

# Michigan Law Review

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Volume 119 | Issue 6

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2021

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### Recommended Citation

Karen M. Tani, *Compensation, Commodification, and Disablement: How Law Has Dehumanized Laboring Bodies and Excluded Nonlaboring Humans*, 119 MICH. L. REV. 1269 (2021).  
Available at: <https://repository.law.umich.edu/mlr/vol119/iss6/12>

<https://doi.org/10.36644/mlr.119.6.compensation>

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# COMPENSATION, COMMODIFICATION, AND DISABLEMENT: HOW LAW HAS DEHUMANIZED LABORING BODIES AND EXCLUDED NONLABORING HUMANS

*Karen M. Tani\**

INJURY IMPOVERISHED: WORKPLACE ACCIDENTS, CAPITALISM, AND LAW IN THE PROGRESSIVE ERA. By *Nate Holdren*. Cambridge: Cambridge University Press. 2020. Pp. xvii, 292. \$59.99.

## INTRODUCTION

“[A] lot of people died,” a Selbyville, Arkansas, chicken plant worker told investigative journalist Jane Mayer this past summer, during Mayer’s investigation of the troubling nexus of the COVID-19 pandemic, the poultry industry, and the influence of political donors on government regulation.<sup>1</sup> How many, the informant couldn’t say. “[H]er bosses were ‘not talking about it,’” at least not with their workers.<sup>2</sup> But she told Mayer about particular colleagues, such as an elderly man named Hyung Lee, known as Pop Pop around the plant. Lee disappeared from work one day and no one knew what happened; Lee’s son later confirmed that he had died from pneumonia, brought on by COVID-19. Mayer’s informant grieved the loss of her friend (“I cried my ass off”).<sup>3</sup> She also took note of her employer’s indifference: “You think they posted *one picture* of a person who died, in memory of

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1. Jane Mayer, *How Trump Is Helping Tycoons Exploit the Pandemic*, NEW YORKER (July 13, 2020), <https://www.newyorker.com/magazine/2020/07/20/how-trump-is-helping-tycoons-exploit-the-pandemic> [https://perma.cc/QW9B-997Q].

2. *Id.* Concern about lack of transparency has been a common theme among low-wage essential workers during the COVID-19 pandemic. See, e.g., Juliana Feliciano Reyes, ‘Are We Essential or Disposable?’ Workers Say They Need to Know More About Positive Cases on the Job., PHILA. INQUIRER (Apr. 21, 2020, 4:37 AM), <https://www.inquirer.com/jobs/labor/coronavirus-essential-employees-tested-positive-20200421.html> [https://perma.cc/N5V4-QYF8]; Nicole Dungca, Jenn Abelson, Abha Bhattarai & Meryl Kornfield, *On the Front Lines of the Pandemic, Grocery Workers Are in the Dark About Risks*, WASH. POST (May 24, 2020), <https://www.washingtonpost.com/investigations/2020/05/24/grocery-workers-coronavirus-risks> [https://perma.cc/B3CA-2432?type=image].

3. Mayer, *supra* note 1.

somebody? Nothing.”<sup>4</sup> She was similarly critical of the plant’s medical personnel, recalling how a company nurse examined and sent back to work a symptomatic colleague. Shortly thereafter, that coworker was on a ventilator. She survived, but never returned to the plant. “It’s an evil company,” the informant concluded.<sup>5</sup>

If concepts of good and evil offer one way of making sense of these human losses, Mayer offers another: greed, enabled by a system in which money flows freely into politics and the law permits worker exploitation. The meatpacking industry is, of course, no stranger to critique,<sup>6</sup> but Mayer adds a modern twist. She shows how the owners of poultry processing plants, in particular, have taken advantage of weak and outdated labor laws to create a maximally vulnerable low-wage workforce, disconnected from labor unions and drawn heavily from immigrant populations,<sup>7</sup> and how profits from that industry translated into large political donations. In 2014, Ronald Cameron, the head of one of the nation’s largest purveyors of chicken, spent \$4.8 million supporting Republican candidates, much of that money flowing through the Koch family political network.<sup>8</sup> In 2016, Cameron donated nearly \$3 million to organizations supporting Donald Trump’s presidential candidacy (and millions more to another Republican candidate, Mike Huckabee).<sup>9</sup> In the lead up to the 2018 midterm elections, Cameron and his company “gave more than \$7.7 million to Republican candidates, campaigns, and groups.”<sup>10</sup> Behind these donations, Mayer suggests, was a desire to roll back regulations that were bad for business.<sup>11</sup>

The administration that these donations helped empower was noticeably kinder to the poultry industry. In 2018, the U.S. Department of Agriculture responded to a petition from the National Chicken Council by effectively retreating from its established maximum poultry processing speed,<sup>12</sup> a change

4. *Id.*

5. *Id.*

6. See, e.g., most famously UPTON SINCLAIR, *THE JUNGLE* (1906).

7. Mayer, *supra* note 1. For further evidence of the vulnerability of poultry-plant workers, see *The Uncertain Hour, You’re an Essential Worker. Do You Get Essential Protections?*, MARKETPLACE (May 13, 2020), <https://www.marketplace.org/shows/the-uncertain-hour/youre-an-essential-worker-do-you-get-essential-protections/> [<https://perma.cc/V4WB-KH3H>]. On why and how U.S. labor laws have left some workers so vulnerable, see Kate Andrias, *The New Labor Law*, 126 *YALE L.J.* 2 (2016).

8. Mayer, *supra* note 1. Mayer’s earlier work mapped this network extensively. See, e.g., JANE MAYER, *DARK MONEY: THE HIDDEN HISTORY OF THE BILLIONAIRES BEHIND THE RISE OF THE RADICAL RIGHT* (2016).

9. Mayer, *supra* note 1.

10. *Id.*

11. *Id.*

12. The agency spelled out how poultry processing plants could secure waivers for speeds up to 25 percent higher than the maximum speed (of thirty-five birds per minute per line inspector). Petition to Permit Waivers of Maximum Line Speeds for Young Chicken Establishments Operating Under the New Poultry Inspection System; Criteria for Consideration of Waiver Requests for Young Chicken Establishments to Operate at Line Speeds of Up to 175

that allowed chicken plants to trade worker safety for profit.<sup>13</sup> And in April 2020, as it became clear that meat processing plants were COVID-19 hotspots and therefore targets of state and local shutdown measures, President Trump issued an executive order that characterized any disruption to this industry's operations as a threat to "critical infrastructure."<sup>14</sup> Since then, meat processing facilities have operated at nearly full capacity,<sup>15</sup> buoyed by messaging from the Labor Department that the federal government alone will determine appropriate safety procedures and that it expects only "good faith attempts" to comply with federally issued safety guidance.<sup>16</sup> As for the federal agency charged with ensuring compliance, the Occupational Safety and Health Administration, it has gone "AWOL," critics say.<sup>17</sup> Four months after the executive order, more than thirty-nine thousand meat and poultry workers had tested positive for COVID-19, and at least 170 had died.<sup>18</sup> May-

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Birds per Minute, 83 Fed. Reg. 49,048 (Sept. 28, 2018); see also Heather Long, *Trump Team Makes Controversial Change to Allow Chicken Plants to Operate at Faster Speeds*, WASH. POST (Oct. 16, 2018, 9:11 AM), <https://www.washingtonpost.com/business/2018/10/16/trump-team-makes-controversial-change-allow-chicken-plants-operate-faster-speeds/> [<https://perma.cc/DS5L-EVCG>]. Subsequent investigative reporting revealed that "[j]ust a week before the order was issued, the meat industry's trade group drafted an executive order that bears striking similarities to the one the president signed." Michael Grabell & Bernice Yeung, *Emails Show the Meatpacking Industry Drafted an Executive Order to Keep Plants Open*, PROPUBLICA (Sept. 14, 2020, 2:43 PM), <https://www.propublica.org/article/emails-show-the-meatpacking-industry-drafted-an-executive-order-to-keep-plants-open> [<https://perma.cc/7HA2-DM9Z>].

13. Isaac Arnsdorf, *Trump's USDA Is Letting Factories with Troubling Safety Records Slaughter Chickens Even Faster*, PROPUBLICA (Oct. 3, 2019, 5:00 AM), <https://www.propublica.org/article/line-speed-waivers-trump-usda-is-letting-factories-with-troubling-safety-records-slaughter-chickens-even-faster> [<https://perma.cc/GKU5-7398>].

14. Exec. Order No. 13,917, 85 Fed. Reg. 26,313 (Apr. 28, 2020).

15. *America's Meatpacking Facilities Operating More than 95% of Capacity Compared to 2019*, U.S. DEP'T AGRIC. (June 9, 2020), <https://www.usda.gov/media/press-releases/2020/06/09/americas-meatpacking-facilities-operating-more-95-capacity-compared> [<https://perma.cc/AKL2-UPH2>].

16. *Statement of Enforcement Policy by Solicitor of Labor Kate O'Scannlain and Principal Deputy Assistant Secretary for OSHA Loren Sweatt Regarding Meat and Poultry Processing Facilities*, U.S. DEP'T LAB. (Apr. 28, 2020), <https://www.dol.gov/newsroom/releases/osha/osha20200428-1> [<https://perma.cc/Y36W-M3S4>].

17. Mayer, *supra* note 1 (citing Opinion, *Why Is OSHA AWOL?*, N.Y. TIMES (June 21, 2020), <https://www.nytimes.com/2020/06/21/opinion/coronavirus-osha-work-safety.html> [<https://perma.cc/MPV2-LMAK>]); see also Noam Scheiber, *OSHA Criticized for Lax Regulation of Meatpacking in Pandemic*, N.Y. TIMES (Oct. 22, 2020), <https://www.nytimes.com/2020/10/22/business/economy/osha-coronavirus-meat.html> [<https://perma.cc/5WPJ-DYV2>]; Deborah Berkowitz, *Workplace Safety Enforcement Continues to Decline in Trump Administration*, NAT'L EMP. L. PROJECT (Mar. 14, 2019), <https://www.nelp.org/publication/workplace-safety-enforcement-continues-decline-trump-administration/> [<https://perma.cc/F5RY-V8LP>] (drawing on government data to conclude that under the Trump Administration, OSHA enforcement activity declined steadily, largely through cutbacks in the number of complicated, high-impact safety and health inspections).

18. Michael Grabell & Bernice Yeung, *Meatpacking Companies Dismissed Years of Warnings but Now Say Nobody Could Have Prepared for COVID-19*, PROPUBLICA (Aug. 20, 2020, 5:00 AM), <https://www.propublica.org/article/meatpacking-companies-dismissed-years>

er's reporting suggests how "dark money" not only enabled these casualties but naturalized them, by securing a government framework that cast worker wellbeing as a necessary sacrifice in a time of "national emergency."

It is possible, however, to take an even longer view on these human losses and to advance a thesis with a broader reach. Before the election of Donald Trump, before the evisceration of campaign finance laws,<sup>19</sup> before the wildfire spread of right-to-work legislation<sup>20</sup> and the fissuring of traditional worker-employer relationships,<sup>21</sup> the U.S. legal system embraced a paradigm that treated working people impersonally—almost fungibly—when it came to the harms they experienced on the job. There was a deliberate retreat from legal approaches that grappled with the singularity of particular workers, striving for (if never achieving) perfect justice in each case. And there was a shift toward aggregate justice, in the form of workers' compensation statutes.<sup>22</sup> Materially, many workers and their families benefited from this shift. It regularized the process of seeking compensation and guaranteed that predictable types of injuries resulted in predictable payouts. It removed workers' claims from a legal system that, in many ways, was arbitrary and cruel. But there was a conceptual cost, and it continually comes due: workers' compensation programs have encouraged and enabled employers to engage in a style of cost-benefit thinking that we might otherwise find reprehensible. Over time, the logic of these programs came to imply that it is acceptable to place a worker, any worker, in harm's way so long as the employer is prepared to pay the scheduled price. Little wonder that Hyung Lee's employer didn't bother to memorialize him, not even with a single photograph. And little wonder that the owners of U.S. poultry processing companies were so agghast

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of-warnings-but-now-say-nobody-could-have-prepared-for-covid-19 [https://perma.cc/P5VH-7R8B]; see also Leah Douglas, *Mapping Covid-19 Outbreaks in the Food System*, FOOD & ENV'T REPORTING NETWORK (Apr. 22, 2020) (updated Oct. 9, 2020), https://thefern.org/2020/04/mapping-covid-19-in-meat-and-food-processing-plants/ [https://perma.cc/TW4V-N3US] (finding that as of October 9, 2020, 45,387 meatpacking workers had tested positive for COVID-19 and 214 of those workers had died); Michelle A. Waltenburg et al., *Update: COVID-19 Among Workers in Meat and Poultry Processing Facilities—United States, April–May 2020*, CTRS. FOR DISEASE CONTROL & PREVENTION (July 10, 2020), https://www.cdc.gov/mmwr/volumes/69/wr/mm6927e2.htm [https://perma.cc/TF9U-9VXA] (reporting that in April and May 2020, the 23 states that responded to a data request reported 16,233 cases of COVID-19 among meat and poultry processing workers, including 86 COVID-19-related deaths; noting that 22 states with animal slaughtering and processing facilities did not respond to the data request).

19. See generally Michael S. Kang, *The End of Campaign Finance Law*, 98 VA. L. REV. 1 (2012).

20. See generally Catherine L. Fisk & Benjamin I. Sachs, *Restoring Equity in Right-to-Work Law*, 4 U.C. IRVINE L. REV. 857 (2014) (documenting the spread of state-level right-to-work laws and explaining how such laws affect the viability of unions in the states where they exist).

21. See generally David Weil, *Understanding the Present and Future of Work in the Fissured Workplace Context*, RSF: RUSSEL SAGE FOUND. J. SOC. SCI., Dec. 2019, at 147.

22. PRICE V. FISHBACK & SHAWN EVERETT KANTOR, NAT'L BUREAU OF ECON. RSCH., A PRELUDE TO THE WELFARE STATE: THE ORIGINS OF WORKERS' COMPENSATION I (2000).

at COVID-19-related plant closures: they had calculated the value of their workers' lives and that calculation favored continued production. When the federal government sided with the companies, some Americans expressed outrage—but that outrage finds little support in the law.

That this longer (and bleaker) view is possible is thanks to Nate Holdren's<sup>23</sup> remarkable new book, *Injury Impoverished: Workplace Accidents, Capitalism, and Law in the Progressive Era*. Part I of this Review summarizes some of the book's most important contributions. It will not do justice to the richness and complexity of the text, but it will capture large themes and striking examples. Part II builds on Holdren's insights about disability discrimination and the disabling power of law, emphasizing why, in the U.S. context, being excluded from labor-force participation is so meaningful. Simply put, the best social benefits flow through employment; those who cannot access employer-linked social welfare are at a deep disadvantage. Part III concludes, aiming to strike the same notes as the book's powerful closing.

#### I. INJURY IMPOVERISHED

Like this Review, *Injury Impoverished* begins with death and injury, observable both at a mass scale and in individual, human stories. But the book tilts always toward the individual, who on page one is Nettie Blom (p. 1). On June 30, 1900, Blom was at work in the laundry of a Yellowstone Park hotel, operating a machine that used steam-heated and steam-powered rollers to iron linens (p. 1). On this particular day, the machine—called a mangle—did to Blom's hand what it was supposed to do to the linens: it trapped, crushed, and burned it. When a coworker finally freed Blom, the sight of her disfigurement was so horrifying that three colleagues fainted. For her part, Blom suffered indescribable pain (she literally could not put it in words) and eventually lost the use of that hand (pp. 1–2).

That we know these facts about Blom's injury and, 120 years later, can at least partially recognize her suffering is because Blom filed a civil suit against her employer.<sup>24</sup> She argued that her employer had been negligent and therefore owed her monetary compensation.<sup>25</sup> Some people with similar experiences won these suits (pp. 4, 26). Blom lost, but in doing so left evidence of a paradigm worth remembering, Holdren argues (p. 6). Today, the U.S. legal system handles workplace injuries mainly through state-level workers' compensation systems,<sup>26</sup> an innovation that Progressive reformers famously championed and that spread across the nation in the first two decades of the twentieth century.<sup>27</sup> These systems, with their insurance logics and predicta-

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23. Assistant Professor, Law, Politics, & Society, Drake University.

24. *Blom v. Yellowstone Park Ass'n*, 90 N.W. 397 (Minn. 1902).

25. *Id.* at 397–98.

26. See *infra* notes 52–53 and accompanying text.

27. See *infra* Section I.B.

ble, scheduled payouts, are generally recognized as an improvement<sup>28</sup> over what they replaced. But “better or worse” is not the only question worth pursuing, this book underscores. We can ask about consequences, including how the shift in legal frameworks affected the way we see the world—and what might have fallen out of view along the way.

### A. *The Imperfect Recognition of Civil Litigation*

“You’re worth something,” jurors told Hope Cheston at the conclusion of her 2018 civil trial.<sup>29</sup> Cheston had sued a security company, among others,<sup>30</sup> after one of its employees raped her on a public picnic table during a visit to a friend’s apartment complex.<sup>31</sup> Age fourteen at the time of the assault, Cheston waited several years to pursue the suit. “I had to basically build up my own self-esteem and remind myself who I am and just where I’m meant to go and remember my purpose on this Earth and not let this man feel like he took my purpose,” Cheston explained to reporters at the time of the trial.<sup>32</sup> By then, the man who assaulted her had been convicted of rape and was serving a twenty-year sentence.<sup>33</sup> But Cheston had not received her own justice—until the jury in her civil suit considered what had happened to her and the mental and emotional toll it had taken.<sup>34</sup> That jury awarded her \$1 billion in damages. Realistically, Cheston was unlikely to collect in full, her lawyer cautioned.<sup>35</sup> But the message mattered. From the lawyer’s perspective, it was a strong statement about the human cost of sexual assault, at a time when women were speaking up en masse about such experiences.<sup>36</sup> From Cheston’s perspective, it represented “human kindness,”<sup>37</sup> by jurors who tried to appreciate “what I went through and my story and how I feel.”<sup>38</sup>

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28. See, e.g., p. 256.

29. Lindsey Bever, *A Rape Victim Was Just Awarded \$1 Billion. Jurors Told Her: ‘You’re Worth Something.’*, WASH. POST (May 24, 2018, 11:55 AM), <https://www.washingtonpost.com/news/post-nation/wp/2018/05/24/a-rape-victim-was-just-awarded-1-billion-jurors-told-her-youre-worth-something> [<https://perma.cc/2YHX-FSXV>].

30. *Id.*

31. *Id.*; Daniel Victor, *Woman Who Was Raped as a Teenager Is Awarded \$1 Billion in Damages*, N.Y. TIMES (May 23, 2018), <https://www.nytimes.com/2018/05/23/us/georgia-assault-billion-dollars.html> [<https://perma.cc/6FX3-UPFC>].

32. Bever, *supra* note 29.

33. *Id.*

34. See *id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. Denise Dillon, *Jury Hands Down \$1 Billion in Rape Case*, FOX 5 ATLANTA (May 23, 2018), <https://www.fox5atlanta.com/news/jury-hands-down-1-billion-in-rape-case> [<https://perma.cc/A7SC-EKEG>].

Injured workers once had access to this same kind of legal forum, along with its tailored pronouncements about individual suffering and moral culpability. Before the emergence of workers' compensation statutes, some injured workers used state courts and common law claims of negligence to attempt to secure individualized compensation for their injuries. Drawing largely on published state court opinions and legal treatises, the opening chapter of *Injury Impoverished* asks that we remember this time.

It is not exactly a forgotten history,<sup>39</sup> but it is one that bears a fresh look. In describing this pre-workers' compensation legal landscape, Holdren notes, scholars have tended to emphasize the same points as the reformers who ultimately remade that landscape: that courts were inaccessible to many potential plaintiffs; that for those who made it through the courthouse doors, lawsuits were an inefficient and unpredictable mechanism for securing redress; and that the substantive law governing these claims often disadvantaged workers.<sup>40</sup>

Holdren acknowledges these critiques<sup>41</sup> and adds one of his own: civil litigation was implicated in an ongoing and diffuse project of commodifying workers—that is, treating them as “economic objects” that could be bought and sold on a market.<sup>42</sup> In courts of law, this occurred through doctrines that cast workers as free and knowledgeable agents, voluntarily putting their bodies in harm's way for the right price (pp. 20–24). It also occurred at the back end of the litigation, when courts used the pre-injury market price of the plaintiff's labor to calculate an appropriate damage award (pp. 27–30).

Departing from the critics, however, Holdren also emphasizes what individual tort suits made possible: “justice as recognition” (p. 35). This is distinct from “distributive justice,” Holdren explains, in that it is not about fair

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39. See, e.g., JOHN FABIAN WITT, *THE ACCIDENTAL REPUBLIC: CRIPPLED WORKINGMEN, DESTITUTE WIDOWS, AND THE REMAKING OF AMERICAN LAW* (2004); Lawrence M. Friedman, *Civil Wrongs: Personal Injury Law in the Late 19th Century*, 1987 AM. BAR FOUND. RSCH. J. 351; Lawrence M. Friedman & Thomas D. Russell, *More Civil Wrongs: Personal Injury Litigation, 1901-1910*, 34 AM. J. LEGAL HIST. 295 (1990).

40. See, e.g., WITT, *supra* note 39, at 43–70; Friedman, *supra* note 39, at 355–58; Friedman & Russell, *supra* note 39, at 310. In emphasizing this broad similarity in the literature, I do not mean to ignore important differences in interpretation. Scholars have advanced different views, for example, on how and whether this legal landscape served modern capitalism. See CHRISTOPHER L. TOMLINS, *LAW, LABOR, AND IDEOLOGY IN THE EARLY AMERICAN REPUBLIC* 28, 294, 304–05 (1993).

41. See p. 15 (characterizing the court system as “systematically indifferent to the economic well-being of working-class people and to the harms of poverty”); pp. 19–24 (noting how various legal doctrines shifted the costs of workplace injuries onto workers); pp. 25–26 (noting the high level of uncompensated injuries and the serious consequences to injured workers and their families of having to bear these costs on their own).

42. See pp. 16, 33 & n.38 (drawing on recent work in the history of capitalism and understanding commodification as a “social practice” that “structural imperatives . . . compel”). On commodification as the defining characteristic of capitalism, see Caitlin Rosenthal, *Capitalism When Labor Was Capital: Slavery, Power, and Price in Antebellum America*, 1 CAPITALISM 296, 302 (2020) (explaining that capitalism exists where the owners of capital enjoy “the power to commoditize” labor, or not, as they choose (emphasis omitted)).



or unfair access to money.<sup>43</sup> It is distinct, too, from procedural fairness, although the idea of being heard is relevant to both. “Justice as recognition” is what is available when a justice giver treats an injured individual as “a fellow human being with dignity,” Holdren explains, and when the justice-giving system has the capacity to express moral judgments about what has happened.<sup>44</sup> To be sure, not every legal proceeding was a dignified experience for the plaintiff.<sup>45</sup> But where the proceeding ended with a finding of employer liability, that finding carried with it a message of societal disapproval.<sup>46</sup> As the legal philosopher Scott Hershovitz has put it, tort law has a “moral vocabulary,” and a finding of liability conveys that the defendant *wronged* the plaintiff.<sup>47</sup>

Holdren also sees the possibility of recognition in the award of non-pecuniary damages—that is, damages aimed to compensate for pain, suffering, mental anguish, loss of enjoyment of life, or some other harm that formal markets do not price.<sup>48</sup> This is not to suggest a starry-eyed view of

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43. See p. 35.

44. P. 35. This argument will resonate with some tort law scholars. In the face of fierce campaigns to limit personal-injury litigation over the past fifty years, scholars have had to contemplate the value of giving such claims their day in court. See Steven D. Smith, *The Critics and the “Crisis”: A Reassessment of Current Conceptions of Tort Law*, 72 CORNELL L. REV. 765, 765 (1987) (characterizing the tort law system as “fac[ing] a crisis of legitimacy”). Some defenders of the court-centered tort law system have emphasized how it recognizes and affirms individuals’ consciousness of being wronged; how it communicates and thereby shores up social values; and how it can protect human dignity. See, e.g., *id.* at 782–83 (finding value in the tort law system’s ability to recognize and address the plaintiff’s personal “sense of injustice” and its capacity to “reinforce[] the normative order upon which society depends”); John C.P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 TEX. L. REV. 917, 974 (2010) (arguing that the state signifies its respect for individuals when it empowers them, via tort law and civil litigation, “to act against others who have wronged them”); Cristina Carmody Tilley, *Tort Law Inside Out*, 126 YALE L.J. 1320, 1320 (2017) (arguing that “tort operates as a vehicle through which communities perpetually reexamine and communicate their values”); Leslie Bender, *Tort Law’s Role as a Tool for Social Justice Struggle*, 37 WASHBURN L.J. 249, 257 (1998) (arguing that the core purposes of tort law are “protect[ing] dignity and promot[ing] social equality and social justice”). A related line of scholarship documents the significance of recognition to injured plaintiffs. See, e.g., Tamara Relis, “It’s Not About the Money!”: *A Theory on Misconceptions of Plaintiffs’ Litigation Aims*, 68 U. PITT. L. REV. 701 (2007).

45. P. 35 (noting the “humiliations” that injured plaintiffs likely had to endure during these suits, as defendants’ lawyers blamed them for their own injuries and as their own lawyers characterized them as “useless, disfigured, undesirable, and ugly”).

46. Pp. 38–39. Here, Holdren joins those tort law scholars who have emphasized the expressive function of tort law, enriching a literature that, by the late twentieth century, had tended to emphasize tort law’s role in either correcting injustice or promoting efficiency. See, e.g., Scott Hershovitz, *Treating Wrongs as Wrongs: An Expressive Argument for Tort Law*, 10 J. TORT L. 405 (2017). For a useful overview of trends in tort law scholarship, see Goldberg & Zipursky, *supra* note 44.

47. Hershovitz, *supra* note 46, at 407. Hershovitz goes on to elaborate on why it can be so important to convey that the defendant wronged the plaintiff. *Id.* at 445 (explaining that this message restores the victim’s social standing).

48. P. 50. Tort law scholars have made a related point: that this category of damages is crucial for people who are not susceptible to market pricing (because they have not sold, or can

how such awards historically functioned—indeed, Holdren is alert to how the awards he found in the historical record bolstered patriarchy and reinforced negative ideas about physical and mental difference.<sup>49</sup> In Holdren's words, "[t]he presence of moral notions in the law is only as good as those notions were" (p. 49). But he appreciates the way nonpecuniary damage awards placed workers and their injuries in social context (pp. 39–50). Rather than abstracting away from individual human suffering, as pecuniary damage awards tended to do, nonpecuniary damage awards leaned into the plaintiff's social world and recognized how the plaintiff's position in it may have worsened.

Some of those who sought to do away with this court-based system for redressing workplace injuries were also concerned about individual human suffering, and Holdren is careful not to impugn their motives. Early twentieth-century reformers such as Crystal Eastman and William Hard connected with injured workers and their families; they showed genuine interest in the social meaning of workers' injuries; and they encouraged a broad societal reckoning with the injustice they observed (pp. 55–64). But, as Holdren astutely notes, "justice as recognition was not the primary goal" for these actors (p. 59). They used individual stories of human suffering to illustrate for their audience "distributive (in)justice," of the kind that was most visible in the aggregate.<sup>50</sup>

Their aggregate-oriented solution, workers' compensation, is our next stop. Ironically, as injury law reformers demanded for working people more justice than the court system provided, they "accidentally encouraged their readers to restrict their imaginations"—"to settle for laws that largely abandoned justice recognition and to settle for labor practices and class relationships that killed and maimed working-class people" (p. 82).

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no longer sell, their labor in a formal market) or whose labor the market devalues. *E.g.*, Lucinda M. Finley, *The Hidden Victims of Tort Reform: Women, Children, and the Elderly*, 53 EMORY L.J. 1263 (2004); *see also* Martha Chamallas, *The Architecture of Bias: Deep Structures in Tort Law*, 146 U. PA. L. REV. 463, 509 (1998) ("The nonmarket character of the pain-and-suffering element thus provides a modest corrective to the status quo nature of the current system of tort damages that generally replicates the market.").

49. Pp. 44–49. Scholars of tort law have voiced similar critiques of nonpecuniary damages. *See, e.g.*, Chamallas, *supra* note 48, at 501–02 (noting how, historically, claims for loss of consortium and loss of services were only available to men and reinforced the notion that women and children were men's property); Samuel R. Bagenstos & Margo Schlanger, *Hedonic Damages, Hedonic Adaptation, and Disability*, 60 VAND. L. REV. 745, 751 (2007) (showing that when personal injury lawyers have sought damages for "loss of enjoyment of life" they have often "treated disability as inherently and tragically limiting the ability to enjoy life"); Anne Bloom with Paul Steven Miller, *Blindsight: How We See Disabilities in Tort Litigation*, 86 WASH. L. REV. 709, 713 (2011) (demonstrating how "tort litigation's distorted perspective [of people with disabilities] fosters troubling stereotypes and encourages plaintiffs with disabling injuries to view themselves in harmful ways").

50. Pp. 57, 61; *see also* WITT, *supra* note 39, at 139–40, 143 (highlighting these reformers' "statistical approach to thinking about accidents").

### B. *The Tyranny of the Table*

In brief, workers' compensation programs apply an insurance approach to the problem of workplace injury. The idea is that work entails risk, and for every risk, there is a predictable rate and amount of injury, which the employer should factor into the cost of doing business. To guarantee that employers do actually factor it in, workers' compensation programs generally require that employers buy insurance coverage for these risks, either from private insurers or the state, or that they self-insure. When a workplace injury occurs, the injured worker (or the worker's family, in the case of fatality) files a claim, and the claim is treated much like any other insurance claim—that is, it goes through a streamlined adjudicatory process, involving a limited set of facts and few of the trappings of a judicial trial. If valid, the claim culminates in compensation for medical expenses, as well as a predetermined wage replacement payment. The latter is calculated on the basis of the type of injury and the worker's wage history, and in general gives only partial compensation for lost wages. In exchange for providing this coverage, employers are insulated from civil suits.<sup>51</sup> By 1920, forty-three states had created such programs.<sup>52</sup> Today, all but two states require employers to provide workers' compensation coverage.<sup>53</sup>

The story of how these programs came to occupy the field is fascinating, but well told elsewhere.<sup>54</sup> Accordingly, Holdren devotes relatively little space to the question of how and why the legal paradigm shifted.<sup>55</sup> Holdren places more emphasis on the insurance logic animating workers' compensation programs and on what workers experienced as their injuries became subject

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51. This overview draws generally on Leslie I. Boden & Emily A. Spieler, *Workers' Compensation*, in THE OXFORD HANDBOOK OF U.S. SOCIAL POLICY 451 (Daniel Béland, Christopher Howard & Kimberly J. Morgan eds., 2015). As these authors note, however, there is a difference between how workers' compensation programs work in theory and in practice. To say that an injury is covered does not mean that every worker with a qualifying injury will receive compensation, much less adequate compensation. *Id.* at 458. Moreover, these programs have never purported to cover all workers and all injuries. In reality, "many workers with work-related injuries and illnesses never collect any benefits under these programs." *Id.*; see also Jeffrey A. Hilgert, *Building a Human Rights Framework for Workers' Compensation in the United States: Opening the Debate on First Principles*, 55 AM. J. INDUS. MED. 506, 516 (2012) (arguing that many injured workers experience the U.S. workers' compensation system as "hostile").

52. Boden & Spieler, *supra* note 51, at 452.

53. *Id.* at 454. On how these programs evolved between the early twentieth century and today, see Emily A. Spieler, *(Re)assessing the Grand Bargain: Compensation for Work Injuries in the United States, 1900–2017*, 69 RUTGERS U. L. REV. 891 (2017).

54. See WITT, *supra* note 39, at 126–86; FISHBACK & KANTOR, *supra* note 22.

55. Lest I shortchange the book, I should note that Holdren adds to this literature a rich discussion I hadn't seen elsewhere: he shows that reform narratives were not only about the suffering of workers and their families, but also about (1) the suffering of the state, from shouldering the burden of injured workers and their families, and (2) the suffering of the employer, at the hands of unscrupulous lawyers and unpredictable juries. Pp. 84–107.

to this new regime. If the court-centered regime had represented the “tyranny of the trial,” this new one represented “the tyranny of the table” (pp. 5–6).

“Tyranny,” Holdren acknowledges, is a “polemical” word, connoting a use of power that is cruel and unfair (p. 5 n.10). It might seem inapt for a system that shifted risk off the backs of workers and distributed material benefits to many Americans.<sup>56</sup> Holdren applies the word to this context because workers’ compensation programs ascribed to “human lives and human suffering” “fixed monetary values”—“no more than that, and not subject to discussion” (p. 5). Holdren vividly recalls his discomfort, as a seventeen-year-old factory worker, to learn that his injured knuckles (crushed by “a few hundred pounds of lumber”) were worth a set price (p. 4–5). Years later, in writing this book, he was finally able to explain a feeling that, at the time, he could only register as “creepy” (p. 5): workers’ compensation programs explicitly commodified workers, without even bothering to acknowledge other ways of valuing them (p. 114). Even though he never actually filed a compensation claim (p. 5 n.9), Holdren also recalls feeling “offended” by the realization that a plant manager with an identical injury would have gotten more (p. 5).

From one perspective, this is just life—or as compensation-fund specialist Kenneth Feinberg has put it, the American way: “If somebody gets hit by an automobile or falls off a ladder, the stockbroker and the banker get more than the waiter, the bus boy, or the fireman,” Feinberg explains.<sup>57</sup> “That’s the American capitalist system, and that’s the role of money in trying to temper the unfortunate.”<sup>58</sup> To Holdren, by contrast, this is cruel and unfair. It’s cruel and unfair because it makes the market for the worker’s pre-injury labor *the* mechanism for ascribing value to particular injuries, and because the market is hardly a natural or infallible force.<sup>59</sup> “The market” boils down to employers’ collective pricing of labor power, including employers’ inegalitarian judgments about the value of particular workers.<sup>60</sup>

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56. See pp. 19–20 (describing how the legal doctrines that preceded workers’ compensation schemes placed risk of injury on workers); p. 124 (noting how workers’ compensation laws would “more equitably distribute funds than lawsuits would”).

57. Steven J. Dubner, *Who Decides How Much a Life Is Worth?*, FREAKONOMICS RADIO, at 19:40–19:50 (Aug. 8, 2018, 11:00 PM), <https://freakonomics.com/podcast/kenneth-feinberg> (on file with the *Michigan Law Review*).

58. *Id.* at 19:50–19:57. For an overview of the September 11th Victim Compensation Fund and other no-fault compensation schemes, see Robert L. Rabin, *The Renaissance of Accident Law Plans Revisited*, 64 MD. L. REV. 699 (2005). Feinberg famously managed the September 11th Victim Compensation Fund, among many others. Kenneth R. Feinberg, Speech at Washington University School of Law: Negotiating the September 11 Victim Compensation Fund of 2001: Mass Tort Resolution Without Litigation (Sept. 14, 2004), in 19 WASH. U. J.L. & POL’Y 21 (2005); see also Elizabeth Kolbert, *The Calculator*, NEW YORKER (Nov. 18, 2002), <https://www.newyorker.com/magazine/2002/11/25/the-calculator> [<https://perma.cc/8TDB-U8W9>].

59. See p. 113.

60. See p. 113. Elsewhere in the book, Holdren discusses the lower wages often paid to people with physical impairments, to women, and to African Americans. Pp. 152, 178–79. “By

Another way of making these points is to highlight where workers' compensation laws departed from what came before. Missing from this new paradigm were precisely those features of the civil litigation system that recognized injured workers' humanity: (1) damage awards for nonfinancial injuries ("[p]ain and loss became newly worthless" under compensation laws), (2) a forum that invited "narration of the individual effects of injury" (these no longer mattered), and (3) a pronouncement about whether the injured worker had been "wronged" (compensation payments carried no such meaning).<sup>61</sup> In Holdren's view, these losses "changed the ethical grammar of the law," "further impoverishing" its ability to recognize the human experience of injury.<sup>62</sup>

### C. *The Rise and Normalization of Disability Discrimination*

Unfortunately, it gets worse, for the compensation paradigm not only further commodified workers, but it also made workers' physical impairments newly salient. Confirming the findings of historian Sarah F. Rose, Holdren shows how employers started screening out people with physical impairments, as a way of "avoiding risk,"<sup>63</sup> and how all workers became subject to new forms of medical surveillance.<sup>64</sup>

Understanding this change requires that we unsettle a set of common assumptions about disability and work: that disability generally disqualifies a person from working, and that, naturally, an employer would not want to hire someone with a disability. Historians have demonstrated that in the nineteenth century and into the early twentieth century, conditions that today are considered disabilities were an unremarkable sight in waged work-

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making wages the sole measure of injuries' values, compensation laws imported the hierarchies of the labor market into the law." P. 179. Damage payments in tort cases are, of course, subject to the same critique, to the extent they are anchored in the injured person's earning history or in statistical calculations of the earning power of a person with the injured person's ascribed characteristics. See, e.g., Martha Chamallas, *Civil Rights in Ordinary Tort Cases: Race, Gender, and the Calculation of Economic Loss*, 38 LOY. L.A. L. REV. 1435 (2005); Kimberly A. Yuracko & Ronen Avraham, *Valuing Black Lives: A Constitutional Challenge to the Use of Race-Based Tables in Calculating Tort Damages*, 106 CALIF. L. REV. 325 (2018).

61. Pp. 115–18. This exclusion is not a necessary feature of compensation laws. Indeed, other modern compensation laws contemplate pain and suffering. Rabin, *supra* note 58, at 710–11.

62. Pp. 115–16. Holdren refers to this phenomenon as "moral thinning." Cf. Barbara Young Welke, *The Cowboy Suit Tragedy: Spreading Risk, Owning Hazard in the Modern American Consumer Economy*, 101 J. AM. HIST. 97, 100 (2014) (noting how, in the context of accidental injuries caused by defective products in the mid-twentieth century, the application of the "logic of risk and insurance" made it "easier to believe that monetary damages somehow compensated the wrong done" and "to erase from consciousness the fact that the underlying physical, emotional, and psychic harm could not be undone").

63. SARAH F. ROSE, NO RIGHT TO BE IDLE: THE INVENTION OF DISABILITY, 1840S–1930S, at 162–67 (2017).

64. This is the general theme of the book's second half. Pp. 135–252. The material on medical surveillance is largely in Chapter Six. Pp. 218–52.

places.<sup>65</sup> Reported court decisions interpreting the new workers' compensation laws confirm that workers with physical impairments were very much in the workforce at the time of the paradigm shift, albeit in a disadvantaged position vis-à-vis "able-bodied" peers (pp. 151–54).

Holdren explains how these same court decisions motivated employers to rid their ranks of such workers. In 1916, the Massachusetts Supreme Court ruled that, under the state workers' compensation law, a bobbin factory must treat a worker's eye injury as causing total loss of sight, even though the worker only had one sighted eye at the time of the injury (pp. 152–53). The court cited a similar New York Court of Appeals case from 1915, involving a one-handed worker who lost his remaining hand in a workplace accident; the court found his employer liable for the workers' actual post-injury position (total incapacity), rather than applying a framework that would treat all losses of a hand in the same way (pp. 153–54). And although other courts took the opposite approach, employers were concerned enough to begin eradicating impaired workers altogether from their payroll—which they now understood as their risk pool (pp. 156–58). Management at the famous Pullman Corporation literally sent around a memo in 1923 with the directive "Do not accept one-eyed men" (p. 159). The list of candidates to be avoided also included men "with organic heart disease, with suspected tuberculosis, with nephritis, with mental infirmities, with major deformities" and "men who are much undernourished and manifestly below par physically" (p. 159). By 1934, the company president went so far as to refer to such applicants as "physical crooks," who must be stopped from "getting on the employment list" at all cost.<sup>66</sup>

All the while, the rhetoric of insurance allowed new gatekeeping practices to seem impersonal and apolitical. The notion, as Holdren explains, was that "[s]ome labor power"—meaning "some people"—had become "potentially financially dangerous for employers' purchase" (p. 208). And so they purchased less. Phrased differently, companies like Pullman didn't dislike disabled workers or wish them ill; they were just reacting to market imperatives (pp. 208–09).

In summary, compensation laws created a "new legal normal," which distributed to employers a greater share of the cost of workers' injuries, but also "a new economic normal," which distinctly disadvantaged people with discernible impairments: "Rather than disabled people being subordinated while included in employment," Holdren explains, "disabled people would be increasingly excluded from employment" altogether.<sup>67</sup> Under the logic of

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65. P. 138; ROSE, *supra* note 63, at 91–136.

66. P. 165. This is also an evocative example of what Doron Dorfman, in the twenty-first-century context, calls "fear of the disability con." Doron Dorfman, *Fear of the Disability Con: Perceptions of Fraud and Special Rights Discourse*, 53 LAW & SOC'Y REV. 1051 (2019); see also SUSAN M. SCHWEIK, *THE UGLY LAWS: DISABILITY IN PUBLIC* 108–38 (2009).

67. P. 172. Chapter Five of the book, titled "Insuring Injustice," extends this argument to other types of workers that could be considered bad risks and therefore became the target of exclusionary efforts. Pp. 175–216.

insurance, they were simply bad risks, which threatened the solvency of the entire endeavor. And thus disability, unemployment, and poverty became ever more tightly linked (p. 173).

## II. THE DISABLING EFFECT OF WORKFORCE EXCLUSION

One of the great insights of disabilities studies, and of the community of self-identified disabled individuals that is intertwined with it, is that many forces beyond human biology are responsible for the experience of disablement. A classic example: For a person who uses a wheelchair, buildings that are only accessible by stairs are disabling. When buildings have ramps and elevators, this person's mobility impairment becomes less salient; the person becomes, in a sense, less disabled. This is not to suggest that all disabilities are socially constructed. It is to say that the world is filled with human variation and these variations have the meaning that societies give to them. From this perspective, even the loss of major bodily function may not be a disability, depending on the person's social context. A human variation becomes a disability when, in context, it precludes a person with that variation from performing the functions that are essential to daily life or from participating in activities that are meaningful to them and to others in their society.<sup>68</sup>

*Injury Impoverished* offers at least two stark examples of the way that the law disables.<sup>69</sup> First, before workers' compensation programs, when injured workers sought redress through the court system, the litigation process often reinforced the belief that physical impairments were disgusting and disgraceful, marking a person as unfit for full participation in social and civic life (pp. 46–49). Second, as discussed in Chapter Six, compensation laws transformed workers with physical impairments from potentially employable, in certain employers' eyes, to necessarily excluded.<sup>70</sup>

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68. See Sagit Mor, *The Meaning of Injury: A Disability Perspective*, in *INJURY AND INJUSTICE: THE CULTURAL POLITICS OF HARM AND REDRESS* 27, 29–30 (Anne Bloom, David M. Engel & Michael McCann eds., 2018) (explaining how the disability movement and the disability studies literature have “transformed the meaning of disability,” replacing “the prevailing individualistic medicalized view of disability” with one that treats disability as “a more complex social, political, and cultural phenomenon”); Doron Dorfman, *Re-Claiming Disability: Identity, Procedural Justice, and the Disability Determination Process*, 42 *LAW & SOC. INQUIRY* 195 (2017) (providing a useful overview of what scholars call the “social model” of disability and identifying how that model has been revised over time); Bagenstos & Schlanger, *supra* note 49, at 778–81 (explaining the social model of disability and its political and legal implications). This understanding of disability infuses *Injury Impoverished*. See, e.g., p. 47 n.95 (“[I]t is not the body that determines whether . . . someone is able. Disability is socially constructed as marginalization, which mean[s] that the sources of disability lie in institutions and power relationships, rather than being inherent in the bodies of disabled people themselves.”).

69. Other examples abound elsewhere in the literature. See, e.g., CLAIRE H. LIACHOWITZ, *DISABILITY AS A SOCIAL CONSTRUCT: LEGISLATIVE ROOTS* (1988); Mor, *supra* note 68; Elizabeth F. Emens, *Framing Disability*, 2012 *U. ILL. L. REV.* 1383.

70. See p. 252. By the 1930s, this exclusion seemed so natural that many New Deal relief policies treated out-of-work disabled people as categorically ineligible for work relief programs. Paul K. Longmore & David Goldberger, *The League of the Physically Handicapped and*

I want to elaborate on this second example, to underscore just how disabling workforce exclusion is. In the period that Holdren covers, such exclusion meant, at a minimum, lack of access to steady, waged work; this, in turn, meant material hardship for excluded workers and their family members (some of whom might now be forced into dangerous workplaces to make ends meet). Hardship could sometimes be mitigated, through support from private charity and local public welfare systems. But this patchwork support system tended to impose its own costs, in the form of surveillance and discipline.<sup>71</sup> In a society organized around male breadwinners, failure to provide also had cultural meaning. Men who appeared to neglect this duty faced stigma, scorn, and even criminalization.<sup>72</sup> When people with physical impairments lost access to waged work, they also lost access to the privileged status it conferred.

The significance of workforce exclusion only deepened as time went on, because of the way that citizen demands for greater social protection ended up getting channeled through private employers. To offer the most salient example, many Americans today receive health insurance via their employers<sup>73</sup> (who, unbeknownst to many Americans, receive public subsidies for providing this vital good).<sup>74</sup> The most privileged workers receive a range of additional benefits, from life insurance to subsidized housing to paid parental leave.<sup>75</sup> Employers also provide access to old-age security, in two ways: (1) some employers provide private pensions, and (2) many employers function as a gateway to government-subsidized Social Security, providing the record of employment that is a condition of eligibility.<sup>76</sup>

The government does not abandon people who lack sufficient ties to the world of formal employment, but the need-based programs that support

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*the Great Depression: A Case Study in the New Disability History*, 87 J. AM. HIST. 888, 898–99 (2000).

71. See generally MICHAEL B. KATZ, *IN THE SHADOW OF THE POORHOUSE: A SOCIAL HISTORY OF WELFARE IN AMERICA* (rev. ed. 1996); LINDA GORDON, *PITIED BUT NOT ENTITLED: SINGLE MOTHERS AND THE HISTORY OF WELFARE, 1890–1935* (1994).

72. See generally Michael Willrich, *Home Slackers: Men, the State, and Welfare in Modern America*, 87 J. AM. HIST. 460 (2000).

73. This arrangement was not inevitable; indeed, it was hotly contested. See generally JACOB S. HACKER, *THE DIVIDED WELFARE STATE* (2002); JENNIFER KLEIN, *FOR ALL THESE RIGHTS: BUSINESS, LABOR, AND THE SHAPING OF AMERICA'S PUBLIC-PRIVATE WELFARE STATE* (2003); PAUL STARR, *REMEDY AND REACTION: THE PECULIAR AMERICAN STRUGGLE OVER HEALTH CARE REFORM* (rev. ed. 2013).

74. See Suzanne Mettler, *20,000 Leagues Under the State*, WASH. MONTHLY (July/Aug. 2011), <https://washingtonmonthly.com/magazine/julyaug-2011/20000-leagues-under-the-state/> [<https://perma.cc/P9XD-2WDS>]. For a fuller elaboration on this idea, see SUZANNE METTLER, *THE SUBMERGED STATE: HOW INVISIBLE GOVERNMENT POLICIES UNDERMINE AMERICAN DEMOCRACY* (2011).

75. ANDREA LOUISE CAMPBELL, *TRAPPED IN AMERICA'S SAFETY NET* 46–48 (2014).

76. See MICHAEL B. KATZ, *THE PRICE OF CITIZENSHIP: REDEFINING THE AMERICAN WELFARE STATE* 178–79 (updated ed. 2008).



them are infamously ungenerous,<sup>77</sup> difficult to navigate,<sup>78</sup> and even punitive.<sup>79</sup> These programs also tend to introduce into recipients' lives a greater and not always magnanimous government presence, in the form of behavioral restrictions and demands, surveillance, and a general air of suspicion.<sup>80</sup>

Culturally, meanwhile, workforce participation remains as significant as ever—arguably more so, in the sense that the expectation of participation now extends well beyond men with families.<sup>81</sup> Consider, for example, the turn toward work requirements in public welfare policy and the recent attachment of these requirements to programs that were once almost universally available to people in need.<sup>82</sup> The message is: if you aren't working—or trying to work—you are a burden, a taker; your other contributions have no value; you deserve nothing.

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77. See Julia F. Lynch, *A Cross-National Perspective on the American Welfare State*, in THE OXFORD HANDBOOK OF U.S. SOCIAL POLICY, *supra* note 51, at 112, 120 (comparing the United States to other nations and noting the low benefit levels for people in need).

78. See, e.g., Michael Lipsky, *Bureaucratic Disentitlement in Social Welfare Programs*, 58 SOC. SERV. REV. 3 (1984); Vicki Lens, *Bureaucratic Disentitlement After Welfare Reform: Are Fair Hearings the Cure?*, 12 GEO. J. ON POVERTY L. & POL'Y 13, 21 (2005); Evelyn Z. Brodtkin & Malay Majmundar, *Administrative Exclusion: Organizations and the Hidden Costs of Welfare Claiming*, 20 J. PUB. ADMIN. RSCH. & THEORY 827, 828–29 (2010); PAMELA HERD & DONALD P. MOYNIHAN, *ADMINISTRATIVE BURDEN: POLICYMAKING BY OTHER MEANS* 22–23 (2018).

79. See, e.g., KAARYN S. GUSTAFSON, *CHEATING WELFARE: PUBLIC ASSISTANCE AND THE CRIMINALIZATION OF POVERTY* 1–2 (2011); JOE SOSS, RICHARD C. FORDING & SANFORD F. SCHRAM, *DISCIPLINING THE POOR: NEOLIBERAL PATERNALISM AND THE PERSISTENT POWER OF RACE* (2011) (illuminating the punitive policy tools that are part of the modern welfare system); JULILLY KOHLER-HAUSMANN, *GETTING TOUGH: WELFARE AND IMPRISONMENT IN 1970S AMERICA* (2017) (illustrating the entanglement of the penal and welfare systems in the 1970s and after).

80. See, e.g., JOHN GILLIOM, *OVERSEERS OF THE POOR: SURVEILLANCE, RESISTANCE, AND THE LIMITS OF PRIVACY* 7–9 (2001); Anna Marie Smith, *The Sexual Regulation Dimension of Contemporary Welfare Law: A Fifty State Overview*, 8 MICH. J. GENDER & L. 121, 127 (2002); Khiara M. Bridges, *Privacy Rights and Public Families*, 34 HARV. J.L. & GENDER 113, 124–32 (2011); MAGGIE MCCARTY, GENE FALK, RANDY ALISON AUSSENBERG & DAVID H. CARPENTER, *CONG. RSCH. SERV.*, R42394, *DRUG TESTING AND CRIME-RELATED RESTRICTIONS IN TANF, SNAP, AND HOUSING ASSISTANCE* (2016); Spencer Headworth, *Getting to Know You: Welfare Fraud Investigation and the Appropriation of Social Ties*, 84 AM. SOCIO. REV. 171, 190 (2019).

81. For striking examples of how men, in particular, continue to face stigma and shame for being unable to participate in the formal labor market, see THOMAS J. COTTLE, *HARDEST TIMES: THE TRAUMA OF LONG TERM UNEMPLOYMENT* (2001). I thank Nate Holdren for this reference.

82. GENE FALK, MAGGIE MCCARTY & RANDY ALISON AUSSENBERG, *CONG. RSCH. SERV.*, R43400, *WORK REQUIREMENTS, TIME LIMITS, AND WORK INCENTIVES IN TANF, SNAP, AND HOUSING ASSISTANCE* (2016). Controversially, work requirements have recently appeared in some state Medicaid programs, in response to an express invitation by federal administrators. Abby Goodnough, *Appeals Court Rejects Trump Medicaid Work Requirements in Arkansas*, N.Y. TIMES (Feb. 14, 2020), <https://www.nytimes.com/2020/02/14/health/medicaid-work-requirements.html> [<https://perma.cc/E9CD-V9FU>].

In short, it is not surprising that people with disabilities have fought so hard to (re)gain access to formal labor markets,<sup>83</sup> even as they seek a more capacious framework for evaluating human worth.<sup>84</sup> In our present context, employment confers much more than wages.

If law has helped create this context, of workforce exclusion and concomitant disablement, can it also create a different context? What would happen if we disentangled private employers from social-benefit administration? What would happen if we treated workforce participation as extraneous to the question of what the government owes its citizens and how it satisfies that obligation?<sup>85</sup> If the history in *Injury Impoverished* is a guide, these changes would likely alter the social meaning of impairment. The “borders of belonging” would expand,<sup>86</sup> drawing in individuals who had been unjustly marginalized.

### CONCLUSION

Eight years ago, in the pages of this publication, Melissa Murray made an argument that stuck with me. She was reviewing Ralph Richard Banks’s *Is Marriage for White People?*, a provocative analysis of the marriage decline among Black Americans,<sup>87</sup> and after dutifully summarizing Banks’s argument, Murray rejected the book’s premise.<sup>88</sup> Rather than joining Banks in debating the best option for Black, marriage-eligible, middle-class women, Murray paused to ask why marriage was so important anyway—and whether we ought to accept its privileged status.<sup>89</sup> *Should* marriage “be the normative ideal for intimate life and the vehicle by which we confer a range of important public and private benefits?”<sup>90</sup>

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83. The Americans with Disabilities Act (ADA) is one important instantiation of these efforts, albeit an imperfect one. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327. On the fight for the ADA, including arguments about the imperative of gaining access to the formal labor market, see LENNARD J. DAVIS, *ENABLING ACTS: THE HIDDEN STORY OF HOW THE AMERICANS WITH DISABILITIES ACT GAVE THE LARGEST US MINORITY ITS RIGHTS* (2015).

84. See, e.g., LEAH LAKSHMI PIEPZNA-SAMARASINHA, *CARE WORK: DREAMING DISABILITY JUSTICE* (2018); MARTA RUSSELL, *Marxism and Disability, in CAPITALISM & DISABILITY: SELECTED WRITINGS BY MARTA RUSSELL* 12, 21–22 (Keith Rosenthal ed., 2019).

85. For a forceful critique of employment-linked social-welfare programs and several thoughtful proposals for reform, see Catherine Albiston & Catherine Fisk, *Precarious Work and Precarious Welfare: How the Pandemic Reveals Fundamental Flaws of the U.S. Social Safety Net*, 42 *BERKELEY J. EMP. & LAB. L.* (forthcoming 2021).

86. This term comes from Barbara Welke’s magisterial synthesis of U.S. history in the long nineteenth century. BARBARA YOUNG WELKE, *LAW AND THE BORDERS OF BELONGING IN THE LONG NINETEENTH CENTURY UNITED STATES* (2010).

87. RALPH RICHARD BANKS, *IS MARRIAGE FOR WHITE PEOPLE?: HOW THE AFRICAN AMERICAN MARRIAGE DECLINE AFFECTS EVERYONE* (2011).

88. Melissa Murray, *Black Marriage, White People, Red Herrings*, 111 *MICH. L. REV.* 977, 999 (2013) (book review).

89. *Id.* at 994.

90. *Id.* at 978.

*Injury Impoverished* is incisive in the same way. It would be understandable if a book on this topic (or if readers of this book) gravitated toward the question, “what is the best way to compensate workers for their injuries?” But Holdren never lets our attention settle there, because he doesn’t want *us* to settle—for a line of inquiry that, though important, is too narrow. This book encouraged me to ask bigger questions about why exclusion from work matters so much; why it is that workplace injuries in the United States are so disabling. Holdren’s own big questions are why the problem of workplace injury exists in the first place, and why we accept it, both on a mass scale and in individual instances.<sup>91</sup>

From a moral perspective, many workplace injuries are not acceptable, and we should resist a framework that enables us to treat them that way. It is probably true that the job of, say, fighting a wildfire cannot be done without confronting the risk of burns or smoke inhalation. But inhaling toxic chemicals need not be treated as part of the price of producing a cutting-edge electric car.<sup>92</sup> Sexual violation need not be treated as an inevitable danger of cleaning a hotel room.<sup>93</sup> And to return to where we started, contracting COVID-19 need not be understood as a necessary hazard of meatpacking.<sup>94</sup>

91. “In the contemporary United States,” Holdren’s sober Conclusion notes, “approximately 5,000 people die as employees each year.” Nonfatal injuries are even more common, although hard to track because of underreporting. P. 253 n.1.

92. See Will Evans & Alyssa Jeong Perry, *Tesla Says Its Factory Is Safer. But It Left Injuries off the Books*, REVEAL (Apr. 16, 2018), <https://www.revealnews.org/article/tesla-says-its-factory-is-safer-but-it-left-injuries-off-the-books/> [<https://perma.cc/9K2A-LA89>] (reporting on workplace injuries at Tesla, including injuries related to toxic fumes).

93. See, e.g., Michelle Chen, *8 in 10 Hotel Workers Have Been Harassed at Work*, NATION (Nov. 13, 2015), <https://www.thenation.com/article/archive/8-in-10-hotel-workers-have-been-harassed-at-work/> (on file with the *Michigan Law Review*) (documenting the high rates of sexual assault and harassment that hotel workers face on the job); Sarah Lyons, “*Hands Off Pants On*”: *The Collective and Radical Art of Shedding Self-Doubt*, 43 LAB. STUD. J. 263, 266 (2018) (reporting that in a survey of Chicago-area hotel workers, 58 percent “had experienced some form of sexual harassment by a guest” and nearly half of surveyed hotel housekeepers “said a guest had flashed them, exposed himself or herself, or answered the door naked”). Note that the most prominent proposed response to this problem is to give workers “panic buttons,” an individualized solution that implicitly assumes continued individual encounters with predators. Alexia Fernández Campbell, *How a Button Became One of the Greatest #MeToo Victories*, VOX (Oct. 1, 2019, 10:00 AM), <https://www.vox.com/identities/2019/10/1/20876119/panic-buttons-me-too-sexual-harassment> (on file with the *Michigan Law Review*); cf. Daniel E. Eaton, *Beyond Room Service: Legal Consequences of Sexual Harassment of Staff by Hotel Guests*, 45 CORNELL HOTEL & REST. ADMIN. Q. 347 (2004) (surveying legal approaches to the sexual harassment of hotel staff by guests and concluding that “the law seems far more interested in what the hospitality operator did to remedy the complaint than to prevent the incident” (emphasis omitted)).

94. Holdren has offered his own reflections on how this book connects to COVID-19. See *Labor, Poverty, and Power*, CAMBRIDGE UNIV. PRESS: FIFTEENEIGHTYFOUR (Sept. 3, 2020), <http://www.cambridgeblog.org/2020/09/labor-poverty-and-power/> [<https://perma.cc/J9TK-BAH9>] (“Unless the harms of Covid-19 and employee injury more broadly are . . . politicized and collectively opposed, people will continue to be injured and killed at work” and “those harms will be treated by the powerful in society as merely unfortunate, rather than unjust, po-

Moreover, if those injuries occur, we need not value them in ways that have anything to do with the going rate of the injured person's labor power. *Injury Impoverished* asks us to imagine a legal framework that resists the naturalization of workplace injuries, however commonplace, and that rejects the notion that when you sell your labor, you've put every other aspect of your being "on the market," too.

Is this asking too much of a legal system so thoroughly entangled with modern capitalism? Maybe. But worse than asking too much is asking too little. Worse, Holdren contends, is being "the proverbial frog in the well who thinks the sky is no bigger than the well's mouth" (p. 277).

In that spirit, I encourage you to read this brilliant, bracing book and then to engage in conversations that help preserve a wider horizon—about the treatment that "we as a society owe one another" and whether "our legal and economic system" helps or hinders us in meeting our obligations (p. 13). There are no easy answers in Holdren's history, and certainly no ready-made policy solutions. But *Injury Impoverished* offers ample fodder for collective deliberation and urgent reminders of the human stakes.

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litical, and violent."); Nate Holdren, *Roundtable on Injury Impoverished*, LAB. & WORKING-CLASS HIST. ASS'N (Aug. 14, 2020) <https://www.lawcha.org/2020/08/14/nate-holdren-responds-roundtable-on-injury-impoverished/> [<https://perma.cc/4P37-ZULK>] (noting how, during the COVID-19 pandemic, the law "serve[s] to insulate decision-makers from having to really confront the moral status" of "ordering workers to face COVID-19 risks").

