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A Hundred Years of Excellence: But Is the Past Prologue? Reflections on the Pennsylvania Workers' Compensation Act

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ABSTRACT

This article repeats themes advanced in my address to the PBA Workers' Compensation Law Section on October 7, 2015 as part of its centennial commemoration of the state's workers' compensation statute. The workers' compensation statutes of Pennsylvania and of most other states emerged out of a remarkable period of cooperation between employers, employees, insurers, and progressive reformers. The statutes have been surprisingly durable, surviving for more than a century, and there is good reason to celebrate their effectiveness in remedying the scourge of workplace injury. On that point Judge Torrey and I agree.

The workers' compensation statutes did not appear out of thin air. They were in effect a product of the failure of both tort law and of various voluntary, non-legal measures created by private actors to combat inadequate compensation of injured workers. The historical conditions under which the broad social consensus of the need for workers' compensation statutes developed were unique. But driving the entire discussion were two factors which I contend are paramount. First, society writ large believed it had a moral obligation to remedy workplace injuries and accidents. Second, employers understood they could recoup the cost of mandatory workers' compensation participation by lowering wages. I question herein whether these factors continue to hold true and, if not, whether the workers' compensation model will endure.

My question is informed by recent developments that are under national discussion. In brief, a number of employers are petitioning state legislatures to authorize employers to opt-out from coverage by workers' compensation statutes. In lieu of statutory coverage, employers would be permitted to substitute lightly regulated "alternative benefit plans." I question whether these initiatives are prompted in

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some manner by a low wage economy in which the cost of mandatory workers' compensation benefits are not so easy to recoup. I also wonder whether employer flight from the workers' compensation regime represents a kind of moral retreat from what had been thought an uncontroversial duty to provide workers with a safe workplace and with adequate remedies for injury. I issue a warning: although Pennsylvania has always done the right thing and may continue to want to do so, a widespread "race to the bottom" by states abandoning the workers' compensation model may test Pennsylvania's moral compass.

INTRODUCTION

There can be little doubt that Judge David Torrey is justified in extolling the virtues of both the Pennsylvania Workers' Compensation Act (PWCA) and the American workers' compensation system writ large, in effect the first great national tort reform project. Judge Torrey ably chronicles the hundred-year history of the Pennsylvania statute and the many challenges it has faced in conforming itself to the shifting economic realities that have been part and parcel of transitions to and from industrialism. In a sense the journey through the history of the implementation of the PWCA is also a journey through the evolution of the developing administrative state within the United States. Young remedial statutes addressing multitudinous social problems were enacted simultaneously with the creation of agencies tasked with filling unknowable but predictable statutory gaps.[1] In a way that modern lawyers can scarcely appreciate simply everything was subject to question. How will facts be found? What will be the nature of the judicial review of administrative fact finding? What will be the relationship between the elected executive branch and its appointed administrative actors? In so many ways I marvel at the ingenuity of these pioneers of a flexible executive branch responding to an array of seemingly intractable pragmatic issues.

The PA workers' compensation statute, along with other such statutes, has been administratively and substantively durable; but opportunities for tactical advantage may persuade some employers to seek abandonment of the century-long workplace injury bargain.

Challenges in implementation aside, the PWCA has been extremely substantively durable. I can also agree with Judge Torrey that the system has withstood many challenges by critics alleging that deficiencies in workers' compensation statutes justified dismantling them. These critics have been rebuffed, sometimes with logic, but always with experience. The system has survived because the perceived need for compromise in the arena of workplace injury has been resilient. Judge Torrey opines that the system can be improved, and I agree, however I fear we may part ways on the question of whether this will in fact transpire. In my view, possibilities for improvement may yield to tempting opportunities for tactical advantage. The bargaining partners responsible for the initial enactment of the PWCA that I discuss below must continue the spirit of compromise embedded in the PWCA. But, as I will argue, there is reason to fear that the compromise may be broken.

PRIMARY FACTORS IN ORIGINS AND CONTINUITY OF WORKERS' COMPENSATION

I contend that there are two primary factors behind both the origin and continuity of the PWCA and other workers' compensation statutes. The first factor is so obvious

1. *See* Felix Frankfurter, "The Task of Administrative Law," University of Pennsylvania Law Review 75 (1927): 617, and a subsequently published and slightly revised version of the same essay, Preface to the First Edition (1932), in Felix Frankfurter and J. Forrester Davison, Cases and Materials on Administrative Law (Chicago: Foundation Press, 1935) *quoted in* Daniel R. Ernst, *Willard Hurst and the Administrative State: From Williams to Wisconsin*, 18 Law & Hist. Rev. 1, 12 (2000) *available at* http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1594&context=facpub.

we do not often consciously think about it, especially when we are busily involved in practice. Pennsylvania has always taken the position that there *should* be *some* legal remedy for workplace injury. Moreover, as the Pennsylvania Bar's Workers' Compensation "Centennial Book" makes clear, from the earliest days of the PWCA there was a commitment to *reasonably* compensating injured workers. Indeed, the statute was early on deemed "a canon of social justice,"[2] and, as Judge Torrey has written, changes to the PWCA had traditionally been prompted whenever it was found by stakeholders within the Commonwealth that it was no longer meeting the needs of injured workers.[3] Even more essentially, the premise of the validity of the PWCA was that it was to serve as a substitute for a substantive tort right under the common law.[4] In other words, no one has seriously doubted since the era of the PWCA's enactment that *some* remedy for workplace injury would be required. Thus, on this set of assumptions, if one wishes to challenge the existence of the PWCA, and other state workers' compensation statutes, one is instantly thrust into the position of discussing legal alternatives to these statutes. During his June 1 Centennial presentation to the Worker's Compensation Section of the Pennsylvania Bar Association, Professor John Burton, a leading workers' compensation scholar, recounted some of the non-workers' compensation legal alternatives to state workers' compensation statutes that have been proposed in recent years. Those alternatives include federal standards, a federal workers' compensation statute, absorption of workers' compensation into existing federal programs such as Social Security Disability or the Affordable Care Act, and a devolution to tort law.[5] Any of these approaches would obviously be nightmarishly complex, and there is always a forceful and rational argument for maintaining a status quo that has not failed.

The second factor behind the origin and continuity of the Pennsylvania Workers' Compensation Act is perhaps not so obvious. It has been widely understood, and has been similarly understood in Pennsylvania, that the theory of workers' compensation is to transfer the risk of injury from individual workers to entire industries, which in turn pass costs occasioned by workplace injury onto the consuming public.[6] Less widely understood is that in competitive markets employers simply reduce employee wages in reaction to any increase in workers' compensation costs.[7] In effect, workers purchase their own workers' compensation insurance unless they have adequate bargaining power to resist wage reductions.[8] Wage reductions have operated as a factor in the durability and continuity of the PWCA because workers have generally been able to bear the costs of such reductions, so employers have effectively recouped their workers' compensation costs.[9]

An issue this second factor raises, therefore, is whether workers' compensation systems could continue, in Pennsylvania and elsewhere, if employers were unable to recoup workers' compensation costs through wage reductions. I, in agreement with Professor Burton,[10] believe that the developing "opt-out" movement represents a

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2. THE CENTENNIAL OF THE PENNSYLVANIA WORKERS' COMPENSATION ACT: A NARRATIVE AND PICTORIAL CELEBRATION 36 (David B. Torrey, Ed., 2015) [hereinafter "CENTENNIAL BOOK"] *quoting* E.H. DOWNEY, WORKMEN'S COMPENSATION 13 (MacMillan Co. 1924).

3. *Id*. at 277.

4. On the concept of tort substitution *see generally* MICHAEL C. DUFF, WORKERS' COMPENSATION LAW 5-7 (Carolina Academic Press 2013).

5. John F. Burton, Jr., *Workers' Compensation: Can the State System Survive?*, KEYNOTE ADDRESS FOR THE CENTENNIAL CELEBRATION OF THE PENNSYLVANIA WORKERS' COMPENSATION PROGRAM (June 1, 2015).

6. CENTENNIAL BOOK at 121 *quoting Smith* v. *City of Reading, Workmen's Compensation Board Decisions*, Volume I, p.136, 142 (July 27, 1916).

7. PRICE V. FISHBACK & SHAWN E. KANTOR, PRELUDE TO THE WELFARE STATE: THE ORIGINS OF WORKERS' COMPENSATION 64-69 (University of Chicago Press 2007) (hereinafter "FISHBACK & KANTOR, ORIGINS OF WORKERS' COMPENSATION").

8. *Id*.

9. On employer recoupment of costs for workers compensation premiums through diminished wages *see* Jonathan Gruber and Alan B. Krueger, *The Incidence of Mandated Employer-Provided Insurance: Lessons from Workers' Compensation Insurance in* David Bradford, ed., TAX POLICY AND THE ECONOMY 111-114 (MIT Press 1991).

10. John F. Burton, Jr., *Workers' Compensation: Can the State System Survive?*, KEYNOTE ADDRESS FOR THE CENTENNIAL CELEBRATION OF THE PENNSYLVANIA WORKERS' COMPENSATION PROGRAM (June 1, 2015) [Hereinafter "Burton Address"].

threat, even if a very new one, to the workers' compensation model. Opt-out is a benefit delivery system by which states would allow employers not to participate in the workers' compensation statutory system. In lieu of participation in the statutory system employers could substitute self-designed and very lightly regulated "alternative benefit plans."The employers appoint fact-finders in such a system and judicial review of factual findings is severely restricted.[11] I speculate that the expanded resistance to traditional workers' compensation suggested by significant employer support for this problematic model[12] may be driven in substantial part by the difficulty employers are experiencing in recouping workers' compensation costs through wage reductions. In an era of declining wages in hypercompetitive product markets, wage margins are razor thin. If this theory is correct, the phenomenon is a major problem because workers' compensation statutes probably could not originally have been enacted in the absence of broad employer support. As I will show below, in 1910, the dawning of the era of receptivity by state legislatures to the concept of workers' compensation, employers had a number of reasons for supporting the legislation.[13] If those reasons are rendered less relevant in modern times, however, there are potentially severe ramifications for the survival of the model.

Aside from the relatively simple explanation of the increased effective cost of workers' compensation as a reason for opt-out, a portion of employer resistance may be attributed to a more fundamental, *ideological* rethinking of the first factor that has sustained the workers' compensation ideal: the broad acceptance by employers of *some* legal duty to provide *adequate* compensation to injured workers. But perhaps it would be more realistic to acknowledge that in some quarters of the employer community, the duty to compensate was from the beginning only grudgingly tolerated and never *really* accepted. Workers' compensation was perceived to be a necessary evil given the alternative of tort liability, and the game of Russian roulette it represented. In any event, the potential impact on workers' compensation continuity by the appearance or reappearance of Oliver Wendell Holmes's "bad man" could prove profound.[14] "I do not wish to pay because I do not wish to pay," says the opt-out, bad man.

I am skeptical that either federal legislation or constitutional protections will act effectively as a legal check on the opt-out movement. To be blunt, in the present political environment, I cannot imagine Congress agreeing on an issue as large and complex as workers' compensation reform at the federal level. Furthermore, notions of federal due process have changed so markedly since the Supreme Court's initial validation of state workers' compensation systems nearly a century ago in *New York Central R. Co.* v. *White,*[15] that it seems likely the Court would uphold any "non-arbitrary" modification by a state of its worker's compensation system, including the authorization of opt-out.[16] At the state constitutional level, challenges to opt-out may be possible, but

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11. Oklahoma is the only state thus far to have enacted the model, *See* 85A O.S. Supp.2014, 201, *et seq*., but it has been under serious consideration in Tennessee and South Carolina.

12. A corporate-funded lobbying group, the Association for Responsible Alternatives to Workers' Compensation ("ARAWC"), "told an insurance journal in November that the corporations ultimately want to change workers' comp laws—presumably to authorize opt-out—in all 50 states." Molly Redden, *Wal-Mart, Lowe's, Safeway, and Nordstrom Are Bankrolling a Nationwide Campaign to Gut Workers' Comp*, Mother Jones, Mar. 26, 2015 *available at* http://www.motherjones.com/politics/2015/03/arawc-walmart-campaign-against-workers-compensation (last accessed April 10, 2015) *quoting* Stephanie K. Jones, *Group Aims to Create Alternatives to Workers' Comp State-by-State, Insurance Journal*, November 10, 2014 *available at* http://www.insurancejournal.com/news/national/2014/11/10/346291.htm (last accessed April 10, 2015).

13. Fishback & Kantor, Prelude to the Welfare State at 13.

14. Oliver Wendell Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 459 (1897):

> If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience.

15. *New York Central R. Co.* v. *White*, 243 U.S. 188 (1917) (upholding against due process challenges exclusive system governing the liabilities of employers and the rights of employees and their dependents in respect of compensation for disabling injuries and death caused by accident in certain employments, classed as hazardous).

16. *See e.g. Washington* v. *Glucksberg*, 521 U.S. 702, 722 (1997) (finding that "the development of the Court's substantive-due-process jurisprudence has been a process whereby the outlines of the 'liberty' specially protected by the Fourteenth Amendment . . . have . . . been carefully refined by concrete examples involving fundamental rights found to be deeply

the legal terrain is a mixed bag. Ultimately, for good or ill, I am hard pressed to conclude that there is any reliable legal bulwark against incursions on the workers' compensation model.[17]

Finally, opt-out is merely the most dramatic threat to the workers' compensation model, and one that is, after all, only in its infancy.[18] More commonly the model is tested as workers' compensation benefits throughout the nation simply decline. According to the most recent report of the National Academy of Social Insurance, nationally workers' compensation benefits as a share of payroll were lower in 2013 (the most recent statistics available) than at any time in the last three decades. Benefits as a percent of payroll declined in thirty-nine states between 2009 and 2013.[19]

The model is clearly under threat. Is that of concern? It is if one believes as I do that compensating injured workers is a *moral* duty. Pennsylvania may soon be thrust into the position of once again having to provide an answer to that moral question, a task it last faced in 1915. Even if Pennsylvania reaffirms its commitment to workers' compensation, it may find itself isolated if neighboring states choose to answer the moral question in the negative. I contend that all states, including Pennsylvania, should be very cautious when questioning the viability of the workers' compensation model. The several states originally arrived at workers' compensation by rejecting earlier approaches to workplace injury that *did not work*. The history leading up to the enactment of workers' compensation should be carefully taken into account when considering whether something should replace it.

I now proceed to touch on the familiar story of how tort law *did not work* and then to discuss failed experimentation with non-legal historical substitutes for tort remedies. The point of revisiting failed legal and non-legal historical alternatives to workers' compensation is to wonder aloud whether we are condemned to relive a history some of us cannot or will not remember.

INADEQUACIES OF TORT AND EMPLOYER LIABILITY STATUTES

The traditional explanation for the emergence of workers' compensation statutes is that the negligence system did not function adequately in the workplace, for either employers or employees (or insurers, for that matter). Employees were met with the three great affirmative defenses of contributory negligence, assumption of the risk, and the fellow servant rule. I will not discuss these defenses at length but will merely say that, as a practical matter, it became difficult for employees to overcome them. Moreover, the mere threat of the assertion of the defenses probably caused many employees to settle before obtaining counsel to assess the viability of a claim.[20] As practicing attorneys are aware, far more cases are settled than are tried, and it is very likely that employees' claims were typically settled rather than tried in the shadow of the chilling defenses.[21]

One point often overlooked in workers' compensation discussions of the negligence system is the extent to which fault-based negligence was itself a relatively new development under the common law at the time of the historic 19th century spike in work-

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rooted in our legal tradition . . . [an] approach tend[ing] to rein in the subjective elements that are necessarily present in due-process judicial review [and] by establishing a threshold requirement that a challenged state action implicate a fundamental right before requiring more than a reasonable relation to a legitimate state interest to justify the action, it avoids the need for complex balancing of competing interests in every case.").

17. I will discuss this later in the essay.

18. Assuming we are speaking of a system that provides "alternative benefits" while retaining the exclusive remedy rule. Many of the early workers' compensation statutes were "opt-out" in the sense that they were elective. But to my knowledge none of those early statutes allowed employers to retain the exclusive remedy rule while operating alternative plans. The election was solely between workers' compensation and negligence (and sometimes negligence without the benefit of the affirmative defenses contributory negligence, assumption of the risk, and the fellow servant rule).

19. Press Release of the National Academy of Social Insurance, August 12, 2015.

20. Fishback and Kantor, Prelude to the Welfare State at 42.

21. *Id*.

related injury and death. As a torts professor, one of my first duties in the fall is to cover with first year students the ancient case *Brown* v. *Kendall*.[22] As readers may recall, Kendall unintentionally struck Brown in the eye with a large stick while attempting to separate two fighting dogs. Brown was seriously injured and filed suit in "trespass." The trial judge instructed the jury, drawing on the prevailing viewpoint under then-existing law, that it was Kendall who had the duty to prove he was acting with *ordinary* care (if his stick wielding activities were "necessary") or with *extraordinary* care (if his stick wielding activities were "unnecessary"). Without getting into an extended discussion about the distinction between necessary and unnecessary activities, it is evident that the burden of proof respecting liability was placed on the injurer (the defendant), not the injured (the plaintiff). This allocation of burdens was a vestige of the common law notion that all injuries caused by defendants, even those that were inadvertent, were "invasions" of the personal security of plaintiffs, actionable either in trespass or case unless justified.[23] Massachusetts' Chief Justice Shaw's famous opinion reversing the trial court decision is frequently referenced as a convenient starting point for American fault-based tort liability.[24] Thus, a mere forty years prior to the inception of the employer liability statutes, in roughly 1890, the burden might easily have been placed on employers to prove, each and every time an employee was injured, that *the involved employer* had exercised ordinary care in connection with the injury. Seen in this light the existing law of personal injury had already shifted significantly in favor of employers after 1850 through modification of the common law writs.[25]

Given the difficulties with substantive injury law that employees experienced in the late 19th century, there was understandably a need and an interest in avoiding it altogether. Originally, one method developed by legislatures to get around these remedial shortcomings was simply to curtail by statute resort by employers to the three great affirmative defenses. By 1911, twenty-five states had passed such laws,[26] and a similar approach was taken in Pennsylvania, at least in part, through enactment of the Casey Act.[27] Under these "employer liability" statutes, once an employee had made out a prima facie negligence case, the employer could not defeat it through resort to contributory negligence, assumption of the risk, or the fellow-servant rule. The employer could, of course, rebut evidence proffered by the employee to prove the prima facie negligence elements.[28] This model has continued in force from 1906[29] to the present day in the railroad industry under the Federal Employers' Liability Act (FELA).[30] Employer liability statutes proliferated during the period 1890-1910,[31] and in theory there was no reason for them not to have worked. However, with the major exception of FELA, they did not, and for a fairly simple reason. Even significant remedial improvements in legal doctrine (from the perspective of injured workers) could not alter the reality that a case would have to be pursued in court or settled, a process that re-

22. 60 Mass. 92 (1850).

23. DAN B. DOBBS, TORTS AND COMPENSATION 23 (West Publishing 1985).

24. RUSSELL L. WEAVER *et al*., TORTS: CASES, PROBLEMS, AND EXERCISES 9-11 (LexisNexis, 4th ed. 2013).

25. According to commentator Lawrence Friedman, "[t]he thrust of the [common law] rules; taken as a whole, approached the position that corporate enterprise should be flatly immune from actions for personal injury." LAWRENCE E. FRIEDMAN, A HISTORY OF AMERICAN LAW (2d. ed. Simon and Schuster) 475 *in* FISHBACK & KANTOR, PRELUDE TO THE WELFARE STATE at 32.

26. JOHN FABIAN WITT, ACCIDENTAL REPUBLIC: CRIPPLED WORKINGMEN, DESTITUTE WIDOWS, AND THE REMAKING OF AMERICAN LAW 67 (Harvard University Press 2004) [hereinafter, WITT, ACCIDENTAL REPUBLIC].

27. *See* Lawrence D. McIntyre, *Before 1915 and the Workers' Compensation Act: The Pennsylvania Fellow Servant Rule and the Partial Reform of the Casey Act in* the CENTENNIAL BOOK at 49. The Casey Act abolished only the fellow servant rule. *Id*.

28. *Fulk* v. *Illinois Cent. R.R. Co*., 22 F.3d 120, 124 (7th Cir. 1994).

29. FELA was struck down by the U.S. Supreme Court on commerce clause grounds but quickly reenacted in 1908 with a jurisdictional provision the courts found palatable.

30. 45 U.S.C. §51 *et seq*. Strictly speaking FELA initially abolished only the fellow servant defense. Contributory negligence was retained as a mechanism for reducing plaintiff's recovery but could not cut off a claim entirely. WITT, ACCIDENTAL REPUBLIC at 67; see also Leonard Czaplewski, *Torts—Liability Under Federal Employers' Liability Act,* 32 MARQ. L. REV. 80 (1948). The assumption of the risk defense was not formally abolished under FELA until 1939. MATTHEW W. FINKIN ET AL., LEGAL PROTECTION FOR THE INDIVIDUAL EMPLOYEE 594 (West 3d ed. 2002).

31. *Id*.

quired time, resources, and often access to a lawyer. Of course, most cases settled because workers needed money immediately and wished to avoid the expense and complexity of court,[32] and the extent to which cases settled in fidelity with their actual strengths and weaknesses under existing law is very unclear.[33]

Although the most obvious reason for employer dissatisfaction with the early twentieth century negligence regime was the possibility of a large damage award—despite the existence of the large advantages provided by the three affirmative defenses—there are more benign explanations for employer support of the scuttling of the *status quo*. One such explanation involved employee relations. Many employers appeared genuinely unhappy with the mismatch between insurance premiums employers sometimes paid on behalf of employees and recoveries ultimately received by injured workers or their families in cases of death.[34] The transaction costs surrounding settlement and litigation comprised a large portion of expenditures, and the resulting low recoveries by employees were not good for morale. Ultimately, neither common law negligence nor the employee liability statutes[35] solved the expense and delay of a court based system or the substantive imperfections of the common law.[36]

Many observers know little more of workers' compensation pre-history than that tort did not "work out" and, as a mysterious consequence, workers' compensation emerged. Consider however that fifty or sixty years elapsed from the beginning of fault-based negligence to the passage of workers' compensation statutes. As it turns out there was a good deal of activity during this gap, which is not surprising considering the expansion of industrialism that was occurring during this period. Given present calls for *de facto* severe curtailment of remedies for workplace injury, the question of what a prior world without a legal guarantee of a "reasonable" or "adequate" remedy for workplace injury looked like in the late 19th century assumes renewed importance.[37] The judges of the period viewed accidental injury as *damnum absque injuria*.[38] But, as a practical matter, the victim of negligent conduct resulting in harm that could not be proved (or was too expensive to prove) was equally without remedy. Remembering what workers excluded from a legal or non-legal remedy for injury experienced before the establishment of workers' compensation should inform policy discussions centered on considering the jettisoning of the current system. Accordingly, I proceed to a discussion of historical, non-legal substitutes for the inadequately remedial tort law.

HISTORICAL SUBSTITUTES FOR "INJURY LAW"

A worker who was injured in the year 1900 had limited remedial options. The worker might have turned to tort law, but we have just considered some of the severe limitations to the court based negligence system. It is (surprisingly) true that in some instances employers paid compensation for accidental injuries even when they believed they were not legally obligated to do so. In these rare instances, compensation was paid as a kind of voluntary benefit to attract and retain valued employees.[39] The worker might have relied on precautionary savings to insure against loss of earning capacity, but any such savings were likely meager. Workers also purchased small

32. Fishback & Kantor, Prelude to the Welfare State at 33.
33. *Id*. at 45.
34. *See e.g*. Herman M. Somers and Anne R. Somers, Workmen's Compensation: Prevention, Insurance, and Rehabilitation of Occupational Disability (John Wiley & Sons 1954).
35. Unions in particular repeatedly made proposals for reforms of employer liability statutes but those efforts either died in legislative committees or were burdened with eviscerating amendments. John Fabian Witt, *The Transformation of Work and the Law of Workplace Accidents*, 107 Yale L. J. 1467, 1498 (1998).
36. Witt, Accidental Republic at 70.
37. Readers believing that I am engaging in hyperbole should thoroughly review the Oklahoma Workers' Compensation Act. *See supra*. n.11 and accompanying text.
38. *Shaw* v. *Boston & Worcester R.R.*, 74 Mass. 45, 67 (1857).
39. Fishback & Kantor, Prelude to the Welfare State at 42-43.

amounts of life and accident insurance, and insured through employer based-funds or fraternal societies (including unions).[40] Once an injury (or death) occurred, workers at times sent children or spouses to work, took in boarders, or perhaps moved in with extended family.[41]

The legal historian John Fabian Witt has studied closely these types of historical substitutes. Each of them, in the end, faced difficulties with which all insurance policy makers are familiar. In the first place, a sufficiently large fund must be amassed to allow for the payment of claims. Second, premiums assessed healthy individuals must be low enough to prevent those individuals from fleeing the system as non-healthy fund applicants are filing claims on accruals. This "adverse selection" problem bedevils compensation systems of all varieties. Finally, provision must be made against at least two varieties of "moral hazard." First, benefits may become sufficiently generous that employees engage in riskier behavior than if they had not been insured; and, second, as benefit levels approach customary wages healthy individuals may malinger.

Here I will focus on three historical substitutes for injury law that I find to be especially of interest. In lieu of, or in conjunction with, pursuit of a legal remedy, workers might attempt to obtain commercial insurance; obtain "cooperative insurance" through fraternal organizations, including unions; or obtain insurance through employer-created accident benefit programs and "enterprise" plans.

Commercial Insurance

It was fairly common for workers to purchase insurance against death in the early 20th century. Nationally, the average level of payout for this type of insurance was about one year's income.[42] However, it was much more difficult for workers to purchase insurance against disability. Insurers of that era were in a poor position to evaluate workplace risk because of their limited information on the safety details of workplaces.[43] As a result, insurers faced adverse selection problems as workers in the riskiest jobs most frequently sought insurance.[44] Consequently, beginning in roughly the late 19th century, most insurers simply refused to sell accident insurance policies to workers in hazardous jobs like mining, railroads, iron and steel works, lumber, and bridge building.[45] Those insurers daring to write such policies found that they were swamped with claims and on a few notorious occasions simply went out of business.[46]

Where insurers did write workplace accident policies they erected a formidable array of exclusions from coverage. Thus, exclusions were established for "'voluntary exposure to unnecessary danger,' 'the influence of intoxicating drinks,' the violation of any laws, voluntary overexertion, failure to use 'due diligence for . . . personal safety,' and countless other specific hazards."[47] Ultimately, therefore, the pre-workers' compensation private insurance market was not a reliable or hospitable source of security from the risk of workplace injury, though many policies of at least some help to workers and their families were written in workplace death contexts.

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40. *Id*. at 70.
41. *Id*.
42. *Id*. at 10.
43. *Id*. at 18.
44. *Id*.
45. Witt, Accidental Republic at 74.
46. *Id*. Witt emphasizes the notorious case of the Provident Life Insurance and Investment Company, which folded after systematically challenging railway workers' claims in litigation.
47. *Id*. (Internal citations omitted).
48. Witt, Accidental Republic at 76.
49. By 1885, WCAs possessed a combined pool of almost 2 billion dollars of life insurance representing half of all life insurance reserves in the United States. *Id*. at 79. By the end of the 19th century WCAs were the leading source of life insurance in the country.

Cooperative Insurance

Given the limitations inherent in the tort system, and the lack of availability of reliable commercial accident insurance, it is not surprising that workers pursued other insurance options. One such venture not widely known to modern students of workers' compensation was cooperative insurance.[48] The cooperative insurance movement began to develop in the late 19th century. Workingmen's cooperative associations (WCAs) initially flourished[49] because they were in a unique position to contend with the universal insurance problems of moral hazard and adverse selection.[50] A healthy insurance customer may be lured away if an insurer imposes excessively on her the costs of paying the claims of unhealthy customers in the risk pool. But if the healthy insured was a member of a WCA, she could possibly be persuaded not to leave the risk pool, even if she could obtain insurance more cheaply from a pool consisting of healthier people. In effect, bonds of class loyalty helped to hold WCAs together. Similarly, with respect to moral hazard, a member of a WCA may have more scrupulously heeded calls to avoid engaging in risky behavior despite having substantial insurance,[51] and may have been less inclined to file spurious claims or to remain out of work after an injury for longer than was necessary. Bonds of loyalty in these contexts were enhanced by the frequent face-to-face dealings between the WCAs and their members, dealings that sometimes included rituals and secret handshakes.[52]

Nevertheless, eventually, due to an increased scale of operations and a change in the organizations' compositions, it became necessary for WCAs to more closely police their members.[53] For example, some railroad brotherhoods paid surprisingly generous benefits for both death and disability. The seven largest railway brotherhoods distributed more than four million dollars in death benefits and over $500,000 in permanent disability benefits to their members each year.[54] While a full discussion of the subject is beyond the scope of this essay, essentially WCAs became bigger and bigger but then collapsed in the second half of the first decade of the 20th century. What happened? First, an influx of immigrants of roughly a million per year, predominantly from eastern and southern European countries began to "atomize" WCAs.[55] In effect, the bonds of broad WCA solidarity and large organizations yielded to smaller, localized WCAs that simply were not able to pay adequate benefits to their members. Second, by their very nature WCAs were meant to compensate for and not to deter or prevent injuries.[56] As the pace of industrialism with its attendant injuries continued to quicken through the first decade of the 20th century, notions more familiar to students of modern workers' compensation began to crystalize. Public policy analysts and industrial management itself began to accept that imposition of uniform costs on employers was likely to cause employers to invest in safety, an outcome upon which WCAs had no impact. Furthermore, the concept of WCAs assumed implicitly that it was appropriate for the costs of industrial accidents to fall on *workers*. This assumption was transformed as the scope of workplace injury rapidly enlarged. Public policy began to embrace the principle that the costs of workplace injury should be borne by industry, which was then in a position to pass those costs on to consumers in the form of higher prices.[57] By 1910 WCAs had almost completely disappeared as a significant "insurer" of employees suffering work-related injuries.

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50. *Id*.
51. I leave for another day my critique of the economists' cloistered notion that a well-insured worker is more likely to expose herself to the risk of grievous injury than one who is poorly-insured. Those who have worked at dangerous jobs see these scholastic arguments for what they are.
52. Witt, Accidental Republic at 72.
53. *Id*. at 83.
54. A total sum of roughly $100,000,000 in 2015 dollars.
55. Witt, Accidental Republic at 99.
56. *Id*. at 100.
57. *Id*. at 101.

Employer-provided Accident Benefit Programs and Enterprise Plans

The last of the historical substitutes for injury law that I will discuss were employer-provided benefit programs. The early 20th century saw the advent of the "scientific management" movement. The managerial class—if one may so speak—began to desire explicit and greater control over working conditions within increasingly large, productive enterprises and companies.[58] For this new breed of managers the huge problem of workplace injury could, like everything else in the workplace, be studied and then managed scientifically. This outlook had a direct bearing on some employers' willingness to voluntarily provide workplace accident benefits.

Frederick Taylor, the influential Philadelphia Quaker, is probably the most well-known proponent of the scientific management movement. At Philadelphia's Midvale Steel Company he was involved in the implementation of employer-provided accident benefits funded by fines imposed on employees for violations of work rules.[59] Later in the plan's development, employees universally contributed five cents per week to a fund from which they could draw death or disability benefits. This fund laid the groundwork for similar employer funds in the future.

The employer fund concept was in theoretical tension with the emerging 19th century legal concept of *damnum absque injuria*. However, even if the law was formally willing to absolve employers from responsibility for purely accidental injuries, there was a significant segment of the efficiency-centered scientific management that could not bring itself to ignore the carnage occasioned by employer underinvestment in safety. Despite substantial support from some representatives of management, it ultimately took a series of railroad strikes to broadly force management's collective hand in initiating employer accident funds.

The Philadelphia & Reading Railroad established a $20,000 accident fund following a strike of its employees in the Pennsylvania anthracite fields in 1875.[60] Following the unprecedented railroad labor disturbances of 1877, the Lehigh Valley Railroad of eastern Pennsylvania set up an accident fund to which both employees and the employer contributed.[61] Thereafter, during the 1880s, more railroads established similar accident funds. By the mid-1890s one-fifth of all railroad workers in the United States were enrolled in one of the six largest railroad company accident programs: the Baltimore and Ohio, the Pennsylvania, the Pennsylvania Lines West, the Philadelphia and Reading, the Chicago, Burlington, and the Quincy.[62] The list reflects that Pennsylvania was in the epicenter of a historical substitute culture of significant proportions; and this involving the railroads, the largest and most dangerous of the turn of the century industries.

Outside of the railroad industry similar private, employer-sponsored, "establishment" funds also began to proliferate in the first decade of the 20th century, a process that reached its pinnacle when both International Harvester and U.S. Steel created establishment funds.[63] The establishment funds frequently paid very substantial benefits.[64] It is worth speculating as to why the remediation of workplace injuries did not simply continue down this path. The likely reasons may sound familiar.

First, the plans were expensive. Whenever competition within an industry intensified there was simply no way for employers to police or enforce informal agreements

58. *Id*. at 109.
59. *Id*. at 110.
60. *Id*. at 113.
61. *Id*.
62. *Id*. at 114.
63. Other companies creating such funds included General Electric, Swift and Company, Westinghouse Airbrake, and New York Edison. *Id*. at 115. Crystal Eastman found that at one point in the early Twentieth Century nearly 23 percent of all injured workers in Pittsburgh were enrolled in an establishment fund.
64. Establishment funds provided one-half to two-thirds of an injured worker's wages for anywhere from 39 weeks to two years, depending on the plan. *Id*. at 115.

between themselves not to break ranks in continuing to provide the programs. Any employer could suddenly "race to the bottom" in order to gain a competitive advantage.[65] Second, employers typically conditioned employee participation in the plans on waiver of the right to file a tort suit. At first, courts went along with such bargains; these events were, after all, transpiring in proximity to the *Lochner* era.[66] Then, courts somewhat abruptly began to hold that pre-injury waivers of tort liability by employees violated public policy (post-injury waivers appeared to pass muster), and refused to enforce them; some states went so far as to establish by *legislation* the non-enforceability of pre-injury waivers.[67] Such waivers appear to have been unlawful in Pennsylvania by 1894.[68]

The overall thrust of the foregoing discussion is that, despite some very large historical experiments by private actors to create private substitutes for injury law, the United States ultimately required a public system to deal with the magnitude of the injury crisis. The lingering pragmatic question is whether such private substitutes could conceivably succeed in a future of less dangerous, post-industrial work. In any future consideration of such questions at the center of the discussion will be whether there *should* be *some* legal remedy for workplace injury and whether employers will continue to support the system if they are unable to reduce workers' wages to pay for it. Diminishing wages may make continuation of compulsory workers' compensation more difficult politically even as the notion of a right to *some* remedy for workplace injury is being challenged conceptually.

HURRYING BACK TO THE RACE TO THE BOTTOM

Professor John Burton has said, and I agree, that the greatest threat facing the workers' compensation system is a race to the bottom.[69] Moreover, this threat has been in existence from the beginning of consideration of the problem of injured workers. Presently, I think most people in most states would recognize a *moral* duty for a state to provide *some* means by which a victim of workplace injury could be compensated. However, now, as in the past, competitive economic pressures may tempt employers to avoid the responsibility of compensating workers for injuries sustained in productive activity. Even a handful of employers without scruples might easily initiate a race to the bottom of the kind generating the collapse of the enterprise plans, "to force the moral sentiment pervading any trade down to the level of that which characterizes the worst man who can maintain himself in it."[70] These observations are in accord with the history leading up to the enactment of workers' compensation. Historical substitutes for injury law attempted to fill a void created by a kind of "market failure" in the law. Each substitute failed because the magnitude of the problem defied deregulatory logic. Injury is expensive and someone must pay for it. Injury invites evasion of financial responsibility.

However, until the enactment of workers' compensation no one seriously doubted a default "right" in the law, even if undesirably only implicit, that a negligent injurer must pay for all foreseeable harm to the injured. The problem we face now is that workers' compensation has in a sense obscured the historical origin and existence of a right to be secure from injury. Thus, discussion of encroachments on the *idea* of work-

65. Witt, Accidental Republic at 125.
66. 198 U.S. 45 (1905).
67. *Id*. at 123. *See also* Fishback & Kantor, Prelude to the Welfare State at 114, n.5, 6 *citing* Lindley D. Clark, *The Legal Liability of Employers for Injuries to their Employees, in the United States*, U.S. Bureau of Labor Bulletin No. 74 (Washington D.C., Government Printing Office 1908).
68. *Johnson* v. *Philadelphia & RR. Co*., 163 Pa. St. 127 (1894).
69. *See* Burton address at 8; *see also* Judge David B. Torrey, Centennial Book at 332.
70. Henry Carter Adams, *Relation of the State to Industrial Action in* Relation of the State to Industrial Accident and Economics of Jurisprudence: Two Essays by Henry Carter Adams 57, 89 (Joseph Dorfman ed. 1954) *quoted in* Witt, The Accidental Republic at 31.

ers' compensation "feel" like actuarial exercises involving merely discretionary employee benefits. However, those encroachments in reality represent challenges to the proposition that the injured in fact possess a right to a remedy. We seek the right in state constitutions—in open courts provisions, for example—in the due process provisions of the federal constitution, and in future, imagined federal statutes. One thing is clear, however. Given the dubious record of workers' compensation pre-history, we had better locate the right somewhere, lest the workers' compensation citadel be overrun, ensuring that the past will not be prologue. I have great confidence, however, that, if we have the collective will to affirm and name the right, Pennsylvania will be more than equal to the task of safeguarding the right, with its customary excellence, during ensuing centuries.