

## BOOK REVIEWS

**Radical Histories versus Liberal Histories in Work Injury Law: Nate Holdren, *Injury Impoverished: Workplace Accidents, Capitalism, and the Law in the Progressive Era* (New York: Cambridge University Press, 2020). Pp. 300. \$59.99 (hardcover). ISBN: 978-1108488709.**

If reading books like Nate Holdren's new *Injury Impoverished* is what happens to mid-career scholars, then I'm all for aging. Holdren has written a brilliant, impassioned, and intellectually stimulating book on the legal history of industrial accidents. He has a live mind, which is animated by his ambitious analytic project to make sense of the law governing the risk of bodily injury for those in the labor market around the turn of the twentieth century. According to Holdren, work accidents were (and are) at their core a form of labor exploitation that reveals the injustices of capitalist labor markets. He describes the law of work accidents as a machinery of injustice that bolstered the legitimacy of a violent and inhuman capitalist system. He fiercely critiques the workers' compensation reforms enacted by progressive reformers a century ago as legitimating the mass violence of labor exploitation. He insists on recognizing and attending to the dignity of each accident victim, both in the content of his argument and as a matter of literary form.

*Injury Impoverished* is a welcome if unsettling rebuke to complacent accounts of the field, perhaps my own among them.<sup>1</sup> But Holdren's analysis also raises many questions. Holdren identifies new forms of power in the law of work accidents – but he attributes little value to the dramatically safer workplaces of the middle of the twentieth century. His cautious admiration for the litigation system of the years before workers' compensation rests on a fantastical conception of the way tort law actually worked. He calls for impossibly demanding forms of justice from the law, including forms of personal recognition that are beyond the capacity of human systems to achieve. He misses the ways in which workers coopted new forms of accident law and turned them to their own interests. And his single-minded Marxian focus on commodification and the point of production leads him to discount the surrounding political and legal institutions that shaped the social meaning of work accidents.

1 See, e.g., JOHN FABIAN WITT, *THE ACCIDENTAL REPUBLIC: CRIPPLED WORKINGMEN, DESTITUTE WIDOWS AND THE REMAKING OF AMERICAN LAW* (2004).

None of this is to gainsay the significance of Holdren's contributions, which are many and which demand attention in the literature. The analytic ambition and the successes of the book make it a work warranting serious engagement. In what follows I describe the scholarly context for Holdren's intervention and set out the structure of his book's important arguments. I then elaborate what I see as the limits of those arguments. I end with a note on the personal dimensions of the book for its author and on where the literature should go from here. Holdren is a work accident victim himself. The engine of his own experience propels the book forward. Its energy may press the field forward, too.

### I. A New Account of Workplace Risks

Each generation of legal historians seems to grapple anew with the history of accidents.

In the middle of the twentieth century, historical accounts from Leon Green to Lawrence Friedman offered what we might call the progressive account of accident law. The progressive view attributed changes in the law of injuries – and the law of employee injuries in particular – to changes in the fundamental social institutions and social norms of American life. Social change produced legal change.<sup>2</sup> In the 1970s, left-leaning critics like James Weinstein and Morton Horwitz offered a critical version of this social history approach, contending that tort law and then workers' compensation were mechanisms by which powerful legal and political actors reallocated resources from the poor to the wealthy.<sup>3</sup> Consensus-building lawyer-historians tried to fend off Horwitz's critical account by writing intellectual and doctrinal histories that purported to find less politicized grounding for the law of injuries.<sup>4</sup> Meanwhile, other scholars deepened the empirical dimensions of the progressive account's law-and-society approach by doing careful studies of the litigation system in nineteenth-century trial court docket books<sup>5</sup> and (even better) business records, where the real story of accident compensation unfolded.<sup>6</sup>

- 2 LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* (3d ed. 2007); Lawrence M. Friedman & Jack Ladinsky, *Social Change and the Law of Industrial Accidents*, 67 COLUM. L. REV. 50 (1967); Leon Green, *The Duty Problem in Negligence Cases (II)*, 29 COLUM. L. REV. 255 (1929); Charles O. Gregory, *Trespass to Negligence to Absolute Liability*, 37 VA. L. REV. 359 (1951); Wex Malone, *The Genesis of Wrongful Death*, 17 STAN. L. REV. 1043 (1965).
- 3 MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860* (1977); JAMES WEINSTEIN, *THE CORPORATE IDEAL IN THE LIBERAL STATE, 1900-1918* (1968).
- 4 Gary T. Schwartz, *Tort Law and the Economy in Nineteenth-Century America: A Reinterpretation*, 90 YALE L.J. 1717 (1981); Gary T. Schwartz, *The Character of Early American Tort Law*, 36 UCLA L. REV. 641 (1989); PETER KARSTEN, *HEART VERSUS HEAD: JUDGE-MADE LAW IN NINETEENTH-CENTURY AMERICA* (1997); G. EDWARD WHITE, *TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY* (1980) (expanded ed. 2003).
- 5 RANDOLPH E. BERGSTROM, *COURTING DANGER: INJURY AND THE LAW IN NEW YORK CITY, 1870-1910* (1992); Lawrence Friedman, *Civil Wrongs: Personal Injury Law in the Late 19<sup>th</sup> Century*, 1987 AM. BAR FOUND. RES. J. 351 (1987); Lawrence M. Friedman & Tom Russell, *More Civil Wrongs: Personal Injury Litigation, 1901-1910*, 34 AM. J. LEGAL HIST. 295 (1990).
- 6 Samuel Issacharoff & John Fabian Witt, *The Inevitability of Aggregate Litigation: An Institutional Account of American Tort Law*, 57 VAND. L. REV. 1571 (2004); Robert J. Kaczorowski, *From Petitions for Gratuities to Claims for Damages: Personal Injuries and Railroads During the Industrialization of the United States*, 57 AM.

At the turn of the twenty-first century, studies directed attention to a different set of analytic categories. Scholars like Margo Schlanger and Barbara Welke turned a spotlight on injuries to women and documented subtle and not-so-subtle ways in which nineteenth- and early-twentieth century tort law encoded sex stereotypes and gender identities.<sup>7</sup> James Schmidt discovered the invention of modern childhood in industrial accident litigation involving child laborers.<sup>8</sup> Welke followed injuries to children into the middle of the twentieth century, when terrible consumer product injuries produced a new crisis of childhood.<sup>9</sup> My own first studies drew on women's history and business history to show how new work injury laws hardened and reproduced gender roles and called down new forms of managerial power at work.<sup>10</sup> My 2004 book and a like-minded article by insurance scholar Adam Scales asserted a deep historical contingency, purporting to show that modern industrial accident law could plausibly have developed (and nearly did) along very different historical paths.<sup>11</sup> Such contingency theories joined an eclectic set of studies published around the same time that rejected the various structural determinisms of the progressive school and its radical Horwitzian variants in favor of history as a world of possibility.<sup>12</sup>

Holdren's book chafes at the eclectic historiography of contingent histories. His work is perhaps closest to that of Christopher Tomlins, whose 1990s scholarship on industrial accidents attended closely to the forms of capitalist power produced and reflected by work accident law and the market.<sup>13</sup> More recently, Tomlins has called for a new materialist approach to legal history rooted in the structural determinants of the market.<sup>14</sup> Holdren's story follows Tomlins's call, proceeding with what Holdren calls "minimal

- J. LEGAL HIST. 261 (2017); PAUL BELLAMY, A HISTORY OF WORKMEN'S COMPENSATION, 1898-1915: FROM COURTROOM TO BOARDROOM (1997).
- 7 BARBARA Y. WELKE, RECASTING AMERICAN LIBERTY: GENDER, RACE, LAW, AND THE RAILROAD REVOLUTION, 1865-1920 (2001); Margo Schlanger, *Injured Women Before Common Law Courts, 1860-1930*, 21 HARV. WOMEN'S L. J. 79 (1998); see also Martha Chamallas with Linda K. Kerber, *Women, Mothers, and the Law of Fright: A History*, 88 MICH. L. REV. 814 (1990).
  - 8 JAMES D. SCHMIDT, INDUSTRIAL VIOLENCE AND THE LEGAL ORIGINS OF CHILD LABOR (2010).
  - 9 Barbara Young Welke, *The Cowboy Suit Tragedy: Spreading Risk, Owning Hazard in the Modern American Consumer Economy*, 101 J. AM. HIST. 97 (2014).
  - 10 John Fabian Witt, *From Loss of Services to Loss of Support: The Wrongful Death Statutes, the Origins of Modern Tort Law, and the Making of Nineteenth-Century Family*, 25 LAW & SOC'L INQ. 717 (2000); John Fabian Witt, *The Transformation of Work and the Law of Workplace Accidents, 1842-1910*, 107 YALE L.J. 1467 (1998); John Fabian Witt, *Speedy Fred Taylor and the Ironies of Enterprise Liability*, 104 COLUM. L. REV. 1 (2004).
  - 11 WITT, ACCIDENTAL REPUBLIC, *supra* note 1; Adam F. Scales, *Man, God and the Serbonian Bog: The Evolution of Accidental Death Insurance*, 86 IOWA L. REV. 173 (2000); see also KENNETH S. ABRAHAM, THE LIABILITY CENTURY: INSURANCE AND TORT LAW FROM THE PROGRESSIVE ERA TO 9/11 (2008); Kenneth S. Abraham & Lance Liebman, *Private Insurance, Social Insurance, and Tort Reform: Toward a New Vision of Compensation for Illness and Injury*, 93 COLUM. L. REV. 75 (1993).
  - 12 Cf. THEDA SKOCPOL, PROTECTING SOLDIERS AND MOTHERS: THE POLITICAL ORIGINS OF SOCIAL POLICY IN THE UNITED STATES (1995); DAVID T. BEITO, FROM MUTUAL AID TO THE WELFARE STATE: FRATERNAL SOCIETIES AND SOCIAL SERVICES, 1890-1967 (2000); CHARLES F. SABEL & JONATHAN ZEITLIN, WORLD OF POSSIBILITIES: FLEXIBILITY AND MASS PRODUCTION IN WESTERN INDUSTRIALIZATION (1997); Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57 (1984).
  - 13 CHRISTOPHER L. TOMLINS, LAW, LABOR, AND IDEOLOGY IN THE EARLY REPUBLIC (1993).
  - 14 Christopher L. Tomlins, *Marxist Legal History*, in THE OXFORD HANDBOOK OF LEGAL HISTORY (2018); Christopher L. Tomlins, *Historicism and Materiality in Legal Theory*, in MAKSYMILIAN DEL MAR & MICHAEL LOBBAN EDS., LAW IN THEORY AND HISTORY: NEW ESSAYS ON A NEGLECTED DIALOGUE (2016); Christopher L. Tomlins, *Toward a Materialist Jurisprudence*, in 2 DANIEL W. HAMILTON & ALBERT L. BROPHY EDS.,

contingency.” (12) History is not chance, flukes, and mishaps in Holdren’s story; there are no accidents. To the contrary, he insists, history is class warfare over time – the “coercive power” of “structural constraint” under capitalism and its “market imperatives.” (7-9)

Chapter one takes up late nineteenth-century work accident cases in the courts. Holdren contends that tort suits thinned out the moral significance of work injuries by turning them into commodities with a market value measured in cash. Unsuccessful work accident suits worked injustice at least twice over. “Every finding against a plaintiff” represented “not only a distributive injustice” but also what Holdren (following the critical theorist Nancy Fraser) calls “an unjust denial of recognition.” (35) Indeed, even judgments on behalf of an injured employee overlooked “the individuality, singularity,” and “infinite of human persons” because they insisted at the end of the day on valuing workers in market values, turning human beings into commodities. (34) Holdren asserts that market-based money damages failed to account for what he calls “justice as recognition,” by which he means the acknowledgment of the moral value of each person. (35) “It is a violation of human dignity to calculate human worth in dollar amounts,” Holdren writes. Some such calculations, he seems to concede, are nearly inevitable. The “monetization” of certain injuries dates to the earliest extant legal codes (29), but Holdren describes monetizing as less objectionable than commodification, which was and is (he says) the indignity “characteristic of capitalism.” (36)

Holdren argues that the workers’ compensation laws enacted in the 1910s and 1920s exacerbated the problem. Holdren asserts that in tort suits, “injured plaintiffs and their families” had come to court (and here he quotes historian James Schmidt) “with a desire to talk about the miseries that had befallen them.” (117) Workers’ compensation laws, by contrast, eliminated the supposed opportunity for injured workers to tell their stories. Chapters two and three describe how well-meaning work accident reformers such as Crystal Eastman and William Hard framed industrial risks as a social problem of distributive justice and thereby sidelined the law’s ability to do individualized justice through recognition. The “abstract persons of reformers’ texts,” Holdren writes, “pushed questions of recognition to the margins. (60) The result, Holdren contends, was a “conceptual transformation” in the law of work accidents, from a flawed effort at individualized recognition to a statistical approach to law and statecraft that Holdren (following French social theorist Michel Foucault) calls “biopolitical.” (64) This new approach took “working-class people as aggregates” and aimed to manage them collectively to conserve the resource of their labor power and to sustain the structure of the nuclear family. (66) The worker, Holdren contends, was turned from a human being into what one early twentieth century progressive-era observer called “an essential factor of society,” a part of the means of production. (89) Crucially, in Holdren’s view, the shift to this new mode of social thought sustained rather than subverted the power of employers. Compensation laws “did not shift

power to employees”; instead, they further obscured the exploitation of the employment relationship. (107)

No wonder, then, as Holdren sees it, that “workmen’s compensation emerged as the primary business-supported policy proposal for the accident problem.”<sup>15</sup> (110) Workers’ compensation’s seductive move was to legitimate the pricing of human bodies in the marketplace. Reformers decried state legal systems that made life too cheap. But Holdren insists that the real problem was haggling about price in the first place. “We must not miss the underlying choice,” he writes, “to treat employees’ lives and limbs as economic objects.” (113) Compensation laws streamlined the legal process of claims-making and eliminated most damages for the pain and suffering of victims. Both features had the effect of further impoverishing the language of work accident law, subverting its already fragile capacity to uphold the irreducible singularity of injured human beings.

Even worse, workers’ compensation laws smoothed the reality of continued industrial violence. They “alleviated the threat that employee injury might create a crisis for powerful people” and ensured that injuries “came to be no longer a crisis for anyone except for working-class people themselves.” (135-36) Yet the injustices kept coming. Holdren’s Chapter four is a deeply original and careful excavation of an important but heretofore unattended corner of the history of work accident law. Workers’ compensation laws made employers liable for certain costs arising out of employee injuries. But which costs? In particular, what about partially disabled employees rendered completely disabled by new incremental injuries? The paradigm case was the worker with one working eye. Was the employer liable for all the losses to such an employee who lost vision in the other eye? Courts in Iowa, Michigan, Minnesota, and elsewhere said no and limited employers’ compensation obligations in such cases. The result was to “render[] disabled people anomalous in the law,” Holdren writes, and to adopt an “ableist” framework that treated disabled people’s injuries as worth less than those of other workers. (148)

Courts in other states dealt with preexisting disabilities differently. Massachusetts and New York awarded such employees compensation to reflect their new cumulative disabilities. But Chapters five and six show that this too came with hazards. At least some courts adopted this position on the theory that disabled employees had been paid less than able-bodied employees, which Holdren characterizes as a form of employment discrimination against the disabled. Moreover, employers in such states responded by removing disabled employees from their workforce and screening them out of the hiring process. “Human weeding,” Holdren calls it. (218) Dealing with one risk turned out to produce others. In what is the best part of the book, Holdren does a deep dive into the archives of the Pullman Corporation on the South Side of Chicago, where management responded to new workers’ compensation laws during the 1920s by systematically removing disabled, injury-prone, and

15 The situation was slightly more complicated. Many of the most sophisticated employers supported workers’ compensation laws, though so did the American Federation of Labor. My view is that progressive reformers set the agenda for policy reform and made workers’ compensation the leading candidate over a number of other plausible reforms, some of which had greater business support. Most small employers opposed workers’ compensation statutes, and most statutes substantially increased employers’ insurance premiums. See WITT, *THE ACCIDENTAL REPUBLIC*, *supra* note 1, at 125, 129.

aging employees from the firm. Workers' compensation insurance compounded the problem: the market for compensation insurance created powerful incentives for insurers to require employers to fire entire classes of workers thought to be especially expensive from an injury compensation perspective. Holdren offers a perceptive account of the ways in which insurance companies became hidden regulators of economic life in the U.S., establishing rules and systems for their insureds. (259-61) He shows, too, how company doctors extended a new medico-employer control over employees through intrusive medical examinations required as a condition of employment. (227) In these ways and myriad more – which Holdren unapologetically calls discriminatory – workers' compensation laws helped produce new systems of managerial control.

Holdren concludes that work injury law depicted “working-class human beings as more object than subject, and specifically as economic objects.” (256 n.7) Workers' compensation in particular participated in the law's redefinition of human social relations according to the commodifying logic of the marketplace. Disguised as pro-employee reform, such laws had the effect of “shoring up the market, preserving the economy, [and] further reducing the legal space for any ways of valuing human beings other than in the monetary values set by employers.” (267)

Throughout, Holdren endeavors to make the form of his book fit the substance of his arguments. He puts actual injury victims and their stories first, offering them sympathetic treatment as singular human beings entitled to our respect. In a mid-book “interlude,” he reproduces the list of names recorded by the Illinois Bureau of Labor Statistics in its listing of the people killed in the infamous Cherry Mine Fire of 1909, which slowly suffocated some 259 men and boys trapped underground. Holdren urges the reader to say every name out loud to let the horror settle in.

## *II. Injuries or Accidents?*

Holdren uses the word “injury” instead of the word “accident” because in his view the harm to employees' bodies at places like the Cherry Mine was no accident at all. His admirable focus is on the big structures of economic life that made a certain number of injuries inevitable, rather than the product of chance.

Yet a confusion creeps in right at the outset of Holdren's analysis. At scale, there is no system of production known to humankind that does not produce injury. As a result, it cannot be that the *inevitability* of injury is what makes it wrong. Holdren must mean either that the exploitative labor relation in which injury happens in a capitalist economy makes it morally wrong, or that the sheer amount of injury taking place makes it wrong. Holdren cuts himself off from the latter argument by paying almost no attention to the number of injuries or to change in the number of injuries. In nearly every industry, workers' compensation laws substantially reduced the number of work injuries in the United States. Holdren says that “the storm” goes on, that injuries continue under capitalism, and that 5,000 workers still die each year. (253) But that number pales by comparison to the figures before workers' compensation. Work fatalities per person hour in American industry fell by two-thirds between 1907 and 1920. One in four workers at U.S. Steel reported a work injury in 1907.

Thirty years later that figure was one worker in three hundred, notwithstanding that workers' compensation had substantially increased the incentives to report.<sup>16</sup> Such sharp drops in injury rates don't seem to move Holdren. But if he is serious about his anguished description of the horrors of each injured body – and there is no doubt that he is – then he should credit the workers' compensation era with millions of moral victories in the form of bodies uninjured.

To be sure, Holdren brilliantly shows that at Pullman and elsewhere employers responded to workers' compensation by developing new forms of power at the work site. Employers reduced work injuries not only by adopting safety measures, but also by establishing new systems of managerial authority over production and by firing older or disabled employees. Still, such measures seem very clearly to have reduced injury, and often new managerial systems seem to have improved safety in the workplace. Individual employee autonomy is often terrible for work safety in large, complex industrial systems. Workers (like people in all sorts of settings) are often dreadfully positioned to know about the risks at issue, or to make good decisions about the risks they face.<sup>17</sup> Consider for example Holdren's discussion of the Pullman Company efforts to get one-eyed employees to wear goggles. When a one-eyed employee named Jerry Murphy refused to wear goggles, Pullman laid him off for a week without pay. Surely this is a poor example of wage exploitation, though Holdren weakly complains such efforts "subordinated" employees' views of their own "safety and comfort at work." (161) Similarly, when Phelps Dodge screened out prospective workers with tuberculosis or syphilis and kept them out of small, isolated mining camps, the firm was taking into account the safety of other employees. Holdren asserts that such policies were discriminatory, but the description seems inadequate to the task. What he really seems to mean is that new employer screening mechanisms were devastating to disabled or aging employees because employment was and is the principal system of social provision in the U.S.

In Holdren's account, workers' compensation laws produced a new risk, namely the risk of firing. In one sense, that is correct. In another sense, however, such laws redirected an old risk, namely the risk of being injured, which employers along with differently abled employees, older employees, and otherwise injury-prone employees had often simply ignored. Holdren objects either way, and what he is really critiquing then is not work injury, and not employee screening, but rather the conditions of labor under capitalism that put workers in such positions of vulnerability. Holdren's argument rests on the claim that capitalist labor relations are inherently exploitative and that this is what makes work injuries both inevitable and wrong. Readers who agree will go along. Others will chafe. They will chafe moreover because Holdren's focus on the point of production leads him to overlook important pieces of the legal story that made conditions both worse and better for the injured workers who are the objects of his historical concern.

For one thing, Holdren overestimates the extent to which the pre-workers' compensation legal regime afforded injured workers and their families opportunities to

16 WITT, *THE ACCIDENTAL REPUBLIC*, *supra* note 1, at 187.

17 MARK ALDRICH, *SAFETY FIRST: TECHNOLOGY, LABOR, AND BUSINESS IN THE BUILDING OF AMERICAN WORK SAFETY, 1870-1939* (1997).

tell their stories and be recognized. “In the court-based system,” he writes, “people could say things.” (270) But could they? For one thing, the powerful incentives to tell their story in ways that brought forward trauma and victimization may have essentially re-traumatized injured employees. Holdren describes excruciating trial testimony about shattered lives as if it were the truth of the matter when of course, like all or nearly all legal language, it was strategic. Successful plaintiffs’ lawyers learned quickly to train their clients to emphasize the harms done, just as successful defense lawyers did the opposite. Was it a good thing for injured workers to be encouraged to describe themselves as victims with their lives ruined? Tort law awards damages in one lump sum at least in part because the costs of offering victims incentives to continue to describe themselves as victims are considerable.

The historical problem of motivated trial language may not be the biggest obstacle if what we want is to understand the social experience of injury law in the era before workers’ compensation. Arguably a greater dilemma is the fact that the tort system was pervasively privatized and the public records of it are skewed by pervasive selection effects. The trials and the appeals on which Holdren relies to reconstruct the social meaning of the litigation system were extraordinarily rare. If trials were rare, appellate opinions (which Holdren relies on especially) were even rarer. For decades, law and society scholars have insisted on using trial dockets to tell the story of the litigation system, rather than unrepresentative and uncommon appellate case opinions.<sup>18</sup> More recently, scholars have offered reason to doubt whether even the trial court docket books offer a reliable image of the litigation system. The newest efforts look to the claims files of businesses and insurers to figure out what was really going on, since private settlement of employee injuries was the rule and trial the rare exception.<sup>19</sup>

Instead of trials, injured employees found themselves in informal systems of settlement created by union representatives, local lawyers, or other go-betweens. The details of particular stories faded before the roughly-cut categories into which injuries fell, which in turn often produced modest compensation awards. Some scholars, myself included, have argued that in practice the differences between workers’ compensation and tort were not nearly as great as they seemed. Neither offered most actually existing injured workers a chance to tell their story. Both offered at best modest compensation without any resolution of the moral problem at hand.<sup>20</sup>

At the very least, one can say with some confidence that tort failed to deliver anything like the idea of justice as recognition that Holdren offers. The system of privatized settlements that emerged in the shadow of the courthouse did not attend to the singular particularities of any one tragic loss. Actors within that system almost

18 Friedman, *Civil Wrongs*, *supra* note 5; Friedman & Russell, *More Civil Wrongs*, *supra* note 5; BERGSTROM, *COURTING DANGER*, *supra* note 5.

19 Efforts to get beyond the trial docket to the actual business history include Issacharoff & Witt, *The Inevitability of Aggregate Settlement*, *supra* note 6; Kaszorowski, *From Petitions for Gratuities to Claims for Damages*, *supra* note 6.

20 Nathaniel Donahue & John Fabian Witt, *Tort as Private Administration*, 105 CORNELL L. REV. 1093 (2020); Nora Freeman Engstrom, *An Alternative Explanation for No-Fault’s Demise*, 61 DEPAUL L. REV. 303 (2012); Nora Freeman Engstrom, *Sunlight and Settlement Mills*, 86 N.Y.U. L. REV. 805 (2011); Issacharoff & Witt, *Inevitability of Aggregate Settlement*, *supra* note 6.

never even tried to do so. Indeed, it is unclear that they either could have or should have. Has there been a legal system in a complex modern society capable of recognizing the infinitude of the persons before it, or taking into account the sympathetic stories in all their fullness and offering a form of respect capable of living up to the difficulties and disappointments of being a person in the world? Surely the answer is no, though certainly the legal system in the U.S. could do better than it does. There are important limits, however. A legal system aims to treat like cases alike. But too much attention to the detailed differences among situations threatens to produce a system that treats everyone differently. We have no democratic consensus on the moral significance of myriad differences among people and their experiences. Holdren's idea of "justice as recognition" is thus implicitly far more radical than it seems. He offers a Marxian-inspired critique of the rule of law and a call for case-by-case assessment of the relative moral status of the parties to a dispute, rather than application of ostensibly equal rules.

Of course, the state and its legal system may not be well-suited to offering the kinds of recognition to which Holdren aspires. What are the institutions capable of offering meaningful understanding of the depths of the human experience? The church, perhaps. The family. Close-knit communities of friends and family. Maybe literature or the arts, or psychiatry. But the state? The state contends with deep disagreement over the significance and worth of different pieces of the human experience. Its rituals typically aim to resolve differences and to manage societies, not to affirm the particular meanings its citizens ascribe to their lives.

In this respect, the money damages Holdren decries play a role he does not acknowledge. In a society in which people value different ways of life, money damages allow the state to adopt a remedy that smarts for injurer and rewards the plaintiff, notwithstanding wide differences in what they value and how they generate meaning.

One of Holdren's great contributions is to observe some of the new power dynamics set off by the workers' compensation laws. He shows employers and insurers responding by producing new forms of authority. But for the most part he omits the ways in which workers pushed back. New attention to safety could be coopted by workers. Unions, for example, could and did seize on safety protocols to take back a measure of control over the production process. Even where unions did not exist, new claims of managerial power could be turned into new claims on employers' responsibility. Plaintiffs' lawyers, for example, pushed the idea of business responsibility for injuries – what legal scholar Wex Malone called "the contagious principle of workers' compensation" – into other areas of the law.<sup>21</sup> To be sure, workers often lost political struggles over the workers' compensation system. Benefit rates, for example, failed to keep up with inflation for much of the twentieth century, as employers' lobbies bested unions in statehouses all over the country. Even there, workers and their lawyers found creative ways to respond. Some workers, for

21 Wex Malone, *Damage Suits and the Contagious Principle of Workmen's Compensation*, 9 NAT'L ASSOC'N CLAIMANTS' COMP. ATT'YS L. J. 20 (1952); see also John Fabian Witt, *The King and the Dean: Melvin Belli, Roscoe Pound, and the Common Law Nation*, in PATRIOTS AND COSMOPOLITANS: HIDDEN HISTORIES OF AMERICAN LAW (2007).

example, used the new compensation laws to ensure minimal wage replacement while their lawyers pioneered new kinds of higher-value claims against the manufacturers of machinery and other products involved in their injuries.<sup>22</sup>

### III. *Exploitation and Social Structures*

Holdren's scintillating book is a critique of centrist progressive-era reform twice over. On one hand, he is critical of the reformers themselves for adopting an ameliorist strategy of improving the system of capitalist wage labor where they should have been abolitionists. On the other hand, Holdren is critical of the historians who, like the reformers before them, accept a certain amount of human tragedy as inevitable and do not confront work injuries as a symptom of pervasive underlying injustice. Writing at a moment when economic injustice is as salient as it has been in a half century or more, Holdren's criticisms land with force.

Fueling his double critique is a personal story. Holdren tells us that when he was 18 years old, several hundred pounds of lumber fell on him at work and badly injured his hand. His anger over that episode and its lasting influence is palpable. He is angry, too, about industrial injuries suffered by his younger brothers. He tells us that carpal tunnel syndrome and back pain accompanied the production of his book. And he reports that the catastrophic risks of the world in which we live leaves him fearing "for my children and the grandchildren I hope to have." (277)

Holdren fears for the future because the employee injury reforms of the past seem to show how the law has been able to accommodate working-class people to the "limited range of possibility present within capitalism." (256 n.7) Even if our broken political system were capable of generating reforms for such problems as climate change, Holdren's haunting suggestion is that injustices will stay in place, as they did a century ago when reformers purported to solve the work injury crisis.

The next generation of legal histories of accidental injury should take Holdren's fierce views about the exploitation of the worker and apply the same moral energy not only to the labor relation itself, but to the decisive political and economic institutions that constitute the law of work accidents. Plaintiffs' lawyers, insurance companies, statehouse lobbyists, and defense-side lawyers along with large repeat-play defendants are the principal creators of the law of work injuries. The interests and practices of these private administrators give shape to the law of work injuries in ways that do not merely reflect the exploitative foundation of the labor relationship. To the contrary, power and institutional history far from the fulcrum of the wage bargain have created radically decentralized and highly erratic systems of injury law in the United States. Holdren's tough and compelling book should inspire new accounts of these systems' grievous failures.

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22 Martha T. McCluskey, *The Illusion of Efficiency in Workers' Compensation "Reform,"* 50 RUTGERS L. REV. 657 (1998); Witt, *The King and the Dean*, *supra* note 23.