ARTICLE

CAPITALISM DISABLES: THE CASE OF WORKERS’ COMPENSATION LAWS

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This article presents an account of disability as social and thus variable, connected to an account of capitalism as an inherently disabling type of society, such that different capitalist societies may disable in different ways, but all of them will disable. The article then takes the early history of workers’ compensation laws in the United States as a case study for the theoretical account of disability and capitalism, arguing that those laws created new incentives for discrimination against disabled people and thus re-organized the process of disabling. The article concludes with brief speculation about what these points imply for the prospects of achieving justice for disabled people through law.

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INTRODUCTION

My introduction to thinking seriously about disability and law came in 2011 due to a series of letters I stumbled across while conducting research at the Wisconsin Historical Society. A Wisconsin paper company had written to the state’s Industrial Commission in 1931 about an employee named Clarence Fors.1 Fors was in poor health, the company wrote, and in the event Fors suffered a workplace accident, he would be at much greater risk for severe injury than a healthier worker.2 For the company, this was a significant concern—under Wisconsin’s workers’ compensation law, any extra severity of Fors’s injuries could translate into additional liability; so great was the financial risk, the company wrote, it was planning to fire Fors.3 At the time I found these letters bewildering. I wondered why these events had happened, if there were other incidents like this, and what these events could possibly mean. Answering those questions took several years and required me to learn more about disability as a category of analysis and to begin to connect that analysis with a Marxist account of capitalism. In what follows I present the perspective at which I have arrived, one I am convinced is illuminating for thinking about law and disability.

I argue that there is a general tendency for capitalist societies to disable, and that this general tendency plays out concretely in time and place specific ways. Thus as capitalist societies change over time for various reasons, the ways in which they disable also change.4 When legal and policy changes bring about transformations from one version of capitalism to another, in doing so they often bring about the social re-organization of disability as well. I suggest at the end of the essay that this places limits on the extent to which disabled people can achieve justice within capitalist societies, and especially limits the achievement of justice via legal claims-making.

I will begin by presenting three claims here that will guide readers through the rest of this paper. First, I consider disability to be an unjust social condition to which people are assigned based on social standards of what

1 Wisconsin Industrial Commission Correspondence File E1747, Correspondence between Wisconsin River Paper and Pulp Company and Wisconsin Industrial Commission, Correspondence and forms, 1912–54, Workmen’s Compensation Division records, Wisconsin Historical Society, Madison, WI.
2 Id.
3 Id.
4 See SARAH F. ROSE, NO RIGHT TO BE IDLE: THE INVENTION OF DISABILITY, 1840S–1930S (2017) (“[A]s mechanized factory labor became increasingly central to the economy, employers in nearly all sectors began to demand workers who . . . had intact, interchangeable bodies.”).
counts as normal and what obligations we have to one another. It seems likely to me that any human society will include people with a variety of physical and mental conditions, but only in specific social contexts will those conditions be considered disabilities. Those contexts are, in my view, unjust, and we could—and should—have a society free of such injustice. Second, I consider capitalism to be fundamentally unjust as well, in part because it tends to generate disablement. Of course, I am not saying that disability is only a result of capitalism, but rather that capitalism is an inherently disabling kind of society. Third, I consider recourse to legal institutions as having serious limitations when it comes to mitigating injustices inherent in capitalism, including the social condition of disability that capitalism tends to generate.

The essay proceeds as follows. I begin by presenting some theoretical background on how I understand the concepts of disability and capitalism. I then turn to a discussion of the early history of workers compensation laws, using this history to concretize my theoretical claims and to demonstrate that my claims have some explanatory purchase on actual events in the world. I conclude with some broader reflections (and provocations) about the implications of my argument for the law and the means for disabled people to achieve justice for themselves. I conclude that justice will be best served via socially disruptive collective action, with use of law best relegated to a secondary and largely defensive role.

I. DISABILITY IS SOCIAL AND CAPITALISM IS DISABLING

In this first Part, I present my account of the concepts of disability and capitalism, and the relationship between the two.

A. Disability is Social

When I first began to think seriously about disability, I had to unlearn the intellectual habit of thinking that a disability is a quality inherent in the body or mind of a person. From reading scholarship on disability, I began to think of “disabled” as the past tense of the verb “to disable.” 5 This is not so much a grammatical point as a social one. Disabling is an action. The subjects who carry out the actions of disabling are institutions. Disabled people are the objects of those actions—to be a disabled person is to be acted upon—and their condition as disabled is the effect of those actions. In this sense of the term, a disabled person is someone assigned to a condition of reduced social

respect and reduced access to the prerequisites for human flourishing.\textsuperscript{6} This means that disability is a power relationship, not a quality of a person but rather a social or political status to which people are assigned. As Catherine Kudlick and Paul Longmore have written, disabled people are a “historically excluded minority.”\textsuperscript{7} Status as an excluded minority is not a natural or medical condition but rather is the result of a power relationship.\textsuperscript{8} In short, society disables people: disability is a social position generated by power relationships. Disability scholar Rosemarie Garland-Thomson has argued for what she calls a “socially contextualized view of disability.”\textsuperscript{9} According to this view, disability is the result of “the attribution of corporeal deviance.”\textsuperscript{10} As such, disability is not “a property of bodies” but rather “a product of cultural rules about what bodies should be or do.”\textsuperscript{11} According to those rules, some people are counted as deviant and others are counted as “the normate,” meaning the normalized person, someone who has the kinds of qualities considered normal in a specific time, place, and institution. In the words of historian Kim Nielsen, disability results from social “definitions of ‘fit’ and ‘unfit’ bodies and minds.”\textsuperscript{12} Disability results from social processes that define normative qualities, sifting who is to be treated as having those qualities—who meets the standards of the normate—and creating consequences for people judged to be non-normative. These definitions and their consequences change over time, such that we cannot explain the “social marginalization and economic deprivation”\textsuperscript{13} faced by disabled people solely by reference to the physical or mental condition of an impaired individual. Disabled people,


\textsuperscript{8} PAUL K. LONGMORE & LAURI UMANSKY, THE NEW DISABILITY HISTORY 12 (Paul K. Longmore & Lauri Umansky eds., 2001). The law’s role in creating and maintaining disability as a category of subordination and exclusion has also been explored. See generally BARBARA YOUNG WELKE, LAW AND THE BORDERS OF BELONGING IN THE LONG NINETEENTH CENTURY UNITED STATES (2010).

\textsuperscript{9} ROSEMARIE GARLAND-THOMSON, EXTRAORDINARY BODIES: FIGURING PHYSICAL DISABILITY IN AMERICAN CULTURE AND LITERATURE 6 (1997).

\textsuperscript{10} Id.

\textsuperscript{11} Id.


\textsuperscript{13} LONGMORE & UMANSKY, supra note 8.
then, are non-normate people who are, in effect, socially punished for their condition as non-normate (though the assignment to the status of disabled is never explicitly called punishment). Both the definition of normate and the punishments inflicted on the non-normate can vary in significant ways.

Thus it is the social context, and not the individual body, that determines whether an impairment is disabling and what the ramifications of disablement are. As a result, what counts as an impairment and the ramifications thereof can change as social context change. These changes are not random, however, but have a kind of pattern or logic to them. In the next section I argue that these patterns can be explained in part through an analysis of capitalism. Capitalism significantly conditions who counts as normate, who counts as disabled, and what the consequences of disability are.

B. Capitalism is Disabling

As scholar and activist Marta Russell has put it, in our society there are “socioeconomic disadvantages imposed on top of a physical or mental impairment.”

One such disadvantage is the limited access to the prerequisites of human flourishing, which results from a defining characteristic of capitalist societies: market dependency. Market dependency means that access to the necessities of life depends on one’s ability to purchase them. In effect, this makes the possession of money socially obligatory. To lack money in a capitalist society is to face a significant socially-imposed penalty. Capitalist societies generally do not provide a right to sufficient money to guarantee well-being. Instead, people have the right to an opportunity to earn a living, supplemented by social programs that provide access to limited amounts of money—generally below the amount needed to maintain what can be reasonably called a good life.

In addition to market dependency, capitalism is characterized by what the philosopher Tony Smith calls the “valorization imperative.”

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17 See id. at 113 (arguing that, in capitalism, working class people have only conditional access to the "means of subsistence" which are "objective pre-conditions of human life").
18 See CLAUS OFFE, CONTRADICTIONS OF THE WELFARE STATE 154 (John Keane ed., 1984) ("the welfare state has done little or nothing to alter the income distribution between the two principal classes of labour and capital"); see also THE CONF. OF SOCIALIST ECONOMISTS, THE STATE DEBATE 58 (Simon Clarke ed., 1991) ("[T]he welfare state can never meet the needs of the working class").
refers to turning a sum of money advanced into a sum of greater value. Generally speaking, capitalists need to get a return on their total expenditures for raw materials, means of production, and employees’ time, or they eventually go out of business. That is, capitalists need to make more money than they spend; they are socially compelled—hence the term “imperative”—to prioritize turning money into more money. An enterprise that never makes more money will eventually go out of business, all things being equal. The valorization imperative is how market dependency manifests in the lives of capitalists.

The valorization imperative helps explain why workers are regularly subject to injurious practices in production and consumers to harmful products. Because of the valorization imperative, the point of producing goods and services is to make money, rather than to meet human needs. To put it another way, employment practices and labor processes will serve human needs, and goods and services are generally produced to meet human needs, only insofar as doing so is compatible with the requirement to turn a profit. A business that acts too much like a charity will eventually go under. As such, the valorization imperative does not permit businesses to prioritize the provision of the necessities of life. As Tony Smith has put it, “human flourishing” is “subordinate to the flourishing of capital.”

Market dependency in turn explains why employees continue to show up to dangerous jobs and why access to beneficial goods and services is limited even when they are produced—because access to these products is conditioned on access to money. People without enough money to pay for what they need tend to face deprivation. If a person lacks the money to buy sufficient goods and services—healthy food, safe and secure housing, access to medical care, and so on—they are more likely to suffer health problems.

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20 See Michael Heinrich, An Introduction to the Three Volumes of Karl Marx’s Capital 16 (Alexander Locascio trans., 2012). Tony Smith’s discussion of Marx is especially rich and clear. See generally Smith, supra note 16.
21 Smith, supra note 16, at 118.
22 Id.
24 Smith, supra note 16, at 108.
25 Id. at 131.
26 See id. at 113 (“In a social world in which [workers] are separated from the objective preconditions of human life (means of subsistence and the means of producing those means of subsistence), capital will reign over social life.”).
In effect, people in unsafe jobs face an immediate and guaranteed economic and physical harm from job loss which they must balance against the dangers in the workplace. Remaining in an unsafe job does not mean employment is secure, either. Because employers must prioritize making money, incentives weigh against employing people who increase employers’ costs. Clarence Fors serves as just one example: when his employer learned there might be additional financial costs to employing Fors, the company began to reconsider his employment.28

Capitalist societies set limits on human flourishing insofar as people need money to access goods and services, and the lack of access to money makes people’s lives worse. Since one must have access to money to get access to goods and services, and since access to money is not socially guaranteed, people in capitalist societies face significant uncertainty as to their ability to secure basic needs, let alone to have a good life in any robust sense of the term. As Beatrice Adler-Bolton has put it, in capitalism “you are entitled to the survival you can buy.”29 Not everyone needs the same basic things in order to survive, let alone to truly flourish, and so not everyone’s costs to buy these basic things are the same: for instance, as someone significantly near-sighted, I need eyeglasses, while some other people do not. To achieve human flourishing with an impairment often requires goods and services, from wheelchairs to medicine to caregiving services, as well as accessible social and built environments, beyond what is required by the normate, and money may be required to meet those additional needs. Market dependency thus poses particular threats to people with impairments: denial of what people need due to impairments is disabling, and there is no social guarantee that impaired people will have their needs met. Furthermore, capitalist employers have significant power over other people’s access to money, and thus over quality of life. Employers also face significant constraints as market dependent actors themselves, leading them to sometimes limit others’ access to money in order to profit (not least by their decisions on who to employ and who not to employ) since making a profit is socially compulsory for businesses.

Understanding market dependency and the valorization imperative helps explain the presence of disability as a social condition that marginalizes

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28 See generally Wisconsin Industrial Commission Correspondence File, supra note 1.

people with impairments in capitalist societies. In addition, as with the example of Clarence Fors, the social definition of the normate can change over time. These changes arise at least in part as the result of processes that are not about disability so much as they are productive of disability.

Thus far I have discussed market dependency and the valorization imperative as general qualities of all capitalist societies. However, these general aspects of society are institutionalized in particular ways in specific capitalist societies. Differences in the institutionalization of capitalist social relations mean that particular capitalist societies will disable in specific ways, and these disabling mechanisms can change over time. I now turn to an exploration of the early history of workers’ compensation laws in the United States as a case study to illustrate these points in more detail.

II. COMPENSATION LAWS AND THE SOCIAL RE-ORGANIZATION OF DISABILITY

This Part turns to the introduction and immediate aftermath of workers’ compensation laws in the early twentieth century United States. This discussion is intended to concretize the theoretical points I have made in Part I. Compensation laws represented a change in the manner that capitalist social relations were institutionalized in the United States, one which in turn drove a change in the social organization of disability. Two important consequences resulted from this change. One result was that people like Clarence Fors, whose poor health had not previously been considered disabling, became newly disabled. A second result was that the ramifications of being disabled changed. I will argue that the transformations in the social organization of disability that resulted from the adoption of compensation laws reflected the effects of market dependency and the valorization imperative.

Historian John Witt has argued that by the early twentieth century the United States was in the grip of an “accident crisis” of unprecedented magnitude, spanning more than fifty years. At the heart of this crisis was the rapidly industrializing American economy, which created a complex web

31 See JOHN FABIAN WITT, THE ACCIDENTAL REPUBLIC: CRIPPLED WORKINGMEN, DESTITUTE WIDOWS, AND THE REMAKING OF AMERICAN LAW 2-3 (2004) (“[T]he United States [in 1907] was in the fifth decade of an accident crisis like none the world had ever seen and like none any Western nation has witnessed since.”).
of factors that served to decrease worker safety along several axes. Growing industrialization meant a growing presence of steam, high heat, electricity, and rapidly-moving machinery in the workplace; it also meant that the pace of work was increasingly set by non-human forces with which human workers were expected to keep pace, a problem compounded by the valorization imperative’s demand for greater productivity to offset the cost of complex machinery.\(^\text{32}\) By the early twentieth century, an estimated ten percent of US wage-earners would permanently lose a body part and 30,000 would die in workplace accidents each year in the United States.\(^\text{33}\) The US economy in this era thus produced an avalanche of injuries.

People injured or killed in this avalanche (and surviving family members) were often left with little recourse and no assurance that they would receive compensation. Without such assurance, the worker or their family had to hope the employer would be kind enough to support them financially. When that didn’t happen, sometimes people would file lawsuits. Precise data is lacking from this era, but what is clear is that injured workers and their families often lost these injury lawsuits.\(^\text{34}\) Even when they won, they often got only small amounts of money. For example, in her investigation of the “injury problem” (as it was known to contemporary reformers), Crystal Eastman found that compensation paid for time away from work due to injury was only one-sixth the income people lost during that time away.\(^\text{35}\) Even when injured workers and their financial dependents did win, it could take a long time before a final damage award, as illustrated by the example of Margueritte Murray. Murray lost all her fingers in an accident with an ironing machine at an industrial laundry in 1906.\(^\text{36}\) She received a final damage award only in 1911, after two trials and two appeals.\(^\text{37}\) Under these conditions, injured workers and their financial dependents were effectively left to face the

\(^{32}\) See Alfred D. Chandler Jr., The Visible Hand: The Managerial Revolution in American Business 281 (15th prtg. 1999) (describing “economies of speed” where efficiency takes precedence over safety); see also Christopher L. Tomlins, Law, Labor, and Ideology in the Early American Republic 322-26 (1993) (“Evidence culled from other writers confirms that a rising curve of injury was a general accompaniment of higher speeds and greater intensification of production pressures.”).

\(^{33}\) See Isaac Max Rubinow, Social Insurance: With Special Reference to American Conditions 68 (1913) (detailing and assessing workplace accident statistics in the early twentieth century).

\(^{34}\) Nate Holdren, Injury Impoverished: Workplace Accidents, Capitalism, and Law in the Progressive Era 53-83 (2020) [hereinafter Injury Impoverished] (“We do not have a precise tally of how often plaintiffs in employee injury lawsuits won or lost, but existing historical scholarship supports the business-protection view of what was happening in courts.”).

\(^{35}\) Crystal Eastman, Work-Accidents and the Law 125 (1910).


\(^{37}\) Id. at 124 (describing the two previous trial verdicts of $17,375 and $15,000).
consequences of those injuries alone. One such consequence was lost income due to time away from work while injured, a consequence reflecting workers’ status as market dependent.

The plight of injured workers and their families increasingly became the subject of public and political discussion over time. An initial approach to dealing with the accident crisis through policy was the adoption of so-called employers’ liability laws. While these laws did make trial victories somewhat easier, many injured workers still lost; those that won still faced inadequate compensation. These laws thus mitigated but did not end the injury crisis.

As the injury crisis continued, it remained the subject of public and political deliberation. Debate around the injury problem gradually coalesced around three general perspectives on employee injury law reform, each with its own reasons to criticize employers’ liability laws. I call the three primary reform perspectives the business-protection perspective, the instrumental-reform perspective, and the social-justice reform perspective.

The business-protection perspective refers to businesses who wanted workers compensation laws to replace employers’ liability laws because doing so would provide them a more favorable legal and economic environment. Despite their flaws, employers’ liability laws did make it easier for workers to win injury lawsuits.

These laws also appear to have increased the number of employee-injury lawsuits; the historian Joseph Tripp argues that, from 1905 to 1910, fully half of the lawsuits in Washington state were employee-injury suits.

38 See, e.g., WITT supra note 31, at 2-4 (describing a speech by President Theodore Roosevelt on the problem of industrial accidents).
39 See INJURY IMPOVERISHED supra note 34, at 98 (“By 1901 seven states had created [employers’ liability] legislation, making it easier for workers to win injury lawsuits. By 1910, twenty-three states had [employers’ liability] laws.”).
40 EASTMAN, supra note 35, at 121 (calculating that in cases of fatal injuries to married men, compensation was over $500 in only 30% of cases; in 53%, there was no compensation at all).
41 See id. at 84-85 (describing the conceptually distinct “instrumental-reform perspective,” “business-protection perspective,” and “social-justice perspective” approaches to the problems of employee injury law).
42 See id. at 102 (“Given their aversion to uncertainty, it is unsurprising that many employers sought insurance against the risk of employers’ liability lawsuits . . . .”).
43 See id. at 98 (“[Employer’s liability] laws made it easier for employees to win their suits and [thus] increased the threat of employer ‘suffering’ . . . .”).
44 See Joseph F. Tripp, An Instance of Labor and Business Cooperation: Workmen’s Compensation in Washington State, 17 LAB. HIST. 530, 537 (1976) (“Dissatisfaction with the liability system, growing
Although most victorious plaintiffs in employee-injury lawsuits brought under employers’ liability laws received relatively modest compensation, occasionally a plaintiff would win a big award. Margueritte Murray, for example, was ultimately awarded fifteen thousand dollars in damages for her injuries.\(^{46}\) Combined with the increasing number of suits, the possibility of large jury awards like Murray’s posed a new and uncertain threat to employers.\(^{47}\)

Injury lawsuits like these were particularly alarming for large companies.\(^{48}\) Workplace accident rates effectively made workplace injuries a near-certainty for a firm with a sufficiently large labor force. In 1900, the annual death rate in workplace accidents in the United States was one in one thousand.\(^{49}\) At that rate, a business with one hundred employees might go ten years without a fatal injury. A business with ten thousand employees, however, could expect to have roughly ten employees killed each year. Under the litigation-based system of employee injury law, the exact amount employers might have to pay for injuries could vary wildly, from nothing at all if the defendant employer won, to large awards like in Margueritte Murray’s case. This meant that large employers faced a threat of major unpredictable costs each year.

Large companies tended to have more complex organizational structures, including medical and legal departments, because managing more employees and larger undertakings required more managerial infrastructure.\(^{50}\) As a result, large companies gained, in the words of historian Paul Bellamy, since 1905, was widespread by 1909 and 1910 . . . . [F]ifty percent of court time was spent on accident litigation . . . .”.


\(^{47}\) See INJURY IMPOVERISHED supra note 34, at 96 (“[T]he crucial factor in the creation of compensation laws was a sharp ‘increase [in] the uncertainty of the negligence liability system’ for employers. Employers and trade associations responded to this increasing uncertainty with growing support for the creation of compensation laws.” (footnote omitted)) (quoting PRICE FISHBACk & SHAWN EVERETT KANTOR, A PRELUDE TO THE WELFARE STATE: THE ORIGINS OF WORKERS’ COMPENSATION 88 (2000)).

\(^{48}\) See id. at 104 (“Both the proceedings and the results of employee injury lawsuits threatened to foster discontent, by raising questions of values and justice, and airing highly emotionally charged accounts of human loss that resulted from injury. It is understandable how this scenario would unsettle employers worried about class conflict.”).

\(^{49}\) WITT, supra note 31, at 3.

\(^{50}\) See INJURY IMPOVERISHED supra note 34, at 108-09 (“This meant that the large corporations of the late nineteenth and early twentieth century were not simply bigger versions of earlier small businesses, but possessed new capacities for knowing about and responding to their own enterprises and thus to the injury problem.”).
“actuarial self awareness,”—an acute awareness of the new financial costs of injury that compensation laws generated for them.51

The new actuarial self-awareness of large companies co-existed with a social environment where injury rates were increasingly well known due to research into the injury problem by social scientists.52 The combination of large firms’ actuarial self-awareness and a growing understanding of workplace injuries likely explains employers’ and trade associations’ support for workers’ compensation laws.53 For businesses, compensation laws promised greater regularity and predictability in the cost of employee injuries; this not only meant that firms could budget for them, but that no firm would be at a competitive disadvantage due to an unexpected result in court.54 That is to say, compensation laws offered businesses protection from financial harms they might incur as result of liability for injury. The business-protection perspective was implicitly a response to businesses’ own market dependent status and their subordination to the valorization imperative: what these reformers sought was protection from financial harms which would impede businesses’ operations.

While business-protection reformers were generally concerned with the fate of individual businesses, the group I call instrumental reformers focused more broadly on overall economic order and efficiency.55 Their interest in reform was “instrumental” in that the ultimate goal was to promote policies that fostered a well-organized society, rather than to reduce suffering or promote justice. Charles Henderson, a sociologist and member of an Illinois commission on the problem of injury compensation, serves as an example.56 Henderson argued—on racist and eugenicist grounds—that employee injuries were inefficient for society as a whole, because they made working-

51 Paul B. Bellamy, From Court Room to Board Room: Immigration, Juries, Corporations and the Creation of an American Proletariat: A History of Workmen’s Compensation, at xiii n.21 (Apr. 4, 1994) (Ph.D. dissertation, Case Western Reserve University) (“Rather, the agents of change here were the corporate managers in the larger finance capital organizations who developed the ‘actuarial self awareness’ that led, in turn, to a broader understanding of a compensation system’s potential savings to the corporate enterprise.”).

52 See, e.g., INJURY IMPOVERISHED, supra note 34, at 67-68 (“Reformers used statistics and statistical vocabulary to make their claims and voice their criticisms of the court-based system of injury law. This vocabulary gave their claims the garb of science and progress.”).

53 See, e.g., id. at 110 (“In 1910 the National Association of Manufacturers (NAM) surveyed 25,000 employers and found that 95 percent supported compensation for employees’ injuries via insurance methods, but many felt they could not afford to set up such policies on their own. The survey reflected the fact that workmen’s compensation emerged as the primary business supported policy proposal for the accident problem.”) (footnote omitted).

54 Id. at 99-100.

55 Id. at 98-99.

56 Id. at 56.
class families less effective at raising the workers of tomorrow.⁵⁷ Lost income disrupted working-class households, he argued, making them less likely to have and raise children who could work in the future.⁵⁸ If that condition continued, he argued, the United States would find itself with a shortage of acceptable workers and would have to let in more immigrants, which would “retard [American] civilization.”⁵⁹ He saw compensation laws as a boon for the economy, government, and nation (understood as a biological and racial entity) as a whole.⁶⁰ Not all instrumental reformers made the point in such ugly terms, but many tended to treat compensation laws as necessary to secure labor supply in the long term.⁶¹ Like business protection reformers, instrumental reformers also implicitly responded to market dependency and the valorization imperative. They feared that working class households with injured workers would not get the money they needed to survive, and the resulting deprivation would disrupt labor markets and the economy as a whole.

Finally, a third group of reformers called for compensation laws to advance social justice. These social justice reformers were deeply sympathetic to injured workers and their loved ones.⁶² One such reformer was Crystal Eastman, a socialist lawyer and sociologist who interviewed injured steelworkers and the families of steelworkers who were killed at work.⁶³ Reformers like Eastman saw workplace injury as a terrible injustice that generated a second, compound injustice: poverty due to lost income in the aftermath of injury.⁶⁴ In Eastman’s words, “the inevitable economic loss” caused by workplace accidents “almost altogether rests upon the workmen injured or the dependents of those killed, and . . . this burden is disastrous to the welfare of the families.”⁶⁵ Social justice reformers were less concerned with the valorization imperative, as they sought reform regardless of whether businesses would continue to profit. On the other hand, the social justice perspective implicitly responded to market dependency by seeking to provide relief to families forced into poverty by injury-derived income losses.

These three reform perspectives informed the creation of compensation laws, which rapidly became the new standard for employee injury law. The

⁵⁷ See id. at 88 (“Henderson argued for compensation laws in part because, he believed, ‘we are producing a new set of degenerates’ as a result of employee injuries.”).
⁵⁸ Id.
⁵⁹ Id. at 89.
⁶⁰ Id.
⁶¹ Id.
⁶² Id. at 87.
⁶³ Id. at 53.
⁶⁴ Id. at 82.
⁶⁵ EASTMAN, supra note 35, at 165.
first compensation laws in the US went into effect in 1911 in eight states. By 1920, forty two US states had them. Under the new compensation laws, an injured worker (or the family of a worker killed) would be compensated based on the wages they were paid at the time of their injury. The injured worker was far from financially whole, however, as the laws only paid for a fraction of lost wages: depending on the state, from half to two-thirds of pre-injury wages. But because most injured workers could count on getting paid some money, the threat of poverty was alleviated somewhat and the problem of inefficiency—central to instrumental reformers like Charles Henderson—was reduced. And by removing unpredictability and the threat of large jury awards, as in cases like Marguerite Murray’s, businesses could plan better and were protected from sudden unforeseen expenses.

While different states’ compensation laws varied in some particulars, these laws generally required employers to pay for some of the financial costs of employees’ injuries and created standardized methods of determining the dollar amount that an injured person would get. Each state had its own law, but most followed a similar basic framework for compensation. Any employee who suffered a serious injury at work would get a payment for injury, typically in regular payment analogous to, and in lieu of, a wage. Payments were set at some percentage of the injured person’s pre-injury wages. Generally speaking, the duration for which the injured would receive payments—and thus the total dollar amount received—increased with the severity and permanence of the injury. In the event of a fatal injury, payment would be made to surviving family.

The new compensation system found support among adherents of each of the three reform perspectives. Compensation laws protected businesses from the disruption that could result from large damages awards in injury suits. The laws partially mitigated post-injury poverty by guaranteeing payment for injuries, and thus reduced both the social disorder and “inefficiency” that so

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67 Id.
68 Id.
69 INJURY IMPOVERISHED, supra note 34, at 112.
70 See J.E. Rhodes, Workmen’s Compensation 4 (1917) (“Under the compensation system the theory is recognised [sic] that industry should bear at least a proportional share of the financial losses caused by industrial accidents.”).
71 See id. at 198 (discussing the periodic payment system while noting that lump-sum payments were occasionally authorized).
72 Id. at 146.
73 Id. at 146–48. In Pennsylvania, for instance, an injured worker would receive 175 weeks’ payment for the loss of a hand and 150 weeks’ payment for the loss of a foot. Id. at 148.
74 INJURY IMPOVERISHED supra note 34, at 112.
alarmed the instrumentalists as well as the human suffering decried by social justice reformers. But the compensation laws only partially “solved” the injury problem: employees continued to suffer serious harm in the workplace.75 And as I discuss in the next Part, these laws created new problems for disabled workers.

III. DISABLED WORKERS’ LAWSUITS, LIABILITY FINANCING, AND THE NEW DISCRIMINATORY NORMAL

While workers’ compensation laws were a qualified improvement, that improvement came at the cost of new hardships for disabled people. These laws brought about a change in the normate, i.e., in the social organization of disablement. Compensation laws required employers to offset a significant portion of that lost income, thus turning employee injury into a financial cost for employers. As a result, employers gained a newfound financial interest in employees’ physical condition, to which they responded by changing hiring practices to disfavor people they previously considered to be acceptable as employees—people like Clarence Fors.76

Two features of the new employment compensation regimes combined to create a new discriminatory impulse: the ambiguous legal status of injured employees who had a pre-existing disability, and the ability of employers to self-insure their liability. In the following sections I explain how each of these legal and policy developments increased the incentives for employers to act to the detriment of disabled workers. In the final section of this part, I describe how these developments drove a shift in the social construction of the normate—from an “old normal” to a “new normal.”

A. Disabled Workers’ Lawsuits

State workers’ compensation laws often seem to have been written under the assumption that an injured worker was physically unimpaired prior to
their injury. However, this assumption was out-of-step with the reality of widespread employment of people with physical impairments prior to 1910. Given the frequency of workplace injuries in the industrial economy, many people who were hurt at work simply convalesced then returned to work with a new impairment. In addition, as historian Sarah Rose has demonstrated, many conditions that are today considered disabilities have long been an unremarkable aspect of working-class life and employment.

By starting from a baseline presumption that employees were not disabled, compensation laws poorly served employees with preexisting impairments when they suffered injuries. For example, in 1913 autoworker Charles Weaver was accidentally struck in the eye with a crowbar at an auto factory in Detroit. A prior injury had deprived him of the use of his other eye, and so the injury left Weaver essentially blind. Weaver filed a workers’ compensation claim. He claimed he was “totally and permanently incapacitated” under the Michigan workers’ compensation law, meaning he would never earn wages again, and thus was entitled to $4,000—the highest compensation payment allowed under the state’s compensation law. Weaver’s employer, the Maxwell Motor Company, contested his compensation claim, arguing that Weaver’s injury should count as a partial disability, entitling him to a lower amount of compensation. Weaver lost. The Michigan court held that the employer was only responsible for one of

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77 See INJURY IMPOVERISHED, supra note 34, at 140-141 (“Even though the employment of people with physical impairments was widespread in the early twentieth century, compensation laws assumed an unimpaired worker.”).

78 See id.

79 See id. at 139 (“[W]orkers who suffered disabling injuries sometimes returned to work.”).

80 See ROSE, supra note 4, at 5 (“Today, disability is a familiar category. But prior to the early twentieth century, people with what now might be termed ‘disabilities’ or ‘impairments’ fell under a multiplicity of terms, from lame, simple, deaf-mute, and invalid to worn out, cripple, feeble, and lunatic, among others.”). The historical presence of disabled people in employment has been poorly documented, at least in part because the social normality of disabled people’s employment meant there was little incentive to document it.

81 See id. at 171 (describing how new workman’s compensation laws created perverse incentive for employers to refuse to hire disable workers); see also INJURY IMPOVERISHED, supra note 34, at 171-172 (characterizing disabled workers’ choice between the old and new normals as a choice between types of discrimination).

82 See INJURY IMPOVERISHED, supra note 34, at 137 (Discussing Weaver v. Maxwell Motor Co., 152 N.W. 993 (Mich. 1915)).

83 See Weaver, 152 N.W. at 993 (“Due to an injury received about seven years ago while working in a dyeworks, applicant received an injury which cost him practically the total loss of sight of the right eye.”)

84 Id.

85 Id.

86 Id. at 994.

87 Id.
Weaver’s eyes, not for his blindness. The employer thus had to pay Weaver only the same amount of compensation it would pay a two-eyed person who lost one eye. The fact that Weaver was left blind was Weaver’s private, individual problem.

The Weaver decision was clearly discriminatory against physically impaired workers. Employers in Michigan would pay the same amount to a previously disabled employee as to a non-disabled employee in the event of an accident. Any additional impairment produced by the injury to the already impaired person was a private cost offloaded onto the impaired person. This required disabled people to run extra risks, thus treating disabled people as second class.

Like Charles Weaver, timber worker Jacob Schwab was working with a physical impairment when he suffered a further disabling injury. Schwab’s left hand had been amputated in 1892; two decades later, in 1914, an accident at a forestry company in New York severed Schwab’s remaining hand. Like Weaver, Schwab filed a compensation claim against his employer claiming total disability, which his employer contested. Unlike Weaver, however, Jacob Schwab won on appeal. The New York Court of Appeals decided that because Schwab had lost his only hand, he should get the same compensation as a two-handed person who lost both hands. Implicitly, the principle in the Weaver decision was to compensate the worker’s lost quantity of body parts, while the principle in the Schwab decision was to compensate the worker’s lost capacity. Schwab put physically impaired workers on more equal footing with non-impaired workers, and so in an important sense was a better decision than that in Weaver. And over time, more courts in other states began to adopt the Schwab approach, compensating workers with preexisting impairments for the full loss of capacity.

Although they represented a more just outcome for the injured worker, these decisions had unfortunate, yet predictable, consequences. Injuries to workers with preexisting impairments were now more expensive for employers than injuries to non-impaired workers, and employers around the country responded rapidly by turning away disabled job applicants and firing

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88 Id.
89 Id.
91 Schwab 153 N.Y.S. at 235.
92 Id. at 236.
93 Id. at 235-36.
disabled employees.\textsuperscript{95} Nothing about employees’ bodies had changed; instead, changing legal contexts and financial incentives had brought about a re-organization of the social condition of disability.\textsuperscript{96} Disability now meant greater exclusion from employment, and who counted as disabled began to change as well—as in the example of Clarence Fors.

\section*{B. Financing Employers’ Liabilities: Self-Insurance}

Incentives to discriminate under compensation laws were especially apparent to large manufacturing corporations. Not only did these companies have greater “actuarial self-awareness;”\textsuperscript{97} the professional managers who ran them tended to have backgrounds in the risk-focused world of finance and defined their jobs as managers as focused on risk.\textsuperscript{98} As workers’ compensation laws transferred some financial liabilities for injuries onto companies, it created incentives for companies to change their behavior in order to reduce those liabilities, and corporate managers were well-equipped to perceive these incentives.

In addition, a further incentive to discriminate developed for especially large companies through a particular feature of the workers’ compensation laws. These laws allowed employers to finance their injury liability either by buying an insurance policy to cover the costs, or by establishing their own dedicated compensation liability funds.\textsuperscript{99} This latter practice was known as self-insurance.\textsuperscript{100} That was a misnomer, as the practice was really just forgoing

\textsuperscript{95} See \textit{INJURY IMPOVERISHED, supra} note 34, at 158 (“A new legal normal for disabled people [produced] new incentives for employers to exclude disabled people from employment in new ways.”). To facilitate this discrimination, employers relied on their medical departments to screen applicants and surveil their employees. See \textit{id.} at 218-52 (2020) (describing how medicalized surveillance facilitated employment discrimination).

\textsuperscript{96} For a deeper discussion and more examples of how the social condition of disability was reorganized by workers’ compensation laws and the financial incentives they produced, see \textit{INJURY IMPOVERISHED, supra} note 34, at 152-58; \textit{ROSE supra} note 4, at 137-71.

\textsuperscript{97} See Bellamy, \textit{supra} note 51 at xiii n.21 (“Rather, the agents of change here were the corporate managers in the larger finance capital organizations who developed the ‘actuarial self awareness’ that led, in turn, to a broader understanding of a compensation system’s potential savings to the corporate enterprise.”).

\textsuperscript{98} See \textit{JONATHAN LEVY, FREAKS OF FORTUNE: THE EMERGING WORLD OF CAPITALISM AND RISK IN AMERICA} 264-316 (2012) (describing how large firms began to think in terms of risk in the Twentieth Century).

\textsuperscript{99} For more detail on the actions taken by employers as a result of the financial incentives produced by workers’ compensation laws, see \textit{INJURY IMPOVERISHED, supra} note 34, at 175-217.

\textsuperscript{100} See E.D. Alexander, \textit{Suggestions to Those Contemplating Self-Insurance}, 1 NAT. COMP. J. 4, 8-9 (1914) (discussing circumstances when self-insurance is appropriate for a business).
insurance.\textsuperscript{101} Insurance is a matter of pooling risks collectively.\textsuperscript{102} So-called self-insurance, on the other hand, allowed large companies to individualize their financial risks by setting aside a large sum of money and paying their own individual injury costs out of that dedicated account. Large firms were thus able to save money that would otherwise go to insurers’ administrative costs and profits.\textsuperscript{103} However, the practice also gave large companies an especially strong incentive to reduce injury costs, since they could not take advantage of the financial protection provided by pooling their risks with other companies. While a company that purchased insurance for its workers’ compensation liabilities was partially shielded from its own individual costs for injuries because of this pooling effect, for self-insuring companies these costs were far more salient—thus intensifying the incentives to not employ physically impaired people. Self-insurance was a widespread practice among the largest firms that dominated the new corporate economy, making large employers even more likely to discriminate against physically impaired employees.\textsuperscript{104}

C. Old and New Normal

To connect the changes brought about by compensation laws more explicitly with my discussion of disability above, I want to recall Garland-Thomson’s terms. Disability is constructed through “cultural rules about what bodies should be or do;”\textsuperscript{105} these rules accord some people status as “the normate,”\textsuperscript{106} i.e., normalized, and accord other people non-normative status, i.e., disabled. Compensation laws, decisions in cases like \textit{Schwab}, and statutory permission to self-insure created a new set of incentives for employers. In following those incentives, employers re-organized the cultural rules defining disability and the normate. I call those changed cultural rules and definitions after compensation laws “the new normal,” and refer to the


\textsuperscript{102} See Tom Baker & Jonathan Simon, \textit{Embracing Risk}, in \textit{EMBRACING RISK: THE CHANGING CULTURE OF INSURANCE AND RESPONSIBILITY} 1, 11-12 (Tom Baker & Jonathan Simon eds., 2002) (“Insurance institutions and technologies gather risks, concentrate and contain (‘pool’) them [to] spread and thereby, in an important sense, eliminate (or at the very least reduce the importance of) those risks from the day-to-day concern of people who are exposed to them.”)

\textsuperscript{103} See \textit{INJURY IMPOVERISHED} supra note 34, at 195 (“The main reason for a company to self-insure was to save money.”).

\textsuperscript{104} See id. at 197-98 (discussing the economics of risk pooling and the related impact on firms’ likelihood of hiring disabled workers).

\textsuperscript{105} G\textsc{arland-thomson}, supra note 9, at 6.

\textsuperscript{106} Id. at 9.
set of rules and definitions of disability prior to workers’ compensation laws as “the old normal.”

I stress that “the old normal” was also discriminatory — compensation laws did not invent disablement, but rather reorganized it. Under the old normal, some disabled people were unemployed, but many disabled people, like Jacob Schwab and Charles Weaver, did find employment.\textsuperscript{107} But even those who found employment were often paid less than non-disabled employees, a legally acceptable form of employment discrimination in that era.\textsuperscript{108} Thus, under the old normal, some disabled people were employed but in a subordinate status.\textsuperscript{109}

Under the new normal ushered in by workers’ compensation laws, employers began to exclude disabled people from employment to a greater degree. Some of those newly excluded had not previously been assigned to the status as disabled.\textsuperscript{110} People like Schwab and Weaver, even if considered disabled, had once been perfectly acceptable hires—albeit subjected to other forms of discrimination—under the old normal. Under the new normal, employers tended to refuse to hire them entirely.\textsuperscript{111}

Employer responses to the incentives arising from compensation laws, intensified by decisions like Schwab and legislative permission to self-insure, altered the social construction of the disabled and the normate. Under the new normal brought about by workers’ compensation laws, disabled people faced newly hostile labor markets. The people pushed out of employment under the new workers’ compensation laws had previously been acceptable employees, but were now excluded as employers sought to control costs.\textsuperscript{112} Rather than arising from any individual employer’s beliefs about the disabled, these changes resulted primarily from the policy and legal construction of incentives. Compensation laws changed the institutionalization of capitalist social relations; after that change, the emergence of the new normal was simply a rational response to market dependency and the valorization imperative.

\textsuperscript{107} See INJURY IMPOVERISHED \textit{supra} note 34, at 139-40 (describing disabled people’s waged workforce participation).

\textsuperscript{108} See Schwab v. Emporium Forestry, 153 N.Y.S. 234, 235 [verified] (N.Y. App. Div. 1915) (“If a man has two hands he is presumably a more efficient worker and can receive higher wages than if crippled by the loss of one hand . . . . Another workman having lost one hand before entering the employment would be receiving say $10 a week for less efficient service.”).

\textsuperscript{109} See INJURY IMPOVERISHED \textit{supra} note 34, at 148-49 (describing the ways in which disabled people were subordinated in the workforce, such as with lower wages).

\textsuperscript{110} See \textit{id. at 164-65} (describing the Pullman Corporation’s reservations over employing people with one eye and other impairments).

\textsuperscript{111} \textit{Id.}

\textsuperscript{112} \textit{Supra} note 77.
IV. PROSPECTS FOR LAW AND JUSTICE FOR DISABLED PEOPLE

I want to close first by briefly summarizing my arguments and then generalizing from them, demonstrating that the theoretical perspective I sketched has purchase beyond my immediate object of analysis. Then, I conclude with what I hope are some worthwhile provocations.

In this Article, I argued that disability is a social condition, that capitalist societies are disabling, and noted the specific ways in which capitalist societies disable change with institutional variations in those societies. Capitalism can be reorganized, but—however reorganized—it remains generative of disability. Disability can similarly be reorganized, but nonetheless remains a social injustice. In this Article, I presented some of the early history of compensation laws as an extended case study attempting to concretize these claims. Compensation laws are an example of legislative change; lawsuits in the aftermath of those laws, such as Schwab, are examples of attempts to use law and policy improve the lives of disabled people. But, whatever benefits to some people accrued from these reform efforts, the ultimate result was continued injustice, however mitigated and reorganized.

The claims above suggest, though they do not conclusively establish, that ending the condition of inflicting injustice on disabled people requires ending disablement altogether. This is not possible in a capitalist society, because capitalism is inherently disabling. Litigation and legislation within a capitalist system can help mitigate injustices that capitalism fosters, but these efforts cannot end them.113

A skeptical reader might reply that perhaps this is so, but there are pressing short term injustices that need addressing as soon as possible—inequalities that cannot be put off until after the end of capitalism. Such a reply is eminently reasonable, and I do not mean to minimize the importance of using law and policy to deal with the immediate and pressing injustices and hardships that disabled individuals face. Instead, I suggest that social justice for disabled people as a group is a goal best advanced primarily through confrontational and socially disruptive protest and only secondarily through litigation and policymaking. I base this on my suspicion that market dependency and the valorization imperative exert pressures on institutions and institutional decisionmakers such that a serious push is required before institutions will meaningfully commit to contravening these pressures. Such a push, I believe, is most effectively provided by collective action. I suspect as well that when improvements occur in the social conditions that create

disability and its consequences, those improvements have generally resulted from the actions of social movements of disabled people and their allies which disrupt the ordinary operations of social institutions\textsuperscript{114}—from collective troublmaking, to put it simply.

On the other hand, law is for the most part an institution that serves the existing social order, though legal conflicts over the specifics of the practices and institutions of that order do also arise.\textsuperscript{115} The legal system and legislation may be used to challenge the institutional specifics of a given version of capitalism.\textsuperscript{116} But as long as market dependency and the valorization imperative remain in place, society will remain disabling, even if the specific way these social processes are institutionalized is reorganized.\textsuperscript{117} Capital must accumulate—value must be valorized, in accordance with capitalism’s imperatives—on an ongoing basis or acute social catastrophe can result.\textsuperscript{118} Since law tends to work to minimize social catastrophes, law is enlisted in maintaining both market dependency and the valorization imperative, disruption of which would likely be a source of massive social upheaval.\textsuperscript{119} Thus law reproduces capitalist social relations: in helping society maintain itself, law simultaneously works to maintain society’s specifically capitalist character.\textsuperscript{120} Recalling that all forms of capitalist societies disable people in some way,\textsuperscript{121} and considering that disablement is a social injustice, I suggest that there is a ceiling on the degree to which disabled people can achieve justice through law. Disability activists seeking social justice should thus consider recourse to law as secondary and focus above all on collective efforts

\begin{itemize}
\item \textsuperscript{114} See Lindsey Patterson, The Disability Rights Movement in the United States, in THE OXFORD HANDBOOK OF DISABILITY HISTORY 439, 451-53 (Michael Rembis, Catherine Kudlick & Kim E. Nielsen eds., 2018) (discussing the vibrancy of disability activists during the twentieth century).
\item \textsuperscript{115} See INJURY IMPOVERISHED, supra note 34, at 256 (discussing the capacities and limits of law in social struggles).
\item \textsuperscript{116} See Capitalism, Law, and Critical Theory: A Reply to Karl Klare, supra note 113 (arguing that “legal work” is a set of practices that can play a subsidiary role in justice-oriented collective action).
\item \textsuperscript{117} See id. (arguing that legal work plays merely a tactical or supportive role in the pursuit of justice rather than a strategic role).
\item \textsuperscript{118} See SMITH, supra note 16, at 109 (“Capital is the dynamic process of ‘the self-valorisation of value.’”).
\item \textsuperscript{120} See supra note 119.
\item \textsuperscript{121} See supra Part I.B.
\end{itemize}
at social disruption. That said, lawyering to help individual dealing with hardship is of course highly laudable humanitarian work, and social movements that succeed at making trouble are likely to need good lawyers to help defend them.\footnote{See Capitalism, Law, and Critical Theory: A Reply to Karl Klare, supra note 113 (arguing for use of law as a shield, i.e. defensively, for social movements).}