REFLECTIONS ON THE "PERSISTENCE OF TORT" AND THE "DEMISE OF THE GRAND BARGAIN"

EDITED TRANSCRIPT*

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Two overriding themes appear to have emerged during the course of this symposium. The first is that we seem to have lost a sense of humanitarianism as the underpinning of the workers' compensation system at large. The second is that, as a society, we have lost any real sense of workers' compensation as a societal bargain—an actual negotiation between co-equal partners. It is very hard to come away with any sense other than that workers' compensation is no longer negotiated (if it ever was), but that it is dictated from "above."

I was a blue-collar worker for a decade and a half and have done some dangerous work. I have also, oddly enough, been a labor lawyer, a workers' compensation attorney, and, now, a law professor. Accordingly, my perspective on workers' compensation issues is often unconventional. And that perspective carries over to the issues raised in the papers for my panel regarding "alternative structures."[1]

It is not surprising to me that in a conversation on alternative structures, the question of tort immediately resurfaces. Tort, after all, was our original injury-compensation baseline. And questions about workers' compensation benefit adequacy implicitly invoke a comparison between workers' compensation benefits and tort damages. I think the

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1. *See* Robert L. Rabin, *Accommodating Tort Law: Alternative Remedies for Workplace Injuries*, 69 RUTGERS U. L. REV. 1119 (2017); Adam F. Scales, Professor of Law, Rutgers Law Sch., Remarks during Panel IV at the Pound Civil Justice Institute, Northeastern University School of Law, and Rutgers Center for Risk and Responsibility Symposium: The Demise of the Grand Bargain: Compensation for Injured Workers in the 21st Century (Sept. 23, 2016) (panel video available at the poundinstitute.org).

reason we instinctively discuss tort in conjunction with alternative structures is because we recognize that alternatives must somehow remain moored to an underlying tort *right* that is often simply forgotten even in a vestigial sense. Broader social discussion of "workers' compensation" or "disability" somehow gets twisted away from that underlying notion of a tort right, and, as a result, away from the idea that anyone has wronged anybody, even in the aggregate. It is all just a big accident, which is a very comfortable way for certain parties to the conversation to have the discussion.

So, should workers' compensation (whatever its essential nature as "right" or "benefit") simply be blown up? I very much appreciated Professor Scales' remarks forcefully making this argument because it gets right to the heart of the question.[2] How one answers that question depends on what one thinks is transpiring right now. If what is transpiring is a natural evolution from one inadequate, but arguably sufficient, system (in the aggregate), to another, then blowing up the first system is perhaps not so bad. There can be hope in the process of rebuilding. However, blowing up the status quo takes on a different nature if the destruction is, in reality, a full-on collapse. I understand and have experienced the effects of collapse. The working class, I dare say, has a different perspective on collapse. Perhaps no rebuilding will occur at all. Perhaps strategies to rebuild a system are really strategies to abandon any notion that someone, somehow is actually responsible to injured workers. There were many times when I was representing injured workers that I felt I was squarely in the middle of strategic waves of irresponsibility attempting to establish that workers' compensation was a series of voluntary arrangements and not a system of rights.

If I am able to let myself believe that we are in the midst of a good faith transition between responsible regimes, and not living through a period of utter abdication of workers' rights, I like a number of Professor Scales' ideas. Given the complexity of current benefit systems—particularly health care benefits—it would be preferable to "slide" components of existing systems around, as Professor Scales appears to propose.[3] People are more likely not to resist new systems consisting of components they already understand. Thus, a system styled as an expansion of the Affordable Care Act that simultaneously offers relief from certain aspects of that Act may be more broadly

2. Scales, *supra* note 1.
3. *See id.*

comprehensible to the general public than something that seems completely new.[4]

While the devil is in the details, I could live with limited tort remedies because such remedies would at least retain some connection to tort. Additionally, the sense (even if vague) that workers have a *right* to be compensated for workplace injuries, in connection with ancient personal injury remedies, would not be lost. After all, employers (society, if you prefer) consciously have made a choice to place employees in a position where harm will result. In the aggregate, the outcomes are entirely foreseeable.

Despite my willingness to discuss ideas of the sort advanced by Professor Scales, I do not believe that in the foreseeable future we (any of us) will have an opportunity to have such sensible policy discussions. It is hard to imagine that in the current political climate there will be any serious policy discussion about workers' compensation that would involve federal intervention into the system.

Price Fishback and Shawn Kantor have written memorably about the social urgency existing during the era of the origins of workers' compensation.[5] All social observers at least seemed to agree that given the scale of industrial injury something simply had to be done.[6] There were bodies lying everywhere, and the humanitarian imperative for helping injured workers—an imperative that, in my view, is omnipresent—was nearly unimpeachable.[7]

I think we need to be somewhat circumspect when evaluating this history, however. As a labor law professor, I am aware that in 1911 unions were weak in comparison to the ensuing decades of the mid-twentieth century. In 1910, for example, union density was roughly 5.5% and was heavily limited to the specific (often privileged) trades of the AFL.[8] Frankly, unions of the period were weak—nothing like the

4. *See id.*

5. *See generally* PRICE V. FISHBACK & SHAWN EVERETT KANTOR, A PRELUDE TO THE WELFARE STATE: THE ORIGINS OF WORKERS' COMPENSATION (2000); Price V. Fishback & Shawn Everett Kantor, *The Adoption of Workers' Compensation in the United States, 1900-1930*, 41 J.L. & ECON. 305, 314 (1998).

6. HERMAN MILES SOMERS & ANNE RAMSAY SOMERS, WORKMEN'S COMPENSATION: PREVENTION, INSURANCE, AND REHABILITATION OF OCCUPATIONAL DISABILITY 26 (1954).

7. JOHN FABIAN WITT, THE ACCIDENTAL REPUBLIC: CRIPPLED WORKINGMEN, DESTITUTE WIDOWS, AND THE REMAKING OF AMERICAN LAW 67 (2004).

8. Leo Wolman, Nat'l Bureau of Econ. Res., *Union Membership in Great Britain and the United States*, 68 BULLETIN 1, 10 tbl.8 (1937), http://www.nber.org/chapters/c5410.pdf.

boisterous and aggressive CIO movement of the 1930s.[9] While Samuel Gompers eventually grudgingly accepted the necessity of workers' compensation,[10] it is no secret that the voluntarist leaders of the early twentieth century labor movement were instinctively hostile to government-created social insurance systems.[11] Therefore, the idea of meaningful worker involvement in original workers' compensation "negotiations" strikes me as an overstatement. It might be more accurate to say that, in the context of bodies lying everywhere, what limited labor organization was in existence was not moved to oppose state (as distinguished from national) social insurance.

It may be more accurate to say that the strengthened labor movement of the 1930s and 1940s *sustained* workers' compensation. During that period of labor strength, union exercise of economic weapons held in reserve was no abstract question.[12] It is unthinkable that in this period business interests could have effected some massive rollback on remedies for injured workers. I doubt they even seriously considered it. Several speakers here have noted the correspondence of diminished workers' compensation benefits with the weakening of the labor movement.[13] The relationship is essentially undeniable.

The absence of viable organized labor opposition calls into question whether even obvious "fixes" to the workers' compensation system are possible. I take it as a given that big, federal fixes are out of the question; but even with respect to obvious solutions, why would parties who are *winning* under the present circumstances agree to change

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9. Robert Asher, *The Ignored Precedent: Samuel Gompers and Workers' Compensation*, NEW LAB. REV., no. 4, Fall 1982, at 51–77. David Ross—a United Mine Workers official—candidly admitted in 1909 that although the voluntarist instincts of the labor movement of the period actually opposed workers' compensation because, in the movement's view, such matters should be incorporated in and handled through collective bargaining agreements, American unions could not compel such an outcome "on account of the limited number who are affiliated with labor unions." Accordingly, "we must look to the compelling influence of general law to accomplish it." *Id.* at 57. My friend and colleague James Gray Pope, of Rutgers Law School, has in conversation cautioned me not to conflate union *density* with union *influence*. E-mail from James G. Pope, Professor of Law, Rutgers Law School, to Michael C. Duff, Professor of Law, Univ. of Wyoming Coll. of Law (Jul 7, 2017) (copy on file with author). I take the point. Perhaps unions of this era possessed a power of which I am unaware to inflict economic disruption. While I will continue to ruminate over the possibility, at present I find scant evidence of such potentiality circa. 1910–1911.

10. Asher, *supra* note 9, at 58.

11. *Id.* at 52.

12. The post-World War II strike waves of 1946 and 1947 provided a potent example of labor's 1940s-era muscle. *See* MELVYN DUBOFSKY & FOSTER RHEA DULLES, LABOR IN AMERICA 335 (7th ed. 2004).

13. Symposium, *The Demise of the Grand Bargain: Compensation for Injured Workers in the 21st Century*, 69 RUTGERS U. L. REV. 881 (2017).

anything? By every measure benefits are eroding, and nothing remains of the muscular labor movement that would have aggressively opposed such developments in earlier decades. I see little reason for race-to-the-bottom states to think about bargaining tables.

This leads me to the reason I think tort and state constitutions are still relevant, and the reason I think talking about state constitutions is relevant.[14] I, frankly, have collapse scenarios firmly in my mind. And, in the context of such scenarios, I see tort as a kind of sentinel, or firewall, especially to the extent it is at least quasi-constitutionalized at the state level. To some, tort may seem a mere band aid, but I want a band aid when I am bleeding. The Oklahoma opt-out model, when stripped to its essence, eliminated any statutory, rights-based remedy for workplace injury: no statutory right, and no common law right.[15] That is why nearly everyone hearing of the system became upset. Professor Rabin very appropriately reminds us that tort has always been in the background and in the interstices of workers' compensation.[16] The continuing, if subtle, dual compensatory system for workplace injury demonstrates that dissolving the Grand Bargain might be a lot more involved than casual observers imagine. Losses, after all, fall somewhere, and remedies are seldom simple. Moreover, it is not merely a matter of the relationship between workers' compensation and tort. Workers' compensation intersects with several workplace laws, so disassembly without a full understanding of the current reticulation is very ill-advised.[17]

When Judge Cueto, in *Cortes v. Velda Farms*,[18] found the entire Florida workers' compensation system unconstitutional,[19] it was understood by all that tort was the remedial residue. Sweeping away workers' compensation was presumed to return us to the *status quo ante* of tort.[20] This presumption appeals to my labor law orientation. In labor law, the remedy for an unlawful unilateral change in the terms

14. *See generally* Robert F. Williams, *Can State Constitutions Block the Workers' Compensation Race to the Bottom?*, 69 RUTGERS L. REV. 1081 (2017).

15. *See* Howard Berkes, *Opt-Out Plans Let Companies Work Without Workers' Comp*, NPR (Oct. 14, 2015, 5:01 AM), http://www.npr.org/2015/10/14/448544926/texas-oklahoma-permit-companies-to-dump-worker-compensation-plans.

16. *See* Rabin, *supra* note 1.

17. *See id.*

18. Cortes v. Velda Farms, No. 11-13661 CA 25, 2014 WL 6685226, at *10 (Fla. Cir. Ct. Aug. 13, 2014), *rev'd sub nom.* State v. Fla. Workers' Advocates, 167 So. 3d 500 (Fla. Dist. Ct. App. 2015).

19. *Cortes*, 2014 WL 6685226, at *10.

20. *Id.* at *8.

and conditions of employment is a return to the *status quo ante*.[21] By analogy, I would argue that a bad-faith breach of the Grand Bargain requires, at a minimum, a return to the *status quo ante* of tort. I am not contending that workers in the aggregate would be better off in tort. As a macroeconomic matter, I do not believe I can know that to be true. But the worst of all possible worlds, it seems to me, is to leave workers with the plainly inadequate regime that workers' compensation is becoming. For those who argue that the workplace is becoming safer, and that workers as a result no longer require the protection of workers' compensation, there could be no principled objection to reinstituting tort in such a safe world.

Thus, I think it is a very natural instinct for this Symposium to have a panel titled the "Persistence of Tort." And it is also appropriate to conduct such a panel at a symposium sponsored by the Pound Institute. In a very real way, the erosion of a tort substitute like workers' compensation on the watch of administrative governmental structures—to the point where the general public no longer sees even the vestiges of tort—is everything Roscoe Pound warned us about.[22] From where I am sitting in the twenty-first century, I cannot scoff at his insistence on the primacy of common law guarded by gatekeeper, common-law judges and juries.[23] I cannot claim we would be better off under such a system. I do confess, however, to feeling more comfortable with a system that is not so theoretically willing to offer up my right to a remedy for serious physical injury, supported by justifications that are merely "rational."

None of this is to say that I am completely unable to imagine a non-collapse, non-abdication legal regime. It would have to be a regime with legal limits in which the Oklahoma opt-out would be completely unacceptable. I can imagine bad limits and bad baselines, but there would have to be *some* baselines. And if we continue to insist on an operating system of administrative adjudication, there must at all events be meaningful judicial review. I also believe that a sustainable

21. *See, e.g.*, Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203, 216 (1964); NLRB v. Katz, 369 U.S. 736, 742–48 (1962).

22. *See* Catherine M. Sharkey, *The Administrative State and the Common Law: Regulatory Substitutes or Complements?*, 65 EMORY L.J. 1705, 1708 (2016) ("Pound inveighed against the dangerous accretion of centralized power and the expansion of a discretionary Executive Branch, which he claimed . . . threaten[ed] our balanced government and endanger[ed] the liberty of individual Americans.").

23. *Id.* at 1711–12 ("Pound argue[d] forcefully for adjudication by common law judges on the theory that, under the alternative system dominated by administrative decision-making, 'we may as well give up all pretense of being a constitutional democracy and set up an avowed dictatorship.'" (quoting JOHN FABIAN WITT, PATRIOTS AND COSMOPOLITANS: HIDDEN HISTORIES OF AMERICAN LAW 232 (2007))).

workers' compensation system will require some mechanism for allowing workers a voice in assessing the system. Only then can we speak with a straight face about the system being a "bargain." Certainly, there has been no "bargaining" in the operation of the system in the last three or four decades.

The persistence of tort is an apt theme. I teach torts in Wyoming and have often had the sense that a significant portion of my state's legislators believe it is an open question as to whether anyone should have a "right" to a remedy for personal injury, whether within or outside of the workplace. If you fall off your horse, you should just get back up on that horse and ride off into the sunset. And, of course, my legislature is not alone. I have had conversations with a number of officials in other states appearing to have precisely this world view. As someone who has been injured himself, and who has seen dear friends and colleagues injured, I find such thinking frightening, and the prospect of living in such a world just plain scary. I also suspect that almost any official policy maker advocating for such an ancient and dangerous existence is likely not often subjected to its perils. It does not seem the kind of world one would argue for from "the original position."[24]

Ultimately, the real tension at play in workers' compensation, and in various other areas of tort, may be the concept of liability "without fault." Legislatures, and the business interests that pressure them, see injustice in being subject to liability without fault. It is hard and expensive, however, for victims to prove causation in individual cases with respect to certain kinds of harm. If we force plaintiffs to make such showings, they will not prevail, and the entire costs of harm will fall on them. To certain sectors of society, this seems the just outcome. And yet, as I said earlier, in the aggregate it is entirely foreseeable that workers will be harmed and that work—to a greater or lesser degree—will have harmed them. Thus, to other sectors of society, it is unconscionable not to remedy work-related injuries. This description marks out the two poles of what seems to me a debate that is not resolvable by appeal to principles of logic. In *MacPherson v. Buick Motor Co.*, an automobile was travelling fifty miles per hour on a

24. *See* JOHN RAWLS, A THEORY OF JUSTICE 15–16 (Harvard Univ. Press rev. ed. 1999) ("[T]he original position is the appropriate initial status quo which insures that the fundamental agreements reached in it are fair. This fact yields the name 'justice as fairness.' It is clear, then, that I want to say that one conception of justice is more reasonable than another, or justifiable with respect to it, if rational persons in the initial situation would choose its principles over those of the other for the role of justice.").

wooden wheel.[25] There was simply no doubt that harm would occur to *someone*, but it was not possible to know precisely *who* would be harmed. Similarly, harm will occur to workers in the course of carrying out society's productive activities. Much of that harm will result from what we call accident. But is it accident? Or is it something else that we cannot quite put our finger on? None of this is new. The only new dimension is that workers do not presently possess the strength to compel the law to take into account all sides of this complicated question when drawing the imprecise lines that must be drawn.[26] Indeed, workers are no longer even in the room during *discussion* of the line drawing; they are nowhere to be seen.

One final word on the timing of the implementation of the workers' compensation regime: Professor Scales has suggested that the timing was all wrong, coming as it did before the great expansion of the administrative state commencing in the 1930s.[27] If workers' compensation had been created during that period, perhaps it would have been bigger, more rational, and less messy. I suspect there are quite a lot of people employed in New-Deal-created administrative agencies that might at the moment have difficulty with that argument. I do not know what an originally federalized, New-Deal-era workers' compensation agency operating under a federal organic statute would look like today. I am, however, confident that it would in current times be under assault, and that critics would be howling for its demise. I cannot say when the right time for the enactment of workers' compensation would have been. It is not inconceivable to me, however, that state-based workers' compensation systems could outlive much later-developed, gigantic federal systems that are currently under dire political pressure.

25. 111 N.E. 1050, 1051 (N.Y. 1916) (Cardozo, J.).

26. In 2016, private sector union membership in the United States fell to 6.4%. News Release, Bureau of Labor Statistics, Union Members Summary (Jan. 26, 2017, 10:00 AM), https://www.bls.gov/news.release/union2.nr0.htm.

27. Scales, *supra* note 1.