SOCIAL CHANGE AND THE LAW OF INDUSTRIAL ACCIDENTS

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Sociologists recognize, in a general way, the essential role of legal institutions in the social order.[1] They concede, as well, the responsiveness of law to social change and have made important explorations of the interrelations involved.[2] Nevertheless, the role law plays in initiating—or reflecting—social change has never been fully explicated, either in theory or through research. The evolution of American industrial accident law from tort principles to compensation systems is an appropriate subject for a case-study on this subject. It is a topic that has been carefully treated by legal scholars,[3] and it is also recognized by sociologists to be a significant instance of social change.[4] This essay, using concepts drawn from both legal and sociological disciplines, aims at clarifying the concept of social change and illustrating its relationship to change in the law.

I. THE CONCEPT OF SOCIAL CHANGE

Social change has been defined as "any nonrepetitive alteration in the established modes of behavior in . . . society."[5] Social change is change in the way people relate to each other, not change in values or in technology. Major alterations in values or technology will, of course, almost invariably be followed by changes in social relations—but they are not in themselves social change. Thus, although the change from tort law to workmen's compensation presupposed a high level of technology and certain attitudes toward the life and health of factory workers, it was not in itself a change in values or technology but in the patterning of behavior.

Social change may be revolutionary, but it normally comes about in a more-or-less orderly manner, out of the conscious and unconscious attempts of

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1. *See, e.g.*, T. PARSONS, STRUCTURE AND PROCESS IN MODERN SOCIETY 190-92 (1960).

2. *See, e.g.*, J. WILLARD HURST, LAW AND SOCIAL PROCESS IN UNITED STATES HISTORY (1960).

3. *See generally* C. AUERBACH, L. GARRISON, W. HURST & S. MERMIN, THE LEGAL PROCESS (1961) [hereinafter cited as AUERBACH].

4. *See, e.g.*, W. OGBURN, SOCIAL CHANGE WITH RESPECT TO CULTURE AND ORIGINAL NATURE 213-36 (Viking ed. 1950).

5. R. FREEDMAN, A. HAWLEY, W. LANDECKER & H. MINER, PRINCIPLES OF SOCIOLOGY 312 (1st ed. 1952) [hereinafter cited as FREEDMAN].

people to solve social problems through collective action. It is purposive and rational; although social actions have unanticipated consequences and often arise out of unconscious motivations, nonetheless social change at the conscious level involves definition of a state of affairs as a "problem" and an attempt to solve that problem by the rational use of effective means. The *problem* defined collectively in this instance was the number of injuries caused to workmen by trains, mine hazards, and factory machinery. It is clear that the number of accidents increased over the course of the century, but it is not self-evident that this objective fact necessarily gave rise to a correspondent subjective sense of a problem that had to be solved in a particular way. To understand the process of social change, one must know how and why that subjective sense evolved. This requires knowledge of how and why various segments of society perceived situations—whether they identified and defined a set of facts or a state of affairs as raising or not raising problems.[6] It also requires an understanding of what were considered appropriate and rational means for solving that problem. The perspective of a particular period, in turn, sets limits to the way a people collectively defines problems and the means available for their solution.[7]

This essay deals with behavior at the societal level. At that level, social change necessarily means changes in powers, duties, and rights; it will normally be reflected both in custom and law, in formal authority relations and informal ones. In mature societies, law will be an important indicator of social change; it is institutional cause and institutional effect at the same time, and a part of the broader pattern of collective perceptions and behavior in the resolution of social problems. The essay will therefore also deal with the way in which legal systems respond to their society—the social impact on law, modified and monitored by the institutional habits of the legal system.

In legal terms, this is the story of the rise and fall of a *rule*, the fellow-servant rule, as the legal system's operating mechanism for allocating (or refusing to allocate) compensation for industrial injuries. It is an exploration of how the rule originated, how it changed, how and when it was overthrown.

II. Development of the Law of Industrial Accidents

A. *Background of the Fellow-Servant Rule*

At the dawn of the industrial revolution, the common law of torts afforded a remedy, as it still does, for those who had suffered injuries at the hands of others. If a man injured another by direct action—by striking him, or slander-

6. A "collective problem solving" approach to the study of social change is set forth in detail by Guy E. Swanson, in Freedman 554-621.

7. Thus, for example, the problem of sickness and feebleness of the aged can be "solved" by euthanasia, prayer, medicare, socialized medicine, or left alone—depending on the society.

ing him, or by trespassing on his property—the victim could sue for his damages. Similarly, the victim of certain kinds of negligent behavior had a remedy at law. But tort law was not highly developed. Negligence in particular did not loom large in the reports and it was not prominently discussed in books of theory or practice.[8] Indeed, no treatise on tort law appeared in America until Francis Hilliard's in 1859;[9] the first English treatise came out in 1860.[10] By this time, the field was rapidly developing. A third edition of Hilliard's book was published in 1866, only seven years after the first edition. The explosive growth of tort law was directly related to the rapidity of industrial development. The staple source of tort litigation was and is the impact of machines—railroad engines, then factory machines, then automobiles—on the human body. During the industrial revolution, the size of the factory labor force increased, the use of machinery in the production of goods became more widespread, and such accidents were inevitably more frequent. In Hilliard's pioneer treatise, railroads already played a major role in tort litigation—a role which he ascribed to their "great multiplication and constant activity; their necessary interference, in the act of construction, with the rights of property . . . the large number and various offices of their agents and servants; and the dangers, many of them of an entirely novel character, incident to their mode of operation. . . ."[11]

In theory, at least, recovery for industrial accidents might have been assimilated into the existing system of tort law. The fundamental principles were broad and simple. If a factory worker was injured through the negligence of another person—including his employer—an action for damages would lie. Although as a practical matter, servants did not usually sue their master nor workers their employers, in principle they had the right to do so.

In principle, too, a worker might have had an action against his employer for any injury caused by the negligence of any other employee. The doctrine of *respondeat superior* was familiar and fundamental law. A principal was liable for the negligent acts of his agent. As Blackstone put it:

8. Blackstone's *Commentaries* has virtually no discussion of negligence. In early 19th century America, tort law (and particularly the law of negligence) remained fairly obscure. Dane's *Abridgment*—an eight-volume compendium of British and American law—has a short, miscellaneous chapter on negligence: cases "which cannot be brought conveniently under more particular heads." 3 N. DANE, A GENERAL ABRIDGMENT AND DIGEST OF AMERICAN LAW 31 (1824). These include some commercial and maritime instances ("If the owner of a ship, in the care of a pilot, through *negligence* and want of skill, sinks the ship of another, this owner is liable," *id.* at 35); and some cases of negligence in the practice of a trade or profession ("if a register of deeds neglects to record a deed as he ought to do, this action lies against him for his negligence," *id.* at 32). Under this latter heading comes one of the very few examples of personal injury—a doctor's negligent practice of his art. *Id.* at 32. (Another example had to do with the negligent owner of a dog or other animal, *id.* at 33.) But, in general, personal injury cases are rare in Dane; and the shadow of the industrial revolution has not yet fallen on this corner of the law.

9. F. HILLIARD, THE LAW OF TORTS (1st ed. 1859); *see* C. WARREN, HISTORY OF THE AMERICAN BAR 450 (1911).

10. C. ADDISON, WRONGS AND THEIR REMEDIES (1st ed. 1860).

11. 2 F. HILLIARD, THE LAW OF TORTS 339 (3d ed. 1866).

> he who does a thing by the agency of another, does it himself . . . . If an innkeeper's servants rob his guests, the master is bound to restitution. . . . So likewise if the drawer at a tavern sells a man bad wine, whereby his health is injured, he may bring an action against the master.[12]

Conceivably, then, one member of an industrial work force might sue his employer for injuries caused by the negligence of a fellow worker. A definitive body of doctrine was slow to develop, however. When it did, it rejected the broad principle of *respondeat superior* and took instead the form of the so-called fellow-servant rule. Under this rule, a servant (employee) could not sue his master (employer) for injuries caused by the negligence of another employee. The consequences of this doctrine were far reaching. An employee retained the right to sue the employer for injuries, provided they were caused by the employer's personal misconduct. But the factory system and corporate ownership of industry made this right virtually meaningless. The factory owner was likely to be a "soulless" legal entity; even if the owner was an individual entrepreneur, he was unlikely to concern himself physically with factory operations. In work accidents, then, legal fault would be ascribed to fellow employees, if anyone. But fellow employees were men without wealth or insurance. The fellow-servant rule was an instrument capable of relieving employers from almost all the legal consequences of industrial injuries. Moreover, the doctrine left an injured worker without any effective recourse but an empty action against his co-worker.

When labor developed a collective voice, it was bound to decry the rule as infamous,[13] as a deliberate instrument of oppression—a sign that law served the interests of the rich and propertied, and denied the legitimate claims of the poor and the weak. The rule charged the "blood of the workingman" not to the state, the employer, or the consumer, but to the working man himself.[14] Conventionally, then, the fellow-servant rule is explained as a deliberate or half-deliberate rejection of a well-settled principle of law in order to encourage enterprise by forcing workmen to bear the costs of industrial injury. And the overthrow of the rule is taken as a sign of a conquest by progressive forces.

It is neither possible nor desirable to avoid passing judgment on human behavior; but one's understanding of social processes can sometimes be hindered by premature moral assessments. The history of industrial accident law

12. 1 W. BLACKSTONE, COMMENTARIES *429-30.

13. And Labor was not alone. "Lord Abinger planted it, Baron Alderson watered it, and the devil gave it increase," said the Secretary for Ireland in a famous remark to the House of Commons in 1897. *Quoted in* W. DODD, ADMINISTRATION OF WORKMEN'S COMPENSATION 5 n.7 (1936). Lord Abinger wrote the decision in Priestley v. Fowler, 150 Eng. R. 1030 (Ex. 1837); Baron Alderson in Hutchinson v. York, N. & B. Ry., 155 Eng. R. 150 (Ex. 1850).

14. The slogan "The cost of the product should bear the blood of the working man" has been attributed to Lloyd George; it expresses the theory that the price of the commodity should include all costs, including that of industrial accidents. *See* W. PROSSER, TORTS 554-55 & n.3 (3d ed. 1964).

is much too complicated to be viewed as merely a struggle of capital against labor, with law as a handmaid of the rich, or as a struggle of good against evil. From the standpoint of social change, good and evil are social labels based on *perceptions* of conditions, not terms referring to conditions in themselves. Social change comes about when people decide that a situation is evil and must be altered, even if they were satisfied or unaware of the problem before. In order, then, to understand the legal reaction to the problem of industrial accidents, one must understand how the problem was perceived within the legal system and by that portion of society whose views influenced the law.

B. *Birth and Acceptance of the Rule*

The origin of the fellow-servant rule is usually ascribed to Lord Abinger's opinion in *Priestley v. Fowler*,[15] decided in 1837. Yet the case on its facts did not pose the question of the industrial accident, as later generations would understand it; rather, it concerned the employment relationships of tradesmen. The defendant, a butcher, instructed the plaintiff, his servant, to deliver goods which had been loaded on a van by another employee. The van, which had been overloaded, broke down, and plaintiff fractured his thigh in the accident. Lord Abinger, in his rather diffuse and unperceptive opinion, reached his holding that the servant had no cause of action by arguing from analogies drawn neither from industry nor from trade:

> If the master be liable to the servant in this action, the principle of that liability will . . . carry us to an alarming extent . . . . The footman . . . may have an action against his master for a defect in the carriage owing to the negligence of the coachmaker. . . . The master . . . would be liable to the servant for the negligence of the chambermaid, for putting him into a damp bed; . . . for the negligence of the cook in not properly cleaning the copper vessels used in the kitchen. . . .[16]

These and similar passages in the opinion suggest that Abinger was worried about the disruptive effects of a master's liability upon his household staff. These considerations were perhaps irrelevant to the case at hand, the facts of which did not deal with the household of a nobleman, great landowner, or rich merchant; *a fortiori* the decision itself did not concern relationships within an industrial establishment. Certainly the opinion made extension of the rule to the factory setting somewhat easier to enunciate and formulate technically. But it did not justify the existence of an industrial fellow-servant rule. The case might have been totally forgotten—or overruled—had not the onrush of the industrial revolution put the question again and again to courts, each time more forcefully. *Priestley v. Fowler* and the doctrine of *respondeat superior* each stood for a broad principle. Whether the one or the other (or neither) would find a place in the law relative to industrial accidents depended

15. 150 Eng. R. 1030 (Ex. 1837).
16. *Id.* at 1032.

upon needs felt and expressed by legal institutions in response to societal demands. Had there been no *Priestly v. Fowler*, it would have been necessary —and hardly difficult—to invent one.

In the United States, the leading case on the fellow-servant situation was *Farwell v. Boston & Worcester Railroad Corp.*,[17] decided by Massachusetts' highest court in 1842. The case arose out of a true industrial accident in a rapidly developing industrial state. Farwell was an engineer who lost a hand when his train ran off the track due to a switchman's negligence. As Chief Justice Shaw, writing for the court, saw it, the problem of *Farwell* was how best to apportion the risks of railroad accidents. In his view, it was superficial to analyze the problem according to the tort concepts of fault and negligence. His opinion spoke the language of contract, and employed the stern logic of nineteenth century economic thought. Some occupations are more dangerous than others. Other things being equal, a worker will choose the least dangerous occupation available. Hence, to get workers an employer will have to pay an additional wage for dangerous work. The market, therefore, has already made an adjustment in the wage rate to compensate for the possibility of accident, and a cost somewhat similar to an insurance cost has been allocated to the company. As Shaw put it, "he who engages in the employment of another for the performance of specified duties and services, for compensation, takes upon himself the natural and ordinary risks and perils incident to the performance of such services, and *in legal presumption, the compensation is adjusted accordingly.*"[18] The worker, therefore, has assumed the risk of injury—for a price. The "implied contract of employment" between the worker and employer did not require the employer to bear any additional costs of injury (except for those caused by the employer's personal negligence).

In *Priestley v. Fowler* too, counsel had argued in terms of implied contract.[19] But Lord Abinger had not framed his logic accordingly. Shaw did, and his opinion had great influence on subsequent judicial reasoning. The facts of the case were appropriate and timely, and Shaw saw the issue in clear economic terms. His decision helped convert the rules and concepts of the status-bound law of master and servant to the economic needs of the period, as he understood them.[20]

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17. 45 Mass. (4 Met.) 49 (1842). Murray v. South Carolina R.R., 26 S.C.L. (1 McMul.) 385 (1841), was decided a year earlier and came to the same result. But *Farwell* is the better known case, the one usually cited and quoted. In England, Baron Alderson extended *Priestley* to a railroad accident situation in Hutchinson v. York, N. & B. Ry., 155 Eng. R. 150 (Ex. 1849). The House of Lords, in Barton's Hill Coal Co. v. Reid, 111 Rev. R. 896 (1858), held the rule applicable in Scotland as well as in England. Lord Cranworth cited *Farwell* with great praise as a "very able and elaborate judgment." *Id.* at 906.

18. Farwell v. Boston & W.R.R., 45 Mass. (4 Met.) 49, 57 (1842) (emphasis added).

19. 150 Eng. R. 1030, 1031 (Ex. 1837).

20. The same impulse motivated Timothy Walker, who introduced his discussion of master and servant in his text on American law with these words:

The title of *master and servant*, at the head of a lecture, does not sound very

Shaw's opinion makes extreme assumptions about behavior, justified only by a philosophy of economic individualism.[21] Partly because of this, it has a certain heartlessness of tone. A disabled worker without resources was likely to be pauperized if he had no realistic right to damages. Unless his family could help him, he would have to fall back upon poor relief, the costs of which were borne by the public through taxation. The railroads and other industrial employers paid a share as taxpayers and, in addition, a kind of insurance cost as part of their wage rate—but no more. Additional damages had to be borne by the worker; if he could not bear them, society generally would pay the welfare costs. Thus the opinion expresses a preference for charging the welfare cost of industrial accidents to the public generally, rather than to the particular enterprise involved.

It is not surprising that such a preference was expressed. Shaw's generation placed an extremely high value on economic growth. As Willard Hurst has noted, that generation was thoroughly convinced it was "socially desirable that there be broad opportunity for the release of creative human energy," particularly in the "realm of the economy."[22] The establishment of a functioning railroad net was an essential element in economic growth. Furthermore, Shaw's resolution of the *Farwell* case is cruel only insofar as society makes no other provision for the victims of accidents—that is, if social insurance and public assistance are inadequate, degrading, or unfair. In a society with a just and workable system of state medical insurance and disability pensions, the *Farwell* solution would be neither inhumane nor inappropriate, even today. Indeed, it could be argued that the broader social responsibility is preferable to one which taxes a particular industry for the claims of its workers. Whether the one side or the other is correct, in economic or political terms, is not here relevant.

Of course, from today's viewpoint, the word "inadequate" is too weak a judgment on what passed for public relief in the early nineteenth century.

> harmoniously to republican ears. . . . But the legal relation of master and servant must exist, to a greater or less extent, wherever civilization furnishes work to be done, and the difference of condition makes some persons employers, and others laborers. In fact, we understand by the relation of master and servant, nothing more or less than that of *employer* and *employed*. It is, therefore, a relation created by contract, express or implied, and might properly be treated under the head of contracts; but custom has placed it among the personal relations, and I shall so treat it.

T. WALKER, INTRODUCTION TO AMERICAN LAW § 114, at 275 (6th ed. 1837).

21. "[*Farwell* represents] the individualistic tendency of the common law, which took it for granted that an employee was free to contract and was not bound to risk life or limb in any particular employment . . . ." W. DODD, *supra* note 13, at 7. "[T]he leading employers' liability eases, from which the whole subsequent juristic development received its tone and direction, were decided at the very moment when the *laissez faire* movement in economic and political thought reached its culmination." E. DOWNEY, HISTORY OF WORK ACCIDENT INDEMNITY IN IOWA 13 (1912). *See also* F. BOHLEN, STUDIES IN THE LAW OF TORTS 461-65 (1926).

22. J. WILLARD HURST, LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES 5-6, *passim* (1956).

Social insurance was unknown. Local poor relief was cruel, sporadic, and pinchpenny. Institutions for the helpless were indescribably filthy and heartless. Villages sometimes shunted paupers from place to place, to avoid the burden of paying for them. Moreover, the whole system was shot through with what strikes us today as an inordinate fear of the spread of idleness and a perverse notion that pauperism generally arose out of the moral failings of the poor. The most that can be said is that the system usually made a minimum commitment to keeping the poor alive.[23]

But our condemnation of nineteenth century welfare administration is based on a certain amount of hindsight. Social welfare is looked upon today as a task of government, and government can lay claim to far greater resources to accomplish welfare goals. In Shaw's day, private charity was assigned a higher place in the relief of misery. Probably most people would have agreed then that the disabled and wretched poor ought not to starve. Where private philanthropy failed, local poor relief stepped in. It was the most miserable sort of minimum, but its deficiencies were not apparent to the average middle or upper class citizen who seldom gave the matter a second thought—just as today the inadequacies of mental hospitals and prisons are only vaguely known and rarely given a second thought by most Americans. Poor relief was not *perceived* as a major social problem in the most literal sense. Furthermore, in Shaw's day certain kinds of crises and risks had to be accepted as inevitable, far more than they would be accepted today. High mortality rates from disease threatened all classes of society. Business entrepreneurs ran heavy risks; business failure was common and could be avoided only by great skill and good fortune. The instability of the monetary system threatened an entrepreneur with sudden, unpredictable, and uninsurable ruin. At the onset of the great business panic of 1857, for example, banks failed by the score; currency turned to ashes, and chain reactions of default were set off by distant collapse or defalcation.[24] Hardly any businessman was safe or immune. Furthermore, imprisonment for debt was still a living memory when Shaw wrote; the present national bankruptcy system did not exist, and local insolvency laws were chaotic and unpredictable.[25] Men like Shaw, the bearers of power and influence, might have conceded that the misfortunes of factory workers were real, but insecurity of economic position cursed the lot of all but the very rich. The problem was one of *general* insecurity.

Shaw and his generation placed their hopes of salvation on rapid economic

23. *See, e.g.*, D. SCHNEIDER & A. DEUTSCH, THE HISTORY OF PUBLIC WELFARE IN NEW YORK STATE 1609-1866, at 211-30 (1938). For a vivid description of early nineteenth century poor relief administration, see M. Rosenheim, *Vagrancy Concepts in Welfare Law*, 54 CALIF. L. REV. 511, 528-30 (1966).

24. *See* B. HAMMOND, BANKS AND POLITICS IN AMERICA (1957).

25. For a discussion of legal and political aspects of the short-lived national bankruptcy acts before 1898, see C. WARREN, BANKRUPTCY IN UNITED STATES HISTORY (1935).

growth.[26] Perhaps they were anxious to see that the tort system of accident compensation did not add to the problems of new industry. Few people imagined that accidents would become so numerous as to create severe economic and social dislocations. On the contrary, rash extension of certain principles of tort law to industrial accidents might upset social progress by imposing extreme costs on business in its economic infancy. The 1840's and 1850's were a period of massive economic development in New England and the Midwest, a period of "take-off" (perhaps) into self-sustaining economic growth.[27] Textiles, and then iron, spearheaded the industrial revolution; westward expansion and the railroads created new markets. Communities and states made a social contribution to the construction of railroads through cash subsidies, stock subscriptions, and tax exemptions. The courts, using the fellow-servant doctrine and the concepts of assumption of risk and contributory negligence,[28] socialized the accident costs of building the roads. That these solutions represented the collective, if uneasy, consensus of those with authority and responsibility is supported by the fact that every court of the country, with but one transient exception,[29] reached the same conclusion in the years immediately following *Farwell*. Moreover, the fellow-servant rule was not abolished by any legislature in these early years. Although legislative inaction is not a necessary sign of acquiescence, it at least indicates lack of a major feeling of revulsion.

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26. It is generally assumed that the "considerations of policy" invoked by Shaw in the Farwell case were those in favor of the promotion of railroad and industrial expansion. Charles Warren . . . observed that railroads began to operate only 8 years before the Farwell decision, and quoted an 1883 writer to the effect that the decision was "a species of protective tariff for the encouragement of infant railway industries." The United States Supreme Court has said that the "assumption of risk" doctrine was "a judicially created rule . . . developed in response to the general impulse of common law courts . . . to insulate the employer as much as possible from bearing the 'human overhead' which is an inevitable part of the cost—to someone—of the doing of industrialized business." "The general purpose behind this development in the common law," the Court continued, "seems to have been to give maximum freedom to expanding industry." Tiller v. Atlantic Coast Line Railroad, 318 U.S. 54, 58-59 (1943).

AUERBACH 84-85; *see* W. DODD, *supra* note 13, at 7; E. DOWNEY, *supra* note 21, at 15; E. FREUND, STANDARDS OF AMERICAN LEGISLATION 21 (1917); A. Brodie, *The Adequacy of Workmen's Compensation as Social Insurance: A Review of Developments and Proposals*, 1963 WIS. L. REV. 57, 58.

27. The 1840's were marked by rail and manufacturing development in the East. The 1850's brought heavy foreign capital inflow and the railroad push into the Midwest. W. ROSTOW, THE STAGES OF ECONOMIC GROWTH 38 (1960).

28. For these doctrines see W. PROSSER, *supra* note 14, at 426-28, 450. Both are essentially 19th century doctrines—indeed, Prosser feels assumption of risk "received its greatest impetus" from *Priestley v. Fowler*. *Id.* at 450 & n.3. On the significance in American law of the doctrine of contributory negligence, see the important article by Wex Malone, *The Formative Era of Contributory Negligence*, 41 ILL. L. REV. 151 (1946).

29. Wisconsin, in Chamberlain v. Milwaukee & M.R.R., 11 Wis. 248 (1860), rejected the fellow-servant rule, but one year later, in Moseley v. Chamberlain, 18 Wis. 700 (1861), the court reversed itself and adopted the rule which was "sustained by the almost unanimous judgments of all the courts both of England and this country . . . [an] unbroken current of judicial opinion." *Id.* at 736.

C. *Weakening the Rule*

A general pattern may be discerned which is common to the judicial history of many rules of law. The courts enunciate a rule, intending to "solve" a social problem—that it, they seek to lay down a stable and clear-cut principle by which men can govern their conduct or, alternatively, by which the legal system can govern men. If the rule comports with some kind of social consensus, it will in fact work a solution—that is, it will go unchallenged, or, if challenged, will prevail. Challenges will not usually continue, since the small chance of overturning the rule is not worth the cost of litigation. If, however, the rule is weakened—if courts engraft exceptions to it, for example—then fresh challenges probing new weaknesses will be encouraged. Even if the rule retains *some* support, it will no longer be efficient and clear-cut. Ultimately, the rule may no longer serve *anybody's* purposes. At this point, a fresh (perhaps wholly new) "solution" will be attempted.

The history of the fellow-servant rule rather neatly fits this scheme. Shaw wrote his *Farwell* opinion in 1842. During the latter part of the century, judges began to reject his reasoning. The "tendency in nearly all jurisdictions," said a Connecticut court in 1885, was to "limit rather than enlarge" the range of the fellow-servant rule.[30] A Missouri judge in 1891 candidly expressed the change in attitude:

> In the progress of society, and the general substitution of ideal and invisible masters and employers for the actual and visible ones of former times, in the forms of corporations engaged in varied, detached and widespread operations . . . it has been seen and felt that the universal application of the [fellow-servant] rule often resulted in hardship and injustice. Accordingly, the tendency of the more modern authorities appears to be in the direction of such a modification and limitation of the rule as shall eventually devolve upon the employer under these circumstances a due and just share of the responsibility for the lives and limbs of the persons in its employ.[31]

The rule was strong medicine, and it depended for its efficacy upon continued, relatively certain, and unswerving legal loyalty. Ideally, if the rule were strong and commanded nearly total respect from the various agencies of law, it would eliminate much of the mass of litigation that might otherwise arise. Undoubtedly, it did prevent countless thousands of law suits; but it did not succeed in choking off industrial accident litigation. For example, industrial accident litigation dominated the docket of the Wisconsin Supreme Court at the beginning of the age of workmen's compensation; far more cases arose under that heading than under any other single field of law.[32] Undoubt-

30. Ziegler v. Danbury & N.R.R., 52 Conn. 543, 556 (1885).
31. Parker v. Hannibal & St. J.R.R., 109 Mo. 362, 397 (1891) (Thomas, J., dissenting).
32. Unpublished survey and classification of all Wisconsin Supreme Court cases 1905-1915, by Robert Friebert and Lawrence M. Friedman.

edly, this appellate case-load was merely the visible portion of a vast iceberg of litigation. Thus, the rule did not command the respect required for efficient operation and hence, in the long run, survival.

One reason for the continued litigation may have been simply the great number of accidents that occurred. At the dawn of the industrial revolution, when Shaw wrote, the human consequences of that technological change were unforeseeable. In particular, the toll it would take of human life was unknown. But by the last quarter of the nineteenth century, the number of industrial accidents had grown enormously. After 1900, it is estimated, 35,000 deaths and 2,000,000 injuries occurred every year in the United States. One quarter of the injuries produced disabilities lasting more than one week.[33] The railway injury rate doubled in the seventeen years between 1889 and 1906.[34]

In addition to the sheer number of accidents, other reasons for the increasing number of challenges to the rule in the later nineteenth century are apparent. If the injury resulted in death or permanent disability, it broke off the employment relationship; the plaintiff or his family thereafter had nothing to lose except the costs of suit. The development of the contingent fee system provided the poor man with the means to hire a lawyer. This system came into being, in the words of an investigating committee of the New York State Bar:

> shortly after the beginning of that which we now call the age of machinery. With the advent of steam and the vast variety of machines for its application to the service of mankind, came a multitude of casualties. This resulted in . . . a class of litigants, whose litigation theretofore had only involved controversies in small transactions . . . calling for the services of inexpensive lawyers. In the new era . . . the poor man found himself pitted . . . against corporations entrenched in wealth and power. . . . Thus resulted a great crop of litigation by the poor against the powerful. . . .[35]

The contingent fee system was no more than a mechanism, however. A losing plaintiff's lawyer receives no fee; that is the essence of the system. The

33. E. DOWNEY, *supra* note 21, at 1-2, gives these estimates based on U.S. BUREAU OF LABOR BULL. No. 78, at 458.

34. Accidents were about 2.5 per 100 railway employees in 1889 and 5 per 100 in 1906. Calculated from ICC figures reported in [1909-1910] WIS. BUREAU OF LABOR AND INDUSTRIAL STATISTICS FOURTEENTH BIENNIAL REP. 99 (1911).

Railroads had been the earliest major source of industrial accidents, and most of the leading American and English fellow-servant cases arose out of railroad accidents. Railroads accounted for more serious industrial accidents than any other form of enterprise in the middle of the 19th century. But in the late 19th century, mining, manufacturing, and processing industries contributed their share to industrial injury and death. For example, close to 80% of the employer liability cases that reached the Wisconsin Supreme Court before 1890 related to railroad accidents; from 1890 to 1907 less than 30% were railroad cases. [1907-1908] WIS. BUREAU OF LABOR AND INDUSTRIAL STATISTICS THIRTEENTH BIENNIAL REP. 26 (1909). In 1907-1908, manufacturing injuries and deaths were more than double those of the railroads. [1909-1910] WIS. BUREAU OF LABOR AND INDUSTRIAL STATISTICS FOURTEENTH BIENNIAL REP. 79 (1911).

35. Report of Committee on Contingent Fees, 31 PROCEEDINGS OF THE N.Y. ST. B. ASS'N 99, 100-01 (1908). The elite of the bar always looked with suspicion upon the contingent fee. But the system was a source of livelihood to many members of the bar, and it suited the American proposition that justice was classless and open to all.

fact is that plaintiffs won many of their lawsuits; in so doing, they not only weakened the fellow-servant rule, but they encouraged still more plaintiffs to try their hand, still more attorneys to make a living from personal injury work. In trial courts, the pressure of particular cases—the "hard" cases in which the plight of the plaintiff was pitiful or dramatic—tempted judges and juries to find for the little man and against the corporate defendant. In Shaw's generation, many leading appellate judges shared his view of the role of the judge; they took it as their duty to lay down grand legal principles to govern whole segments of the economic order. Thus, individual hardship cases had to he ignored for the sake of higher duty. But this was not the exclusive judicial style, even in the appellate courts. And in personal injury cases, lower court judges and juries were especially prone to tailor justice to the case at hand. For example, in Wisconsin, of 307 personal injury cases involving workers that appeared before the state supreme court up to 1907, nearly two-thirds had been decided in favor of the worker in the lower courts. In the state supreme court, however, only two-fifths were decided for the worker.[36] Other states undoubtedly had similar experiences. Whether for reasons of sympathy with individual plaintiffs, or with the working class in general, courts and juries often circumvented the formal dictates of the doctrines of the common law.

Some weakening of the doctrine took place by means of the control exercised by trial court judge and jury over findings of fact. But sympathy for injured workers manifested itself also in changes in doctrine. On the appellate court level, a number of mitigations of the fellow-servant rule developed near the end of the nineteenth century. For example, it had always been conceded that the employer was liable if he was personally responsible (through his own negligence) for his worker's injury. Thus, in a Massachusetts case, a stable owner gave directions to his employee, who was driving a wagon, that caused an accident and injury to the driver (or so the jury found). The employer was held liable.[37] Out of this simple proposition grew the so-called vice-principal rule, which allowed an employee to sue his employer where the negligent employee occupied a supervisory position such that he could more properly be said to be an alter ego of the principal than a mere fellow-servant. This was a substantial weakening of the fellow-servant doctrine. Yet some states never accepted the vice-principal rule; in those that did, it too spawned a bewildering multiplicity of decisions, sub-rules, and sub-sub-rules. "The decisions on the subject, indeed, are conflicting to a degree which, it may safely be affirmed, is without a parallel in any department of jurisprudence."[38] This

36. [1907-1908] WIS. BUREAU OF LABOR AND INDUSTRIAL STATISTICS THIRTEENTH BIENNIAL REP. 85-86 (1909).

37. Haley v. Case, 142 Mass. 316, 7 N.E. 877 (1886). In *Priestley v. Fowler* itself the same point was made.

38. 4 C. LABATT, MASTER AND SERVANT 4143 (1913).

statement appeared in a treatise, written on the eve of workmen's compensation, which devoted no fewer than 524 pages to a discussion of the ramifications of the vice-principal rule.

There were scores of other "exceptions" to the fellow-servant rule, enunciated in one or more states. Some of them were of great importance. In general, an employer was said to have certain duties that were not "delegable"; these he must do or have done, and a failure to perform them laid him open to liability for personal injuries. Among these was the duty to furnish a safe place to work, safe tools, and safe appliances. Litigation on these points was enormous, and here too the cases cannot readily be summed up or even explained. In *Wedgwood v. Chicago & Northwestern Railway Co.*[39] the plaintiff, a brakeman, was injured by a "large and long bolt, out of place, and which unnecessarily, carelessly and unskillfully projected beyond the frame, beam or brakehead, in the way of the brakeman going to couple the cars."[40] The trial court threw the case out, but the Wisconsin Supreme Court reversed:

> It is true, the defendant . . . is a railroad corporation, and can only act through officers or agents. But this does not relieve it from responsibility for the negligence of its officers and agents whose duty it is to provide safe and suitable machinery for its road which its employees are to operate.[41]

So phrased, of course, the exception comes close to swallowing the rule. Had the courts been so inclined, they might have eliminated the fellow-servant rule without admitting it, simply by expanding the safe place and safe tool rules. They were never quite willing to go that far, and the safe tool doctrine was itself subject to numerous exceptions. In some jurisdictions, for example, the so-called "simple tool" rule applied:

> Tools of ordinary and everyday use, which are simple in structure and requiring no skill in handling—such as hammers and axes—not obviously defective, do not impose a liability upon employer[s] for injuries resulting from such defects.[42]

Doctrinal complexity and vacillation in the upper courts, coupled with jury freedom in the lower courts, meant that by the end of the century the fellow-servant rule had lost much of its reason for existence: it was no longer an efficient cost-allocating doctrine. Even though the exceptions did not go the length of obliterating the rule, and even though many (perhaps most) injured workers who had a possible cause of action did not or could not recover, the instability and unpredictability of operation of the common law rule was a significant fact.

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39. 41 Wis. 478 (1877).
40. *Id.* at 479.
41. *Id.* at 483.
42. Dunn v. Southern Ry., 151 N.C. 313, 315, 66 S.E. 134-35 (1909); *see* 3 C. LABATT, *supra* note 38, at 2476-84.

The numerous judge-made exceptions reflected a good deal of uncertainty about underlying social policy. The same uncertainty was reflected in another sphere of legal activity—the legislature. Though the rule was not formally abrogated, it was weakened by statute in a number of jurisdictions. Liability statutes, as will be seen, were rudimentary and in many ways ineffective. This was partly because of genuine uncertainty about the proper attitude to take toward industrial accident costs—an uncertainty reflected in the cases as well. The early nineteenth century cannot be uncritically described as a period that accepted without question business values and practices. Rather, it accepted the ideal of economic growth, which certain kinds of enterprise seemed to hinder. Thus in the age of Jackson, as is well known, popular feeling ran high against financial institutions, chiefly the chartered banks. Banks were believed to have far too much economic power; they corrupted both the currency and the government. They were a "clog upon the industry of this country."[43] But many a good judge, who decried the soulless corporation (meaning chiefly the moneyed kind) in the best Jacksonian tradition, may at the same time have upheld the fellow-servant rule. One did not, in other words, necessarily identify the interests of the common man with industrial liability for personal injuries.

Later on, the railroads replaced the banks as popular bogeymen. By the 1850's some of the fear of excessive economic power was transferred to them. Disregard for safety was one more black mark against the railroads; farmers, small businessmen, and the emerging railroad unions might use the safety argument to enlist widespread support for general regulation of railroads, but the essential thrust of the movement was economic. The railroads were feared and hated because of their power over access to the market. They became "monopolistic" as the small local lines were gradually amalgamated into large groupings controlled by "robber barons." Interstate railroad nets were no longer subject to local political control—if anything, they controlled local politics, or so it plausibly appeared to much of the public. Farmers organized and fought back against what they identified as their economic enemy. It is not coincidental that the earliest derogations from the strictness of the fellow-servant rule applied *only* to railroads. For example, the first statutory modification, passed in Georgia in 1856, allowed railroad employees to recover for injuries caused by the acts of fellow-servants, provided they themselves were free from negligence.[44] A similar act was passed in Iowa in 1862.[45] Other statutes were passed in Wyoming (1869)[46] and Kansas (1874).[47] The chron-

43. T. Sedgwick, Jr., *What is a Monopoly?* (1865), *quoted in* SOCIAL THEORIES OF JACKSONIAN DEMOCRACY 220, 231 (Blau ed. 1954).
44. No. 103, [1855] Ga. Acts 155.
45. Ch. 169, § 7, [1862] Iowa Laws 198.
46. Ch. 65, [1869] Wyo. Terr. Laws 433.
47. Ch. 93, §1, [1874] Kan. Laws 143.

ology suggests—though direct evidence is lacking—that some of these statutes were connected with the general revolt of farmers against the power of the railroad companies, a revolt associated with the Granger movement, which achieved its maximum power in the 1870's.[48] Wisconsin in 1875 abolished the fellow-servant rule for railroads; in 1880, however, when more conservative forces regained control of the legislature, the act was repealed.[49]

The Granger revolt, and similar movements, were not without lessons for the railroad companies. Despite the fall of Granger legislatures, the legal and economic position of the railroads was permanently altered. Great masses of people had come to accept the notion that the power of the railroads was a threat to farmers and a threat to the independence and stability of democratic institutions. Out of the ashes of ineffective and impermanent state regulation of railroads arose what ultimately became a stronger and more systematic program of regulation, grounded in federal power over the national economy.

The Interstate Commerce Commission was created in 1887,[50] chiefly to outlaw discrimination in freight rates and other practices deemed harmful to railroad users. The original legislation had nothing to say about railroad accidents and safety. But this did not long remain the case. The railroads had become unpopular defendants relatively early in American legal history. By 1911, twenty-five states had laws modifying or abrogating the fellow-servant doctrine for railroads.[51] Railroad accident law reached a state of maturity earlier than the law of industrial accidents generally; safety controls were imposed on the roads, and the common law tort system was greatly modified by removal of the employer's most effective defense. The Interstate Commerce Commission called a conference of state regulatory authorities in 1889; the safety problem was discussed, and the Commission was urged to investigate the problem and recommend legislation.[52] In 1893, Congress required interstate railroads to equip themselves with safety appliances, and provided that any employee injured "by any locomotive, car, or train in use" without such appliances would not "be deemed . . . to have assumed the risk thereby occasioned."[53]

The Federal Employers' Liability Act of 1908[54] went much further; it abolished the fellow-servant rule for railroads and greatly reduced the strength

48. *See generally* R. HUNT, LAW AND LOCOMOTIVES (1958).

49. Ch. 173, [1875] Wis. Laws 293 (*repealed*, Ch. 232, [1880] Wis. Laws 270). A new act, somewhat narrower than that of 1875, was passed in 1889. Ch. 348, [1889] Wis. Laws 487.

50. Interstate Commerce Act § 11, 24 Stat. 379 (1887). As much as workmen's compensation, the development of utility regulation was a kind of compromise among interests. Under public regulation, companies gain freedom from local political harassment and uncontrolled competition; they are virtually guaranteed a "fair" but limited return on investment. In exchange, they agree to accept supervision and regulation by the general government.

51. 1 A. LARSON, WORKMEN'S COMPENSATION § 4.50, at 30 (1965).

52. 1 I. SHARFMAN, THE INTERSTATE COMMERCE COMMISSION 246 n.4 (1931).

53. Safety Appliance Act, 27 Stat. 531-32 (1893) (now 45 U.S.C. § 7 (1964)).

54. 35 Stat. 65 (1908).

of contributory negligence and assumption of risk as defenses. Once the employers had been stripped of these potent weapons, the relative probability of recovery by injured railroad employees was high enough so that workmen's compensation never seemed as essential for the railroads as for industry generally. The highly modified FELA tort system survives (in amended form) to this day for the railroads.[55] It is an anachronism, but one which apparently grants some modest satisfaction to both sides. Labor and management both express discontent with FELA, but neither side has been so firmly in favor of a change to workmen's compensation as to make it a major issue.[56]

FELA shows one of many possible outcomes of the decline in efficacy of the fellow-servant rule. Under it, the rule was eliminated, and the law turned to a "pure" tort system—pure in the sense that the proclivities of juries were not interfered with by doctrines designed to limit the chances of a worker's recovery. But the railroads were a special case. Aside from the special history of regulation, the interstate character of the major railroads made them subject to national safety standards and control by a single national authority. For other industrial employers, the FELA route was not taken; instead, workmen's compensation acts were passed. In either case, however, the fellow-servant rule was abolished, or virtually so. Either course reflects, we can assume, some kind of general agreement that the costs of the rule outweighed its benefits.

D. *Rising Pressures for Change*

The common law doctrines were designed to preserve a certain economic balance in the community. When the courts and legislatures created numerous exceptions, the rules lost much of their efficiency as a limitation on the liability of businessmen. The rules prevented many plaintiffs from recovering, but not all; a few plaintiffs recovered large verdicts. There were costs of settlements, costs of liability insurance, costs of administration, legal fees and the salaries of staff lawyers. These costs rose steadily, at the very time when American business, especially big business, was striving to rationalize and bureaucratize its operations. It was desirable to be able to predict costs and insure against fluctuating, unpredictable risks. The costs of industrial accident liability were not easily predictable, partly because legal consequences of accidents were not predictable. Insurance, though available, was expensive.

In addition, industry faced a serious problem of labor unrest. Workers and their unions were dissatisfied with many aspects of factory life. The lack of compensation for industrial accidents was one obvious weakness. Relatively

55. The 1908 act was limited to railroad employees injured while engaged in interstate commerce. A 1906 act [Act of June 22, 1906, ch. 3073, 34 Stat. 232] had been declared invalid by the Supreme Court in the Employers Liability Cases, 207 U.S. 463 (1908), because it applied to employees not engaged in interstate commerce. The 1908 act was liberalized in 1910 and in 1939. *See* 45 U.S.C. §§ 51-60 (1964). *See generally* V. Miller, *FELA Revisited*, 6 CATHOLIC U.L. REV. 158 (1957).

56. Arguments by supporters and opponents of FELA are reviewed in H. SOMERS & A. SOMERS, WORKMEN'S COMPENSATION 320-25 (1954).

few injured workers received compensation. Under primitive state employers' liability statutes, the issue of liability and the amount awarded still depended upon court rulings and jury verdicts. Furthermore, the employer and the insurance carrier might contest a claim or otherwise delay settlement in hopes of bringing the employee to terms. The New York Employers' Liability Commission, in 1910, reported that delay ran from six months to six years.

> The injured workman is driven to accept whatever his employer or an insurance company chooses to give him or take his chance in a lawsuit. Half of the time his lawsuit is doomed to failure because he has been hurt by some trade risk or lacks proof for his case. At best he has a right to retain a lawyer, spend two months on the pleadings, watch his case from six months to two years on a calendar and then undergo the lottery of a jury trial, with a technical system of law and rules of evidence, and beyond that appeals and perhaps reversals on questions that do not go to the merits. . . . If he wins, he wins months after his most urgent need is over.[57]

When an employee did recover, the amount was usually small. The New York Commission found that of forty-eight fatal cases studied in Manhattan, eighteen families received no compensation; only four received over $2,000; most received less than $500. The deceased workers had averaged $15.22 a week in wages; only eight families recovered as much as three times their average yearly earnings.[58] The same inadequacies turned up in Wisconsin in 1907. Of fifty-one fatal injuries studied, thirty-four received settlements under $500; only eight received over $1,000.[59]

Litigation costs consumed much of whatever was recovered. It was estimated that, in 1907, "of every $100 paid out by [employers in New York] on account of work accidents but $56 reached the injured workmen and their dependents." And even this figure was unrepresentative because it included voluntary payments by employers. "A fairer test of employers' liability is afforded by the $192,538 paid by these same employers as a result of law suits or to avoid law suits, whereof only $80,888, or forty-two percent, reached the beneficiaries."[60] A large fraction of the disbursed payments, about one-third, went to attorneys who accepted the cases on a contingent basis.[61]

These figures on the inadequacy of recoveries are usually cited to show how little the workers received for their pains. But what did these figures mean to employers? Assuming that employers, as rational men, were anxious to pay as little compensation as was necessary to preserve industrial peace and maintain a healthy workforce, the better course might be to pay a higher *net* amount direct to employees. Employers had little or nothing to gain from

57. *Quoted in* W. DODD, *supra* note 13, at 23-24.
58. *Id.* at 19.
59. *Id.* at 20-21.
60. E. DOWNEY, *supra* note 21, at 83.
61. *See* W. DODD, *supra* note 13, at 22-23.

their big payments to insurance companies, lawyers, and court officials. Perhaps at some unmeasurable point of time, the existing tort system crossed an invisible line and thereafter, purely in economic terms, represented on balance a net loss to the industrial establishment. From that point on, the success of a movement for change in the system was certain, provided that businessmen could be convinced that indeed their self-interest lay in the direction of reform and that a change in compensation systems did not drag with it other unknowable and harmful consequences.

As on many issues of reform, the legal profession did not speak with one voice. Certainly, many lawyers and judges were dissatisfied with the status quo. Judges complained about the burdens imposed on the court system by masses of personal injury suits; many felt frustrated by the chaotic state of the law, and others were bothered by their felt inability to do justice to injured workmen. One writer noted in 1912:

> [A]mendatory legislation in scores of separate jurisdictions have made employers' liability one of the most involved and intricate branches of the law, have multiplied definitions more recondite and distinctions more elusive than those of the marginal utility theory, and have given rise to conflicts of decisions that are the despair of jurists.[62]

Some influential judges despaired of piecemeal improvements and played an active role in working for a compensation system. In a 1911 opinion, Chief Justice J. B. Winslow of Wisconsin wrote:

> No part of my labor on this bench has brought such heartweariness to me as that ever increasing part devoted to the consideration of personal injury actions brought by employees against their employers. The appeal to the emotions is so strong in these cases, the results to life and limb and human happiness so distressing, that the attempt to honestly administer cold, hard rules of law . . . make[s] drafts upon the heart and nerves which no man can appreciate who has not been obliged to meet the situation himself . . . . These rules are archaic and unfitted to modern industrial conditions . . . .
>
> When [the faithful laborer] . . . has yielded up life, or limb, or health in the service of that marvelous industrialism which is our boast, shall not the great public . . . be charged with the duty of securing from want the laborer himself, if he survive, as well as his helpless and dependent ones? Shall these latter alone pay the fearful price of the luxuries and comforts which modern machinery brings within the reach of all?
>
> These are burning and difficult questions with which the courts cannot deal, because their duty is to administer the law as it is, not to change it; but they are well within the province of the legislative arm of the government.[63]

62. E. DOWNEY, *supra* note 21, at 17.

63. Driscoll v. Allis-Chalmers Co., 144 Wis. 451, 468-69, 129 N.W. 401, 408-09 (1911); *see* Monte v. Wausau Paper Mills Co., 132 Wis. 205, 209, 111 N.W. 1114, 1115 (1907) (Winslow, C.J.).

Justice Roujet D. Marshall propagandized for workmen's compensation in his judicial opinions.[64] He claimed in his autobiography "to have been largely the exciting cause of the establishment of the workmen's compensation law" in Wisconsin.[65] He also wrote part of the governor's message to the 1909 legislature appealing for a workmen's compensation statute, and he helped induce the Republican Party to back a workmen's compensation plan in its 1910 platform.[66] Legal writers and law teachers also spoke out against the common law and in favor of a compensation system. Roscoe Pound voiced a common opinion in 1907:

> [I]t is coming to be well understood by all who have studied the circumstances of modern industrial employment that the supposed contributory negligence of employees is in effect a result of the mechanical conditions imposed on them by the nature of their employment, and that by reason of these conditions the individual vigilance and responsibility contemplated by the common law are impossible in practice.[67]

In 1911, when the New York Court of Appeals unanimously declared the nation's first workmen's compensation statute unconstitutional,[68] Dean Pound and thirteen other "experts in political and Constitutional law" issued a lengthy statement in an influential New York City weekly newspaper, *The Outlook*, which the editors summarized as demonstrating that the "decision of the Court of Appeals of the State of New York is not in accordance with the best legal authorities in the United States."[69]

When considerations of politics were added to those of business economics and industrial peace, it was not surprising to find that businessmen gradually withdrew their veto against workmen's compensation statutes. They began to say that a reformed system was inevitable—and even desirable. A guaran-

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64. *See, e.g.*, Houg v. Girard Lumber Co., 144 Wis. 337, 352, 129 N.W. 633, 639 (1911) (separate opinion); Monaghan v. Northwestern Fuel Co., 140 Wis. 457, 466, 122 N.W. 1066, 1070 (1909) (dissenting opinion).

65. 2 AUTOBIOGRAPHY OF ROUJET D. MARSHALL 53 (Glasier ed. 1931).

66. *Id.* at 239-46.

67. R. Pound, *The Need of a Sociological Jurisprudence*, 19 GREEN BAG 607, 614 (1907). The entire April 1906 issue of *The Green Bag* was devoted to employers' liability and workmen's compensation. See, particularly, R. Newcomb, *The Abuse of Personal Injury Litigation*, 18 GREEN BAG 196, 199-200 (1906). *See also* F. Walton, *Workmen's Compensation and the Theory of Professional Risk*, 11 COLUM. L. REV. 36 (1911); E. Wambaugh, *Workmen's Compensation Acts: Their Theory and Their Constitutionality*, 25 HARV. L. REV. 129 (1911).

68. Ives v. South Buffalo Ry., 201 N.Y. 271, 94 N.E. 431 (1911), *declaring unconstitutional* Ch. 674, [1910] N.Y. Laws 1945.

69. *The Workmen's Compensation Act: Its Constitutionality Affirmed*, 98 THE OUTLOOK 709-11 (1911). Lyman Abbott, editor of *The Outlook*, and his contributing editor, Theodore Roosevelt, wrote frequently about employers' liability and compensation statutes. See especially the issue of April 29, 1911, 97 THE OUTLOOK 955-60 (1911).

Roosevelt, as President, had stated as early as 1907 that "it is neither just, expedient, nor humane; it is revolting to judgment and sentiment alike that the financial burden of accidents occurring because of the necessary exigencies of their daily occupation should be thrust upon those sufferers who were least able to bear it. . . ." E. DOWNEY, *supra* note 21, at 277 n.540.

teed, insurable cost—one which could be computed in advance on the basis of accident experience—would, in the long run, cost business less than the existing system.[70] In 1910, the president of the National Association of Manufacturers (NAM) appointed a committee to study the possibility of compensating injured workmen without time-consuming and expensive litigation, and the convention that year heard a speaker tell them that no one was satisfied with the present state of the law—that the employers' liability system was "antagonistic to harmonious relations between employers and wage workers."[71] By 1911 the NAM appeared convinced that a compensation system was inevitable and that prudence dictated that business play a positive role in shaping the design of the law—otherwise the law would be "settled for us by the demagogue, and agitator and the socialist with a vengeance."[72] Business would benefit economically and politically from a compensation system, but only if certain conditions were present. Business, therefore, had an interest in pressing for a specific kind of program, and turned its attention to the details of the new system. For example, it was imperative that the new system be in fact as actuarially predictable as business demanded; it was important that the costs of the program be fair and equal in their impact upon particular industries, so that no competitive advantage or disadvantage flowed from the scheme. Consequently the old tort actions had to be eliminated, along with the old defenses of the company. In exchange for certainty of recovery by the worker, the companies were prepared to demand certainty and predictability of loss—that is, limitation of recovery. The jury's caprice had to be dispensed with. In short, when workmen's compensation became law, as a solution to the industrial accident problem, it did so on terms acceptable to industry. Other pressures were there to be sure, but when workmen's compensation was enacted, businessmen had come to look on it as a positive benefit rather than as a threat to their sector of the economy.

E. *The Emergence of Workmen's Compensation Statutes*

The change of the businessman's, the judge's, and the general public's attitudes toward industrial injuries was accelerated by the availability of fresh information on the extent of accidents and their cost to both management and workers. By 1900, industrial accidents and the shortcomings of the fellow-servant rule were widely perceived as *problems* that had to be solved. After 1900, state legislatures began to look for a "solution" by setting up commissions to gather statistics, to investigate possible new systems, and to recommend

70. For a comparison of the cost efficiency of the two systems, see generally W. DODD, ADMINISTRATION OF WORKMEN'S COMPENSATION 737-83 (1936).

71. NATIONAL ASSOCIATION OF MANUFACTURERS, PROCEEDINGS OF THE FIFTEENTH ANNUAL CONVENTION 280 (1910).

72. NATIONAL ASSOCIATION OF MANUFACTURERS, PROCEEDINGS OF THE SIXTEENTH ANNUAL CONVENTION 106 (1911) (remarks of Mr. Schwedtman).

legislation.[73] The commissions held public hearings and called upon employers, labor, insurance companies, and lawyers to express their opinions and propose changes. A number of commissions collected statistics on industrial accidents, costs of insurance, and amounts disbursed to injured workmen. By 1916, many states and the federal government had received more-or-less extensive public reports from these investigating bodies.[74] The reports included studies of industrial accident cases in the major industries, traced the legal history of the cases, and looked into the plight of the injured workmen and their families.

From the information collected, the commissions were able to calculate the costs of workmen's compensation systems and compare them with costs under employers' liability. Most of the commissions concluded that a compensation system would be no more expensive than the existing method,[75] and most of them recommended adoption, in one form or another, of workmen's compensation. In spite of wide variations in the systems proposed, there was agreement on one point: workmen's compensation must fix liability upon the employer regardless of fault.

Between 1910 and 1920 the method of compensating employees injured on the job was fundamentally altered in the United States. In brief, workmen's compensation statutes eliminated (or tried to eliminate) the process of fixing civil liability for industrial accidents through litigation in common law courts. Under the statutes, compensation was based on statutory schedules, and the responsibility for initial determination of employee claims was taken from the courts and given to an administrative agency. Finally, the statutes abolished the fellow-servant rule and the defenses of assumption of risk and contributory negligence. Wisconsin's law, passed in 1911, was the first general compensation act to survive a court test.[76] Mississippi, the last state in the Union to adopt a compensation law, did so in 1948.[77]

Compensation systems varied from state to state, but they had many features in common. The original Wisconsin law was representative of the earlier group of statutes. It set up a voluntary system—a response to the fact that New York's courts had held a compulsory scheme unconsitutional on

73. For example, in 1907, Illinois required employers to report their employees' accidents to the State's Bureau of Labor Statistics. [1907] Ill. Laws 308.

74. *See* W. DODD, *supra* note 70, at 18.

75. For example, the Wisconsin Bureau of Labor and Industrial Statistics argued, on the basis of cost estimates in 1908, that:

> Employers' liability insurance costs now in Wisconsin from 12 cents per $100 of wages in knitting mills to at least $9.00 in some building operations — an average of 50 or 60 cents. But it is very probable that this expense would be increased in the near future by weakening the defense of the employer in the courts. . . . The cost of the present system would be sufficient to inaugurate a general system of compensation if properly administered.

[1907-1908] WIS. BUREAU OF LABOR AND INDUSTRIAL STATISTICS THIRTEENTH BIENNIAL REP. (1909), *quoted in* AUERBACH 588.

76. Borgnis v. Falk Co., 147 Wis. 327, 133 N.W. 209 (1911).

77. Ch. 354, [1948] Miss. Laws 507.

due process grounds.[78] Wisconsin abolished the fellow-servant rule and the defense of assumption of risk for employers of four or more employees. In turn, the compensation scheme, for employers who elected to come under it, was made the "exclusive remedy" for an employee injured accidentally on the job. The element of "fault" or "negligence" was eliminated, and the mere fact of injury at work "proximately caused by accident," and not the result of "wilful misconduct," made the employer liable to pay compensation but exempt from ordinary tort liability.[79] The state aimed to make it expensive for employers to stay out of the system. Any employer who did so was liable to suit by injured employees and the employer was denied the common law defenses.

The compensation plans strictly limited the employee's amount of recovery. In Wisconsin, for example, if an accident caused "partial disability," the worker was to receive 65% of his weekly loss in wages during the period of disability, not to exceed four times his average annual earnings.[80] The statutes, therefore, were compensatory, not punitive, and the measure of compensation was, subject to strict limitations, the loss of earning power of the worker. In the original Wisconsin act, death benefits were also payable to dependents of the worker. If the worker who died left "no person dependent upon him for support," the death benefit was limited to "the reasonable expense of his burial, not exceeding $100."[81] Neither death nor injury as such gave rise to a right to compensation—only the fact of economic loss to someone, either the worker himself or his family. The Wisconsin act authorized employers to buy annuities from private insurance companies to cover projected losses. Most states later made insurance or self-insurance compulsory. Some states have socialized compensation insurance, but most allow the purchase of private policies.[82]

In essence, then, workmen's compensation was designed to replace a highly unsatisfactory system with a rational, actuarial one. It should not be viewed as the replacement of a fault-oriented compensation system with one unconcerned with fault. It should not be viewed as a victory of employees over employers. In its initial stages, the fellow-servant rule was not concerned with fault, either, but with establishing a clear-cut, workable, and predictable rule, one which substantively placed much of the risk (if not all) on the worker. Industrial accidents were not seen as a social problem—at most as an economic problem. As value perceptions changed, the rule weakened; it developed exceptions and lost its efficiency. The exceptions and counter-exceptions can be looked at as a

78. Ives v. South Buffalo Ry., 201 N.Y. 271, 94 N.E. 431 (1911).
79. Ch. 50, § 1, [1911] Wis. Laws 43, 44.
80. Ch. 50, § 1, [1911] Wis. Laws 46.
81. Ch. 50, § 1, [1911] Wis. Laws 48.
82. *See* A. REEDE, ADEQUACY OF WORKMEN'S COMPENSATION 231-38 (1947); H. SOMERS & A. SOMERS, *supra* note 56, at 93-142.

series of brief, ad hoc, and unstable compromises between the clashing interests of labor and management. When both sides became convinced that the game was mutually unprofitable, a compensation system became possible. But this system was itself a compromise: an attempt at a new, workable, and predictable mode of handling accident liability which neatly balanced the interests of labor and management.

III. The Law of Industrial Accidents and Social Theory: Three Aspects of Social Change

This case study, devoted to the rise and fall of the fellow-servant rule, utilizes and supports a view of social change as a complex chain of group bargains—economic in the sense of a continuous exchange of perceived equivalents, though not economic in the sense of crude money bargains. It also provides a useful setting for evaluating three additional popular explanations of the origin or rate of social change. First, the apparently slow development of workmen's compensation is the classic example of what Ogburn called "cultural lag." Second, since German and English statutes were enacted prior to the American laws, the establishment of compensation schemes in America can be viewed as a case of cross-cultural influence. Third, the active role of particular participants (in Wisconsin, for example, Judge Marshall and John R. Commons) may substantiate the theory which advances the causal influence of "great men" in the process of social change. A thorough examination of these theories is not contemplated here. Students both of law and of sociology, however, may profit from a brief discussion of these theories in the context of the social change embodied in workmen's compensation statutes.

A. *The Concept of Cultural Lag*

The problem of "fair and efficient incidence of industrial accident costs," in the words of Willard Hurst, "followed a fumbling course in courts and legislature for fifty years before the first broad-scale direction [leading to workmen's compensation] was applied."[83] In a famous book written in 1922, the sociologist William Fielding Ogburn used the example of workmen's compensation and the fifty-year period of fumbling to verify his "hypothesis of cultural lag."[84] "Where one part of culture changes first," said Ogburn, "through some discovery or invention, and occasions changes in some part of culture dependent upon it, there frequently is a delay . . . . The extent of this lag will vary . . . but may exist for . . . years, during which time there

83. J. Willard Hurst, Law and Social Process in United States History 69 (1960).

84. W. Ogburn, Social Change With Respect to Culture and Original Nature 200 (Viking ed. 1950). *See generally id.* at 199-280. In the book cultural lag was offered as a hypothesis; in later writing Ogburn referred to it as a theory.

may be said to be a maladjustment."[85] In the case of workmen's compensation, the lag period was from the time when industrial accidents became numerous until the time when workmen's compensation laws were passed, "about a half-century, from 1850-70 to 1915." During this period, "the old adaptive culture, the common law of employers' liability, hung over after the material conditions had changed."[86]

The concept of cultural lag is still widely used, in social science and out—particularly since its popularization by Stuart Chase in *The Proper Study of Mankind*.[87] And the notion that law fails to adjust promptly to the call for change is commonly voiced. In popular parlance, this or that aspect of the law is often said to "lag behind the times." This idea is so pervasive that it deserves comment quite apart from its present status in sociological thought.

The lesson of industrial accident law, as here described, may be quite the opposite of the lesson that Ogburn drew. In a purely objective (nonteleological) sense, social processes—and the legal system—cannot aptly be described through use of the idea of lag. When, in the face of changed technology and new problems, a social arrangement stubbornly persists, there are *social* reasons why this is so; there are explanations why no change or slow change occurs. The legal system is a part of the total culture; it is not a self-operating machine. The rate of response to a call for change is slow or fast in the law depending upon who issues the call and who (if anybody) resists it. "Progress" or "catching up" is not inevitable or predictable. Legal change, like social change, is a change in behavior of individuals and groups in interaction. The rate of change depends upon the kind of interaction. To say that institutions lag is usually to say no more than that they are slow to make changes of a particular type. But why are they slow? Often the answer rests on the fact that these institutions are controlled by or respond to groups or individuals who are opposed to the specific change. This is lag only if we feel we can confidently state that these groups or individuals are wrong as to their own self-interest as well as that of society. Of course, people *are* often wrong about their own self-interest; they can be and are short-sighted, ignorant, maladroit. But ignorance of this kind exists among progressives as well as among conservatives—among those who want change as well as among those who oppose it. Resistance to change is "lag" only if there is only one "true" definition of a problem—and one "true" solution.

There were important reasons why fifty years elapsed before workmen's compensation became part of the law. Under the impact of industrial conditions

85. *Id.* at 201.
86. *Id.* at 236.
87. See S. CHASE, THE PROPER STUDY OF MANKIND 115-17 (1st ed. 1948). For other applications of cultural lag, see H. Hart, *Social Theory and Social Change*, in SYMPOSIUM ON SOCIOLOGICAL THEORY 196, 219-25 (Gross ed. 1959). *See generally* H. Hart, *The Hypothesis of Cultural Lag: A Present Day View*, in TECHNOLOGY AND SOCIAL CHANGE 417-34 (Allen ed. 1957).

Americans were changing their views about individual security and social welfare. Dean Pound has remarked that the twentieth century accepts the idea of insuring those unable to bear economic loss, at the expense of the nearest person at hand who can bear the loss. This conception was relatively unknown and unacceptable to judges of the nineteenth century.[88] The fellow-servant rule could not be replaced until economic affluence, business conditions, and the state of safety technology made feasible a more social solution. Labor unions of the mid-nineteenth century did not call for a compensation plan; they were concerned with more basic (and practical) issues such as wages and hours. Note the form that the argument for workmen's compensation took, after 1900, in the following quotation; few Americans reasoned this way fifty years earlier.

> [S]uppose you carry an accident policy and are negligent in stepping from a street car. Do you not expect the insurance company to pay? If you negligently overturn a lamp and your house burns, do you not expect the fire insurance company to pay? That is what insurance is for—to guard against the slips and mistakes that are characteristics of human nature. . . .
>
> Before granting a pension do we ask whether a man used due care in dodging the bullets, or do we plead that he voluntarily assumed the risk? Then why, when a man courageously volunteers to do the dangerous work in transportation, mining, building, etc., should it seem wrong to grant him or his dependents compensation in case of accidents?[89]

Social insurance, as much as private insurance, requires standardization and rationalization of business, predictability of risk, and reliability and financial responsibility of economic institutions. These were present in 1909, but not in 1850.

Prior to workmen's compensation, the legal system reflected existing conflicts of value quite clearly; the manifold exceptions to the fellow-servant rule and the primitive liability statutes bear witness to this fact. These were no symptoms of "lag"; rather, they were a measure of the constant adjustments that inevitably take place within a legal system that is not insulated from the larger society but an integral part of it. To be sure, the courts frequently reflected values of the business community and so did the legislatures, but populist expressions can easily be found in the work of judges, legislatures, and juries. In the absence of a sophisticated measuring-rod of past public opinion—and sophisticated concepts of the role of public opinion in nineteenth century society—who is to say that the legal system "lagged" behind some hypothetical general will of the public or some hypothetically correct solution?

The concept of lag may also be employed in the criticism of the courts' use of judicial review to retard the efficacy of social welfare legislation. In

88. R. Pound, *The Economic Interpretation and the Law of Torts*, 53 HARV. L. REV. 365, 376 (1940).

89. [1907-1908] WIS. BUREAU OF INDUSTRIAL AND LABOR STATISTICS THIRTEENTH BIENNIAL REP. (1909), *quoted in* AUERBACH 586.

1911, the New York Court of Appeals declared the state's compulsory workmen's compensation act unconstitutional. As a result of this holding, the state constitution had to be amended—two years later—before workmen's compensation was legally possible in New York.[90] Because of the New York experience, six states also amended their constitutions and others enacted voluntary plans. The issue was not finally settled until 1917, when the United States Supreme Court held both compulsory and elective plans to be constitutional.[91] But it adds little to an understanding of social process to describe this delay in terms of the concept of cultural lag. Courts do not act on their own initiative. Each case of judicial review was instigated by a litigant who represented a group in society which was fighting for its interests as it perceived them; these were current, real interests, not interests of sentiment or inertia. This is completely apart from consideration of what social interests the courts thought they were serving in deciding these cases—interests which hindsight condemns as futile or wrong, but which were living issues and interests of the day.

Conflicts of value also arose in the legislatures when they began to consider compensation laws. The Massachusetts investigating commission of 1903 reported a workmen's compensation bill to the legislature, but the bill was killed in committee on the ground that Massachusetts could not afford to increase the production costs of commodities manufactured in the state.[92] Once more, the emergence of compensation depended upon a perception of inevitability—which could cancel the business detriment to particular states which enacted compensation laws—and of general economic gain from the new system. It is not enough to sense that a social problem exists. Rational collective action demands relatively precise and detailed information about the problem, and clear placement of responsibility for proposing and implementing a solution. For many years legislatures simply did not consider it their responsibility to do anything about industrial injuries. Since they did not view accidents as a major social problem, and since state legislatures were weak political structures, they were content at first to leave accidents to tort law and the courts.[93] Moreover, state agencies were not delegated the task of collecting information on the nature and extent of industrial accidents until relatively late. The Wisconsin legislature created a Bureau of Labor and Indus-

90. N.Y. CONST. art. 1, § 19, was added in 1913; the new compensation law it authorized was enacted that same year. *See* Ch. 816, [1913] N.Y. Laws 2277.

91. New York Cent. R.R. v. White, 243 U.S. 188 (1917); Hawkins v. Bleakly, 243 U.S. 210 (1917). In Mountain Timber Co. v. Washington, 243 U.S. 219 (1917), the Court also held an exclusive state insurance fund to be constitutional.

92. R. Warner, *Employers' Liability as an Industrial Problem*, 18 GREEN BAG 185, 192 (1906).

93. "Laying the personal injury burdens of production upon the things produced . . . should have been efficiently recognized long ago, and would have been had the lawmaking power appreciated that it is its province, not that of the courts, to cure infirmity in the law." Borgnis v. Falk Co., 147 Wis. 327, 370, 133 N.W. 209, 223 (1911) (Marshall, J., concurring).

trial Statistics in 1883, but did not provide for the collection of data on industrial accidents until 1905.[94] When a need for accident legislation was perceived, individual legislators, under pressure of constituencies, began to introduce work accident indemnity bills. Some were inadequately drafted; most were poorly understood. In order to appraise potential legislation, investigating commissions were created to collect information, weigh the costs and report back alternative solutions.

What appears to some as an era of "lag" was actually a period in which issues were collectively defined and alternative solutions posed, and during which interest groups bargained for favorable formulations of law. It was a period of "false starts"—unstable compromise formulations by decision makers armed with few facts, lacking organizational machinery, and facing great, often contradictory, demands from many publics. There was no easy and suitable solution, in the light of the problem and the alignment of powers. Indeed, workmen's compensation—which today appears to be a stable solution —was only a compromise, an answer acceptable to enough people and interest groups to endure over a reasonably long period of time.

Part of what is later called "lag," then, is this period of false starts—the inadequate compromises by decision makers faced with contradictory interest groups pressing inconsistent solutions. There may not *be* a "solution" in light of the alignment of interests and powers with respect to the problem at any given point in time. Perhaps only a compromise "solution" is possible. What later appears to be the final answer is in fact itself a compromise—one which is stable over some significant period of time. Sociologically, that is what a "solution" to a problem is: nothing more than a stable compromise acceptable to enough people and interest groups to maintain itself over a significant period of time. Theoretically, of course, total victory by one competing interest and total defeat of another is possible. But in a functioning democratic society, total victories and defeats are uncommon. Total defeat would mean that a losing group was so utterly powerless that it could exert no bargaining pressure whatsoever; total victory similarly would imply unlimited power. In the struggle over industrial accident legislation, none of the interests could be so described. Different perceptions of the problem, based at least in part on different economic and social stakes, led to different views of existing and potential law. When these views collided, compromises were hammered out. Workmen's compensation took form not because it was (or is) perfect, but because it represented a solution acceptable enough to enough interests to outweigh the costs of additional struggle and bargaining. If there was "lag" in the process, it consisted of acquiescence in presently acceptable solutions which

94. Ch. 416, §§ 1, 4, [1905] Wis. Laws 680, 682.

turned out not to be adequate or stable in the long run. "Lag" therefore at most means present-minded pragmatism rather than long-term rational planning.[95]

B. *Cross-Cultural Borrowing*

The adoption of workmen's compensation in America does represent an instance of what can be called conscious cross-cultural borrowing. Workmen's compensation was not an American innovation; there were numerous European antecedents. Switzerland passed a workmen's compensation act in 1881; Germany followed in 1884 with a more inclusive scheme. By 1900 compensation laws had spread to most European countries. In 1891 the United States Bureau of Labor commissioned John Graham Brooks to study and appraise the German system. His report, published in 1893, was widely distributed and successfully exposed some American opinion-leaders to the existence of the European programs.[96] Most of the state investigating commissions also inquired into the European experience, and a number of early bills were modeled after the German and British systems.

Though workmen's compensation can therefore be viewed as an example of cross-cultural borrowing, care must be exercised in employing the concept. Successful legal solutions to social problems are often borrowed across state and national lines but this borrowing must not be confused with the actual "influence" of one legal system over another. "Influence" carries with it an implication of power or, at the least, of cultural dominance. The forces that led to a demand for workmen's compensation were entirely domestic, as this study has argued. The fact that European solutions to similar problems were studied and, to an extent, adopted here shows not dominance but an attempt to economize time, skill, and effort by borrowing an appropriate model. It would be quite wrong to detect European legal "influence" in this process. The existence of the European compensation plans was not a cause of similar

95. Other instances of supposed cultural lag can be analyzed in similar terms. For example, Ogburn used exploitation of the forests and the tardy rise of conservation laws as another illustration of the lag. *See* W. OGBURN, *supra* note 84, at 203-10. Professor Hurst's elaborate study of law and the Wisconsin lumber industry demonstrates that the legal system supported the exploitation of the forests of Wisconsin in the 19th century; the public did not and would not consider the ultimate social costs of destroying the forests. "Common opinion through the lumber era considered that the public interest *had no greater concern* than the increase of the productive capacity of the general economy." J. WILLARD HURST, LAW AND ECONOMIC GROWTH 261 (1964) (emphasis added). "[T]he dominant attention of nineteenth-century policy was upon promotional rather than regulative use of law." *Id.* The crucial problem was how to develop and settle the continent, not how to conserve or reforest. Certainly no one was concerned with playgrounds for unborn urban masses. People backed demands arising out of immediate interests: the development of stable, economically prosperous communities. Courts reflected these attitudes. Blindness to future needs for natural resources did not result from evil intentions or from a yielding to the "pine barons"; the law reflected "prevailing community values," seeking concrete solutions to problems concretely and currently perceived. *Id.*

96. *See* 1 A. LARSON, WORKMEN'S COMPENSATION § 5.20 (1964).

American statutes. Rather, the interest shown in the foreign experiences was a response to American dissatisfaction with existing industrial accident law.[97] Similarly, the current drive for an American *ombudsman* is not an example of the "influence" of Scandinavian law. A foreign model here sharpens discussion and provides a ready-made plan. Yet the felt need for such an officer has domestic origins.

C. *Great Men and Social Change*

Sociologists are fond of pointing out the inaccuracy of the "great-man theory of history," which holds that particular persons play irreplaceably decisive roles in determining the path of social change. The influence of single individuals, they say, is hardly as critical as historians would have us believe.[98] The role of outstanding persons in bringing about workmen's compensation acts seems on one level quite clear. In Wisconsin, Roujet Marshall excoriated the existing system from the bench; off the bench he was a vigorous champion of the new law and, indeed, helped draft it. John R. Commons worked tirelessly for passage of the act, and served on the first Industrial Commission whose obligation it was to administer the law.[99] His writings and teachings helped mobilize informed public opinion and virtually created a lobby of academicians for workmen's compensation. Political figures, businessmen, union leaders, and others played active roles in the passage of the law. It is quite tempting to say that the Wisconsin law would be unthinkable but for the work of Marshall, or Commons, or LaFollette and the Progressive tradition in the state, or the craftsmanship of Wisconsin's pioneering legislative reference service under the skilled leadership of Charles McCarthy.[100] Reformers and academicians served as important middlemen in mediating between interest groups and working out compromises. Their arguments legitimated the act; their zeal enlisted support of middle-class neutrals. They were willing to do the spadework of research, drafting, and propagandizing necessary for a viable law. In the passage of many other welfare and reform laws, outstanding personalities can be found who played dominant roles in creating and leading public opinion—for example, Lawrence Veiller for the New York tenement housing law of 1901,[101] Harvey Wiley for the Federal Food and Drug Act.[102]

The great-man hypothesis is not susceptible of proof or disproof. But the course of events underlying workmen's compensation at least suggests that

97. Of course, cross-cultural borrowing of legal institutions presupposes a certain level of world interchange of culture. At the time workmen's compensation was adopted, American intellectuals were in close communication with Europe, and academics were in particular infatuated with things German. African or Asiatic models—had they existed—most likely would have been ignored. America was disposed to learn from Englishmen and Germans, not from Chinese or Bantus.

98. *See, e.g.*, FREEDMAN 83 (rev. ed. 1956).

99. *See* 2 J. COMMONS, INSTITUTIONAL ECONOMICS 854 (1934).

100. On McCarthy, see J. COMMONS, MYSELF 107-11 (1934).

101. *See generally* R. LUBOVE, THE PROGRESSIVES AND THE SLUMS (1962).

102. *See* O. ANDERSON, JR., THE HEALTH OF A NATION (1958).

social scientists are properly suspicious of placing too much reliance on a great-man view. If the view here expressed is correct, then economic, social, political and legal forces made workmen's compensation (or some alternative, such as FELA) virtually inevitable by the end of the nineteenth century. Outstanding men may be necessary in general for the implementation of social change; someone must take the lead in creating the intellectual basis for a change in perception. Nonetheless, when a certain pattern of demand exists in society, more than one person may be capable of filling that role. Particular individuals are normally not indispensable. The need is for talent—men with extraordinary ability, perseverance, and personal influence, men who can surmount barriers and accomplish significant results. Obviously, the absence of outstanding persons interested in a particular cause can delay problem solving or lead to inept, shoddy administration. The appearance of truly exceptional persons at the proper moment in history is undoubtedly not automatic. But talent, if not genius, may well be a constant in society; and the social order determines whether and in what direction existing talent will be exerted.

Thus, it would be foolish to deny that specific individuals exert great influence upon the development of social events, and equally foolish to conclude that other persons could not have done the job as well (or better) if given the opportunity. "Great men," however, must be in the right place, which means that society must have properly provided for the training and initiative of outstanding persons and for their recruitment into critical offices when needed. In difficult times, great businessmen, political leaders, musicians, or physicists will emerge. "Great men" appear "when the time is ripe"—but only insofar as society has created the conditions for a pool of creative manpower dedicated to the particular line of endeavor in which their greatness lies.

POSTSCRIPT: WORKMEN'S COMPENSATION AND AFTER

We have called workmen's compensation a solution to the problem that called it forth, defining a solution as a stable compromise. In what sense can the present system be called stable? A literature of attack on it is certainly at hand.[103] It has been criticized as not "adaptable enough to keep abreast of a changing environment";[104] some say it has not "removed litigiousness";[105] at mid-century, others report that "despite the progress from the modest beginnings of 50 years ago, employers and labor are both dissatisfied with workmen's compensation."[106] In what sense, then, has workmen's compensation been a solution at all?

103. *See generally* H. SOMERS & A. SOMERS, *supra* note 56, at 268-89; A. Brodie, *The Adequacy of Workmen's Compensation as Social Insurance: A Review of Developments and Proposals*, 1963 WIS. L. REV. 56, 63-91.
104. H. SOMERS & A. SOMERS, *supra* note 56, at 269.
105. *See id.* at 178; A. Brodie, *supra* note 103, at 63.
106. A. Brodie, *supra* note 103, at 74.

It has certainly not been stable in the sense of unchanging. Few, if any statutory programs have been so frequently tampered with. Not a session of the Wisconsin legislature, for example, goes by without amendments—some major, some minor—proposed and frequently passed.[107] Many changes have also come about through judge-made law, or through judicial ratification of changes initiated by the various state commissions. The original concept of the industrial accident almost seems buried under layers of statutory and judicial accretion. In some states compensation may be paid for heart attacks suffered on the job.[108] Not *all* heart attacks, to be sure, are compensable; the hairline distinctions and causistry involved in deciding which ones bring recovery rival the ramifications of the fellow-servant rule at its height.[109] Thousands of accidents are compensable that have nothing to do with the impact of machine upon man in an industrial setting. A bartender hit by a stray bullet fired by a customer's wife,[110] a teacher struck by a student's missile,[111] and a traveling salesman burnt in his sleep by a hotel fire[112] have recovered for their losses. Moreover, the law seems to have wandered from the notion that compensation covers only economic loss. Thus, losses of arms and legs are compensable without showing a connection with the injured man's power to earn,[113] and awards have been occasionally made for disfigurement seemingly unrelated to earning capacity.[114] The full significance of these and other changes would require extensive treatment in itself. But the stupendous number of reported cases, the huge bulk of the technical literature on the law of compensation, and the constant statutory tinkering with the program indicate that workmen's compensation has embarked on a voyage comparable to that of the fellow-servant rule, except that the direction is toward expanding rather than contracting a principle. Compensation is stable, then, only in the sense that it is the base onto which accretions are added. The many changes are in it and to it, not from it. In this respect it is similar to the federal income tax law—constantly amended and tinkered with, but in the predictable future accepted in essential structure as a fact of legal and social life.

If all the tendencies of the case law were followed to their logical limit, then workmen's compensation would end up covering workers for all illnesses, injuries, and disabilities which might be linked somehow to the job—either

107. Thus, in 1963 the Wisconsin statute was amended so that (among other things) a worker who suffers injury on the job and whose hearing aid is damaged, can recover also for the damage to his hearing aid. WIS. STAT. ANN. § 102.01 (Supp. 1966).

108. *E.g.*, Rebsamen West, Inc. v. Bailey, 396 S.W.2d 822 (Ark. Sup. Ct. 1965).

109. *See generally* 1 A. LARSON, *supra* note 96, at § 38.64 (1965); J. Wigginton, *The Heart of the Working Man—A Post Mortem*, 17 U. FLA. L. REV. 543 (1965).

110. Industrial Indem. Co. v. Industrial Accident Comm'n, 95 Cal. App. 2d 804, 214 P.2d 41 (Dist. Ct. App. 1950).

111. Whitney v. Rural Independent School Dist. No. 4, 232 Iowa 61, 4 N.W.2d 394 (1942).

112. Wiseman v. Industrial Accident Comm'n, 46 Cal. 2d 570, 297 P.2d 649 (1956).

113. Alaska Indus. Bd. v. Chugach Elec. Ass'n, 356 U.S. 320, 323 (1958).

114. See 2 A. LARSON, *supra* note 96, at § 58.32.

causally, or because they happened during working hours. Present law is far from reaching this point, and most likely it cannot reach it, within the limits of a compensation system. Vastly increased coverage would levy an unacceptable tax on industry, and if compensation reached the point where it became a kind of total social insurance for workers, industry would demand further spreading of the risk. Institutionally, it is difficult for courts and legislatures to go fast or far *within* a compensation system, since the traditional limits of the system help define its legitimacy, and its legitimacy in turn suggests definite limits. The words of the statute prevent judges from going past a certain invisible point in stretching language. Legislatures make only marginal changes because of the absence, so far, of a strong sustained call for a great broadening of scope.

One possible change in direction would be an abandonment of compensation in favor of a more comprehensive plan secured by state insurance. Such a change would give up the theory that compensation costs are allocated in accordance with industrial responsibility for the injuries of employees and replace it with a more general social theory of welfare and risk. The British have reached this stage.[115] Whether the United States will in the near future is doubtful. Old-age assistance, medicare and other welfare programs may blunt the demand—or, conversely, they may prepare the way for it. Perhaps workmen's compensation will fall if the irrationalities of the present system become so gross that all parties in interest agree to abandon it, just as the fellow-servant rule was abandoned.

In short, workmen's compensation is in the second of the three stages which the fellow-servant rule itself went through—the stage of technical complexity and unstable compromise. Nothing here is intended to suggest that the third stage must come within some definite time-period or that it must come at all. To make definite predictions would be foolish. Even sensible guessing is not possible without careful comparative study of the life-cycle of legal rules and doctrines. It is clear, however, that the general three-stage pattern followed by the fellow-servant rule is quite common.[116] This is because such a pattern is the natural result of the impact of social change, moving more or less in one

115. National Insurance (Industrial Injuries) Act of 1946, 9 & 10 Geo. 6, ch. 62, *as amended*, 11 & 12 Geo. 6, ch. 42 (1948).

116. Another example is provided by the national quotas system in immigration law, which was unpopular with some groups and under attack throughout its history. Immigration Act of 1924, ch. 190, 43 Stat. 153. It went through a period of high complexity and unstable compromises before being abolished in 1965. Act of Oct. 3, 1965, Pub. L. No. 89-236, § 1, 79 Stat. 911. In the middle stage, the basic restrictive features of immigration law were complicated by private immigration and naturalization bills, as well as special statutory provisions for relatives of citizens, refugees, and others. Between 1952 and 1965 probably "two out of every three immigrants entered the United States outside the quota restrictions." It was finally replaced by a more "liberal" bill, which carefully protected the vital interests of those groups which opposed free, open immigration, while removing the complexity and iniquity of the system of national quotas. *See* T. Scully, *Is the Door Open Again?—A Survey of our New Immigration Law*, 13 U.C.L.A.L. REV. 227, 236 (1966). *See generally id.* at 242-44.

definite direction, upon a given area of law. If the proper societal demands are made, wide-reaching changes in law inevitably come about; and the process of change in the law, despite enormous diversities, produces noticeable regularities of behavior.