup> The system emerged from the horrendously dangerous working conditions that were a feature of the intensifying industrialism of the late 19th century and employers were able to defeat claims by arguing the employee played some role in bringing an injury or death on herself. See *infra* note 65 and accompanying text.

<sup>18</sup> While the precise origins of the phrase are unclear, the Grand Bargain consisted of employees relinquishing negligence damages in exchange for freedom from employer affirmative defenses that frequently defeated employee negligence actions: contributory negligence, assumption of the risk, and the fellow-servant rule. Ellen Relkin, *The Demise of the Grand Bargain: Compensation for Injured Workers in the 21st Century*, 69 RUTGERS U. L. REV. 881, 883 (2017).

<sup>19</sup> See JOHN FABIAN WITT, *THE ACCIDENTAL REPUBLIC: CRIPPLED WORKINGMEN, DESTITUTE WIDOWS, AND THE REMAKING OF AMERICAN LAW* 3–4 (2004) (quoting proponent Teddy Roosevelt's explanation—delivered in a speech—of how workers' compensation laws operated).

injury<sup>20</sup>—employees in the United States have not been permitted to sue their employers in negligence for more than a century.<sup>21</sup> The inability to sue because of the “exclusive remedy rule” can be seen as a positive or negative feature of workers’ compensation depending on what one thinks of the overall adequacy of workers’ compensation benefits. Experience during the COVID-19 pandemic suggested that plaintiffs utilized creative strategies to evade workers’ compensation’s limited benefits,<sup>22</sup> which were otherwise indelibly locked into the remedial structure by the exclusive remedy rule.<sup>23</sup> Originally, workers’ compensation was elective, and the exclusive remedy rule did not apply, so there was no reason to try to evade it: a majority of the original American workers’ compensation statutes allowed employees to elect whether to pursue a workers’ compensation claim or a torts suit.<sup>24</sup> The case in which the United States Supreme Court first upheld workers’ compensation as a matter of U.S. constitutional law, for example, *New York Central*

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<sup>20</sup> Although the workers’ compensation model was originally upheld by the U.S. Supreme Court in *N.Y. Cent. R.R. Co. v. White*, the ruling concerned a New York statute applicable only to “hazardous” employments from which employees could opt out. 243 U.S. at 203–04. The Court did not clearly uphold workers’ compensation as applied to non-extrahazardous employment until the 1920s. *Ward & Gow v. Krinsky*, 259 U.S. 503, 516 (1922). The Supreme Court upheld the original Arizona statute that allowed employees to elect an employer liability or a workers’ compensation remedy, but the opinion did not turn on the compulsory nature of the structure from the employee’s perspective. *Arizona Copper Co. v. Hammer*, 250 U.S. 400, 430–31 (1919).

<sup>21</sup> PRICE V. FISHBACK & SHAWN EVERETT KANTOR, A PRELUDE TO THE WELFARE STATE: THE ORIGINS OF WORKERS’ COMPENSATION 4 (2006).

<sup>22</sup> On creative strategies, see e.g., Vin Gurrieri, *COVID Suits Test ‘Public Nuisance’ Claim In Workplace Cases*, LAW360 (June 9, 2020, 9:50 PM) (discussing workers’ attempts to utilize public nuisance suits as a gambit to evade the exclusive remedy rule), <https://www.law360.com/articles/1281347/covid-suits-test-public-nuisance-claim-in-workplace-cases> [<https://perma.cc/5358-X624>]. Similarly, families of workers killed from alleged wrongful exposure to Covid filed wrongful death suits. Chantell Foley & Fisher Phillips, *Employers Face Increase in COVID-19 Wrongful Death Lawsuits*, INS. J. (Aug. 27, 2020), <https://www.insurancejournal.com/news/national/2020/08/27/580463.htm> [<https://perma.cc/9SAW-J5QL>]. On limited benefits, see *infra* Part II.B.

<sup>23</sup> Some of this is necessarily speculative but it is likely that many anticipated cases were never filed because employees realized they were subject to exclusivity. See Elaine S. Povich, *States Braced for a Wave of COVID Lawsuits. It Never Arrived.*, PEW (July 21, 2021), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2021/07/21/states-braced-for-a-wave-of-covid-lawsuits-it-never-arrived> [<https://perma.cc/2BHY-5VHV>].

<sup>24</sup> Under the English Workmen’s Compensation Act of 1897, the employee not only had the option to sue but, could even pursue a workers’ compensation claim after losing a negligence suit. Richard A. Epstein, *The Historical Origins and Economic Structure of Workers’ Compensation Law*, 16 GA. L. REV. 775, 797–99 (1982) (citing 60 & 61 Vict., ch. 37). In the United States, all the original statutes (c. 1911–1912) except that of Rhode Island were elective. HARRY B. BRADBURY, WORKMEN’S COMPENSATION AND STATE INSURANCE LAW OF THE UNITED STATES 1–38 (1912). If the employer opted not to participate in workers’ compensation, it usually lost its affirmative defenses to negligence actions. *Id.* at 1–2. Employees could generally elect negligence actions in lieu of workers’ compensation (for reasons that prompted workers’ compensation statutes in the first place, they usually did not make such an election) but if the employer refused to come under the terms of the workers’ compensation statute the employee could not “elect” that remedy. *Id.* at 4–5. Massachusetts, Michigan, Nevada, New Jersey, Washington, and Wisconsin allowed employees to elect negligence actions, but in some instances required employees to provide written notice of nonelection. *Id.* at 20–21, 23, 25, 29, 35–36, 38. California and Ohio permitted employees to elect a negligence suit if the employer engaged in gross negligence or declined to participate in workers’ compensation. *Id.* at 9, 32–33. As of 1929, thirty-two workers’ compensation statutes in the United States continued to be elective, though in most of those states, election was presumed absent active rejection. WALTER F. DODD, ADMINISTRATION OF WORKMEN’S COMPENSATION 747–48 (1936) (citing DEP’T OF LAB., BUREAU OF LABOR STATISTICS, WORKMEN’S COMP. LEGISLATION OF THE UNITED STATES AND CANADA AS OF JANUARY 1, 1929, Bulletin No. 496 (1929)).

*R. Co. v. White*,<sup>25</sup> featured a New York statute in which employees had the right to elect not to participate in workers' compensation.<sup>26</sup> In other words, employees could elect to pursue a tort lawsuit rather than a workers' compensation claim.

Workers' compensation statutes required Supreme Court endorsement because, where mandatory in hazardous industries, states could not implement the statutes without simultaneously abolishing negligence in the workplace; in the second decade of the 20th century, which lay amidst the *Lochner* era,<sup>27</sup> it was not clear if such a scheme passed constitutional muster.<sup>28</sup> States initially proceeded cautiously under a cloud of possible court disallowance,<sup>29</sup> and elective statutes provided a potential legal escape valve: aside from hazardous industries, if employees (or employers) did not want to participate, they were not required to do so.<sup>30</sup> Workers' compensation was initially mandatory only with respect to extrahazardous occupations, and in that context, employers challenged the statutes under the Fourteenth Amendment as unconstitutional interference with their fundamental rights of liberty and property.<sup>31</sup> The Court ultimately found that workers' compensation fell within the allowable scope of states' police powers.<sup>32</sup>

This background history is important to understanding claims made in this article. The history shows that courts eventually considered workers' compensation to be a lawful substitute for negligence damages,<sup>33</sup> but with a presupposition the substitute was adequate,<sup>34</sup> and within an initial context of elective statutes that employees could reject.<sup>35</sup> Leaving to one side whether workers really bargained for this system, this article poses a simple question: given the current mandatory nature of workers' compensation,<sup>36</sup> is there a constitutional floor beneath which state legislative curtailment of benefits should trigger heightened judicial scrutiny? In tort reform

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<sup>25</sup> *N.Y. Cent. R.R. Co. v. White*, 243 U.S. at 203–04.

<sup>26</sup> *Id.* at 195–96 (citing Chap. 816, Laws 1913, as reenacted and amended by c. 41, Laws 1914, and amended by e. 316, Laws 1914).

<sup>27</sup> *Lochner v. New York*, 198 U.S. 45, 53, 64 (1905) (holding that the right to freely contract was a fundamental right under the 14th Amendment of the United States Constitution that states could not invade without inviting judicial scrutiny).

<sup>28</sup> See *infra* Part IV. Of course, courts did not speak in the language of the post-*Lochner* era utilizing phrases like substantive due process. James W. Ely, Jr., *The Oxymoron Reconsidered: Myth and Reality in the Origins of Substantive Due Process*, 16 CONST. COMMENT. 315, 319 (1999) (“It bears emphasis that the phrase ‘substantive due process’ is anachronistic when used to describe decisions rendered during the nineteenth and early twentieth centuries.”).

<sup>29</sup> The New York Court of Appeals declared an early version of compulsory workers' compensation in extrahazardous industries unconstitutional under state law and given the influence of the New York courts the opinion had an impact on the early workers' compensation climate. FISHBACK & KANTOR, *supra* note 21, at 93.

<sup>30</sup> An employee probably would have wanted to participate because of the great practical difficulty of bringing a negligence suit in the early 20th century. Whatever the valid critiques of the structure, it was for many employees a pronounced improvement over the prior situation. FISHBACK & KANTOR, *supra* note 21, at 88–89.

<sup>31</sup> See *N.Y. Cent. R.R. Co. v. White*, U.S. 243 at 196–97 (1917).

<sup>32</sup> *Id.* at 207.

<sup>33</sup> See *infra* Part IV.

<sup>34</sup> See generally Michael C. Duff, *How the U.S. Supreme Court Deemed the Workers' Compensation Grand Bargain “Adequate” Without Defining Adequacy*, 54 TULSA L. REV. 375, 404 (2019) (arguing that the shift to workers' compensation was adequate, despite the Supreme Court never explicitly declaring it so).

<sup>35</sup> *White*, 243 U.S. at 208 (upholding New York's elective statute).

<sup>36</sup> GRIFFIN MURPHY, JAY PATEL, ELAINE WEISS & LESLIE I. BODEN, WORKERS' COMPENSATION: BENEFITS, COVERAGE AND COSTS, NATIONAL ACADEMY OF SOCIAL INSURANCE 5 (2020) (showing that workers' compensation is now mandatory in all states but Texas and Wyoming).

debates, such questions have arisen in disputes over legislative limitations on noneconomic damages—pain and suffering.<sup>37</sup> Tort caps are usually not applied to economic damages.<sup>38</sup> Yet, workers' compensation benefits resemble significantly reduced economic damages, the reduction justified by the difficulty employees once had prevailing in negligence actions in the early twentieth century by operation of the tort affirmative defenses of contributory negligence, assumption of the risk, and the fellow-servant rule.<sup>39</sup> During the latter twentieth century, contributory negligence and assumption of the risk have ceased to be absolute bars to tort suits in all but four states and Washington, D.C.<sup>40</sup> A fundamental baseline assumption for damage reduction has therefore been called into question because contributory negligence and assumption of the risk do not necessarily reduce negligence damage.

Workers' compensation is a tort reform, not a discretionary employment benefit.<sup>41</sup> No tort reform cases have held that states may abolish tort law, as an employer might be able to simply eliminate an employment benefit.<sup>42</sup> Acknowledging that a person has no vested right in a specific rule of the common law<sup>43</sup>—some magnitude of tort damages—it does not follow that a person has no right to any rule within a particular branch of the common law (de facto elimination of tort damages).

This article contends that tort law is an important branch of the common law,<sup>44</sup> and represents one possible, traditional method of protecting an important historical right to personal security<sup>45</sup> that no state may abridge without substituting something adequate in its stead.<sup>46</sup> The question of adequate benefits for workplace injury is abstract or esoteric only to those not compelled to do physical work. The question is, in other words, of the utmost importance to workers, especially those who work in dangerous jobs.<sup>47</sup> A worker's right to personal security is (or would be but for

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<sup>37</sup> THOMAS O. MCGARITY, DOUGLAS A. KYSAR & KAREN SOKOL, *THE TRUTH ABOUT TORTS: AN INSURANCE CRISIS, NOT A LAWSUIT CRISIS*, CENTER FOR PROGRESSIVE REFORM 2–3 (2005).

<sup>38</sup> *But see infra* note 56, observing that the Virginia courts have upheld limitations on aggregate damages, not simply noneconomic damages. Indiana, *see* IND. CODE § 34-18-14-3 (2017) (noting total cap of \$1.25 million), and Nebraska, *see* NEB. REV. STAT. § 44-2825 (noting total cap of \$2.25 million), cap total damages in medical malpractice cases. These totals have been inflation-adjusted periodically. Colorado also caps total medical malpractice damages at one million dollars, but courts may exceed the cap for “good cause shown.” COLO. REV. STAT. § 13-64-302 (2003).

<sup>39</sup> *See infra* note 65 and accompanying text.

<sup>40</sup> *See infra* note 63 and accompanying text.

<sup>41</sup> The distinction probably explains why workers' compensation is carved out from employee benefit regulation under the Employee Retirement and Income Security Act of 1974 (ERISA). 29 U.S.C. § 1003(b)(3).

<sup>42</sup> *See McGann v. H & H Music Co.*, 946 F.2d 401, 406–08 (5th Cir. 1991) (affirming argument that “an employer has an absolute right” under ERISA to terminate at-will employee welfare benefit plan absent contractual language to the contrary).

<sup>43</sup> *Munn v. Illinois*, 94 U.S. 113, 134 (1876).

<sup>44</sup> *See infra* Part III.

<sup>45</sup> *Washington v. Glucksberg*, 521 U.S. 702, 712–14 (1997) (“Sir William Blackstone, whose Commentaries on the Laws of England not only provided a definitive summary of the common law but was also a primary legal authority for 18th- and 19th-century American lawyers,” discussed personal security first in the Commentaries as one of the absolute rights in English law). *See infra* Part IV.

<sup>46</sup> *See id.* at 720–21 (“[T]he Due Process Clause specially protects those fundamental rights and liberties which are, objectively, ‘deeply rooted in this Nation’s history and tradition.’”) (citation omitted). *See infra* Part IV.

<sup>47</sup> Although the workplace has become steadily safer since 1972, 2018 statistics revealed 2.8 cases of workplace injury for every 100 full time equivalent workers and 5,250 workplace fatalities. Jeff Brown, *Nearly 50 Years of*

workers' compensation) protected by tort law in two ways. First, tort protects people from injury by deterring unreasonably risky conduct.<sup>48</sup> Second, tort compensates people who have been injured.<sup>49</sup> Other methods of assuring personal security in the context of physical injury may exist, and workers' compensation is one example. But however accomplished, a person's interest in personal security and bodily integrity deserves adequate constitutional protection through provision of baseline legal remedies for wrongfully caused harm and of a state forum to pursue those remedies.<sup>50</sup>

This article proceeds in four parts, the first of which is this introduction. Part II of the article explores contentions that workers' compensation has become inadequate and attempts to explain the nature of those critiques. Part III explores tort law to address what is essential in assessing if workers' compensation is an adequate substitute for tort law. Workers' compensation compensates, but not in a manner consistent with the spirit of tort law, for it appears blithely to accept injury as an inevitability without seeming seriously to consider that injury might be deterred. Part IV analyzes whether benefit inadequacy implicates the United States Constitution in a manner subjecting significant incursions on workers' compensation benefits to heightened judicial scrutiny as interference with workers' fundamental rights to personal security. The article concludes that it does. It is obvious that workers' compensation, an administrative agency-based system obviating the need for court suits, provides workers with benefits post-injury faster than court adjudication would provide damages. A benefits model that on closer scrutiny provides workers with effective destitution, however, does not compel allegiance.

## I. WORKERS' COMPENSATION AND BENEFIT INADEQUACY

This Part discusses the adequacy of the workers' compensation quid pro quo from the perspective of critical reformers arguing that workers' compensation does not function as intended, but with the implicit expectation that the system could be fixed and made fairer through a series of relatively minor adjustments. The Part begins with background helpful to contextualizing conventional benefit adequacy arguments and then proceeds to discuss two unusual, relatively contemporary, national conversations on the adequacy of workers' compensation.

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*Occupational Safety and Health Data*, U.S. BUREAU OF LAB. STAT.: BEYOND THE NUMBERS (July 17, 2020), <https://www.bls.gov/opub/btn/volume-9/nearly-50-years-of-occupational-safety-and-health-data.htm> [<https://perma.cc/Z6F2-QZ3E>].

<sup>48</sup> David. G. Owen, *Deterrence and Desert in Tort: A Comment*, 73 CAL. L. REV. 665, 669 (1985) (discussing deterrence function in tort law).

<sup>49</sup> Stephen D. Sugarman, *Doing Away with Tort Law*, 73 CAL. L. REV. 555, 642 (1985) (discussing compensatory function of tort law and theorizing alternative approaches).

<sup>50</sup> No one seriously questions the existence of a Fourteenth Amendment substantive due process right protecting incursions of bodily integrity by the state in individual cases. See Stephanie Weiler, Comment, *Bodily Integrity: A Substantive Due Process Right to Be Free from Rape by Public Officials*, 34 CAL. W. L. REV. 591, 597-601 (1998).



## A. Background

Advocates for injured workers often contend that workers' compensation benefits have become abysmally low.<sup>51</sup> One of the more obvious jumping-off points for a discussion of workers' compensation adequacy is the magnitude of benefits. The original workers' compensation statutes provided totally disabled employees a maximum of about fifty-percent of their pre-injury average wages as an indemnity benefit, no ongoing medical benefits, and a death benefit payable to eligible dependent survivors of employees killed by work.<sup>52</sup> Given these modest benefits, workers' compensation, from its inception, resembled an "anti-destitution" rather than a "make-whole" system.<sup>53</sup> As Richard Epstein has explained, low benefits are by design and have been from the inception of workers' compensation.

[T]o concentrate on that point [of low "damages"] is to miss the central role [of the workers' compensation system]. First, low damages help keep down the overall costs of the plan, which will induce employers to continue to hire labor. Second, low benefits help prevent fraud against the plan, as there is less to gain by pretending that an injury, or its consequences, is work-related. Third, the low awards create additional incentives upon the worker for self-protection and therefore act as an implicit substitute for assumption of risk and contributory negligence.<sup>54</sup>

One major problem with economic justifications for low benefits is that they supply no benefit floor. Similar efficiency arguments have been made in favor of low tort damages: overall costs must be held down, the argument goes, so as not to disincentivize productive activity, and generous damages may provoke fraud and lead to underinvestment by plaintiffs in their own safety.<sup>55</sup> Everyone understands that such arguments must have limits; stretched to their logical extremes (no damages would be even more helpful for defendants than low damages), society might simply eliminate all remedies for personal injury.<sup>56</sup> A critical threshold issue in workers'

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<sup>51</sup> See *infra* Part II.B.

<sup>52</sup> See *infra* Part II for a discussion on the types of workers' compensation benefits. The modern figure tends to be closer to two-thirds of the pre-injury wage, but the figure varies significantly across states. The death benefit in the original statutes took different forms, but typically paid three to four times the deceased employees annual wage at the time of injury or half the employee's average weekly wage. The expenditures were typically capped and therefore modest.

<sup>53</sup> Scott Hershovitz, *Corrective Justice for Civil Recourse Theorists*, 39 FLA. ST. U. L. REV. 107, 118 (2011) (discussing historical background of the idea of make-whole relief and arguing that the idea is more recent than commonly imagined).

<sup>54</sup> Epstein, *supra* note 24, at 800–01.

<sup>55</sup> See, e.g., A. Mitchell Polinsky & Yeon-Koo Che, *Decoupling liability: optimal incentives for care and litigation*, 22 RAND J. ECON. 562, 563 (1991) (discussing party incentives in litigation and proposing in part that plaintiffs be paid limited amounts to disincentivize litigation).

<sup>56</sup> Tort reform movements usually center on reductions of noneconomic damages. Few would argue for a cap on compensatory economic damages, though Virginia has enacted such a cap, and its Supreme Court found the cap constitutional. *Pullman v. Coastal Emergency Servs. of Richmond*, 509 S.E.2d 307, 310 (Va. 1999) (holding \$2,000,000 cap on total damages—whatever the level of economic damages—constitutional). But even that opinion has implicit limits. The legislative supremacy mood of the *Pullman* court would surely not hold legislative elimination of all tort damages in Virginia constitutional. Similarly, espousal of no-fault traffic accident and products liability schemes rarely advocate for elimination of economic damages. Their target has usually been "pain and

compensation analysis is therefore whether one acknowledges the existence of some benefits floor. In thinking about a floor, a starting point is to reject the idea—repeated by Professor Epstein—that workers’ compensation must incorporate reduced benefits derivatively through assumption of the risk principles.<sup>57</sup> That “priced in” argument has now been undercut by widespread adoption of comparative fault regimes during the 1960s and 1970s, after the Grand Bargain was struck.<sup>58</sup>

Further explanation of this critical point is warranted. A negligence claim exists when a defendant breaches a duty of reasonable care to a plaintiff, and the breach causes harm to the plaintiff.<sup>59</sup> Sometimes a plaintiff’s own negligence contributes, at least in part, to her injuries. This is known as “contributory negligence.”<sup>60</sup> A plaintiff may also knowingly or voluntarily encounter a risk created by a defendant. This is known as “assumption of the risk.”<sup>61</sup> These types of affirmative defenses once operated as absolute bars to injured workers’ negligence suits; even if a defendant-employer negligently harmed a plaintiff-employee, the employee was often completely cut off from any remedy.<sup>62</sup> “Comparative fault” now applies in all but five United States jurisdictions.<sup>63</sup> Assuming causation, plaintiffs in comparative fault jurisdictions may usually recover damages whenever they are less than fifty percent at fault for an injury caused in part by a defendant’s negligence.<sup>64</sup>

This means that defendants would face much more liability in the current negligence regime than they would have faced under early twentieth century negligence law. If the “unholy trinity” of negligence affirmative defenses<sup>65</sup> was a basis for the original workers’ compensation bargain,<sup>66</sup> the bargain’s underpinnings have been undermined, and injured workers’ advocates would argue that the bargain should be recalibrated. To take a simple example, assume employee tort claim A occurred at T1 (time of the original bargain c. 1911). Assume the damages from that injury were calculated at one million dollars (in 2022 figures), and the employee was deemed one percent tortiously responsible for the underlying injuries; the employer was deemed ninety-nine percent responsible. The value of claim A at T1 is zero. Suppose now the same underlying facts in claim B at T2 (present time). The value

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suffering” damages. Thus, the limits of economic compensatory tort floor seem undertheorized. It is a major contention of this article that the absence of such a floor necessarily generates Federal constitutional difficulty.

<sup>57</sup> Epstein, *supra* note 24, at 801 (discussing incentives for both employers and employees to “take care”).

<sup>58</sup> DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, *DOBBS L. OF TORTS* § 220 (2d ed.) (explaining the emergence of the comparative fault regime which replaces all or nothing determinations with a system of damages proportional to fault).

<sup>59</sup> RESTATEMENT (THIRD) OF TORTS: PHYSICAL & EMOTIONAL HARM § 3 (AM. L. INST. 2010).

<sup>60</sup> See DOBBS, *supra* note 58, at § 218.

<sup>61</sup> *Id.* at § 235.

<sup>62</sup> See *infra* note 65 and accompanying text.

<sup>63</sup> Alabama, the District of Columbia, Maryland, North Carolina, and Virginia are the exceptions. DOBBS, *supra* note 58, § 220. Sydney Goldstein, *Comparative and Contributory Laws by State*, LAWINFO (Nov. 30, 2020), <https://www.lawinfo.com/resources/personal-injury/comparative-and-contributory-negligence-laws-by-state.html> [<https://perma.cc/C9SK-AZJ7>].

<sup>64</sup> DOBBS, *supra* note 58, § 220.

<sup>65</sup> The defenses were contributory negligence, assumption of the risk, and the fellow-servant rule (the employer escaped negligence by claiming the co-worker of the injured employee was in essence a superseding cause). See Joseph H. King, Jr., *The Exclusiveness of an Employee’s Workers’ Compensation Remedy Against His Employer*, 55 TENN. L. REV. 405, 409 n.15 (1988) (discussing the term “unholy trinity” and the development).

<sup>66</sup> See FISHBACK & KANTOR, *supra* note 21, at 30.

of claim B is \$999,000 (the plaintiff is not cut off and damages are reduced by only one percent). The bargain may not look as good to workers now as it once did (if it ever really did in the first place).<sup>67</sup> This, then, is one preliminary argument that workers' compensation benefits are too low in the aggregate and unfair.

Leaving to one side this argument that low benefits are, generally, structurally undervalued as part of the original quid pro quo—because theoretical negligence recoveries have improved so dramatically in the ensuing decades from the perspective of plaintiffs—isolated structural aspects of the exchange are underappreciated as additional features of undervaluation. Overall, it is unclear how benefits relate to tort damages. Few can explain, for example, where the 1910s benefit ceiling of fifty percent of pre-injury average wages originated—a figure that tends to run closer to sixty-six and two-thirds percent under modern statutes.<sup>68</sup> A common explanation is that any larger benefit would produce moral hazard, with employees choosing benefits over work.<sup>69</sup> This argument has some appeal (except perhaps to workers) if the question concerns returning to work after injury. There would possibly be some worker preference for inactivity over activity, though inactivity due to workplace injury is hardly pleasurable during the healing period.<sup>70</sup> Although it is true that the one-third shortfall tends to be offset by tax policy—tort damages are typically taxed while workers' compensation benefits are not—that is a fortuity, not a right.

Any suggestion that, because of moral hazard, employees would injure or even kill themselves to obtain higher workers' compensation benefits is suspect, to put it mildly. The thought, moreover, that employees have clear ideas about workers' compensation benefits or specific work risks is farfetched.<sup>71</sup> The error takes on near-maliciousness when one considers that workers' compensation was implemented during an era when many workers (especially those working on railroads) suffered grievous injury and very high rates of workplace death.<sup>72</sup> No serious contemporary observer in the early 20<sup>th</sup> century asserted that paying generous workers' compensation benefits might result in employees causing their own deaths. Arguments have of course been made that payment of higher benefits leads to employees engaging in riskier conduct, which in turn leads to death.<sup>73</sup> Much doubt

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<sup>67</sup> Florida claimants have gained some traction with this argument in recent years, though Florida's state constitution is uniquely protective of common law rights and their substitutes. *See* Order on Amended Motion for Summary Final Judgment at 16, *Fla. Workers' Advoc. v. State*, No. 11-13661 CA 25 (Fla. Miami-Dade Cnty. Ct. Aug. 13, 2014) (finding Florida workers' compensation no longer provided an adequate quid pro quo because of erosion of benefits and alteration of employer affirmative defenses), *rev'd on other grounds*; *State v. Fla. Workers' Advoc.*, 167 So. 3d 500, 506 (Fla. Dist. Ct. App. 2015) (finding the case moot and the "intervenor/appellees" without standing). On questioning whether the "bargain" model described what happened, *see* WITT, *supra* note 19, at 128–29 (observing that bargain theory cannot explain why New York statute kicking off compensation movement was elective); Martha T. McCluskey, *The Illusion of Efficiency in Workers' Compensation Reform*, 50 RUTGERS L. REV. 657, 675 (1998) (noting that "many labor groups strongly opposed adoption of workers' compensation systems").

<sup>68</sup> MURPHY, *supra* note 36, at 6.

<sup>69</sup> *See supra* note 54 and accompanying text.

<sup>70</sup> Leslie I. Boden & Monica Galizzi, Comment, *Blinded by Moral Hazard*, 69 RUTGERS U. L. REV. 1213, 1216–17 (2017).

<sup>71</sup> *Id.* at 1217.

<sup>72</sup> WITT, *supra* note 19, at 3.

<sup>73</sup> Alan B. Krueger, *Incentive Effects of Workers' Compensation Insurance*, 41 J. PUB. ECON. 73, 82–84 (1990).

exists that such a claim could be supported empirically, and, after a century of workers' compensation, scant evidence supporting the proposition exists.<sup>74</sup> It might also be contradicted summarily and effectively by the testimony of flesh and blood workers routinely toiling in dangerous occupations, if anyone thought to ask them.<sup>75</sup> Another argument, easier to understand, is that once injured workers begin collecting workers' compensation benefits, they may not wish to return to dirty, difficult, or dangerous jobs. If benefits equal or exceed pre-injury wages, it seems plausible that workers might delay returning to work. In the world of tort, of course, a wrongdoing tortfeasor would be required to pay damages in advance, at the time of settlement or adjudication, despite its suspicions of a plaintiff's future work motivation, or lack thereof. Accepting the shirking argument on its own terms, however, the fifty-percent damages ceiling was never supported by empirical evidence rationally connecting the magnitude of the discount to increased claim filing or decreased work effort. The very big number seems pulled out of the air.

Another original diminishing structural feature of workers' compensation concerned arbitrary suspensions of benefits at certain monetary ceilings. Early workers' compensation statutes capped the lifetime aggregate benefits of injured workers in addition to discounting fifty percent from pre-injury wages in the manner just discussed.<sup>76</sup> The original British statute capped aggregate weekly compensation, but paid benefits, whether total or partial, "during the incapacity."<sup>77</sup> The New York statute upheld by the U.S. Supreme Court in *White*,<sup>78</sup> contained the same weekly cap,<sup>79</sup> as did other early American statutes. But American statutes also tended to contain overall durational limits for receipt of benefits,<sup>80</sup> beyond which the benefits were simply cut off.<sup>81</sup> The weekly cap moreover penalized higher wage earners (as it continues to do), a practice presumably justified by financial priorities but divorced from traditional tort compensation. At the present time, workers' compensation indemnity benefits in the United States are generally capped near a state's average

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<sup>74</sup> Micro-responses of employees to small adjustments in compensation are generally speculative. A representative example of such an exercise is found in an article which presents a series of thought experiments followed by a single case example which is claimed to provide "evidence in favor of the view that higher benefits *cause* more workers' compensation claims, rather than vice versa." *Id.* The evidence consisted of a group of maintenance workers whose workers' compensation claims-filing diminished when their maximum benefits were reduced from 100% of their regular wages to 70%. *Id.* The author acknowledged that this sole evidence in support of a broad proposition generated through thought experiments could have had other causes. *Id.* at 84.

<sup>75</sup> Professor Epstein does relent a bit by suggesting that low benefits might make work safer because workers appreciating both the danger of work and the paltriness of benefits might be cautious. See Epstein, *supra* note 54 and accompanying text. This makes sense only if the work can be done more safely, or if workers caused the unsafe conditions, which is at least subject to doubt.

<sup>76</sup> Representative in this regard was Wisconsin. Although the statute compensated the employee, the "aggregate disability period" could not exceed four times the average annual earnings of the employee nor could the employee be compensated "beyond fifteen years from the date of the accident." 1911 Wis. Sess. Laws 46-47.

<sup>77</sup> Workmen's Compensation Act 1897, 60 & 61 Vict., Ch. 37, § 1, sched. 1(b).

<sup>78</sup> N.Y. Cen. R.R. Co. v. White, 243 U.S. 188, 209 (1917).

<sup>79</sup> Fifteen dollars per week in 1914 dollars. *Id.* at 192 (citing N.Y. WORKERS' COMP. LAW § 15.5 (1914)).

<sup>80</sup> As of 1917, twelve states paid the permanently disabled employee benefits for life but for the most part states made four hundred or five hundred weeks of payments and then terminated benefits. BUREAU OF LAB. STAT., U.S. DEP'T OF LAB., NO. 203, 91-92, WORKMEN'S COMPENSATION LAWS OF THE UNITED STATES AND FOREIGN COUNTRIES (1917).

<sup>81</sup> *Id.*

weekly wage; lost wages that would otherwise produce a benefit, but exceed the wage cap, are not compensated.<sup>82</sup> Make whole negligence damages are not similarly capped, so these reductions represent a departure from traditional pecuniary compensatory damage principles.<sup>83</sup>

The structure of workers' compensation has, accordingly, from its inception provided workers with a portion (of a portion) of pecuniary-only compensatory damages, and has left completely uncompensated pain and suffering.<sup>84</sup> This forgiving benefits scheme ignores whether an employer inflicted a "wrong" upon a worker, and the structure of the Grand Bargain suggests very limited concern with deterrence or any policy objective underscoring the right of a worker to be free from wrongful harm in the first place. The progenitors must have assumed either that all injuries were accidental, or that negligent defendants would invariably escape liability: facts of life they must have believed compelled employees to "take or leave" inferior workers' compensation benefits.

Refusing to see any worker injury as resulting from a wrong<sup>85</sup> simultaneously legitimized low compensatory benefits and frustrated recognition of non-pecuniary employee harms like pain and suffering.<sup>86</sup> Workers' compensation justifies itself in this regard through appeal to its efficiency as compared to negligence law alternatives.<sup>87</sup> As Martha McCluskey has shown, even on its own terms workers' compensation has often been only illusorily efficient,<sup>88</sup> but there is no doubt that considerations of efficiency have dominated workers' compensation policy

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<sup>82</sup> 8 LEX K. LARSON, ARTHUR LARSON & THOMAS A. ROBINSON, *LARSON'S WORKERS' COMPENSATION LAW* § 93.04 (2022).

<sup>83</sup> RESTATEMENT (SECOND) OF TORTS § 924 cmt. c (AM. L. INST. 2022).

<sup>84</sup> Death benefits to survivors are based on the *employee's* pre-injury wages, not on actual losses sustained by survivors of the employee. Discounted "damages" based on the employee's wages might be consistent with the scheme in a survival action. But in a wrongful death action, the discount (to the extent it is justifiable) should be applied to the larger measure of damages available to survivors in a wrongful death action, which under black letter law includes the survivors' suffering and loss. See 8 LARSON, *supra* note 82.

<sup>85</sup> Holdren chronicles this dismissiveness, very effectively terming the process—the "tyranny of the table," a hyper-focus on so-called "objective criteria" of disability in a way that culminated in an almost talismanic commodification of injury. NATE HOLDREN, *INJURY IMPOVERISHED: WORKPLACE ACCIDENTS, CAPITALISM, AND LAW IN THE PROGRESSIVE ERA* 5 (2020).

<sup>86</sup> *McGranahan v. McGough*, 820 P.2d 403, 409 (Kan. 1991) ("Historically, workers compensation does not compensate directly an employee for pain and suffering."). The same phenomenon is encountered in scholarship discussing compensation schemes such as those for no-fault automobile awards. In Leon Green's influential book on the topic, written in the late 1950s, however, it was none too subtly acknowledged that juries—people who might know a bit more about pain and suffering than system architects and special masters—must be kept out of the business of determining damages. See LEON GREEN, *TRAFFIC VICTIMS—TORT LAW AND INSURANCE* 87–93, 97 (1958).

<sup>87</sup> See GREEN, *supra* note 86, at 87–93. Pareto-efficiency exists "if and only if there is no alternative state that would make some people better off without making anyone worse off. More precisely, a state of affairs *x* is said to be Pareto-inefficient (or suboptimal) if and only if there is some state of affairs such that no one strictly prefers *x* to *y* and at least one person strictly prefers *y* to *x*." Sean Ingham, *Pareto-optimality*, ENCYC. BRITANNICA (Nov. 28, 2019), <https://www.britannica.com/topic/Pareto-optimality> [<https://perma.cc/3KHR-DGBE>].

<sup>88</sup> Martha T. McCluskey, *The Illusion of Efficiency in Workers' Compensation "Reform"*, 50 RUTGERS L. REV. 657, 657–58 (1998) (arguing that "rhetoric about restoring an 'efficient' balance between workers and employers through workers' compensation reforms instead masks the fact that those reforms serve to redistribute resources away from workers toward employers and insurers").

justifications.<sup>89</sup> The argument has been that, even if a perfect solution might be to more fully remedy a wrong, pursuit of that goal should not become the enemy of the good of achieving an efficient adequate remedy.<sup>90</sup>

Even those accepting the efficiency of workers' compensation, however, have a difficult time coming to a consensus on the meaning of workers' compensation benefit adequacy.<sup>91</sup> Workers' compensation benefits are probably not adequate by contemporary standards,<sup>92</sup> but they are better than those provided under original workers' compensation statutes.<sup>93</sup> Arguments that current statutes quantitatively breach the original quid pro quo are in the main incorrect. The original statutes were much worse than contemporary laws yet were upheld by the United States Supreme Court.<sup>94</sup> The focus on fidelity of current workers' compensation with the original Grand Bargain is the wrong point of emphasis. A more important question is whether workers' compensation protects the personal security of workers by deterring injury and by compensating the workers in a rational, adequate manner. When rare national conversations on workers' compensation have occurred, often during episodic "race[s] to the bottom" of benefit floors,<sup>95</sup> critics and commentators implicitly have raised these questions.

### B. Contemporary Criticisms and National Conversations

The previous subsection questioned threshold aspects of the original workers' compensation benefit model. This subsection discusses workers' compensation as social insurance.<sup>96</sup> Social insurance notes the historical origins of workers' compensation, but seldom critically.<sup>97</sup> Social insurance advocates press for what is fair, but the basis upon which fairness is to be measured is often left unstated. The link of fairness to foregone negligence rights is opaque. Fairness is undertheorized,

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<sup>89</sup> *Id.* at 672 ("By linking workers' compensation to efficiency ideals, the image of the workers' compensation bargain gives workers' compensation its status as model social welfare legislation."); *see also* Epstein, *supra* note 24, at 801.

<sup>90</sup> 8 LARSON, *supra* note 82 at § 1.03 (discussing theory of "compensation principle").

<sup>91</sup> Epstein unabashedly admits, "[i]n exchange for the broad coverage formula, the workman received a level of compensation that, by design, left him *worse off* than if the injury itself had never taken place." Epstein, *supra* note 24, at 800. A major point of this article is that Epstein is right, and the system is wrong as matter of constitutional law, at least with respect to wrongfully injured workers. The state is not constitutionally permitted to facilitate a tortfeasor's inadequate compensation of his victim.

<sup>92</sup> ADEQUACY OF EARNINGS REPLACEMENT IN WORKERS' COMPENSATION PROGRAMS: A REPORT OF THE STUDY PANEL ON BENEFIT ADEQUACY OF THE WORKERS' COMPENSATION STEERING COMMITTEE, NAT'L ACAD. OF SOC. INS. 27 (H. Allan Hunt ed., 2004) (defining adequacy in terms of recouping loss of earnings and achieving a "'socially adequate'" standard of living and finding workers' compensation wanting under either metric).

<sup>93</sup> *See infra* Part II.B.

<sup>94</sup> N.Y. Cent. R.R. Co. v. White, 243 U.S. 188, 192, 209 (1917); *see also* Ward & Gow v. Krinsky, 259 U.S. 503, 516 (1922) (holding that the statute is not repugnant to guaranty of due process under the Fourteenth Amendment); *see also* Arizona Employers' Liability Cases, 250 U.S. 400, 430–31 (1919) (holding that a state can abolish contributory negligence defense regarding employee compensation).

<sup>95</sup> *See* Stephen Franklin, *The War on Workers' Comp*, IN THESE TIMES (June 13, 2016), <https://inthesetimes.com/article/the-war-on-workers-comp> [<https://perma.cc/R88Z-3JB7>].

<sup>96</sup> *See infra* note 110, at 6 (providing a definition of social insurance).

<sup>97</sup> ADEQUACY OF EARNINGS REPLACEMENT IN WORKERS' COMPENSATION PROGRAMS, *supra* note 92, at 25 (eschewing discussion of the "personal injury model" as "beyond the scope of this book").

and there is no attempt to interrogate quantitatively whether workers are better off in workers' compensation than they might have been in tort. In Part III, this article more deeply explores the legitimacy of dollars-for-bodies market exchanges of remedies in a broader consideration of how workers' compensation aligns with negligence. Margaret Radin's analysis of market commodification of tort remedies substantially informs the later discussion.<sup>98</sup> For now, in Part II.B, the legitimacy of dollars-for-bodies comparisons is assumed the measure of adequacy,<sup>99</sup> and the discussion also assumes that one is comparing apples to apples—that an impairment of the body can be monetized. Social insurance simply wants more apples.

Still, some preliminary analysis of negligence damages theory is necessary to inform the discussion. Negligence actions provide successful plaintiffs with compensatory damages for lost wages and medical expenses caused by carelessly inflicted injury to make a plaintiff “whole.”<sup>100</sup> These are known as “economic” damages.<sup>101</sup> Workers' compensation, on the other hand, provides payment for medical treatment necessitated by work-related injuries and cash indemnity benefits for lost earnings because of those injuries.<sup>102</sup> One way of assessing adequacy—in an apples-to-apples framework—is to compare workers' compensation benefits to economic damages in negligence. A threshold conceptual problem is that workers' compensation beneficiaries include both victims of negligence and those of “pure” accident.<sup>103</sup> Benefits might be adequate from the perspective of accident victims (sometimes entitled to nothing in a negligence regime), but inadequate from the perspective of negligence victims (because compensatory damages are limited and no noneconomic damages such as pain and suffering are available).

Another way to assess benefit adequacy might be to ask whether benefits are consistent with social expectations. Assessing adequacy in this manner is difficult because expectations have differed over the decades.<sup>104</sup> Workers' compensation in the United States originally did not pay ongoing medical benefits,<sup>105</sup> for example, a category that now consumes almost half of all workers' compensation benefit expenditures.<sup>106</sup> As social insurance experts note, “benefit adequacy has no meaning

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<sup>98</sup> See *infra* note 313, at 57 and accompanying text.

<sup>99</sup> The constitutional legitimization of the existence of workers' compensation appears to depend upon benefit adequacy. In the seminal *White* case, the U.S. Supreme Court stated, “it perhaps may be doubted whether the State could abolish all rights of action on the one hand, or all defenses on the other, without setting up *something adequate* in their stead. No such question is here presented, and we intimate no opinion upon it.” *N.Y. Cent. R.R. Co. v. White*, 243 U.S. at 201 (emphasis added).

<sup>100</sup> There is near-universal agreement on this point; the controversies emerge in connection with non-economic “pain and suffering” damages. Randall R. Bovbjerg, Frank A. Sloan & James F. Blumstein, *Valuing Life and Limb in Tort: Scheduling “Pain and Suffering,”* 83 NW. U.L. REV. 908, 909–10 (1989) (agreeing with this proposition but further explaining that courts sometimes differ on how to evaluate future economic losses which can in some instances seem speculative).

<sup>101</sup> See *infra* Part II.B.1–3.

<sup>102</sup> 8 LARSON, *supra* note 82, at § 80.03. Sundry additional benefits are available for items such as disfigurement and vocational rehabilitation. The focus here is on the major benefit categories.

<sup>103</sup> *Id.* at § 42.01.

<sup>104</sup> See ADEQUACY OF EARNINGS REPLACEMENT IN WORKERS' COMPENSATION PROGRAMS, *supra* note 92, at 25–28.

<sup>105</sup> See *infra* note 113 and accompanying text. By “ongoing,” I mean payment of medical benefits for as long as a work-related injury continues to necessitate medical treatment.

<sup>106</sup> MURPHY, *supra* note 36, at 19.

independent of the stated goals and the social and political context of a particular benefit program.”<sup>107</sup> In general agreement with the notion that adequacy must be considered contextually, though noting again that workers’ compensation is a “benefit” tied to a tort right, I next consider context by first describing workers’ compensation benefits, and then providing some contours for national workers’ compensation debates held during the last few decades.

#### i. Medical Benefits

Medical benefits under current workers’ compensation statutes are adequate if the point of comparison is the original American workers’ compensation statutes implemented around 1911, for those statutes provided no payment for ongoing medical benefits.<sup>108</sup> At the end of the first decade of the twentieth century, American states chose to implement the British rather than German model of workers’ compensation.<sup>109</sup> German workers’ compensation was part of a larger national system that one might now call “social insurance,” and included in all cases full payment of medical care necessitated by a work-related injury.<sup>110</sup> Its sweeping public-private design was beyond (in terms of government involvement) what many American business interests were willing to accept at the time, though some individual state policy analysts preferred it.<sup>111</sup> The British iteration of workers’ compensation, on the other hand, did not provide benefits for ongoing medical care.<sup>112</sup> Similarly, the earliest American statutes usually paid only for the equivalent of first aid for a maximum of about 90-days post injury.<sup>113</sup> No one in present times would think adequate a workers’ compensation law not providing continuous payment of an injured worker’s reasonable medical expenses.<sup>114</sup> This is clearly one notion of adequacy that has varied over time.

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<sup>107</sup> ADEQUACY OF EARNINGS REPLACEMENT IN WORKERS’ COMPENSATION PROGRAMS, *supra* note 92, at 19.

<sup>108</sup> See HARRY B. BRADBURY, *WORKMEN’S COMPENSATION AND STATE INSURANCE LAW OF THE UNITED STATES, 197–200* (1912).

<sup>109</sup> Some authors argue that the German contribution to American workers’ compensation has been excessively downplayed, see Michael L. Perlin, *The German and British Roots of American Workers’ Compensation Systems: When is an “Intentional Act” “Intentional,”* 15 SETON HALL L. REV. 849, 867 (1985). For my purposes, the key point is that ongoing payment of medical expense was a non-starter for the original legislatures.

<sup>110</sup> “In their purest form, social insurance schemes cover the entire population. One of social insurance’s core principles, universal availability, is simply that all those facing the same risks should be members of the same insurance pool.” THEODORE R. MARMOR, JERRY L. MASHAW & JOHN PAKUTKA, *SOCIAL INSURANCE: AMERICA’S NEGLECTED HERITAGE AND CONTESTED FUTURE* 9 (2014). The authors of this book also treat social insurance as a species of bargain, referring to it as a “quasi contract.” *Id.*; see generally Perlin, *supra* note 109, at 852–60 (discussing the history and evolution of the German workers’ compensation system from 1838 to 1963).

<sup>111</sup> James Weinstein, *Big Business and the Origins of Workmen’s Compensation*, 8 LAB. HIST. 156, 168 (1967).

<sup>112</sup> Workmen’s Compensation Act 1897, 60 & 61 Vict., Ch. 37, § 1, sch. 1.

<sup>113</sup> There is some variation. Some statutes appeared to require the payment of all medical expense preceding the work-related death of the workers. Ohio did not provide a time limit but capped the amount of reimbursable expense at \$200 (roughly \$5400 in 2021 dollars). Most states allowing for payment imposed such a cap and limited the time for reimbursement to periods from two weeks to 90 days. BRADBURY, *supra* note 108, at 197–201.

<sup>114</sup> Three states, however—New Mexico, Oregon, and Washington—require employees to contribute to workers’ compensation, so the employees are also contributing to the costs of their workers’ compensation-related medical treatment. MURPHY, *supra* note 36, at 48–49. See generally 8 LARSON, *supra* note 82, at § 94.



The real puzzle might be why anyone ever thought that workers' compensation not providing full payment of ongoing medical benefits was an adequate quid pro quo for the surrender of negligence rights that formally would have provided damages to pay for medical treatment.<sup>115</sup> While the British Act, unlike the competing German law, failed to pay ongoing medical benefits for work-related injuries, the United Kingdom provided a form of universal health insurance to its workers by 1911,<sup>116</sup> so the omission was not ultimately comparable to that of the American statutes. One gruesome possibility explaining the apparent acceptability of the lack of medical expense coverage in the early American experience may be that anyone with a disability serious enough to warrant extended medical treatment would likely have died, and there is little doubt that a major impetus for the original enactment of workers' compensation in the United States was to compensate the widows and orphans of deceased workers in extrahazardous occupations.<sup>117</sup>

Whether workers' compensation medical benefits are today adequate on their own terms, leaving historical origins to one side is debatable. On the one hand, the design of workers' compensation is to pay for reasonable and necessary medical care made necessary by a work-related injury.<sup>118</sup> Courts have also held that where medical care is required to be provided, the care must be adequate.<sup>119</sup> On the other hand, and in significant tension with rhetoric of broad coverage, in order for medical care to be compensable, an underlying inability to work must have been caused by employment.<sup>120</sup> Causation can be fraught with complexity,<sup>121</sup> especially with respect to occupational disease and cumulative injuries, concerning which states have erected numerous barriers to compensation.<sup>122</sup> Additionally, where it is generally procedurally difficult for workers to file workers' compensation claims, it will be similarly difficult to file claims for workers' compensation medical benefits.<sup>123</sup> When workers' compensation cases are contested, controversies over whether an employee will be provided continued paid access to his or her treating doctor are

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<sup>115</sup> Compare J. Paul Leigh & John A. Robbins, *Occupational Disease and Workers' Compensation: Coverage, Costs, and Consequences*, 82 MILLBANK Q. 689, 690 (2004) (noting that in the early 20th century, injured workers were required to release their employers from liability in return for less than full compensation for medical expenses) with DOBBS, *supra* note 58, at § 479 (2d. ed. 2022) (finding that individuals are entitled to current and future medical expenses "proximately resulting from tortious injury").

<sup>116</sup> See J. H. WATTS, THE LAW RELATING TO NATIONAL INSURANCE 76 (1913) (defining covered individuals as all persons employed).

<sup>117</sup> See generally WITT, *supra* note 19, at 25–27.

<sup>118</sup> 8 LARSON, *supra* note 82, at § 94.

<sup>119</sup> *Id.* § 94.02[4][e].

<sup>120</sup> 1 LEX K. LARSON, LARSON'S WORKERS' COMPENSATION § 3 Introduction (Matthew Bender, ed.) (2022).

<sup>121</sup> *Id.*

<sup>122</sup> Leigh & Robbins, *supra* note 115, at 699–702 (citing research showing that, by some accounts, fewer than ten percent of all valid occupational disease claims are ever paid).

<sup>123</sup> See Emily Spieler & John Burton, *The Lack of Correspondence Between Work-Related Disability and Receipt of Workers' Compensation Benefits*, 55 AM. J. IND. MED. 487, 488 (2012) (explaining that workers are excluded from the system "first, through specific exclusions of categories of workers or employers; second, through failure of workers to file claims; and third, through a range of more procedural and evidentiary rules that create barriers to receiving compensation").

common.<sup>124</sup> Finally, New Mexico, Oregon, and Washington require employees to contribute a portion of the premium for workers' compensation coverage, some of which is provided in the form of medical care.<sup>125</sup>

## ii. Permanent Total Disability Indemnity Benefits (PTD)

Workers' compensation indemnity benefits may be "permanent total," "permanent partial," "temporary total," or "temporary partial."<sup>126</sup> In a typical case, a worker is injured and only temporarily disabled.<sup>127</sup> When the worker has healed completely, any residual disability is compensable if the underlying injury was caused by work.<sup>128</sup> In tort, of course, if a person is so significantly injured by another person's negligence that he or she could never work again, the measure of damages would certainly include all lost wages, and the calculation would include actual lost wages at the time of adjudication or settlement, and projected lost wages through the time the plaintiff could be expected to retire from the work force.<sup>129</sup> Consistent with this principle, most states award benefits to totally disabled employees for life or for the duration of the disability.<sup>130</sup> As already discussed, however, some states, from early on in workers' compensation history, imposed a lifetime cap on benefits that could be earned with respect to an injury.<sup>131</sup> Even in present times, some states retain statutory discretion to suspend permanent total disability benefits after they have been awarded—even if disability is ongoing.<sup>132</sup> From the perspective of injured workers, this seems like a negligent defendant being allowed to reopen an award of tort damages years after being awarded because, the defendant contends, the plaintiff now allegedly possesses greater earning capacity than had originally been anticipated. Some states do not allow for even the possibility of an injured worker's remaining entitled to permanent total disability benefits until retirement (unless the injury was suffered very late in the worker's career); benefits are *initially* awarded

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<sup>124</sup> 8 LARSON, *supra* note 82, at § 94.02[2] (noting the ongoing dispute in this area between employer/insurance carrier and employees: employees want free choice of doctors while employers want "continuous control of the nature and quality of medical services from the moment of injury.").

<sup>125</sup> MURPHY, *supra* note 36 at 48–49.

<sup>126</sup> *Id.* at 6–7.

<sup>127</sup> *Id.* at 37.

<sup>128</sup> *Id.* at 8 (noting "[t]he funds encourage employers to hire injured workers who want to return to work with residual impairments, because the current employer is responsible only for workers' compensation benefits associated with a subsequent illness or injury"). Employers paying benefits temporarily are not necessarily estopped from later denying benefits when the more expensive issue of permanency is at hand. *See e.g.*, MASS. GEN. LAWS ANN. ch. 152, § 8(1). (allowing initial 180 day payment without prejudice period).

<sup>129</sup> DOBBS, *supra* note 58, at § 479, n.19.5–25 and accompanying text.

<sup>130</sup> As this article was being prepared, the author counted twenty-nine states that unambiguously provided totally disabled employees benefits for life or for the duration of their disability. *State Laws for Workers' Compensation*, INSUREON, <https://www.insureon.com/small-business-insurance/workers-compensation/state-laws> [<https://perma.cc/KV5W-NGXG>].

<sup>131</sup> *See* UNITED STATES BUREAU OF LAB. STAT., *supra* note 80.

<sup>132</sup> 13 LEX K. LARSON, LARSON'S WORKERS' COMPENSATION § 131 (Matthew Bender, ed.) (2022) (discussing reopening of awards "for modification to meet changes in claimant's condition, such as increase, decrease or termination of disability").

for less than the duration of the disability.<sup>133</sup> Wyoming provides an example of an American state that both limits the amount of time an injured worker can collect permanent total disability benefits, and defines total disability very narrowly so that few workers would qualify for the benefit.<sup>134</sup> Some states presume permanent total disability if an employee has lost the use of specified members, or combinations of members, of the body.<sup>135</sup> In addition to weekly benefit caps, time limits on receipt of benefits, despite ongoing disability, strike many critics as harsh.<sup>136</sup> Nevertheless, permanent total disability benefits are nationally consistent, even if they are capped and do not intelligibly correspond to negligence damages.<sup>137</sup>

One caveat to the general consistency involves the “odd lot doctrine,” a workers’ compensation rule allowing partially disabled employees to collect total disability benefits if they prove they are unable to work because of physical limitations imposed by their work-related injuries.<sup>138</sup> Entitlement to total benefits is usually proved by placing on the worker the burden of engaging in a “work search” while keeping detailed written records of the search.<sup>139</sup> At first blush, this may seem strange to outside observers: a worker who cannot obtain work within work-injury-caused limitations appears totally disabled. The odd-lot doctrine is a form of equitable, but confused, joint causation. Odd lot claimants receive contingent total disability benefits on the theory that both a work injury and the dynamics of a local employment market have caused loss of employment.<sup>140</sup> Awarding workers what are, really, contingent benefits allows employers or their insurance carriers easier later review of cases to diminish benefits when an employee has allegedly regained work capacity.<sup>141</sup> Causation is “confused” because the question of the extent to which the work injury is contributing to work incapacity pushed out into the hazy future.<sup>142</sup> In practice, the cumbersome justification doctrine necessarily introduces precarity into workers’ receipt of benefits. Perhaps fair enough if the employee was in fact only

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<sup>133</sup> See e.g., WYO. STAT. ANN. § 27-14-406 (2022) (allowing up to eighty months of payments); S.C. CODE ANN. § 49-9-10(a), (c) (allowing up to five hundred weeks of payments unless the claimant is quadriplegic or has suffered brain damage); IND. CODE ANN. § 22-3-3-8 (2022) (allowing up to five hundred weeks of payments).

<sup>134</sup> The Wyoming statute awards total disability for 80 months and defines it as “the loss of use of the body as a whole or any permanent injury certified [by a physician] which permanently incapacitates the employee from performing work at any gainful occupation for which he is reasonably suited by experience or training.” WYO. STAT. ANN. § 27-14-102(a)(xvi) (2022) (internal citations omitted). Not surprisingly given the definition, few injured workers are found totally disabled. Rather, the practice is to declare the workers provisionally totally disabled subject to a fact finder’s determination they are searching for work in good faith. Then total benefits are awarded, but they are subject to relatively expeditious reduction. MICHAEL C. DUFF, A TREATISE OF WYOMING WORKERS’ COMPENSATION LAW 109–15 (2d. ed. 2021).

<sup>135</sup> 82 AM. JUR. 2D WORKERS’ COMPENSATION § 361, n.10 (2021).

<sup>136</sup> 6 LEX K. LARSON, LARSON’S WORKERS’ COMPENSATION LAW § 80.03 (Matthew Bender, ed.) (2022) (explaining that the Florida Supreme Court found the state’s statutory limitation on duration of benefits to create “a system of redress that no longer functions as a reasonable alternative available to tort litigation”).

<sup>137</sup> Maximum weekly benefits for PTD tend to hover closely to a state’s average weekly wage and in the main are paid for the duration of an injured worker’s disability. *Id.*

<sup>138</sup> 7 LEX K. LARSON, LARSON’S WORKERS’ COMPENSATION LAW § 83.01 (Matthew Bender, ed.) (2022).

<sup>139</sup> *Id.* § 84.01.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

partially incapacitated; perhaps not so fair if the mechanism is employed as a stratagem to interfere with formal determinations of PTD.

### iii. Permanent Partial Disability Indemnity Benefits (PPD)

Possibly nothing contributes more to the perception that workers' compensation benefits are too low than close inspection of the permanent partial disability benefit structure of American workers' compensation statutes. In this section, I discuss that structure. Like the odd lot doctrine discussed in the previous section, models of permanent partial disability benefits have tended to conflate work-injury-related physical impairment with work-injury-related impacts on a worker's ability to earn wages after an injury (earnings impairment).<sup>143</sup>

As mentioned, workers' compensation indemnity benefits are classified as permanent-total, permanent-partial, temporary-total, and temporary-partial.<sup>144</sup> With respect to these benefits, the original British Act paid a totally disabled worker fifty percent of the worker's average weekly wages during the fifty-two weeks preceding the injury.<sup>145</sup> The benefits were capped at one pound (about \$146 in 2021 U.S. dollars)<sup>146</sup> and were paid for the duration of the incapacity. The British Act was substantially revised in 1906, but the 1897 benefit model remained intact.<sup>147</sup> The earliest American workers' compensation statutes<sup>148</sup> followed similar models.<sup>149</sup> Those statutes—the dates of their enactment are in parentheses—included Wisconsin (1911),<sup>150</sup> Ohio (1911),<sup>151</sup> Kansas (1911),<sup>152</sup> California (1911),<sup>153</sup> Illinois (1911),<sup>154</sup>

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<sup>143</sup> See generally 6 LARSON, *supra* note 136, at §§ 80.04–80.05. Statutes use the terms “incapacity” and “disability” interchangeably. In either case, the terms refer to an inability to work. “Permanent impairment,” on the other hand usually means the degree of physical dysfunction of the physical body without regard of the impact of the injury on a worker's ability to earn.

<sup>144</sup> See MURPHY, *supra* note 36, at 6–7.

<sup>145</sup> Workmen's Compensation Act 1897, 60 & 61 Vict. c. 37, § (1)(b), sch. 1.

<sup>146</sup> Conversions are always tricky business, but I have tried to rough justice with a colleague's “engine.” Eric W. Nye, *Pounds Sterling to Dollars: Historical Conversion of Currency*, <https://www.uwyo.edu/numimage/currency.htm> [<https://perma.cc/Q3HW-GQJB>] (last visited June 26, 2021).

<sup>147</sup> BUREAU OF LAB. STAT., *supra* note 80, at No. 203, 317.

<sup>148</sup> Statutes discussed in this section may be found in BRADBURY, *supra* note 108, at 852–1112. See also 6 LARSON, *supra* note 136, at § 80.05 (discussing competing theories of earning impairment versus physical impairment).

<sup>149</sup> In the footnotes that follow AWW means “average weekly wage;” PTD means “permanently and totally disabled;” PPD means “permanently and partially disabled.” Some states use the terms “disability” and “incapacity” interchangeably. See BRADBURY, *supra* note 108, at 1001 (noting the compensation law for New Hampshire uses these terms interchangeably).

<sup>150</sup> *Id.* at 1091, 1112.

<sup>151</sup> *Id.* at 1021, 1033.

<sup>152</sup> *Id.* at 913, 935.

<sup>153</sup> 65% of average weekly wage (AWW); wage loss; 3 x annual salary; 15 years of benefits maximum. *Id.* at 876–877.

<sup>154</sup> 50% of AWW for eight years followed by 8% of amount that would have been paid in the event of death, Partial = 50% of wage loss. *Id.* at 900–901.

New York (originally 1910, then 1915-16),<sup>155</sup> Massachusetts (1911),<sup>156</sup> Michigan (1912),<sup>157</sup> Nevada (1911),<sup>158</sup> New Hampshire (1911),<sup>159</sup> and New Jersey (1911).<sup>160</sup> Unlike the original British statutes, some of the American laws limited the duration of benefit payments.<sup>161</sup>

With respect to permanently partially disabled workers, two methods of setting benefit levels were eventually used.<sup>162</sup> One method, utilized in practically every state, was “the payment of an award based on the percentage of wage loss caused by a work injury.”<sup>163</sup> Permanent partial wage loss benefits were nominally paid for the entire disability, but in reality were subject to weekly benefit caps.<sup>164</sup> The second method for paying partial benefits was the adoption of a schedule of injuries, which awarded benefits for fixed periods based upon physical impairment of the worker’s body.<sup>165</sup> Formally, both methods of calculating permanent partial benefits were authorized under most American statutes, but in practice, most states paid a percentage of the injured worker’s pre-injury wage for fixed periods for certain enumerated injuries: a completely physically impaired shoulder might be rated by schedule at the worker’s total disability rate for two-hundred weeks; an off-schedule injury, on the other hand, was compensated as a percentage of wage or “earning capacity” loss during disability.<sup>166</sup> Originally, only major injuries were scheduled—loss of an arm, hand, leg, foot, eye, fingers, toes, and parts of these “members.”<sup>167</sup>

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<sup>155</sup> PTD = 66 and 2/3% of AWW; PPD = 66 and 2/3% x schedule. Otherwise, 66 and 2/3% AWW minus earning capacity. Capped at \$15 per week for PTD and \$20 per week for PPD (unscheduled injuries). See BUREAU OF LAB. STAT., *supra* note 80, at 727–728.

<sup>156</sup> Permanent total incapacity = 50% of AWW maximum \$10 per week; capped at 500 weeks and \$3,000 (2021 dollars = \$82,000). Permanent partial incapacity = 50% of difference between AWW and wages able to earn thereafter; no more than \$10 per week; 300 weeks maximum; permanent impairment in addition to all other compensation. See BRADBURY, *supra* note 108, at 938.

<sup>157</sup> Permanent total incapacity = 50% AWW maximum \$10 (2021 dollars = \$272) per week for 500 weeks but no more than \$4,000 (2021 dollars = \$109,000). Permanent partial incapacity = 50% of difference between AWW and wages able to earn thereafter. \$10 maximum; 300 weeks. No dollar maximum. Scheduled injuries but not clear if they are in addition to or in lieu of standard partial benefit. *Id.* at 961–63.

<sup>158</sup> Total = 60% of AWW; partial = percentage depleted earning capacity bears to the total disability. Maximum of \$3,000. 40% in addition if worker lost both feet or hands, one foot and one hand, both eyes, one eye and one foot or one hand. 15% in addition to 60% if worker lost one foot, one hand or one eye. Combined payments may not exceed wages earned in month of injury. \$3,000 in wages was total (\$81,000 in 2021). *Id.* at 994–95.

<sup>159</sup> *Id.* at 998–1005.

<sup>160</sup> Total = 50% of AWW; permanent partial = 50% of difference between AWW & earning capacity; \$10 per week and 300 weeks maximum. No maximum dollar figure. *Id.* at 1009–11.

<sup>161</sup> *Id.* at 852–1112.

<sup>162</sup> See BUREAU OF LAB. STAT., *supra* note 80, at 92. It appears that only the states of New Jersey and New York originally utilized a partial disability schedule as the exclusive means of establishing levels of permanent partial disability. See also 6 LARSON, *supra* note 136, at § 80.05 (“In summary, by the end of 1911, of the 22 statutes enacted in foreign countries and provinces, and the 10 enacted in the United States, all but two were of the pure wage-loss type, and only one had a ‘schedule.’”). Furthermore, “up to the end of 1911, of the 32 statutes enacted throughout the world, including ten in the United States, only one, New Jersey, had a schedule.” *Id.*

<sup>163</sup> See BUREAU OF LAB. STAT., *supra* note 80, at 92.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> *Id.* at 92–94; 6 LARSON, *supra* note 136, at § 80.05(6).

<sup>167</sup> 6 LARSON, *supra* note 136, at § 80.05(4).

Most states provided schedules only by statute, but in a few states, the schedules were established by administrative agencies or commissions.<sup>168</sup>

It is worth pausing for a moment to consider two important facts. First, permanent partial incapacity claims presently comprise just over a third of workers' compensation claims in the United States and made up, as of 2016, approximately fifty-six percent of workers' compensation indemnity benefit expense; they are consistently, as a category, the most expensive type of claim within the American workers' compensation system due to their frequency.<sup>169</sup> Most states now provide partially disabled employees some form of scheduled benefits for even minor injuries.<sup>170</sup> Permanent total benefits are rarely paid,<sup>171</sup> perhaps because few employees are totally disabled as a result of a generally safer economy, or perhaps because states have made total disability claims very difficult to prove.<sup>172</sup>

Second, much current litigation in workers' compensation concerns the adequacy of permanent partial disability benefits.<sup>173</sup> Many states use a method of calculating permanent partial disability benefits in which the level of an injured worker's physical impairment is calculated with reference to the American Medical Association Guides to the Evaluation of Permanent Impairment;<sup>174</sup> once physical dysfunction has been established (a shoulder, for example, has been thirty-percent impaired with a resulting eight percent impairment to the "whole person"), a

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<sup>168</sup> *Id.*

<sup>169</sup> *Id.*; see MURPHY, *supra* note 36, at 36–37.

<sup>170</sup> "Schedule benefits for permanent partial disability are authorized by the statutes of all American jurisdictions except Florida, Kentucky, and Nevada." 7 LARSON, *supra* note 138, at § 86.01. The majority rule is that if the effects of the loss of a "scheduled member" extends to other parts of the body, the scheduled benefit for the lost member is not exclusive. *Id.* at § 87.02 (quoting *Gilliam v. Woodside Mills*, S.E.2d 872, 874–75 (S.C. Ct. App. 1993), *cert. granted* (June 30, 1994)). See also PETER S. BARTH, COMPENSATING WORKERS FOR PERMANENT PARTIAL DISABILITIES, 65 SOCIAL SECURITY BULLETIN, No. 4 (2003/2004), [https://www.ssa.gov/policy/docs/ssb/v65n4/v65n4p16.html#mt8\(\)](https://www.ssa.gov/policy/docs/ssb/v65n4/v65n4p16.html#mt8) [<https://perma.cc/ZBT8-WBRU>] (discussing the relationship between scheduled and unscheduled members).

<sup>171</sup> "Permanent total disability and fatality claims are relatively rare, accounting for less than one percent of claims involving cash benefits (approximately 0.6 percent in every year from 2003 to 2016)." MURPHY, *supra* note 36, at 37. In some instances, partially disabled employees are paid total benefits under the "odd lot doctrine" when they can demonstrate that despite their partial earning capacity, they have been unable to locate work because of work-injury related limitations. *Id.* at 41.

<sup>172</sup> States have enacted an array of procedures tending to lead to significant under claiming of workers' compensation. See Spieler & Burton, *supra* note 123, at 488.

<sup>173</sup> See, e.g., *Johnson v. U.S. Food Serv.*, 478 P.3d 776 (Kan. 2021) (analyzing constitutional dispute over adequacy of partial benefits calculated under schedule).

<sup>174</sup> Known in shorthand as the "AMA Guides":

As of December 31, 2020, thirty-two states mandated the use of the AMA Guides in determining workers' compensation impairment. Eighteen states utilize their own standard, although in most cases, the AMA Guides are given some deference. Twelve states require the use of the 6th Edition. Ten states require the use of the 5th Edition. Seven states dictate the use of the 4th Edition, while two states still require adherence to the 3rd Edition (as revised).

6 LARSON, *supra* note 136, at § 80.07(2). Use of the Guides has proven controversial because, in a *physical* impairment-based system, the Guides may de facto establish benefits paid to injured workers. Where a state statute compels use of the "current version" of the AMA Guides, employees have contended, and at least one state supreme court has agreed, that the state has delegated lawmaking functions to a private organization. *Protz v. Workers' Comp. Appeal Bd. (Derry Area Sch. Dist.)*, 161 A.3d 827, 841 (Pa. 2017) (finding a "non-delegation doctrine" constitutional violation on this theory).

scheduled benefit may be calculated and awarded.<sup>175</sup> Various issues arise under this model. In *Johnson v. U.S. Food Service*,<sup>176</sup> a dispute erupted over whether Kansas workers' compensation remained an "adequate" injury remedy, within the meaning of the Kansas and U.S. constitutions, under a partial benefit schedule authorizing use of the Sixth Edition of the AMA Guides instead of the Fourth Edition.<sup>177</sup> For the same injury, "[the employee's] award for a 25% impairment would have been \$61,713.70. But under the Sixth Edition of the AMA Guides, Johnson's impairment rating was only 6%, for an award of \$14,810.80."<sup>178</sup> Initially, conflict over whether \$14,810 for a six-percent permanent impairment of a shoulder is adequate seems inevitable in the absence of a definition of adequacy. But it is also clear that AMA Guide impairment awards are not connected to individualized wage loss or earning capacity reduction determinations—a practice fueling intuitions of arbitrariness and inadequacy.<sup>179</sup>

Calculating benefits by schedule seems simple and efficient. The alternative might be, for example, a state agency having to calculate frequently the difference between a worker's average earnings before the injury and what the worker was able to earn after suffering the injury.<sup>180</sup> But efficiency has its limits. The benefit is written on the wind and is not even an apparent proxy for lost earning capacity. It would be as if, following a serious automobile accident, a plaintiff accepted a random amount of money in settlement of a claim before knowing the extent of her injuries. We would perhaps allow her to do so, though we would refer her to counsel. It would be her choice, however. Ultimately, workers' compensation schedules are generally not voluntary.<sup>181</sup>

The New York workers' compensation statute, upheld by the U.S. Supreme Court in *White*,<sup>182</sup> paid a permanent partial benefit for the work-related loss of a leg of sixty-six and two-thirds percent times eighty-eight weeks—in lieu of all other compensation.<sup>183</sup> Rough calculations applying that formula to inflated current wage estimates lead to the following observations: the statewide average weekly wage in New York in 2020 was \$1594.57;<sup>184</sup> two-thirds of that figure is \$1,063.05; that product times eighty-eight weeks is \$93,548. Reasonable minds may perhaps disagree about the adequacy of such a sum for the loss of a worker's leg. Reasonable minds could not disagree, however, that the formula eighty-eight weeks times the pre-injury average weekly wage as an unwavering measure of indemnity is arbitrary, especially where there is no indication that the figure is an average or proxy for any

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<sup>175</sup> 6 LARSON, *supra* note 136, at § 80.07(4).

<sup>176</sup> 427 P.3d at 780.

<sup>177</sup> *Id.* at 1000.

<sup>178</sup> *Id.* at 1001.

<sup>179</sup> All workers' compensation awards in the end can be seen as both a windfall to the victim of a purely accidental injury and a shortfall to a worker who was clearly the victim of an employer's negligence. 6 LARSON, *supra* note 136, at § 80.07(2).

<sup>180</sup> E.H. DOWNEY, WORKMEN'S COMPENSATION 38 (MacMillan Co. 1924).

<sup>181</sup> 7 LARSON, *supra* note 138, at § 87.03.

<sup>182</sup> N.Y. Cent. R.R. Co. v. White, 243 U.S. 188, 203–04 (1917).

<sup>183</sup> N.Y. Worker's Compensation Law § 15(3) (McKinney 2020).

<sup>184</sup> *New York Average Weekly Wage*, N.Y. DEP'T OF LAB., [http://www.wcb.ny.gov/content/main/SubjectNos/sn046\\_1400.jsp](http://www.wcb.ny.gov/content/main/SubjectNos/sn046_1400.jsp) [https://perma.cc/8WZJ-DKZW].

other sums. Although the Social Security Administration once referred to workers' compensation scheduling as a form of "average justice,"<sup>185</sup> it made no attempt to explain how the number of scheduled weeks designated for each impaired body part was "averaged,"<sup>186</sup> and it is doubtful that anyone can.

Neither the nineteenth century European, nor early American statutes, contained partial benefit schedules. The Department of Labor's 1917 international summary of workers' compensation systems revealed twenty-two nations that had preceded the United States in implementing worker's compensation systems; no other nation possessed a partial benefits schedule—all indemnity benefits were based on wage loss or individualized estimates in the reduction of a worker's earning capacity.<sup>187</sup> Arthur Larson, the leading scholar of workers' compensation, speculated that partial benefit schedules probably originated in private insurance policies, and recognized that schedules did not exist prior to the adoption of workers' compensation in the United States.<sup>188</sup> Professor Larson also opined that it was impossible to rationally rate disability once the tie with earning capacity had been severed:

The schedule approach . . . presupposes that there is an abstract and uniform measure of "disability" that is valid and fair for all persons, apart from their activities or occupations. What, for example, does "loss of use" of three fingers mean? Loss of use for what purpose? Threading a needle? Lifting a bale of hay? Administering a karate chop? Holding a pencil? These are all "uses," after all.<sup>189</sup>

Given a lack of individualized determination of disability, or even attempts at averaging such determinations, the schedules are irrational (though they likely save employers and insurers a great deal of money);<sup>190</sup> scheduled permanent partial disability benefits bear no demonstrable relationship to the negligence damages for which they were theoretically exchanged.<sup>191</sup> One cannot say if, in the aggregate, workers receiving scheduled partial disability benefits have realized any specific percentage of the damages they might have received in the former or current negligence regimes.<sup>192</sup> This is an unpalatable "bargain" to impose on future generations of workers.<sup>193</sup>

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<sup>185</sup> See BARTH, *supra* note 170 and accompanying text.

<sup>186</sup> *Id.*

<sup>187</sup> See BUREAU OF LAB. STAT., *supra* note 80, at 306–50; see also *supra* note 162 and accompanying text. For example, simply subtract post-injury wage from pre-injury wage and take half of the difference.

<sup>188</sup> Arthur Larson, *The Wage-Loss Principle in Workers' Compensation*, 6 WM. MITCHELL L. REV. 501, 506–07 (1980). Professor Larson was the author of the *Larson's treatise* and was for many years the leading scholar of workers' compensation.

<sup>189</sup> *Id.* at 516; 7 LARSON, *supra* note 138, at § 86.01.

<sup>190</sup> Compare for example a thirty-year old with a 50% disability who might be entitled to one-half of her average weekly wage for thirty-five years to the same employee under Wyoming's workers' compensation system who would be entitled to a total of three and a half years of indemnity benefits. MICHAEL C. DUFF, A TREATISE OF WYOMING WORKERS' COMPENSATION LAW 119–24 (6th ed. 2021), <https://www.cali.org/books/treatise-wyoming-workers-compensation-law> [https://perma.cc/Z5QX-HP2R].

<sup>191</sup> 7 LARSON, *supra* note 138, at § 86.02.

<sup>192</sup> RESTATEMENT (SECOND) OF TORTS § 405 (AM. L. INST. 1975).

<sup>193</sup> On the intergenerational complexities of social compacts, see DAVID HUME, *Of the Original Contract*, ESSAYS, MORAL, POLITICAL AND LITERARY (1748); RESTATEMENT (SECOND) OF TORTS § 405 (Am. L. Inst. 1975).



Scheduled benefits might, in theory, provide some advantage to injured workers because present losses in wages or reductions in earning capacity may occasionally understate impacts on earnings due to the general tendency of wages to rise; a benefit calculation made during a snapshot of disability loses real value over time; some of the problem may be rectified with cost-of-living adjustments, but not all of it.<sup>194</sup> Yet this consideration presupposes some original attempt to connect scheduled benefits to wage losses, or reductions in earning capacity, or to average such losses, which seems never to have occurred. The original schedules were blind, and subsequent developments have not changed the situation one whit.<sup>195</sup> Deflationary pressures are not, therefore, sufficient justification for small, fixed, irrational awards. Professor Larson predicted that litigation over scheduled benefits was virtually assured, pointing out that in Florida, as of 1979, “it was estimated that quarrelling about disability evaluations consumed seventy-nine percent of administrative and legal time.”<sup>196</sup> Somewhat ironically, Professor Larson, a strong proponent of benefits based exclusively on wage loss, believed that scheduled benefits might tend to overcompensate some minimally injured workers at the expense of the most seriously injured workers, since all workers satisfying the schedule are paid benefits whether their earnings are reduced post-injury or not.<sup>197</sup> As the article will discuss in the next section, this concern did not animate the 1972 National Commission on Workmen’s Compensation’s criticisms of the schedule model; the Commission seemed committed to the idea that scheduled partial benefits were broadly less than compensatory.<sup>198</sup>

Arye Miller may have been closer to the mark when he argued that workers’ compensation scheduled benefits are a form of (desirable, from his perspective) pain and suffering damages.<sup>199</sup> That conclusion seems incongruent, however, because in tort, pain and suffering damages are paid in addition to pecuniary damages—not in lieu of them. New Zealand’s National Accident Compensation Act (about which I will say more below) operates like a national workers’ compensation system applicable in and out of the workplace,<sup>200</sup> and it has replaced negligence law in that country altogether. Although the Act has come under criticism after reforms in 1992, speaking to Miller’s point, it originally paid pain and suffering benefits in addition to workers’ compensation-like pecuniary indemnity benefits.<sup>201</sup> The American system does not seem to agree with Miller’s assertion that scheduled benefits are an echo of pain and suffering damages, though it is difficult to explain why many states will award PPD “impairment” award to employees who have suffered no loss of wages or earning capacity. In any case, the substitution of scheduled benefits for the partially compensatory but individualized pecuniary benefits originally a feature of

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<sup>194</sup> See DOWNEY, *supra* note 180, at 46–47.

<sup>195</sup> 7 LARSON, *supra* note 138, at § 86.01.

<sup>196</sup> Larson, *supra* note 188, at 523.

<sup>197</sup> *Id.* at 522–23.

<sup>198</sup> See *infra* note 238 and accompanying text.

<sup>199</sup> Arye L. Miller, *Should Social Insurance Pay Compensation for Pain and Suffering?*, 31 INT’L & COMPAR. L. Q. 550, 551 (1982).

<sup>200</sup> Rt. Hon. Sir Geoffrey Palmer, *New Zealand’s Accident Compensation Scheme: Twenty Years On*, 44 U. TORONTO L.J. 223, 223 (1994).

<sup>201</sup> *Id.* at 249–50.

early workers' compensation statutes renders apple-to-apple, benefit-to-damages comparisons opaque. Are workers now better off under workers' compensation than they would have been in tort? I do not believe our legal order has the slightest idea, and I very much doubt it.

The nature of permanent partial disability schedules has implicitly come up during contemporary debates over the adequacy of workers' compensation. In 2015, ProPublica and NPR ran a much-discussed series of articles and radio shows on the claimed inadequacy of workers' compensation in the United States; some of the stories featured disabled workers whom the system had mysteriously cast adrift after awarding an unexplained but apparently arbitrary scheduled benefit.<sup>202</sup> A 2016 Federal Department of Labor Report written during the tenure of Barack Obama's labor secretary, Tom Perez, mentioned permanent partial disability benefits as a factor in what the report concluded was a deeply flawed national workers' compensation system.<sup>203</sup>

Perhaps partial benefit schedules would not seem quite so bad if employees had elected to participate in the workers' compensation system utilizing them. In *Texas Workers' Compensation Commission v. Garcia*,<sup>204</sup> claimants challenged as unconstitutional enactment of an amended workers' compensation statute that, among other things, shifted payment of permanent partial disability benefits from an earning capacity to a physical impairment model regulated through use of the AMA Guides (that is, a schedule system).<sup>205</sup> The Texas Supreme Court upheld the statute against these challenges. In Texas, workers' compensation is elective for employers,<sup>206</sup> and although the partially disabled employees of employers electing to participate receive scheduled partial benefits by default,<sup>207</sup> they may opt out of workers' compensation to pursue tort claims.<sup>208</sup> All employees locked into scheduled partial disability benefits should have the same option, even if they may decide not to elect the option. Employees will come to know if scheduled partial benefits have become too low.

#### iv. The 1972 National Commission

By 1970, Congress had concluded that something was seriously amiss with the American workers' compensation system just described.<sup>209</sup> In the legislative findings accompanying the Occupational Safety and Health Act passed that year, Congress

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<sup>202</sup> See *infra* note 222 (discussing multiple anecdotal stories of workers whose benefits were suspended showing that the recipients were not receiving permanent total benefits).

<sup>203</sup> U.S. DEP'T OF LAB., DOES THE WORKERS' COMPENSATION SYSTEM FULFILL ITS OBLIGATION TO INJURED WORKERS 9 (2016).

<sup>204</sup> 893 S.W.2d 504 (Tex. 1995).

<sup>205</sup> *Id.* at 513–515, 519.

<sup>206</sup> Jason Ohana, Note, *Texas Elective Workers' Compensation: A Model of Innovation?*, 2 WM. & MARY BUS. L. REV. 323, 340 (2011).

<sup>207</sup> See *supra* note 183 and accompanying text.

<sup>208</sup> TEX. LAB. CODE ANN. § 406.034 (2011).

<sup>209</sup> *Id.*

directed the convening of a commission to investigate the workers' compensation status quo.<sup>210</sup> According to the directive:

[T]he vast majority of American workers, and their families, are dependent on workmen's compensation for their basic economic security in the event such workers suffer disabling injury or death in the course of their employment; and [] the full protection of American workers from job-related injury or death requires an adequate, prompt, and equitable system of workmen's compensation as well as an effective program of occupational health and safety regulation . . . .

[I]n recent years serious questions have been raised concerning the fairness and adequacy of present workmen's compensation laws in the light of the growth of the economy, the changing nature of the labor force, increases in medical knowledge, changes in the hazards associated with various types of employment, new technology creating new risks to health and safety, and increases in the general level of wages and the cost of living.<sup>211</sup>

Congress instructed the Commission to “undertake a comprehensive study and evaluation of State workmen's compensation laws in order to determine if such laws provide an adequate, prompt, and equitable system of compensation.”<sup>212</sup> The Commission's ensuing report ultimately opined, “[o]ur intensive evaluation of the evidence compels us to conclude that State workmen's compensation laws are in general neither adequate nor equitable.”<sup>213</sup> The Commission defined “adequacy” somewhat circularly: “We use ‘adequate’ to mean sufficient to meet the needs or objectives of the program; thus, we examine whether the resources being devoted to workmen's compensation income benefits are sufficient.”<sup>214</sup> This requires a definition of sufficiency, which the Commission did not provide. The Commission defined “equitable” to mean fair or just; thus, we examine whether workers with similar disabilities resulting from work-related injuries or diseases are treated similarly by different States.”<sup>215</sup>

Implicit in this equitability formulation was that some states were performing better than others, and that underperforming states, accordingly, possessed unfair systems. Lost in the formulation was any clear idea of the meaning of adequacy. The Commission did not, for example, satisfactorily focus on the original connection between workers' compensation and negligence, a body of law calculated to make victims whole.<sup>216</sup> While it did discuss the historical quid pro quo, it did so most forcefully from the employer's side, while curtly dismissing the viability of any

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<sup>210</sup> LEGISLATIVE HISTORY OF THE OCCUPATIONAL SAFETY AND HEALTH ACT OF 1970, 92ND CONG., 2 SUBCOMM. ON LABOR OF THE S. COMM. ON LABOR & PUBLIC WELFARE 1138, at § 27 (Comm. Print 1971); 29 U.S.C. § 676 (1970).

<sup>211</sup> *Id.* at (a)(1)(A)–(B).

<sup>212</sup> THE REPORT OF THE NATIONAL COMMISSION ON STATE WORKMEN'S COMPENSATION LAWS 3–4 (1972).

<sup>213</sup> *Id.* at 24–25.

<sup>214</sup> *Id.* at 15.

<sup>215</sup> *Id.*

<sup>216</sup> See Bovbjerg, *supra* note 100 and accompanying text.

questioning of the constitutional adequacy of the exchange.<sup>217</sup> In fairness, the Commission was responding to the language of the OSH Act's Congressional findings and directives, which were correspondingly vague.<sup>218</sup> After issuance of the report, and after much internal governmental tracking of injury data over decades,<sup>219</sup> no Federal standards or other hard measures applicable to improvement of workers' compensation were ever created—an outcome the Commission had anticipated as a possibility.<sup>220</sup> Despite the impact of workers' incomplete compensation coverage on Federal benefits programs,<sup>221</sup> no Federal governmental agency has attempted to track workers' compensation benefit adequacy, as defined by the National Commission or otherwise, since 2004.<sup>222</sup>

The Commission made nineteen “essential recommendations” for workers' compensation reform, and those recommendations probably fairly reflected a 1970s specialist understanding of the meaning of workers' compensation adequacy.<sup>223</sup> Remarkably, the Commission almost unanimously agreed that the Federal government should intervene in workers' compensation in the absence of substantial state compliance with the recommendations by 1975.<sup>224</sup> The U.S. DOL monitored

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<sup>217</sup> The Commission's discussion of the historical quid pro quo covered the essential elements:

The quid is the principle of liability without fault, which means that many workers qualify for workmen's compensation benefits who could not qualify for damages under negligence suits. The quo is that an employer's liability is limited. The employer's liability is less in some workmen's compensation cases than it would be under negligence suits, where awards can include payments for full economic loss, pain and suffering concurrent with an accident, and the non-financial burdens of permanent impairment.

REPORT OF THE NATIONAL COMMISSION, *supra* note 212, at 38. The report underemphasized that the adequacy of the employee's quo was central to the original constitutional exchange, while repetitively claiming that states should abandon elective statutes because constitutional concerns surrounding the exchange were no longer relevant. *Id.* at 44 (“[T]he elective approach originally was based on contemporary interpretations of the Constitution. These constitutional mandates now are largely irrelevant.”). This begs the question. If compulsory statutes were deemed constitutional because adequate, what made them adequate? *N.Y. Cent. R.R. Co. v. White*, 243 U.S. 188, 203–04 (1917). Furthermore, why should an injured worker be compelled to participate in a system delivering inadequate benefits?

<sup>218</sup> See *supra* note 210 and accompanying text.

<sup>219</sup> See U.S. DEP'T. OF LAB., EMP. STANDARDS ADMIN., OFF. WORKERS' COMPENSATION PROGRAMS, & DIV. STATE WORKERS' COMPENSATION STANDARDS, STATE COMPLIANCE WITH THE 19 ESSENTIAL RECOMMENDATIONS OF THE NATIONAL COMMISSION ON STATE WORKMEN'S COMPENSATION LAWS, 1972–1980, at 155 (1981).

<sup>220</sup> THE REPORT OF THE NATIONAL COMMISSION OF STATE WORKMEN'S COMPENSATION LAWS 25 (1972) (discussing the possibility of and reasons for an “indifferent” public response).

<sup>221</sup> J. Paul Leigh & John A. Robbins, *Occupational Disease and Workers' Compensation: Coverage, Costs, and Consequences*, 82 MILLBANK Q. 689, 710 (2004) (explaining that when workers' compensation does not adequately cover work-related harms, the costs are shifted “onto employees and their families, other non-WC private insurance carriers, Medicare, Medicaid, and other payers”).

<sup>222</sup> See Michael Grabell, & Howard Berkes, *The Demolition of Workers' Comp*, PROPUBLICA (Mar. 4, 2015), <https://www.propublica.org/article/the-demolition-of-workers-compensation> [https://perma.cc/STP8-WKBV].

<sup>223</sup> THE REPORT OF THE NATIONAL COMMISSION ON STATE WORKMEN'S COMPENSATION LAWS 26 (1972). The Commission's report was in turn informed by earlier national conversations on “workmen's” compensation as reflected in various Model Acts of the Council of State Governments and the U.S. Department of Labor's 1955 document titled “Draft Provisions for a Comprehensive Workmen's Compensation Law.”

<sup>224</sup> *Id.* at 26–27. I say almost because some on the Commission preferred federal intervention while others counseled such intervention only as a last-ditch effort if states were intransigent in implementing the proposals. The two labor representatives on the Commission, James R. O'Brien and Michael R. Peevey, thought that Congress

state compliance with the recommendations until 2004, but ceased doing so thereafter.<sup>225</sup> A scathing report on workers' compensation produced in 2016 by the same DOL, during the administration of President Barack Obama, alleged the following:

As the National Commission's legacy faded and medical and lost wage costs increased, there was a shift toward controlling costs by cutting benefits. Restrictions on access to benefits generally, and medical care specifically increased; inflation-adjusted statutory benefit levels began to decline . . . Compliance with the 19 essential recommendations of the National Commission slowed: average compliance rose only from 12.1 in 1980 to 12.8 in 2004, the last time that the Department of Labor analyzed the state laws. A ProPublica analysis of state compliance in 2015 shows that only 7 states now follow at least 15 of the recommendations, and 4 states comply with less than half of them. Although most states had raised and maintained the level of weekly temporary total benefits to conform to the basic National Commission recommendations, other statutory changes represented both overt and more subtle attacks on the availability of benefits for people who were injured at work.<sup>226</sup>

It is telling that the government report adverted to the statistics of a private news organization. The inference flowing from such reliance is that the government no longer is aware of what level of compliance exists with respect to the essential recommendations. This lack of awareness must be viewed in the context of the substantial Federal resources originally devoted to tracking and reporting on compliance with the recommendations in the immediate aftermath of the 1972 report.<sup>227</sup> The Federal silence on workers' compensation adequacy since the 1970s is also telling. Indeed, it is unclear what provoked renewed DOL commentary on the subject in 2016. In the next subsection, I discuss a possible catalyst: Oklahoma's attempt, in 2013, to make workers' compensation elective; and the potential for other states following Oklahoma's lead in a race to the bottom that might rapidly shift injury costs to other Federal benefit systems.<sup>228</sup>

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should take *immediate* action: "We feel a Federal statute setting forth numerous minimum standards each State must meet should be enacted now." *Id.* at 133.

<sup>225</sup> Garbell, *supra* note 222 ("The U.S. Labor Department used to keep track of how states complied with the presidential commission's recommendations, but stopped after budget cuts in 2004.").

<sup>226</sup> U.S. DEP'T OF LAB., *supra* note 8, at 12.

<sup>227</sup> Volumes of detailed statistical material were maintained after the 1972 report, all devoted to compilation of data related to state compliance with the report's recommendations. *See, e.g.*, STATE COMPLIANCE WITH THE 19 ESSENTIAL RECOMMENDATIONS OF THE NATIONAL COMMISSION ON STATE WORKMEN'S COMPENSATION LAWS, 1972-1980, *supra* note 219, at 27-28. The government undertook the compilation in the context of the Commission's suggestion of the potential need for Federal intervention in workers' compensation. To many, this did not seem an idle threat, especially given the intensity of subsequent information gathering.

<sup>228</sup> The Department of Labor explained the methods that can be observed at the state level:

Some state legislatures continue to attempt to reduce workers' compensation costs, and proposals for statutory amendments that restrict workers' benefits or access have become increasingly bold. Notably, there have been legislative efforts to restrict benefits and increase employer control over benefits and claim processing, most dramatically exemplified by the opt-out legislation enacted,

The Commission's report represented an ad hoc declaration on workers' compensation inadequacy, but its conclusions did not arise in a vacuum and were informed by "the recommended standards of several organizations, as compiled and published by the U. S. Department of Labor, and the 'Workmen's Compensation and Rehabilitation Law' of the Council of State Governments [the [1965] Model Act]." <sup>229</sup> While the Commission's recommendations differed in certain respects from those of the other organizations, <sup>230</sup> they emerged from an ongoing national conversation on workers' compensation adequacy. <sup>231</sup> The nineteen recommendations were:

- Coverage by workers' compensation laws should be compulsory with no waivers permitted;
- Employers should not be exempted because of the number of their employees;
- Farmworkers should be covered like other employees;
- Household workers/casual workers should be covered if they are covered by social security;
- Workers' compensation should be mandatory for government employees;
- No exemptions should be allowed for classes of employees like athletes or employees of charities;
- Employees or their successors should be permitted to file claims in the state of injury/death, of employer location, or of hire;
- All states should provide full coverage for work-related diseases;
- Temporary Total Disability <sup>232</sup> should comprise at least 66 2/3% of a worker's gross weekly wage;
- The maximum TTD benefit should be 66 2/3% of the state average weekly wage by July 1, 1973 & 100% of the state average weekly wage by July 1, 1975;
- Permanent Total Disability <sup>233</sup> definitions as used in most states should apply (employees with substantial earning capacity are not PTD);
- PTD should be paid at a rate of at least 66 2/3% of a worker's gross weekly wage;
- PTD should be paid for the duration of a disability or for life without limitation;
- The maximum PTD benefit should be 66 2/3% of the state average weekly wage by July 1, 1973 & 100% by July 1, 1975;

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and recently struck down by the state supreme court, in Oklahoma and considered in Tennessee and South Carolina, among other states.

See U.S. DEP'T OF LAB., *supra* note 8, at 2.

<sup>229</sup> THE REPORT OF THE NATIONAL COMMISSION ON STATE WORKMEN'S COMPENSATION LAWS 44 (1972); see *supra* note 223 at 44 and accompanying text.

<sup>230</sup> See *supra* note 223 and accompanying text.

<sup>231</sup> A foundational document for evolving standards was the Department of Labor's 1955 draft language for a more comprehensive workers' compensation system. *Id.*

<sup>232</sup> [Hereinafter *TTD*].

<sup>233</sup> [Hereinafter *PTD*].

- Death benefits should be paid at a rate of at least 66 2/3% of worker's gross weekly wage;
- Death benefits should be paid at a rate of at least 66 2/3% of the state's average weekly wage by July 1, 1973 & 100% by July 1, 1975;
- Death benefits should be paid to a deceased worker's spouse until remarriage and to the deceased worker's children until 18 (or longer if the child is disabled or attending school);
- Once initiated, there should be no time or monetary limits for receipt of medical care or rehabilitation for work-related impairment; and
- The right to medical and physical rehabilitation for work-related impairment should not expire.<sup>234</sup>

The Commission's report made clear that no consensus had been reached on essential recommendations pertaining to permanent partial disability benefits.<sup>235</sup> This statement does not seem entirely accurate, however. The report recommended the removal of schedules used to calculate permanent partial disability benefits from workers' compensation statutes. This decision seems a concession that use of scheduled benefits did not deliver adequate benefits, an important finding given the predominance of scheduled permanent partial disability benefits in contemporary workers' compensation systems:

Almost every workmen's compensation statute contains a schedule which stipulates the benefits to be paid for the listed impairments. These schedules in some cases may provide a short-cut to the determination of the benefits to be paid, but that is not an adequate justification for their use. Present schedules include only a small proportion of all medically identifiable permanent impairments. Also, some schedules have not been revised for many years, despite considerable progress in the understanding of the relationship between specific injuries and extent of functional impairment.<sup>236</sup>

Although the report went on to say that the AMA Guides represented a more rational basis for determining impairment,<sup>237</sup> it offered no rationale for *any* use of physical impairment-based determinations of permanent partial disability. Seemingly to the contrary, the report soundly rejected calculation of partial benefits based solely on physical impairment:

Some statutes incorporate a schedule of benefits for a specific list of impairments, and the benefits are paid whether or not there is a disability. Moreover, the benefits are the exclusive remedy for workers with these impairments (except, in most States, for the temporary total disability benefits paid during the healing period), *even if the worker's wage loss far exceeds the scheduled benefits* . . . . It could be argued that the main

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<sup>234</sup> STATE COMPLIANCE WITH THE 19 ESSENTIAL RECOMMENDATIONS OF THE NATIONAL COMMISSION ON STATE WORKMEN'S COMPENSATION LAWS, 1972-1980, *supra* note 219, at 155.

<sup>235</sup> THE REPORT OF THE NATIONAL COMMISSION ON STATE WORKMEN'S COMPENSATION LAWS 19-20 (1972).

<sup>236</sup> *Id.* at 69.

<sup>237</sup> *Id.*

purpose of such a schedule is to provide benefits for disability, and that impairment is used as the basis for benefits because impairment and disability are closely related. The validity of this argument is questionable because there is no exact relationship between the degree of impairment and the extent of wage loss.<sup>238</sup>

Read in context, the report recommended substantial elimination of scheduled permanent partial disability benefits, particularly where the benefits were based solely on physical impairment.<sup>239</sup> The report did not discuss state attempts to draw rational relationships between physical impairment-based permanent partial disability benefits and actual wage losses or reductions in earning capacity that had been suffered by workers. Then, as now, no such attempts existed.

v. Attempts to Repeal State Workers' Compensation Benefits:  
The Oklahoma Opt-Out Episode and  
Categorical Exclusions of Pandemic Compensation

Up to now the discussion has focused on workers' compensation critiques and proposals centered on the idea that workers' compensation benefits were quantitatively too low to be adequate. Arguments in that context debate where to draw lines. In recent years, however, the question has been seriously broached as to whether lines—that is to say, mandatory benefits—should exist at all.

1. *Oklahoma Opt-Out*

In 2013, Oklahoma enacted a law titled “the Oklahoma Employee Injury Benefit Act.”<sup>240</sup> This complex statute—ultimately declared unconstitutional by the Oklahoma Supreme Court as a prohibited special law<sup>241</sup>—purported to apply the exclusive remedy rule to employees participating in employer alternative benefit plans.<sup>242</sup> Such alternative plans were authorized by Oklahoma statute to satisfy an employer's workers' compensation obligations.<sup>243</sup> With very few exceptions, however, employee welfare benefit plans are exclusively governed by the Employee Retirement Income and Security Act of 1974.<sup>244</sup> So, if an employee benefit plan is not formally created by a state workers' compensation law—plans maintained or created solely to comply with workers' compensation law being exempted from

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<sup>238</sup> *Id.* at 67–68 (emphasis added).

<sup>239</sup> *Id.* at 69.

<sup>240</sup> Daniel E. Walker, *Workers' Compensation/Constitutional Law—Opt-Out and the Fourth Era of Workers' Compensation: Has Industry Left the Bargaining Table?* 41 W. NEW ENG. L. REV. 111, 125 (2019).

<sup>241</sup> A special law is “a law that applies to a particular place or especially to a particular member or members of a class of persons or things in the same situation but not to the entire class and that is unconstitutional if the classification made is arbitrary or without a reasonable or legitimate justification or basis.” *Special Law*, MERRIAM-WEBSTER LEGAL DICTIONARY, <https://www.merriam-webster.com/legal/special%20law> [<https://perma.cc/ZT3C-TVHR>].

<sup>242</sup> Walker, *supra* note 240, at 136.

<sup>243</sup> *Id.* at 125.

<sup>244</sup> 29 U.S.C. § 1002(1) [hereinafter *ERISA*].



ERISA coverage<sup>245</sup>—states are prevented from regulating the benefit plan, and any attempt to do so is preempted under Section 514(a) of ERISA.<sup>246</sup> The anomalous result is that a state, having allowed alternative plans to substitute for workers' compensation, would be unable to set plan benefit levels or, indeed, to regulate the alternative plan in any manner.<sup>247</sup> In addition, the opt-out law insulated participating employers from both negligence and workers' compensation liability.<sup>248</sup> It follows that because ERISA provides no substantive requirements for employee welfare benefit plans,<sup>249</sup> an alternative plan would permit employers to voluntarily pay whatever level of benefits they wished, and claim denials could not be challenged except under ERISA in Federal court.<sup>250</sup> This was a very good situation for low-cost employers not concerned with public relations fallout from providing employees marginal injury insurance coverage. As already noted, it was a little too good: the Oklahoma Supreme Court nixed the law on special law grounds.<sup>251</sup> In short, workers' compensation eliminated entitlement to negligence damages, and "opt-out" would have eliminated rights to a statutory workers' compensation remedy, even while maintaining the exclusive remedy rule. The underlying right to a remedy for wrongfully caused injury would have been eliminated in lieu of a discretionary employee injury benefit, as the drafters of the law must have understood.<sup>252</sup>

## 2. *Pandemic Dual Denial*

During the pandemic, many workers were left without a remedy for wrongfully caused COVID-19 infection through dual denial of both workers' compensation and negligence remedies.<sup>253</sup> First, workers' compensation is available only to injured

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<sup>245</sup> 29 U.S.C. § 1003(b)(3) (exempting plans "maintained solely for the purpose of complying with applicable workmen's compensation laws or unemployment compensation or disability insurance laws").

<sup>246</sup> 29 U.S.C. § 1144(a).

<sup>247</sup> Michael C. Duff, *Workers' Compensation Opt-Out Laws: No Escape From ERISA Preemption?*, LEXISNEXIS LEGAL NEWS ROOM (2016), <https://www.lexisnexis.com/legalnewsroom/workers-compensation/b/recent-cases-news-trends-developments/posts/workers-compensation-opt-out-laws-no-escape-from-erisa-preemption> [<https://perma.cc/45D5-9267>].

<sup>248</sup> Walker, *supra* note 240, at 128.

<sup>249</sup> The situation is different for ERISA-regulated pension benefit plans, concerning which ERISA imposes, among other things, substantive vesting, funding, participation, and accrual requirements. 29 U.S.C. §§ 1051–1054.

<sup>250</sup> *Aetna Health Inc. v. Davila*, 542 U.S. 200, 221 (2004) (holding unenforceable a state duty of care imposed on an employee benefit plan because it allowed compensatory or punitive damages not available under ERISA).

<sup>251</sup> Walker, *supra* note 240, at 129–35; on special laws, see Justin R. Long, *State Constitutional Prohibitions on Special Laws*, 60 CLEV. ST. L. REV. 719, 719 (2012) (explaining that special laws were enacted in the 19th century by state citizens to prevent them from being dominated by "narrow economic elites, who would use their economic power to win grants of privilege from the state legislatures").

<sup>252</sup> See *Vasquez v. Dillard's*, 381 P.3d 768, 783 (2016) (Gurich, J., concurring) (discussing the practical effect of allowing employers to be both free from tort suits and workers' compensation liability simultaneously).

<sup>253</sup> See *COVID-19 Civil Liability Immunity - State Activity 2021*, CHUBB (2021), <https://www.chubb.com/content/dam/chubb-sites/chubb-com/microsites/covid19-resource-center/agents-brokers/documents/pdf/chubb-state-civil-immunity-activity-tracking-chart.pdf> [<https://perma.cc/QP9Y-8NDH>]. Thus, workers denied workers' compensation claims because they could not prove employee status were categorically also denied negligence claims. *Id.* Michael C. Duff, *What Covid Laid Bare: Adventures in Workers' Compensation Causation*, 59 SAN DIEGO L. REV. 291, 297–98 (2022).

workers who can prove that work caused an injury or disease.<sup>254</sup> Although it is difficult to prove that work caused a disease to which the general public is exposed to the same extent as those in a workplace, it is not impossible; yet many states appeared reflexively to deny that causation could be established.<sup>255</sup> For those workers who could not prove such a causal relationship, workers' compensation was unavailable.<sup>256</sup> Where a disease is in theory covered by workers' compensation, but causal relationship cannot be established, the exclusive remedy applies just as if it could.<sup>257</sup> In other words, the workers' compensation law may preempt a negligence claim with nothing substantive.<sup>258</sup> This gap is, and will continue to be, significant because workers' compensation is the only nationwide program that pays workers short term or partial disability benefits.<sup>259</sup> To make matters worse, some states categorically exclude workers' compensation coverage of all infectious diseases.<sup>260</sup> Alarming, during the pandemic, many states also conferred broad negligence immunity on a variety of businesses.<sup>261</sup> The result of this confluence of events was that a wrongfully sickened worker was, in several states, left without any legal remedy for negligently caused COVID-19.

## II. REFLECTIONS ON THE NATURE OF TORT AND ITS ADEQUATE SUBSTITUTION

The previous Part discussed how contemporary critics, especially those from within social insurance traditions, have viewed benefit shortfalls apparent in workers' compensation. The social insurance discussion underscores principles of open-texture fairness. The end of the section also revealed how, in certain specialized contexts, social insurance simply collapsed as state rationales for benefit elimination emerged. But addressing questions of benefit inadequacy demands deeper discussion

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<sup>254</sup> 1 ARTHUR LARSON, LEX K. LARSON & THOMAS A. ROBINSON, LARSON'S WORKERS' COMPENSATION LAW § 3.01.

<sup>255</sup> Duff, *supra* note 253, at 292, 295, 309, 313, 315, 323 (criticizing the development). Roughly seventeen states did, however, establish causation presumptions in favor of claimants. *Id.* at 298–99.

<sup>256</sup> *Id.* at 298.

<sup>257</sup> 9 ARTHUR LARSON, LEX K. LARSON & THOMAS A. ROBINSON, LARSON'S WORKERS' COMPENSATION LAW § 100.05[3][d] (discussing principle that workers' compensation "coverage" is sufficient to trigger employer tort immunity).

<sup>258</sup> The outcome is like ERISA preemption. A state enacts a law to compel an employer-provided health plan to carry a particular benefit. ERISA preempts the law, but it preempts with nothing substantive. By operation of the federal statute, Congress occupies the regulatory field, but not in a context where it will substitute a federal benefit for the ousted state benefit. *See Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 758 (1985) (finding no preemption concerning a Massachusetts state law requiring mandatory minimal mental health benefits under which outpatient services could be provided by a licensed psychologist).

<sup>259</sup> Social security disability, for example, only pays cash benefits for total disability expected to last more than twelve months. 20 C.F.R. § 404.1505 (2012).

<sup>260</sup> 4 ARTHUR LARSON, LEX K. LARSON & THOMAS A. ROBINSON, LARSON'S WORKERS' COMPENSATION LAW § 51.01.

<sup>261</sup> *See* Chris Marr, *Covid-19 Shield Laws Proliferate Even as Liability Suits Do Not*, BLOOMBERG L. (June 8, 2021, 5:31 AM), <https://news.bloomberglaw.com/daily-labor-report/covid-19-shield-laws-proliferate-even-as-liability-suits-do-not> [<https://perma.cc/GEN9-EGMD>]. It must be noted that the standard statute allowed tort suits only where harm was the product of gross negligence that could be proven by clear and convincing evidence, a nearly impossible standard to meet.

of the nature of tort rights, and whether the integrity of the human body is adequately protected by limited monetary compensation for wrongful damage.<sup>262</sup> After all, if there had been no negligence law in the early twentieth century, workers' compensation law would likely never have been created; tort law is the rights foundation of workers' compensation.<sup>263</sup> And tort aims not only to compensate for harm but also to deter wrongdoing.<sup>264</sup> It is a source of continuing controversy as to whether tort is private law aimed at instrumental after-injury compensation in a quasi-regulatory manner, or a mechanism of corrective justice vindicating deeper primary rights.<sup>265</sup> If tort is solely the former, then workers' compensation is merely cheap; if tort includes broader values of protection, then workers' compensation falls short in more profound ways.

The prior Part also assumed the theoretical defensibility of an apples-to-apples Grand Bargain of tort damages for statutory benefits and showed that the exchange of apples did not seem adequate from the perspective of workers.<sup>266</sup> The arcane structure still does not permit a meaningful quantitative assessment of the exchange of rights, defenses, and remedies—so it is difficult to say whether corrective justice is being done in the aggregate. As scholars have noted, “[c]orrective justice describes the moral obligation of repair: the person morally responsible for wrongfully harming another has a duty to compensate the person harmed.”<sup>267</sup> It is hard to quantify the obligation to repair here. It is also difficult to evaluate workers' compensation as a form of distributive justice because “[d]istributive justice divides a benefit or burden in accordance with some criterion.”<sup>268</sup> When permanent partial disability benefits are parsed out to injured workers on the basis of impairment schedules that neither purport to assess lost earning capacity, nor consider the adequacy of the benefit to support life, they are based on shrouded criteria.

Even preliminarily, however, the limited apples-for-apples framework can be questioned under tort theory on two grounds. First, as a compensatory structure workers' compensation completely eradicates pain and suffering damages, while providing less than make-whole pecuniary damages.<sup>269</sup> The only way this can be justified is if workers' compensation is not intended to be meaningfully corrective,

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<sup>262</sup> See *infra* Part II.

<sup>263</sup> See generally *N.Y. Cent. R.R. Co. v. White*, 243 U.S. 188, 189–90 (1917) (holding that employees' constitutional rights are not harmed by optional insurance plans that “are free from constitutional objections as regards employers”); see *supra* note 25 and accompanying text.

<sup>264</sup> Gregory Keating, *The Priority of Respect Over Repair*, 18 *LEGAL THEORY* 293, 303 (2012).

<sup>265</sup> Earnest J. Weinrib, *Corrective Justice*, 77 *IOWA L. REV.* 403, 403 (1992) (describing the ongoing scholarly controversy of whether private law—including tort law—is regulatory, compensatory, or something else altogether).

<sup>266</sup> The quid pro quo is frequently expressed in terms of a bargain or negotiation. See Emily A. Spieler, *(Re)Assessing the Grand Bargain: Compensation for Work Injuries In The United States, 1900-2017*, 69 *RUTGERS U. L. REV.* 891, 893 (2017). The reality of such a bargain is dubious. See McCluskey, *supra* note 88 at 673–74 and accompanying text.

<sup>267</sup> Steven Walt, *Eliminating Corrective Justice*, 92 *VA. L. REV.* 1311, 1311 (2006).

<sup>268</sup> Weinrib, *supra* note 265, at 408.

<sup>269</sup> Two states—Colorado and Virginia—limit pecuniary damages in medical malpractice claims to \$1 million and \$2.5 million, respectively. *COLO. REV. STAT. ANN.* § 13-64-302 (West 2022); *VA. CODE ANN.* § 8.01-581.15 (West 2022). Otherwise, compensatory pecuniary damages are very rarely limited and, when they are, the limits typically apply to limited classes to defendants. *DOBBS, supra* note 58, at § 486.

but is instead merely a bare-bones anti-destitution law.<sup>270</sup> Second, if workers' compensation is meant to remedy injuries that are accidental, no argument in favor of insulating employers from liability for intentional conduct withstands scrutiny. Employer conduct, having as its purpose the injury of employees, is not accidental. The same may be said of conduct that an employer knows to a substantial certainty will harm its workers.<sup>271</sup> Some states have tinkered with the definition of intent in a manner making it harder to prove in workers' compensation cases than under the common law.<sup>272</sup> This tactic can have the effect of expanding the exclusive remedy rule, thereby limiting application of traditional intentional tort law. Some states have gone even further and explicitly applied exclusivity to intentional employer conduct.<sup>273</sup>

#### A. *Negligence Victims or Accident Victims?*

At a more essential level, the underlying assumption motivating creation of workers' compensation was that injured workers (victims) could not establish negligence claims because of the destructive nature of affirmative defenses.<sup>274</sup> Given plaintiffs' lack of access to negligence law, the instrumental rationale of workers' compensation proponents was that victims should be satisfied with an imperfect bargain in which all interested parties—employees, employers, insurance companies, and perhaps government—came out “ahead.”<sup>275</sup> Not emphasized in the customary explanation is that statutory beneficiaries were not similarly situated: some injured workers were accident victims, and some were victims of negligence (or worse) but could often not afford to prove it.<sup>276</sup> Workers' compensation negligence victims might conceptually further be divided into those who would possess weak negligence cases and those who would possess strong negligence cases. In the workers' compensation scheme, as a matter of logic, injured workers with strong negligence cases effectively subsidize accident victims and negligence victims with weak negligence cases. This account differs substantially from

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<sup>270</sup> It is telling that workers' compensation benefits are not clearly and consistently tied to Federal measures of poverty. From 1972 to 1998, the average temporary total disability benefit (in other words the benefit paid to workers who are completely unable to work and are provisionally paid total benefits) averaged from eighty to one hundred and twenty percent of the Federal poverty threshold. ADEQUACY OF EARNINGS REPLACEMENT IN WORKERS' COMPENSATION PROGRAMS, *supra* note 92, at 74.

<sup>271</sup> DOBBS, *supra* note 58, at § 29 (discussing the concepts of intent and knowledge to a substantial certainty).

<sup>272</sup> See e.g., Kaminski v. Metal & Wire Products Co., 927 N.E.2d 1066, 1079 (Ohio 2010) (upholding legislature's decision to equate “substantially certain” with circumstances in which an employer acts “with deliberate intent to cause an employee to suffer an injury, a disease, a condition, or death”).

<sup>273</sup> States following this minority rule include Alabama, Georgia, Indiana (in occupational diseases cases), Maine, Nebraska, New Hampshire, Pennsylvania, Rhode Island, Virginia, and Wyoming. 9 ARTHUR LARSON, *supra* note 257, at § 103.01D. Usually, the reason for applying the exclusivity bar to intentional conduct is that the underlying Act covers injuries not caused by a discrete “accident.” The logic of this purported symmetry seems questionable.

<sup>274</sup> See King, *supra* note 65, at 409–10 and accompanying text.

<sup>275</sup> PRICE V. FISHBACK & SHAWN EVERETT KANTOR, A PRELUDE TO THE WELFARE STATE: THE ORIGINS OF WORKERS' COMPENSATION 25 (2000) (concluding that, at least in the aggregate, both employers and employees came out ahead economically).

<sup>276</sup> Some states apply exclusivity even to intentional torts. See e.g., Wyoming. Parker v. Energy Development Co., 691 P.2d 981, 984–85 (Wyo. 1984).

narratives insisting that all industrial injuries are “accidents,”<sup>277</sup> a theory without foundation.<sup>278</sup> Cross-class subsidization strains questions of adequacy because the answer may depend upon differing victim perspectives. These tensions create a compound problem of distributive justice. The first part of the distributive justice problem is how to justify negligence victims’ receipt of less than compensatory damages. The second part of the distributive justice problem is how to justify preferential treatment of accident victims over negligence victims. Viewed from the perspective of workplace negligence victims, it might seem unfair to deprive a plaintiff of compensation simply because she did not have the “good luck” to be harmed by a negligent actor outside of the workplace.

One answer to the negligence victim-accident-victim-subsidization problem might be to embrace it by treating all injury victims equally rather than conferring superior rights upon negligence victims. On this view, which I see as topsy-turvy enterprise liability,<sup>279</sup> combining victims in a single class undoes discrimination. As Thomas Douglas has explained, this manner of thinking deeply influenced policy deliberations during the creation of New Zealand’s No Fault Accident law, a national tort substitute in which all the country’s negligence law was converted to a no-fault system resembling workers’ compensation.<sup>280</sup> In the late 1960s, the Woodhouse Report on personal injury in New Zealand stated such a discrimination thesis explicitly: “[f]ew would attempt to argue that injured workers should be treated by society in different ways depending upon the cause of the injury. Unless economic reasons demanded it the protection and remedy society might have to offer could not in justice be concentrated upon a single type of accident to the exclusion of others.”<sup>281</sup>

The argument continued, “[i]t cannot be regarded as just that workmen sustaining equal losses should be treated unequally by society.”<sup>282</sup> In this bizarre rendering, workers’ compensation was considered the true baseline, and negligence victims entitled to tort damages were somehow being unjustly enriched.<sup>283</sup> Yet, as Douglas further explains, this fairness argument might be extended even further, but in a different direction: if the wrongfulness of victim injury is irrelevant to the question of compensation, why not jettison other seemingly indispensable precursors to

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<sup>277</sup> A similar point can be made with respect to traffic accident cases. According to National Highway Traffic Safety Administration, an estimated 94% of auto crashes can be related to “human choice or error.” NAT’L HIGHWAY TRAFFIC SAFETY ADMIN., FEDERAL AUTOMATED VEHICLES POLICY 5 (2016), <https://www.transportation.gov/AV/federal-automated-vehicles-policy-september-2016> [<https://perma.cc/69CY-2ABB>]. A compelling reason for adopting no-fault compensation systems should not rationally be because no one was at fault unless one is prepared to believe that 94% (or some similarly compelling number) is the product of pure accident.

<sup>278</sup> See Spieler, *supra* note 266, at 903 (discussing the contemporary widespread assumption that fault could not be assigned in emerging mechanized economy of the late 19<sup>th</sup> and early 20<sup>th</sup> century).

<sup>279</sup> For a discussion of enterprise liability, see *infra* note 293 and accompanying text.

<sup>280</sup> See Thomas Douglas, *Medical Injury Compensation: Beyond No-Fault*, 17 MED. L. REV. 30, 34–35 (2009).

<sup>281</sup> ROYAL COMMISSION TO INQUIRE INTO AND REPORT UPON WORKERS’ COMPENSATION, COMPENSATION FOR PERSONAL INJURY IN NEW ZEALAND: REPORT OF THE ROYAL COMMISSION OF INQUIRY (1967) at 20–21.

<sup>282</sup> *Id.* ¶ 57.

<sup>283</sup> *Id.*

liability, such as the requirement of an identifiable actor?<sup>284</sup> If it is unfair not to extend compensation to the victim of a faultless accident, it might be similarly unfair to deny compensation to individuals incapacitated through natural misfortune; but considerations of cost, Douglas argues, are thought to render such a policy infeasible.<sup>285</sup> When fault is removed from the equation, it is not clear why anyone is being compensated. Nevertheless, the architects of the New Zealand structure originally included pain and suffering supplements to statutory benefits, implicitly individualizing awards in a way that insurance would not, and recognizing that not all statutory beneficiaries were accident victims.<sup>286</sup> Though that practice has now been abolished,<sup>287</sup> it would probably be initially very hard to sell a modern version of a tort abolition law to a common law country electorate without including some vestige of traditional damages.

### B. Tort Compensation of Accident Victims

One may of course move in the other direction to argue on nondiscrimination grounds that both accident and negligence victims should be entitled to tort compensation, a theory of recovery pushing the discussion in the direction of true enterprise liability.<sup>288</sup> If both negligence and accident victims are entitled to tort compensation, then cross-class subsidization is less problematic, unless the damages available to the two groups are substantially dissimilar. As Gregory Keating has argued, law and economics theorists tend to simply write off already incurred physical harms, even to the human body (even when negligently caused), as “sunk costs,”<sup>289</sup> and this view of the world might be directed at both accident and negligence victims.<sup>290</sup>

*Larson’s* treatise, in seeking to distance workers’ compensation from negligence, is dismissive of the contention that “when an employer embarks on an enterprise, there is a strong probability of personal injuries sooner or later, and accordingly the employer may be made to assume absolute liability for these injuries when they do occur.”<sup>291</sup> The treatise says this idea is wrong because “[e]mployment generally is not ultra-hazardous in the sense used in strict-liability tort cases.”<sup>292</sup> This viewpoint works hard to ground workers’ compensation in discretionary social benevolence rather than tort reform, assuming that liability without fault could emerge only in the case of ultrahazardous activity. But it is this idea that seems wrong. Professor

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<sup>284</sup> Douglas uses the example of a patient who suffers a brain hemorrhage caused by a genetic condition; the patient is rushed to the hospital, but before any doctor can operate, he suffers irreparable damage to “the part of his brain which controls his right leg.” See Douglas, *supra* note 280, at 36.

<sup>285</sup> *Id.* at 38.

<sup>286</sup> Richard S. Miller, *The Future of New Zealand’s Accident Compensation Scheme*, 11 U. HAW. L. REV. 1, 11 (1989).

<sup>287</sup> See *infra* note 334 at 1174–75.

<sup>288</sup> See *infra* note 293, at 5 and accompanying text.

<sup>289</sup> Keating, *supra* note 264, at 295.

<sup>290</sup> See GUIDO CALABRESI, *THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* 26 (1970).

<sup>291</sup> 1 LARSON, *supra* note 254, at § 1.03.

<sup>292</sup> *Id.*

Keating has argued in defending enterprise liability, a body of tort law originating in workers' compensation:<sup>293</sup>

Enterprise liability is a response to the intrinsic moral significance of unavoidable harm, and it embodies a collective conception of responsibility fitted to the collective character of risk in our world. That conception of responsibility embodies commutative justice by constructing communities of risk and responsibility within which the burdens and benefits of organized risk imposition are shared fairly. And, in distributing burden and benefit fairly, enterprise liability also does corrective justice. For an enterprise to fail to repair harm that it unavoidably inflicts on others wrongly sacrifices victims to the good of the enterprise. Reparation rights that wrong.<sup>294</sup>

While this view, too, emphasizes moral themes, it does not dismiss the idea of righting a wrong, and contests the notion that foreseeability of harm is insufficient to trigger tort liability in the absence of the individualistic fault of an isolated tortfeasor.<sup>295</sup> Another way to look at things is that enterprise liability forces organized human activity, by happenstance in the form of “enterprises,” to accurately reflect through prices the true costs of making goods and services available.<sup>296</sup> But the harm in question is not neatly dyadic, involving a symmetrical particular plaintiff and defendant.<sup>297</sup> Rather, the enterprise unavoidably, or so it is contended, imposes general risk of harm upon a broad community of, for example, workers as part of its typical activity.<sup>298</sup> Workers' compensation theory also views workplace risk as both general and unavoidable, generating liability even when not the product of ultrahazardous activity.<sup>299</sup> The system constructs a community of risk consisting of producers, employees, and consumers of products and services.<sup>300</sup> Workers' compensation theory holds that it would not be fair to impose on workers the costs of work-related injuries occasioned by activities deemed reasonable and unavoidable.<sup>301</sup> But the idea seems to concede as a premise that all workplace injuries are accidents, an assumption facilitating construction of a narrative steeped in fantastic morality.<sup>302</sup> As the story goes, society had no legal obligation to compensate

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<sup>293</sup> VIRGINIA E. NOLAN & EDMUND URSIN, UNDERSTANDING ENTERPRISE LIABILITY: RETHINKING TORT REFORM FOR THE TWENTY-FIRST CENTURY 5 (1995).

<sup>294</sup> GREGORY C. KEATING, REASONABLENESS AND RISK 208 (forthcoming 2022) (manuscript at 204) (on file with author).

<sup>295</sup> *Id.*

<sup>296</sup> Howard C. Klemme, *The Enterprise Liability Theory of Torts*, 47 U. COLO. L. REV. 153, 162 (1976).

<sup>297</sup> See DOWNEY, *supra* note 180, at 21–22.

<sup>298</sup> *Id.*

<sup>299</sup> *Id.*

<sup>300</sup> *Id.* at 21.

<sup>301</sup> HERMAN MILES SOMERS & ANNE RAMSAY SOMERS, WORKMEN'S COMPENSATION: PREVENTION, INSURANCE, AND REHABILITATION OF OCCUPATIONAL DISABILITY 28–29 (1954).

<sup>302</sup> “[Society could] refuse all aid, and let the worker starve in the street, or let the worker squat on the sidewalk with a few yellow pencils and beg for pennies from those who were yesterday his or her equals. Since the reign of Queen Elizabeth, no Anglo-American community has considered this a morally acceptable solution.” 1 LARSON, *supra* note 254.

injured workers, but did so out of a sense of morality.<sup>303</sup> A narrative of morally conferred discretionary benefits (delivered irrespective of fault) naturally resists claims that workers' compensation benefits could be inadequate as a matter of tort, for tort has dropped completely out of the equation.

### *C. Reassessing Fault in the Context of Commodification*

Once fault reappears, the question of adequacy in terms of tort is resurrected. Paying truncated compensatory damages to accident victims, or to negligence victims who could not have proven a negligence case, as a second-best solution may be remedially defensible under enterprise liability principles.<sup>304</sup> But damages truncation applied to obvious negligence victims with the potential for strong claims runs counter to tort law's remedial structure.<sup>305</sup> Enterprise liability was not originally meant to compensate negligence victims possessing strong claims but (practically speaking) to compensate accident victims, or perhaps those victims with harms that are not easily proved as the product of negligence. Although it is sometimes difficult to distinguish fault-based from accidental harms, it is not always difficult;<sup>306</sup> and when harm from negligence is probable, the rationale for skimpy statutory workers' compensation benefits is obviously weakened.

Legal historian Nate Holdren has described the nakedly instrumentalist origins of workers' compensation.<sup>307</sup> Early 20<sup>th</sup> century reformers, on his account, uncritically accepted a form of injury remedy "biopolitics," addressing solutions for the population in the aggregate.<sup>308</sup> While this was, in many respects, a progressive development, because it more robustly took into account the general public when setting public policy,<sup>309</sup> biopolitics, in its fervor to support statistically, fairly averaged decision making, also uncritically accepted the inevitability of injury.<sup>310</sup> The biopolitical development simultaneously accepted a system of commodified costs—a body part market—in which injury remedies were expressed exclusively in

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<sup>303</sup> *Id.*

<sup>304</sup> Virginia E. Nolan & Edmund Ursin, *Enterprise Liability Reexamined*, 75 OR. L. REV. 467, 475–477 (1996) (discussing diminished damages as a potential tradeoff for expanded enterprise liability).

<sup>305</sup> DOBBS, *supra* note 58, at § 479 ("In personal injury cases the normal remedy is compensatory damages, awarded in a lump sum, for all losses that have proximately resulted from the tort and all losses that will so result in the future. The plaintiff has the burden of proving both past and future damages by the preponderance of the evidence.")

<sup>306</sup> Confirmation of this fact may be obtained by casually perusing the fact patterns of garden variety workers' compensation claims. See generally MICHAEL C. DUFF, *WORKERS' COMPENSATION LAW* (2021) (noting legal issues in workers' compensation cases).

<sup>307</sup> HOLDREN, *supra* note 85, at 9.

<sup>308</sup> *Id.* Although Holdren seems to like the term, it is difficult. Foucault seemed to mean something like a way of governing that is at once "frugal" and more attuned to the actual needs of people. MICHEL FOUCAULT, *THE BIRTH OF BIOPOLITICS: LECTURES AT THE COLLEGE DE FRANCE* 28 (2004).

<sup>309</sup> But see Robert L. Rabin, *Some Thoughts on The Ideology of Enterprise Liability*, 55 MD. L. REV. 1190, 1193 n.19 (discussing Charles O. Gregory, *Trespass to Negligence to Absolute Liability*, 37 VA. L. REV. 359, 388–97 (1951)) ("Gregory also traced an earlier mid-nineteenth century doctrinal shift from trespass to negligence to what could be regarded as a generally collectivist spirit—the desire to promote the growth of infant industry.")

<sup>310</sup> See Spieler, *supra* note 266 and accompanying text.



averaged, hyper-simplified compensatory formulae.<sup>311</sup> The approach, appealing to a kind of surface objectivity, not only deindividualized victims and denied them an opportunity to have their day of airing grievances in a court, it also blindly lumped victims of accident and negligence into a single, all-encompassing “table.”<sup>312</sup> In acceding to this tactic, progressives unwittingly accepted that work injuries were almost certainly the product of accidents that could not be addressed in terms of fault.

The workers’ compensation disability schedules to which Holdren refers and objects represent an example of the remedial incoherence that Margaret Radin has previously identified in tort law itself:

[O]ur legal practice reflects conflict in how compensation for personal injury is understood [but] . . . compensation is a contested concept. A commodified conception of compensation, in which harm to persons can be equated with a dollar value, coexists with a noncommodified conception, in which harm cannot be equated with dollars. In the commodified conception, harm and dollars are commensurable, and in the noncommodified conception, they are incommensurable.<sup>313</sup>

Workers’ compensation solved the conflict to which Professor Radin alluded by ignoring it, thus writing completely out of the law even the possibility of recognition of pain, suffering, or wrongfulness attending workplace injury. All work-related harms have been presumed incommensurable.<sup>314</sup> Moreover, the presumed fact of incommensurability has led to an additional conclusion that is certainly not the product of the working classes: because it is difficult to quantify pain and suffering, the only way forward is to extirpate, or significantly reduce, pain and suffering damages.

The disparate treatment of negligence victims created by this lumping together of remedies and victims foments a two-way tension. First, negligence victims are undercompensated.<sup>315</sup> Second, recognition of the idea of an accident victim depends on the existence of accidents. The celebrated jurist, Oliver Wendell Holmes, once famously declared, “the general principle of our law is that loss from accident must lie where it falls, and this principle is not affected by the fact that a human being is the instrument of misfortune.”<sup>316</sup> As Emily Spieler has observed, however, “[t]oday, workplace injuries are viewed as largely preventable by public health advocates, government regulators and many employers.”<sup>317</sup> Professor Spieler further notes that the modern changed attitude with respect to workplace safety has been a springboard for Government regulatory intervention into the field of workplace safety.<sup>318</sup> This

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<sup>311</sup> As discussed in Part II, *supra*, the American version of this commodification eventually became even more mechanistic, authorizing payment of permanent partial incapacity benefits based solely on the physical impairment of the body, and assigning arbitrary numbers of weeks of benefits as a function of that impairment without regard to an injured worker’s earning impairment particulars.

<sup>312</sup> HOLDREN, *supra* note 85, at 5.

<sup>313</sup> Margaret Jane Radin, *Compensation and Commensurability*, 43 DUKE L.J. 56, 56 (1993).

<sup>314</sup> That is, of course, the point of workers’ compensation exclusivity. *See id.* at 63.

<sup>315</sup> *See, e.g., supra* note 51.

<sup>316</sup> OLIVER WENDELL HOLMES, JR. *THE COMMON LAW* 87 (Harv. Univ. Press, 2009) (1881).

<sup>317</sup> Spieler, *supra* note 266, at 964.

<sup>318</sup> *Id.*

view challenges the notion that workplace injuries are unexpected, unforeseeable, or inevitable events.<sup>319</sup> A hallmark of the emergence of 20<sup>th</sup> century tort law was that reasonably foreseeable injury triggers a duty in an actor to avoid the injury.<sup>320</sup> When workers are injured by accident, tort liability appears oxymoronic.<sup>321</sup> Leaving enterprise liability to one side,<sup>322</sup> pure accidents are, after all, not the product of fault. But the argument proves too much. If all accidents were faultless, the frenetic avoidance of tort liability culminating in workers' compensation is difficult to explain, as is the apparently continued willingness by employers to embrace the no-fault system.<sup>323</sup>

#### D. Commodification and Individualization

Holdren's objection to the "tyranny of the table" seems in part a protest to the inability of a workers' compensation claimant to have her day in court.<sup>324</sup> But the table is, after all, a series of rules.<sup>325</sup> Rules, ideally, check arbitrary conduct by government officials and create regularity and accountability in the public interest; in some situations, the Supreme Court requires rules.<sup>326</sup> But workers' compensation claimants may wish to argue that their claims, involving as they do systemic deprivation of individual tort rights, should, at a minimum, make allowance for

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<sup>319</sup> As John Fabian Witt has ably recounted, the thinking of early workers' compensation architects was that work injury was inevitable and that tort law would equally inevitably view such injury as "damnum absque injuria." See WITT, *supra* note 19, at 142.

<sup>320</sup> See *Heaven v. Pender*, 11 Q.B.D. 503, 509 (Eng. C.A. 1883) (holding that dock owner had duty to employees of shipowner injured when dock owner's staging collapsed during foreseeable work duties); *MacPherson v. Buick Motor Co.* 111 N.E. 1050, 1055 (N.Y. 1916) (holding that product manufacturer liable for injuries suffered by foreseeable third-party customers); *Tarasoff v. Regents of the University of California*, 551 P.2d 334, 353 (Cal. 1976) (holding university liable to family of foreseeable victim with no legal relationship to university).

<sup>321</sup> HOLMES, *supra* note 316, at 75–76.

<sup>322</sup> The idea of "characteristic risks" of an industry or occupation, see KEATING, *supra* note 294, Chapter 7, Section I, is in tension with the idea that foreseeability creates legal duty. If a risk is characteristic, the very term suggests it is foreseeable. In this light, enterprise liability may simply have been recognizing that immunization from tort law of liability for injury produced by foreseeable risks of harm is inconsistent with tort norms. Surely moral fault is involved, but the tortfeasor has been immunized ex ante in the name of economic efficiency, a policy decision one doubts was democratically vetted.

<sup>323</sup> Texas, the only American state in which workers' compensation is elective for employers and employees, provides an interesting case study. While employers may decline to opt into workers' compensation (they are presumptively out of the system as a matter of law), most employers choose to participate in the workers' compensation system. Ohana, *supra* note 206, at 339.

<sup>324</sup> For additional discussion of the increasing resort to "statistical laws" during the period, see WITT *supra* note 19, at 141.

<sup>325</sup> Permanent partial disability claims decided rigidly under the American Medical Association guides would seem to qualify. Under the Administrative Procedure Act, for example, a rule is broadly defined as the following:

[T]he whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor [sic] or of valuations, costs, or accounting, or practices bearing on any of the foregoing.

5 U.S.C. § 551(4).

<sup>326</sup> Lawrence H. Tribe, *Structural Due Process*, 10 HARV. C.R.-C.L. L. REV. 269, 283–84 (1975).

individualized determinations.<sup>327</sup> As Lawrence Tribe has argued, individualized judgments may be “in some circumstances not only more ‘enlightened’ but indeed constitutionally propelled.”<sup>328</sup> Tables, especially in the form of permanent partial disability schedules, stand as an irrebuttable presumption of a worker’s extent of partial disability.<sup>329</sup>

A middle road may exist. As distasteful as commodification may be, biopolitics has become a feature of operating a mass compensation system. Professor Radin’s paradox can perhaps not be avoided, but surely society can recognize categories of harm and not ignore the victims of negligence. Just as monetary damages are awarded in battery for the invasion of dignitary interests rather than for harm *per se*,<sup>330</sup> additional benefits might be awarded in workplace injury administrative systems for pain and suffering, and still more benefits when the actions of an employer approach recklessness.<sup>331</sup> The amount of the benefits could be negotiable at the state level and in accord with predetermined criteria.<sup>332</sup> The process of negotiation would perhaps be more important than its exact fruit.

The arbitrariness of benefit schedules might be addressed in two ways. First, standards could be established allowing claimants in extraordinary circumstances to challenge application of a schedule to them and to proceed on individualized grounds if the standards are satisfied. Second, if the prospect of protracted adjudication with respect to the benefit schedule appeals appears overwhelming, a schedule could be established but periodically revisited—say, every ten years—to assess experience under it. At all events, schedules ought to be explained.<sup>333</sup> On what basis is an award of benefits being made? An average of wage loss or reductions in earning capacity

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<sup>327</sup> See generally *id.* at 284 (noting plaintiffs may want an individualized judgment). As a testament of the potential inflexibility of the AMA Guides, in *Protz*, the Pennsylvania Supreme Court found the incorporation of the guides in the Pennsylvania workers’ compensation statute unconstitutionally violated delegation doctrine. *Protz v. Workers’ Comp. Appeal Bd. (Derry Area School District)*, 161 A.3d 827, 841 (Pa. 2017) (holding generally that a legislature may not overly broadly delegate its legislative responsibilities to private organizations).

<sup>328</sup> See Tribe, *supra* note 326, at 285.

<sup>329</sup> See *U.S. Dept. of Agric. v. Murry*, 413 U.S. 508, 514 (1973) (striking on due process grounds the Government’s irrebuttable presumption that a child who was eighteen years old or older and had in the immediately preceding year been claimed as a dependent of a taxpayer not currently residing in food stamp applicant’s household could never be considered a dependent for purposes of assessing the applicant’s need for benefits).

<sup>330</sup> RESTATEMENT (SECOND) OF TORTS § 18, cmt. c (AM. L. INST. 1965) (“Since the essence of the plaintiff’s grievance consists in the offense to the dignity involved in the unpermitted and intentional invasion of the inviolability of his person and not in any physical harm done to his body, it is not necessary that the plaintiff’s actual body be disturbed.”).

<sup>331</sup> “A person acts recklessly in engaging in conduct if . . . the person knows of the risk of harm created by the conduct or knows facts that make the risk obvious to another in the person’s situation, and . . . the precaution that would eliminate or reduce the risk involves burdens that are so slight relative to the magnitude of the risk as to render the person’s failure to adopt the precaution a demonstration of the person’s indifference to the risk.” RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 2 (2010).

<sup>332</sup> The Commonwealth of Massachusetts, for example, awards double benefits to an employee when the mechanism of injury involves “serious and wilful” misconduct. MASS. GEN. LAWS ANN. CH. 152, § 28 (LexisNexis 2022). A state might set a baseline such as this and revisit it periodically to assess its sufficiency.

<sup>333</sup> This would be a challenging process, but because the alternative to such recalibration would, under my analysis, be implementation of something very like negligence law, if not negligence law itself, parties would have a strong interest in coming to agreement. Workers’ compensation itself, it will be recalled, was substantially implemented within a single decade.

across the economy in particular industries? Or what? Lack of explanation renders a system irrational and arbitrary.

No system of law could long endure arbitrary, non-individualized damage awards for injury. New Zealand likely included pain and suffering awards in its initial tort-substitute law, enacted in 1972, for precisely this reason.<sup>334</sup> Implementation of a New Zealand-type system in other common law countries has not been attempted. Perhaps this inactivity is precisely because of damage calculations not closely aligned with individualized human losses, a practice seemingly far removed from the traditional practices of common law tort. Even if accepting the legitimacy of the elimination of pain and suffering compensation, the original architects of workers' compensation did not include non-individualized benefit schedules in the original workers' compensation statutes.<sup>335</sup> We are not bound by such a clumsy commodified system. As Professor Tribe has made a similar point:

[T]he legitimacy of a law poses a question for each generation to address anew. Its legitimacy does not inhere in the past alone; its locus is also the present and the future. And the measure of such legitimacy is not the momentary coincidence of alienated wills at the instant of contracting but is instead the gradual evolution of shared values—values shared (not merely overlapping) as they could never be in the contractarian vision.<sup>336</sup>

Surely this awkward bargain is not frozen in time, and legislatures should be encouraged to see workplace injury remedies and workplace safety as works in progress policed by considerations of policy flexibility and, equally importantly, the topic taken up next: constitutional adequacy.

### III. ON BREACHES OF THE QUID PRO QUO AND STATE LEGISLATIVE SUPREMACY

In the preceding Part, the article assessed the extent to which workers' compensation corresponds to tort. This Part asks what constitutional significance attaches if states depart especially dramatically from providing even minimally satisfactory statutory benefits for tort damages (comparing apples to apples); or fail to explicitly protect workers prior to injury, either by inadequately deterring harm, or by willfully failing to know if their workers' compensation systems deter harm.<sup>337</sup> Despite what critics might argue about workers' compensation adequacy, a state may simply decide to implement bare-bones, anti-destitution statutes not even remotely approximating tort values. Or a state may obviously descend below what is

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<sup>334</sup> Pain and suffering awards were abolished in a 1992 revision of the Act. Stephen Todd, *Treatment Injury in New Zealand*, 86 CHICAGO-KENT L. REV. 1169, 1174–75 (2011).

<sup>335</sup> See sources cited *supra* note 162.

<sup>336</sup> Tribe, *supra* note 326, at 301.

<sup>337</sup> This discussion omits consideration of state constitutional theories such as those arising under open courts and right to remedy provisions. I have written on the subject elsewhere. See Michael C. Duff, *Worse than Pirates or Prussian Chancellors: A State's Authority to Opt-Out of the Quid Pro Quo*, 17 MAR. BEN. & SOC. WELFARE L. REV. 123 (2016).

commonly understood as the current contours of the Grand Bargain.<sup>338</sup> The following discussion considers the limits of state legislative supremacy to disregard tort and the deeper values that tort vindicates.

#### A. Earlier Twentieth Century Court Opinions

Courts have generally avoided precise statements on the question of the lower boundaries of workers' compensation benefits or tort damages. The Supreme Court's original workers' compensation cases established that a state's traditional police powers extended to the health and safety of its citizens,<sup>339</sup> and that states' judgments in such areas would not lightly be disturbed by Federal courts on U.S. constitutional grounds.<sup>340</sup> At the state level, some antebellum courts unabashedly embraced the full measure of legislative supremacy. The Pennsylvania Supreme Court, for example, once stated, "[i]f the people of Pennsylvania had given all the authority which they themselves possessed, to a single person, they would have created a despotism as absolute in its control over life, liberty, and property, as that of the Russian autocrat."<sup>341</sup> On this view, powers, once delegated by the people to the legislature, in the absence of explicit constitutional prohibitions, are nearly limitless, and states are free to do whatever is not prohibited.<sup>342</sup>

But the U.S. Supreme Court's original state police power opinions upholding workers' compensation seem to have assumed the existence of certain implicit constitutional limits to the truncation of remedies. The Court consistently reiterated the maxim that "[n]o person has a vested interest in any rule of law entitling him to insist that it shall remain unchanged for his benefit."<sup>343</sup> But the manner in which the Court applied the principle suggests that, in context, it governed modification of common law rules and did not implicitly authorize structural elimination of common law remedial principles.<sup>344</sup> The Court hinted strongly that eliminating all common law liability rules respecting workplace liability might raise constitutional issues.<sup>345</sup> The Court made this point in the *White* case:

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<sup>338</sup> See the former Oklahoma Injury Benefit Act discussed *supra* note 240 and accompanying text.

<sup>339</sup> For a recent discussion of this principle in COVID-19 contexts, see Robert Gatter, *Reviving Focused Scrutiny in the Constitutional Review of Public Health Measures*, 64 WASH. U. J.L. & POL'Y 151, 165–66 (2021).

<sup>340</sup> Justice Pitney wrote of such:

One of the grounds of [the public's] concern with the continued life and earning power of the individual is its interest in the prevention of pauperism, with its concomitants of vice and crime. And, in our opinion, laws regulating the responsibility of employers for the injury or death of employees arising out of the employment bear so close a relation to the protection of the lives and safety of those concerned that they properly may be regarded as coming within the category of police regulations.

See *N.Y. Cent. R.R. Co. v. White*, 243 U.S. 188, 207 (1917).

<sup>341</sup> *Sharpless v. Mayor of Philadelphia*, 21 Pa. 147, 160 (Pa. 1853).

<sup>342</sup> *Id.* at 163 (stating that no "State Court has ever yet held a law to be invalid, except where it was clearly forbidden").

<sup>343</sup> *N.Y. Cent. R.R. Co. v. White*, 243 U.S. at 198 (citing *Munn v. Illinois*, 94 U.S. 113, 134 (1876)).

<sup>344</sup> *Munn v. Illinois*, 94 U.S. 113, 134 (1876) (describing common law rules of contract as merely a "form[]" of "municipal" law changeable by legislatures "unless prevented by constitutional limitations") (emphasis added).

<sup>345</sup> *White*, 243 U.S. at 201.

[I]t perhaps may be doubted whether the State could abolish all rights of action on the one hand, or all defenses on the other, *without setting up something adequate in their stead*. No such question is here presented, and we intimate no opinion upon it. The statute under consideration sets aside one body of rules only to establish another system in its place.<sup>346</sup>

Justice Marshall's concurring opinion in *Pruneyard Shopping Center v. Robins* echoed this view, though in a property law context.<sup>347</sup> In *Pruneyard*, the U.S. Supreme Court upheld the California Supreme Court's interpretation of the California constitution as requiring shopping center property owners to allow the exercise of free expression and petitioning of government on private property.<sup>348</sup> Justice Marshall concurred in the judgment:

I do not understand the Court to suggest that rights of property are to be defined solely by state law, or that there is no federal constitutional barrier to the abrogation of common-law rights by Congress or a state government. The constitutional terms "life, liberty, and property" do not derive their meaning solely from the provisions of positive law. They have a normative dimension as well, establishing a sphere of private autonomy which government is bound to respect. *Quite serious constitutional questions might be raised if a legislature attempted to abolish certain categories of common-law rights in some general way*. Indeed, our cases demonstrate that there are limits on governmental authority to abolish "core" common-law rights, including rights against trespass, at least without a compelling showing of necessity or a provision for a reasonable alternative remedy.<sup>349</sup>

Although *Pruneyard* involved the law of trespass and takings, Justice Marshall broadly argued that "'core' common-law rights" may not be abolished without "a compelling showing of necessity," or without state "provision of a reasonable alternative remedy."<sup>350</sup> The Supreme Court has never decided as a matter of constitutional law, and appears to have avoided,<sup>351</sup> the question of whether a state legislature may abolish common law tort without providing a reasonable alternative

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<sup>346</sup> *Id.* (emphasis added).

<sup>347</sup> *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 93 (1980) (Marshall, J., concurring).

<sup>348</sup> *Id.* at 79.

<sup>349</sup> *Id.* at 93-94 (emphasis added).

<sup>350</sup> *Id.*

<sup>351</sup> See *Fein v. Permanente Med. Grp.*, 474 U.S. 892, 894-95 (1985) (White, J., dissenting from dismissal of certiorari in case contesting the California Supreme Court's upholding a \$250,000 cap for noneconomic damages). According to Justice White:

Whether due process requires a legislatively enacted compensation scheme to be a *quid pro quo* for the common-law or state-law remedy it replaces, and if so, how adequate it must be, thus appears to be an issue unresolved by this Court, and one which is dividing the appellate and highest courts of several States. The issue is important and is deserving of this Court's review. Moreover, given the continued national concern over the "malpractice crisis," it is likely that more States will enact similar types of limitations, and that the issue will recur.

remedy.<sup>352</sup> Such cautious treatment suggests recognition of both the importance of tort law and of the implications that would flow from its effective abolition.

It might also be argued that the Court's early workers' compensation opinions were strict scrutiny opinions, even if it is anachronistic to think of them in such a way. The Court consistently emphasized both state flexibility and limits. With respect to limits, in *White*, the Court suggested that a state might go too far by sweeping away all tort actions and defenses.<sup>353</sup> In *New York Cent. R.R. Co. v. Bianc American Knife*,<sup>354</sup> emphasizing flexibility, the Court said that New York could choose to require provision of both wage loss and disfigurement benefits<sup>355</sup> to workers without depriving employers of due process rights.<sup>356</sup> In the *Arizona Employers' Liability Cases*,<sup>357</sup> the Court carefully explained the flexibility available to states in providing workers' compensation as a substitute for common law tort damages, but it also suggested limits:

Indeed, if a State recognizes or establishes a right of action for compensation to injured workmen upon grounds not arbitrary or fundamentally unjust, the question whether the award shall be measured as compensatory damages are measured at common law, or according to some prescribed scale *reasonably adapted to produce a fair result*, is for the State itself to determine. Whether the compensation should be paid in a single sum after judgment recovered, as is required by the Arizona Employers' Liability Law just as under the common law system in the case of a judgment based upon negligence, or whether it would be more prudent to distribute the award by instalment [sic] payments covering the period of disability or of need, likewise is for the State to determine, and upon this the plaintiffs in error can raise no constitutional question.<sup>358</sup>

As in *White*, *Arizona Liability Cases*, at first blush, applied what might now be called rational basis review, but only insofar as a workers' compensation system was not arbitrary or fundamentally unjust. The question left unanswered is *when* a state has not provided benefits "according to some prescribed scale reasonably adapted to produce a fair result."<sup>359</sup> Regardless, the early workers' compensation opinions are

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<sup>352</sup> *Duke Power Co. v. Carolina Env't. Study Group*, 438 U.S. 59, 87–88 (1978) (raising the question of whether a quid pro quo was required when tort was supplanted by Price-Anderson remedies readdressing but not resolving remedial inadequacy issues during due process analysis that was conducted *as if* alleged statutory deprivation of negligence remedies triggered heightened scrutiny).

<sup>353</sup> See case cited *supra* note 346 and accompanying text.

<sup>354</sup> *New York Cent. R.R. Co. v. Bianc. American Knife*, 250 U.S. 596 (1919).

<sup>355</sup> A form of benefit in which money is provided to workers' compensation claimants based solely on disfigurement to their bodies and irrespective of wage loss. 6 LARSON, *supra* note 136, at § 88.01.

<sup>356</sup> *Bianc American Knife*, 250 U.S. at 600–01. The employers argued that disfigurement awards, which provided monetary compensation for "mere" physical injury without consideration of the injury's impact on an injured worker's earning capacity were a form of disguised negligence remedy falling outside the ambit of *White* and therefore objectionable. The Court upheld the arrangement, but did not pass upon the question (because it was not presented) of whether core disability benefits could be provided through impairment schedules. In the case below, disability benefits had been awarded based on wage loss. *Id.* at 603.

<sup>357</sup> 250 U.S. at 400.

<sup>358</sup> *Id.* at 429 (emphasis added).

<sup>359</sup> *Id.*

not the product of perfunctory review of state action. The Court consistently considered the constitutionality of impacts on workers, notwithstanding employers had challenged the statutes,<sup>360</sup> an approach not consistent with modern principles of rational basis review.<sup>361</sup> Furthermore, the review was consistently of *elective* workers' compensation statutes from which employees could escape.

*B. A Contemporary Assessment of the Constitutional Connection  
Between Workers' Compensation and Tort*

If employer-provided workers' compensation benefits were not the tort-substitute, exclusive remedy for workplace injury, they would be uncontroversially discretionary employee welfare benefits. Substantively, state statutes permitting employer modification (or cancellation) of such benefits would be subject to very limited judicial review, to rational basis review for alleged constitutional infirmity, and perhaps, to review for statutory compliance with ERISA.<sup>362</sup> Any argument for heightened judicial scrutiny of legislative encroachments on workers' compensation benefits must therefore originate from the premises that workers have been divested of tort rights, and that tort rights may not be seriously obstructed without enhanced justification.<sup>363</sup> Workers' compensation is patently discriminatory; employees are treated sometimes dramatically differently than non-employees with respect to personal injuries.<sup>364</sup> Yet, under the American constitutional system, states are afforded broad latitude to regulate the activities of their citizens through creation of discriminatory classifications.<sup>365</sup> Federal intrusion in state schemes is carefully limited.<sup>366</sup>

The Supreme Court has said with respect to other legislative classifications that under state law, “[i]n areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.”<sup>367</sup>

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<sup>360</sup>

In considering the constitutional question, it is necessary to view the matter from the standpoint of the employee as well as from that of the employer. For, while plaintiff in error is an employer, and cannot succeed without showing that its rights as such are infringed . . . yet . . . the exemption from further liability is an essential part of the scheme, so that the statute if invalid as against the employee is invalid as against the employer.

N.Y. Cent. R.R. Co. v. White, 243 U.S. 188, 197 (1917).

<sup>361</sup> Raphael Holoszyc-Pimentel, *Reconciling Rational Basis Review: When Does Rational Basis Bite?*, 90 N.Y.U. L. REV. 2070, 2074 (2015) (explaining that a challenger in a rational basis case “bears the burden of proving the irrationality of the challenged statute”).

<sup>362</sup> See generally RONALD D. ROTUNDA & JOHN E. NOWAK, 2 TREATISE ON CONSTITUTIONAL LAW § 15.4(d) (2021) (discussing the narrow grounds for judicial review of ordinary state legislative acts). On ERISA, see *supra* note 246 and accompanying text.

<sup>363</sup> See e.g., *F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 312–13 (1993) (discussing the narrow grounds for heightened judicial scrutiny under equal protection analysis).

<sup>364</sup> See *supra* Part II for the measure of workers' compensation benefits.

<sup>365</sup> *F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. at 312–13.

<sup>366</sup> See Holoszyc-Pimentel, *supra* note 361, at 2095–96.

<sup>367</sup> *Beach Commc'ns, Inc.* 508 U.S. at 313.



But in agreement with John Goldberg, this article “argues for recognition of a right, grounded in the Fourteenth Amendment’s Due Process Clause, to a body of law that empowers individuals to seek redress against persons who have wronged them.”<sup>368</sup> Furthermore, this article contests the notion that tort and workers’ compensation are merely areas of social and economic policy.<sup>369</sup> Rather, tort and workers’ compensation protect the security of the human body. Moreover, as Gregory Keating has said, “it is better for wrongs not to be done in the first place than it is to attempt to erase their untoward effects once they have been committed.”<sup>370</sup> The right to be free from harm is distinct from the right to after-harm redress that Professor Goldberg identifies and advances—though encroachments on the right to a remedy should also be protected by courts.<sup>371</sup> After harm, corrective justice theorists would return a victim to the status quo ante; law and economics theorists would impose liability on the cheapest cost avoider of present injury to deter future injury.<sup>372</sup> These theorists, with Professor Goldberg, focus on repair, not the right of the victim to avoid harm.<sup>373</sup> Concededly, this article has also discussed workers’ compensation’s failures to repair negligence victims wholly, arguably deemphasizing injury avoidance. Much scholarship is devoted to concessionary discussion of risk internalization, closing the barn door after the horse has fled.<sup>374</sup>

The foregoing is well and good. My discussion from this point forward assumes that a state is simply not persuaded to modify workers’ compensation in response to arguments that it inadequately replaces negligence. The question remaining is whether state law immunizing employers from tort through workers’ compensation is subject to enhanced judicial scrutiny if it descends below some floor of rules and remedies. The answer depends on tort’s constitutional status because workers’ compensation stands in the shoes of tort. Like Lisa Laplante, I conceive of tort as a form of primary right,<sup>375</sup> or more precisely, as a right emanating from a primary right. Like Professor Goldberg, I agree that federal recognition of “this right need not entail the federalization of tort law, or even require that tort law remain a part of our legal system.”<sup>376</sup> Goldberg argues that tort is derivative of a primary constitutional “right to redress.”<sup>377</sup> I resist that derivation because the idea of redress for injury seems passively to accept the inevitability of injury. I view both tort and workers’

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<sup>368</sup> John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 YALE L.J. 524, 529 (2005).

<sup>369</sup> *Id.* at 524.

<sup>370</sup> Keating, *supra* note 264, at 315.

<sup>371</sup> The right to a remedy “is one of the oldest of Anglo-American rights, rooted in Magna Carta and nourished in the English struggle for individual liberty and conscience rights. Today, it expressly or implicitly appears in forty state constitutions.” Thomas R. Phillips, *The Constitutional Right to a Remedy*, 78 N.Y.U.L. REV. 1309, 1310 (2003).

<sup>372</sup> William M. Landes & Richard A. Posner, *The Positive Economic Theory of Tort Law*, 15 GA. L. REV. 851, 920 (1980) (arguing broadly that tort law has in fact been efficient under the common law but placing efficiency in the foreground).

<sup>373</sup> *Id.*; Goldberg, *supra* note 368, at 626–27.

<sup>374</sup> Jennifer H. Arlen, *Reconsidering Efficient Tort Rules for Personal Injury: The Case of Single Activity Accidents*, 32 WM. & MARY L. REV. 41, 44 (1990).

<sup>375</sup> Lisa J. Laplante, *Human Torts*, 39 CARDOZO L. REV. 245, 249–50 (2017).

<sup>376</sup> Goldberg, *supra* note 368, at 529.

<sup>377</sup> *Id.*

compensation as rights in service of a broader primary right of personal security. Lisa Laplante refers to a primary right conceptualization as a two-step:

If it were determined that a primary right had been violated, the plaintiff's secondary right to redress was activated. The secondary right represents a power to bring a claim and is procedural and dependent upon the purely substantive idea of a primary right. Thus, this jurisprudence followed what I call the "two-step tort formula" which requires first finding a violation of a primary right which only then gives rise to the right of the secondary right of a remedy.<sup>378</sup>

Taking Laplante's approach one step further,<sup>379</sup> I want to emphasize the primary right that tort law seeks to vindicate. I argue that it is personal security, and, conceived as such, injury remedies are important, but secondary. Blackstone discussed personal security as first among the "absolute" rights, and defined it to include "[t]he preservation of a man's health from such practices as may prejudice or annoy it."<sup>380</sup> Blackstone further explained, "As to injuries which affect the personal security of individuals, they are either injuries against their lives, their limbs, their bodies, their health, or their reputations."<sup>381</sup> Blackstone continued, "[i]njuries affecting a man's health are where, by any unwholesome practices of another, a man sustains any apparent damage in his vigor or constitution."<sup>382</sup> This definition encompasses indirectly caused wrongs,<sup>383</sup> and Blackstone discussed it in the context of remedies for violation of the absolute right of individuals to personal security; Blackstone thought personal security implicated more than, for example, the right to bear arms:

These are wrongs or injuries unaccompanied by force, for which there is a remedy in damages by a special action of *trespass upon the case*. This action, of *trespass*, or transgression, *on the case*, is a universal remedy, given for all personal wrongs and injuries without force; so called because the plaintiff's whole case or cause of complaint is set forth at length in the original writ. For though in general there are methods prescribed, and forms of action previously settled, for redressing those wrongs which most usually occur, and in which the very act itself is immediately prejudicial or injurious to the plaintiff's person or property, as battery, non-payment of debts, detaining one's goods, or the like; yet where any special consequential damage arises, which could not be foreseen and provided for in the ordinary course of justice, the party injured is allowed, both by common law and . . . [statute] . . . to bring a special action on his

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<sup>378</sup> Laplante, *supra* note 375, at 283.

<sup>379</sup> Laplante discusses the right of personal security. See *id.* at 282–287. My purpose is to connect protection more explicitly from wrongful physical injury to a broader right of personal security that states may not abridge without substantial justification.

<sup>380</sup> 1 WILLIAM BLACKSTONE, COMMENTARIES \*121, \*134; see also Laplante, *supra* note 375, at 232.

<sup>381</sup> 3 WILLIAM BLACKSTONE, COMMENTARIES \*119.

<sup>382</sup> *Id.* at \*122.

<sup>383</sup> In the old English "writ system," actionable injuries to the person were either directly and forcibly caused ("vi et armis"), in which case they were denoted "trespasses," or were, as Blackstone defined them, "a culpable omission; . . . where the act is not immediately injurious, but only by consequence and collaterally, there no action of trespass vi et armis will lie, but an action on the special case, for the damages consequent on such omission or act." *Id.*

*own case, by a writ formed according to the peculiar circumstances of his own particular grievance.* For wherever the common law gives a right or prohibits an injury, it also gives a remedy by action; and therefore, wherever a new injury is done, a new method of remedy must be pursued. And it is a settled distinction that where an act is done which is in itself an *immediate* injury to another's person or property, there the remedy is usually by an action of trespass *vi et armis*; but where there is no act done, but only a culpable omission, or where the act is not immediately injurious, but only by *consequence* and collaterally, there no action of trespass *vi et armis* will lie, *but an action on the special case, for the damages consequent on such omission or act.*<sup>384</sup>

Thus, the ideas of trespass and transgression encompassed both intentionally caused injury and injury that was direct but not intentional.<sup>385</sup> The idea of “case” encompassed “culpable omission,” but was also a catch-all for injuries suffered, but not precisely defined; and Blackstone thereby described the priority of the primary right to “remedy by action.”<sup>386</sup> This two-step seems intuitively correct. The right to bear arms, for example (one instance of a means to protect personal security),<sup>387</sup> is a right to prevent harm by others—not to remedy harm after it has occurred.<sup>388</sup> Blackstone was the most important source of authority of the law as it existed at the time of the Founders,<sup>389</sup> who would have been aware of his capacious theories of personal security as an absolute right, and his discussion of trespass and case as remedies vindicating personal security. These conceptions of personal security, accordingly, have deep historical roots. I argue that the rootedness of the right explains the caution of courts when initially endorsing the Grand Bargain (thereby preempting the common law tort rights of workers) even though the police power doctrine of the day and the procedural posture of the lead cases did not suggest any need for enhanced scrutiny on behalf of workers.<sup>390</sup>

Tort, nevertheless, is a creature of the common law, and it has been claimed that “[a] person has no property, no vested interest, in any rule of the common law.”<sup>391</sup> As Benjamin Cover has underscored, “cases analyzing remedy denial under the Fourteenth Amendment have generally applied rational basis review and upheld the restrictions.”<sup>392</sup> In the context of the Fourteenth Amendment, however, the Court has also said, “[i]t is the duty of every State to provide, in the administration of justice,

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<sup>384</sup> *Id.* at \*122–23 (emphasis added).

<sup>385</sup> See *supra* note 383 and accompanying text (emphasis added).

<sup>386</sup> 3 WILLIAM BLACKSTONE, COMMENTARIES \*123.

<sup>387</sup> Stephen P. Halbrook, *Personal Security, Personal Liberty, and the Constitutional Right to Bear Arms: Visions of the Framers of the Fourteenth Amendment*, 5 SETON HALL CONST. L.J. 341, 393 (1995) (discussing the understanding of the 39th Congress).

<sup>388</sup> “[T]his negative system, of *wrongs* must correspond and tally with the former positive system, of *rights*.” 3 WILLIAM BLACKSTONE, COMMENTARIES \*119.

<sup>389</sup> DANIEL J. BOORSTIN, *THE MYSTERIOUS SCIENCE OF THE LAW* 3 (1958) (“In the first century of American independence, the *Commentaries* were not merely an approach to the study of law; for most lawyers they constituted all there was of the law.”)

<sup>390</sup> See *N.Y. Cent. R.R. Co. v. White*, 243 U.S. 188, 206, 208–09 (1917).

<sup>391</sup> *Munn v. Illinois*, 94 U.S. 113, 134 (1876).

<sup>392</sup> Benjamin Plener Cover, *The First Amendment Right to a Remedy*, 50 U.C. DAVIS L. REV. 1741, 1744 (2017) (arguing among other things for First Amendment constraints on damages limitations).

for the redress of private wrongs . . . .”<sup>393</sup> This second proposition conflicts with the idea that a state could abolish the redress of private wrongs by legislating remedies out of existence. Workers’ compensation, and other forms of tort reform, have been consistently upheld on state police power theories—and as discussed above, this was the animating principle of Supreme Court opinions which upheld workers’ compensation against Fourteenth Amendment liberty and property challenges raised by employers in the early twentieth century.<sup>394</sup> These cases were decided well before modern paradigms of constitutional analysis had developed. If a plaintiff today wished to challenge, on federal constitutional grounds, state legislation abolishing or seriously impairing remedies for workplace injury, she would find her avenues of attack limited. The essence of any such constitutional challenge would be to determine whether a right to personal security, policed by tort law, or its adequate substitute, is guaranteed by either the Due Process or Privileges or Immunities clauses of the Fourteenth Amendment.

### C. Substantive Due Process

Perhaps a challenger would contend that practical abolishment of tort through provision of poverty-level workers’ compensation benefits violated substantive due process. With respect to substantive due process analysis, the Court has said, “[t]he day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought.”<sup>395</sup>

Substantive due process derives from the Fourteenth Amendment of the U.S. Constitution: “No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law . . . .”<sup>396</sup> The majority judicial view is that due process not only protects certain legal procedures, but also protects certain substantive rights unrelated to procedure.<sup>397</sup> But substantive due process was, by some accounts, weaponized during the *Lochner* era, when companies argued that legislative and regulatory activity (involving the workplace in particular) deprived them of property or liberty without due process.<sup>398</sup> The New Deal era was hostile to substantive due process analysis operating as a check on progressive legislation.<sup>399</sup>

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<sup>393</sup> *Mo. Pac. Ry. Co. v. Humes*, 115 U.S. 512, 521 (1885).

<sup>394</sup> See generally *White* 243 U.S. 188 (upholding exercise of police powers); see also *Mountain Timber Co. v. State of Washington*, 243 U.S. 219, 244–46 (1917) (upholding exercise of police powers).

<sup>395</sup> *Williams v. Lee Optical Co.*, 348 U.S. 483, 488 (1955).

<sup>396</sup> U.S. CONST. amend. XIV, § 1.

<sup>397</sup> *Meyer v. Nebraska*, 262 U.S. 390, 403 (1923) (striking on substantive due process grounds a Nebraska law prohibiting the teaching of the German language).

<sup>398</sup> See Mila Sohoni, *The Trump Administration and the Law of the Lochner Era*, GEO. L.J. 1323, 1330–31 (2019) (providing this traditional account but criticizing it as “incomplete”).

<sup>399</sup> For a useful summary of the Court’s transition during the New Deal to minimal rationality review under substantive due process see Tribe, *supra* note 326, at 271–73.

After liberal Supreme Court justices attempted to expand individual rights during the 1960s and 1970s, under their evolving interpretation of Fourteenth Amendment substantive due process,<sup>400</sup> conservative justices responded. Justices Scalia and Thomas reinforced the idea (which has always been present in constitutional law cases to one degree or another) that the Due Process Clause “is to prevent future generations from lightly casting aside important traditional values—not to enable this Court to invent new ones.”<sup>401</sup> Especially instructive, in *Cruzan v. Director, Missouri Department of Health*, is Justice Scalia’s concurring opinion in which he states, “[a] claimant seeking to maintain a substantive due process claim must demonstrate that the State has deprived him of a right historically and traditionally protected against state interference.”<sup>402</sup> This “traditionalist” argument was again featured in *Washington v. Glucksberg*.<sup>403</sup> In *Glucksberg*, the Supreme Court unanimously held that a right to assisted suicide was not protected by the Due Process Clause.<sup>404</sup> Chief Justice Rehnquist wrote that a right not “‘deeply rooted in the nation’s history’” does not qualify as being a protected liberty interest.<sup>405</sup>

More recently, the Supreme Court seemingly changed tack in *Obergefell v. Hodges*, holding that the Fourteenth Amendment requires a state to license a marriage between two people of the same sex, not a historically protected interest under a narrow level of generality, and to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out of state.<sup>406</sup> The Court has been in sharp disagreement over the general contours of substantive due process and over the limits of historically based substantive due process, but it is difficult to deny that traditionalism—whether seen as a positive force, a negative force, or a value in need of integration—has been central to substantive due process analysis.<sup>407</sup>

While workers’ compensation may not be deeply rooted in our nation’s history (it is just a century old) tort rights and remedies (or their trespass/transgression-based antecedents in the writ system) are deeply rooted.<sup>408</sup> As discussed, the leading lawyer of the founding era, William Blackstone, viewed rights establishing freedom from bodily trespass as necessary to vindicating the absolute right of personal security.<sup>409</sup> Given the importance of workers compensation as a substitute for the tort right

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<sup>400</sup> See, e.g., *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (scheme to prevent marriages between persons solely based on racial classifications held to violate the Equal Protection and Due Process Clauses of the Fourteenth Amendment); *Roe v. Wade*, 410 U.S. 113, 166 (1973) (holding that Texas’s criminal law anti-abortion statute was unconstitutional).

<sup>401</sup> *Michael H. v. Gerald D.*, 491 U.S. 110, 122 n.2 (1989); *Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261, 269 (1990).

<sup>402</sup> *Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. at 294 (Scalia, J., concurring).

<sup>403</sup> *Washington v. Glucksberg*, 521 U.S. 702 (1997).

<sup>404</sup> *Id.* at 735.

<sup>405</sup> *Id.* at 720–21 (quoting *Moore v. East Cleveland*, 431 U.S. 494, 502 (1977) (plurality opinion)).

<sup>406</sup> *Obergefell v. Hodges*, 576 U.S. 644, 675–76 (2015).

<sup>407</sup> Katharine T. Bartlett, *Tradition as Past and Present in Substantive Due Process Analysis*, 62 DUKE L.J. 535, 540, 556 (2012) (discussing ongoing competing visions of tradition in recent configurations of the Court as unnecessarily diametrically opposed).

<sup>408</sup> See BLACKSTONE, *supra* note 383.

<sup>409</sup> *Id.* at 133.

protecting the right of personal security,<sup>410</sup> under *Glucksberg*, the Court should subject serious infringements on the right to heightened scrutiny.<sup>411</sup>

Federal substantive due process analysis has also previously been applied to overturn state damages law. In *BMW v. Gore*, the Supreme Court reaffirmed that a tort award that can be fairly categorized as “grossly excessive” in relation to the interests it seeks to vindicate may be sufficiently arbitrary to violate the Due Process Clause.<sup>412</sup> The case concerned punitive damages imposed by a jury and upheld by the Alabama state courts under Alabama state tort law.<sup>413</sup> In reaching its decision, the Court cited earlier precedent, including *Pacific Mutual Life Insurance Company v. Haslip*,<sup>414</sup> a case in which an Alabama punitive damages award was upheld, drawing on principles of “fundamental fairness” and “reasonableness.”<sup>415</sup> *Haslip* acknowledged the long historical pedigree of punitive damages:

In view of this consistent history, we cannot say that the common-law method for assessing punitive damages is so inherently unfair as to deny due process and be *per se* unconstitutional. “If a thing has been practised for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it.”<sup>416</sup>

Still, the *Haslip* court opened the door for *Gore* by observing, “[i]t would be . . . inappropriate to say that, because punitive damages have been recognized for so long, their imposition is never unconstitutional.”<sup>417</sup> Jury discretion “in the fixing of punitive damages may invite extreme results that jar one’s constitutional sensibilities.”<sup>418</sup> Neither *Gore* nor *Haslip* pretended that Alabama’s damages practices ran afoul of the common law.<sup>419</sup> If grossly excessive damages, arguably consistent with the common law (a damages zenith) run afoul of substantive due process, it might be difficult for injured workers to understand why grossly deficient statutory benefits that are inconsistent with common law tort (a nontraditional damages nadir) would not be similarly repugnant to fairness. Grossly low damages, it may be credibly argued, are sufficiently arbitrary to violate the Due Process Clause.<sup>420</sup> *BMW v. Gore* may be conceived simply as a punitive damages case that incorporates, by way of the Fourteenth Amendment, the Eighth Amendment’s prohibitions against excessive fines and cruel and unusual punishment against the

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<sup>410</sup> See Halbrook, *supra* note 387.

<sup>411</sup> Regardless of what level of generality is used to frame the right—to personal security, to redress, to remedy—it has been embedded in Anglo-American law for a long time.

<sup>412</sup> *BMW v. Gore*, 517 U.S. 559, 585–86 (1996).

<sup>413</sup> *Id.* at 563–67.

<sup>414</sup> *Pacific Mutual Life Insurance Company v. Haslip*, 499 U.S. 1 (1991).

<sup>415</sup> *Id.* at 9–10 (quoting *Browning-Ferris Industries of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 276–77 (1989)), 17–19.

<sup>416</sup> *Id.* at 17 (citing *Sun Oil Co. v. Wortman*, 486 U.S. 717, 730 (1988)).

<sup>417</sup> *Id.* at 18.

<sup>418</sup> *Id.*

<sup>419</sup> *Id.* at 15–16; *BMW v. Gore*, 517 U.S. 559, 585–86 (1996).

<sup>420</sup> *Gore*, 517 U.S. at 568.

states.<sup>421</sup> Perhaps appallingly low benefits for serious injuries are their own kind of excessive fine imposed against injured workers.

#### *D. Privileges or Immunities*

What rights are not reachable by states? The argument that the Fourteenth Amendment protects against significant incursions by states on historically grounded tort rights, on substantive due process grounds, relies derivatively on the claim that life, liberty, and property are impaired through encroachments on personal security. One may even conceive of a citizen having a property interest in his or her own body, the rights to which must be subject to vindication in a state forum, though it is the state that would delimit the substance of such a right.<sup>422</sup> Yet, some judges reject altogether the idea of substantive due process. Justice Thomas emphasized this point in *McDonald v. Chicago*:<sup>423</sup>

The notion that a constitutional provision that guarantees only “process” before a person is deprived of life, liberty, or property could define the substance of those rights strains credulity for even the most casual user of words. Moreover, this fiction is a particularly dangerous one. The one theme that links the Court’s substantive due process precedents together is their lack of a guiding principle to distinguish “fundamental” rights that warrant protection from nonfundamental rights that do not.<sup>424</sup>

This article raises a problem in the context of the right to personal security and for a citizen to avoid harm that is similar to the problem faced by challengers of local gun regulations in *McDonald v. Chicago*.<sup>425</sup> The Fourteenth Amendment does not explicitly forbid state or local interference with a citizen’s right to bear arms.<sup>426</sup> The Fourteenth Amendment also does not explicitly forbid state interference with a citizen’s ability to obtain personal security through assurance of cause of action and a remedy against her injurer.<sup>427</sup> The right to bear arms is guaranteed by the Second Amendment of the U.S. Constitution only against the Federal government.<sup>428</sup> The right to personal security is not enumerated in the text of the Constitution, and any limitation on a state’s power to curtail these rights can be found only in the Fourteenth Amendment. The candidates for implicit federal limits on the exercise of

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<sup>421</sup> See *Cooper Indus. v. Leatherman Tool Grp.*, 532 U.S. 424, 433–34 (2001) (“Despite the broad discretion that States possess with respect to the imposition of criminal penalties and punitive damages, the Due Process Clause of the Fourteenth Amendment to the Federal Constitution imposes substantive limits on that discretion. That Clause makes the Eighth Amendment’s prohibition against excessive fines and cruel and unusual punishments applicable to the States.”).

<sup>422</sup> Radhika Rao, *Property, Privacy, and the Human Body*, 80 B.U. L. REV. 359, 367–71 (2000).

<sup>423</sup> *McDonald v. Chicago*, 561 U.S. 742, 805 (2010) (Thomas, J., concurring).

<sup>424</sup> *Id.* at 811.

<sup>425</sup> *Id.* at 749–50.

<sup>426</sup> *Id.* at 754.

<sup>427</sup> See U.S. CONST. amend. XIV.

<sup>428</sup> U.S. CONST. amend. II. See generally *New York State Rifle & Pistol Association v. Bruen*, 142 S. Ct. 2111 (2022) (upholding the right to bear arms).

state power reduce, as a practical matter, to the Substantive Due Process and Privileges or Immunities clauses of the Amendment.<sup>429</sup>

The Privileges or Immunities clause states, “The Citizens of each State shall be entitled to all Privileges or Immunities of Citizens in the several States.”<sup>430</sup> A great deal of disagreement has existed among scholars and courts as to whether the clause possesses substantive federal content.<sup>431</sup> The Reconstruction Congress of 1868, especially that body’s “radical” Republicans, believed that both enumerated and unenumerated federal constitutional rights existed and had been enforceable against the states from the founding of the Republic.<sup>432</sup> This belief was contrary to the early nineteenth century holding of the Supreme Court in *Barron v. Baltimore* that not even the U.S. Constitution’s Bill of Rights was enforceable against the states.<sup>433</sup>

Architects of the Fourteenth Amendment repeatedly seized upon another early nineteenth century federal circuit court opinion authored by Bushrod Washington, *Corfield v. Coryell*,<sup>434</sup> to argue that the Privileges and Immunities clause of Article IV of the Constitution was meant to confer rights of national citizenship on state citizens enforceable against the states.<sup>435</sup> *Corfield* itself rejected the national citizenship claim because the right under consideration—to harvest oysters—was not among fundamental rights unassailable by the state under the federal constitution.<sup>436</sup> But Justice Washington used the opportunity presented by the case to opine that there were, in principle, Article IV rights of national citizenship.<sup>437</sup> It is evident that the chief spokesmen advancing the Fourteenth Amendment in the 1868 Congress, such as drafting committee chair Jacob Howard, thought the Article IV rights described by Justice Washington and the first eight amendments of the federal constitution were national rights that no state could abridge.<sup>438</sup>

Just a few years later, however, the Supreme Court interpreted the Fourteenth Amendment’s Privileges or Immunities clause, in the *Slaughterhouse Cases*,<sup>439</sup> to be solely one of comity (as Article IV’s Privileges and Immunities clause had formerly been interpreted to be<sup>440</sup>): a state was not required to provide any particular right; but once having done so, the state was required to provide the right, without

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<sup>429</sup> See generally *McDonald v. Chicago*, 561 U.S. 742, 762 (noting “chief congressional proponents of the Fourteenth Amendment espoused the view that the Amendment made the Bill of Rights applicable to the States”). I omit all discussion of the Equal Protection Clause because it is virtually impossible for challengers to succeed under it.

<sup>430</sup> U.S. CONST. amend. XIV, § 1.

<sup>431</sup> *McDonald*, 561 U.S. at 756–57.

<sup>432</sup> MICHAEL KENT CURTIS, *NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS* 41–56 (1986).

<sup>433</sup> *Barron v. Baltimore*, 32 U.S. 243 (1833).

<sup>434</sup> *Corfield v. Coryell*, 6 F. Cas. 546 (1823).

<sup>435</sup> Randy E. Barnett & Evan D. Bernick, *The Privileges or Immunities Clause, Abridged: A Critique of Kurt Lash on the Fourteenth Amendment*, 95 NOTRE DAME L. REV. 499, 500–01 (2019).

<sup>436</sup> See *Corfield*, 6 F. Cas. at 551–52.

<sup>437</sup> *Id.*

<sup>438</sup> CURTIS, *supra* note 432.

<sup>439</sup> *Slaughterhouse Cases*, 83 U.S. 36 (1873) (upholding the City of New Orleans’ assumption of monopoly power over meat butchering activities in the interest of public sanitation over the opposition of private butchers whose livelihoods were thereby dispossessed on the grounds that the butchers had no Federal right to be free from such dispossession).

<sup>440</sup> See 32 U.S. 243 (1833).



discrimination, to both citizens and non-citizens.<sup>441</sup> Subsequent scholarship has shown that the Congress of 1868 was not simply replicating the comity reading of the Privileges *and* Immunities clause when constructing the Privileges *or* Immunities clause.<sup>442</sup> Scholars have established that “[v]irtually no serious modern scholar—left, right, and center—thinks that this [interpretation] is a plausible reading of the Amendment.”<sup>443</sup> A majority of the Supreme Court now appears to have rejected *Slaughterhouse*’s reasoning, but not its holding.<sup>444</sup> As Justice Alito wrote in *McDonald v. Chicago*: “For many decades, the question of the rights protected by the Fourteenth Amendment against state infringement has been analyzed under the Due Process Clause of that Amendment and not under the Privileges or Immunities Clause. We therefore decline to disturb the *Slaughter-House* holding.”<sup>445</sup> This embrace of stare decisis makes sense institutionally, but not logically. For Justice Thomas, who rejects substantive due process conceptually, Privileges or Immunities analysis offers an attractive alternative for traditionalists to protect historically rooted rights outside of the substantive due process framework. Justice Gorsuch seems also to have endorsed the approach in principle in *Timbs v. Indiana*.<sup>446</sup>

Privileges or Immunities analysis may lend support for the notion that a state’s weakening of injury rights and remedies (providing its citizens personal security) has limits. All rights theoretically extrapolated from beyond the explicit text of the Fourteenth Amendment will be subject to the “ink blot” objection.<sup>447</sup> The evolving understanding of the nature of a “privilege” or an “immunity” is ultimately an exploration of the idea of natural law and “unenumerated” rights.<sup>448</sup> Yet the Right to

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<sup>441</sup> See Barnett & Bemick, *supra* note 435, at 503–04 (2019).

<sup>442</sup> CURTIS, *supra* note 432.

<sup>443</sup> Akhil Reed Amar, *Substance and Method in the Year 2000*, 28 PEPP. L. REV. 601, 631, n.178 (2001).

<sup>444</sup> *McDonald v. Chicago*, 561 U.S. 742, 746 (2010).

<sup>445</sup> *Id.* at 758.

<sup>446</sup> *Timbs v. Indiana*, No. 17–1901 (Feb. 20, 2019) (holding in concurring opinion that state of Indiana’s civil forfeiture procedure violated both substantive due process and the Privileges or Immunities Clause).

<sup>447</sup> See Richard L. Aynes, *Ink Blot or Not, The Meaning of Privileges and/or Immunities*, 11 U. PA. J. CONST. L. 1295, 1312 (2009). During Congressional Supreme Court confirmation hearings in 1987, Judge Bork (an unsuccessful nominee) famously said of the Ninth Amendment:

I do not think you can use the Ninth Amendment unless you know something of what it means. For example, if you had an amendment that says, “Congress shall make no” and then there is an ink blot and you cannot read the rest of it and that is the only copy you have, I do not think the court can make up what might be under the ink blot if you cannot read it.

Kurt T. Lash, *Of Inkblots and Originalism: Historical Ambiguity and the Case of the Ninth Amendment*, 31 HARV. J. L. & PUB. POL’Y 467, 469 (2008) (quoting Nomination of Robert H. Bork to be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary, 100th Cong. 224 (1987) (statement of Judge Robert H. Bork)).

<sup>448</sup> A. Christopher Bryant, *What McDonald Means for Unenumerated Rights*, 45 GA. L. REV. 1073, 1085 (2011):

[T]he paradox of looking to an apparently procedural guarantee for the protection of substantive rights vanishes once one shifts the focus from the Due Process to the Privileges or Immunities Clause . . . To be sure, a great deal of work remains to be done to get from even *that* text to the Court’s unenumerated rights rulings, either historical or contemporary, and it is far from clear how such inquiries either would or ought to be resolved. But at least such efforts would be directed to the right part of the Constitution.

Personal Security, first among Blackstone’s absolute rights,<sup>449</sup> would be an odd choice to omit from any list of important but unenumerated rights. Justice Thomas seems no friend of unenumerated rights and essentially<sup>450</sup> supports Kurt Lash’s view that the Privileges or Immunities clause nationalized enumerated rights against the states but provided only comity with respect to unenumerated rights.<sup>451</sup> But Jacob Howard’s words during debate on the Fourteenth Amendment have a different ring to them. Explaining the Privileges or Immunities clause on the Senate floor,<sup>452</sup> Howard quoted Bushrod Washington on what Privileges and Immunities meant within the meaning of Article IV of the Constitution:

[Privileges and immunities] may . . . be all comprehended under the following general heads: protection by the Government, the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, subject nevertheless to such restraints as the Government may justly prescribe for the general good of the whole.<sup>453</sup>

Howard added, “To these privileges and immunities, whatever they may be—for they are not and cannot be fully defined in their entire extent and precise nature—to these should be added the personal rights guarantied [sic] and secured by the first eight amendments of the Constitution . . . .”<sup>454</sup>

Ultimately, Howard concluded, “Now, sir, here is a mass of privileges, immunities, and rights, some of them secured by the second section of the fourth article of the Constitution, which I have recited, some by the first eight amendments of the Constitution . . . .”<sup>455</sup>

Howard was no opponent of unenumerated rights. Even if Howard’s open-textured explanation of the intended content of the Privileges or Immunities clause is difficult to construe, it seems inconceivable that either the Original Founders, or the Congress of 1866, would have contemplated with approval the ability of a state to abolish a citizen’s common law remedy against his injurer or to limit it in a purported bargain to whatever arbitrary figure a state might unilaterally decide upon. That is hardly a right to state protection that Washington and Howard would have recognized. Blackstone’s absolute right of personal security would never have been treated so shabbily.

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<sup>449</sup> See Laplante, *supra* note 379 and accompanying text.

<sup>450</sup> McDonald v. Chicago, 561 U.S. 742, 836–38 (2010).

<sup>451</sup> KURT T. LASH, THE FOURTEENTH AMENDMENT AND THE PRIVILEGES AND IMMUNITIES OF AMERICAN CITIZENSHIP 192, 194 (2014).

<sup>452</sup> CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866) (Statement of Sen. Howard).

<sup>453</sup> *Id.* (quoting Corfield v. Coryell, 6 F. Cas. 546, 551 (C.C.E.D. Pa. 1823) (No. 3230)).

<sup>454</sup> *Id.*

<sup>455</sup> *Id.*

## CONCLUSION

This article has contended that workers' compensation has become inadequate because it fails to protect a constitutional baseline of personal security. It has become unmoored from tort to a degree that it rarely even vaguely resembles historical principles of pecuniary compensation. A stale Grand Bargain traps workers in an irrational compensation environment. The victims of true accident—if such exists—may be better off in the regime. It is doubtful the same can be said of negligence victims. One can concede that some negligence victims with meritorious claims, at least, would choose to avoid the rigors, time, and expense of negligence litigation, but this reflects a critique of the tort system rather than approval of workers' compensation.

Benefit inadequacy previously justified by the “unholy trinity” is now indefensible. All but four states have implemented comparative fault regimes. Negligence cases that would likely have failed in 1911 would much more likely be substantially viable under current tort law. The cost-benefit calculus of the entire system is now askew.

States viewing workers' compensation as a form of “welfare” are unlikely to take seriously the connection between work-related injuries and constitutional baselines. This article has contended that the judiciary should play a role in guarding such baselines by subjecting serious state-sponsored erosions of historically grounded injury rights and remedies to heightened scrutiny under the Fourteenth Amendment. Courts might view their mission as an act of equitable recission: if the Grand Bargain *is* an agreement, it must be equitably reevaluated as one. Injured workers must either be fairly compensated for altered assumptions in the underlying agreement, or they must be permitted to elect the status quo ante of negligence law.<sup>456</sup>

How might legislative equity lighten the burden of the courts? A large step forward could consist of an honest explanation of what, in connection with a work-related injury, is being compensated, and why. If the American Medical Association Guides to Permanent Impairment show that a worker is twenty percent disabled as the result of a shoulder injury, and a worker's compensation schedule directs payment of a certain number of weeks given the level of impairment, the state should transparently explain what the award represents as a percentage of the statewide average weekly wage and the worker's pre-injury wage. Or the state should frankly admit that workers' compensation awards are arbitrary. States should convene periodically, transparently, to determine the adequacy of workers' compensation benefits according to whatever adequacy baseline the state openly establishes through its political processes. The National Academy of Social Insurance Study Panel on Benefit Adequacy once tracked a useful metric: the relationship between the average total disability indemnity benefit level and the federal poverty level.<sup>457</sup> Tracking such numbers would stimulate honest policy debate on benefit adequacy. It should not be a secret if workers' compensation is plunging beneficiaries into

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<sup>456</sup> RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 54 cmt. j (AM. LAW INST. 2011).

<sup>457</sup> See ADEQUACY OF EARNINGS REPLACEMENT IN WORKERS' COMPENSATION PROGRAMS, *supra* note 92, at 27–28.

poverty. Workers' compensation benefit levels set by a state's political processes without explicit reference to workers' lost wages and reductions in earning capacity should, upon adjudicative challenge through a negligence action, trigger heightened judicial scrutiny. No state should be permitted to suspend permanent total disability benefits while disability is ongoing. States should automatically allow workers suffering catastrophic injuries the option of pursuing negligence actions given the often-glaring remedial discrepancies between negligence and workers' compensation in such contexts.

These state practices would be a start. At all events, the Right to Personal Security is too important to be left to the vicissitudes of legislative whimsy policed by a judicial rubber stamp. Fifty more years of workers' compensation ineffability is unacceptable.