

THE ILLUSION OF EFFICIENCY IN WORKERS' COMPENSATION "REFORM"

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I. INTRODUCTION

Around the world, policymakers are criticizing or cutting back social welfare programs as unaffordable in an age of global economic competition.¹ In the conventional wisdom, social welfare ideals must yield to economic realities.²

¹ "The modern welfare state, the social protections that rich nations enacted to ameliorate the harsh inequalities of industrial capitalism, is now in peril. Some would say it is already obsolete." WILLIAM GREIDER, *ONE WORLD, READY OR NOT: THE MANIC LOGIC OF GLOBAL CAPITALISM* 23 (1997) (arguing for an alternative global economic consciousness that incorporates strong social and environmental protections). Greider compares and critically analyzes recent cutbacks in welfare state protections in Germany, Japan, and the United States. *Id.* at 333-359. *See also* POVERTY, INEQUALITY & THE FUTURE OF SOCIAL POLICY; WESTERN STATES IN THE NEW WORLD ORDER (Katherine McFate ed. 1995). Media reports on the demise of the Western welfare state are legion:

Pressed by global competition, Europe's elaborate systems of social protection -- from liberal maternity leaves to early pensions, long holidays, free medical care and generous public payrolls -- are now under attack as baggage that central governments can no longer afford.

Celestine Bohlen, *Officially, Sicily Is Desperately Short of Jobs, but Sub Rosa, Things Are Rosier*, N.Y. TIMES, June 17, 1997 at A6 (discussing rise in black market economy as result of European economic changes). In a news report declaring that "Sweden is rapidly scaling back its vast social welfare system," Prime Minister Carl Bildt was quoted explaining that "We must have systems we are certain of being able to pay for." Richard Stevenson, *Swedes Facing Rigors of Welfare Cuts*, N.Y. TIMES, March 14, 1993 at 1.

² "Since the end of the Cold War, the dominant fact of Western politics has been the crisis of the welfare state. Global economic competition and aging populations are making large public sectors unsustainable." *Faites Attention, Newt*, WALL ST. J., June 4, 1997 (editorial). "In a global economy, capital will flow to areas where returns are highest and away from those where it is savaged by taxes, regulations and tort liabilities. So the U.S. has no choice but to stop building welfare and entitlement dependencies it can no longer afford. . . ." Paul Craig Roberts, *The G.O.P. Contract Is Too Timid*, N.Y. TIMES, Dec. 3, 1994 at 23 (op-ed commentary by Cato Institute Fellow and former Assistant Treasury Secretary).

William Greider explains that government debt and capital exit have worked together in a vicious

Recent "reforms"³ of U.S. workers' compensation systems exemplify this pattern of perceived tension between the goals of social welfare programs and economic growth. From the late 1980s through the 1990s, many states have enacted legislation imposing substantial restrictions on workers' compensation benefits available to injured workers.⁴ Underlying these purported reforms is a widespread belief that a general trend of benefit growth during the 1970s and 1980s drove costs to crisis levels.⁵ These benefit cuts are typically justified as necessary to restore an economically sound balance to the system.⁶

circle to tighten the squeeze on welfare programs: capital exit leaves more citizens in need of state assistance which in turn leads to higher deficits or increased taxes and further capital exit (although he argues that such pressures are the result of political choices, not simply inevitable economic realities). *See supra* note ?, at 360.

³ Although the term "reform" typically implies improvement, this article aims to question the claim that recent law changes in workers' compensation improve the system. I use that problematic term nonetheless to acknowledge that supporters of the changes have presented them as improvements, and I assume that all claims to "reform" are a matter of political perspective.

⁴ *See infra* Part One (II)(C) notes ?-? & accompanying text.

⁵ "Until the mid-1980s, workers' comp insurance costs were driven primarily by ever increasing cash benefits for injured workers. In the last several years, however, . . . medical expenses have taken the place as the driving force behind cost increases." Roger Thompson, *Reforming Workers' Compensation*, EDITORIAL RESEARCH REPORTS, April 13, 1990 (Congressional Quarterly publication). "States are paying more and paying longer for workers' compensation claims, and they are including more things for coverage." Roger Thompson, *Fighting the High Cost of Workers' Comp*, NATION'S BUSINESS, March 1990, at 21 (quoting consulting firm president Robert J. Mill). A 1990 survey of employers by the insurance consulting branch of the Towers Perrin firm reported that the system was "in crisis" and that the top two reasons employers cited were rising costs of medical benefits and widening definitions of work-related injuries. *See Employers paid \$60 Billion in 1990, More than Doubling Amount in Five Years*, 1 BNA'S WORKERS' COMPENSATION REPORT, Dec. 25, 1990 at 1. *See also* Ruth Gastel, *Workers' Compensation*, Insurance Information Institution, August 1997 (available on LEXIS, NEWS library), (insurance industry report summarizing historical background of recent reforms by explaining that expansion of coverage and benefits have been accompanied by increasing pressures to reduce employers' costs). For my discussion of this expansion of benefits, *see infra* text accompanying notes ?-?.

⁶ *See, e.g., NCCI President Says Carriers' Solvency Depends on Changes, Not Rate Hikes*, 1 BNA'S WORKERS' COMPENSATION REPORT, Dec. 11, 1990 at 1 ("the only viable solution is reform" [of workers' compensation benefit systems], according to William Hager, president of insurance industry association). A flyer issued by a state official in support of West Virginia's 1995 benefit reform legislation stated, "Our system must be fixed NOW or our workforce

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As one insurance industry executive explained, "the question of limits" is at the center of the workers' compensation crisis: "'How much do we want to pay injured workers?' . . . society must weigh the compensation that will be paid to a worker with a partial disability against the economic loss that will be sustained if a business moves out of state -- or out of the country."⁷

becomes less competitive in the world marketplace." Emily A. Spieler, *Assessing Fairness in Workers' Compensation Reform: A Commentary on the 1995 West Virginia Workers' Compensation Legislation*, 98 W. VA. L. REV. 23, 129 (1995) (citing Bureau of Employment Programs, WV Workers' Compensation Crisis, The Solutions (Feb. 6, 1995) (unpublished handout distributed in legislative session)).

⁷ James M. Burcke, *Comp system needs intensive care*, BUS. INS., Oct. 19, 1992 at 34 (quoting David A. Kocher, group executive for property/casualty operations at Aetna Life & Casualty Co., at a 1992 conference of insurers and insurance agents). Another insurance industry representative (and former state insurance regulator) explained, "The problems in the system . . . come down to a few basics: greed, abuse, and generosity. . . . We're a generation that wants to have it all," just like with the federal deficit and health care." Joseph A. Edwards, *Workers comp system plagued by greed and generosity*, LEWISTON MAINE SUNDAY, Feb. 7, 1993 at 3D (op-ed essay). See also ORIN KRAMER & RICHARD BRIFFAULT, WORKERS' COMPENSATION: STRENGTHENING THE SOCIAL COMPACT 4 (1991) ("Plainly put, the dollars available to pay workers' compensation costs are not limitless.").