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Mary E. O'Connell

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Contingent Lives: The Economic Insecurity of Contingent Workers

Mary E. O'Connell*

In the paper he contributes to this symposium,¹ Dr. Richard Belous once again provides his readers with some of the best data available on the state of the contingent work force.² While dismissing the media projection that one worker in two will soon be a contingent employee,³ Dr. Belous cautions that the numbers are large.⁴ At least one in four employed Americans — and perhaps closer to one in three — is already a member of the contingent work force.⁵ And while the period of most dramatic growth may have passed, the ranks of contingent workers are expected to increase, if more slowly, in the years to come.⁶

Dr. Belous also outlines the benefits and the costs of contingent employment.⁷ Weighing both, he concludes that contingent employment is a valuable response to international competition and is here to stay.⁸ The challenge, Dr. Belous suggests, is not to eradicate contingent employment, but to redress its deficiencies, especially its impact on workers' access to

* Professor, Northeastern University School of Law. B.A., 1970, Brandeis University; J.D., 1975, Northeastern University School of Law. Thanks to my colleagues, Wendy E. Parmet and Lucy Williams, who reviewed an earlier draft of this comment. Thanks also to librarian Kim Dulin for procuring even the most obscure sources, to Theodore Sharp and Catherine Cragg for excellent research assistance, and to my secretary, Evelyn Wiley, who makes me look far more organized than I really am. Thanks also to the organizers of and participants in this very stimulating symposium.

1. Richard S. Belous, *The Rise of the Contingent Work Force: The Key Challenges and Opportunities*, 52 WASH. & LEE L. REV 863 (1995).

2. *Id.*

3. *Id.* at 864.

4. *Id.* at 867-68.

5. *Id.* at 868 tbl. 2.

6. *Id.* at 868.

7. *Id.* at 873-75.

8. *Id.* at 876.

social welfare benefits.⁹ On this point I agree completely with Dr. Belous; indeed, I would state the case more pointedly. Contingent work radically alters the basic structures of employment and, in doing so, reveals what has long been invisible: That in America, access to crucial social benefits is linked not simply to the work force, but to assumptions about work that contingent employment defies.

I. *The Contraction of Work-Based Benefits*

A. *Health Insurance*

During the last decade, the work-based portion of our social welfare system has contracted severely.¹⁰ By 1993 (the latest year for which data are available), the number of Americans without health insurance of any kind, public or private, had reached forty-one million.¹¹ This represents 18% of the nonelderly population,¹² and it reflects an ever widening gap. As recently as 1989, the number of uninsured Americans was below thirty-five million, or 16% of the nonelderly population.¹³

Obviously, not every uninsured American is a contingent worker, but there are data — including some that Dr. Belous cites¹⁴ — that strongly suggest that contingent work plays an important role in creating and maintaining

9 *Id.*

10. Like Dr. Belous, I define the term "social welfare system" broadly to encompass work-based contractual benefits, such as private pensions, health insurance, disability insurance, and life insurance; work-based statutory benefits, like workers' compensation, Social Security Old Age, Survivors' and Disability Insurance (OASDI), 42 U.S.C. §§ 401-433 (1988 & Supp. V 1993), and Unemployment Insurance (UI), 42 U.S.C. §§ 501-504 (1988 & Supp. V 1993); and non-work-based benefits, such as Medicare, 42 U.S.C. §§ 1395-1395ccc (1988 & Supp. V 1993), Medicaid, 42 U.S.C. §§ 1396-1396v (1988 & Supp. V 1993), Supplemental Security Income (SSI), 42 U.S.C. §§ 1381-1383d (1988 & Supp. V 1993), and Aid to Families with Dependent Children (AFDC), 42 U.S.C. §§ 601-687 (1988 & Supp. V 1993). Obviously, the non-work-based portion of the social welfare system is contracting severely as well. See Mickey Kaus, *The G.O.P.'s Welfare Squeeze*, N.Y. TIMES, Apr. 6, 1995, at A31 (describing attempts at welfare reform); Christopher Georges, *GOP Senators Want \$25 Billion More To Be Slashed from Welfare Programs*, WALL ST. J., July 13, 1995, at A4 (same).

11. EMPLOYEE BENEFIT RESEARCH INSTITUTE, SPECIAL REPORT SR-28 AND ISSUE BRIEF NUMBER 158, SOURCES OF HEALTH INSURANCE AND CHARACTERISTICS OF THE UNINSURED: ANALYSIS OF THE MARCH 1994 CURRENT POPULATION SURVEY 4 (1995) [hereinafter EBRI REPORT 1995].

12. *Id.* Because 95.5% of the elderly are covered by the public Medicare program, they are excluded from most calculations of the uninsured population. *Id.*

13. *Id.* at 5 tbl. 1.

14. Belous, *supra* note 1, at 875 tbl. 6.

the health coverage gap. A recent study by the Employee Benefit Research Institute (EBRI) describes the uninsured population in terms characteristic of contingent workers.¹⁵ The study notes that many of the uninsured are "not consistently employed by the same employer."¹⁶ They "may have a weaker (or temporary) attachment to the work force, and have less disposable income to allocate to the purchase of health insurance."¹⁷ According to the report, firms that do not provide health insurance "employ many part-time workers and experience rapid turnover."¹⁸

The study also documents the shrinking portion of the population with private, employer-provided health coverage. In 1988, 66.8% of Americans under age sixty-five had employer-provided health coverage.¹⁹ By 1993, that number had fallen to 60.8%²⁰

An earlier EBRI study focused on workers who failed to participate in their employers' health plans.²¹ Not surprisingly, some of these workers were covered by a spouse's or parent's plan.²² Others could not afford the employee contribution required for coverage.²³ But fully 36% — mostly part-time, contract, or temporary workers — did not participate in their employer's plan because they were ineligible.²⁴

Finally, an uninsured worker has no coverage to offer her or his dependents. Although these dependents may not be contingent workers themselves, their plight is directly linked to that of the contingent employee. Perhaps the most depressing statistic in EBRI's report is this: The fastest growing segment of the uninsured population is children. In 1992, America boasted 10.2 million uninsured children.²⁵ By 1993, the number was 11.1 million.²⁶

15. See EBRI REPORT 1995, *supra* note 11, at 9-19 (describing the uninsured).

16. *Id.* at 14.

17. *Id.* at 15.

18. *Id.* at 14.

19. *Id.* at 7 tbl. 2.

20. *Id.*

21. EMPLOYEE BENEFIT RESEARCH INSTITUTE., SPECIAL REPORT SR-24 AND ISSUE BRIEF NUMBER 152, EMPLOYMENT-BASED HEALTH BENEFITS: ANALYSIS OF THE APRIL 1993 CURRENT POPULATION SURVEY 2 (1994) [hereinafter EBRI REPORT 1994].

22. *Id.* at 13.

23. *Id.*

24. *Id.* Over 66% of the ineligible workers were part-time, contract, or temporary workers. *Id.*

25. EBRI REPORT 1995, *supra* note 11, at 18.

26. *Id.* The vast majority of these children had a working parent. Only 1.5 million

B. Pension Coverage

Unfortunately, health insurance is not the only incredible shrinking benefit. In a 1992 *Wall Street Journal* article on declining pension coverage, Dr. Belous predicted that by 1993 only 40% of American workers would be covered by private pensions, down from a peak of 50% in 1980.²⁷ In fact, as I suspect Dr. Belous would agree, the pension picture has grown more complex in the ensuing three years. Defined-benefit plans, once the staple of the industry, have continued to decline precipitously.²⁸ In remarks to a Senate subcommittee last December, Secretary of Labor Robert Reich noted that twenty years ago nine out of every ten workers with pension coverage participated in a defined-benefit plan.²⁹ By 1994, only 60% of pension participants were in defined-benefit plans.³⁰ However, the rapid growth of defined-contribution plans, particularly section 401(k) plans,³¹ has partially offset this decline.

Defined-contribution plans are attractive to employers for several reasons. The one most frequently cited is that defined-contribution plans are cheaper for employers to administer.³² Less loudly trumpeted, but clearly advantageous to employers, is the fact that defined-contribution plans shift the risk that pension investments will perform poorly from the employer to the employee.³³ Although a defined-benefit plan guarantees a certain income

uninsured children had no working parent in the family. Indeed, over half were the children of full-time, year-round workers. *Id.*

27. Cathy Trost, *Labor Letter*, WALL ST. J., Apr. 21, 1992, at A1.

28. Employers terminated a stunning 42,000 defined-benefit plans in a two year period from 1989 to 1991. The American Academy of Actuaries calls this phenomenon "startling." AMERICAN ACADEMY OF ACTUARIES, PRELIMINARY REPORT: RESULTS OF THE AMERICAN ACADEMY OF ACTUARIES SURVEY OF DEFINED BENEFIT PLAN TERMINATIONS 1 (1992) [hereinafter ACTUARIES].

29. *Reich Says Decline in Savings Rate May Hurt Retirement Living Standards*, 21 Pens. & Ben. Rep. (BNA) 2312, 2312 (Dec. 12, 1994).

30. *Id.*

31. I.R.C. § 401(k) (West 1994).

32. Anne Willette, *Few Workers Know Risks of 401(k) Plans*, USA TODAY, Feb. 20, 1995, at 1A, 2A (noting lower cost to employers of savings plans). Willette cites the human resources firm Hay/Huggins' estimate that managing a 401(k) costs less than 75% of the cost of managing a defined-benefit plan. *Id.*, see also ACTUARIES, *supra* note 28, at 10 (stating that cost of defined-benefit plans has become much more important concern to employers).

33. See Camilla E. Watson, *Machiavelli and the Politics of Welfare, National Health, and Old Age: A Comparative Perspective of the Policies of the United States and Canada*, 1993 UTAH L. REV 1337, 1381 (noting that employee assumes investment risk in defined-

at retirement,³⁴ a defined-contribution plan does not.³⁵ Finally, many of the employers who terminate defined-benefit plans either do not replace them at all, leaving their workers with no pension,³⁶ or replace them with less generous plans — nearly always defined-contribution plans.³⁷

The continuing turbulence in the pension area makes it difficult to generalize about American workers' pensions. Owing largely to the popularity of 401(k)'s, overall pension coverage seems to be up slightly, from 42% of workers in 1988 to 43% in 1993,³⁸ contrary to Dr. Belous's earlier prediction.³⁹ But the American Academy of Actuaries' survey data may suggest that although coverage is up, the amount invested in pensions is down.⁴⁰

For at least some contingent workers, however, the pension picture is much clearer — and bleak. The Pension and Welfare Benefits Administration of the Department of Labor recently reported that pension plans cover only 15% of part-time workers.⁴¹ Other estimates are lower.⁴²

contribution plan).

34. See ROBERT L. CLARK & ANN A. MCDERMED, *THE CHOICE OF PENSION PLANS IN A CHANGING REGULATORY ENVIRONMENT* 31 (1990) (outlining risks associated with defined-benefit plans).

35. See *id.* at 13-16 (delineating risks associated with defined-contribution plans).

36. The American Academy of Actuaries study indicated that 34% of defined-benefit plan terminations result in workers losing all pension coverage. ACTUARIES, *supra* note 28, at 14.

37. "In nearly half of the cases where the employer provided some pension coverage after terminating the defined-benefit plan, the benefits of the follow-on plan or plans was rated to be less generous than the benefits provided by the defined-benefit plan that had been terminated." *Id.* at 16.

38. *Labor Department to Propose Changes after Completing Disclosure Rule Review*, 21 Pens. & Ben. Rep. (BNA) 1258, 1259 (June 27, 1994).

39. Trost, *supra* note 27, at A1.

40. This would be true if more generous defined-benefit plans were replaced by less generous defined-contribution plans. See ACTUARIES, *supra* note 28, at 16 (noting 90% probability that post-termination plan will be defined-contribution plan).

41. *Pension Coverage for Women Increases, Section 401(k) Plans on Rise, Survey Shows*, 21 Pens. & Ben. Rep. (BNA) 1053, 1054 (May 30, 1994).

42. See *Future Pension Income Less Certain for Today's Workers, Conference Told*, 21 Pens. & Ben. Rep. (BNA) 2313, 2313 (Dec. 12, 1994) [hereinafter *Future Pension Income*] (noting remarks of Olena Berg, Assistant Secretary of Labor for the Pension and Welfare Benefits Administration, at conference marking twentieth anniversary of ERISA, that coverage of part-time workers is virtually nonexistent). A Labor Department report dated January 27, 1994, put the number of part-timers with pension coverage at slightly more than one-tenth. *Majority of Employees in Small Firms Offered Health Plan in 1992, BLS Finds*, 21 Pens. & Ben. Rep. (BNA) 291, 292 (Jan. 31, 1994).

C. Unemployment Insurance

Lack of pension and health coverage are the gaps in social welfare benefits most often cited in connection with contingent work; indeed, they are the two Dr. Belous notes in his paper.⁴³ In fact, however, the scenario is worse. Moving from the contractual to the statutory side of work-based welfare benefits reveals substantial erosion in the protections ostensibly offered by the Unemployment Insurance (UI) system.⁴⁴ Although UI covers more than 97% of American workers,⁴⁵ the proportion of applicants deemed eligible for benefits is in free-fall. A 1993 General Accounting Office (GAO) report put the reciprocity rate at only 39%⁴⁶ In other words, more than six of every ten unemployed workers who have applied for UI benefits since 1990 have been denied. This is substantially worse than the experience during the recessions of the 1950s, 1960s, and 1970s, when the proportion of unemployed workers receiving UI was typically about 50%,⁴⁷ a rate that is itself low by international standards.⁴⁸

The GAO study describes a complex web of factors that have combined to produce these low reciprocity levels, perhaps the most important being the deteriorating financial status of the state UI trust funds, the source of UI benefits.⁴⁹ During the 1980s, these funds were battered by

43. Belous, *supra* note 1, at 875 tbl. 6, 877 tbl. 7

44. 42 U.S.C. §§ 501-504 (1988 & Supp. V 1993). The federal unemployment compensation system was created by Titles III and IX of the Social Security Act of 1935, Pub. L. No. 74-271, 49 Stat. 620 (1935).

45. U.S. GEN. ACCOUNTING OFFICE, GAO/HRD-93-107, REPORT TO THE CHAIRMAN, SENATE COMMITTEE ON FINANCE, U.S. SENATE: UNEMPLOYMENT INSURANCE: PROGRAM'S ABILITY TO MEET OBJECTIVES JEOPARDIZED 2 (1993) [hereinafter GAO].

46. *Id.*

47. *Id.* at 3.

48. During that time, reciprocity rates were about 60% in Germany, Japan, and Sweden. See FORD FOUNDATION PROJECT ON SOCIAL WELFARE & THE AMERICAN FUTURE, THE COMMON GOOD: SOCIAL WELFARE AND THE AMERICAN FUTURE: POLICY RECOMMENDATIONS OF THE EXECUTIVE PANEL 60 (1989) [hereinafter FORD FOUNDATION].

49. GAO, *supra* note 45, at 3. Most of the funds used to pay UI benefits come from state payroll taxes levied on employers. Four states also levy taxes on employees. ADVISORY COUNCIL ON UNEMPLOYMENT COMPENSATION, UNEMPLOYMENT INSURANCE IN THE UNITED STATES: BENEFITS, FINANCING, AND COVERAGE: A REPORT TO THE PRESIDENT AND CONGRESS 49 (1995) [hereinafter ADVISORY COUNCIL REPORT]. Each state maintains a trust fund with the United States Treasury used for depositing program income and paying UI benefits. GAO, *supra* note 45, at 16. In addition, the UI program provides for automatic federal loans so that the states can continue to pay UI benefits even if state trust funds are depleted. *Id.* Until the 1970s, states rarely used the loan account. *Id.* But three recessions, including back-to-back recessions in 1980 and 1981-82, depleted many state trust fund

a series of recessions.⁵⁰ The states, which control eligibility for UI in addition to collecting UI taxes, responded by ratcheting up their eligibility criteria.⁵¹ Each state requires applicants for UI benefits to prove that they have worked a minimum number of weeks and/or earned a minimum total wage in some designated period. Failure to meet these eligibility criteria results in a denial of benefits.⁵² By raising the minimum weeks or wages needed to qualify for benefits, the states saved money. But they did so by pushing ever increasing numbers of low-wage, part-time, or short duration workers — i.e., contingent workers — out of the UI safety net.⁵³

The GAO study also documented a number of techniques employers use to subvert UI's experience rating. The term "experience rating" means that an employer's UI tax rate increases when the number of layoffs attributable to that employer goes up.⁵⁴ The goal of experience rating is to reduce layoffs by giving employers a financial incentive to retain employees even during low points in the business cycle.⁵⁵ In fact, however, any tactic that

reserves. *Id.* at 16-17. As many as 21 state funds became insolvent. *Id.* at 17

50. GAO, *supra* note 45, at 16-17. During a recession, the funds experience the double burden of decreased contributions and increased payouts. *Id.* at 16.

51. *See id.* at 3 (noting that declining trust fund balances were associated with law changes that restricted program eligibility).

52. The criteria vary significantly from state to state. Massachusetts, for example, requires an applicant to have earned at least \$2,000 during the statutory "base period." MASS. GEN. LAWS ANN. ch. 151A, § 24(a) (West Supp. 1995). This period is usually the four calendar quarters just prior to the application for benefits. *Id.* ch. 151A, § 1. However, a different base can be used in some cases, if the use of the prior four quarters would result in a denial. *Id.* In New York, an applicant must have worked during at least twenty of the last fifty-two weeks or fifteen of the last fifty-two weeks plus forty of the last one hundred and four weeks. N.Y. LAB. LAW § 527 (McKinney 1988). In addition, the New York applicant must have earned an average of at least \$89.25 per week during the weeks she or he worked. N.Y. LAB. LAW § 590(5) (McKinney Supp. 1995).

53. *See* GAO, *supra* note 45, at 3 (noting that, while states improved financial condition of state trust funds, fewer unemployed workers received UI benefits). In fact, the UI eligibility of workers who are available only for part-time work has long been contested terrain. A 1994 survey conducted by the Interstate Conference of Employment Security Agencies (ICESA) found that individuals seeking part-time work only are ineligible for UI benefits in 39 of the 50 states. ADVISORY COUNCIL REPORT, *supra* note 49, at 104.

54. *See* GAO, *supra* note 45, at 16 (stating that employer's tax rates will vary according to its experience in laying off workers who subsequently receive UI benefits).

55. *See* ADVISORY COUNCIL REPORT, *supra* note 49, at 73 (noting argument that experience rating encourages stable employment). By retaining the employees, the employer would avoid an increase in its UI tax rate. *See id.* (noting that highest tax rates are imposed on employers that generate most cost to system).

decreases the number of UI claims attributable to a given employer will serve to reduce the employer's rate.

One tactic noted in the GAO report is the manipulation of employees' hours and wages to prevent them from reaching the minimums needed for UI eligibility.⁵⁶ Another approach involves classifying employees as independent contractors whenever possible because independent contractors are not covered by UI.⁵⁷ Employee leasing may also circumvent UI regulations because the company leasing a worker is sometimes not considered the worker's employer.⁵⁸ If the lessor company is not deemed the employer, it can cut workers at will without experiencing a layoff chargeable to its UI account.⁵⁹

In short, contingent workers are increasingly squeezed out of the UI system, both by ever narrower state eligibility standards and by employers who manipulate their work forces and increase their use of contingent workers in an explicit effort to minimize their contributions to the UI funds.⁶⁰

II. *The Tradition of Provision: Relational Employment*

Documenting the impact of contingent work on the widening gaps in the work-based social welfare system is surely a worthwhile endeavor. No rational reform can proceed in the absence of data. But it is one thing to begin to assemble the data and quite another to decide how to respond. Solutions to the problems that contingent work poses are likely to be some time in the making. At this juncture, it may be most wise simply to ask why the phenomenon of contingent work has riveted the attention of analysts from so many different disciplines. I believe one reason is this: Contingent work is forcing a fundamental realignment of crucial social obligations. It poses

56. GAO, *supra* note 45, at 38. In New York, for example, a worker earning minimum wage who works 20 hours per week or less will not earn the \$89.25 average wage required for eligibility (i.e., \$4.25 x 20 = \$85.00). See N.Y. LAB. LAW § 590(5) (McKinney Supp. 1995) (containing New York's minimum earnings requirement).

57. GAO, *supra* note 45, at 39.

58. *Id.* at 40. This is a very complex area, implicating ERISA's nondiscrimination rules as well as UI regulations. Legislation to address some of these practices is now pending in several states. *Id.*

59. See *id.* (listing employee leasing as contributing factor to declining numbers of UI recipients).

60. Recent recommendations by the Advisory Council on Unemployment Compensation would offer contingent workers some relief. The Council recommends changes in UI eligibility that would ease the burden on low-wage applicants and would prohibit the states from barring claims by part-time workers. ADVISORY COUNCIL REPORT, *supra* note 49, at 17-19

quite starkly the question: What do employers and employees owe one another? The answers it offers are more than a bit troubling.

Employment is inherently a conundrum, for it is simultaneously a transaction and a relation. It is a contract, and it is a way of life. Indeed, one can view employment as a constantly shifting balance, with relation dominating at some points and transaction at others.⁶¹ But the break has never been complete — until, perhaps, now. The defining feature of contingent employment may be that it renders work a nearly pure transaction, stripped of any pretense of relation between employer and employee.

One might well ask, "Does that matter?" My tentative answer is that it matters a great deal because for centuries the employment relation has been a crucial locus of social provision. We should not romanticize this fact. Employer provision has frequently been patronizing and, at times, directly oppressive.⁶² But in light of the enormous outcry against employer mandates in the recent health care debates, it may be useful to remind ourselves that employer-provided benefits, in one form or another, have a very long history.

It may also be useful to remember that the roots of employment law lie in the ancient relation of master and servant, not in the johnny-come-lately law of contract.⁶³ Few contemporary Americans aspire to be servants, and the negative side of that relation, with its constraints on liberty and its lack of dignity, tends to dominate our thinking. But, again at the risk of romanticizing, it seems important to note that by law or custom, masters owed many obligations to their servants.⁶⁴ An indentured servant or apprentice was

61. For two recent works that explore the relational and transactional aspects of employment, one on the macroscopic, the other on the microscopic level, see KAREN ORREN, *BELATED FEUDALISM: LABOR, THE LAW, AND LIBERAL DEVELOPMENT IN THE UNITED STATES* (1991) and Stewart J. Schwab, *Life-Cycle Justice: Accommodating Just Cause and Employment at Will*, 92 MICH. L. REV. 8 (1993). Of course, the classic work on the relational aspect of contracts remains IAN R. MACNEIL, *THE NEW SOCIAL CONTRACT: AN INQUIRY INTO MODERN CONTRACTUAL RELATIONS* (1980).

62. *Infra* text accompanying notes 85-90.

63. One would be bold indeed to venture to pinpoint the birth of contract law, but the writ of *assumpsit* from which modern contract law springs did not emerge in full bloom until the decision in *Slade's Case*, 76 Eng. Rep. 1074 (1602). Unless Henry Maine was sorely mistaken, the status of master and servant long predated contract law. For a detailed study of the persistence of master and servant rules well into the nineteenth century, see ORREN, *supra* note 61, at 79-91.

64. Karen Orren disputes this interpretation, at least as to legal obligations. She states that "whatever household imagery may have been present in the sources, any inference that employers, earlier or later, had a legal responsibility for the welfare of their employees should be approached with extreme caution." ORREN, *supra* note 61, at 100. Orren does not

housed in the master's home, clothed, fed, cared for if he became ill, and trained in the techniques of the master's craft.⁶⁵ In short, the employment relation was the source of the apprentice's housing, maintenance, medical care, and education. Apprentices, of course, were in some sense a privileged class. House servants, a lower caste, were not educated or trained. They were subject to corporal punishment by their masters, and they were bound to them for a fixed term, during which time they were not free to leave.⁶⁶ Their compensation was maintenance and a cash wage.⁶⁷ But there is evidence that even as to the house servant, the master's obligation went further and included maintenance and care during illness. In *The Invention of Free Labor*, Robert Steinfeld quotes an eighteenth-century treatise that states that "if a servant retained for a year, happen within the time of his service to fall sick, or to be hurt or disabled by the act of God, or in doing his master's business," the master could not discharge him and, indeed, must continue the servant's wage.⁶⁸

The master-servant relationship that Steinfeld describes has many striking parallels to the employment relationship as it developed in early industry. The story of the Lowell mills provides ready examples. Although the mill operatives did not live in their masters' homes,⁶⁹ the corporations

deny that employers provided their servants with room and board, but she urges that this must not be "regarded as solicitude." *Id.* However, she does dispute the assertion that the law obliged employers to provide medical care. *Id.* at 101. Because my concern is with a tradition of provision rather than its legal basis, I believe my argument stands, despite Orren's caution.

65. See ROBERT J. STEINFELD, *THE INVENTION OF FREE LABOR: THE EMPLOYMENT RELATION IN ENGLISH AND AMERICAN LAW AND CULTURE, 1350-1870* 25 (1991).

66. In this, they joined the apprentice, who was typically bound to his master for a term as long as seven years. *Id.* at 25. The house servant more commonly served on a yearly basis. *Id.* at 31. Orren notes that in England the assumption of a fixed term shifted to the "at will" concept in the 1880s. ORREN, *supra* note 61, at 80-81.

67. STEINFELD, *supra* note 65, at 31. The apprentice was not paid a wage. His training was his compensation. *Id.* at 25.

68. *Id.* at 31 (quoting RICHARD BURN, *JUSTICE OF THE PEACE AND PARISH OFFICER* (15th ed. 1785)). Again, Orren's view is more negative. She notes that while American judges would pay the sick servant wages *already* earned, the English courts frequently held that the servant's failure to complete his contract barred all wage claims, including those for services rendered before his illness or injury. ORREN, *supra* note 61, at 97. Even the American courts might allow the employer to deduct from the servant's wages any damages that the employer suffered because of the servant's inability to work. *Id.* at 98.

69. This would have posed some substantial difficulty because the population of Lowell grew from 2,000 in 1823 to 17,000 in 1836. HARRIET HANSON ROBINSON, *LOOM AND SPINDLE OR LIFE AMONG THE EARLY MILL GIRLS* 11 (Press Pacifica 1976). Robinson's book is a contemporary account by a woman employed in the mills from 1835 to 1848. *Id.* at ix.

built boarding houses to lodge them.

These were leased to respectable widows — often well-bred and somewhat cultivated — who in return for low rental terms agreed to keep the property clean and see to it that the girls obeyed the company's rules. Each boardinghouse keeper, by the terms of her lease, was required to set aside one bedroom as an infirmary⁷⁰

The corporations prescribed the diet to be served in the boarding houses,⁷¹ all of which were equipped with running water and supplied with soap.⁷² Like the servant or apprentice, then, the Lowell mill operative looked to her employer for food, shelter, and medical care. Like the servant or apprentice, she was also required to sign on for a fixed term, usually twelve months, and to give two weeks' notice of her intent to leave.⁷³ A too early departure could result in a "dishonorable discharge," which could place the offender's name on a blacklist freely shared among the mills.⁷⁴ By contrast, a worker fulfilling her contract and giving the proper notice would be given an honorable discharge.⁷⁵

Lowell was, of course, merely an early entry in a controversial chapter in American employment history — the era of welfare capitalism. Stuart Brandes, whose book is a richly detailed portrait of this phenomenon,

It was first published in 1898. *Id.* at vii. There were 5,000 mill operatives in Lowell by 1833. HANNAH JOSEPHSON, *THE GOLDEN THREADS: NEW ENGLAND'S MILL GIRLS AND MAGNATES* 56 (1949).

70. JOSEPHSON, *supra* note 69, at 68, 70.

71. *See id.* at 68 (noting diet of those living in boarding houses).

72. Although the mill owners owned the boarding houses and had constructed them expressly for the mill operatives, they were not provided without charge. ROBINSON, *supra* note 69, at 46; JOSEPHSON, *supra* note 69, at 213.

73. JOSEPHSON, *supra* note 69, at 72.

74. *Id.* at 222. Steinfeld writes that, despite these contracts, workers actually left employment freely, and employers made little or no effort to stop them. STEINFELD, *supra* note 65, at 162-63. This seems to have been the case substantially prior to the conversion to at-will hiring that Orren describes. *See* ORREN, *supra* note 61, at 80-81. Apparently, blacklisting was usually reserved for more serious offenses, such as "disobedience to orders" or "dissatisfaction with wages." *See* JOSEPHSON, *supra* note 69, at 222 (listing reasons for inclusion on black list).

75. *See* ROBINSON, *supra* note 69, at 45 (acknowledging author's receipt of honorable discharge). This practice too had strong parallels in earlier times. Orren notes that a testimonial letter from the prior employer specifying the circumstances of the employee's previous employment was necessary to obtain wage work in the Middle Ages. Hiring an employee without such a letter subjected the employer to legal penalties. ORREN, *supra* note 61, at 104.

defines welfare capitalism as "any service provided for the comfort or improvement of employees which was neither a necessity of the industry nor required by law"⁷⁶ In the century following the opening of the Lowell mills, there was much that met this definition. Companies built worker housing: "[B]y 1916 at least a thousand American firms provided housing for at least 600,000 employees and their families, roughly three percent of the population of the United States."⁷⁷ In the copper fields of Michigan, Cornish miners established a system that later spread throughout much of American mining: "Each month the mining companies deducted a fixed sum, in return for which a company physician treated the miner and his family"⁷⁸ Employer-provided health care spread, perhaps reaching its apex with the Endicott Johnson Company of Binghamton, New York, whose Workers Medical Service "include[d] eighteen physicians, four dentists, five dental hygienists, two physical therapists, four bacteriologists, four pharmacists, seventeen technicians, sixty-seven nurses, and sixteen clerks and office assistants."⁷⁹ Employers ran nurseries, kindergartens, and schools.⁸⁰ They built recreational facilities, the Endicott Johnson Company boasting "softball and hardball diamonds, skating rinks, tennis courts, bowling alleys, swimming pools, parks, picnic grounds, dance pavilions, a horse racetrack, and an eighteen-hole golf course."⁸¹ In 1911, employers introduced group life insurance.⁸² It was followed eleven years later by group sickness and accident insurance.⁸³ Between 1900 and 1925, employers initiated some 300 pension plans.⁸⁴

Welfare capitalism has been vehemently criticized. Company housing was often, though not uniformly, shoddy in both construction and upkeep.⁸⁵ Many residents of company towns received no cash wage. They were paid in scrip redeemable only at the overpriced company store.⁸⁶ Some com-

76. STUART D. BRANDES, *AMERICAN WELFARE CAPITALISM: 1880-1940* 5-6 (1976).

77. *Id.* at 38.

78. *Id.* at 93.

79. GERALD ZAHAVI, *WORKERS, MANAGERS, AND WELFARE CAPITALISM: THE SHOEWORKERS AND TANNERS OF ENDICOTT JOHNSON, 1890-1950* 48 (1988).

80. See BRANDES, *supra* note 76, at 52-65 (describing company-provided education).

81. ZAHAVI, *supra* note 79, at 50-51.

82. BRANDES, *supra* note 76, at 97

83. *Id.*

84. See *id.* at 106 (noting estimates of employer-established pension programs).

85. *Id.* at 40-42.

86. *Id.* at 47

pany towns were "closed," i.e., private police barred entrance to all but residents in an effort to exclude the dreaded union organizers.⁸⁷ The schools served mostly to indoctrinate the young with a work ethic,⁸⁸ and the pensions could be withdrawn unilaterally by the company.⁸⁹ Only the medical benefits seem to withstand the critics' scrutiny, though the consensus of historians is that these too were often quite meager.⁹⁰

This dark underside of welfare capitalism is undeniable. It was paternalistic to the point of insult, virulently (and sometimes violently) anti-union, and frequently miserly in the extreme. But these enormous faults should not obscure a simple point: Welfare capitalism extended and expanded the tradition of social provision by masters/employers for their servants/employees from pre-industrial times to the dawn of the New Deal. Through welfare capitalism, employers voluntarily assumed a key role in social provision. As George Zahavi notes in describing the Endicott Johnson Shoe Company, "[t]he company attempted to unite the functions of firm and family. The corporation became a partner in providing basic family needs such as medical care, relief, recreation, and housing."⁹¹

For Stuart Brandes, the New Deal marks the end point of welfare capitalism. The system was already creaking by 1930, and the Depression both curtailed employer efforts and spurred unprecedented government action. The Social Security Act of 1935⁹² instituted a federal pension program and pushed the states to create unemployment insurance systems. The labor law reforms of the 1930s also freed unions to take an active role in the work of social provision.⁹³

In the end, however, neither government nor union supplanted employer provision; indeed, in crucial ways both reinforced it. An important example can be found in the actions of the National War Labor Board (NWLB). During World War II, the NWLB froze the wages of American

87. *See id.* at 49 (noting company housing lease provisions limiting ingress and egress to occupant and family).

88. *Id.* at 52.

89. *See id.* at 107 (noting common provision containing right of company to revoke pension at company's pleasure).

90. *See id.* at 97 (outlining drawbacks of mutual benefit associations). The Endicott Johnson facility may have had the most extensive medical benefits. Zahavi writes that, in 1928, 94% of eligible individuals or their family members used the medical services. ZAHAVI, *supra* note 79, at 48.

91. ZAHAVI, *supra* note 79, at 46.

92. Pub. L. No. 74-271, 49 Stat. 620 (1935).

93. BRANDES, *supra* note 76, at 142-45.

workers.⁹⁴ Faced with a severe labor shortage, employers pressured the Board for relief. The response was a 1943 ruling that "fringe adjustments" in the form of employer contributions to insurance and pension plans would not be deemed wages.⁹⁵ Historian Beth Stevens notes that "[t]his move opened the floodgates to the institution of employee benefits programs as unions and management sought wage increases under the guise of 'fringe adjustments.'"⁹⁶

Earlier, in the Depression years, unions had supported public benefit initiatives such as the Social Security Act. But in the boom times that followed the War, public provision was not on the legislative agenda. Americans consistently demonstrate a deep-seated preference for decentralized, private-sector mechanisms and are suspicious of any program run by the federal government and funded with tax dollars.⁹⁷ Responding to this preference, unions actively and successfully bargained for ever-increasing packages of employer-provided, private sector benefits.⁹⁸ Rather than providing benefits directly, government reinforced the private, employment-based system by granting fringe benefits preferential tax treatment.⁹⁹

In short, employer provision has been a cornerstone of economic well-being in the United States from pre-industrial times to the present day. In fact, as the health care debates demonstrated, Americans are more dependent on employer provision than citizens of any other country. Other industrialized countries provide universal health care; we insure only 82% of our nonelderly population, 61% through employer-provided insurance.¹⁰⁰ Other countries operate two-tier pension systems that tie minimum pro-

94. See Beth Stevens, *Blurring the Boundaries: How the Federal Government Has Influenced Welfare Benefits in the Private Sector*, in *THE POLITICS OF SOCIAL POLICY IN THE UNITED STATES* 123, 132-33 (Margaret Weir et al. eds., 1988).

95. *Id.* at 133.

96. *Id.* There was also the small matter of the 80% excess profits tax imposed by the Revenue Act of 1942 as part of the effort to finance the War. The Act gave employers a strong incentive to lower their pretax profits by providing benefits to employees. *Id.* at 130.

97. This preference for decentralized, private-sector mechanisms is not an artifact of either the Reagan years or the 1994 elections. It has deep roots in American political tradition. On this point, see Roy Lubove's classic work, *THE STRUGGLE FOR SOCIAL SECURITY: 1900-1935* 1-24 (1968) (describing constraint of ideology of voluntarism on social security legislation).

98. STEVENS, *supra* note 94, at 133-35.

99. For a discussion of the preferential tax treatment accorded fringe benefits and its effect on American workers, see Mary E. O'Connell, *On the Fringe: Rethinking the Link Between Wages and Benefits*, 67 *TUL. L. REV.* 1421, 1505-09 (1993).

100. EBRI REPORT 1995, *supra* note 11, at 7 tbl. 2.

vision for the elderly directly to citizenship.¹⁰¹ Our system links all benefits to employment records and lifetime wage earning.¹⁰² Ours is what the Ford Foundation labelled "the peculiarly American system of employment-related social welfare protection."¹⁰³

III. Transactional Work in a Relational World: The Challenge of Contingent Employment

In the preceding sections of this paper, I have tried to demonstrate that all of us — government, society, and workers — have long relied on employers to provide more than a wage. Indeed, we have used the employment relation to insure against the inherent frailty of the human condition. In the great economic boom that stretched from the end of World War II into the 1970s,¹⁰⁴ employers were the primary source of health insurance, life insurance, disability coverage, and pension benefits.¹⁰⁵ Employers covered both workers and workers' children from the cradle of the latter to the grave of the former, so long as the worker's tenure in employment endured and, if the worker achieved retiree status, perhaps beyond.¹⁰⁶ Thus, I agree with Dr. Belous that our present social welfare system rests on the assumption "of a household with one worker who works for one employer during *his* economic lifetime."¹⁰⁷

In moving to contingent hiring, employers are unilaterally abandoning this fundamental social contract. The dilemma for the larger society is

101. See EDWARD BERKOWITZ & KIM MCQUAID, *CREATING THE WELFARE STATE: THE POLITICAL ECONOMY OF TWENTIETH-CENTURY REFORM* 103 (1980) (noting concept of plan paying benefits to everyone).

102. O'Connell, *supra* note 99, at 1434, 1490-96; see also BERKOWITZ & MCQUAID, *supra* note 101, at 103 (noting that only those with employment records receive benefits).

103. FORD FOUNDATION, *supra* note 48, at 51, see also Martin Rein & Lee Rainwater, *The Institutions of Social Protection*, in *PUBLIC/PRIVATE INTERPLAY IN SOCIAL PROTECTION: A COMPARATIVE STUDY* 25, 50-54 (Martin Rein & Lee Rainwater eds., 1986) (describing distribution of social benefits in United States).

104. For a masterful and provocative commentary on this lengthy economic aberration, see Michael Elliott, *America: A Better Yesterday*, *ECONOMIST*, Oct. 26, 1991, at 3-26.

105. Social Security, to which both employer and employee contribute, also provides disability coverage and pension benefits.

106. That the employer of the cradle will rarely be the employer of the grave seems not to matter, so long as both needy ends of the spectrum are covered by social welfare protections rooted in employment. If both parent and offspring have "good" jobs, this should be the result.

107. Belous, *supra* note 1, at 876 (emphasis in original).

whether, and how, to respond. And while the answer is far from clear, the options are actually quite limited. There may be many variations, but I see only four basic approaches to the issue of benefits for contingent workers:

1. We can allow employers to opt out of providing benefits, and we can provide for contingent workers through enhanced social insurance.
2. We can require employers to cover their contingent workers by mandating benefits.
3. We can try to encourage the creation of new private benefit networks, larger than a single employer.
4. We can do nothing, leaving the problem to the individual worker and her family

It would be impossible in this already lengthy comment to sketch out each option, even if I knew how each would play out — which I don't. But I offer a preliminary exploration in the hope that it may provoke comment and criticism.

A. Augmented Social Insurance

At a minimum, augmenting social insurance to cover contingent workers would mean providing the uninsured with health coverage and expanding and patching Social Security's OASDI (Old Age, Survivors' and Disability Insurance)¹⁰⁸ and UI (Unemployment Insurance)¹⁰⁹ programs. The latter clearly needs fixing, as Congress recognized in creating the Advisory Council on Unemployment Compensation and charging it with root and branch reform.¹¹⁰ If UI continues to exclude more than 60% of workers who lose their jobs,¹¹¹ current efforts to reform Aid to Families with Dependent Children (AFDC) by "putting recipients to work" are doomed to fail. Regardless of one's political viewpoint, it is difficult to imagine that the one-third of current AFDC recipients who are adults¹¹² will become

108. 42 U.S.C. §§ 401-433 (1988 & Supp. V 1993).

109. 42 U.S.C. §§ 501-504 (1988 & Supp. V 1993).

110. The Council was created by the Emergency Unemployment Compensation Act of 1991, Pub. L. No. 102-164, 105 Stat. 1049 (1991).

111. See *supra* text accompanying note 47

112. The 1994 Green Book lists 14.1 million AFDC recipients in 1993, of whom 9.5 million were children. This is 67%, meaning that 33% of recipients are adults. COMMITTEE ON WAYS AND MEANS, U.S. HOUSE OF REPRESENTATIVES, AN OVERVIEW OF ENTITLEMENT PROGRAMS 395 tbl. 10-24 (1994).

benefit-rich core workers upon entering the work force. Most of them will enter as contingent workers whose low pay, limited hours, and frequent job changes will disqualify them from UI coverage. When they lose their jobs — and it is likely that many will¹¹³ — they will have no stopgap source of income to pay their rent and feed their children. To date, this problem has met with deafening silence. It needs to be addressed.¹¹⁴

As for expanding OASDI — or any other government program — even a less than astute observer can see that the political tsunami is moving in the other direction. In addition, were one to propose a new public pension system and enhanced survivors' insurance and disability coverage for contingent workers, the powerful private insurance lobby would surely take up the cudgel. Still, that an approach seems infeasible at the moment is no reason to reject it out of hand. Presumably, contingent workers are attractive because they perform productive labor at low cost, a cost that ignores the inherent vulnerability of human beings. It is neither wrong nor stupid to consider whether those vulnerabilities should be shared in a public system,¹¹⁵ as, indeed, they already are to a limited extent by OASDI¹¹⁶ and by public disability insurance systems in five states.¹¹⁷

113. Women remain on jobs for a substantially shorter period of time than men. JOHN A. TURNER ET AL., *PENSION POLICY FOR A MOBILE LABOR FORCE* 18 (1993). Roughly 90% of adult AFDC recipients are women. U.S. DEP'T OF HEALTH AND HUMAN SERVS., *CHARACTERISTICS AND FINANCIAL CIRCUMSTANCES OF AFDC RECIPIENTS, FY 1991* 2 (1991).

114. The Institute for Women's Policy Research has conducted an excellent and highly relevant study. See Roberta Spalter-Roth, Heidi Hartmann & Beverly Burr, *Income Insecurity: The Failure of Unemployment Insurance to Reach Out to Working AFDC Mothers*, Paper Presented at the Second Annual Employment Task Force Conference (March 20-22, 1994) (unpublished paper, on file with author). This paper demonstrates that many women cycle in and out of work, UI, and AFDC.

115. In fact, such a suggestion was recently made with respect to disability coverage. Kenneth S. Abraham & Lance Liebman, *Private Insurance, Social Insurance, and Tort Reform: Toward a New Vision of Compensation for Illness and Injury*, 93 COLUM. L. REV. 75 (1993).

116. In an earlier work on this subject, I described some of the specific deficiencies in the old age insurance (OAI) and disability insurance (DI) programs that affect workers with discontinuous work records. See O'Connell, *supra* note 99, at 1461-68, 1490-96. To better cover contingent workers, we need to abolish "recency" requirements, which exclude workers who have breaks in service from disability coverage. We also need to abolish waiting periods so that frequent job changers do not find themselves permanently "waiting." And we need to stop penalizing those who spend fewer than 35 years in paid employment by greatly reducing their Social Security retirement (OAI).

117. California, Hawaii, New Jersey, New York, and Rhode Island have public disability

Using social insurance to provide benefits to contingent workers would also bring the United States into line with most other developed countries. As Dr. Belous notes,

nations with more advanced social welfare systems than the United States may be in a better position to obtain the benefits from part-time workers strategies. Many nations that have high part-time employment levels have developed advanced social safety nets that compensate for many of the costs born by part-time workers.¹¹⁸

B. Employer Mandates

Employer mandates are an alternative to expanded social insurance. Although the Chamber of Commerce and other business lobbies spent last year comparing mandates to being boiled in oil, responsible policymakers need to consider this option outside the political firestorm. The followers of Chicken Little will point in horror to Europe and assure us that requiring anything of employers will immediately send the unemployment rate into the stratosphere. But employer mandates need not include six weeks' paid vacation (Germany), two years' severance pay for every laid-off employee (Belgium), or a Christmas bonus equal to a month's pay (Germany).¹¹⁹ They would involve basic social provision — health insurance, pensions, disability, and unemployment compensation.

Admittedly, employer mandates run counter to current trends. Mandates would return to employers costs they have been busily shifting to their employees. For example, employers' medical costs fell last year for the first time in a decade.¹²⁰ But Henry Aaron of the Brookings Institution argues that this may simply reflect "offloading costs onto employees or curtailing their coverage."¹²¹ As I have noted above,¹²² this offloading

insurance systems. Puerto Rico also operates a public short-term disability program. SOC. SECURITY BULL., Spring 1992, at 124 n.12.

118. Belous, *supra* note 1, at 873.

119. For a discussion of these practices, see Charles Stein, *The Politics of Security: Americans Are Feeling Nervous About Their Futures, Can Clinton Quiet Their Fears? At What Cost?*, BOSTON GLOBE, Nov 21, 1993, at A1, Donald R. Utroska, *Management in Europe: More Than Just Etiquette*, MGMT. REV., Nov 1992, at 21.

120. Milt Freudenheim, *Health Costs Paid by Employers Drop for First Time in a Decade*, N.Y. TIMES, Feb. 14, 1995, at A1.

121. *Id.*

122. See *supra* text accompanying notes 27-42.

is also occurring in the pension area. Each year, thousands of employers terminate defined-benefit plans, while only about two-thirds of them offer their employees an alternative.¹²³ In addition, half of these alternate plans are markedly less generous than the plan they replace.¹²⁴ A survey by the U.S. Chamber of Commerce found that contributions to defined-benefit plans average 4.9% of payroll.¹²⁵ By contrast, employer contributions to "savings plans" like 401(k) average only 2.3% of payroll.¹²⁶ Employees are supposed to make up the difference or do without.

The second way that employer mandates swim against the tide is by "requir[ing] a group of 'haves' to extend benefits to a group of 'have nots.'"¹²⁷ Because employers would, presumably, spread the cost of mandated coverage across their employees, those who currently have benefits might get less so that those without could get more. This is dangerous territory, as was amply demonstrated by the furor aroused by the Medicare Catastrophic Coverage plan. The plan required wealthy elders to contribute to catastrophic health coverage for poorer beneficiaries as well as themselves. Their powerful lobby beat Congress into submission, and the Act was repealed.¹²⁸ Still, if the territory is dangerous, it is nonetheless familiar. Employers have always been key actors in American systems of social provision. That they wish to opt out now is relevant but not determinative, for there are dangers to the alternate turf as well.

C. Multi-Employer Approaches

At the close of his paper, Dr. Belous suggests in a general way what some of this alternate turf might look like. Using a term much in vogue in employment discussions in the 1990s, he urges "flexibility"¹²⁹ His main theme, if I read this section correctly, is that linking benefit acquisition to

123. See ACTUARIES, *supra* note 28, at 14 (noting that two-thirds of employers who terminated plans did not leave workers without coverage).

124. *Id.* at 16.

125. Willette, *supra* note 32, at 2A.

126. *Id.* at 2A.

127. Charles Stein, *Who's Going to Pay the Bill Top Issue in Health Reform*, BOSTON GLOBE, June 21, 1994, at 35, 37

128. See Medicare Catastrophic Coverage Act of 1988, Pub. L. No. 100-360, 102 Stat. 683 (1988); Medicare Catastrophic Coverage Repeal Act of 1989, Pub. L. No. 101-234, 103 Stat. 1979 (1989); see also Elaine S. Povich, *Senate OKs End of Catastrophic Insurance Surtax*, CHI. TRIB., Oct. 7, 1989, at 1, 1.

129. Belous, *supra* note 1, at 876-78.

a single employer defies reality because contingent workers have many employers during their work lives.¹³⁰

Clearly, changing employers wrecks havoc with pension acquisition,¹³¹ and full pension portability, which Dr. Belous suggests, is an idea I readily endorse. But full portability will help only the employee who moves *from* a job with a pension *to* a job with a pension. An excellent recent study by John Turner of the Department of Labor suggests that, particularly for women, such moves are rare. Only 38% of workers in female-dominated industries have pension coverage;¹³² thus, a woman moving from one female-dominated industry to another is likely to lack pension coverage on one end or the other, if not both. Portability won't help such an employee because it fails to grapple with the problem of the employer who opts out of pension coverage in the first place. Nor will portability help the employee who cannot afford the contribution necessary to participate in a 401(k) plan.¹³³ And would Dr. Belous's plan mean that employer, as well as employee, contributions would vest immediately, or would five-year vesting remain the rule? Immediate vesting would raise employer costs substantially

I am leery of solutions grounded in "flexibility" because I think the problem goes beyond regulations and paperwork. The truth is that many employers fail to provide contingent workers with benefits because they believe — correctly — that they can get away with it.¹³⁴ While flexibility might persuade some employers to provide a benefit that they now ignore and may help some job-changers with pension continuity, I seriously doubt that flexibility alone will provide very many contingent workers the economic security they lack.

130. *Id.* at 876.

131. In some of my earlier work, I spell out the losses that a job changer with a defined-benefit pension plan suffers even if she is always a participant in her employer's plan and has no gaps in her employment. See O'Connell, *supra* note 99, at 1458 n.171.

132. TURNER ET AL., *supra* note 113, at 27

133. Traditional defined-benefit plans were noncontributory. That is, no employee contribution was required for participation. By contrast, when an employer offers a § 401(k) or other defined-contribution plan, the employee generally must contribute a portion of her salary to the plan in order to participate. Low-wage employees often cannot afford the required contribution, and they are excluded from the plan. See *Future Pension Income*, *supra* note 42, at 2314.

134. For a pilot study that showed a stunning lack of enthusiasm among small employers for help with health insurance coverage, see Kenneth E. Thorpe et al., *Reducing the Number of Uninsured by Subsidizing Employment-Based Health Insurance: Results from a Pilot Study*, 267 JAMA 945 (1992).

Of course, there have been alternatives to employer provision. Unions have provided pensions that follow their workers through frequent job shifts. Immigrants to the United States developed mutual aid societies in stunning numbers: forty-nine Czech mutual aid societies in Chicago between 1870 and 1890 and thirty-five Italian "societa di mutuo soccorso" in Cleveland alone. The societies provided their members with funds to cover the expenses of illness, accidents, and funerals. They lent money for home purchases and other expenditures.¹³⁵ But with only 16% of the labor force unionized¹³⁶ and most of the immigrant societies extinct, the prospects for private, nonemployer entities providing benefits to the millions who now lack them seems remote. Certainly, creative thinking in this area would not be amiss, but I am pessimistic about realizing many gains in the short term.

D The Worker on His Own

This leaves, of course, the worker himself. If neither government nor the employer will underwrite the contingent worker's social welfare, he may simply have to go it alone. To many, this solution will seem correct. Described in political terms, the argument would be that American workers — like their European counterparts¹³⁷ — have been coddled. Society will be better off if they regain a greater measure of self-reliance by giving up the expensive benefits packages that are crushing American industry.¹³⁸

There is no question that the cost of fringe benefits has skyrocketed. Between 1950 and 1983, their value as a percentage of payroll increased

135. Robert F. Harney, *Introduction to Records of the Mutual Benefit Society: A Source of Ethnocultural Studies*, in 5 *AMERICAN IMMIGRATION & ETHNICITY* 33, 33 (George E. Pozzetta ed., 1991).

136. See U.S. BUREAU OF THE CENSUS, *STATISTICAL ABSTRACT OF THE UNITED STATES*: 1994 439 tbl. 683 (114th ed. 1994) [hereinafter *CENSUS* 1994]. If the count is limited to private, nonagricultural workers, the percentage falls to 11%. *Id.*

137. See sources cited *supra* note 119 (describing benefits provided to European workers).

138. Whether American industry is being crushed is, of course, highly debatable. A recently released international study rated the U.S. economy the world's most competitive for a record second consecutive year. See Tyler Marshall, *U.S. Widens Its Competitiveness Lead, Study Says*, *L.A. TIMES*, Sept. 6, 1995, at D1, see also Guy de Jonquière, *US Ranked as 'Most Competitive' Nation*, *FIN. TIMES*, Sept. 6, 1995, at 15. For many companies, the '90s has been a decade of record profits. See Steven Pearlstein, *A Very Little Something Extra: Inflation, Corporate Profits to Overshadow 1995's Modest Pay Raises*, *WASH. POST*, Aug. 26, 1994, at B1 (reporting 20% increase in corporate profits for 1993 and projected 10% increase in 1994).

300%¹³⁹ In the ensuing decade, they grew an additional 75%, totalling 28.7% of overall compensation in 1993¹⁴⁰ But, as I have demonstrated above, these are not wholly new costs. The post-New Deal fringe benefit is the successor to pre-New Deal welfare capitalism. The costs may indeed be spiralling, but the concept is far from new. In addition, today's workers face at least three perils that their pre-New Deal predecessors were largely spared: divorce, out-of-control medical costs, and longevity.

The first peril, divorce, undermines contingent workers' security because many of them depend upon a spouse for their health insurance, pension coverage, and other benefits.¹⁴¹ In 1939, the year spousal benefits were added to the Social Security Act,¹⁴² 1.9 of every 1000 Americans obtained a divorce.¹⁴³ In the peak year, 1981, the rate was 5.3 per 1000.¹⁴⁴ Although rates have since fallen,¹⁴⁵ Americans still have the highest divorce rate on earth.¹⁴⁶ Thus, although marriage can provide a contingent worker with valuable benefits, today's marriages, like today's jobs, are often not around

139 Killard W. Adamache & Frank A. Sloan, *Fringe Benefits: To Tax or Not to Tax?*, 38 NAT'L TAX J. 47, 47 (1985).

140. CENSUS 1994, *supra* note 136, at 433 tbl. 671. I derive the percentage increase by comparing the United States Department of Commerce figure for the percentage of total employee compensation represented by fringe benefits in 1983 — 16.4% — with the 1993 Bureau of the Census figure. For the earlier figure, see BUREAU OF ECONOMIC ANALYSIS, U.S. DEP'T OF COMMERCE, REVISED ESTIMATES OF THE NATIONAL INCOME AND PRODUCT ACCOUNTS, SURV. CURRENT BUS., July 1984, at 72 tbl. 6.5B, 94 tbl. 8.4.

141. Dr. Belous presents data showing that 17% of individuals who work part time for economic reasons and 34% of individuals who work part time for noneconomic reasons obtain health coverage through someone else's employer. Belous, *supra* note 1, at 875tbl. 6. Presumably, in most cases this someone else is a spouse.

142. Social Security Amendments of 1939, Pub. L. No. 76-379, § 202, 53 Stat. 1360, 1363-1367 (1939) (codified as amended at 42 U.S.C. § 402 (1988 & Supp. V 1993)).

143. 1 U.S. BUREAU OF THE CENSUS, HISTORICAL STATISTICS OF THE UNITED STATES: COLONIAL TIMES TO 1970 64 tbl. 216-20 (Bicentennial ed. 1975) [hereinafter HISTORICAL STATISTICS].

144. CENSUS 1994, *supra* note 136, at 102 tbl. 139.

145. The figure for 1993 was 4.6 divorces per 1000 Americans. NATIONAL CENTER FOR HEALTH STATISTICS, ADVANCE REPORT OF FINAL DIVORCE STATISTICS, 1989 AND 1990 1 (1995).

146. The sole exception is the Maldives Islands. At 11.56 divorces per 1000 (in 1991), they leave the United States in the dust. The next closest competitor is Lithuania, with a rate of 4.07 divorces per 1000. The United Kingdom, a country often compared with the United States, had a rate of 2.88 in 1990, when the United States' rate was 4.7. See DEPARTMENT OF INT'L ECONOMICS & SOCIAL AFFAIRS, UNITED NATIONS DEMOGRAPHIC YEARBOOK: 1992 318-21 tbl. 14 (1994).

for the long haul. It is far more important in 1995 than it was in 1935 for an individual to have direct, not derivative, access to benefits.¹⁴⁷

Although high divorce rates make derivative benefits a riskier proposition now than when they were created in the 1930s and 1940s,¹⁴⁸ they are certainly better than nothing. Yet nothing is exactly what many contingent workers have. Dr. Belous cites statistics that dispel the myth that all contingent workers are the spouses of benefit-rich core workers. He quotes Levitan and Conway's study showing that approximately 30% of part-time workers have no health coverage at all.¹⁴⁹

This lack of health coverage is the second key difference between our self-reliant pre-New Deal worker and the worker of today. Each year, I am forcefully reminded of the dramatic escalation in health care costs by a case I cover with my contracts students. The case concerns an elderly woman who spent eleven months in a hospital in 1955-56, at a total cost of \$3,218.30.¹⁵⁰ This figure is put into context by the fact that the patient's very modest house (which is the subject of the contract dispute) was worth \$7,000.¹⁵¹ In short, in the mid-1950s, one could spend two years in the hospital for the price of a modest home. I doubt that one could spend two months in a hospital for a comparable cost today. That health care is simply out of reach for the uninsured is a proposition so well proven in last year's health care debate that I simply make the point and move on.

The last great difference between today's contingent worker and his self-reliant pre-New Deal counterpart is the blessing and curse of longevity

147. Of course, there are some important ameliorating statutes. Divorced spouses may collect some Social Security benefits on their ex-spouse's record. They can remain in the ex-spouse's employer-provided health plan for up to three years after divorce, 29 U.S.C. § 1162(2)(A)(iv) (1988), 29 U.S.C. § 1163(3) (1988), if they are able to pay the premiums, which can be as much as 102% of the spouse's premium. See 29 U.S.C. § 1162(3)(A) (1988). I discuss the shortcomings of these and other ameliorative provisions in *On the Fringe*. O'Connell, *supra* note 99, at 1478-97.

148. I should note that the mid- and late-1940s also saw extremely high rates of divorce. The 1946 rate was three times the 1933 rate. In fact, it was not surpassed until 1973. U.S. BUREAU OF THE CENSUS, CURRENT POPULATION REPORTS: DIVORCE, CHILD CUSTODY, AND CHILD SUPPORT 7 tbl. 1 (1979). Postwar peaks in the divorce rate have been noted since the 1860s. See Andrew Cherlin, *The Trends: Marriage, Divorce, Remarriage*, in FAMILY IN TRANSITION 128, 132, 133 fig. 3 (Arlene S. Skolnick & Jerome H. Skolnick eds., 4th ed. 1983).

149. Belous, *supra* note 1, at 875 tbl. 6; see also *supra* text accompanying notes 41-42 (discussing part-timers' lack of pension coverage); *supra* text accompanying note 53 (dealing with part-timers' disqualification from UI benefits).

150. *In re Estate of Crisan*, 107 N.W.2d 907, 908 (Mich. 1961).

151. *Id.*

The life expectancy of an American born in 1935, the year the Social Security Act was passed, was 61.7 years.¹⁵² In short, one had to defy the odds to retire.¹⁵³ By contrast, an American child born in 1995 has a life expectancy of more than seventy-six years.¹⁵⁴ Thus, today's contingent worker needs to plan for eleven years of post-work life, a far cry from the world that faced his self-reliant ancestor.¹⁵⁵

Free market defenders may nonetheless assert that while this state of affairs is not pretty, workers without benefits simply lack the skills necessary to earn both benefits and their wage. Providing these workers with benefits would amount to a subsidy beyond the value of their work. Ironically, the public at large *does* subsidize fringe benefits, but not for those who currently lack them. Instead, the tax code, by exempting most fringe benefits from taxation, provides a subsidy for those workers who do receive benefits, with the largest subsidies accruing to the highest paid employees.¹⁵⁶

152. 1 HISTORICAL STATISTICS, *supra* note 143, at 55 tbl. 107-15. For men (and most retirees would be men) life expectancy was only 59.9 years. *Id.*

153. See Martin Woollacott, *A Grey Burden That Makes the Men in Suits Shudder*, GUARDIAN, Jan. 11, 1995, at 20, 20 (noting that life expectancy was three years below retirement age when Social Security was introduced).

154. CENSUS 1994, *supra* note 136, at 87 tbl. 114.

155. This assumes, of course, retirement at age sixty-five, but many workers retire earlier. Writing in 1986, Michael Boskin noted that "[m]ore people now claim their first Social Security check at age 62 than at age 65." MICHAEL J. BOSKIN, TOO MANY PROMISES: THE UNCERTAIN FUTURE OF SOCIAL SECURITY 49 (1986). A recent New York Times article quoted an average retirement age of 63. Phillip Lutz, *Workers Expected to Stay Longer and Delay Retirement*, N.Y. TIMES, Jan. 15, 1995, at 13L1 1.

156. The most highly compensated employees get the largest subsidies because of graduated tax rates. That is, excluding an item from taxation is more valuable to a person who would otherwise pay 30 cents on the dollar in taxes than it is for someone who would otherwise pay only 15 cents. In *On the Fringe*, I deal with the issue of tax subsidies at some length and provide a number of examples of their effect. O'Connell, *supra* note 99, at 1504-09.

I am aware that Professor Handelman disagrees with my classification of this treatment as a subsidy, at least with regard to health insurance. Gwen Thayer Handelman, *On Our Own: Strategies for Securing Health and Retirement Benefits in Contingent Employment*, 52 WASH. & LEE L. REV 815, 839 n.151 (1995); Gwen Thayer Handelman, *The Truth About Tax Subsidies for Health Benefits*, 61 TAX NOTES 353, 353 n.2 (1993) [hereinafter *The Truth About Tax Subsidies*]. She also correctly notes that the language of a sentence on page 1423 of my article is inconsistent with a position I take on pages 1504-09. Handelman, *The Truth About Tax Subsidies*, *supra*, at 353 n.2, 356 n.18 and accompanying text. I accept Professor Handelman's criticism. I should not have used the word "wealth" on page 1423, and, had I been thinking with my tax hat on, I would not have done so. The error to which I plead guilty, however, is using the term "wealth" too loosely on page 1423. Were I to rewrite the offending sentence, I would say, "Although these devices [fringe benefits] provide access to money or services, they are intended not to augment *cash income*, but to insulate the recipient

As for contingents, however, apparently the market has spoken. It proposes to expel one-quarter to one-third of American workers from the social welfare system. Covering them is "too expensive" for the employer, so the cost of their welfare — a cost that has been shared through the workplace for decades, if not for centuries — is to be lifted from the employer and placed squarely on the contingent employee's shoulders. In the hard, cold world where work is a transaction and not a relation, many contingent workers are simply on their own.

In the end, however, decisions about social welfare are as political as they are economic. The market may have spoken, but it does not get the last word. The economic decision merely poses the hard social and political questions. What happens to contingent workers is not up to employers or the marketplace. It is up to us all.

from economic calamity." The benefits I describe do indeed augment wealth.

