Building a Human Rights Framework for Workers’ Compensation in the United States: Opening the Debate on First Principles

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Background This article introduces the idea of human rights to the topic of workers’ compensation in the United States. It discusses what constitutes a human rights approach and explains how this approach conflicts with those policy ideas that have provided the foundation historically for workers’ compensation in the United States.

Methods Using legal and historical research, key international labor and human rights standards on employment injury benefits and influential writings in the development of the U.S. workers’ compensation system are cited.

Results Workers’ injury and illness compensation in the United States does not conform to basic international human rights norms.


KEY WORDS: workers’ compensation; human rights; injured workers’ rights; labor economics; social policy

INTRODUCTION

The many failures in the workers’ compensation system across the United States have now raised human rights concerns. Workers’ compensation is the insurance system for job-related injuries and illnesses. Injured workers in the U.S. have encountered significant obstacles in seeking compensation for medical expenses, rehabilitation, and income replacement benefits. These obstacles range from social stigmatization to being surveilled by private investigators to facing retaliatory discrimination to struggling with medical bills to being forced into poverty.

There has yet to be an open debate of workers’ compensation in the United States as a human rights issue. This policy brief begins this discussion by defining elements of the human rights perspective as it relates to workers’ compensation in the United States. It is neither a human rights fact-finding report nor an extensive treatment of the topic but rather a policy brief discussing what adopting a human rights approach would mean in practice. The objective is to open the debate on first principles and lay a strong conceptual foundation for moving towards a human rights approach.

This brief is divided into three sections. The first section discusses the main elements of a human rights approach as a normative framework. It presents human rights as not only a legal analysis but a philosophical and political analysis, highlighting the relevance of each perspective to workers’ compensation in the United States. The second section then compares this human rights view with
institutional labor economics, the market-based philosophy that has served as the dominant normative framework for workers’ compensation in Anglo-American society. This section presents human rights as a direct challenge to market-based social policy. The third and final section highlights the shift in values that would accompany a human rights approach to workers’ compensation in the United States. It raises the key issues of universal access to adequate health care, treating workers’ compensation as an essential social good, challenging what is considered the “original bargain” in workers’ compensation, protecting the dignity and respect of injured workers, and ensuring the right to participation in the administration of workers’ compensation systems.

Workers’ compensation remains an important social issue because workers’ health and safety remains a serious social problem. Despite official statistics that claim fatal work-related injuries and non-fatal illnesses and injuries are declining, evidence shows the reality is different. Government figures have been described as erroneous and misleading. They fail to count fatalities from work-related disease and undercount by large margins non-fatal illness and injury.

The undercount of non-fatal injuries and illnesses misses up to 61% of illnesses and injuries [Rosenman et al., 2006]. One study found that 83% of the reported decline in illness and injury between 1992 and 2003 was due to changes in record-keeping requirements rather than declines in illness and injury [Friedman and Forst, 2007]. The exact number of workers that are injured or made ill by work each year in the United States is unknown in part because workers routinely fail to report injuries and illnesses as they fear retaliation by their employers. One estimate places the number of people in the U.S. made injured or ill by their working environment to be as high as 12.3 million workers annually [AFL-CIO, 2008].

Researchers estimate the magnitude of mortality from occupation-related disease in the United States to be as high as 49,000 deaths annually [Steenland et al., 2003]. This startling estimate, when added to the official government traumatic death figures, increases the number of work-related deaths annually in the U.S. to a range around 55,200 people. Labor activists have also questioned the official traumatic fatality figure [Hazards Magazine, 2008]. If these suspicions are accurate, the real U.S. death toll may approach 60,000 annually, making work the eighth leading cause of death in the United States.

Considering the social tragedy that is workplace safety and health in the United States, how would a human rights perspective connect to the issue of workers’ injury compensation?

The importance of this question is highlighted by several recent high profile disasters like the Upper Big Branch mine explosion killing 29 West Virginia miners and the British Petroleum Deepwater Horizon oil rig explosion killing 11 workers and decimating untold miles of the Gulf of Mexico’s ecosystem. How is a human rights approach different than other social theories that have served to justify injured workers’ compensation historically? What are the tangible public policy approaches and implications that result from moving towards a human rights understanding of social justice for injured workers in the United States? Before we can answer these questions, we must first locate, define and explain workers’ injury compensation as a human rights concern.

WORKERS’ COMPENSATION AS A HUMAN RIGHT

Workers’ compensation in the United States has rarely, if ever, been considered a human rights issue. In the U.S., the state-based workers’ compensation system covering private sector employment was created between 1910 and 1940, well before the dawn of the modern human rights era in 1948. The current systems were therefore embedded in another system of values entirely. These values, discussed in the next section, hold a strong market-bias that challenges the recognition and adoption of new values in concordance with human rights perspectives.

One challenge facing employment injury benefits as a human rights concern is how the issue takes a back seat to questions of preventive injury and illness at work. At first glance this would appear logical; if there were no work-related injury and illnesses, there would be no need for workers’ compensation. Here, the question is how to prevent work from making people injured or ill going forward into the future, not human rights for workers already injured or ill. This general deference to the importance of prevention, however, leaves workers’ “comp” systems as a political afterthought; as secondary matters in an already marginalized area of public policy.

A human rights worldview is relevant to this predicament. Human rights are just claims on power held by the victims of universal moral violations. Prevention going forward does not by itself resolve the just claims on power held by those workers already made injured or ill by the workplace. A human rights approach recognizes as separate and distinct those just claims on power held by injured workers that have suffered due to hazards in the working environment.

The human rights approach in workers’ compensation means that workers are entitled to a system that functions in their best interest as rights-holding individuals. Employment injury benefits should not exist for any other purpose than to satisfy those human rights obligations owed to injured workers. This means the system does not exist to
provide an alternative dispute resolution procedure for employers. It also means that questions of prevention and using the system as a prevention tool must not detract from its effective functioning and primary aim to work in the best interest of all rights-holding injured workers. In human rights parlance this is the recognition of an employment injury benefits system as a fundamental social good that works to guarantee a life of human dignity for injured and ill workers and prevents social exclusion.

Employment injury benefits are defined by both the international human rights system and the international labor standards system. Both systems have developed an important body of jurisprudence on the question of employment injury benefits. In both systems, the topic is considered a question of social security. This use of the term social security is significantly broader than that which is colloquially used in the United States to refer to the retirement benefit program administered by the U.S. Social Security Administration. In the international human rights system, the main treaty that specifically protects employment injury benefits as a human right is the International Covenant on Economic, Social and Cultural Rights (ICESCR).

The UN Committee on Economic, Social and Cultural Rights (CESCR) is the legal body responsible for monitoring the International Covenant on Economic, Social and Cultural Rights. It considers employment injury benefits a distinct human rights question and has considered the issue under Article 9 on social security and social insurance, one of nine principle branches of social security. The Committee monitors these human rights by receiving periodic reports from countries around the world and making comments and observations about domestic social policy in reference to human rights principles and standards. The Committee also issues higher-profile “General Comments” on particular human rights topics that apply to all countries seeking to be in compliance with basic international human rights standards. The CESCR has noted that all social security benefits such as employment injury benefits must “be treated as a social good, and not primarily as a mere instrument of economic or financial policy” [CESCR, 2008: Para. 10].

A separate and distinct human rights analysis for workers’ compensation in the United States means first understanding these and other human rights principles that constitute a human rights approach and worldview. To help explain a human rights view, scholars have identified three discourses on human rights: A philosophical discourse, a legal discourse, and a political discourse [Evans, 2005]. Each of these adds to the human rights-based worldview. Each offers an approach to thinking about human rights that helps develop a critique of the U.S. system.

**Basic Human Rights Philosophy**

Human rights philosophy argues human beings are deserving of a universal dignity and respect simply by the fact that they are human. Violations of this universal dignity impact other human rights, making human rights indivisible and interdependent. Comparisons are made with Immanuel Kant’s categorical imperative, where “the supreme principle of morality” requires “that we treat people as ends, never as means …” [Donnelly, 2007: 24]. This fundamental dignity logic and its moral claims are at the center of this basic human rights philosophy.

Specific logic follows this philosophy. When workers’ compensation or any other issue rises to the level of a human rights concern, it possesses a “prima facie priority over competing claims” [Donnelly, 2007: 22]. Human rights claims trump non-human rights. Human rights thus provide a powerful interpretive lens to seek social justice. It is the language of the victimized and dispossessed who strive towards “altering legal or political practices” and to “self-liquidate” their rights claim [Donnelly, 2007: 22]. This means the human rights idea gives injured workers legitimate political ground to stand upon. Instead of being one voice among many competing for policy changes, their claims must be prioritized first. Their goal is not to secure power for the sake of power, but to realize a specific thread of social justice which, realized systematically, discharges their claim. This, for many injured workers, make their advocacy tangible and more legitimate as they struggle both for themselves and others on an issue recognized internationally as a necessity for living a life of human dignity.

Two notable documents underlying the philosophical discourse of human rights include the Universal Declaration of Human Rights [United Nations, 1948] and the Vienna Declaration of the World Conference on Human Rights [United Nations, 1993]. Universality is one principle found within these documents. Other principles include equality, the guarantee of an effective remedy for human rights violations, and the view that it is the first responsibility of governments to assure a social order where human rights are protected. The belief that universal human rights are indivisible, interdependent, and interrelated is also clearly stated. This means realizing one set of human rights may in part be dependent upon realizing another group of human rights, an important consideration in countries like the U.S. with no universal system of healthcare.

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1 The other branches of social security defined in the Int’l Covenant on Economic, Social, and Cultural Rights are healthcare, sickness, old age, unemployment, family/child support, survivors/orphans, maternity, and disability.
Regarding workers’ compensation, the Universal Declaration of Human Rights in Article 22 recognizes that “Everyone, as a member of society, has the right to social security.” The UN has recognized the indivisibility of employment injury benefits with other rights. Healthcare is both a guaranteed entitlement for all as well as an important element of social policy in cases of employment injury. The CESCR has noted the lack of access to social security undermines the realization of other economic and social rights [CESCR, 2008: Para. 8]. Protecting social security on employment injury, “plays an important role...in poverty reduction and alleviation, preventing social exclusion and promoting social inclusion” [CESCR, 2008: Para. 4].

The philosophical discourse of human rights is a powerful interpretive lens around which to organize and mobilize support for injured workers’ rights. Seeing workers’ compensation as a universal human rights issue elevates its moral authority in political debates, opens the door to making new political allies and building coalitions for change, and requires that voice be given to injured workers. As all human rights are indivisible and interrelated, this basic rights philosophy means recognizing the interconnection with occupational health and safety violations while still treating injured workers’ rights as a separate and distinct fundamental human rights claim that calls upon governments to ensure a social order that addresses both affronts to human dignity.

Human Rights and International Law

Another important component of the human rights worldview encompasses international labor and human rights law. International human rights law adds moral and political authority to injured workers’ rights claims by referencing specific global standards. International law within many areas offers detailed labor and social policy prescriptions. Legal observations supervising these standards also give the victims of human rights violations added authority in their cause.

The leading international treaties of relevance to the question of workers’ compensation can be found in the International Covenant on Economic, Social, and Cultural Rights (ICESCR) and within certain labor standards adopted by the annual conference of the International Labor Organization. Part III of the ICESCR addresses the world of work and workers’ rights. Article 7 defines “the right of everyone to the enjoyment of just and favorable conditions of work” which includes “safe and healthy working conditions.” Article 9 says everyone has the right to social security and social insurance. Article 11 protects “an adequate standard of living.” Each of these provisions is further elaborated in the specific comments and observations of the CESCR.

The International Labor Organization operates the international labor standards system. This system is distinct from the UN human rights system but is no less important as many of the issues addressed overlap with human rights norms. In short, the ILO facilitates the negotiation of international treaties on labor topics. These “labor conventions” are then ratified by national governments and ILO bodies supervise their implementation in domestic law. Employment Injury Benefits have been historically an important subject under international labor standards.

The ILO’s Convention No. 121 of 1964 covers Employment Injury Benefits. Unlike in the human rights system, however, where nearly every nation has ratified the treaty related to employment injury benefits, only 24 countries have ratified Convention 121. None the less, it is another international statement on systemic principles for social policy on employment injury. It covers both medical care and cash benefits [International Labor Organization, 1964].

The employment injury benefit rights under the ICESCR human rights system were elaborated by the Committee in General Comment No. 19 on the right to social security. General Comment 19 outlines the specific legal obligations related to employment injury under the International Covenant on Economic, Social, and Cultural Rights. Because the ICESCR has been ratified by almost every country of the world, CESCR General Comments form a jurisprudence that is considered an important part of basic human rights obligations under international law.

A detailed point-by-point treatment of employment injury benefits under international human rights standards is not the aim of this article. This task would entail an in-depth study of the country-by-county observations made within the international labor and human rights systems. Certain key elements of the international human rights jurisprudence on employment injury benefits, however, are worth noting in any debate of first principles.

First, adequate access to healthcare must be available for all [CESCR, 2008: Para. 13]. The interconnection of the universal access to healthcare and employment injury benefits has been recognized. Second, although privately run schemes are acceptable in workers’ comp, any private system must conform to human right norms [CESCR, 2008: Para. 5]. Any private system of employment injury benefits is thus evaluated equally to a public system under human rights standards and must satisfy the same basic human rights obligations under international law.

Third, even if a private system exists, state and federal governments retain the obligation as public authorities to ensure adequate protection. Public authorities “must take responsibility for the effective administration or supervision of the system” [CESCR, 2008: Para. 11]. There can, therefore, be no claim by a government that systemic problems are outside of its domain of control because the
problems occur within a private insurance system. Fourth, the administration of a workers’ compensation system— and this point applies to all claims-handling by private insurance carriers—must not be arbitrary with unreasonable restrictions [CESCR, 2008: Para. 9]. The private carrier practice in the United States of the initial denial of claims would thus violate this provision. Similarly, benefits must be provided without discrimination [CESCR, 2008: Para. 29–31]. This includes indirect discrimination that might be observed where particular groups of workers, like non-English speaking workers, do not receive equal employment injury benefits.

Fifth, adequate benefits, in amount and duration, must be provided as are needed to ensure income security and to cover the loss of support for spouses or dependents [CESCR, 2008: Para. 17]. Moves by some U.S. states to cap benefits for permanent partial disability at ten years clearly violates human rights norms. Compromise and release agreements likely also violate this human rights obligation. Other questionable practices in the U.S. would be indemnity benefits inadequate to secure what the Committee has deemed “an adequate standard of living” [CESCR, 2008: Para. 22]. Another human rights obligation is the requirement that all workers be provided employment injury benefits protection. In the U.S. independent contractors excluded from coverage, as well as self-employed and home-based workers, runs afoul of basic human rights standards on employment injury benefits [CESCR, 2008: Para. 33].

Although the human rights legal discourse affords advocates of social justice for injured workers the authority of international human rights law, human rights discourse in an exclusively legal mode has limits. The U.S. is a party to neither the ICESCR nor ILO Convention 121. This means worker advocates cannot use the supervisory mechanisms established by these key treaties to press for injured workers’ rights. These standards serve as education and organizing tools to illustrate how far U.S. policy departs from international human rights norms on workers’ comp.

Another concern with an exclusively legal approach is that injured worker advocates may find some language lacking in protection. The Employment Injury Benefit Convention No. 121, for example, allows for, under some circumstances, the exclusion of public servants and other categories of workers from protection, seemingly in conflict with the ICESCR. Legal discourse as an exclusive advocacy strategy can be both a strength and a weakness for injured workers.

There remain, however, specific human rights standards on workers’ injury compensation that the U.S. fails to meet. Although the U.S. has not ratified the ICESCR, human rights scholars have argued that the fundamental and basic human rights that are embodied in the ICESCR have become, as a part of the International Bill of Human Rights, a global common law—customary international law—which all nations of the world are obligated to respect. The United States has not ratified the ICESCR, but it did sign the treaty in 1979. No U.S. administration has submitted it to the Senate for a ratification vote since. Under international law, the United States as a signatory to the treaty has an obligation to “refrain from acts which would defeat the object and purpose of a treaty” [Vienna Convention on the Law of Treaties, 1969: Article 18].

### Human Rights as a Political Analysis

Distinct from a philosophical or legal discourse, a political analysis is also found within human rights. This approach sees human rights as a set of social institutions, rules and practices that serve (or fail to serve) the interests of specific rights-holders. Injured workers are rights-holders and governments and employers are duty-bearers. This political analysis acknowledges the priority and interests of the rights-holders in this relationship. It critiques the institutions that challenge the realization of human rights. Where the real interests of injured workers fail to be realized in public policy, the focus becomes determining a more effective protection of rights.

The political discourse on human rights naturally encourages a focus on the social setting and how public policies work in practice, including how various types of power inequalities can confound the exercise of human rights. The political analysis involves questions of power and powerlessness, and how interests associated with different human rights frameworks are served or not served by the political choices made. The social setting is important because one context or national system may be very different than another setting, impacting the legal protections. A human rights-based political analysis extends beyond questions of legal compliance with global standards to encompass questions of institutions, interests and the alternatives for effectiveness.

Elements of this political analysis often overlap with human rights law. The ICESCR, for example, explains that beneficiaries of social security schemes “must be able to participate in the administration of the social security system.” This includes the right “to seek, receive, and impart information on all social security entitlements in a clear and transparent manner.” This is a legal obligation that recognizes a distinct political analysis that injured workers must be given priority participation and administration rights in workers’ compensation systems. Conversely, it is important to note that the Committee is silent on the human rights of employers or private insurance companies to participate and administer workers’ compensation systems [CESCR, 2008: Para 26]. In the U.S. context, where the most basic information about claims-
making rests in private hands, serious human rights issues exist. A privatized system administered without the participation of injured workers also contravenes these basic human rights norms.

Considering the legislative activity that surrounds workers’ compensation in the U.S. every year, another relevant provision concerns “retrogressive measures.” Lawmakers may not take retrogressive measures when changing their workers’ compensation systems. Reductions in employment injury benefits may not be made without the “most careful consideration of all alternatives” and must be “duly justified by reference to the totality of rights provided for in the Covenant” after “genuine participation of affected groups in examining the proposed measures and alternatives” [CESCR, 2008: Para 42]. These provisions highlight a distinct political analysis in the human rights approach.

Because workers’ rights exist in the inherently class-bound inequality of the employment relationship, the political analysis of human rights is important. This encompasses the rights of injured workers. Institutional choices are made based on differing worldviews and standards of judgment about how workers’ comp should operate. In the U.S., the fixation on controlling costs and keeping workers’ compensation rates competitive in relation to other states is an example of one particular standard of judgment. A human rights analysis critiques how these policy choices impact rights-holders and the protection of injured workers’ rights to healthcare and income.

**Building the Human Rights Argument**

To summarize what is meant by a human rights approach is to recognize different dimensions of the human rights worldview. Human rights involve a particular philosophical approach that articulates the existence of that which is required for a life of basic human dignity. This approach gives injured workers a priority basis for claims-making and political advocacy. Human rights law defines specific standards agreed upon by the international community that constitute in practice global human rights norms. Applied to the U.S. context, a quick review of the employment injury benefits system finds a list of violations of international human rights norms. Human rights also involve a political analysis. Key principles like participation and transparency in not just the design but in the administration of an employment injury system constitute a completely different consciousness of workers’ compensation than that which has dominated public policy in the United States since 1910. Adopting a comprehensive human rights approach to injured workers’ rights advocacy means engaging these three distinct but interconnected human rights viewpoints. Such ideas face an admittedly difficult challenge in the domestic policy arena. It is to the challenge of this real politick to which this article now turns; an examination of the dominance of market-based ideologies in U.S. workers’ compensation.

**THE CHALLENGE OF MARKET-BASED IDEOLOGIES**

A human rights view of workers’ compensation challenges values and assumptions that are deeply held in the United States. Market ideologies provide the dominant normative policy framework for workers’ compensation in the United States today. The values and assumptions underlying these perspectives have for a century provided the political and philosophical policy foundation of workers’ compensation systems around the country. Shifting to a human rights-based workers’ compensation system entails a fundamental challenge to these dominant values.

Identifying the historical influences that gave rise to workers’ compensation in the United States is a complex question. While the dominance of market values undoubtedly contributed ideas and bolstered the politics shaping the system as it emerged early in the 20th century, this is admittedly a complex history that cannot be reduced to a single stream of economic thought. The contribution and at times the dominance of a market-based approach, however, cannot be ignored and continues to pose obstacles to fundamental human rights as an organizing principle for U.S. social policy. The market-based social policy advocated by the main thinkers behind the U.S. workers’ compensation system clearly impacted the design of the system as it formed in the early 20th century. A close critique is thus important to understanding the obstacles faced in moving towards a human rights understanding of workers’ compensation in the United States.

**The High Theory of Market-Based Social Policy**

Among the first advocates of injured workers’ compensation in the United States were the institutional labor economists. Although critical of neo-classical economics for its failure to address the social problems faced by workers, the institutional labor economists advocated labor policy reforms within a market economics framework. Workers’ compensation in the U.S. was founded and organized around market-based values and assumptions as a result. This view of social policy emerged a generation before the modern human rights era began in the wake of World War II. Embedding the injured workers’ compensation system within a market-based approach to social policy has led to a basic conflict with the human rights perspective.

To demonstrate the conflict between human rights and a market-based policy model, one need only examine how
the U.S. institutional labor economists like John R. Commons of the Wisconsin School diagnosed the problem of hazards at the workplace. According to Commons and many other economists at the time, hazards were the result of “imperfections” in the market.

Their empirical study and observation led them to support regulatory laws on grounds widespread employment and poverty wages resulted from market imperfections and externalities originating in social institutions rather than as the inevitable price of overall progress. Such socially determined conditions included too little or too much competition in labor markets, either of which could be devastating in the absence of institutional protections. Market imperfections generated market externalities absorbed by individual workers, working-class households and industrial communities in the form of low wages, bad working conditions, and social welfare experiments [Craypo, 1997: 62].

By diagnosing dangerous working conditions in a policy framework of “market imperfections” the institutional labor economists executed a magician’s equivalent of an unseen slight of hand. Public policy regulating workers’ health and safety and the treatment of injured workers could be confined to market-based choices. By diagnosing the problem as market imperfections, there was an implied message that hazards could be corrected through reestablishing what economists called “equilibrium” in the market. Hazards were the result of a “disequilibrium” in the market.

What was happening was that the institutional labor economists were constructing policy alternatives around their own normative disposition, a belief in market-based labor policy. This disposition has been explained as a “high theory” that serves to structure normative judgments.

The high theory [in labor economics] is structured around the notion of Pareto optimality, which defines normative criteria in a very precise way. Applied economic research is directed at the solution of a set of specific, and in the end well-specified, social problems. The theory itself is built around the idea of rational individuals pursuing their self-interest in a competitive market, where they interact indirectly with each other through price signals. The theory seeks to produce as its outcome a stable equilibrium; normative judgments are derived by comparing alternative equilibrium [Piore, 2006: 149].

The high theory of the institutional labor economists meant that regulation of the employment relationship must be structured around the notion of balancing the equilibrium between labor market actors. In economics today achieving a more humane market equilibrium is advocated as a “balancing imperative” between enterprise efficiency and employment equity [Budd, 2004].

In practice, a market-based view applied to labor market policy means balancing the interests of actors in the labor market. This means balancing the interests of workers against the interests of employers. The policy prescriptions of the classic industrial labor economists almost entirely fell within this approach. Today, there is more diversity among institutional economists in how they understand the labor market, but among the classic ILE scholars writing at the time the U.S. workers’ compensation system took shape, they understood the labor market at its core as a natural phenomenon that that existed independently of government action and public policy.

For injured workers this normative framework creates three major problems. First, it shifts the main focus away from injured workers who have been thrown out of the labor market altogether. Second, it ignores the inherent failures of the labor market by arguing hazards can be prevented by correcting market imperfections. Third, it constrains all social policies to market-based policy options within the normative high theory of market economics, namely a balancing imperative. These obstacles would be embedded in the workers’ compensation systems as the institutional labor economists drafted the original formula that would shape policy for a century.

Workers’ Compensation in a Market-Based Framework

North American institutional labor economics drew as its inspiration the Fabian socialism of Sidney and Beatrice Webb in England.2 The Webb’s likewise questioned the strong role of government in the regulation of English industrial hazards. Although the Fabians recognized the effectiveness of regulations at preventing worker death, they argued against such regulation as the mass of work injuries and illnesses were unforeseen “acts of God” and were no employer’s fault. One explanation for this mysterious religious awakening was that if a worker’s death was to be deemed preventable by a legal enactment, the common law tort liability that would thus follow would be unacceptable. The Webbs understood the magnitude of the

2 The history in Canada is more complex than in the United States on this point considering how the Meridith Report of 1913 in Ontario advocated following the German model of workers’ compensation versus the British model.
tort liability facing employers and argued against holding any employers liable, even in cases deemed avoidable.

A new formula was needed to remedy the clear inconsistencies between human rights and employer control. The institutional labor economists responded: Full employer protection from liability for workplace safety and health violations. Workers would be barred from remedy at common law and channeled into an alternative dispute resolution system. Despite the efficacy of regulation in protecting against dangerous hazards, the Fabians then offered a most questionable prescription, outright restriction of effective state action through strong preventive inspectorates.

[T]he necessary regimentation of employers and their control by rigid rules would be extremely distasteful to English capitalists, whilst there would be real difficulty in adapting any such organization to the remarkable variety, complexity, and mobility of English industry . . . [workers’] compensation avoids all these difficulties, and requires no more regimentation or registration than is already submitted to by every mine or factory owner . . . [workers’] compensation might count on the powerful support of the great capitalists in the coal, iron, and railway industries, who would find themselves relieved of the special and exceptional burden now cast upon them [Webb and Webb, 1897: 391].

To say nothing of the special and exceptional burden placed upon the orphans of the dead or the misery to avail the survivors of workplace injuries. The institutional labor economists prescribed payment upon injury or death and a weak preventive labor inspectorate. Anything otherwise was “distasteful to English capitalists” and must be avoided. Thus from the earliest foundations, the Anglo-American workers’ compensation systems were designed to protect employer power by using as a guise the protection of labor market efficiency. The consolation prize for any injured workers was the denial of the right to sue and a little blood money upon their injury or death.

Practically speaking for workers, the high theory of the labor economists meant limiting the intervention of the state on behalf of workers’ rights. Ironically, it did not mean limiting the intervention of the state in the employment relationship. John R. Commons railed against the “menace of competition” that caused disequilibrium in the labor market while constructing key rationales that allowed state power to back industrial negligence on workers’ health and safety.

In the run up to the passage of workers’ compensation laws in the United States, many states passed statutory modifications of the common law. These statutes, known as employer’s liability laws, frequently modified or completely abolished the fellow-servant rule and other common law employer defenses. Some of these new state laws even made an employer’s failure to comply with safety codes a basis for negligence and torts by injured workers [Lencsis, 1998].

As employers were facing increasing tort liability for workplace deaths and injuries, it was the institutional labor economists led by John R. Commons that argued for a new approach to U.S. occupational safety and health policy. The most efficient regulation of workplace safety and health and inspection was not making the state subject to any human rights-based regulatory standard and treating workers’ compensation as an essential social good as in the human rights approach. Rather, Commons enthusiastically supported a “business reasonableness” standard.

The doctrine which the court applies to this function of [health and safety] investigation is both the noblest and the most practical of legal doctrines—“reasonableness.” By this doctrine the court applies its philosophy to the particular facts, but requires that all of the facts be taken into account . . . When the commission began its work of selecting its staff, it had entertained the idea that it should place at the head of its safety and sanitation work engineering and medical experts. But after interviewing a number of these experts it was discovered that they considered their problem to be that of drawing up ideal or standard specifications, which the commission, going out then with a “big stick,” should compel employers to adopt . . . [B]ut a democratic country would not consent to be ruled by those whose ideal standards might be removed from the everyday conditions of business. This decision of the [Wisconsin Industrial Commission] also conforms to the doctrine of reasonableness, which requires practicability adapted to existing conditions [Commons, 1913: 398].

Protecting workplace health and safety could not for John R. Commons be an affront to “the everyday condition of business.” Thus the “high theory” of achieving labor market efficiencies in practice was used as a smoke screen to legitimize new state protections of employer power.

Despite evidence that strong legal enactments were the best public policy strategies to protect against workplace illness and injury, workplace health and safety was to be the sacrificial lamb of institutional labor economics. Regulation to protect against worker deaths and injuries would occur only where output and “the everyday condition of business” was first safeguarded by the state. The
state would provide employers immunity from torts when brought by aggrieved workers and instead pay a fraction of their profits to workers’ compensation insurance systems.

Workers’ compensation in this mold was not treated as an essential social good, nor was it first designed as a hazard prevention tool. This is evidenced by the legislative history of the first U.S. workers’ compensation law, documented in The Report of the Special Committee on Industrial Insurance, made to the Wisconsin legislature in 1911. The historical record indicates a fixation on employers’ liability and creating an alternative dispute resolution system in response, not adequate compensation or workplace hazard prevention. The early political debates on workers’ comp in the U.S. are best summarized by the vice-chair of the Wisconsin legislative committee itself who wrote “Employers’ Liability instead of Industrial Insurance more correctly designates the work of our committee” [Special Committee on Industrial Insurance, 1911: 45].

The early workers’ compensation regimes in the United States were created and designed with extensive employer input. In Wisconsin, the committee’s final meeting before reporting to the legislature was a private invitation-only affair called by the Merchant’s and Manufacturers’ Association of Milwaukee, attended by around 200 of the major employers in Wisconsin. When the committee reported to the legislature, the overwhelming concern was employers’ liability, not workplace hazard prevention or employment injury insurance as an essential public good.

Workers’ compensation emerged historically at a time when legislatures were eliminating common law defenses for workplace injuries. “The Committee feels,” the Wisconsin legislative history reveals, “that it would be harsh to the average manufacturers having many employees, to wipe out these [legal] defenses without offering some method whereby the liability incurred by the employer might be definitely fixed.” What emerged was not an essential public good but the “original bargain” of workers’ comp, an insurance program encased in limited employer liability.

Workers’ comp as designed by this school of labor economists derived from a fear that laws were challenging employer property rights and managerial prerogatives. A new normative framework was thus created. A market-based prescription emerged that portrayed the labor market as a natural, stateless institution that functioned best without strong social protections. The rights of injured workers were not viewed through the lens of an essential social good. Instead, workers’ comp in the United States became tied to a system of alternative dispute resolution that protected employers. Only later would the system be said to be a hazard prevention tool under the guise of pushing higher premium costs on hazardous employers to correct labor market “inefficiencies.”

Making Human Rights the New High Theory

Workers’ compensation policy highlights an historic contradiction of John R. Commons, the Wisconsin School and the classic institutional labor economics field. Their criticisms of laissez faire neoclassical economics won them accolades as progressive social reformers, yet their vision of the labor market existed alongside a ceaseless justification of state protection of the right of employers to kill and maim workers in those labor markets. Despite the expressed need for better labor institutions, government’s role was highly prescribed to prevent only those tragedies capable of protection within a framework of alternative market efficiencies. Designing a new workers’ injury compensation system that would afford the strongest protection of injured workers’ rights was secondary to justifying state safeguards of business property rights.

The policy trajectory set by the early labor economists would be unchanged throughout the 20th century. The constructed vision of the labor market advanced policy strategies not for their effectiveness at protecting workers but for their management of the state, business output and capitalist property rights. These normative dispositions marginalized strong protections for injured workers’ rights. The priority was “the market” a.k.a. uninterrupted business production and employer property rights, even as the state itself was called on to make this all possible.

Moving to a human rights-based workers’ injury compensation system means designing a system that serves the interests of injured workers in the best, most effective way possible. This means shifting the high theory from market “efficiency” to human rights, where injured workers and their rights claims are satisfied as the first priority of government action. The human rights approach to workers’ compensation makes a direct challenge to the modern day market-based formula of workers’ compensation where injured workers are denied effective recourse for their injuries and are forced into a disparaging, limited system of workers’ compensation for relief.

Today, the market-based justification for social policy takes different forms. It may be a concern for job loss if new social protections are strengthened, or a concern about the cost of workers’ defrauding a system to secure benefits. The common theme, however, has a longer history—private market power has priority over basic human rights. With the human rights approach, fundamental social policies are established as the first responsibility of government. Where legitimate concerns exist about the balancing of human rights against other human rights concerns, policymakers must make choices based on
ethics and knowledge. Human rights are not, however, to be traded or balanced against business or private insurance concerns that have no standing as fundamental human rights. The priority must be securing basic human rights.

**SHIFTING VALUES TO A HUMAN RIGHTS-BASED APPROACH**

Advocating a human rights-based workers’ compensation system introduces a new set of values and raises a new set of issues that require a new set of strategies. This article does not aim to address these issues and strategies at length. The primary aim here is to open a debate on first principles in the U.S. workers’ compensation system. A few salient examples demonstrate what a human rights approach would mean for employment injury benefits in the United States. This includes securing access to adequate health care, treating a workers’ compensation system as an essential social good, challenging the original bargain in the U.S. workers’ compensation system, protecting the dignity and respect of injured workers, and ensuring the right of injured workers to participation in the oversight and the administration of workers’ compensation systems.

**Securing Universal Access to Adequate Health Care**

Workers’ compensation as a human right takes on a special importance in the United States context. According to the U.S. Census Bureau the number of Americans without health insurance rose to more than 50 million people last year, a new record. The private provision of health insurance as a largely employer-based system means that injured workers’ compensation has played a special role in U.S. social policy. The stakes are much higher for those injured or ill workers seeking help. The private provision of health insurance is a significant contrast in social policy between the United States and countries with a more universal health insurance provision.

One of the human rights concerns raised by the privatized health insurance system in the U.S. is how the adjudication of workers’ compensation claims becomes high-stakes. In societies with universal healthcare, injured workers visit a clinic or hospital and employers contest the injured workers’ claim *ex post facto* medical care to decide if the bill is paid by the employer or by the public health insurance scheme. In the U.S., medical care is twisted up with the claim adjudication process causing delays in treatment, second-class treatment, partial treatment, and even financial ruin if a worker is burdened with the cost of the care after an unsuccessful claim.

Taking a human rights approach to employment injury benefits in the U.S. compels the injured worker advocate to broaden the system of healthcare protection. No system should allow claims adjudication to impede or limit healthcare access in any way. There should be no second-class system of healthcare for injured workers. Protecting injured workers’ rights means moving toward a healthcare system where the provision of care is not contingent upon whether or not an injury or illness is work-related. The CESCR has also noted the need for a non-contributory employment injury benefits scheme for those situations where workers fall outside of employer-paid injury insurance arrangements or are simply not able to afford insurance contributions.

**Treating Workers’ Compensation as an Essential Social Good**

Although a human rights approach recognizes injured workers’ rights as distinct and separate claims, the connection with occupational health and safety prevention going forward has led advocates to push for using workers’ compensation as a tool to prevent future injuries and illnesses. This is attempted through the concept of “experience ratings” and other insurance-based strategies that push costs back on employers for maintaining hazardous workplaces. The question of whether experience ratings are effective as a prevention tool is not the issue here. What is the issue is that workers’ compensation itself be valued as a social policy onto itself.

Using workers’ compensation as an instrument of a prevention strategy may raise human rights concerns. Experience rating first emerged as a policy tool in North America but questions have developed about whether such practices cause employers to manage—and coercively discourage—claims for benefits versus investing in workplace health and safety. Injured or ill workers have a human right to receive workers’ compensation. Employer experience ratings may discourage the enjoyment of this right. A human rights approach requires a functioning employment injury benefits system in its own right. If evidence suggests preventive strategies may detract from achieving social justice for injured workers, alternative strategies must be developed and implemented. The workers’ compensation system must itself be a social good.

**Challenging the Original Bargain in Workers’ Compensation**

The Universal Declaration of Human Rights (UDHR) Article 29 states that government may only restrict rights and freedoms to protect the human rights of others. Since the only legitimate restriction on human rights is to balance the human rights of others, the original bargain in workers’ compensation must be questioned. Balancing
employer interests as non-human rights with injured worker human rights is unacceptable. Restrictions on pursuing full judicial remedies for workplace injuries may be unjustified since an employer right to maintain a hazardous workplace is not a human right. A human rights approach may, therefore, challenge the exclusive remedy doctrines. The critical question becomes securing effective remedies.

The right to an effective remedy for acts violating human rights is found in Article 8 of the UDHR. This obligation is distinct from the right to maintain an effective employment injury benefits system under the ICESCR. The real question from a human rights perspective is not necessarily access to tort remedies but access to effective remedies. If tort remedies would be effective in some cases, arguments could be made for lifting the exclusive remedy doctrines. The original bargain of trading participation in one system for participation in another system is unfounded under a human rights standard. The important policy question is effective remedies as human rights are bound with the idea of effective remedy. Governments must ensure that the workers’ compensation system provides effective remedies for injured workers. Where the exclusive remedy doctrine may limit the pursuit of effective remedies, changes must be made.

Protecting the Dignity and Respect of Injured Workers

Basic human rights principles are rooted in an understanding of the inherent dignity of each human being. The Preamble of the UDHR recognized this inherent dignity. Article 1 of the UDHR elaborates and says that “All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.” The ICESCR elaborates dignity in practice for injured workers.

Advocating human rights for injured workers means, first and foremost, recognizing that injured workers deserve dignity and respect. The workers’ compensation system in most of the United States is a hostile system for injured workers. Making an injured workers’ compensation claim in the United States can result in employer retaliation and discharge, surveillance at home by private detectives, a lack of legal representation, restrictions in medical providers, healthcare provision that is delayed or denied, the loss of income, and blacklisting from future employment. Capacity building across U.S. civil society (including labor unions) is needed to understand the human right to employment injury benefits in the U.S. context. Violations of the human right to employment injury benefits must be documented and made known publicly once the collective understanding of these fundamental human rights principles is referenced to the domestic U.S. social policy context. Human rights provide an important critique of domestic social policies on many levels and human rights fact-finding is one step in developing these important critiques.

Ensuring the Right of Injured Workers to Participation

The International Convention on Economic, Social and Cultural Rights is clear that the beneficiaries of employment injury benefit systems must have the right to participate not only in establishing but also in administering the workers’ compensation system. Injured workers have a right to not only participate but to participate in a genuine and meaningful way. They may seek, receive, and impart all information on all social security entitlements in a clear and transparent manner. On this point, the international human rights standards are clear.

Because the workers’ compensation system in the United States is largely a privatized affair with layers of private insurance carriers managing claims largely independent of the public authorities on a day-to-day basis, the rights of injured workers to participation in the administration of workers’ compensation systems is severely restricted. Even basic data on workers’ compensation claims is held in private hands, let alone do provisions exist for the authentic participation of injured workers. Here, the workers’ compensation systems in the United States at the state level diverge greatly from international human rights norms.

CONCLUSION

Thinking about workers’ compensation as a human right requires a fundamental shift in consciousness for the United States. The question may be asked “how does this approach change anything?” The response to this question is multi-dimensional. Human rights entails changing how we think of the role of government and social policy. It means engaging in an international system of law that is a living jurisprudence actively working to articulate through global dialog that which is fundamental for ensuring basic human dignity. In addition to understanding a new basis for social policy in the United States, adopting a human rights view also means recognizing the legitimate voices of injured workers and the rights of those voices to engage in the design, administration and protection of their own human rights. It is not simply a matter of adopting a new advocacy strategy; it entails an entire reorganization of the basic politics of injured workers, including changing the underlying goals and objectives of what injured workers are advocating.

In the United States, a human rights approach directly challenges the historical tradition of regulating injured
workers’ rights through market-based social policies. The human rights approach conflicts with the market-based normative assumptions behind the classic institutional labor economics upon which the U.S. workers’ compensation systems have been constructed. Adopting a basic human rights approach means shifting the focus to basic human rights and the real interests of injured workers as the human rights-holders. This is a dramatic shift away from the historic administration of workers’ compensation around market efficiency frameworks.

This article has opened a discussion to define what adopting a human rights approach to workers’ injury and illness compensation means in practice in the context of the United States. A more complete treatment of the topic is needed, but a preliminary assessment would indicate serious transgressions exist between international human rights norms and the workers’ injury compensation system in the United States. The first step to realize and protect the human rights of injured workers in the U.S. is to understand the human rights approach, how adopting a human rights approach challenges deeply held social values, and shifting our values in response. Human rights frameworks do not fit easily into U.S. policy discourse. American exceptionalism—the sentiment that the United States is a unique, new world with nothing to learn from the international community—is deeply rooted. We cannot just cry “human rights, human rights” and expect government officials, legislators, regulators, opinion leaders, interest groups or even trade union and civil society groups to march in one direction under a human rights banner.

The question of a realpolitik strategy for realigning the workers’ compensation system according to human rights principles remains an open and urgent matter. Reorienting our values around principles that acknowledge the human rights of injured workers, while at the same time constructing a human rights-based politics where injured workers actively engage their voices, constitutes an incredibly important first step for any viable future political strategy. The basic international human rights norms are not simply making the current system better. What they constitute is an entirely different consciousness underlying the core rationale for social policy.

Workers’ compensation policy debates in the United States have been so embedded in a century-old contest between cost versus benefit, tort versus exclusive remedy, work-related versus non-work related, coverage versus exclusion, private versus state versus self-insurance, employee’s physician versus employer’s physician, preponderance of evidence versus clear and convincing evidence, and other time-worn arguments that the politics goes around in perpetual circles—sometimes in circular firing squads. A human rights analysis allows a reexamination of first principles, re-poses first questions, and breaks out of these self-defeating circles. The next step is to develop concrete political and organizing strategies that move us forward in a way that recognizes the human rights of the thousands of people suffering injuries and illness from work. What this task entails is not simply reforms around the edges of failure. It entails a qualitatively different understanding and advocacy that directly challenges the failed politics at its foundation.

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REFERENCES


Commons JR. 1913. Labor and administration. New York: Macmillan.


