On the fringe: rethinking the link between wages and benefits

Mary O'Connell
ON THE FRINGE: RETHINKING THE LINK BETWEEN WAGES AND BENEFITS

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I. INTRODUCTION

This is an Article about economic security and the curious, and often perverse, mechanisms through which it is distributed in contemporary American society. It is about the long-standing tension between the desire to protect the needy and the need to reward the productive. And it is about the way in which systems presently in effect fail on both scores.

The pages that follow examine a variety of devices designed to enhance economic security. These include income for the dis-
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abled, funds to defray the costs of medical care, and income for those who have no employment due to age (whether young or old) or inability to find work. Although these devices provide access to money or services, they are intended not to augment wealth, but to insulate the recipient from economic calamity.

During the past century, these economic security devices have proliferated rapidly, and both private employers and legislatures have created multiple sets of complex rules to govern their distribution. This Article will argue that these distributive rules—some of them statutory, some contractual—often make little sense, either by reference to marketplace norms or to notions of public benefit. The rules both fail to provide for all citizens and fail to reward the most productive. They do, however, redistribute income—sometimes from those with fewer assets to those with more—they rigidify the labor market, contribute directly to the poverty of women and children, and disproportionately disadvantage people of color.

For most Americans—that is, for those without substantial family wealth—access to economic security is closely linked to participation in the paid labor force. The greatest security belongs to those whose attachment to paid work is lengthy,

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2. Examples include employer-provided health insurance, Medicare, 42 U.S.C. §§ 1395-1395ccc, and Medicaid, id. §§ 1396-1396u. See infra text accompanying notes 85-99.
3. Examples include employer-provided pensions, the old-age portions of the Social Security Act, 42 U.S.C. §§ 401-433, unemployment compensation, id. §§ 501-504, and Aid to Families with Dependent Children, id. §§ 601-687. See infra text accompanying notes 54-62, 100-03, 120-23, 153-76.

interrupted, and highly remunerative.\textsuperscript{5} Those who earn a low wage, or whose labor-force participation is interrupted or less than life long, may glean access to some economic security devices, but their share is markedly poorer than that garnered by the preferred worker—the highly paid long-term employee.\textsuperscript{6} A second mode of access allows some persons to claim economic security derivatively—that is, through the labor-force participation of another individual. As will be demonstrated below,\textsuperscript{7} however, this mode of access produces a hodgepodge of entitlements, fraught with gaps, that frequently fails to provide needed protection to the recipient. Finally, those who do not engage in paid work, and who lack access on a derivative basis, must look to statutes providing means-tested benefits for their economic security.\textsuperscript{8} These benefits are chronically underfunded and their receipt is often stigmatized. The recipients—who, if they can find work at all, may not earn a wage sufficient to cover the costs of child care and medical insurance—are characterized as nonproductive. Perversely, however, this group’s benefits may sometimes exceed those of the low-wage or intermittent worker.\textsuperscript{9}

This Article will argue that this three-tiered system is neither essential nor wise. While it is the product of powerful historical and ideological forces, it fits poorly with contemporary demography, it forms a barrier to needed change in the workplace, and it discourages certain productive and essential tasks while rewarding the nonproductive acts of others.

\textsuperscript{5} I owe my identification of these three factors—length of work life, absence of interruption, and high salary—to Professor Grace Ganz Blumberg. See Grace G. Blumberg, \textit{Adult Derivative Benefits in Social Security}, 32 \textit{Stan. L. Rev.} 233, 243-246 (1980).

\textsuperscript{6} This point is extensively developed in the pages that follow. Many of the original insights on which this work expands belong to Diana Pearce. See, e.g., Diana M. Pearce, \textit{Toil and Trouble: Women Workers and Unemployment Compensation}, 10 \textit{Signs} 439 (1985); Diana M. Pearce, \textit{Welfare Is Not for Women: Why the War on Poverty Cannot Conquer the Feminization of Poverty}, in \textit{Women, the State, and Welfare} 265, 265-79 (Linda Gordon ed., 1990).

\textsuperscript{7} See infra notes 259-355 and accompanying text.

\textsuperscript{8} These include the portions of the Social Security Act providing Aid to Families with Dependent Children (AFDC), 42 U.S.C. §§ 601-687, Supplemental Security Income (SSI), \textit{id.} §§ 1381-1385, and Medicaid benefits, \textit{id.} §§ 1396-1396a, and the federal legislation authorizing food stamps, 7 U.S.C. § 2011 (1988). An exception might be the person who is presently unable to find work, but who has performed paid work in the recent past. That person might qualify for nonmeans-tested unemployment benefits, see 42 U.S.C. §§ 501-504, or, if he were disabled, for nonmeans-tested benefits under Social Security Disability (SSD), \textit{id.} §§ 401-433.

\textsuperscript{9} For a compelling argument that the working poor are in the worst situation under our current system, see David T. Ellwood, \textit{Poor Support: Poverty in the American Family} 81-127 (1988).
II. THE SOURCES OF ECONOMIC SECURITY

Many benefits flow from participation in the paid labor force. Most obvious is the wage, a cash income that can be converted to food, shelter, clothing, and other comforts. Of growing significance, however, are the noncash benefits received by some (but only some) participants in the paid labor force. In 1983 these represented 16.4 of overall compensation,10 more than a 300% increase over 1950 levels.11 By 1991, they had grown to a striking 27.7%.12 One estimate by the Social Security Administration suggests that by the middle of the next century, these noncash benefits will account for nearly 40% of the total value of employee compensation.13

Noncash benefits are as varied as they are valuable, running the gamut from use of a company car to health insurance coverage. In this Article, I have chosen to focus on the subset of benefits that is, I believe, the most critical to the achievement of economic security. These include: health insurance; pension coverage—including both private coverage and Social Security benefits—as well as protection for survivors; unemployment compensation; workers’ compensation; and disability insurance. While this list may strike some as underinclusive,14 I believe that those who have access to all of the benefits listed are, relatively speaking, economically secure.15

Presumably, all would agree with the abstract proposition that economic security is preferable to economic insecurity. But this agreement avoids the hard question—that is, who should be economically secure? There seems to be two possible answers.

14. One might, for example, argue that life insurance coverage is essential to economic security. While I do not disagree with the security aspects of life insurance coverage, life insurance is more readily available through private, individual purchase than are any of the economic security devices listed in the text.
15. This assumes, of course, an adequate level of benefits—an issue covered in detail below. See infra notes 88-355.
First, one might argue that all members of society should be economically secure because economic security for its members is a primary function of society. This view would favor the universal distribution of at least some basic set of economic security entitlements. A different, though not necessarily conflicting, argument would be that economic security should be earned. This argument assumes that a healthy society must encourage its members to be productive, and that economic security should be a reward for productivity. The most productive workers can be offered the greatest security, while others, encouraged by the prospect of greater security, might redouble their efforts.

Obviously, one's preference for community or for individual initiative will determine which of these distributive patterns one favors. My argument is that our current system for distributing economic security achieves neither. It is neither universal nor dependably a reward for productive labor. In part, this is a result of the way in which benefit systems have grown. They are not the product of some rational master plan; rather, they are an admixture of contractual and statutory rights lacking both a common source and a unified structure. Each system is, furthermore, imbued with both the ideology of its architects and the demography of its formative period. In the next section, I briefly review the history of economic security devices and comment on the effects of ideology before turning to the proof of my assertions.

16. As Marmor, Mashaw, and Harvey point out in their recent thoughtful work, one result of our decentralized, democratic form of government is that most policies are the product of compromise and incremental change. Master plans are rare. See generally THEODORE R. MARMOR ET AL., AMERICA'S MISUNDERSTOOD WELFARE STATE: PERSISTENT MYTHS, ENDURING REALITIES 22-52 (1990); THE POLITICS OF SOCIAL POLICY IN THE UNITED STATES (Margaret Weir et al. eds., 1988) [hereinafter POLITICS]. All these authors would agree, however, that the structure of the Social Security Act, 42 U.S.C. §§ 301-1397 (1988), has had a profound and far-reaching influence.

17. This is not to say, however, that the roots of current systems have been lost. A substantial volume of recent scholarship on the origins of benefit systems is available to the interested reader. Particularly significant is the work THEDA SKOCPOL, PROTECTING SOLDIERS AND MOTHERS (1992); see Barbara J. Nelson, The Origins of the Two-Channel Welfare State: Workmen's Compensation and Mothers' Aid, in WOMEN, THE STATE, AND WELFARE, supra note 6, at 123; see also Diane Pearce, The Feminization of Poverty: Women, Work and Welfare, 1978 URB. & SOC. CHANGE REV. 28; Theda Skocpol, The Limits of the New Deal System and the Roots of Contemporary Welfare Dilemmas, in POLITICS, supra note 16, at 293. Both Nelson and Pearce argue that the current system (which they describe as two-tiered, though I think it is three-tiered) is a predictable outgrowth of treating men's and women's needs separately. Skocpol presents a novel and sophisticated analysis of the role of both grassroots and political institutions in the design of American social provision.
III. Provision for Economic Security: A Brief History

In the United States, economic security is underwritten through both public and private sources. Some devices, like health insurance, are more often private than public. Others, such as disability coverage, are more often public, while a third set—pensions, for example—is both. This mix is the product of the interaction of historical events and a long dominant American ideology, both of which are important to achieving an understanding of the current structure of our systems of economic security.

A. Private Models

In the United States, private economic security devices predated all large-scale public systems and served as models for the design and attribution of public benefits. Beginning more than a century ago, visionaries like Nelson O. Nelson and

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18. In 1990, just over 150.5 million Americans received private health benefits through their employment. This is roughly 61% of the population and 71% of the insured population. 1992 Statistical Abstract, supra note 12, at 105 tbl. 153.

19. Both workers’ compensation statutes and the Social Security Act provide for disability. While some employees do receive private disability coverage, it is often quite limited. See infra notes 135-52 and accompanying text.

20. See generally infra notes 153-76 and accompanying text. Public pensions are provided by the Social Security Act, see 42 U.S.C. §§ 401-433, as well as by the Railroad Retirement Act, 45 U.S.C. §§ 231-231u (1988), and the statutes governing military pensions, 10 U.S.C. §§ 1401-1467 (1988). State governments also provide pensions to their employees, while a significant number of employees in the private sector receive pension credits by contract with their employers.

21. See generally Edward Berkowitz & Kim McQuaid, Creating the Welfare State: The Political Economy of Twentieth-Century Reform (1980). The Civil War pension system is a notable exception to this rule. See Skocpol, supra note 17. Originally limited to disabled Union veterans or the survivors of deceased soldiers, these programs expanded so dramatically that they eventually became de facto old age and disability pensions reaching about half the native-born elderly men in the nation. Abuses connected with these pensions engendered deep-seated suspicion of all public provision. Id. at 102-51, 248-310.

In addition, the states and localities had been supplying charity since the colonial period. Most of this, however, was parsimonious in the extreme. The Elizabethan Poor Laws, the model for public charity, sought to render the conditions of relief so unpalatable that work at any price was preferred. Berkowitz and McQuaid would not describe state and local provisions for the poor as a large-scale public system. For a discussion of the philosophy underlying the poor laws and public charity in nineteenth-century America, see Lubove, supra note 4, at 180-87. The classic critique of “relief” as a mechanism of social control is that of Piven and Cloward. See Frances F. Piven & Richard A. Cloward, Regulating the Poor: The Functions of Public Welfare (1971).

22. Berkowitz & McQuaid, supra note 21, at 159-67.
Edward A. Filene struggled to put into practice their common conviction that the capitalist in an industrial society, like the master in an agrarian one, is morally obliged to insure the well-being of his employees. The systems they created to implement this belief included a wide array of benefits. While Nelson founded a company town and instituted profit sharing, Filene's model more closely resembled a modern economic security package. Filene established an employee loan fund, initiated free medical and recreation programs, provided employees with insurance, and opened an at-cost cafeteria. These employer initiatives striving toward employee well-being came to be called "welfare capitalism."

The benefits that the welfare capitalists provided served a number of purposes: they enhanced the quality of life in the workplace, stimulated productivity, increased employee loyalty and forestalled unionization. Some of the early welfare capitalists had a moral mission as well. Whether morally motivated or otherwise, however, the entitlement packages created by the welfare capitalists provided an early, private-sector model for the creation of valuable noncash benefits and for the attribution of those benefits to members of the labor force rather than to the public at large. This has remained the dominant model in the United States, despite a substantial challenge early in this century by the liberal wing of the social insurance movement.

B. The Battle for Social Insurance

Social insurance is a term with many meanings. It has

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23. The town was Leclaire, Illinois. See Berkowitz & McQuaid, supra note 21, at 6.
24. For a description of both Nelson and Filene as well as other early welfare capitalists, see id. at 1-21.
26. See Berkowitz & McQuaid, supra note 21, at 46.
27. Berkowitz and McQuaid discuss the original moral basis for welfare capitalism and its transformation to a business decision rationalized on productivity grounds. See id. at 1-21.
28. See supra text accompanying notes 4-9.
29. An informative, if highly critical, discussion of social insurance, largely in the
been applied to a wide variety of programs with this common thread: all address the need for a collective response to the predictable risks of an industrial society, such as workplace injury, unemployment, or disability due to old age.

The earliest social insurance program in the United States was the workers' compensation system. Workers' compensation is a statutory claim deriving from state law. Through it, some members of the paid labor force who are injured in an accident arising out of and in the course of their employment can collect a benefit designed to compensate them, at least in part, for the wages they lose and the medical expenses they incur as a result of the workplace injury. Workers' compensation seems, on its face, to substitute collective for individual risk, and to embody the recognition that workplace injuries are a social, rather than an individual, burden.

In fact, however, workers' compensation is a hybrid. It is as responsive—or, in historian Roy Lubove's judgment, more responsive—to "business imperatives" than to "considerations of equity and social expediency." Through a series of compromises pushed by business interests, legislatures adopted a low cash-benefit schedule expressed as a percentage of wages. In addition, the injured worker's "benefit level also was affected by waiting periods, aggregate and maximum weekly cash allowances, time limitations, skimpy medical requirements, and the exclusion of occupational disease." In the end, according to Lubove, the program "prized economic incentive above economic security, even under the extenuating circumstances of work-injury."

In short, workers' compensation legislation reflected the tension I noted at the outset of this Article: the conflict between the desire to help the needy and the need to encourage productivity. In the case of workers' compensation, the balance tips quite strongly away from humanitarian and toward productivity concerns because a parsimonious system presses workers to return to their jobs as soon as possible.

context of the Social Security system, can be found in JERRY R. CATES, INSURING INEQUALITY: ADMINISTRATIVE LEADERSHIP IN SOCIAL SECURITY, 1935-54, at 22-49 (1983).

30. LUBOVE, supra note 4, at 45.

31. These are the "magic words" of the statutes. 1 ARTHUR LARSON, THE LAW OF WORKMEN'S COMPENSATION §§ 6.00-.10, 14.00-19.63 (1990 & Supp. 1991).

32. LUBOVE, supra note 4, at 57.

33. Id.

34. Id. at 45.
The next major initiatives in social insurance focused on old-age pensions and unemployment compensation. Here, for the first time, conservative (productivity-maximizing) and liberal (benefit-maximizing) schools squared off directly. The liberal school is largely identified with Abraham Epstein and Isaac Max Rubinow. Epstein and Rubinow were Russian Jewish immigrants who offered to the debate their sweeping visions of the proper role of social insurance. Like more conservative social insurance proponents, Epstein and Rubinow believed that industrial society is destabilized by the laboring classes' utter dependence on wages. Like the conservatives, they endorsed workers' compensation and unemployment legislation as a means for providing wage continuation in the face of two predictable threats: workplace injury and economic downturns. But Epstein and Rubinow went further, identifying two classes of persons outside the wage system who must also be provided for if social stability is to be achieved: the unemployed aged and "dependent mothers." Because any society will necessarily contain members of both classes, Rubinow reasoned that any rational system must provide for them.

Rubinow's suggestion that social insurance be broadly designed to include both the aged unemployed and dependent mothers was vehemently criticized for doing violence to fundamental conceptions of insurance. His plan would allow members of these two groups to collect benefits without paying a cash premium as a precondition. Although to many this plan seemed more like public charity than private insurance, Rubinow and his followers were unpersuaded. Provision for the elderly and for dependent mothers might be a matter of practical necessity rather than actuarial economics, but this did not make it any less

35. Lubove's book describes some intermediate failed programs, such as national health insurance. Id. at 66-90.
36. Rubinow had written a major treatise on the subject. See I.M. Rubinow, Social Insurance: With Special Reference to American Conditions (1913).
37. See Lubove, supra note 4, at 35. An agrarian society would, at least in theory, be more stable, because an entire family would collectively work a piece of land. Although family members would, of course, be subject to vicissitudes of weather, market fluctuations, etc., their collective activity—and for those who own the land they farm, their ownership of the means of production—would make them far less vulnerable than the family that is utterly dependent on the wages of a single member for all of its needs.

Individuals were more vulnerable in a wage economy as well, particularly one obsessed with measurable productivity. If illness or age impaired one's ability to meet quotas, loss of one's job often resulted. See Rubinow, supra note 36, at 302-05.
38. See Lubove, supra note 4, at 91.
necessary. Dependent motherhood, Rubinow noted, was a problem of mass poverty that could not be relegated to voluntary charity.\footnote{Rubinow understood that private charitable endeavors would be woefully inadequate to the task of providing for the foreseeable risks of an industrial economy. During the Great Depression, at least one prominent businessman, Henry Dennison, agreed with him, stating, "businessmen through voluntary effort rarely succeed in covering ten per cent of the necessary field of [social] action, and seldom get as high as three percent." \cite{BERKOWitz & McQUAId, supra note 21, at 82 (quoting HENRY S. DENNISON, ETHICS AND MODERN BUSINESS 58-59 (1932)).}

Epstein's and Rubinow's vision of social insurance was needs-focused, not workplace-focused. Their goal approached one of universal security\footnote{At least, it mandated security for several identified groups: paid workers, those too old to work, and those whose work was child care.}—a goal clearly influenced by their European origins. In attempting to transplant this vision to America, however, they confronted a competitor that called itself by the same name—"social insurance"—but was fundamentally dissimilar, being shaped by the peculiarities of American ideology. This competing school of social insurance was associated with economist John Commons and political reformer John Andrews.\footnote{I base my description of this model on Jerry Cates's interpretation. See CATES, supra note 29, at 23.} Unlike Rubinow's and Epstein's needs-based model, the Commons-Andrews approach emphasized initiative, competition, and thrift. In Lubove's words, it used "capitalist methods—competition and the profit motive—to achieve collective security."\footnote{Sociologist Jerry Cates, who has studied and written about the Social Security Administration, notes that Edwin E. Witte, the executive director of the Committee on Economic Security—the research and writing group that produced the Social Security Act—was Commons's student, and that Rubinow complained to Epstein that he had been "treated shabbily by Miss Perkins [Roosevelt's Secretary of Labor and a member of the CES] and all her lieutenants." \cite{CATES, supra note 29, at 27 (quoting LUBOVE, supra note 4, at 176).}} In fact, this "collective" security seems to be collective only in the sense that the summing of individual securities—which are attained by appropriate individual efforts in the marketplace—should result in security for all. This vision prevailed, and it was Commons' disciples, not Rubinow's, who drafted the Social Security Act of 1935.\footnote{MARMOR ET AL., supra note 16, at 22-52.} The choice was made for what Marmor, Mashaw, and Harvey call the "opportunity-insurance state."\footnote{MARMOR ET AL., supra note 16, at 22-52.}
C. The Conservative Triumph

In retrospect, the ascendancy of the Commons-Andrews model and the failure of Rubinow's and Epstein's broader conception is not surprising. For one thing, Rubinow came too soon. At the time of publication of his book (1913), the tiny size and primitive organization of the public sector made the adoption of his programs impossible. As Berkowitz and McQuaid note: "At the turn of the century the federal establishment contained fewer employees than a single basic industry such as steel. A federal government that did not even possess the right to tax incomes of businesses and individuals until 1914 was hardly capable of expensive experiments in any field." Second, the federal government of the 1920s and early 1930s generally emulated private business rather than challenged it. Government relied on private organizations and expertise to supply its own lack in both areas. The federal role was "that of a clearing house." Government brought private businessmen together in problem-focused conferences for the exchange of expertise that would then be implemented through the private sector. Not until this strategy failed utterly in the Great Depression did the federal bureaucracy begin to grow to a size and attain the independence that would render it capable of undertaking direct responsibility for social welfare programs.

Even the birth of the federal bureaucracy, however, failed to provide all of the raw materials that the Rubinow-Epstein plan would have required. Their vision simply deviated too far from the American conviction that private, productive labor is the best and safest source of both individual and collective security. The Rubinow-Epstein conception was too public and too governmental to fit comfortably with what Lubove calls "the ideology and institutions of voluntarism."

45. See, however, Skocpol's discussion of the Pension Bureau. SKOCPOL, supra note 17, at 118-20. For a detailed discussion of the impact of American decentralized government on the formation of welfare systems, see the essays collected in POLITICS, supra note 16. My colleague Professor Wendy Parmet also comments that considering the state of constitutional law at the time, Rubinow's reforms would almost certainly have been held unconstitutional.

46. BERKOWITZ & MCQUAID, supra note 21, at 25.
47. Id. at 61.
49. BERKOWITZ & MCQUAID, supra note 21, at 96-104.
50. LUBOVE, supra note 4, at 4; see MARMOR ET AL., supra note 16, at 22-52.
In his work on the ideological and political struggles preceding the adoption of the Social Security Act, Lubove argues that the dominant American value system strongly prefers that which it perceives as voluntary to any program perceived as mandated.\(^5\) Governmental activity is equated with compulsion, while private activity is associated with freedom and choice.\(^5\) As Lubove notes, this facile association obscured the emergence of the modern organizational society—the structural similarities between public and private institutions which had developed. . . . Any institutions defended as expressions of American voluntarism were more comprehensible as large-scale bureaucratic systems with their characteristic features of great size, specialization, hierarchy, and routinization. The nature of private, voluntary institutions in an industrial-urban society had changed, giving rise to an essentially bureaucratic phenomenon. But the ideology of voluntarism lagged. It viewed public institutions as generically different from private; the latter, presumably, were neither bureaucratic nor coercive.\(^5\)

D. Private Models for Public Programs: Enshrining the Wage Link

Although the structures necessary for the creation of a universal, redistributive social insurance system had appeared by the mid-1930s, the ideology of voluntarism and the power of

\(^{51}\) Lubove, supra note 4, at 8. Contemporary examples of the continuing force of this ideology are easy to find. See, e.g., Joel Kurtzman, Business Diary, Sept. 29-Oct. 4, N.Y. Times, Oct. 6, 1991, at C2 (discussing former President Bush’s opposition to the Family and Medical Leave Act; see also Nathaniel C. Nash, Senate and White House Near Pact on Child Care, Lawmakers Say, N.Y. Times, Oct. 16, 1990, at B9 (discussing Bush’s opposition to Democratic proposals for child-care funding).

Under former President Reagan, voluntarism took on a quasi-religious tone, as in an October 1981 Presidential address:

"With the same energy that Franklin Roosevelt sought government solutions to problems, we will seek private solutions. The challenge before us is to find ways once again to unleash the independent spirit of the people and their communities. . . . Voluntarism is an essential part of our plan to give the government back to the people."


\(^{52}\) See Skocpol, supra note 17, at 261-85 (discussing the continuing impact of the abuses connected with the Civil War pensions, and their chilling effect on all proposals for public programs).

\(^{53}\) Lubove, supra note 4, at 8.
welfare capitalism merged to produce instead a highly conservative and uniquely American product. The Social Security Act, still the basic repository of American social programs, mixes a number of preexisting forms to produce a complex and often puzzling entity. The original Act's major titles—Titles II and III—addressed the problems of the elderly and the unemployed in a manner strongly influenced by private-sector models. For example, Title II, the old-age insurance title,

retained the joint contributory format reminiscent of private pension plans. . . . Only those with employment records, not simply anyone over 65, received benefits. This format insured that America's social welfare system would continue to be connected with the private labor market. Further, an employee's Social Security benefits reflected the wages that he had earned during his working lifetime. . . . The use of this benefit schedule, instead of one that paid the same retirement income to everyone, guaranteed that America's public welfare system would continue to accept private industry's judgment of a person's worth.  

The adoption of this format also responded directly to the tenets of the ideology of voluntarism. Although a government bureaucracy would collect contributions and dispense benefits, the private sector set wages, and only productive (wage-earning) labor in the private sector entitled one to those benefits. Thus,

54. Title I of the Act probably also deserves the modifier "major." It provided for those elderly persons who had already left the work force, and those who would leave with only limited or no entitlements under the Old-Age Insurance (Title II) provisions. Title I, referred to as Old-Age Assistance, provided grants to the states for the care of impoverished elders. In the early years, these Title I grants accounted for a very large percentage of expenditures under the Act—expenditures that substantially exceeded in value those paid out under the old-age insurance provisions. CATES, supra note 29, at 106. The Social Security Administration, however, always understood that old-age assistance was a temporary program that would ultimately become obsolete as the elderly population became covered by old-age insurance, Title II. The fundamental difference between the two programs echoed to some extent the difference between the Rubinow-Epstein and Andrews-Commons schools of social insurance, though Rubinow would have found Title I too limited. Old-Age Assistance was needs-based and noncontributory. Old-Age Insurance was nonmeans-tested and contributory. By including Title I, the Social Security Act did respond to the needs of the impoverished elderly, a group championed by Rubinow and Epstein. By including Title II, however, it provided for the ultimate replacement of the assistance model with one that met the Commons-Andrews criteria.

55. BERKOWITZ & MCQUAID, supra note 21, at 103.

although the federal government had designed a comprehensive social program that it would administer directly, the role of the private sector had not been omitted. Freed of administrative responsibility, the private sector nonetheless wielded great, if indirect, power in the setting of benefits.

A second key provision of this Depression-era statute also operated along familiar lines. The unemployment titles—Titles III and IX—were funded entirely by the contributions of private employers, in a manner reminiscent of workers' compensation. Although workers' compensation involved the purchase of insurance, while unemployment operated through the imposition of a federal tax, the real goal of the unemployment legislation was to induce the states to set up unemployment systems. To that end, the Act gave employers who contributed to a state system credits of up to 90% of the federal tax otherwise due. The states determined the level and duration of benefits, and employers' rates were set to reflect experience—that is, employers who laid off many workers contributed more to the unemployment fund than those who laid off fewer. The remaining provisions of the Act bypassed the federal bureaucracy altogether and operated through grants to the states, essentially providing federal funding for some portion of the means-tested public charity that states and localities had dispensed since the colonial period.

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61. These included aid to the needy aged (Title I), to dependent children (Title IV), and to the blind (Title X), and funds for maternal and child health care (Title V). See W. ANDREW ASCHENBAUM, SOCIAL SECURITY: VISIONS AND REVISIONS 25-26 (1986).

While some social insurance advocates were heartened by the inclusion of these "categorical" programs in the Social Security Act, Rubinow was not among them. His response to the statute was to note that he had not "preached social insurance for thirty-five years
At its core, then, America's first major foray into the publicization of economic security was conservative in the extreme. Much of the Social Security Act merely involved granting aid to the states to pursue means-tested charity. In its more novel provisions the Act drew heavily on preexisting private systems, adopting and adapting their structures including, most critically, the wage link.

E. After the Act: Economic Security After 1935

The highly conservative model of Social Security just described underwent a fundamental reconstruction while still in its infancy. In 1939, before the first old-age insurance benefit came due, Congress altered the old-age provisions of the Act. The time for commencement of payments was accelerated and new classes of beneficiaries were added: survivors and dependents of workers. Suddenly, and with comparatively little debate, it seemed that Rubinow's and Epstein's vision had triumphed, for dependent mothers had been brought within the Act. Although they paid no tax, they could receive benefits from the system on the death or retirement of their worker husbands.

What might have seemed a victory for universal security principles was, however, much more complicated. The concern that prompted the 1939 amendments was not the adequacy of the old-age benefits under the 1935 Act, but rather the accumulation, during the still continuing Depression, of huge

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in order now, at this late date, to abandon [his] ideal for the sake of a somewhat glorified system of public relief with half a dozen means tests." Lubove, supra note 4, at 175 (quoting Letter from Rubinow to Abraham Epstein (Oct. 8, 1935)).

62. For a far more detailed journey to this conclusion, see generally Cates, supra note 29, at 1-49.


65. See id. § 202(b)-(f), 53 Stat. at 1364-66.

66. Rubinow's other favored class, the nonworking elderly, was already covered by Title I. See supra note 54. The amendments also provided benefits for children and dependent parents. Pub. L. No. 76-379, § 202(c), (f), 53 Stat. at 1360, 1364, 1366.

cash reserves by the Social Security Administration.68 The attack on the reserves came from the insurance industry, which feared that their existence would create pressure for the expansion of the system.69 In a thoroughly ironic twist, Congress responded to this complaint by reducing the reserves through an expansion of the system.70 As to whether this might be construed as a victory for liberalism, Martha Derthick comments that “[a] conservative critique had paved the way for a liberal outcome, one of many illustrations of the ambiguity and adaptability of social insurance policy, in which it is often hard to tell the sides apart or who won.”71

Since 1939, the old-age insurance provisions of the Social Security Act have combined reward-for-productivity and care-for-the-needy concerns in a thoroughly puzzling array. They provide, in Milton Friedman’s words, “too much attention to ‘need’ to be justified as return for taxes paid, and . . . too much attention to taxes paid to be justified as adequately linked to need.”72 While moving steadily toward “adequacy” (the term generally used to describe provision for the needy), and away from “equity” (the term for justifications based on the link between contributions and benefits),73 the system retains to this day its often illogical mix of goals.74 Adequacy goals are not discounted, but are addressed primarily via a workplace-centered scheme of payroll taxes, with benefits paid only to workers and their dependents.

These same five-plus decades have also seen an explosion of other economic security devices, especially in the private sphere. Sociologist Beth Stevens traces the roots of this private-sector expansion to the Revenue Act of 1942,75 a funding provision

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69. DERTHICK, supra note 63, at 142-43.
70. Id.
71. Id. at 143.
73. This is Derthick’s conclusion. See DERTHICK, supra note 63, at 213.
74. For a critique that recommends a purer equity model, see ALICIA H. MUNNELL, THE FUTURE OF SOCIAL SECURITY (1977). For an insightful endorsement of the present mixed model, see MARMOR ET AL., supra note 16, at 128-75.
necessitated by America's entry into the Second World War. The Act imposed a whopping 80% excess profits tax on businesses, providing them with a strong incentive to lower their pretax profits by providing benefits to employees. The Act also included provisions expressly designed to encourage the establishment of private pensions. These incentives were compounded by the wartime wage freeze—the National War Labor Board's attempt to keep inflation in check. As Professor Stevens tells the story:

In an attempt to reduce the demands for higher wages, the board ruled in 1943 that employer contributions to insurance and pension plans would not be counted as "wages" during the freeze. This move, of course, opened the floodgates to the institution of employee benefits programs as unions and management sought wage increases under the guise of "fringe adjustments."

After the war, union efforts shifted. Prior to that time, unions had supported a number of public benefit initiatives. Faced with the need to deliver tangible results to the rank and file, however, postwar unions actively—and successfully—bargained for ever-increasing packages of employer-provided, private-sector benefits. Stevens notes that the working man had begun to look with great favor on noncash benefits, and Congress, through the Internal Revenue Code, reinforced their attractiveness by granting them preferential tax treatment.

The public-sector devices created since 1939 have, virtually without exception, been grafted onto the Social Security Act and reflect its structure. They provide relatively generous workplace-linked benefits for some, parsimonious, means-tested benefits for the neediest, and often nothing for those in between. For example, disability coverage, which was added to the Social Security Act in 1956, has been the subject of numerous amendments and interpretations. Stevens traces the causes of this shift and notes that the high taxes of the postwar period made tax-avoidance strategies appealing even to the lower middle and working classes. See id. at 134-35.

The preferential tax treatment of fringe benefits is discussed below. See infra notes 380-99 and accompanying text.
Security Act in 1956, is available only when a paid worker becomes disabled. It cannot be tapped by an unpaid, full-time mother who is injured, although her caregiving functions must be replaced. Because she is not a wage earner, the mother must look to the Supplemental Security Income (SSI) provisions of the Social Security Act for assistance. But that assistance is means-tested, and requires that the recipient exhaust most of her assets to qualify.

Two final and enormously significant programs were added to the Social Security Act in 1965: Medicare and Medicaid. The latter, like all categorical programs, is a form of means-tested charity. It is simply distributed to those who qualify in kind (as medical care) rather than in cash. Medicare is harder to classify. It deviates the furthest from prior models in that it is neither means-tested nor preconditioned on the payment of taxes over some minimal period. While Medicare is financed by a payroll tax and operates through a trust fund, it is very clearly a program through which current workers pay the health costs of current retirees.

In sum, we approach the year 2000 with a varied complement of economic security devices, virtually all of which can be assigned to one of the three tiers described above. Under the current system, the most valuable devices are distributed through the paid work force; the rights of paid workers' close family members to make some claims derivatively are recognized; and some support is provided to those who fail to qualify

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82. The insurance industry has periodically debated the merits of providing private disability insurance for “homemakers.” See, e.g., Barbara J. Lautzheimer, Disability Insurance: Are You Covered if You Can't Work?, CHANGING TIMES, Apr. 1982, at 58 [hereinafter Disability Insurance]; The Impact of Women's Lib on Disability Insurance, INDEPENDENT AGENT, July 1974, at 49, 54-56.
83. 42 U.S.C. §§ 1381-1383(c).
86. See EDWARD D. BERKOWITZ, AMERICA'S WELFARE STATE FROM ROOSEVELT TO REAGAN 167 (1991). Current workers do contribute to the Medicare trust fund. The program also includes some complex transitional provisions for public-sector employees who did not contribute to the Social Security System during their work lives. Those with spotty or nonexistent work records are included via a transfer payment from Medicaid to Medicare. But all these devices are quite unlike the Title II Old-Age Insurance, in that they do not link the level of benefit received to the amount of tax contributed.
87. BERKOWITZ, supra note 86, at 167.
either as paid workers or close family members. I turn now to the wisdom and efficacy of the current system.

IV. THE GOAL OF UNIVERSAL DISTRIBUTION

I suggested earlier that one rational goal for an economic security system would be to provide security for all members of society. If we assume this is the goal of contemporary American systems, then we must ask if our distributive rules conveniently and efficiently disseminate security throughout the population. The fragmented nature of our economic security devices greatly complicates the task of evaluating their distributive efficiency, but certain crucial questions can be identified, and at least partial answers provided. Although different uses of dissimilar databases make comparisons across devices difficult, some strikingly similar themes do emerge in response to the inquiry, "Do current systems achieve universal distribution of security?"

A. Benefits Not Offered

1. Contractual Benefits

Provision for health care provides a good starting point for testing the scope of our security distribution system because it is among the most crucial and commonly provided wage-linked benefits. The question to be asked is whether a workplace-based distribution system effectively disseminates health insurance throughout the population. Only one who has successfully avoided all televisions, radios, newspapers, and magazines for the past several years could fail to recognize that the answer to this question is a resounding "no."

In a paper published in January 1993, the Employee Benefit Research Institute (EBRI) estimated that in 1991, 36.3 million citizens under age sixty-five lacked health insurance of any kind. This is approximately 16.6% of the population. The most recent U.S. Census Bureau Statistical Abstract cites a figure of 33.6 million or 13.6% of the population. These people are excluded from all the forms of health insurance described

88. See supra text accompanying notes 15-16.
above—workplace-based, derivative or means-tested.\textsuperscript{91} Equally unsettling is the estimate that nearly 64 million Americans (28.1\%) lacked health coverage for at least one month during a 28-month period from 1986 to 1988.\textsuperscript{92}

The EBRI research also explored the composition of this uninsured population. Rephrasing the Institute’s questions in our terms, we would ask: which tier of benefits produces this deficiency? The answer is unequivocal: it is the first and second tiers, those in the work force and those whose economic security should be attained derivatively through them. These are the “employed uninsured” and their dependents. The EBRI study estimated that the first group—those who work but have no health coverage—consists of 20.5 million people, or 56.4\% of the uninsured population.\textsuperscript{93} An additional 9.5 million uninsured persons were children under the age of 18—a group we would expect to see covered by derivative benefits. These children represented 26.3\% of EBRI’s uninsured population. In fact, the unemployed and all other adult nonworkers under the age of 65 constituted only 17.3\% of the uninsured population.\textsuperscript{94}

EBRI’s investigations thus reveal an enormous gap in the health insurance system. The next crucial question should be: why? Why do so many workers—and through them, their dependents—lack health insurance coverage? In a 1985 study, researchers at the National Center for Health Services Research and Health Care Technology Assessment attempted to determine whether uninsured workers were declining proffered coverage. Examining data drawn from the 1980 National Medical Care Utilization and Expenditure Survey (NMCUES) and the 1977 National Medical Care Expenditure Survey (NMCES), the researchers concluded that they were not. Two-thirds of the employed uninsured worked for employers who did not offer health insurance plans.\textsuperscript{95} An additional 22\% were ineligible for


\textsuperscript{93} SOURCES, supra note 89, at 20 tbl. 6. The vast majority of the uninsured live in families headed by a full-time, year-round worker. Id. at 22 tbl. 8.

\textsuperscript{94} Id. at 20 tbl. 6.

\textsuperscript{95} The researchers based this conclusion on data from the 1977 National Medical Care Expenditure Survey (NMCES). See Alan C. Monheit et al., The Employed Uninsured
the plans offered by their employers. Only 11.1% declined to enroll in an available plan. Thus, a striking 88.9% of the employed uninsured simply had no coverage available to them.

A final series of conclusions drawn from these studies concerns the demography of the uninsured population—that is, the characteristics of those workers who are not offered health insurance coverage by their employers. The researchers at the National Center for Health Services Research stated that the group is, in fact, quite diverse, but that it has several salient features.

Workers most likely to lack coverage earn low wages, are less educated, and have household incomes significantly below those of insured workers. Workers in industries and occupations characterized by seasonal employment and less technical or administrative skill are also more likely to be uninsured, as are young workers, part-time employees, and the self-employed.

The study concluded that nonwhite workers are more likely to lack health insurance than whites, and that uninsured workers as a whole are characterized by "poor economic circumstances, relatively weak bargaining power (little or no union representation, readily available labor substitutes for low-skill workers), and an unwillingness of employers to insure seasonal or margi-

and the Role of Public Policy, 22 INQUIRY 348, 354 tbl. 4 (1985). For a more recent confirmation of this conclusion, 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).

96. The study does not comment on the reasons for this ineligibility. For a discussion of waiting periods and similar barriers to benefit attainment, see infra notes 135-222 and accompanying text.

97. Monheit et al., supra note 95, at 359. Firm size is also relevant. Another study found that over 90% of employees in firms with more than 25 workers have health insurance plans available, compared to only 55% of workers in firms with 25 or fewer employees. AMY K. TAYLOR & WALTER R. LAWSON, JR., U.S. DEP'T OF HEALTH & HUMAN SERVS., DATA PREVIEW: EMPLOYER AND EMPLOYEE EXPENDITURES FOR PRIVATE HEALTH INSURANCE, June 1981, at 3, 4.

98. Monheit et al., supra note 95, at 351. Economist Arleen Leibowitz found no correlation between race and the likelihood of receiving health insurance benefits, although she notes that only 4% of the workers in her sample were black, requiring that her results be "interpreted with caution." Arleen Leibowitz, Fringe Benefits in Employee Compensation, in THE MEASUREMENT OF LABOR COSTS 371, 380 (Jack E. Triplett ed., 1983).

The latest Statistical Abstract, covering the total population rather than workers alone, delineates a clear gap: 12.7% of whites have no health insurance, but 18.4% of blacks and 31.4% of Hispanics fall into the uninsured category. 1992 STATISTICAL ABSTRACT, supra note 12, at 105 tbl. 153; see also John M. Eisenberg, Economics, 268 JAMA 344 (1992).
nal workers."  

A second example of significant gaps in benefit distribution can be found in the private pension system. Despite general agreement with the proposition that both Social Security and a private pension are necessary to achieve economic security in old age, private pension plans currently cover less than half the work force, and coverage is declining. In 1979, approximately 50% of full-time workers had private pensions. By 1983, that number had dropped to 48%, and by 1988, had fallen again to 46%. Most analysts doubt that this trend will reverse. The industries most likely to provide pension coverage—manufacturing, mining, transportation—are shrinking. The areas where growth is expected—nonprofessional services and small, nonunion businesses—are the least likely to provide employees with pension coverage.

In sum, at least as to two critical benefits—health insurance and private pensions—the three-tiered system of labor-force-linked, derivative, and means-tested access produces serious gaps.

2. Statutory Benefits

The research cited above suggests that the absence of health benefits in the employment contracts of low-wage workers may reflect those employees' lack of bargaining power. But such an explanation would account only for the absence of privately contracted benefits. Individual bargaining power would not affect the scope of entitlements created by statute. A review of

99. Monheit et al., supra note 95, at 359. The EBRI study concludes that young workers and low earners are the most likely to lack health insurance. SOURCES, supra note 89, at 10, 13.
100. See, e.g., THE COMMON GOOD, supra note 4.
102. See id. at 10-12; see also Alicia H. Munnell, ERISA—The First Decade: Was the Legislation Consistent with Other National Goals?, 19 U. Mich. J.L. Ref. 51, 81 (1985).
103. Munnell, supra note 102, at 81; Woods, supra note 101, at 10-12.
104. See supra notes 96-99 and accompanying text.
105. Professor Edward Berkowitz notes quite properly that in a real sense these benefits do reflect bargaining power. Benefit laws are in part a response to lobbying efforts in state or federal legislatures, where the powerlessness of certain groups will be reflected. Interview with Professor Edward Berkowitz, George Washington University (June 8, 1991). In the text above, I refer only to the absence of individual bargaining in the case of statutory benefits. I agree with Berkowitz that statutory schemes as a whole do reflect the power—or lack thereof—of various constituencies.
statutory benefits reveals, however, that gaps clearly exist, and that they parallel quite strikingly the exclusions seen in the health insurance area.

A case in point is workers’ compensation. Many workers’ compensation statutes were, and some still are, elective—a feature that necessarily makes benefit distribution nonuniform. Even within those statutes, however, certain exceptions and exclusions operate to limit the class of workers covered. According to the 1991 supplement to Larson’s treatise, a majority of states excludes domestic service workers and “casual” workers from workers’ compensation coverage, while a significant minority also excludes agricultural workers and employees in very small firms (fewer than five workers).

The overlap between the groups excluded from workers’ compensation coverage and those workers who lack health insurance is substantial. The EBRI study notes that 40.8% of agricultural workers lack health insurance, as do 33.9% of personal service workers—a category that apparently encompasses domestic workers. As only 16.5% of all employed persons lack health insurance, the agricultural and personal service statistics are extremely high. The National Center for Health Services Research study noted that “[w]orkers in industries characterized by seasonal or transitory employment and in occupations requiring less technical skill are also more likely to be

106. Lubove notes that into the 1950s approximately half of the statutes were elective. Lubove, supra note 4, at 61. This means that either the employer or the employee could choose not to participate in the compensation system. While an employer who opted out lost several extremely valuable defenses otherwise available at common law, id. at 58, the election requirement did have a depressing effect on benefits. That is, the cost to the employer of the compensation system could not exceed the cost of this enlarged common-law liability. If employers perceived it as doing so, they would simply decline workers’ compensation. Id. at 202-03 n.40 (citing State of Pa., Report of Industrial Accidents Commission 15 (1915)).

In 1972, the National Commission on State Workmen’s Compensation Laws submitted a Report to the President which included the recommendation that all of the state acts be amended to make coverage compulsory. It is unclear to what extent this recommendation was adopted, though Larson noted in 1972 that even in states having election provisions “the nonelecting employer is exceptional.” 1 Larson, supra note 31, § 5.30.

107. 1C Larson, supra note 31, § 50.10.


109. Id.

110. The EBRI report lists other sectors with large uninsured populations: self-employment (21.5% uninsured), construction (30.7%), and retail trade (25.2%). Id. The study further reveals that all of the service industries—personal, professional, business and repair, and entertainment and recreation—taken together account for 23.1% of all uninsured workers. See id. at 47 tbl. 26.
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uninsured." Logically, there should be overlap between these categories and the "casual" worker of the workers' compensation statute, though the fit is by no means perfect.112

Because workers' compensation coverage is not negotiated by the employer and employee, the bargaining process cannot explain the pattern of exclusions. Larson offers two rationales. The first is an administrative feasibility argument. Describing agricultural workers, Larson alludes to "the practical administrative difficulty that would be encountered by hundreds of thousands of small farmers in handling the necessary records, insurance, and accounting." The same argument is offered with respect to "casual" workers and domestics: "[T]he compensation system simply could not operate if every odd job undertaken by an employee for a householder were covered." But Larson himself admits the weakness of this justification as applied to agricultural workers, as many of them are employed by large businesses on a seasonal but regular basis, while others may be employed full-time year-round.115

Larson's second justification, the "no product" rationale, is similarly inapposite. According to Larson, one of the great strengths of the workers' compensation system is that it is not a social insurance system at all, but a refined method of attributing costs in a capitalist economy. Through workers' compensation, the cost of workplace injuries can be added to the price of the product being produced, causing it to correctly reflect the true cost of its manufacture. Because domestic and casual workers do not produce a product for sale, the costs of underwriting their workplace injuries cannot be attached to the fruits of their efforts.

Like the administrative feasibility argument, the "no product" argument proves too much. Agricultural workers clearly do produce a product. As for domestic and casual workers,

111. Monheit et al., supra note 95, at 351.
112. The term "casual" might, for example, not include an employee whose work was noncontinuous but predictably recurring. 1 LARSON, supra note 31, § 51.12. This worker would therefore be covered by the workers' compensation statute. Such a worker might, however, be too "transitory" to be offered health insurance.
113. 1C id. § 53.20.
114. 1C id. § 50.22.
115. 1C id. § 53.20.
116. 1C id. §§ 3.20, 50.25.
117. The workers' compensation statutes of most states limit the definition of "casual worker" to one whose services are outside the course of the employer's usual business. 1C id. § 51.12.
their "product" is consumed by their employers. Failure to charge their employers for the cost of insuring them thus understates the true cost of this "product" as much as the failure to include the costs of workplace injury in the price of manufactured goods would. Although it is correct that the employer in such cases cannot pass the cost of insurance on to other consumers, that is because he is himself the consumer of the "product," and nevertheless the employer should, like the purchaser of manufactured goods, bear the ultimate cost of the worker's workplace injuries.118

Larson's justifications for excluding certain classes of workers from the workers' compensation statutes are thus unsatisfactory. While administrative feasibility and risk spreading are important, neither concern explains the exclusion of all farm workers or all domestic workers from a significant percentage of statutes. Furthermore, the overlap in the categories of workers excluded from the compensation statutes and those who have no health insurance is striking. They are the least powerful workers—those who do unskilled labor in traditionally low-paying industries. They are also workers who are very likely to be Hispanic or black.119

Similar patterns emerge in connection with other benefits—unemployment compensation, for example. The unemployment provisions of the Social Security Act of 1935 excluded agricultural and domestic workers, citing administrative feasibility as the justification.120 Although the scope of unemployment coverage has steadily expanded since 1935, reaching some 97% of paid workers by 1985, those who remain uncovered include the self-employed, workers on small farms, and domestic workers who perform services for several employers in a given calendar quarter.121 Writing in 1974, Martin Feldstein noted the maldistribution of unemployment benefits: "While many of those who

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118. I owe this insight to my colleague, Professor Daniel C. Schaffer.
119. Tabulations contained in the 1992 Statistical Abstract indicate that 29.3% of all cleaners and servants are black and an additional 26.3% are Hispanic. Thus, this population is 55.6% Hispanic and black. It is also 95.8% female. 1992 Statistical Abstract, supra note 12, at 394 tbl. 629. The related category, "maids and housemen," is 46.9% black and Hispanic and 82.9% female. The farm-worker category is less dramatically tilted, but the Abstract lists the farm-worker population as 35.4% black and Hispanic. Id.
120. Division of Research & Statistics, New York State Dep't of Labor, supra note 60, at 7; see also James M. Rosbrow, Unemployment Insurance System Marks Its 50th Anniversary, MONTHLY LAB. REV., Sept. 1985, at 21.
121. Rosbrow, supra note 120, at 24.
receive unemployment insurance benefits are poor, most of the benefits go to middle and upper income families.”122 Feldstein cited a number of possible causes of this anomaly, including the fact that the poor “are more likely to work in uncovered occupation[s].”123

In sum, statutory and contractual entitlements show strikingly similar patterns of distribution. While most workers receive benefits, there are significant, systemic gaps that correlate directly with income level and occupational type. In a study comparing the yearly median value of benefits received by members of different income groups, economist Timothy Smeeding cited a range with a peak of $5345 for unionized craft workers and a low of $709 for service workers.124 Smeeding concluded, moreover, that “these differences are more a matter of benefit recipiency status than of benefit levels per se.”125

Although other types of benefits could be examined—all with variations and idiosyncrasies that complicate the analysis—those described above reflect what seems to be a dominant pattern: our present attribution system falls far short of achieving universal economic security. Those outside the labor force are not offered compensation while they search for employment, and are offered health and disability coverage only when they meet strict and often stingy means tests.126 More striking, however, is the empirical data that suggests that full-time, year-round workers are also excluded from valuable benefits in a pattern that cuts across benefit types. Our benefits structure systematically excludes the poorest and least skilled workers. These workers not only lack health insurance, but may be excluded from workers’ compensation and unemployment coverage, and are unlikely to have access to private pensions.127 Furthermore, the exclu-

123. Id. at 237.
124. Timothy M. Smeeding, The Size Distribution of Wage and Nonwage Compensation: Employer Cost Versus Employee Value, in The Measurement of Labor Costs, supra note 98, at 237, 250. Smeeding demonstrates that 51.4% of managerial and administrative employees receive both health and pension benefits, while only 12% of service workers receive similar coverage. Id. at 252 tbl. 6.5.
125. Id. at 250.
126. Unless, of course, they are dependents of a paid worker. See infra notes 259-355 and accompanying text.
127. The focus here has been on the full-time worker, as it is commonly assumed that she does gain access to valuable entitlements through her work. The dearth of benefits available to part-time workers is well documented elsewhere. See, e.g., Levitan & Con-
sion of these workers results in the exclusion of their dependents as well. However, because these are working families, many are not poor enough to qualify for means-tested benefits. One could hardly concoct a more perverse result.

3. The Sources of Exclusion

Why do these gaps in the benefit system exist? One possible source is myopia. Professor Edward Berkowitz notes that many of the programs I have described were enacted as responses to the problems of industrialization. Workers’ compensation, for example, was never intended to handle agricultural accidents, which had, after all, been occurring for centuries.\footnote{128} While I believe Berkowitz is correct, this story contains a darker side as well, one that he himself recognizes.\footnote{129} At least in some instances, exceptions were intentionally created to exclude African Americans from benefit coverage. The clearest example of this phenomenon can be found in the old-age provisions of the Social Security Act.\footnote{130}

Writing about the influence of southern members of Congress on New Deal legislation, sociologist Jill Quadagno notes that the initial draft of the Social Security Act included agricultural and domestic workers in the old-age provisions. But southern Congressmen objected to their inclusion and the bill was amended, deleting these categories, and “leaving only 10 percent of the black labor force covered by [the old-age provisions].”\footnote{131} This was necessary, Quadagno implies, because the availability of old-age benefits would have seriously threatened the sharecropping system, which was, at that time, essential to Southern agriculture.\footnote{132}

Other writers, describing the exclusionary patterns of various programs, make similar points. For example, Professor WAY, PART-TIME EMPLOYMENT: LIVING ON HALF RATIONS (1988); Martha Chamallas, Women and Part-Time Work: The Case for Pay Equity and Equal Access, 64 N.C. L. REV. 709, 716 (1986); Colien Hefferan, Employee Benefits, 6 FAM. ECON. REV. 6 (1985); Leibowitz, supra note 98, at 379-80.

\footnote{128} Interview with Edward Berkowitz (June 8, 1991).
\footnote{129} See Berkowitz, supra note 86, at 36.
\footnote{130} See Jill Quadagno, The Political Economy of Relief in the South, in POLITICS, supra note 16, at 235.
\footnote{131} Id. at 238.
\footnote{132} Id. at 239-41. Quadagno makes this point explicitly with respect to old-age assistance, the means-tested benefit of Title I of the Social Security Act, but her argument would apply as well to Title II, the contributory insurance section, though the effect of including agricultural workers under that Title would have been less immediate.
Margaret Weir comments that many basic decisions about unemployment compensation were left to the states under Title III of the Social Security Act because federal programs "threatened to disrupt the caste system of race relations upon which Southern economic and political arrangements were based."\textsuperscript{133}

In sum, though the patterns of inclusion and exclusion have shifted over time, drawing many more persons into the benefit system,\textsuperscript{134} the history of the rules of exclusion should give us pause. This history suggests that a benefit system can be—and in part was—constructed with the explicit intent of excluding and disadvantaging a given group. Efforts at reform would do well to note that there was perhaps more bias and less administrative feasibility in the patterns noted above than most of us would like to acknowledge.

B. Gatekeeping Provisions

The arguments and data presented above confirm that many members of the paid labor force are not offered benefits by their employers, or are categorically excluded from benefits provided by statute. In this section I will demonstrate that even when employers do offer contractual benefits, or when a statute includes a given category of worker, threshold requirements may impede access to what the employer or the law appears to provide. I will also demonstrate that women and racial minorities bear the brunt of these exclusionary provisions.

The gatekeeping rules that I examine are of three types: (1) waiting periods, which deny a worker a benefit until she has put in some minimum time on the job; (2) vesting periods, which are similar but have a retroactive quality (once the vesting requirements have been met the employee receives credits for time already served); and (3) recency requirements, which make the availability of a benefit turn on whether the employee has been out of the labor force at any time during the recent past. All three sets of requirements serve to exclude employees who would otherwise be eligible for valuable benefits.


\textsuperscript{134} The old-age provisions of Social Security, for example, now include agricultural and domestic workers. See Social Security Amendments of 1950, Pub. L. No. 81-734, § 101, 64 Stat. 477, 482 (current version at 42 U.S.C. § 402 (1988)).
1. Waiting Periods

Although little attention has been paid to waiting periods, they are quite prevalent, as they affect most contractual benefits. An employee beginning a new job is likely to find that many of the benefits her employer offers are withheld until she has put in a certain number of weeks or months on the job. Some benefits, such as long term disability coverage, may be delayed for many months or even years.

A recent study of medium and large firms conducted by the Bureau of Labor Statistics found that 49% of health insurance plans and 51% of life insurance plans imposed waiting periods. Technical, clerical, and production workers were more likely to experience waiting periods than were professional and administrative employees. In the case of health insurance, 58% of production workers experienced a waiting period, compared with only 38% of professional and administrative workers. For life insurance, the percentages were 59% of production workers and 41% of professionals and administrators. The most common waiting period was three months, though a one-month wait was nearly as prevalent. Other benefits required still longer waits. Short-term disability, for example, entailed an average wait of three months for employees covered by sick leave and six months or less for those covered by sickness and accident insurance. The study found that more than one-fifth of the long-term disability (LTD) plans had waiting periods of

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135. This figure may, in fact, be too low. The authors of the study could not determine whether a waiting period was required in another 9% of the plans. Only 42% of the plans that included health benefits clearly provided immediate coverage. BUREAU OF LABOR STATISTICS, U.S. DEP’T OF LABOR, BULLETIN NO. 2363, EMPLOYEE BENEFITS IN MEDIUM AND LARGE FIRMS, 1989, at 66 tbl. 58. (1990) [hereinafter EMPLOYEE BENEFITS].

136. Id. at 79 tbl. 76. Again, there may be undercounting, as it was impossible to determine if a waiting period was required in 3% of the plans.

137. Id. at 66 tbl. 58.

138. Id. at 79 tbl. 76.

139. Id. at 44, 47.

140. Id. at 19-20. Paid sick leave generally replaces 100% of the employee’s wage, and is available beginning on the first day of illness. By contrast, sickness and accident insurance typically pays a percentage of the wage, often in the 50-67% range, and may apply only to an illness that lasts beyond some excluded duration, such as one to seven days. Id. at 18-19. Professional workers are more likely to be covered by sick leave, and production workers by sickness and accident insurance. Combining the two sources indicates that some 96% of professional workers receive one sort of coverage or the other. The comparable percentage for production workers is 84%. Id. at 22 tbl. 18.
one year or more.\textsuperscript{141}

The effect of waiting periods is obvious. If an employee gets sick, is disabled, or dies during the waiting period, no benefits will be paid. Clearly, then, the length of the waiting period is quite significant. Very short periods, such as a month, pose less risk than longer ones, though the prospect of having no health insurance for even the "brief" period of one month is something no sane person would welcome.

Of course, not every new employee lacks benefit coverage. A person who was previously employed can sometimes retain her life insurance for a brief period after the termination of her employment. Some employers pay life insurance premiums on a periodic basis, and a departing employee may be covered for the balance of the period paid. This may be sufficient to bridge the gap until she meets her eligibility requirements with a new employer. The same can hold true for health insurance.\textsuperscript{142} Furthermore, federal law now requires that an employee who quits her job, or whose services are terminated by her employer, be allowed to remain in the employer's group health plan for up to eighteen months.\textsuperscript{143} However, the employee must pay the full cost of this coverage,\textsuperscript{144} a significant burden some departed employees cannot meet.

As to the lengthy waiting periods frequently associated with long-term disability, the empirical data necessary to determine the incidence of disabilities during the waiting period have not been developed. Common sense, however, suggests that as the noncovered period expands, the likelihood that a disability will occur within that period increases.

Why do employers require employees to work for some period before benefits become available? The practice is seldom discussed. Whether dictated by employers or their insurers, waiting periods seem to be a given—simply a part of the fabric of the American work force. It is fairly easy to understand employer enthusiasm for waiting periods. Some benefits, particularly health insurance, require significant administrative costs. The Bipartisan Commission on Comprehensive Health Care, for example, estimated that health insurance loading fees—the costs

\textsuperscript{141} The exact figure is 22%. \textit{Id.} at 20.

\textsuperscript{142} This will not be the case, however, if the employer self-insures, as many do.

\textsuperscript{143} See 29 U.S.C. §§ 1161-1168 (1988). An exception is made for the employee who is guilty of "gross misconduct." \textit{Id.} § 1163(2).

\textsuperscript{144} \textit{Id.} § 1164.
associated with administration, marketing, and risk determination—can reach 40% of plan costs for small employers.\textsuperscript{145} These costs are exacerbated when the employer has large numbers of part-time workers or significant worker turnover.\textsuperscript{146} Delaying an employee's enrollment in a health plan may thus eliminate costs that would otherwise be incurred for short-term employees.\textsuperscript{147}

There is evidence, however, that suggests that employers use waiting periods not merely to avoid administrative costs, but also to escape claims. The very long waits associated with long-term disability coverage (LTD) have been explained by the comment that "[b]ecause of the long-term nature of the LTD benefits, more employers restricted eligibility to employees who had demonstrated some attachment to the company."\textsuperscript{148} This explanation has more to do with a desire to limit exposure than with administrative burden.

What may be rational from the employer's viewpoint, however, is not inherently socially wise. I believe there is a quite pressing need to examine waiting periods from the employee's point of view. The effect of waiting periods is this: at any given moment, at least some employees in firms that theoretically provide a certain wage-linked benefit are excluded from coverage because they have not yet met waiting-period requirements. If the employee's work life is one of stable association with this employer, then, in all likelihood, the waiting period means little. The employee will sit out the waiting period once and thereafter enjoy full benefit entitlement. However, the employee who moves from job to job will find that her mobility severely impairs her access to work-force-based benefits. Each job change begins the clock anew, and frequent changes mean that the employee spends much of her time excluded from benefit entitlement while she is "waiting" for coverage to begin.

The impact of waiting periods is not randomly distributed throughout the work force. Instead, their adverse effects fall disproportionately on those whose tenure on the job is relatively

\textsuperscript{145} U.S. Bipartisan Comm'n on Comprehensive Health Care, A Call for Action: Final Report 27-28 (1990). These fees fall to less than 10% for larger firms purchasing similar policies. \textit{Id}.
\textsuperscript{146} See Thorpe et al., supra note 95, at 945.
\textsuperscript{147} Increased medical screening by health insurers, for example, swells the costs of adding new employees to the health plan.
\textsuperscript{148} Employee Benefits, supra note 135, at 20.
brief—that is, on women and blacks. Writing in 1982, demographer Shirley Smith of the Bureau of Labor Statistics noted that the average man would enter the labor force 3 times in his lifetime. The average woman would do so 4.5 times. Men are likely to complete the phase of intermittent work more quickly than women. At age 25, they would anticipate an average of just 1.1 more labor force entries, while women could look forward to 2.7 additional entries. . . . Because most men were firmly attached to the job market by age 25, they would spend an average of 29.1 years in the labor force for every entry beyond that age, but the typical woman would engage in several shorter periods of activity, averaging just 8.6 years per entry.149

A similar study conducted by the Bureau of the Census found that 72% of the women in the survey population had experienced a work interruption, compared with only 26% of the men surveyed. Among professionals, the numbers were 61% for women and only 15% for men.150

Turning from sex- to race-based variations, the Census Bureau report stated:

Black men had a higher overall interruption rate than White men and spent a higher proportion of their potential work years away from work. The percent with interruptions caused by an inability to find work was about 15 percent among White men and 35 percent among Black men. Overall, Black men spent about 7 percent of their potential work years away from work compared to about 3 percent for White men.151

This data measures work interruptions—that is, departures from the labor force—not mere job turnover. Turnover—movement from job to job—is extremely difficult to measure, and statistics on the phenomenon are unavailable.152 Clearly, however, a job change is a more frequent event than a labor-force depa-
ture. Thus, the data I have cited probably understates the wait-
ing period problem. It is a problem deserving attention. Waiting periods are a potent threat to the economic security of the highly mobile worker, and almost certainly discourage what may be socially beneficial occupational mobility.

2. Vesting

Vesting has been a key concept of Anglo-American prop-
erty law since feudal times. Although its seemingly endless per-
mutations are a memorable (and usually painful) chapter in every law student's rite of passage into the profession, in fact, vesting is nothing more than a turgid variant of the waiting period. Vesting denotes the transformation of an expectancy into a right; a nonvested benefit is a hope, which may or may not be realized. A vested right is real and concrete; the property interest that vests is one that will come to fruition, whether now or in the future.

Prior to the enactment of the Employee Retirement Income Security Act of 1974 (ERISA), many employee retirement plans lacked any concept of vesting. Employers were free to dis-continue the plans at any time, and even long-term employees on the verge of retirement often had no enforceable pension claims. Plans that included vesting provisions tended to make the required service periods so long, and disqualifying events so numerous, that very few participants—fewer than 10%—ever attained benefit eligibility.

ERISA and its vesting rules dramatically altered this land-
scape by stating that no pension plan would qualify for preferen-

155. The governing state law was inconsistent. Some courts held that pension plans were mere gratuities, and thus not enforceable as contracts. See, e.g., Kravitz v. Twentieth Century Fox Film Corp., 160 N.Y.S. 2d 716, 719-20 (1957). Others held that while a plan might be promissory in form, no consideration had been given for it, and the employer was therefore not bound. See, e.g., Plowman v. Indian Ref. Co., 20 F. Supp. 1, 4-6 (E.D. Ill. 1937). Still other courts declared pension promises enforceable. See, e.g, Hunter v. Spar-
156. A study undertaken by the Senate Labor Committee during the deliberations on ERISA found that in a large group of plans, covering 6.9 million employees, only 4% of the participants attained benefit eligibility. See Legislative History of the Employee Retire-
tial tax treatment unless the employee participating in the plan became fully vested as to all benefits within some stated period. Originally, this period could be as long as ten years.\textsuperscript{157} Since 1986, it has been reduced to five years.\textsuperscript{158} The effect of this reduction is significant. An employee aged twenty-one or older who joins a firm with a pension plan in effect must, under current law, be permitted to enroll in the pension plan no later than one year after the commencement of her employment.\textsuperscript{159} If the employee completes five years of service with the employer, her previous pension benefits "vest."\textsuperscript{160} This means that she is guaranteed to receive pension benefits at her retirement based on (1) her years of participation in the plan, and (2) the rules and formulas of the employer's plan. An employee who leaves her

\textsuperscript{157} In fact, the employer could wait 15 years for full vesting so long as partial vesting commenced after year five, Pub. L. No. 93-406, § 203(a)(2)(B), 88 Stat. at 854 (amended 1986), or could use the so-called "Rule of 45" that provided 50% vesting when the employee's combination of age and service (a minimum of five years) equaled 45, with 10% additional vesting for each of the next five years. Id. § 203(a)(2)(C)(i), 88 Stat. at 855 (amended 1986). However, the ten-year schedule, called "cliff vesting," was predominant. STEPHEN R. BRUCE, PENSION CLAIMS: RIGHTS AND OBLIGATIONS 190-91 (1988). Cliff vesting remains predominant in defined benefit plans—the type of plan that was the major source of pre-ERISA abuse. See generally Munnell, supra note 102. Eighty-nine percent of the participants in defined benefit plans are covered by plans that use cliff vesting. EMPLOYEE BENEFITS, supra note 135, at 103 tbl. 93.

Most basic pension plans fall into one of two categories: the defined benefit plan or the defined contribution plan. A defined contribution plan "provides for an individual account for each participant and for benefits based solely on the amount contributed to the participant's account, and any income, expenses, gains and losses." I.R.C. § 414(i) (1988). In other words, money is actually invested or deposited in a specific account for the individual employee, and the ultimate value of her pension is the value of these deposits and investments plus interest. All plans not classified as defined contribution plans are classed as defined-benefit plans. Id. § 414(j). Typically, these plans operate through a formula that promises the employee a pension benefit based on a percentage of her preretirement income. Frequently, this percentage is multiplied by her years of service with the employer, thus extending larger benefits to longer term employees. See STEPHEN J. KRASS & RICHARD L. KESCHNER, THE PENSION ANSWER BOOK 20-21 (Theodor J. Huber ed., rev. 4th ed. 1987).

\textsuperscript{158} Tax Reform Act of 1986, Pub. L. No. 99-514, § 1113(a), 100 Stat. 2085, 2446 (amending I.R.C. § 411(a)(2)(A)). Again, there is a longer period for so-called "step plans." If employee rights begin to vest after year three, the employer can delay full vesting to year seven. I.R.C. § 411(a)(2)(B).

\textsuperscript{159} ERISA thus contains both a vesting period and a waiting period. An employee aged 21 or older may be required to wait up to one year before enrolling in a pension plan. An employee who begins work before the age of 21 can be required to wait until her twenty-first birthday to enroll. In fact, actual enrollment may be delayed until the beginning of the next "plan year," so long as this is not more than six months from the day on which the employee becomes eligible to enroll. I.R.C. § 410(a)(1)(A). Prior to enrollment, an employer is not required to credit the employee with pension benefits.

\textsuperscript{160} Again, the youngest employees can be delayed. Years of service before age 18 can be disregarded for vesting purposes. Id. § 411(a)(4).
employer prior to vesting, however, forfeits her benefits.\footnote{161} These amounts revert to the employer.\footnote{162}

Unlike the dearth of evidence on the impact of waiting periods on employees' health, disability, and life insurance coverage, statistics were developed during the debates on ERISA that reflect employees' duration of employment at their current jobs. Senator Hartke of Indiana, testifying before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, presented data indicating that even in the forty-five to forty-nine-year-old age group—a stable group that has theoretically passed the "try-out" stage but that is substantially preretirement—the average woman's tenure on her current job was only 4.4 years. Senator Hartke further noted that "in wholesale and retail trade, where women so commonly work, the median years on the current job of women over 45 was 4.9 years as compared with 8.8 years for men."\footnote{163}

More recent data indicate that "because increasing proportions of women are now permanent members of the work force, the gap in tenure between men and women should begin to narrow."\footnote{164} At the present time, however, it remains substantial. A study conducted by Ellen Seghal indicated that the overall median job tenure for all males in the work force in 1983 was 5.1 years—longer than the new ERISA vesting period—while the median for women was 3.7 years—shorter than the ERISA vesting period.\footnote{165} Seghal attributes this difference to the fact that "uninterrupted labor force participation has been common for men but is a more recent practice for women."\footnote{166}

The effect of failure to vest is dramatic. Assume an eighteen-year-old high school graduate, Eleanor, joins Company A as a secretary in 1990. Assume also that her employer requires all

\footnote{161} If the plan is one to which the employee and the employer both make contributions (contributory), the employee's own contributions are not forfeited. \textit{Id.} § 411(a)(1). However, a departing employee does lose benefits attributable to the employer unless she returns to that employer within five years. \textit{Id.} § 411(a)(6)(C).

\footnote{162} Because it is predictable that this event—called a "forfeiture"—will occur, it is factored into the employer's cost in funding the pension. See \textit{Id.} § 401(a)(8); \textit{BRUCE}, supra note 157, at 23-24. Forfeitures are used to reduce future employer contributions to the plan.

\footnote{163} \textit{LEGISLATIVE HISTORY}, supra note 156, at 1771.


\footnote{165} Seghal, supra note 164, at 18.

\footnote{166} \textit{Id.} at 19.
employees to attain the age of twenty-one before enrolling in the pension plan.\[^{167}\] At age twenty-one, Eleanor enrolls in the plan and her employer begins to credit her with pension benefits. Eighteen months later, after four and one-half years with Company \(A\), Eleanor gives birth to a child, and after searching in vain for infant day care that costs less than her weekly take-home pay, she quits her job. Although Eleanor worked for Company \(A\) for four and one-half years, and worked from the day of her high school graduation until the birth of her child, she was credited with pension benefits for only eighteen months. Because those credits failed to vest, she has, in the end, no private pension credits despite having worked four and one-half years at a firm that, ostensibly, has a pension plan.\[^{168}\]

Now assume that when Eleanor’s child is six, he begins first grade—the first full-day school program that has been available for him. Eleanor finds child care for her son for the hours between 3:00 p.m. and 5:30 p.m. and returns to her job at Company \(A\). Although at the time of her departure, Eleanor had completed four and one-half of the five years of service required for her pension to vest, her service will be disregarded because Eleanor was away from Company \(A\) for more than five years. In addition, the six-year period during which she was away exceeds her prior period of service with Company \(A\). As a result, she loses her accumulated years for vesting purposes as well as the eighteen months’ worth of contributions formerly credited to her.\[^{169}\] Thus, although Eleanor may now work another four and one-half years with Company \(A\), bringing her total service to nine years, she still has no vested pension rights. If, after another four and one-half years with Company \(A\), Eleanor leaves

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\[^{167}\] This is permissible under I.R.C. § 410(a)(1)(A).

\[^{168}\] This assumes that Eleanor’s pension was noncontributory—that is, that she did not make contributions to her pension on her own behalf. This is not unusual. Most defined benefit plans are noncontributory, BRUCE, supra note 157, at 26, and many pension plans are of the defined benefit type. The Bureau of Labor Statistics estimates that 63% of the employees in medium and large firms participated in defined benefit plans in 1989. EMPLOYEE BENEFITS, supra note 135, at 80. Defined benefit plans are being replaced by defined contribution plans in many companies, but they still represent over 40% of all plans. See Health Benefit Costs Rose Faster than Payroll in 1989, Survey Finds, 17 Pens. Rep. (BNA) No. 51, at 2067 (Dec. 17, 1990).

\[^{169}\] This is the result of what ERISA refers to as a “break in service.” I.R.C. § 411(a)(6)(A). Under the current statute, employees who are away from an employer for less than five years may, on their return, recoup, for the purposes of vesting, periods of employment with that employer prior to the service break. When a break is five years or more, the employee loses her prior credits unless her term of prior service exceeds the length of the service break. Id. § 411(a)(6)(D); see BRUCE, supra note 157, at 217-21.
to follow her transferred husband to a new city, she once again loses all credits toward vesting.

To complete her saga, let us assume that in her new city Eleanor takes a job with Company B. Company B requires new employees to work for one year before enrolling in its pension plan.\footnote{170. See I.R.C. § 410(a)(1)(A).} Eleanor enrolls in the plan and stays with Company B, attaining five years of service. Eleanor is now thirty-eight years old, and has worked full-time in the paid labor force for fourteen years. Although all of those years were spent with companies that ostensibly had pension plans, Eleanor has only four years’ worth of vested benefits as a reward for fourteen years of service.

Eleanor’s story is fictional, but one would be hard-pressed to deny that many workers (particularly women) exhibit a similar work pattern.\footnote{171. As is noted above in connection with waiting periods, Eleanor’s pattern is not only more common among women than men, but is more common among black men than white. See supra notes 150-51 and accompanying text.} In fact, Congress has recognized the problems Eleanor encounters—to some degree at least—and has addressed some of the difficulties caused by break-in-service rules. If Eleanor could have found and afforded infant child care and returned to Company A after a brief maternity leave, she would not have been charged with a service break at all.\footnote{172. The Internal Revenue Code states that in the event of a period of absence from work “by reason of the pregnancy of the individual,” “by reason of the birth of a child of the individual,” or by reason of the placement of a child with the individual in connection with the adoption of such child by such individual, or for purposes of caring for such child for a period beginning immediately following such birth or placement, the plan...}
she had been able to return to Company A in less than five years, even though she would have accrued no pension credits during her absence, she would have retained the four and one-half years of service and the eighteen months of credits acquired before her child's birth.¹⁷³

Clearly, any rule that increases the probability of vesting is, from the employee's perspective, a step in the right direction.¹⁷⁴ Just as clearly, however, pension reform could go much further. Two steps could be taken to ameliorate Eleanor's problems. The first would be a shift to what is called full portability. A benefit is "portable" if the employee can carry credits from one job to another.¹⁷⁵ As the example above demonstrates, in the absence

shall treat as hours of service, solely for purposes of determining under this paragraph whether a 1-year break in service has occurred [up to 501 hours] . . . . I.R.C. §§ 410(a)(5)(E), 411(a)(6)(E). The effect of these provisions is to make it possible for a worker to take a maternity or paternity leave without incurring a break in service. A break in service occurs if an employee does not complete more than 500 hours of work during a year. Id. § 411(a)(6)(A). By crediting the employee who takes a parenting leave with 501 hours of service, the statute prevents the break in service. This credit may be applied only in the year during which the employee's absence commences, or the following year. Id. §§ 410(a)(5)(E)(iii), 411(a)(6)(E)(iii). Thus, the employee who becomes a parent late in the year, after having worked more than 500 hours, can apply the credit to the following year. While this provision is clearly a boon to women who return to paid work relatively soon after giving birth or adopting a child, it does not change the facts of Eleanor's case.

¹⁷³ This is a result of the so-called "rule of parity." Bruce describes this rule as follows:

Under ERISA . . . a participant cannot lose accumulated years of service for vesting, and consequently cannot lose accumulated years of participation for benefit accruals, unless he or she incurs a series of consecutive one-year "breaks in service" equal to or exceeding the number of years of service the participant had for vesting before the break began—regardless of whether or not those years were accumulated consecutively.

BRUCE, supra note 157, at 219. The Retirement Equity Act of 1984 further provides that the employee cannot begin to lose credits accrued prior to the service break until the service break exceeds five years. I.R.C. §§ 410(a)(5)(D), 411(a)(6)(E) (as amended by Pub. L. No. 98-397, § 205, 98 Stat. 1426, 1449 (1984)).

¹⁷⁴ Such increased probability was Congress's specific intent in enacting the Retirement Equity Act of 1984, the source of these provisions. The Senate Finance Committee Report recommending passage of the Act stated that its purpose was to improve the delivery of retirement benefits and provide for greater equity under private pension plans for workers and their spouses and dependents by taking into account changes in work patterns, the status of marriage as an economic partnership, and the substantial contribution to that partnership of spouses who work both in and outside the home.


¹⁷⁵ Social Security retirement, for example, is fully portable; credits earned at any time in any job covered by the Act—which includes the vast majority of jobs—are factored into the ultimate pension-benefits equation.
of portability, employees who change jobs—or who interrupt paid work for substantial periods to perform unpaid work—attain far poorer pension benefits than those who are able to remain with a single employer for a lengthy period. Second, shorter vesting periods—or, preferably, universal immediate vesting of benefits—would insure that the frequent job changer or intermittent worker would not, like Eleanor, repeat the vesting period. But each of these changes would increase employers’ pension costs and, thus, provoke understandable resistance.

Although data on the status of current pension recipients is only somewhat useful, because today’s retirees spent most of their work lives in the pre-ERISA world, the gap between men’s and women’s pensions is substantial. The Older Women’s League (OWL) has compiled data showing that only 22% of women over age sixty-five receive private pension payments at all, and that those women’s average monthly payment in 1986 was $365, compared to $615 for men.176

Like waiting periods, vesting provisions favor the employee with a long-term, continuous association with a single employer. They serve to exclude “new” employees, even when those employees have substantial prior experience. In fact, within limits set by ERISA, vesting provisions treat as “new” prior employees who have been unemployed for some time. These restrictions, and a final set of gatekeeping provisions—the recency requirements—serve to impose high transaction costs on movements in and out of the labor force, or from job to job.

3. Recency Requirements

Recency requirements are to statutory benefits what vesting is to pensions; that is, they require as a condition of eligibility a certain amount of time on the job. Furthermore, as their name

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In terms of coverage for current workers, the news for women is better. In 1979, there was a 16% gap between men’s and women’s coverage rates. By 1988, the gap was only 6%. Some of this closure is due to increased coverage for women but some is also due to losses in pension coverage among men. This data reflects only coverage, not vesting. Woods, supra note 101, at 17-18. Woods further notes:

Although women under age 35 have achieved parity with men, the parity for those under age 30 is at relatively low levels of pension coverage. More meaningful gains have been made by middle-aged and older women, but men in these age groups continue to have coverage rates that are 8-14 percentage points higher. Id. at 18.
implies, they require that the requisite time on the job be "recent." Two major statutory benefits—Social Security Disability (SSD) and unemployment—include recency requirements that serve to deny benefits to employees whose injury or loss of job occurs within a given but not always brief period after the commencement of their employment, or after their return to paid work following a work interruption.

a. Disability

Since 1956, Title II of the Social Security Act has made funds available to certain disabled workers and, since 1958, to their dependents. To qualify for disability benefits, a worker must have sufficient credits with the Social Security system. She acquires those credits by working at a job in which she pays Social Security taxes. At the end of a prescribed period, which is, in effect, a vesting period, the worker attains what is referred to as fully insured status. Until this status is achieved, no rights accrue.

In addition to establishing fully insured status, a disability claimant must also show that she has disability-insured status. She does this by demonstrating that her quarters of coverage (QCs) include some minimum number of the most recent quarters, such as twenty of the forty calendar quarters immediately preceding her disability.

If we return to our hypothetical employee, Eleanor, and change the facts of her situation slightly, the effect of these two requirements becomes clearer. Assume again that Eleanor began work with Company A at age eighteen, and this time left after four years. Let us also again assume that she returned to

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178. Id. §§ 501-504, 1101-1109, 1321-1324.
182. §§ 404.101, .130.
183. §§ 404.130-.133.
184. The quarter of coverage is the period used by the Social Security Administration to measure time served toward benefit eligibility. Id. § 404.101(b).
185. Most disability claims are governed by this so-called 20/40 requirement. See id. § 404.130(b).
186. For purposes of this example, I have reduced Eleanor's term with Company A from four and one-half to four years for each stint. I have done this in order to avoid the complications posed by the Social Security Administration's method of calculating QCs.
paid work with Company $A$ after six years of unpaid childrear-
ing. She proceeded to work for Company $A$ for an additional
four years, then became disabled as a result of a serious fall in
her home. Assume finally that while at Company $A$, Eleanor
paid Social Security tax. Can Eleanor make a Social Security
Disability (SSD) claim?

In order to make a claim for SSD, Eleanor must first estab-
lish that she is "fully insured." As noted previously, one
becomes fully insured by paying Social Security tax for some
prescribed period. That period can be calculated in either of two
ways. First, an employee can show that she has worked forty
quarters during which she earned wages subject to Social Secur-
ity tax. But Eleanor does not have forty QCs. During her
first stint with Company $A$, she amassed sixteen QCs (four years
times four quarters), and after her return to the paid work force
she was credited with sixteen more, for a total of only thirty-two
QCs.

The second method for computing fully insured status
allows workers to qualify for coverage with a minimum of six
QCs. To meet the requirements of this rule, the employee
must accumulate at least one QC for each calendar year after the
year in which she turns twenty-one. Under the facts of our
hypothetical, Eleanor is thirty-two years old at the time of her
injury. Thus, eleven years have elapsed since the year in
which she turned twenty-one, which means that Eleanor needs
eleven quarters of coverage to be fully insured. She meets this
threshold test.

Clearing this hurdle, however, does not mean that Eleanor
will receive disability benefits. Although she is fully insured, she

QC s are based on wages earned rather than time worked. Id. § 404.143(a). Thus, it is
possible to earn more than one QC in a given calendar quarter. In fact, if one is paid a high
enough wage, it is possible to earn four QCs in a single calendar quarter. However, it is not
possible to earn more than four QCs in a calendar year. Id. Thus, the half-years credited
to Eleanor in the prior example, see supra text accompanying notes 166-70, might represent
two, three, or four quarters, depending on her wage. By reducing Eleanor's periods of
employment to whole years, I have avoided this complication.

187. 20 C.F.R. § 404.132.
188. See supra text accompanying notes 181-82.
189. 20 C.F.R. § 404.110(b)(1).
190. Id.
191. Id. § 404.110(b)(2).
192. The computation is: 18 years (at start of employment) + 4 years (first term of
paid employment) + 6 years (uncompensated childrearing) + 4 years (term of paid
employment until injury) = 32 years.
must also satisfy one of four tests that determine disability-insured status. The most commonly applied of these tests is the 20/40 requirement. This test requires the individual making the disability claim to have worked at a job at which she paid Social Security tax during at least twenty of the forty quarters preceding the quarter in which her disability occurs. In our hypothetical, Eleanor has been engaged in Social-Security-covered employment for four years, or sixteen quarters, at the time of her accident. Prior to that time, her work was childrearing, which is uncompensated and not credited for Social Security purposes. She engaged in this work for six years, or twenty-four quarters. Thus, Eleanor paid Social Security tax in only sixteen of the last forty quarters. She fails the 20/40 requirement and thus collects no disability pay.

It is important to note that lengthening the period during which Eleanor paid Social Security tax before her child's birth will not help. For example, if her child had been born two years (eight quarters) later, Eleanor would have amassed twenty-four quarters of coverage prior to her departure from Company A. If, as in the hypothetical, she worked another four years (sixteen quarters) after her return to paid work, she would have garnered a total of forty quarters of coverage, making her fully insured. Despite her fully insured status, Eleanor fails the disability-insured test because she was in employment in which she paid Social Security taxes for only sixteen of the previous forty quarters. Eleanor is disqualified from receiving disability payments although she is severely injured, and although, under these facts, she has contributed to the Social Security system for ten years.

None of the four remaining methods for establishing disability-insured status will help Eleanor. The first of these is limited to workers who become disabled before the age of thirty-one. The second applies to persons who have had a period of disability before reaching age thirty-one, and who are disabled again at age thirty-one or later. The third test applies to

193. 20 C.F.R. § 404.130.
194. Id. § 404.130(b).
195. QCs can be accumulated at any time. Unlike private pension credits, they are not lost during breaks in service. See FRANK S. BLOCH, FEDERAL DISABILITY LAW AND PRACTICE § 2.3, at 33 (1984 & Supp. 1986).
196. See 20 C.F.R. § 404.130(c).
197. Id. § 404.130(d).
claimants who are statutorily blind. The last method affects those who become disabled within three years of their twenty-first birthday.

Rationales for the requirement of fully insured status and for the 20/40 rule have been articulated by both Congress and the courts. The rules are thought to fulfill two goals. First, they "tend[] to make the system self-supporting by assuring some substantial contribution to the system before the onset of disability." Second, "it is reasonable and desirable that there be reliable means of limiting such protection to those persons who have had sufficiently long and sufficiently recent covered employment to indicate that they probably have been dependent upon their earnings."

The above hypothetical casts substantial doubt on the effectiveness of current SSD regulations in meeting these goals. In one of our variations, Eleanor was ineligible for disability coverage despite ten years of contributions to the system. At the same time, another worker contributing far less could be eligible for benefits. To demonstrate this fact, consider a second worker, Daniel. Assume Daniel begins work the same day as Eleanor, but on the day Eleanor leaves to give birth to her child, Daniel is in an accident and becomes disabled. Prior to his accident, Daniel paid Social Security taxes for four years and acquired sixteen QCs. He is thus substantially shy of the forty QCs needed for fully insured status, but, like Eleanor, he can make use of an alternative computation rule. The rule that controls Daniel's case states that when a worker becomes disabled within three years of his twenty-first birthday, he establishes benefit eligibility by demonstrating that he had six QCs in the twelve-quarter period ending with the quarter in which he became disabled. For this computation, the entire twelve-quarter period preceding the disability is considered, even if it extends to

198. *Id.* § 404.130(e).
202. Because I wish to demonstrate the operation of disability rules rather than workers' compensation rules, assume that Daniel's accident is unrelated to his employment.
203. I assume in this hypothetical that Daniel and Eleanor are the same age. Both began work at age 18 and left—Eleanor to give birth and Daniel due to disability—at age 22.
204. 20 C.F.R. § 404.130(a)(3)(ii).
the period prior to the worker's twenty-first birthday. Daniel meets the requirements of this test. He has sixteen consecutive QCs in the period just prior to his disability. Thus, Daniel, who paid Social Security taxes for four years, is eligible for disability coverage, while Eleanor, who paid for eight years in one hypothetical and ten in the other, is not eligible under either scenario. Despite Congress's stated goal of "assuring some substantial contribution to the system before the onset of disability," current rules exclude some persons who have contributed to the system over a longer period while including others who have paid only briefly.

One final provision of the "disability-insured status" regulations deserves mention, though it could not have been applied to either Eleanor or Daniel. That is the special provision for workers disabled before the age of thirty-one. To demonstrate its effects, assume that a final hypothetical worker, Margaret, began Social Security-covered employment at age eighteen, left to engage in unpaid childrearing at age twenty-one, returned to paid work at twenty-four, and became disabled at twenty-five. At the time of her disability, Margaret has contributed to the Social Security system for four years, the same time period as Daniel. However, she fails to qualify for benefits. She has fully insured status, but not disability-insured status. She fails because of a special requirement applicable to disabled workers under the age of thirty-one. That provision requires that she have earned a QC in at least one-half of the quarters since her twenty-first birthday. There are sixteen quarters between Margaret's twenty-first birthday and her disability at age twenty-five, and she was engaged in unpaid childrearing for twelve of them. Thus, she fails to meet the test. However, if Margaret were allowed to use all of her time in covered employment, she could add the twelve quarters she amassed before turning twenty-one. This would raise her total quarters since beginning paid work to twenty-eight, of which sixteen quarters—more than half—were spent in employment in which

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206. Like Eleanor, Margaret will use the rule that requires one QC for each calendar year elapsing after the year in which she turned 21. 20 C.F.R. § 404.110(b)(2). This requires Margaret to have four QCs. However, the minimum for fully insured status is six. Id. § 404.110(b)(1). Margaret has 16 QCs and meets this requirement.
207. Note that she is over 24, and therefore cannot use the provision applicable to Daniel. 42 U.S.C. § 423(c)(1)(B)(ii).
208. 20 C.F.R. § 404.130(c).
Social Security tax was paid. This is not permitted by the regulations, however.  

Congress's second goal in authorizing these technical rules—limiting coverage to those who "probably have been dependent upon their earnings"—betrays some curious and incompletely articulated premises. The assumption seems to be that a person who has not been in paid work during twenty of the past forty quarters does not really need a wage. With two-earner families now the norm, this is a premise well worth re-examining. It amounts to concluding that because a family can manage for six years on a single wage, it can so manage permanently. But is this assumption accurate? Might it be more accurate to suggest that some families, through careful budgeting, can manage to withdraw the lower wage earner from the paid labor force temporarily, but can ill afford to lose her wage permanently? Perhaps the answer is that we simply do not know. The problem, of course, is that the assumption that the family can manage permanently without the mother's wage is embedded in the Social Security regulations. Those regulations disqualify workers like Eleanor, whatever her family's plans and needs might be.

In fact, a strange twist to the disability-insured requirement further skews the goal of limiting coverage to the worker who is dependent on her earnings. Because of the way the provisions are worded—requiring QCIs in one-half the quarters in some set period—one could satisfy the rule by working only six months

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209. This issue was raised in another context in Medina v. Finch, 330 F. Supp. 121 (D. Conn. 1971), and resolved against the young claimant. One final quirk should be noted: if Margaret had become disabled at 22—before returning to the labor force—she would have qualified for disability benefits. On her twenty-second birthday, she had amassed four quarters without coverage, preceded by 12 QCIs. Thus, in the 12 quarters preceding her disability, she would have 8 QCIs and qualify under 42 U.S.C. § 423(c)(1)(B)(ii).


211. According to economist Howard V. Hayghe of the Bureau of Labor Statistics, dual-earner families have been more numerous than "traditional" families since the mid-1970s. By 1988, they represented some 40% of all families, while traditional families represented only about 20%. The change is dramatic; in 1940, three-fifths of all families were "traditional" families. Howard V. Hayghe, Family Members in the Workforce, MONTHLY LAB. REV., Mar. 1990, at 14, 16 & chart 1.

212. A six-year work interruption would result in an employee's having fewer than 20 QCIs in the last 40 quarters, and would cause forfeiture of private pension benefits as well. See supra text accompanying notes 167-69.
per year. Are such workers more likely to be "dependent on their earnings" than is Eleanor, four years after her return to full-time work? In addition, although the two sets of rules for younger disabled workers inject needed liberality into the SSD scheme, they do so in odd ways. They strongly disfavor those who begin work prior to age twenty-one (the less educated), and benefit the employee who works only six months per year. Similarly, they exclude one who is absent for a longer period, even though her overall quarters in covered employment may be greater.

In 1958, Congress expressly recognized the tenuous connection between requiring recent employment and identifying substantial contributors to the system who were dependent on their wages. Amendments to the Social Security Act passed in that year dropped a requirement that the employee claiming a disability must have spent six of the previous thirteen quarters in covered employment. The Senate Report accompanying the revised statute stated:

Experience under the program has indicated that the currently insured status requirement[215] has operated to deny disability protection in some cases in which there is no doubt that a worker's earnings have been cut off as a result of disability. A large number of disabled workers fail to meet the currently insured status requirement even though they have worked for substantial periods in covered employment and have normally been dependent upon their earnings. In many instances, these are persons whose work was interrupted by a progressive illness and who at the onset of this impairment met the work requirements for disability protection. It is not uncommon that an impairment which is not severe enough to meet the definition of disability in the law causes a worker to be absent from work for extended periods. The result is that by the time the impairment becomes serious enough to meet the definition of disability, the worker has lost his currently insured status.

213. In fact, because the Social Security system measures quarters by wage rather than time, such a person could work less than six months per year so long as sufficient wages were earned to attribute two QCs. 20 C.F.R. §§ 404.140(c). .143.

214. This provision was stricken by the Social Security Amendments of 1958. See S. REP. No. 2388, supra note 201, at 12-13, reprinted in 1958 U.S.C.C.A.N. at 4229-30. This "currently insured status" requirement remains in effect for nondisability claims under the Social Security Act. 20 C.F.R. § 404.120.

215. This is the name given to the rule that the employee must have spent 6 of the most recent 13 quarters in covered employment. See 20 C.F.R. § 404.120.

Thus, in 1958, Congress recognized that disability can be caused not only by an accident or an acute episode, but also by chronic conditions that become increasingly debilitating over time. In short, Congress recognized that disability could take many forms. To date, however, Congress seems unaware that dependence on one’s wage can also take many forms. A family that can divert a wage earner to full-time parenting temporarily may well be unable to spare her permanently. The vision of one’s being “dependent on earnings” that inspired current SSD rules is too limited to fit the more complex work patterns of today's families.

In sum, the technical requirements of SSD eligibility exclude workers from coverage in a crazy quilt pattern. Not only may those with brief contribution records be included while those with lengthy ones are denied, but the rules are fraught with unarticulated assumptions that some workers have no real need for the wages they earn.

b. Unemployment

Like access to disability benefits, entitlement to unemployment compensation may be predicated on meeting the dictates of recency requirements. It is more difficult to generalize about the unemployment program because the regulation of eligibility is, in large measure, left to the states. All of the states have some restrictions on eligibility, but they vary from requiring that an individual have earned at least $1200 during the previous year, to demanding that the individual have completed twenty weeks of employment during the fifty-two weeks preceding the claim, and that during that time she earn at least the minimum weekly wage set by the statute. These limitations clearly have the effect of disqualifying significant numbers of the unemployed, a fact noted and criticized by the Ford Foundation’s Project on Social Welfare and the American Future. In summarizing its policy recommendations, the Project’s Executive Panel stated:

For the past half century, the unemployment compensa-
tion system has helped those with substantial work histories weather limited periods of joblessness. But as the economy and labor force have changed and the state unemployment insurance trust funds have been battered by recessions, the UI program has become a less adequate component of the safety net. In 1986 only one-third of the unemployed received UI benefits, and in some subsequent months the proportion has dropped to one-quarter. By contrast, during the 1970s about half of the unemployed received benefits, compared with more than 60 percent in Germany, Japan and Sweden. Recent labor market entrants and many re-entrants do not receive benefits because they lack sufficient work histories, while others have exhausted their twenty-six weeks of coverage.

Unemployment Insurance was designed when adult males dominated the labor force and many of them worked at one job or one career all their lives. The system’s goal was to tide such workers over during a layoff from a job to which they were likely to return when demand picked up. Today’s work force is more diverse, and many laid-off workers will never return to their prior jobs. In a rapidly changing economy, more people will change occupations, industries, and regions in which they are employed. They still need some income maintenance.

The substance of the Foundation’s criticism of the unemployment system parallels the analysis of Social Security disability set forth above. Both systems use as their model the long-time worker experiencing a work disruption. Both exclude new workers and what the Ford Foundation report calls “re-entrants.” These workers, many of whom are women or racial minorities, are rapidly growing in numbers and are ill-served by the benefit system’s current structure.

The problem is far from new. Writing nearly twenty years ago, Martin Feldstein argued that the structure of unemployment benefits is perverse, providing benefits to higher earners that may actually exceed the after-tax income they earn while working, while at the same time excluding many poor workers entirely. Speculating on the causes of this anomaly, Feldstein stated:

220. The Common Good, supra note 4, at 60.
Why then do the poor receive such a small share of unemployment benefits while those with relatively high incomes receive a substantial share? There are several possible reasons. When the poor are unemployed, they are often ineligible for unemployment benefits. They are more likely to work in uncovered occupation [sic], to have worked too little to qualify for benefits or to have quit their last job. Moreover, the poor may also be more likely to remain unemployed long enough to exhaust their benefits. In contrast, middle and upper middle income persons are more likely to work in covered employment and to have earned enough to qualify for benefits for the maximum duration. The unemployment for this group is often a temporary lay-off followed by recall to the same firm.\(^2\)

In short, as the Ford Foundation Report notes, unemployment benefits were created for, and are structured to suit, a certain kind of worker: one whose bouts of unemployment are but a relatively brief interruption of an otherwise long-term relationship with a single employer or industry.

C. The Failure of Universality: Introducing "The Good Worker"

The Ford Foundation's critique of unemployment insurance is more profound than its authors imagined, for as the coverage requirements are aggregated, it becomes clear that the worker who qualifies for benefits must fit a predetermined profile. The qualifying worker is one who has already been employed more or less steadily over a period of time. With certain variations and embellishments, this model is fundamental not only to unemployment, but to the structure of our benefit system as a whole.

Beginning with the workers' compensation statutes, and continuing through the enactment of ERISA, benefits have been designed to reward a creature whom I shall call "the good worker." The good worker and his dependents would qualify for the benefits described in the previous pages, at least in the vast majority of cases.

I believe that the prevalence of good-worker models in the structure of benefit systems reflects two crucial but generally unarticulated premises. First is the assumption that the American population divides rather neatly into two groups: good workers and their dependents. Second is the belief that, except

\(^2\) Feldstein, *supra* note 122, at 237.
in extraordinary periods like the Great Depression (and, perhaps, the 1990s), all who make an honest effort will find themselves in one group or the other, with the occasional exception of those suffering such afflictions as blindness or widowhood. The latter might need supplemental provisions, but the great bulk of the population (we assume) will derive its security from its relationship to the work force or its recognized dependence on a worker.

The problem, of course, is that the model is fallacious. First, it equates participation in the labor force with access to benefits. But as I have demonstrated above,223 the benefit system contains yawning gaps that disenfranchise entire occupational groups, particularly those groups containing significant numbers of women, black, and Hispanic workers. I have also shown that a complex web of gatekeeping provisions serves to deny benefits to mobile workers even within occupational groupings in which benefits are, theoretically, available. A second fallacy concerns the vision of the labor force as a place with room for all, offering everyone willing to make the effort the opportunity to become the good worker. In the next Part, I will argue: (1) that predictable contractions and retrenchments in the labor force make it impossible for some workers to behave in "good-worker" fashion and (2) that most women today violate the norms of both the good-worker and dependent models. Theirs is a hybrid role that, although unquestionably socially productive, is heavily penalized simply for its deviation from entrenched models.224

V. WORK PATTERNS AND BENEFIT RULES: SYSTEMS OUT OF SYNCH

In the preceding pages, I have attempted to show that our economic security system fails miserably at providing security for all members of society. In this Part, I argue that the gaps in the system are widening, largely as the result of the confluence of two trends. First, our model of the good worker is constricting.

223. See supra notes 89-222 and accompanying text.

224. I do not mean to imply that this penalization is accidental. As the cost of non-cash benefits soars, so does the incentive for both public and private sectors to curtail or avoid them. This impetus naturally leads to the expansion of waiting periods and other gatekeeping provisions. See supra notes 135-222 and accompanying text. Thus, although the consequences of deviation from the good-worker model are not unknown (although others do not describe them in the terms presented here), there is a strong unwillingness to increase costs by expanding the model. This is explained in more detail below. See infra notes 356-474 and accompanying text.
At the same time, the array of work life patterns adopted by members of the population is expanding. The cumulative effect is to increase economic insecurity in the population as a whole.

A. The Good Worker and Shifting Patterns of Job Security

Demographers and industrial relations experts have recently added to the lexicon a term to describe the worker "who do[es] not have a long-term attachment to [her] employer[.] (for example, temporary, part-time, and subcontracted workers)." This is the contingent worker, a soul whose ranks show "dramatic growth" as "many employers have altered their basic systems to reduce their core work force in favor of contingent workers." Estimates of the size of the contingent labor force are striking: it now contains one-fourth to one-third of all workers.

Many of those chronicling this group describe contingent employment as a relatively new phenomenon, largely a product of the 1980s. There is, however, much in the history to suggest that contingent hiring, at least of blue collar workers, was commonplace in the United States in the 1920s and earlier. In his classic book The Work Ethic in Industrial America, 1850-1920, Daniel T. Rodgers describes the work force of 1900 to 1920 as strikingly mobile... rattling from job to job at a rate astonishingly high by modern [1974] standards. At the Armour meat-packing plant in Chicago, for example, the average daily payroll numbered about eight thousand during 1914. But to keep that many employees, the company hired eight thousand workers during the course of the year, filling and refilling the places of transients.

226. Id.
227. Id. According to Belous, core workers have a strong link with their employers and expect to remain with the employer for a long period. Id. at 8.
228. Belous estimates the contingent labor force at one-fourth of the total. Id. at 11. Another recent work puts it at one-third. JOHN J. SWEENEY & KAREN NUSBAUM, SOLUTIONS FOR THE NEW WORKFORCE: POLICIES FOR A NEW SOCIAL CONTRACT 55 (1989).
229. Id. Consider, for example, Eli Ginzberg's comment: "'We're at the beginning of a fundamental change in employment practices. . . . We used to hire, and now we don't want to hire people at all, except on a contractual basis.'" SWEENEY & NUSBAUM, supra note 228, at 55 (quoting Eli Ginzberg, Director of the Office for the Conservation of Human Resources at Columbia University).
Mobility, of course, is not the same as "contingent status," and Rodgers warns that a good deal of this turnover was voluntary. The workers' conduct was in part an open rebellion against "middle-class ideals of time and labor." But a great deal was also due to the simple fact that the industrial economy itself was highly unstable. . . . [T]he boom and bust cycle . . . afflicted virtually every industry in industrial America and caught up workers in repeated cycles of overtime work and unemployment. . . . [T]he economics of cheap labor took precedence over steady employment, even though the result worked to undercut the factory goal of steady, clockwork labor—ingraining habits of irregular work on potentially steady workers and uprooting others in the constant scramble for jobs.

Rodgers's thesis is supported by the detailed snapshots of life in Muncie, Indiana, that constitute the extraordinary legacy of Robert S. and Helen Merrell Lynd. In the first two volumes of their *Middletown* series, the Lynds describe a population living under the eternal threat of the layoff.

Among the working class . . . the business device of the "shutdown" or "lay-off" is a recurrent phenomenon. . . . In one leading plant, 1,000 is regarded as the "normal force." When interviewed in the summer of 1924, about 250 men were actually getting a living at this plant, though the bosses "think of about 550 [of the normal 1,000] as our men." The other 450 are floaters picked up when needed.

The Lynds go on to note that during a 1924 recession, only 38% of the working-class persons in their sample population escaped layoff.

Interestingly, the phenomenon of the layoff was almost entirely limited to the working class. Among the members of what the Lynds label the "business class," "[t]he most prosperous two-thirds . . . at a rough estimate . . . are virtually never

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231. *Id.* at 164.
232. *Id.* at 168.
233. *Id.* at 169-70.
235. *MIDDLETOWN*, supra note 234, at 56.
236. *Id.* at 57.
237. For an explanation of the Lynds' division of the population of "Middletown" into these classes, see *id.* at 22-24.
subject to interruptions [in their work]." This absence of
direct experience with unemployment may well have fueled a
denial of the problem's existence, which the Lynds also
document:

"People come to the house a great deal and tell me they can’t
get work," remarked the wife of a prominent business man.
"Of course, I don’t really believe that. I believe that any one
who really tries can get work of some kind." This remark
appears to sum up the philosophy of unemployment of many of
the business class in Middletown.

Thus, the Lynds and Rodgers describe a situation much like
that of today's contingent worker, though limited in large mea-
sure to those whom we would describe as blue collar. This raises
an interesting question: what happened between 1925 and 1980
to make what is essentially a recurrence of the 1925 pattern seem
so novel? Because a detailed study of fluctuations in the labor
force in the mid-twentieth century is well beyond the scope of
this paper, I offer, instead, two ideas. First, I think it not
unlikely that the remarkable economic boom that prevailed
(though not without interruption) from the end of World War II
into the early 1970s sustained—and, for many, made real—the
observation of the woman quoted by the Lynds. Most people,
most of the time, could and did find work—even steady
work. While layoffs never disappeared, the prevailing mood was one of
optimism. The labor force did indeed seem to have room
enough for all. Second, the Lynds and Rodgers describe a con-
tingent labor force made up almost entirely of blue-collar work-
ners. In contrast, today's contingent worker may perform any
job, from production-line worker to physician in charge of a hos-

238. Id. at 55.
239. Id. at 59.
240. In 1954, Herbert Parnes of the Social Science Research Council published a
summary of the work done to that date on labor mobility. HERBERT S. PARNES, SOCIAL
SCIENCE RESEARCH COUNCIL, BULLETIN No. 65, RESEARCH ON LABOR MOBILITY: AN
APPRAISAL OF RESEARCH FINDINGS IN THE UNITED STATES (1954). Concentrating
on the 1940s and early 1950s, the research reveals striking labor-force stability. Parnes states that
37 percent of the workers 25 years of age and over who had worked at least a
month in 1950 as well as at some time during 1940-49 had had only one employer
during the decade. Over the same decade and 1950, 21 percent of the Census
Bureau's national sample of persons of the same ages who were employed in Janu-
ary 1951 had been continuously employed by one employer since before January
1940.
Id. at 66.
pital emergency room.\textsuperscript{241} Thus, contingent status may well be quite new to white collar and professional workers, giving the phenomenon as a whole an unwarranted sense of novelty.\textsuperscript{242}

Whether contingency is new—or as I believe, merely a recurrence of an earlier pattern—must not, however, obscure one crucial difference between the worker of 1920 and the worker of 1980. In 1920, the only noncash benefit available to most employees was workers' compensation. By 1980, all of the Social Security programs, as well as employer-provided health, life and disability insurance and private pensions had been added to the mix. In short, workers have come to expect and depend on a vastly augmented array of economic security devices. The ante has been "upped" dramatically. The incentive to be the good worker and to garner these benefits could hardly be stronger.

As the importance of being the good worker has grown, however, the entrance requirements have multiplied. To receive workers' compensation, one need only be injured in the course of and because of one's employment.\textsuperscript{243} In contrast, the Old-Age Insurance (OAI) program limits entry using the concept of minimal participation,\textsuperscript{244} and the unemployment program has ushered in recency rules.\textsuperscript{245} SSD added new and different (and more stringent) recency requirements,\textsuperscript{246} while private disability insurance and, most notably, private pensions, added the requirement that the good worker remain with a single employer for a number of years.\textsuperscript{247} Thus by the mid-1970s,\textsuperscript{248} the good worker was a man or woman whose employment was long term

\begin{itemize}
  \item \textsuperscript{241} For a description of the broad range of workers included in today's contingent labor force, see Sweeney \& Nussbaum, \textit{supra} note 228, at 55-59.
  \item \textsuperscript{242} A fascinating recent discussion that agrees with the proposition that the great post-war boom was a lengthy aberration appears in Michael Elliot, \textit{America: A Better Yesterday}, Economist, Oct. 26, 1991, at 3 (arguing that Americans would do better to use the America of 1914, rather than that of 1954, as a model for the future).
  \item \textsuperscript{243} I do not mean to suggest that workers' compensation is a generous program, or that benefits are easily obtained. As I have already demonstrated, it is a program that excludes a great many workers on a categorical basis. \textit{See supra} text accompanying notes 106-19. My point is simply that this benefit has fewer complex or technical rules than, for example, ERISA.
  \item \textsuperscript{244} 42 U.S.C. § 414 (1988).
  \item \textsuperscript{245} \textit{See supra} notes 177-222 and accompanying text.
  \item \textsuperscript{246} \textit{See supra} notes 179-216 and accompanying text.
  \item \textsuperscript{247} \textit{See supra} notes 153-76 and accompanying text.
\end{itemize}
(needed to maximize benefits under both Social Security and private pensions\textsuperscript{249}), continuous (needed to meet recency requirements for disability and unemployment compensation and to comply with waiting periods), and with a single employer (needed for private pension vesting and maximization, and private long-term disability coverage).

The strictures of the good-worker model are thus cumulative. They have been built slowly through a series of choices made sometimes by private employers and sometimes by Congress. They are not new. What is new, however, and frightening, is the interaction of this model with today’s labor force.

B. The Demise of the Good Worker: The Rise of the Contingent Labor Force

The last decade has seen a dramatic expansion in the number of part-time, temporary, and contract workers. Economists and labor analysts explain this shift as one that enhances efficiency. Contemporary business has apparently concluded that it is strategically wise to expand and contract the work force to match demand.\textsuperscript{250} Layoffs, however, harm worker morale and may increase unemployment insurance premiums.\textsuperscript{251} The ideal situation would allow the employer to trim the work force without layoffs. The use of temporary or contracted workers produces this result. These employees are hired on an as-needed basis with no expectation of long-term affiliation with the employer. When they are no longer needed, they simply disappear, and the employer incurs labor costs only as required to produce his output.

From the employer’s perspective, the use of contingent workers provides a flexible and cheap source of labor.\textsuperscript{252} But the

\textsuperscript{249} This is partially a result of vesting rules, see supra notes 153-76 and accompanying text, and partly the effect of the concept of “work life” discussed below, see infra text accompanying notes 325-47.

\textsuperscript{250} Belous states that:

A few years ago, discussing strategic choices and labor costs at the same time would have sounded pretentious. . . .

But, because of flexibility and the growing numbers of contingent workers, corporate managers have discovered that human resources provide a vital and effective strategic lever. In fact, in certain cases, it may be the most important control mechanism that management has in the short run, given that management often can treat labor as a variable cost while other costs usually are fixed.

Belous, supra note 225, at 7.


\textsuperscript{252} Belous notes that “contingent workers may be paid less than core workers for
ability to make these workers disappear on cue is, of course, a fantasy. The employer’s vaunted savings are in reality a mere shift in costs from employer to employee. By employing workers intermittently for low wages with few or no benefits, employers have simply created—or recreated—a work force that is cheap, but economically insecure.

What happens to these workers? Some, of course, are the dependents of good workers and obtain derivatively what they are denied directly. But the myth that the part-time and temporary work force is made up exclusively of married women who elect these work patterns (“mothers’ hours”) is not borne out by the empirical data. The number of “involuntary” part-time workers—those who want, but are unable to find, full-time work—is growing at twice the rate of the voluntary part-time or temporary work force. In December of 1991, 6.5 million workers described themselves as working part-time because full-time work was unavailable. That number is 5.2% of the total work force. Nor does responsibility for these employees shift to the public sector. Because they are working, contingent workers fail to qualify for most means-tested benefits; how-

working at similar types of jobs.” Belous, supra note 225, at 9. Sweeney and Nussbaum assert that the contingent worker’s wage may be as little as 60% of that paid an equivalent core worker. Sweeney & Nussbaum, supra note 228, at 59.

253. The workers described in Middletown, who labored in the days before the inception of most social benefits, would have, in a perverse way, suffered less as a result of a layoff—since they had less to lose—but would have been more insecure during periods of employment. See MIDDLETOWN, supra note 234. It is interesting to note that avoiding the one extant benefit—workers’ compensation—was an explicit goal of Middletown’s managers as revealed by the following statement made to a researcher: “[T]he company has decided to adopt a policy of firing every employee as he reaches sixty, because it takes a man over sixty so long to recover from accidents and the State law requires us to pay compensation during the entire period of recovery.” Id. at 34.


255. Uchitelle, supra note 254, at D4.

256. For a discussion of the situation of the working poor, see Ellwood, supra note 9, at 81-127; John E. Schwarz & Thomas J. Volgy, The Forgotten Americans (1992).
ever, because they work only part-time or intermittently, they also cannot claim most wage-related benefits. The result is that many contingent workers simply do without health insurance or pensions, and if their work is part-time or intermittent, without most statutory benefits as well.

Richard Belous, in the conclusion of his report on the contingent work force, stated that:

Prior to the 1980's, there was a high degree of rigidity in both the labor market and the social welfare system. However, in the 1980's, labor markets became more flexible. Yet the same degree of change has not been experienced within the social welfare system. . . .

While labor markets have become much more flexible and now incorporate both core and contingent workers, the social welfare system, in many cases, still incorporates only the traditional core worker. This could cause difficulties for some workers.

I would label this a distinct understatement.

Thus, although widespread use of contingent workers may not be new, the expansion of this group in the "postbenefit era" is producing unprecedented problems. Contingent workers exacerbate the already poor fit between our systems for distributing noncash benefits and our population. They deviate markedly from the good-worker model embedded in the benefit distribution structure. As a result, contingent workers enhance the efficiency and flexibility of their employers, but in doing so, lose their own economic security.

C. The Demise of the Good Wife: Benefits in a World of Divorce

The prevalence of divorce in contemporary society, like the resurgence of the contingent labor force, does not create problems with the benefit system so much as it highlights and exacerbates existing deficiencies. Divorced women find themselves particularly vulnerable because they are likely to have deviated from both of the extant models of benefit acquisition. Unlike the good worker, they will often have failed to maintain a

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257. Sweeney and Nussbaum note the paucity of benefit coverage in part-time and contingent work. SWEENEY & NUSSBAUM, supra note 228, at 59-61. I know of no study that has determined which part-time and contingent workers have benefit coverage as dependents.

258. Belous, supra note 225, at 12.
lifelong attachment to a good job, having instead devoted years of their lives to the rearing of children and, increasingly, to the care of their elderly parents and parents-in-law. But in divorcing, they have also strayed from the alternative model of lifelong attachment to a good man. In this section, I will first explain why the latter attachment has never been as valuable or as secure as good-worker status, and then describe the barriers divorced women face whether they claim benefits derivatively or directly.

1. The Inherent Inadequacy of Derivative Benefits: The Good Wife Didn't Have It So Good

In truth, the lifelong, work-in-the-home wife has always been at risk of failing to qualify for valuable benefits. To begin with, any limitations on her husband's claims also operate to limit her claims. The wife of an agricultural worker, for example, lacks derivative access to the many benefits for which her husband fails to qualify. In addition, even when her husband has a generous store of rights, a wife claiming derivatively is less than totally protected. Some benefits, such as disability coverage, are not available on a derivative basis. Although a disabled worker may be able to collect benefits for both himself and his family in the event of his disability, a disabled homemaker collects nothing. No funds will flow to the family to assist them in replacing the personal care that the homemaker previously provided. Nor can a family necessarily decide to acquire the homemaker coverage privately. Many private insurers simply do not offer this type of policy. Thus, the fact that one mem-


261. Of course, to the extent that a homemaker's disability involves a health problem, her health costs will be covered if her husband's employer provides family health insurance coverage.

262. The topic of disability insurance for homemakers arises periodically in insurance circles. A discussion of the topic in a 1974 trade journal concluded: Disability income for the homemaker is one of the more difficult subjects. The problem is not really one of determining what the benefit amount should be. The costs of a maid and/or private nurse might be an appropriate measure. The real problem is in claims administration and determining if the homemaker is truly disabled. Claims administration costs would necessarily be high and, again, since those who receive the benefits should pay for them, would require special rates.
ber of a family has a relatively valuable benefit package does not mean that all family members have access to these benefits. Generally, the family of a well-situated worker will have some derivative claims, such as health insurance or retirement benefits, but not others, like disability.263

Derivative benefits also present a third problem that is more complex and far-reaching than the two just described. Even benefits that expressly include derivative beneficiaries often contain odd and dangerous gaps that have no parallel in the primary benefit on which they are based. The Social Security system provides the best examples of this phenomenon.

Social Security's derivative benefits are justified—when they are justified at all—by reference to need.264 However, at least in the view of some of the system's many critics, this need is the worker's need, not that of the dependent.265 The history of the

Possibly a special policy would also be necessary to define what constitutes disability for a homemaker. I understand one company did develop a disability policy for homemakers and spent a great deal of money to promote it, but just wasn't able to find or develop a market for it. The housewives didn't feel they needed it. The Impact of Women's Lib on Disability Insurance, supra note 82, at 56.

By the early 1980s, at least three companies were writing homemakers' policies, and the State of Ohio had passed legislation requiring companies selling disability insurance to include provisions for homemaker coverage. Lautzenheimer, supra note 82, at 56.

263. A somewhat different but not insignificant problem arises in connection with unemployment insurance. The wage earner who loses his job is sometimes entitled to unemployment benefits designed to tide him over until he can obtain new employment. See supra text accompanying notes 120-23, 217-22. A full-time homemaker has no such benefit available, even though her husband's unilateral decision to terminate their marriage may result in a withdrawal of economic support that directly parallels a job loss. For the result of one homemaker's effort to challenge this disparity, see Curtis v. Department of Employment Sec., 695 P.2d 341 (Idaho 1984). For a rebuttal of the argument that alimony provides a substitute for unemployment compensation for divorced homemakers, see Lenore J. Weitzman, The Divorce Revolution: The Unexpected Social and Economic Consequences for Women and Children in America (1985); Mary E. O'Connell, Alimony After No-Fault: A Practice in Search of Theory, 23 New Eng. L. Rev. 437 (1988).

264. Before 1939, the retirement provisions of the Social Security Act provided benefits to workers only. The Act contained no spousal or other derivative benefits. In recommending substantial amendments to the original Act in 1939, the Social Security Board defended spousal benefits on the ground that they recognized "greater presumptive need of the married couple without requiring investigation of individual need." Social Security: Hearings Relative to the Social Security Act Amendments of 1939 Before the House Comm. on Ways and Means, 76th Cong., 1st Sess. 3, 5 (1939) (report of Social Security Board). For an excellent discussion of the 1939 amendments, see Edward D. Berkowitz, The First Social Security Crisis, PROLOGUE, Fall 1983, at 133.

265. Grace G. Blumberg, in an important work on this topic, writes: "[T]he wife's benefit itself was designed not so much for the wife as to ensure the adequate support of the retired worker." Grace G. Blumberg, Adult Derivative Benefits in Social Security, 32 Stan. L. Rev. 233, 257-58 (1980).
Social Security system makes it clear that the creation of dependents' benefits was not prompted by benefit inadequacies—the 1939 amendments were enacted before any benefits were ever paid. Rather, the goals were fiscal and political, and were largely spurred by the desire to reduce the Social Security reserves. In fact, perhaps the best description of derivative benefits is Peter Martin's. He remarks that they "incorporate no coherent rationale for entitlement" at all.

A few examples of the "incoherence" of derivative benefits demonstrate that they are a wholly inadequate substitute for primary benefits. Consider, for example, the so-called "widow's blackout." Social Security provides benefits to the surviving spouse of a deceased employee under some but not all conditions. The conditions chosen create a patchwork that can result in benefits being received, then withdrawn, then received again. For example, the spouse of a fully insured worker who is caring for a child of the worker under the age of sixteen may collect benefits at the death of the worker. These are the so-called "mother's and father's insurance benefits." They are set at 75% of the amount the worker would have received had he retired. When the youngest child turns sixteen, these mothers' and fathers' benefits are cancelled. The parent then has no access to Social Security benefits until she reaches age sixty, unless she is disabled. A disabled widow may make a survivor's claim on reaching age fifty.

To help put these rules in perspective, let us call once again on our long-suffering heroine, Eleanor. In this scenario, assume that Eleanor marries at age twenty-four, and at age twenty-six

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266. The first benefits were paid in 1940. See Pub. L. No. 76-379, § 202, 53 Stat. 1360, 1363-67 (1939).
267. See supra text accompanying notes 63-71.
269. "Fully insured status" is defined in 20 C.F.R. § 404.101(a) (1992); see supra text accompanying notes 187-92.
271. Id. § 402(g)(2).
272. Id. § 402(s)(1).
273. Id. § 402(e)(1).
274. Id.
275. Id. § 402(e)(2)(A).
she has her first child and leaves paid work for unpaid childrearing. At age twenty-nine she has a second child, and at age thirty-four, a third. She continues full-time childrearing until the youngest child is six. She is now age forty, and she takes a part-time job. Two years later her husband, the major wage earner in the family, dies. Under the rules currently in force, Eleanor is eligible for Social Security benefits, though they will be reduced in recognition of her own earnings.\textsuperscript{276} These benefits will cease when Eleanor's youngest child reaches age sixteen,\textsuperscript{277} at which time Eleanor will be fifty. Between the ages of fifty and sixty, assuming that she is not disabled, Eleanor will have to depend entirely on her own wages. Then, at age sixty, she will be eligible for benefits based on her deceased husband's work record.\textsuperscript{278}

Obviously, not every widow experiences acute financial distress. If there is significant family wealth or if there is substantial life insurance, the financial blow of the death may be mitigated. But the question I pose is whether derivative benefits protect someone whose ability to garner primary benefits has been compromised by a hiatus in her labor-force participation. If the system described in the preceding paragraph is representative, the answer is clearly "no." Eleanor finds herself in serious economic jeopardy because she devoted herself to uncompensated childrearing and, later, to part-time work designed to leave time for family responsibilities. In doing so, she relied on her husband to produce income for the family. When he died, although the benefit system gave her the right to make derivative claims, these claims were not structured to match her needs. Termination of benefits when her youngest child reaches sixteen, for example, is arbitrary and unconnected to any likely drop in family expenses.

Those who have commented on these derivative benefit rules have often viewed them in an "either/or" light. That is, they have equated the receipt of the benefit with "not work-

\textsuperscript{276} Id. § 403(b)(1)(A). Current law provides that a beneficiary under age 65 loses $1 in benefits for every $2 earned above a specified exempt amount. 20 C.F.R. § 404.430. In 1993, this amount is $640 per month. See Department of Health and Human Services 1993 Cost-of-Living Increase, 57 Fed. Reg. 48,619 (1992). The amount is set by the Trustees of the Federal Old-Age, Survivors and Disability Insurance Trust Funds, and is published in their \textit{Annual Reports} and in the \textit{Federal Register}.

\textsuperscript{277} This assumes that the child is not disabled. See 42 U.S.C. § 402(s)(1).

\textsuperscript{278} Id. § 402(e)(1)(b). Her own employment record will also be relevant. See infra text accompanying notes 416-17 (regarding the "dually entitled" worker).
ing”—with the mother’s complete withdrawal from the paid work force. This argument seems to me to miss the point. While I would agree with the notion that most parents whose youngest child is sixteen can undertake paid work, the much more important question is: what sort of wage might such a person command? Every indicator in this hypothetical points to a very low wage for Eleanor. She spent fourteen years in unpaid childrearing. Women who leave the labor force for extended periods never “catch up” to those whose paid work is uninterrupted. Eleanor will be looking for full-time paid employment beginning at age forty-two. And she will have to juggle this employment with the burdens of single parenthood. All of these factors will likely have a negative effect on Eleanor’s earnings, an effect that will not suddenly evaporate on her youngest child’s sixteenth birthday. In reality, then, we are not asking whether Eleanor should or should not “work.” The more accurate question is should her earnings, assuming they are low, be supplemented by Social Security. Perhaps the answer is “yes,” perhaps it is “no”; either is defensible. But “yes” from age forty-two to fifty, “no” from age fifty to sixty, and “yes” again after age sixty is utterly arbitrary. Either it assumes the “on/off” work pattern—which, I argue, is highly unlikely—or it is a pure exercise in political compromise, having nothing to do with Eleanor’s need. There is good reason to suspect the latter.

Other quirks and gaps further plague the derivative benefit system. For example, when the family member who served as the link to the health insurance system dies, the Consolidated


281. This assumes that she looks for a full-time job soon after her husband’s death.

282. Of course, if they are high, they will serve to reduce her Social Security benefits. See supra note 276 and accompanying text.

283. One piece of evidence comes from the debates over the addition of widows’ and children’s benefits to Social Security in 1939. After lengthy discussion of whether all widows should be covered or only those age 65 and over, the latter was voted. Arthur Altmeier, then-Chairman of the Social Security Board, stated that the decision was based on a desire for uniformity, not an attempt to measure the widow’s needs. See Berkowitz, supra note 264, at 146.

284. For two excellent studies, see Blumberg, supra note 265; Martin, supra note 268.
Omnibus Budget Reconciliation Act of 1985 (COBRA), 285 protects the surviving members for only three years. 286 While this three-year extension is a vast improvement over the prior system, which would have allowed immediate ouster, the limitation may place some former derivative beneficiaries in great jeopardy. For example, the woman who is too young for Medicare, 287 and who works for an employer who does not provide health insurance, may find herself without a source of health benefits at the end of the three years. 288 Furthermore, even if she can find alternative coverage, a widow or an ex-spouse may learn that preexisting medical conditions that were covered under her old plan are excluded from the new. 289 Thus, though the extended protections provided by federal law are clearly valuable, like much legislation intended to address the needs of intermittent workers and ex-wives, the law offers only partial protection at best.

These brief examples could be expanded, but the net effect would remain the same: derivative benefits are in no sense a substitute for primary benefits. The latter tend to be both more valuable 290 and more dependable. Because they are measured by the life and needs of the recipient himself, they provide far greater security than does the odd patchwork of derivative benefits.

2. Derivative Benefits and Divorce

In 1939, when derivative benefits were added to the Social Security Act, the annual divorce rate in America stood at 1.9


287. For the nondisabled person, the minimum age for Medicare enrollement is 65. 42 U.S.C. § 426 (1988).

288. Assuming that this hypothetical widow is a relatively late entrant into the labor force, she is likely to be employed in the service sector and for a small business. This is the sort of job least likely to provide her with health insurance. See SWEENEY & NUSSBAUM, supra note 228, at 81-84. If she has been continuously employed full-time, she may well be able to shift to her own employer's group health coverage.

289. In her book on divorce, sociologist Lenore Weitzman recounts the story of a woman who had a benign breast tumor removed during her marriage. After her divorce, she purchased individual health coverage, but the insurer insisted on excluding cancer coverage based on this risk. When the woman subsequently developed breast cancer, she had no funds to cover the needed surgery. WEITZMAN, supra note 263, at 135-36.

290. Social Security retirement, for example, pays the ex-spouse of a retired wage earner only 50% of the wage earner's benefit. 42 U.S.C. § 402(b)(2).
divorces per 1000 population.\textsuperscript{291} In the peak years of 1979 and 1981, this figure reached 5.3 per 1000.\textsuperscript{292} Although the rate has dropped since 1981,\textsuperscript{293} it remains the highest in the world,\textsuperscript{294} and the universal adoption of no-fault standards\textsuperscript{295} has created the phenomenon of unilateral divorce.\textsuperscript{296} Today, the prevailing rule in most states is that no matter how blameless a spouse's conduct, or how strong her desire to remain married, her partner can establish an "irretrievable breakdown" of the marriage and obtain a divorce.\textsuperscript{297} Thus, divorce is a risk faced by all married persons and one against which spouses cannot truly protect themselves.

As the preceding discussion suggests, the model on which derivative benefits are premised is, in essence, a genderized mirror-image of the primary benefits model. The attainment of maximum primary benefits requires lifelong employment; derivative status envisions lifelong marriage. Like the job that ends too soon, the marriage truncated by divorce wreaks havoc with the entitlements of the person whose access to the system is derivative—virtually always the wife.

Initially, the Social Security Act's treatment of divorced wives was both simple and brutal. Under the 1939 amendments, divorce terminated all derivative rights, even if the divorce occurred after benefits were already being paid.\textsuperscript{298} Thus, a woman who married at age twenty and devoted herself to childrearing and homemaking could, at age seventy, be divorced by her husband and find herself with no source of income whatso-
ever. While such a scenario may have been unheard of in 1939, by 1989, divorce among the elderly had become commonplace.

Bowing to this new reality, Congress has several times amended the Social Security Act to provide for divorced spouses. However, the derivative rights of divorced spouses have all of the deficiencies described in the preceding section, and more. Like a never-divorced widow, a divorced widow may experience the "widow's blackout." In addition, she is likely to face hardship at other points in her life. For example, when a worker retires, he receives a benefit referred to as his primary

299. It does not appear that the drafters of the 1939 amendments spent much time on the topic of divorce. See Blumberg, supra note 265, at 257-58. They may well have erroneously assumed that a divorced wife would receive alimony sufficient for her support. See O'Connell, supra note 263, at 437.

300. In 1987, the divorce rate per 1000 married women in the population was 18.6. For men, the equivalent figure was 18.8. Among those over 65, the divorce rate stood at 1.5 per 1000 married women, and 2.0 for men. The rate for the slightly younger population of 60- to 64-year-olds was 2.7 for women and a striking 4.3 for men. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 88 tbl. 134 (11th ed. 1991) [hereinafter 1991 STATISTICAL ABSTRACT].

301. In 1950, Congress extended mothers' benefits to divorced women caring for a child of a deceased worker. Social Security Amendments of 1950, Pub. L. No. 81-734, § 202(g)(1), 64 Stat. 477, 485 (codified as amended at 42 U.S.C. § 402(g)(1) (1988)). In 1965, Congress extended retirement and survivors' benefits to women who had been married to a covered employee for 20 years or more. Social Security Amendments of 1965, Pub. L. No. 89-97, § 308, 79 Stat. 286, 375 (codified as amended at 42 U.S.C. §§ 402(b)(1), (e)(1), 416(d)). In 1972, Congress eliminated the requirement that a divorced wife be actually dependent on her former spouse in order to qualify for benefits. Social Security Amendments of 1972, Pub. L. No. 92-603, § 114, 86 Stat. 1329, 1348 (codified as amended at 42 U.S.C. §§ 402(b), (g)). In 1977, Congress reduced the duration of the marriage requirement from 20 years to 10. Social Security Amendments of 1977, Pub. L. No. 95-216, § 337, 91 Stat. 1509, 1548 (codified as amended at 42 U.S.C. § 416(d)(1)-(2)). In 1983, Congress eliminated the rule that reduced a divorced spouse's benefits if her ex-spouse had postretirement earnings. Social Security Amendments of 1983, Pub. L. No. 98-21, § 132(b)(1)(A)(v), 95 Stat. 65, 94 (codified as amended at 42 U.S.C. § 403(b)(2)(A)). This same set of amendments further provided that a widow whose husband died before reaching retirement age would be permitted to "update" his earnings record to the time of her eligibility. Id. § 133(a)(1), 97 Stat. at 95 (codified as amended at 42 U.S.C. § 402(e)(2)(B)). The 1983 amendments also provided that a divorced spouse aged 62 or over could apply for retirement benefits using her ex-spouse's earnings record, even if he had not yet retired. Id. Prior law had required her to wait until he filed for benefits. Finally, since 1983, the divorced spouse's benefits are exempt from the family maximum. Id. § 132(b), (e)(2), 97 Stat. at 94 (codified as amended at 42 U.S.C. § 403(a)(3)(C)). Prior to this amendment, the divorced spouse and her children, the current spouse and children of the worker, and the worker himself (if he were living) had their benefits added together, and if they exceeded a "family maximum," all would be reduced. The family maximum is created by 42 U.S.C. § 403(a).
insurance amount (PIA).\textsuperscript{302} His current spouse gets a benefit equal to 50\% of his PIA (assuming she meets the age requirements and claims derivatively).\textsuperscript{303} A divorced spouse claiming on the same man's record also receives a 50\% benefit.\textsuperscript{304} It seems, then, that the two spouses receive the same treatment. The key difference, however, is in the household income of the two families. The 150\% of PIA received by the couple may be enough to provide for their basic needs, while the 50\% payment to the ex-wife will not lift her out of poverty unless it is supplemented by other funds. In 1989, for example, the average retired worker collecting Social Security received a benefit of $639 per month.\textsuperscript{305} If his current wife receives half this amount as a secondary benefit, the two together would receive $639 multiplied by 1.5, or $958.50. The worker's ex-wife, however, would receive only $319.50.\textsuperscript{306}

Social Security retirement is not the only area in which divorce contributes to the economic insecurity of women. Divorce may also impair a woman's access to a private pension because a married woman's husband is more likely than she to be enrolled in a pension plan, even if she is a member of the paid work force.\textsuperscript{307} If she does have a pension plan, it is less likely to vest;\textsuperscript{308} if her pension rights do vest, her lower income will produce a lower benefit. Thus, many women have access to better pension rights derivatively, as wives, than directly, as workers.

Divorce can jeopardize derivative access, however. While many women do claim and receive a share of their husbands' pensions at divorce, the pension is often valued at the time of the

\textsuperscript{302} The extraordinarily complex derivation of this amount is set forth in 20 C.F.R. §§ 404.201-290.

\textsuperscript{303} 42 U.S.C. § 402(b)(2).

\textsuperscript{304} Id. § 402(b)(3). This assumes that the marriage lasted at least 10 years.

\textsuperscript{305} Heading for Hardship: Retirement Income for American Women in the Next Century, OLDER WOMEN'S LEAGUE (Wash., D.C.), May 1990, at 4 [hereinafter Heading for Hardship].

\textsuperscript{306} In fact, this is somewhat generous. The Older Women's League placed the average spousal benefit for 1989 at only $294. Id.

\textsuperscript{307} In 1987, 32\% of men over age 65, but only 13.6\% of women, received private pension income. Id. at 8. While this gap may close, because today's young women seem destined to spend more years in paid work than current retirees, women's nonmale work patterns will continue to impair their access to pensions on a primary basis. Data from 1990 indicate that 42\% of all male workers were covered by pension plans, compared to only 36\% of women. 1992 STATISTICAL ABSTRACT, supra note 12, at 363 tbl. 875.

\textsuperscript{308} This fact is discussed in some detail above. See supra notes 153-76 and accompanying text.
divorce.\textsuperscript{309} This process of "cashing out" is highly speculative, with actuaries able to defend widely divergent figures.\textsuperscript{310} Some family-law commentators argue that judges lean toward the more conservative projections. These favor the payor spouse—usually the husband.\textsuperscript{311}

In sum, the divorced spouse who looks for economic security through derivative claims faces a dual set of barriers. First, derivative claims are a patchwork that, at best, provides protection only some of the time. Second, the divorced spouse gets less than the never-divorced spouse. While Congress and the courts have acted several times to replace parts of what she loses at divorce, this has amounted to laying a patchwork on a patchwork—while the protections have increased, the gaps remain.

3. "Making It on Her Own"

Any discussion of the effect of divorce on the derivative claims of ex-wives would be incomplete if it failed to consider the fact that virtually all ex-wives have paying jobs.\textsuperscript{312} Thus, a

\textsuperscript{309} In fact, a number of different methods are used. Most favorable to the wife is the qualifying domestic relations order (QDRO). See I.R.C. § 414(p) (1988). This order is addressed to the payor of the pension—the husband's employer or an insurance company—and tells the payor that, at the time the pension becomes payable, X\% is to be paid to the husband and Y\% to the wife. Other courts, however, "cash out" the pension, particularly if the marriage was short or many years remain before retirement. See, e.g., Dewan v. Dewan, 506 N.E.2d 879 (Mass. 1987). For a brief discussion of this subject as it is treated in the Massachusetts courts, see Franklin E. Peters, Evaluating Pension Benefits as Marital Assets, 6 MASS. FAM. L.J. 1, 1-2 (1988).

\textsuperscript{310} Peters, supra note 309, at 7-9 (discussing actuarial assumptions). In 1990, Massachusetts Continuing Legal Education, Inc., sponsored a seminar entitled A Pension Case for the Experts. Data distributed at the course included the valuation of a hypothetical pension by two actuaries. One actuary produced a present value for the marital portion of the pension of $80,930. The second's value was $28,111. The gulf in methodology is so wide that it produces differences not just of a few dollars, but of nearly 300\%. See Massachusetts Continuing Legal Educ., Inc., Course No. 90-306, A Pension Case for the Experts 34, 75 (on file with Author).

\textsuperscript{311} See, e.g., Grace G. Blumberg, Marital Property Treatment of Pensions, Disability Pay, Workers' Compensation, and Other Wage Substitutes: An Insurance, or Replacement, Analysis, 33 UCLA L. Rev. 1250 (1986); Elizabeth A. Beskin, Comment, Retirement Equity Inaction: Division of Pension Benefits upon Divorce in Louisiana, 48 LA. L. Rev. 677 (1988).

\textsuperscript{312} Gregg Duncan and Saul Hoffman state:

The labor force participation of women increases dramatically in response to divorce. The fractions of women working at least 1,000 hours in the year after a divorce is more than twenty percentage points higher than the fractions performing a comparable amount of market work in the year prior to the divorce.

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complete evaluation of the effect of divorce on benefit acquisition must ask whether the typical divorced woman’s own employment allows her to “make it on her own”—to acquire an adequate stock of benefits independent of her ex-husband. Answering this question requires a brief detour to pension principles.

a. Problems in the Acquisition of Private Pensions

Private pension plans are usually divided into two general classes: defined contribution plans and defined benefit plans. Though both are important, the former provide a particularly clear example of the problems faced by a woman who interrupts her paid work for family care.

A defined contribution plan is one that does not promise the employee any fixed benefit at retirement. Rather, the employer binds itself to make regular, specified contributions to a pension fund for the employee. The amount contributed is often set as a percentage of wages. Under this plan, the more the employee earns, the more his employer contributes on his behalf, generally up to some maximum, after which the contribution no longer receives preferential tax treatment. Under this kind of pension arrangement, getting “stuck” in a low-wage job means getting stuck with low pension contributions. There is a further complication: because the employer contributes only on behalf of employees, leaving one’s employment terminates the flow of contributions. Clearly, then, the employee who will fare best in a defined contribution plan is the continuously employed, high-salaried employee for whom the employer makes maximum contributions over a period of many years.

Although the analysis is more complicated with respect to defined benefit plans, the same result occurs. A defined benefit plan is one that pays pension benefits based on a contractual formula, rather than maintaining a segregated fund for each employee. Most defined benefit plans fall into one of two categories: flat-benefit plans or unit-benefit plans. The former link the

313. See generally EMPLOYEE BENEFITS, supra note 135.
314. Current law provides that contributions to defined contribution plans receive preferential tax treatment up to a maximum of $30,000, or 25% of the employee’s compensation per year, whichever is less. I.R.C. § 415(e)(1), (2) (1988). Defined benefit plans may be structured to pay a participant up to 100% of his average compensation for his three highest consecutive years, or $90,000, whichever is less. Id. § 415(b)(1)(2).
315. There may be exceptions for temporary leaves, but only if the employee returns to the same employer. See, e.g., id. § 410(a)(3)(e) (regarding maternity leave).
pension benefit to the employee's salary—for example, 30% of average monthly compensation during the employee's three highest paying years. The unit-benefit plan varies the computation by adding a factor that represents the employee's longevity with the firm. For example, it may provide that the employee shall receive 1% of his average monthly compensation multiplied by his years of employment with the company.\textsuperscript{316} Clearly, then, the pension benefit paid to the highly compensated employee will exceed that paid to the low-wage employee, and the employee with more years of service will, at least under a unit-benefit plan, receive more than the employee with fewer years.

Employees who are not covered by a pension plan may, of course, make tax-deferred contributions to an Individual Retirement Account (IRA). At the present time, however, the tax deferral is limited to $2000 per individual per year,\textsuperscript{317} which is far below the $30,000 that can be deferred by top earners with an employer-based defined contribution plan. The preference for the highly paid long-term employee is indisputable. As a result of that preference, a woman whose life's work involves leaving the paid labor force for several years of uncompensated childcare before returning to paid work on a limited, part-time basis accumulates a far poorer stock of pension rights than someone, man or woman, whose paid work is essentially lifelong (assuming that her employer provides a pension plan at all, and that her rights in that plan vest). The woman who combines work and family obligations will have more difficulty with vesting periods, will accumulate no pension credits during her years of uncompensated childcare and will earn few, if any, credits while engaging in paid work on a part-time basis. It is not surprising that in 1987, men over age sixty-five received average annual incomes from private pensions of $5,727, while women received only $3,352.\textsuperscript{318}

b. Problems with Social Security Retirement

The computation process for Old-Age and Survivors' Insur-

\textsuperscript{316} Both of these examples are drawn from KRASS & KESCHNER, \textit{supra} note 157, at 20-21.

\textsuperscript{317} The situation for the spouse who is not engaged in paid work is even worse. If her husband is also contributing to an IRA, the maximum tax-deferred contribution for the two of them is $2250. I.R.C. § 219(c).

\textsuperscript{318} \textit{Heading for Hardship, supra} note 305, at 8.
ance (OASI)\(^{319}\) also prefers the more highly paid long-term worker,\(^{320}\) although it simultaneously contains a preference for lower paid workers. This contradiction arises because the Social Security retirement formula is based on the amount an employee earns through his employment,\(^{321}\) but it replaces earnings at three different rates. The highest rate applies to the first $401 of monthly wages\(^{322}\) (90%), with a lower rate applying to earnings from $401 to $2420 (32%), and the lowest rate (15%) applying to earnings in excess of $2420 per month.\(^{323}\) The formula also imposes a maximum beyond which wages are not considered.\(^{324}\) Thus, the low-wage earner benefits from a higher replacement rate—that is, more of her wage is replaced by Social Security retirement benefits than is the case for the higher earner. This makes Social Security benefits progressive. At the same time, however, it is the higher earner who receives the most benefit dollars, up to the statutory maximum.\(^{325}\) He will receive a lower percentage of his preretirement wage, but more dollars will flow to him. Thus, like any wage-linked system, Social Security has an inherently regressive feature—it gives the most to those who have the most.

\(^{320}\) This is true up to a limit: there is a statutory ceiling on benefits. See infra note 325 and accompanying text.
\(^{321}\) The term "employment" is defined at 42 U.S.C. § 410(a). It includes the vast majority of jobs, excepting only some federal workers, id. § 410(a)(5), state and local government employees in those states that have not opted to join the Social Security system, id. § 410(a)(7), clergymen, id. § 410(a)(8), newspaper carriers under the age of 18, id. § 410(14)(A), and a few additional narrow categories.
\(^{322}\) In fact, the worker's actual wage is first averaged, then increased by the application of a formula intended to recognize that a wage earned 30 or more years ago bears little relation to today's costs. This indexing formula, which is more fully described below, see infra text accompanying notes 326-36, reflects the percentage by which the average annual earnings of all workers have increased during the retiring worker's work life. The resulting figure is referred to as the Average Indexed Monthly Earnings, or AIME. 42 U.S.C. § 415(b).
\(^{324}\) This coincides with the maximum wage on which tax is imposed. The 1993 amount is $57,600. 57 Fed. Reg. 48,620 (1992).
\(^{325}\) The highest possible payment to a 1993 retiree would be $1128 per month. Robert Pear, Social Security Benefits to Increase 3% in January, N.Y. TIMES, Oct. 16, 1992, at A20. A family, however, might collect more on this individual's record, up to a maximum of $1973.20 per month. See 57 Fed. Reg. 48,619. Any amount paid to a divorced spouse claiming on this individual's record would be in addition to this ceiling. See supra note 301.
The Social Security benefit formula is further complicated by the application of what is known as the "work life" concept. In computing retirement benefits, the Social Security Administration (SSA) goes through a technical process, the bare bones of which must be understood in order to evaluate its effect on those who deviate from the good-worker model. That process proceeds essentially as follows.

(1) To compute a retiree's Social Security benefits, the SSA first counts the years from the one in which the beneficiary's twenty-second birthday occurred to that of her sixty-first. This forty-year span is referred to as elapsed years.

(2) From these forty elapsed years, the worker is allowed to drop the five with the lowest earnings. These are referred to as drop-out years.

(3) Elapsed years reduced by dropout years equal benefit computation years. For most retiring workers, this number will be thirty-five.

(4) For each of these benefit computation years, the worker's actual wages are recorded, up to the established maximum amount. These earnings are then indexed. As noted above, the purpose of indexing is to artificially inflate the worker's wage so that the base from which benefits are computed will have some relevance to current costs.

(5) To index a worker's wage, the SSA first chooses what is called an indexing year. For workers who are retiring, this is the year of their sixtieth birthday. Indexing a retiree's wage involves a five-step process:

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326. The rules are actually far more complicated. There are special rules for those who turned 22 before 1951, and different computations for disability and survivors' benefits than for retirement. For the sake of clarity—a difficult goal at best—I limit discussion here to those who turn 22 after 1951, and to applications for retirement benefits only. For a full discussion of this topic, see 20 C.F.R. § 404.211(e) (1992).


328. This seems to be a colloquial rather than a technical name, but it is widely employed. See, e.g., LAWYERS' COOP., SOCIAL SECURITY LAW AND PRACTICE § 23:15 (Timothy E. Travers et al. eds., 1987 & Supp. 1991). The name is used in the regulations in connection with disability. See, e.g., 20 C.F.R. § 404.211(e)(3), (4).


330. Again, the number will be different (lower) for workers who turned 22 before 1951, for applicants for disability and survivors' benefits, and for retirees who experienced a period of disability during their work lives.

331. See supra note 324.

332. See 20 C.F.R. § 404.211(d).

333. Id. § 404.211(d)(1)(ii).
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(a) The indexing year is considered. For that year, the SSA will have developed a figure called the average of total wages. This is, essentially, an average wage for all earners during the relevant year.

(b) The average of total wages for the retiree's indexing year is compared to the average of total wages for each year of his work life. This will produce a ratio. For example, assume that the average of total wages during Retiree X's indexing year is $15,000. During the first year of his worklife, assume that the average of total wages was $3000. The ratio of these two values is five.

(c) The ratio is applied to X's actual earnings in the first year. If he earned $2800, the figure inserted in his computation is $2800 x 5 = $14,000.

(d) The indexing procedure is repeated for each of Retiree X's benefit-computation years.

(e) The indexed amounts are then totalled, and the total is divided by the number of months within the benefit computation years. For a thirty-five-year period, this number will be 420. This calculation produces one of the computation's key figures, the average indexed monthly earnings (AIME).

So far, nothing in the computation seems particularly distressing for divorced women or others with an intermittent relationship with the labor force. One more factor must be loaded in before the problem becomes apparent. That is, a person applying for retirement benefits must include in her computation all of the years since her twenty-second birthday. The only exceptions to this rule involve disability. A worker who amasses fewer

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335. Each year will have a different indexing ratio, since each year will compare the average total wages for that year to the average total wages for the indexing year. Each successive year produces a lower indexing figure. For an example of a complete computation, see LAWYERS' COOP., supra note 328, § 23:23.


337. Two different sorts of exceptions exist, both involving the situation in which a worker has been disabled. The first exception is that, for retirement purposes, the years in which the worker was disabled are excluded from the computation base years. 20 C.F.R. § 404.211(b)(2). Thus, a worker who was disabled, recovered, returned to work, and is now retiring, may retire using a set of computation base years fewer than 35. The other exceptions apply to applications for disability benefits rather than retirement. Id. § 404.211(e)(3), (4).
than thirty-five years of paid work for reasons other than disability thus encounters a serious problem. Because she must include thirty-five entries in her AIME computation, some of those entries—for example, those years in which she engaged in uncompensated childcare or elder care—will be the number zero. 338 It takes little mathematical sophistication to comprehend the effect of the insertion of a zero in the computation of such an average. 339

There is simply no question that this work life formula severely disadvantages women. In a study published in 1982, demographic statistician Shirley Smith calculated that the average 16-year-old man can expect to spend 38.5 years in the labor force (more than the 35 years needed to calculate his AIME), while the average woman of that age can expect to spend 27.7 years in the labor force—a number that would result in the insertion of approximately 7 zeros in her AIME computation. 340

More recently, the Older Women's League estimated that the average man spends a total of 1.3 years of prime work time outside the labor force, while for the average woman, this number is 11.5. 341 "Even by the year 2030," the report states, "fewer than four in ten women age 62-69 will have worked 35 years or more. The remaining 60% will have zeroes averaged into their earnings record." 342

This disparity has, in fact, been recognized by policy analysts who have suggested several approaches to correct it. Proposals to grant Social Security credits to women who leave the

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338. This occurs because the regulations state: "For computing old-age insurance benefits . . . we subtract 5 from the number of your elapsed years. . . . For benefit computation years, we use the years with the highest amounts of earnings after indexing. They . . . must include years of no earnings if you do not have sufficient years with earnings." Id. § 404.211(e)(2).

339. Assume, for example, the unrealistic but simple case of the worker whose indexed earnings amounted to $20,000 per year for his entire work life. His average earnings would be, of course, $20,000. Now assume that this worker performed paid labor for only 34 years, and must insert a zero for year 35. The insertion of a single zero reduces the $20,000 average to $19,429. If 2 zeros are inserted, the average falls to $18,857.

340. Smith, supra note 149, at 15. If we return to our prior example and assume 28 years of earnings at $20,000 per year, the insertion of the required 7 zeros would reduce the $20,000 average to $16,000.

341. Heading for Hardship, supra note 305, at 6. There may also be a racial disparity. Recall that white men spend only 3% of their potential work years away from work, while for black men the figure is 7%. See supra note 151 and accompanying text.

labor force to rear children have been filed in Congress,\textsuperscript{343} and an extensive study of the feasibility of having spouses share earnings records was completed in the mid-1980s.\textsuperscript{344} All of these proposals stalled, however, in definitional quandaries,\textsuperscript{345} in fears that the proposals would generate new expenses for the program, and out of a concern that proposals intended to help childrearers would target middle-income women, while missing poor mothers.\textsuperscript{346}

Rather than debate the merits of these proposals, I merely wish to emphasize the one-dimensional nature of the current model. Social Security Old-Age Benefits are deliberately structured as a vehicle for wage replacement. Although the benefit computation is progressive (and thus favors lower paid workers), OASI, like all wage-linked systems, is also regressive. The higher earner is paid higher benefits until the maximum is reached, while the less than lifelong worker—for example, the woman who moves in and out of paid work—may be severely penalized. Thus, any adult who devotes significant time to

\begin{itemize}
  \item \textsuperscript{344} A number of reports on this plan were issued. One comprehensive study is included in \textit{Report on Earnings Sharing Implementation Study: Hearings Before the Subcomm. on Social Security of the House Comm. of Ways and Means}, 99th Cong., 1st Sess. (1985).
  \item \textsuperscript{345} There was much debate, for example, about who should be entitled to a childcare credit. Would unmarried parents be included? What about women (or men) who left the labor force to care for a dependent family member who is not a child, such as an elderly parent? Interestingly, these definitional problems did not prevent the introduction of childcare dropout years into SSD computations. \textit{See Social Security Disability Amendments of 1980}, Pub. L. No. 96-265, 94 Stat. 441 (codified as amended in scattered sections of U.S.C.). Since 1981, an individual applying for disability benefits may increase her dropout years if, for some portion of her work life, she meets the childcare requirement. The regulations state: "The child-care requirement for any year is that the worker must have been living with his or her child (or his or her spouse's child) substantially throughout any part of any calendar year that the child was alive and under age 3." 20 C.F.R. § 404.211(e)(4) (1992). The regulations further limit the use of a dropout year to years in which the worker had zero earnings. \textit{Id.} Although disability presents different issues than retirement, the decisions embodied in the childcare dropout for disability purposes would seem at least partially applicable to retirement. It is also puzzling that childcare years are dropped in computing the disability benefit, but not in determining the claimant's eligibility. \textit{See supra} notes 179-216 and accompanying text.
  \item \textsuperscript{346} This is because the person who would benefit from a homemaker credit or additional childcare dropout years is the one who can afford to leave the paid work force and spend her full time in childrearing. Many poorer women have no choice but to continue to work full-time, even when their children are very young.

For a critique of all of these issues, see the excellent work of Karen Holden, \textit{Supplemental OASI Benefits to Homemakers Through Current Spouse Benefits, a Homemaker Credit, and Child-Care Drop-Out Years}, in \textit{Challenge}, supra note 279, at 41.
uncompensated caregiving does so at the risk of her security during old age. If she amasses fewer than thirty-five years of Social-Security-covered employment, benefit claims based on her own earnings record will be drastically reduced by the insertion of zero years. If she relies instead on her husband’s record, she runs the risk that a divorce will leave her with only a 50% benefit until her husband’s death.

Women who spend less than thirty-five years in paid work and who find themselves divorced at retirement suffer because they are neither the good worker nor the good wife. She who fails on both scores will find herself extraordinarily vulnerable.

D. Why Things Will Get Worse

The goal of this discussion has been to demonstrate that shifts in the composition of the work force are producing new and severe strains on the benefit system. Contingent workers and divorced women—the categories, of course, overlap—deviate from the rigid models that control benefit distribution and, as a result, receive few benefits, poor benefits, or no benefits. It seems unlikely that their difficulties will abate. Though speculating about the future of the labor force is a perilous exercise, the era of stiff global competition is certainly on us. If such competition is to continue—and, as seems likely, to intensify—then the practice of treating labor as a variable cost to be controlled through temporary and part-time hiring will continue to be a wise strategy for employers.

Nor does it seem likely that divorce will soon disappear. Although the rate of divorce has fallen during the past decade, reversing prior trends, the American rate remains extraordinarily high. Furthermore, the effect of the historically high rates on retirement has yet to be felt. Today’s retired women lived most of their married lives during a period of substantially lower divorce rates. The full impact of divorce on retirement, then, must await the aging of a younger cohort.

347. See supra text accompanying notes 301-06.
348. See supra notes 291-94 and accompanying text.
349. A person retiring in 1992 at age 65 would have been born in 1927. While people divorce at many different ages, when this woman was aged 25 to 35, the divorce rate ranged from 2.2 to 2.6 per thousand population. 1992 STATISTICAL ABSTRACT, supra note 12, at 64 tbl. 80. The rate for the peak years of 1979 and 1981 was 5.3—more than twice as high as the highest rate she would have experienced in the decade from her mid-twenties to her mid-thirties. See id.
Certainly there are many variables to consider in pondering the impact of high divorce rates on women's economic situation. Younger women are likely to remarry after a divorce, and, thus, to replace their link to a male worker and his array of benefits. In addition, today's women have longer work lives than their mothers, bolstering their own wage records. But neither of these phenomena guarantees security. Second and subsequent marriages fail even more often than first marriages, and women's pay remains low, even as their years of paid work grow longer. Finally, there is the Older Women's League's bleak prediction, cited earlier, that even by the year 2030, a majority of women will fall short of the magical thirty-five-year work life required by Social Security. Thus, although piecemeal legislation like COBRA and the various Social Security amendments cited above have clearly helped, divorced women continue to experience severe problems in benefit acquisition, and their numbers will almost surely remain high.

VI. "EARNED RIGHTS" AND PRODUCTIVITY: RATIONALES FOR LIMITING BENEFITS

Prior portions of this Article have demonstrated the failure of current benefit systems to provide universal coverage to the American population. Although the three-tiered model of


353. See supra note 342 and accompanying text.
354. See supra notes 285-86 and accompanying text.
355. See supra note 301 and accompanying text.
356. See supra notes 88-355 and accompanying text (Parts IV and V).
work-related, derivative, and means-tested entitlements could, at least in theory, provide universal distribution of economic security, quite clearly the systems currently in place do not. The yawning gaps described above strongly suggest that benefits were never intended to provide universal coverage.

In their recent work on the welfare state, Marmor, Mashaw and Harvey wisely counsel against asking what so complex a structure as the American economic security system "was meant to do." Although they take issue with the claim that the structure is incoherent, they concede that it is filled with compromises, and, perhaps, inconsistencies. The inconsistencies—and I have noted many in the pages above—are easy to identify. Clearly, some cry out for correction. Just as clearly, however, Marmor, Mashaw, and Harvey are correct: the search for the "master plan" is futile. But it is not futile to think about and examine some of the core assumptions that—if they did not order the structuring of the benefit system—seem, at least, to legitimate its current form. One key assumption is wage replacement theory.

Wage-replacement theory argues that the purpose of most fringe benefits is to replace the wage of a person who, for some legitimate reason, is no longer able to work. Of course, wage-replacement theory is at a loss to explain the linkage of health insurance to wage earning, but once health coverage is eliminated, the remaining benefits do seem largely or entirely intended as wage replacements. Because one has to earn a wage in order to make its replacement necessary, linking such benefits as disability and pension coverage to wage earning might make sense. As has been demonstrated, however, the benefit system currently in place does not act simply as a wage-replacement mechanism. It fails to replace the wages of some wage earners, while it provides wage replacements to some nonearners. That is, it is both underinclusive and overinclusive.

In the world of pure wage replacement (which is not a world I advocate), nonearners—whether widow or dependent child—would not be paid benefits. But in a system that attempted to identify those who depend on a wage, rather than

357. See MARMOR ET AL., supra note 16, at 22.
358. Id. at 47-49.
359. However, consider my comments above regarding the disabled full-time parent. See supra notes 260-62 and accompanying text.
360. And, under the purer model of the 1935 Social Security Act, they were not.
those who earn one, widows and dependent children would be wage-replacement recipients. To use the term applied in the Social Security debates, concerns over adequacy would push for their inclusion. Clearly, adequacy concerns play an important role in the structure of current benefits. The many Social Security provisions directed toward divorced women, for example, are adequacy-oriented. They are designed to provide for individuals who may have contributed to the Social Security system only intermittently, or not at all, and who have not themselves lost a wage. But in losing their access to their ex-spouse's wage, they have been placed in a position of need. To address that need, a dozen amendments dating back to 1950 have been enacted.\textsuperscript{361}

There is a countervailing pressure on the benefit system, however: the lash of cost. The money to pay for benefits must come from somewhere, and it seems only right that, in large measure at least, benefits should inure to those who pay for them. This rationale pushes wage replacement in the opposite direction, squeezing out nonearners in a patchwork pattern,\textsuperscript{362} and excluding many wage earners on the ground that they have not contributed sufficiently to the system to be entitled to draw from it. This latter rationale, in various forms, explains waiting periods, vesting, and recency requirements and is also used to explain the absence of certain benefits from the contracts of low earners.\textsuperscript{363} Clearly, then, concerns for both adequacy and equity drive the wage-replacement model, rendering it a hybrid that replaces wages sometimes but not always, and that pays nonearners as well as earners.

My point is not that mixing adequacy and equity is wrong. It seems, in the end, to do a good deal of rough justice at the expense of nothing more important than logic. But I believe that the current contraction of the benefit system has been legitimated in some measure by a new emphasis on the equity side of the wage-replacement model. There is a rising rhetoric of "earned right"—an idea that benefits belong to an individual because he worked to earn them. This rationale proceeds approximately as follows: people who "go to work" do something of value and for that they are compensated. One hundred years ago, that compensation would have been a cash wage. Today, it is likely to be a combination of a cash wage and a

\textsuperscript{361} See supra note 301.  
\textsuperscript{362} See supra notes 260-311 and accompanying text.  
\textsuperscript{363} See supra text accompanying notes 97-99, 104.
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noncash set of rights, including the right to demand third-party reimbursement for medical expenses and the right to demand pension payments starting at age sixty-five. That the payment of wages has in this sense become more sophisticated, the argument goes, does not change the fact that what the worker receives is still what he—and only he—has earned. Thus, those who complain about not receiving a certain benefit are really complaining that they are unhappy with their low wages. This is a common complaint, but hardly an indictment of the benefit system.

I believe that earned-right theory is generally accepted (and is vociferously championed) in large measure because it defines the benefit system as one of property rights rather than gratuities. In doing so, it renders the recipient of benefits an owner, rather than a government client. It is this ownership aspect that lends earned right its enormous ideological significance. Earned-right theory reconciles the existence of the benefit system with deeply held convictions about independence and autonomy.\textsuperscript{364}

Examined closely, earned-right arguments seem to operate on two levels. The first is the popular culture or “man-on-the-street” level. Here, the concepts of “earning” and “ownership” are key: a man is entitled to benefits because he has earned them and therefore owns them. But at a more abstract level, the argument almost reiterates the Andrews-Commons vision of social security.\textsuperscript{365} The core idea is that linking benefits to wages will encourage individuals to be productive. While they are rarely articulated in this fashion, I believe these assumptions about benefits and their link to wage earning are powerful, important, and, on close examination, highly inaccurate.

For the first level of the earned-right rationale to be accurate, two corollary propositions must be true. First, the value of any benefit must be directly related to the value of the work performed to acquire it. If this corollary were true, we would find that employees who perform equal work would receive equal benefits. Second, benefits, because they are wages, should be paid by the employer, or by insurance paid for by both employer

\textsuperscript{364}. See generally supra notes 29-87 and accompanying text (discussing the key role of ideology in the structuring of the benefit system). My comments on the importance of ideology also appear in Wendy E. Parmet & Mary E. O'Connell, The Rehnquist Court's Road to Serfdom: The Ominous Message of Rust v. Sullivan, Am. Prospect, Spring 1992, at 94.

\textsuperscript{365}. See supra text accompanying notes 41-44.
and employee. The public at large should not be charged with the benefit's cost.

For the second level, the productivity claim, to be accurate, it should be provable that those who are denied benefits are not working—that is, that they are not engaging in socially productive behavior. The converse should also be true: those who are receiving benefits are engaging in productive behavior. In essence, the argument is that if benefits are intended to reward and encourage productivity, they should track productivity.366

In this section, I demonstrate that none of these corollary propositions is accurate, and, therefore, that the proposition that benefits are earned by productive activity is flawed. In fact, it is easy to demonstrate that the value of many benefits is influenced by a multitude of factors having nothing to do with the work performed by the benefit recipient. Often, the value of the benefit is far in excess of the "price" paid by the employer and employee, because benefits are regularly augmented by a complex system of hidden subsidies. As a result of these subsidies, those who perform the same work may garner very different benefits, and benefits that are ostensibly the same may be worth far more to the wealthier worker than to the poorer one. In addition, the existence of these subsidies means that the general public, through both income and payroll taxes, underwrites supposedly "earned" benefits to the tune of billions of dollars per year. Earned-right theory is thus a powerful ideology, but in no sense an economic fact.

As to productivity, the benefit system in its current form excludes many who perform essential and productive work, while at the same time encouraging socially unproductive behavior from others.

A. Earned Rights and Unequal Outcomes: Disparate Benefits for Equal Work

The first of the corollary propositions offered above asserts that if benefits are earned by labor, it should follow that two individuals expending the same effort, at the same job, for the same duration, should garner the same stock of benefits.367 In

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366. A more refined method of stating this would be quantitative rather than qualitative—that is, those who do not receive benefits are performing work that is less valuable than the work of those who do receive benefits.

367. I leave out, for purposes of this discussion, the possibility that these workers were given the opportunity to choose among a range of benefits and simply chose differ-
fact, of course, this is not the case at all. The best example comes from OASI, the Social Security retirement system.

To view the disparate treatment of workers performing identical tasks, assume that an unmarried man works in Social-Security-covered employment for forty years. During each of those years, he earns exactly the average wage for all wage earners. On the day before his sixty-fifth birthday he dies—single, childless, and not survived by his parents. Despite his forty years of contributions, nothing will be paid to this worker’s estate by Social Security. His contributions are effectively confiscated.

Now consider a married worker whose spouse has worked in the home without pay and has, therefore, not paid Social Security tax. Assume that this earner also works in Social-Security-covered employment for forty years, and each year earns exactly the average wage for all wage earners. When he dies on the day before his sixty-fifth birthday, a very different set of consequences will ensue. For the sake of tidiness, let us assume that this married worker’s wife is exactly the same age as he. Because she is over sixty, she is entitled to a Social Security widow’s benefit equal to 100% of what her husband would have received had he lived to retire. In 1989, the average widow’s benefit was $523 per month. Ignoring cost-of-living increases, if we assume that this wife lives to age eighty, she will have collected $94,140 as a result of her late husband’s contributions to the system. Thus, two workers who made equal efforts over a forty-year span were rewarded with benefits that ranged from $0 to $94,140, although their tax payments and work-force efforts were identical.

ently. This may well be the result where employees have a so-called “cafeteria plan.” See generally Daniel M. Fox & Daniel C. Schaffer, Tax Law as Health Policy: A History of Cafeteria Plans, 1978-1985, 8 AM. J. TAX POL’Y 1 (1989). My focus here is on workers whose benefits are different in value, not merely in type, and who lack the ability to change this situation.

371. One could, of course, argue that these two men were actually purchasers of insurance, with one simply being luckier than the other, but that does not explain how the same premium bought joint-and-survivor coverage for one man and not for the other.
My point here is not that the very different treatment of these two workers amounts to a bad policy decision. Rather, I wish to consider what this divergence has to say about the earned-right rationale for benefits. That is, assuming that rights to OASI are earned with labor and tax payments, how can it be that the equal labor and equal tax payments of these two workers produce such disparate results? The answer, of course, is that OASI is not earned in any simple sense of that term. While the Social Security Administration does use a worker's wages as the starting point for the AIME computation, the ultimate benefit structure does not remotely resemble a dollar-in/dollar-out equation. Benefit entitlements depend on family structure (adequacy) as much as—or more than—productivity or Social Security taxes paid during a lifetime.

Many other types of benefits also consider family structure in computing payout, thus providing more to workers with families than to those without. Examples are SSD, which provides funds to the dependents of disabled workers; unemployment insurance, which, in some states, considers family size in setting the amount of the benefit; and, to some extent, health insurance. It is true, of course, that not all benefits work this way. A private pension will have a lower monthly payout if a joint-and-survivor option is chosen than if the benefit period is limited to the employee's lifetime. However, variations among bene-

Karen Holden describes these payments as an implicit credit to wives for time spent working in the home. See Karen C. Holden, The Inequitable Distribution of OASI Benefits Among Homemakers, 19 GERONTOLOGIST 250, 251-52 (1979).

372. Note that their treatment would also have been disparate had both lived. If both had retired in 1989, the single worker would have received a benefit of $639 per month. See Heading for Hardship, supra note 305. But the married worker's spouse would have been entitled to an additional 50% benefit based on her husband's employment record. Thus, the benefit to the married worker's family would have amounted to $958.50 per month, although his workplace efforts and tax payments were identical to those of the single worker.


375. If the employer pays 100% of employee health insurance costs and offers family coverage, he will be providing more for the employee with a family than for the one without a family. In any case where family coverage is provided, the employee with a large family is receiving more coverage, in per person terms, than the employee with a small family.

fits do not change the fact that the disparate payouts noted above reveal a major flaw in the earned-right analysis. If benefits are truly nothing more than a wage in a different form, then family size, structure, and need should be irrelevant. But they are not; this fact alone indicates that simple wage analysis fails to capture the true nature of the benefit system.

B. A System of Subsidies

The second proposition that I view as essential to the earned-right rationale focuses on the source of the funds that pay for benefits. If benefits are a wage, their cost should be borne by the employer or his insurer, not the public. Of course, the fact that the cost of benefits is partially borne by employers has become a matter of great concern and frequent public debate. Employers constantly complain that the escalating costs of benefits make it difficult or impossible for them to compete, particularly with foreign firms. Others—generally economists—claim that it is actually the employee who pays for benefits via decreased cash wages. Either of these scenarios, however, would be consistent with an earned-right rationale. In either case, the benefit would be part of the exchange between employer and employee. Of far more significance to testing earned-right theory is the indirect but key role played by the public in subsidizing benefits through both the income tax and Social Security systems. To gain an accurate picture of who picks up the benefits tab, we need to consider (1) the effect of the nearly complete exclusion of benefits from federal income taxa-

still choose to receive payments that terminate at his death, doing so requires that “the spouse of the participant consents in writing to such election, and the spouse’s consent acknowledges the effect of such election and is witnessed by a plan representative or a notary public.” 29 U.S.C. § 1055(c)(2)(A) (1988).


378. See, e.g., Employers Shift Burden as Healthcare Costs Skyrocket, EMPLOYEE BENEFIT NEWS, Aug. 1989, at 16; see also SWEENEY & NUSSBAUM, supra note 228, at 76-78.

379. John Brittain has made this argument with respect to Social Security taxes. See John A. Brittain, The Incidence of Social Security Payroll Taxes, 61 AM. ECON. REV. 110 (1971). Very clearly, this is how cafeteria plans function. See generally Fox & Schaffer, supra note 367. Whether the theory is true in all cases is more controversial. In their study of health insurance, Monheit and others concluded that it was not the case that “workers excluded from health insurance benefits receive compensating wage increases.” Monheit et al., supra note 95, at 355.
tion, and (2) the complex cross-subsidies of the Social Security system.

1. Excluding Employee Benefits from Income Taxation

As a general matter, the Internal Revenue Code imposes a tax on all income without regard to its form. Employer-provided fringe benefits are an important exception to this rule, perhaps the most important exception. The Code provides that employer contributions to such benefits as health and accident plans, group legal services plans, education benefits, dependent care assistance, and employee pensions shall, in the year such contributions are made, be partially or entirely excluded from the gross income of the employee. In short, these benefits are received essentially "tax free." This special treatment of fringe benefits has a number of effects, at least two of which are directly relevant to any test of the earned-right thesis. One effect is that produced by what is known as a "tax expenditure." The second results from the effect of graduated tax rates on exclusions from gross income.

The term "tax expenditure" was coined by Professor Stanley Surrey some twenty-five years ago. Surrey argued that exempting a certain type of income from the usual rules of taxa-

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381. Id. § 120.
382. Id. § 127. There is a cap on this benefit. Only the first $5250 paid by the employer for educational assistance during a calendar year is excluded from the employee's income. See id. § 127(a)(2).
383. Id. § 129. This exclusion is also capped. The maximum annual exclusion is $5000. Id. § 129(a)(2)(A).
384. Id. §§ 404, 415. This exclusion is also capped. The limits vary with the type of plan. A profit-sharing plan has a limit of 15% of employee compensation. Id. § 404(a)(3)(A)(i). For defined contribution plans, the maximum is the lesser of $30,000 or 25% of employee compensation. Id. § 415(c)(1). For defined benefit plans, one may not accrue a benefit in excess of $90,000 or 100% of average compensation for the employee's three highest years, whichever is less. Id. § 415(b)(1).
385. Some benefits, such as health insurance and dependent care allowances, escape taxation permanently as exclusions from income. See id. §§ 101-136. Other benefits, such as contributions to pensions, qualify for tax deferral. See id. §§ 401-409. In the case of pensions, the income tax on both the employer's contribution (and the employee's, if any) and the pension fund's earnings are deferred until the employee receives distributions. Id. § 402(a). The employer, on the other hand, may be allowed a deduction in the year of its contribution. Id. § 404.
386. This concept was introduced by Professor Surrey and is described and elaborated in his seminal—and remarkably readable—work, STANLEY S. SURREY, PATHWAYS TO TAX REFORM: THE CONCEPT OF TAX EXPENDITURES (1973). Surrey first used the term in 1967. Id. at vii-ix.
tion is exactly the same as making a direct payment to the taxpayer with funds drawn from the United States Treasury. Surrey's thesis is easily demonstrated by examining the tax treatment of employer-provided health insurance.

First, assume that a certain employer contributes $100 per month toward each of its employees' health premiums. Next, assume an employee in the 31% tax bracket. Finally, assume that Congress did not choose to exempt income paid in the form of fringe benefits from taxation. Under this set of assumptions, the employee would have to pay $31 per month in tax on this $100 contribution. In the course of a year, the contributions made by the employer on the employee's behalf would generate a tax liability of $372. In deciding to exempt this contribution from taxation, Congress has, in essence, given this taxpayer $372. Congress has spent the money by exempting it from tax, hence the label "tax expenditure."

Surrey's analysis of the effect of decisions not to tax has been extremely influential. Seven years after he first suggested it, and one year after the publication of his book, Congress ordered the Treasury to include a new section in the federal budget to project the loss of revenue resulting from these "tax expenditures." This is "Special Analysis G", which has been part of the federal budget since 1974. In Special Analysis G, the Treasury estimates the additional revenue it would have received had the various "special exclusion[s], exemption[s] or deduction[s] from gross income" been eliminated from the Internal Revenue Code. The figures are staggering. Shortly before leaving office in January 1993, President Bush issued a budget statement indicating that the preferential treatment of employer-provided health insurance premiums alone would produce a revenue loss in 1994 in excess of $57 billion. The Congressional Research Service (CRS) put the cost of excluding pension contributions in 1993 at $59 billion, and the total cost of all tax expenditures in that year at $101.8 billion.

387. Id.
389. Id. (citing 2 U.S.C. § 622(3) (1988)).
392. See Stanford G. Ross, Federal Tax Policy, in BUSINESS, WORK AND BENEFITS:
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The use of exclusions from taxation to effectuate social policy is a matter of ongoing, and often intense, debate. But my question, at the moment, is simpler: what is the significance of tax expenditures for the argument that employees earn their fringe benefits? I believe—as do all who are persuaded by Surrey's analysis—that tax expenditures constitute a massive underwriting of the cost of fringe benefits by the public. By exempting the value of fringe benefits from taxation, Congress is making the decision that the United States Treasury will forego more than $400 billion in revenue each year. In short, in a time of chronic shortfalls and a bulging deficit, Congress is making the decision to use public funds—by failing to collect them—to underwrite the purchase of fringe benefits.

As a policy decision, this treatment of fringe benefits is complex. Some have claimed that it results in a wider distribution of these important economic security devices. But it also means that those who are fortunate enough to have access to fringe benefits are receiving a public subsidy that is no different in effect than a direct grant such as AFDC. Furthermore, the total annual subsidy is immense. It could, for example, fund the much-maligned AFDC program for more than sixteen years.

The magnitude of this tax-expenditure subsidy also calls into question the claim that fringe benefits are earned by employees. Certainly on some level they are earned, but they are also subsidized. Their value is augmented by a policy decision that renders them immune from taxation at direct public expense. Achieving this subsidy through tax expenditure rather than direct grant has two effects, both of which are crucial to earned-right analysis. First, it makes the subsidy invisible. Unlike AFDC grants, which all perceive as money flowing out of the Treasury, tax expenditures are an absence of inflow. The

ADJUSTING TO CHANGE 153 (Employee Benefit Research Inst. ed., 1988). Attempts to add these exclusions face a number of complications, as the exclusions interact.

393. See, e.g., Fox & Schaffer, supra note 367.
394. This assumes the adoption of the CRS estimate. See supra note 391 and accompanying text.
395. See Fox & Schaffer, supra note 367, at 37-53.
396. See, e.g., id. at 6-9, 26-27.
397. This estimate (1) adopts the CRS figure for the annual revenue loss attributable to the tax exemption for fringe benefits, see supra note 391 and accompanying text, and (2) uses a figure of $25 billion for the total annual cost of AFDC at all levels, federal, state and local. See Erik Eckholm, Solutions on Welfare: They All Cost Money, N.Y. TIMES, July 26, 1992, at 1.
result, as Surrey well understood, is exactly the same, but the process essentially "goes underground." Senators and Congressmen need not engage in public debates over the adequacies or excesses of the appropriation. It simply lurks quietly in the tax code to be used, in a sense, "privately" by individual taxpayers and their employers.

The second important effect of the special tax treatment accorded fringe benefits is a result of the system of graduated rates. When tax rates are graduated, high-bracket taxpayers benefit more from exclusions from income than do low-bracket taxpayers, and zero-bracket taxpayers benefit not at all. Translated into the language of subsidy, this means that we, the public, subsidize the fringe benefits of high-bracket taxpayers the most, those of lower bracket taxpayers less, and those of zero-bracket taxpayers not at all. Whatever may be the policy goals of a widely distributed benefits system, it is difficult to conceive of any argument that could countenance this distribution of public funds. It is, in Surrey's words "an upside-down result utterly at variance with usual expenditure policies.'

398. Expanding the example above of the employer who contributes $100 per month to the cost of employee health insurance, see supra text accompanying notes 386-87, assume two taxpayers, one with a 31% marginal tax rate, and one with a marginal rate of 15%. Under current rules, both employees receive their wage—taxed at the appropriate rate—plus the reduction of their health insurance premiums by $100. Perhaps this might seem to be equivalent treatment. However, if the employer were to stop providing the health insurance, and to instead increase each employee's salary by $100 per month, very different results would obtain. The higher bracket employee would have to pay $31 in income tax on this $100 payment, leaving him with a net amount of $69. Assuming (though this is unlikely) that this employee could replace the health coverage his employer formerly provided for the same $100 the employer paid, we see that the employee now falls $31 short. He will need $31 to restore himself to the position he had when the employer paid the health premium. Of course, if he earns the additional $31, it too is subject to taxation—of $9.61—leaving him still short by that amount, and so on.

If we now apply this same exercise to the lower bracket taxpayer, we see that he pays only $15 in taxes on the additional $100 he receives from his employer, and thus nets $85. If he too can replace his lost health coverage for $100, he falls only $15 short. The point of this example, of course, is to demonstrate that although both employees benefit from having the employer pay their health premiums (rather than simply increasing their salaries by the amount of the premium), the magnitude of the benefit is directly related to the taxpayer's marginal rate of taxation. The higher bracket taxpayer in our example saved $31 by virtue of the exclusion of the employer's contribution to his health insurance from his income. The lower bracket taxpayer saved only $15. And a zero bracket taxpayer would save nothing at all. This last effect is important, for a substantial number of families have no federal income tax liability (zero bracket). A husband and wife with two children pay no income tax unless their adjusted gross income exceeds $14,300. I.R.C. §§ 62, 63(a), 63(c), 151, 152 (1988).

399. Surrey, supra note 386, at 37.
My goal here is not to argue for the immediate abolition of tax expenditures. Rather, I wish to emphasize that a public that balks at an expenditure of $25 billion for poor children and their families quietly tolerates—or is ignorant of—a subsidy more than sixteen times as large to fund private health coverage, life insurance, pensions, and other fringe benefits in a system structured to provide the most generous benefits to the most highly paid. Whatever might be the private-sector rationales for pay disparities and the presence or absence of benefits, this scheme amounts to public financing of private wealth in an upside-down pattern.

2. Cross-Subsidies in Social Security

Preferential tax treatment of fringe benefits is not the only source of disguised subsidies. There is a second font of benefits, and of the rhetoric of earned right, that is fully as potent as the tax code—namely, the Social Security system.

Those who understand it best acknowledge that the Old-Age, Survivors, and Disability Insurance Program (OASDI)—the program most laypeople refer to by the generic name "Social Security"—is a paradox. It is neither an insurance system nor a welfare program, though it contains elements of both. Nevertheless, in the public eye, OASDI is viewed as a system of earned entitlements, the polar opposite of welfare. I believe that most Americans would endorse the statement that retirees have earned their Social Security benefits, and that their situation is entirely different from that of AFDC recipients. The latter's failure to work means that they earn nothing, while the former's labor generates an inalienable claim to their Social Security checks. At least, this is the view of the matter through the lens of earned right. The tenacity—indeed, at times, ferocity—with which defenses of Social Security are mounted

400. 42 U.S.C. §§ 401-433 (1988). This is the program that contributes to the support of retirees, their survivors, and the disabled.

401. Consider the comment of Milton Friedman, cited earlier, that OASDI pays "too much attention to 'need' to be justified as return for taxes paid, and it gives too much attention to taxes paid to be justified as adequately linked to need." Cohen & Friedman, supra note 72, at 36.

makes it important to examine the claim of earned right in that context.

Social Security is many things; one thing it is not is an analog of a private pension system. Although the original Social Security Act created a scheme much like a modern-day defined contribution plan, with an account established for each worker and funds remitted to it by his employer, the original structure lasted only four years (1935 through 1939) and no benefits were ever paid under it.403 In 1939, Congress enacted legislation fundamentally altering the Social Security system and placing it on a so-called “pay-as-you-go” basis. Under this scheme, the worker’s payments to Social Security are not held in an account for that worker. Instead, they are used to pay benefits to a current retiree. The benefits that will be paid the contributing worker in the future are thus not derived from the funds he contributes, but come from payments that will be made by future workers after his own retirement.405 Pay-as-you-go financing alone means that Social Security benefits are not simply funds set aside early in life to draw on at retirement. The system is far more complex than that.

Social Security is both a system of taxation and a system of benefits. While the former is the source of the latter, the two are created by separate statutory provisions, and have different features. For present purposes, the most salient feature of the former is its regressivity, and that of the latter its redistributive effects.

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403. For a thorough and lucid account of the recrafting of Social Security between 1937 and 1939, see Berkowitz, supra note 264.


405. Or so matters stood from 1939 to 1983. Beginning in 1983, however, the Social Security tax climbed steeply, with a portion of the funds collected dedicated to the accumulation of an OASDI surplus. This surplus is designed to cover the gap that would otherwise exist if the baby-bust generation of 1965 and after were asked to finance the retirement of the much larger baby-boom cohort of 1946 through 1964. As a result of this change, current workers are contributing some of the funds that they are scheduled to collect in the future, at least in theory. The actual effect of the 1983 amendments, of course, will depend on future events. For a summary of the amendments and their predicted effect on the future financial status of the OASDI trust fund, see John A. Svahn & Mary Ross, Social Security Amendments of 1983: Legislative History and Summary of Provisions, Soc. SECURITY BULL., July 1983, at 3, 41-44.
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a. Social Security: The Tax Side

Social Security benefits are financed by levying a tax of 7.65% on wages earned, up to a maximum wage of $57,600.\(^{406}\) Employers pay a matching tax, making the total burden attributable to each wage (up to the maximum) 15.3%.\(^{407}\) Unlike the income tax, Social Security's payroll tax has no system of exemptions and deductions. It is paid on the first dollar of earnings regardless of total earnings.\(^{408}\) Thus, a minimum-wage worker will have the full 7.65% tax deducted from her wages just like the person earning $57,600.\(^{409}\) This is a significant burden. Even assuming a minimum wage of $5.00 per hour, a full-time earner will gross only $200 in a forty-hour week. Social Security will then impose a tax of $15.30 on this already tiny income.

The Social Security tax is "proportional," up to its maximum. That is, the rate of tax is the same for all taxpayers. This distinguishes Social Security from a graduated or progressive tax, like the federal income tax, in which higher earners pay a greater percentage of their incomes than lower earners. The

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406. This is the rate currently in effect, and the taxable maximum for 1993. However, this is the maximum for the OASDI portion of the tax only. A person who earns more than the $57,600 continues to pay the Medicare (HI) portion of the Social Security tax at a rate of 1.45% until the 1993 maximum of $135,000 is reached. See Department of Health and Human Services 1993 Cost-Of-Living Increase, 57 Fed. Reg. 48,619, 48,619 (1992). The taxable maximum is scheduled to increase each year through 1996. In that year, the applicable maximums are scheduled to be $69,000 for OASDI and $162,600 for HI. Office of Management and Budget, Executive Office of the President of the U.S., Budget of the U.S. Gov't, Fiscal Yar 1992 at tbl. 22-2.

407. Again, since the change in the Medicare maximum, the tax is actually more complicated. There is a 15.3% tax imposed on the first $57,600, with a tax of 2.9% continuing until the Medicare maximum of $135,000 is reached.

408. This is true, of course, only for those workers who participate in the Social Security system. Some workers do not, but their numbers are small. See Svaah & Ross, supra note 405, at 24. The Social Security Amendments of 1983, Pub. L. No. 98-21, § 101, 97 Stat. 65, 67-70 (codified as amended at 42 U.S.C. § 410 (1988)), extended coverage to federal employees and the employees of nonprofit organizations. A very few remaining workers are exempted from the tax. These include, among others, those whose wages are likely to be low—for example, college students employed by their college and newspaper carriers under age 18. See 42 U.S.C. § 410 (1988). While these earners are exempted from tax, they also earn no benefit entitlements. A more important mechanism for offsetting Social Security tax is the Earned Income Tax Credit. See infra text accompanying notes 425-36.

409. In this section, I deal only with the portion of the Social Security Tax assessed against the employee, although it is generally conceded by economists that the employee in fact bears the burden of the entire tax, including the portion nominally charged to the employer. The classic explication of this position is that of John A. Brittain. See Brittain, supra note 379, at 110.
comparative fairness of proportional versus graduated taxes has been a classic question of tax policy. Fortunately, it need not be resolved here, 410 for, in fact, the Social Security tax is not proportional, but regressive. It taxes lower earners at a higher rate than higher earners.

The regressivity of the Social Security tax is a product of the “cap,” or statutory maximum taxable income. 411 The effect of the cap is to place a ceiling on the Social Security contributions of high earners. As a result of the cap, the minimum-wage earner pays a Social Security tax of 7.65% on her income. The person earning $57,600 also pays 7.65%. But an individual who earns $115,200 pays only 4.55%. 412 At $230,400, the rate falls to 2.40%. 413 In short, high earners pay much lower Social Security taxes than low earners.

Considering its undeniable regressivity, one might well ask why the Social Security tax is capped. The defense is drawn directly from earned-right theory. That is, because Social Security benefits are capped, 414 taxes must be as well. If they were not, an upper-income taxpayer would be paying money into the system that would not serve to enhance the benefits he would ultimately receive.

This reasoning is seductive, but bogus. Many people pay Social Security tax without getting benefits in return. One such person is the unlucky man described above, who died without a family just shy of his sixty-fifth birthday. 415 Another is the married woman who spends much of her life performing uncompensated family care, but also works briefly in Social-Security-

412. This number is derived by taxing the OASDI base—$57,600—at 7.65%, and the balance of the $115,200—as it is less than the HI base—at 1.45%. This produces a tax of $5242 and a composite rate of 4.55%.
413. That is, $57,600 at 7.65%; $77,400 at 1.45%; and $95,400 at 0%, for a composite rate of 2.40%.
415. See supra text accompanying notes 367-71.
covered employment. This woman is described as "dually entitled." At her retirement, she is entitled to use either her own earnings record or her husband's as a benefit base. However, her wages are likely to be low, and her benefit computation skewed by the insertion of zeros.\textsuperscript{416} Thus, she will use her husband's record to attain a higher benefit. Of course, she could have used his record in exactly the same way had she never been required to contribute to Social Security. Her own contributions buy her no additional benefits.\textsuperscript{417}

In short, the Social Security system already collects taxes from many people who get nothing in return. This is not an indictment of the system, but the predictable outcome of an impure equity model—one that employs such adequacy-oriented features as variable replacement rates and indexing. The net effect of all these mechanisms is a system in which the connection between pay-in and pay-out is highly attenuated. Yet the tax cap remains, with earned right as its justification.

And things are getting worse. In the last one and one-half decades, an important shift has occurred that distinctly favors higher earners. During that time, Social Security tax rates have increased by some 31%,\textsuperscript{418} while the progressive income tax has been cut to the bone. Some comparative figures are startling; in 1977, for example, the maximum any wage earner could contribute to Social Security in an entire year was $965.\textsuperscript{419} In 1993, one can contribute that same amount in just nine weeks.\textsuperscript{420} The maximum contribution for any earner in 1993 will be $5529, or nearly six times the 1977 maximum.\textsuperscript{421} And because Social Security is collected on an individual rather than a family basis,

\textsuperscript{416} See supra text accompanying notes 337-39.
\textsuperscript{417} Much has been written about dually entitled women. See, e.g., CHALLENGE, supra note 279.
\textsuperscript{418} In 1977, the Social Security rate was 5.85%. (Again, this is the rate charged to the employee's wage; a matching amount is paid by the employer.) By 1992 it had reached 7.65%, a 31% increase. The tax rates in effect and the maximum taxable earnings from the inception of Social Security to the year 1982 are contained in Robert J. Myers & Bruce D. Schobel, A Money's-Worth Analysis of Social Security Retirement Benefits, 35 TRANSACTIONS SOC'Y ACTUARIES 533, 538-39 (1983). Myers and Schobel also estimated the maximum taxable income from 1982 to 2024, but their figures have so far proved to be too high. In this paper, I use their table only for pre-1983 data. Robert Myers served as Chief Actuary for the Social Security System from 1947 to 1970. See DERTHICK, supra note 63, at 55.
\textsuperscript{419} See Myers & Schobel, supra note 418, at 538. ($16,500 \times 5.85\%)$.
\textsuperscript{420} The maximum contribution by a wage earner to OASDHI in 1993 will be $5187. This is a rate of $100 per week, making it possible to contribute $965 in just over nine weeks.
\textsuperscript{421} A 31% increase in the tax rate can produce a 500% increase in the tax paid.
if both spouses earn $135,000 per year, both will pay the maximum, for a total family contribution to Social Security of more than $10,000. Admittedly, this family, with its $270,000 income, is quite well off. But the family living on a much more modest scale, with a gross income of $35,000 for one spouse and $22,600 for the other will pay over $4400 in Social Security tax in 1993.

While payroll taxes have soared, graduated income tax rates have plummeted, until today's top rate is a paltry 31%.

This top rate sweeps in a range of earners from a comfortable but not wealthy married couple with taxable incomes of approximately $40,000 each, to an income at the level of Michael Milliken in his salad days. In 1987, the Congressional Budget Office (CBO) estimated the change in the distribution of federal taxes for the period 1975 to 1990. Dividing the population into deciles, the CBO demonstrated that during the period from 1977 to 1988, federal taxes for the lowest decile increased from 8.0% to 9.6% (a 20% jump), while those of the highest decile fell from 26.7% to 25% (a 6% drop). In fact, all but one of the bottom five deciles showed a net tax increase. At the same time, the top 5% of taxpayers experienced a decrease in their federal tax burden from 27.5% to 24.9% (19%).

In short, over the past fifteen years, the federal tax burden has shifted dramatically. Payroll taxes, which fall most heavily on modest earners, have skyrocketed. At the same time, the wealthy, whose income from capital is untouched by payroll taxes, and whose wages "top out" of the payroll tax system, have seen the tax that most affects them—the federal income tax—fall.

There is one bright spot in this cockeyed system. In 1975,
Congress created the Earned Income Tax Credit (EITC), and in 1990, raised the dollar figures high enough for EITC to matter. EITC is an outgrowth of a series of debates that took place during the Nixon administration regarding methods for aiding poor families. The Senate Finance Committee had advocated a “work bonus” that would, in effect, refund the Social Security taxes paid by both employers and employees where annual earnings are low. Measures to implement this bonus were introduced in 1972, 1973, and 1974. Finally, in 1975, the EITC was enacted as part of the Tax Reduction Act of 1975.

The EITC does not directly affect the Social Security tax. Earners still pay this tax no matter how low their wages. But the EITC allows the low-wage earner in a family with dependent children to take a credit against income tax. A family eligible for every portion of the credit receives an income-tax reduction of $2020. The key feature of the EITC is that this credit is refundable. This means that if the family’s income-tax liability is less than $2020, the tax liability will be canceled, and the difference between $2020 and the family’s income tax liability will be sent to the family as a check from the U.S. Treasury. For the family with no income-tax liability, this would mean receiving a check for $2020. This is far in excess of the Social Security

428. See id. at 3. Storey quotes Senator Russell Long as saying that the purpose of the legislation was to “prevent the social security tax from taking away from the poor and low-income earners the money they need for support of their families.” Id. His goal was to “prevent the taxing of people onto the welfare rolls.” Id.
430. The basic credit is available to a family with one child, earnings of $7140 or more, and an adjusted gross income of not more than $11,250. The credit has a maximum of $1,192 per year. If the family has two children, this amount rises to $1235. If one child is under age one, there is an additional 5% credit ($357). If the family pays health insurance premiums there is an additional credit of up to $428. A family qualifying for all available credits would have a total credit of $2020. All of these values are derived from 1991 benefit levels. See STOREY, supra note 427, at 13.
431. This assumes, as just noted, that this family qualifies for every subpart of the credit and does not exceed the income cap. Families with adjusted gross incomes over
tax the family would have paid.\textsuperscript{432}

The EITC is, then, an important antidote to the current heavy burden imposed by payroll taxes. But it is also problematic. While its amounts are, since the 1990 amendments, reasonable,\textsuperscript{433} its restriction to families with children makes little sense. The history explains the limitation. The original "work-bonus" provision was posed as an alternative to the failed Family Assistance Plan (FAP).\textsuperscript{434} But the continuation of this limitation results, for example, in denying Social Security tax relief to the woman who finds herself within the "widow's blackout."\textsuperscript{435} When a widow under age sixty no longer has a dependent child in her care, she loses her Social Security benefits\textsuperscript{436} and she is not entitled to any relief from Social Security taxes, even if she earns a very low wage.

While the ideas behind the EITC are laudable, like so many benefit provisions, it creates an odd patchwork of recipients, greatly aiding some, while leaving others in continuing distress. If our hypothetical minimum-wage worker has a dependent child, the EITC will refund the full amount of her Social Security tax in addition to paying her a cash stipend. But if she is not a parent, she will pay the same 7.65 cents per dollar as the worker earning $57,600.

We have already seen that low earners tend to be benefit-poor. Because virtually all of them are engaged in employment covered by the Social Security Act, they are potentially entitled to Social Security benefits in the future. Their current condition, however, is that of a heavily burdened contributor to a system

\textsuperscript{432} The Social Security tax on earnings of $11,250 would be $861. \textit{See supra} note 418. While this family's earnings would, of course, exceed its adjusted gross income, and would, therefore, produce a higher Social Security tax, earnings must reach $26,405 to incur $2020 in Social Security tax.

\textsuperscript{433} They represent a significant increase over prior amounts. The 1991 maximum of $1192 for a family with one child and no "extras" is up from a 1986 maximum of only $550. \textit{See} \textsuperscript{STOREY, supra} note 427, at 15 tbl. 4.

\textsuperscript{434} \textit{Id.} at 3. For a fascinating account of the rise and fall of FAP, see \textbf{DANIEL P. MOYNIHAN, THE POLITICS OF A GUARANTEED INCOME: THE NIXON ADMINISTRATION AND THE FAMILY ASSISTANCE PLAN} (1973).

\textsuperscript{435} \textit{See supra} text accompanying notes 268-78.

\textsuperscript{436} Actually, this happens on the child's sixteenth birthday—an age at which virtually all children are still dependent. 42 U.S.C. § 402(s)(1) (1988).
that deprives them of funds they might otherwise use to increase their stock of current benefits, or, perhaps more realistically, to improve their nutrition or housing. Congress has wisely acted to change this state of affairs for low-income families. But other low-income people need help as well, and the very regressivity of the Social Security tax cries out for attention. Unfortunately, on the rare occasions when such attention is given, the common response is to point to the progressivity of the benefit structure. That complex issue also warrants examination.

b. Social Security: The Benefit Side

When Social Security issues surface in the public debate, criticisms of the inequitable impact of the tax side of the system are generally muted by the claim that on the benefit side the system is progressive. This claim is undeniably true—at least in part. The three-tiered replacement ratio that provides a greater percentage of wages to a lower paid earner has already been described. As a result of this formula, the lower wage earner, who will have contributed less through the payroll tax, will get a better return on her taxes than the higher wage earner. In this very real sense, Social Security benefits are progressive.

Of course, as critics on the right are quick to note, this progressivity is itself inconsistent with the notion that Social Security is earned. Why should someone with a lower wage

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437. John Brittain made this point. He stated:

Low-income families frequently must borrow at very high interest rates. It is therefore difficult to justify forcing them to save, even at a real interest rate of 7 percent under social security; they may at the same time (and in part as a consequence) be borrowing at 36 percent or more. 


439. See supra text accompanying notes 319-23.

440. A dominant voice from the right is Peter Ferrara of the Cato Institute. See PETER J. FERRARA, SOCIAL SECURITY: AVERTING THE CRISIS (1982); PETER J. FERRARA, SOCIAL SECURITY: THE INHERENT CONTRADICTION (1980); PETER J. FERRARA,
"earn" more Social Security benefits per dollar paid than an earner with a higher wage? A true "earned right" would mean that the same benefits inured to those who made the same contributions—a state of affairs that clearly does not exist under Social Security.\footnote{441}

But challenges to the structure of Social Security benefits can also be mounted from the left, for the three-part replacement curve, while undeniably progressive, masks but does not alter the inherent regressivity of any wage-linked system. While it is true that those with the lowest incomes have the greatest percentage of their wage replaced by Social Security benefits, it is also true that they receive the smallest benefits in dollar amount. This is a direct result of the wage link. Because the AIME\footnote{442} and the benefit it produces—the primary insurance amount or PIA\footnote{443}—begin by accumulating and indexing the beneficiary's actual wages, those who have more receive more, up to the benefit maximum. Thus, progressivity is undercut by the decision to pay the highest benefits to those with the highest (but below cap) wages.

I will defer to the next section my critique of the wage link. My point at this juncture is that the fabled progressivity of the Social Security benefit scheme: (1) is partially counteracted by the inherent regressivity of the decision to pay the highest benefits to those with the highest (but below cap) wages, and (2) is itself added proof that Social Security benefits are not earned—in any normal or usual sense of that word.

But the true refutation of the earned-right argument vis-à-vis Social Security benefits lies elsewhere. If Social Security benefits are a return to the recipient of contributions he made during his years in the work force, then these contributions—plus an additional sum representing the interest he could have earned had he invested his contributions in some other medium—should approximate the total benefits he receives during retirement.\footnote{444} But studies have shown that most Social Security recipients receive many times their original contribution, plus


\footnote{441. See supra notes 367-76 and accompanying text.}

\footnote{442. See supra text accompanying notes 326-36 (regarding computation of AIME).}

\footnote{443. See 20 C.F.R. § 404.201 (1992).}

\footnote{444. A more refined method would inquire into the value of the annuity such contributions might fund.}
interest. In 1983, former Social Security chief actuary Robert J. Myers and Bruce Schobel published an article in which they calculated that a single male with average earnings who retired in 1960 and had an average lifespan would receive Social Security benefits that were 700% of his accumulated taxes plus imputed interest.\footnote{445} That is, this man’s total benefits equalled his contributions, plus his employer’s contributions, plus all interest reasonably attributable to them seven times over.

Myers and Schobel were careful to point out that this extraordinary windfall has decreased over time. However, the single man with average earnings retiring in 1980 will still receive 275% of the total contributions made on his behalf, plus interest.\footnote{446} For the married couple collecting benefits on the earnings of only one, the news is even better. For this couple, even as late as 1980, “the value of the benefits is 5 times the value of the combined employer-employee taxes.”\footnote{447} Myers and Schobel stated this same information in another way: “For 1980 retirees, the ‘repayment period’ for single average-wage earners is 4-1/2 years, while for married earners it is 3 years.”\footnote{448} Within those very brief periods, the beneficiary receives all that he is entitled to under any earned-right theory. Thereafter, the money he receives is someone else’s.

Myers’s and Schobel’s study was completed prior to the significant changes effected by the 1983 Social Security Amendments. Those Amendments accelerated scheduled increases in the Social Security tax rate, and, for the first time, subjected 50% of benefits to income tax.\footnote{449} Even without factoring in these significant changes, Myers and Schobel warned that “for each succeeding cohort of retirees, the proportion of ‘winners’ will decrease, while the proportion of ‘losers’ will increase.”\footnote{450} This state of affairs will be realized most rapidly for the max-

\footnote{445} See Myers & Schobel, supra note 418, at 541. 
\footnote{446} Id. In part, this simply reflects the maturation of the Social Security system. Because the Social Security tax was not imposed until 1937, a person retiring in 1960 could only have paid into the system for 23 years. The 1980 retiree will have paid over 43 years. 
\footnote{447} Id. 
\footnote{448} Id. at 544. 
\footnote{449} See Svahn & Ross, supra note 405, at 26-28 (discussing these amendments). 
\footnote{450} Myers & Schobel, supra note 418, at 544. The authors based this conclusion on the assumption that Social Security tax rates would increase sufficiently to make the system self-supporting. They define a “loser” as one who cannot expect to receive back in benefits what he paid in taxes, plus interest. Id. 
mum wage earner, but will eventually apply to the average wage earner as well. As Myers and Schobel explain,

The explanation for this—which may, at first, seem surprising for a system with tax rates that are self-supporting—is that, for all workers in all periods combined (continuing into perpetuity), the accumulated value (at interest) of the taxes must equal the present value of the benefits; therefore, because those retiring in the early decades of operation received more than their money's worth (on the basis of the combined employer-employee taxes), it follows that, in the aggregate, those retiring in the future—especially the distant future—must receive less than their money's worth . . . .

Writing in 1987, Michael Boskin and his colleagues reaffirmed this prediction in a study that incorporated the 1983 changes, including the impact of the income tax on benefits received. Boskin argued that in the future only the lowest earners will receive Social Security benefits in excess of their contributions, and even for them, this excess will be very small.

The commentators agree, then, that in the past—indeed, in the present—Social Security operates to transfer large amounts of funds from the working generation to the elderly, and makes these transfers to the wealthy as well as the struggling. In fact, in the past, the transfers to maximum earners have been larger than those made to lower earners. They also

451. Id. at 545.
452. That is, for cohorts born in 1945 and after. Boskin et al., supra note 440, at 25-27.
453. Id. at 22-26.
454. Boskin, who is a harsh critic of the present system—mostly on the ground that it will, in the future, burden high earners—stated in 1986 that “[w]ealthy individuals have received large benefits above and beyond what they and their employers paid in, plus interest, and are scheduled to do so for decades to come.” MICHAEL J. BOSKIN, TOO MANY PROMISES: THE UNCERTAIN FUTURE OF SOCIAL SECURITY 104 (1986).
455. This conclusion is based on the work of Martha Ozawa. Writing in 1974, Ozawa demonstrated that a worker retiring in 1973 at age 65 who paid maximum contributions from the inception of the Social Security system could expect, on the average, subsidies from the working population in the amount of $26,000, discounted to 1973 value, in his lifetime. Martha N. Ozawa, Individual Equity Versus Social Adequacy in Federal Old-Age Insurance, 48 Soc. Service Rev. 24, 28-34 (1974). This contrasted with $18,000 in subsidies for a worker with the same employment and demographic background, but whose wage was only one-half of the maximum in every year for the same period of time. Id. at 33-34. Ozawa summarized her findings succinctly in a later work, stating: “T]he high-wage retiree receives a larger amount of subsidy from the working population than does the low-wage retiree.” Martha N. Ozawa, Income Redistribution and Social Security, 50 Soc. Service Rev. 209, 217 (1976).
agree that if the system remains on the course presently charted for it (a matter that is unknowable), this state of affairs will reverse. Higher earners will pay more into the system than they will get out of it. Boskin suggests that this effect will begin to be felt very soon by the highest earners, and will reach average earners by the time the cohort born in 1945 retires.

To some, this new computation is a source of alarm. They find in it proof of Social Security's inefficiency and fundamental inequity. If there is to be a transfer program directed at the elderly, they argue, let it be one that is honestly portrayed as what it is: a welfare system. Others react with alarm to such proposals, noting that welfare systems are stigmatized and chronically underfunded, and that for many of the elderly—particularly women and racial minorities—Social Security spells the difference between dignity and poverty. The debate is far from trivial, and the areas of disagreement are large, but, for present purposes, it is the areas of agreement that are most significant. Analysts from the left, right and center agree that Social Security retirement, the most fiercely defended of all earned rights, is clearly and indisputably an income transfer program. And income transfers are generally labelled by that most unpleasant term: welfare. For those who have retired to date, or will retire in this century, Social Security will massively augment their assets via transfers from current workers. This does not make the system bad—it merely makes it unearned. It is bad only if we equate unearned with bad, which we sometimes do, and at other times do not. What cannot be denied, however, is that "earned right" has far more to do with ideology than with actuarial science or economics.

C. Productivity and Security: Of Models and Morals

The subjugation of earned-right rationale by economic analysis is, however, something of a hollow victory. Even if Stanley Surrey and Robert Myers are right, and all those who offer earned-right arguments are wrong, the mathematical proof

456. His data show a negative transfer for maximum earners born in 1930 or later. Boskin et al., supra note 440, at 23 tbl. 1A.
457. Id.
458. See, e.g., Boskin, supra note 454, at 115-19.
459. See, e.g., Marmor et al., supra note 16.
refutes only one level of the argument. Taken alone, the fact that fringe benefits and Social Security are underwritten by massive public subsidies would probably not vitiate public support for those programs, even if it were more widely known. Although many might find aspects of the analysis above disturbing, earned right is, I believe, only a shorthand version of a more deeply felt, if less clearly articulated, idea: the idea that a benefit system tied to participation in the labor force is wise because it avoids the pitfall of supporting the unproductive. It is in this commitment to individual productivity, and in the accompanying deep-seated fear of being asked to support the lazy and shiftless, that the real support for current systems probably lies.

It is perfectly rational for a society to wish to reward "productive" behavior. Indisputably, some behaviors inure to the benefit of society as a whole, and some do not. The trick, of course, is to tell the difference. All of what I have written above is an attempt to suggest that a core problem with contemporary economic security systems lies in our confusion of productive and unproductive behaviors. That is, we apply the lash of economic insecurity to millions of contingent or intermittent workers who are engaged full-time in activities that are socially productive. At the same time, our systems encourage, support, and underwrite early retirement, and excuse from all productive activity large numbers of healthy, capable sixty-five-year-olds.461

Why does this happen? I believe that at least some of our problems stem from our choice of marker. Implementing a system that is supposed to encourage productive behavior requires a tool for measuring the presence or absence of such behavior by individual actors. In America, benefit systems routinely use as markers: (1) participation in the paid labor force, and (2) the level of a worker's wage. In short, the earning of a wage and the wage earned have long served as a surrogate for productivity.

It is easy to see the wage's attraction. If one believes in market systems, the wage proves that the recipient's actions have value because someone is willing to pay for them. It becomes unnecessary to make difficult, perhaps impossible, decisions about which behaviors contribute to social well-being and, if benefits are not going to be equal across the board, whose contribution is more valuable. But the wage is a deficient surrogate

461. See infra text accompanying notes 466-70.
at best. We have long recognized (if sometimes poorly) that a benefit system that provides only for wage earners is underinclusive. For example, the wage system classifies the work of a full-time parent (or other full-time family caregiver) as worthless. But we are not comfortable with this outcome, and our discomfort produces derivative benefits. At the same time, our insistence that benefits operate through the wage system requires that we tie the caregiver to a wage earner and then derive the caregiver’s benefits from the wage earner’s. When divorce rates were low, when most families were “traditional” families, when out-of-wedlock birth was rare, this system may have worked. But new demographic trends, particularly in divorce, have required an extraordinary amount of backing and filling to maintain the ever-more attenuated link between caregivers and wage-earners.

Despite this backing and filling, many remain excluded. Those who bear children without marrying often lack the link that would connect them and their children to the benefit system. Unless they can manage single parenthood and steady, full-time work simultaneously, they and their children are condemned to economic insecurity.

Current benefit systems could also be criticized for being overinclusive. The clearest example of this is the trend toward early retirement. The average age of new retirees has been declining for several decades. By 1985, only 16% of men aged sixty-five and over were in the work force. This contrasts with over 50% shortly after World War II. Here again, a model that fit 1940 better than 2000 seems to drive the structure. The America of 1940 was an America of heavy industry. The heavy physical labor that was the life’s work of many might be difficult or impossible for a man past his middle sixties. Today’s labor force is radically different. Even in the declining heavy indus-

462. See supra text accompanying notes 291-300.
463. In 1940—the year after derivative benefits were added to the Social Security Act—seven out ten United States families had the husband, but not the wife, in the labor force. Hayhge, supra note 211, at 15.
464. Some comparative statistics can be found in Eckholm, supra note 397.
465. Backing and filling occurs here, too—with Medicaid, for example.
467. Boskin, supra note 454, at 49.
468. Recall the comments of the manager quoted by the Lynds in MIDDLETOWN, supra note 253.
trial sector, machines and computers do many of the tasks the human back once accomplished. At the same time, longevity and overall health have improved. Thus, we now have a work force far more capable of work after sixty-five than we did in 1940. But retirement still occurs at sixty-five—or, increasingly, earlier.\textsuperscript{469}

Once again, the Social Security Amendments of 1983 are relevant. They will slowly increase the age of eligibility for Social Security retirement benefits in the next century. Even then, however, full benefit entitlement will be available at age sixty-seven.\textsuperscript{470}

As the preceding discussion has shown, support of the retired is expensive. In providing for all workers over sixty-five (or, eventually, sixty-seven) and requiring no work whatsoever on their part, the current benefit system may be overinclusive. It may be paying out in ways that fail to match social productivity.\textsuperscript{471}

\textsuperscript{469} Boskin states, "More people now claim their first Social Security check at age 62 than at age 65." Boskin, supra note 454, at 49. He also warns, however, that there continue to be jobs which are so physically demanding that retirement at age 65 or earlier is sound social policy. \textit{Id.} at 57-59.

\textsuperscript{470} Before taking office, President Clinton stated that a more rapid phase-in of the later retirement ages would be carefully considered by his administration. See Greg McDonald, Clinton Tackles Deficit Headache; Raising Social Security Retirement Age Is Possible Panacea, \textit{HOUSTON CHRON.}, Dec. 19, 1992, at A1.

\textsuperscript{471} The issue of retirement is far too complex to analyze here, but it is interesting to note a shift away from earlier justifications for retirement policies. In the 1930s, retirement was viewed as an effective method for expanding the jobs available to younger workers. Thus, there was a social benefit to be derived from the practice. Substituting young workers for older ones was also thought to benefit the employer—by substituting a more productive for a less productive employee—and might also save money, because the older worker's seniority probably meant that he commanded a higher wage than would his replacement. The benefit to the young employee was, of course, that he got a job. The benefit to the older employee was that he was no longer expected to do a job that had become physically difficult, but was not condemned to penury either.

The data available strongly indicate that retirement is still seen as a highly attractive option by the potential retiree. See supra notes 466-67 and accompanying text. But economists now dispute whether the simple one-to-one correlation between job vacated and job available, which was assumed in the 1930s, is at all valid. Boskin speaks derisively of the "lump-of-labor" concept, "that there are a fixed number of jobs and that, each time an individual retires, precisely one job is created." Boskin, supra note 454, at 47. In fact, retirement policies in the early nineties have frequently been implemented to reduce the total number of jobs, not to open the workplace to new employees. See, e.g., Mike Causey, Early Out Sweeteners, \textit{WASH. POST}, Sept. 22, 1991, at B2; David Evans, Army Lures Volunteers to Retire, \textit{CHI. TRIB.}, Jan. 10, 1992, at C1. While this practice may benefit the retiree—who is often offered a very attractive exit package—and the employer, who ultimately saves money by cutting the job, it is far less evident that it is positive social policy. Retirement turns a private sector cost (assuming a private sector employee) into a public
One final comment on the wage link seems in order. As I have noted above, we link benefit entitlement not only to wage earning, but to the level of the wage earned. In so doing, we "guarantee[s] to accept private industry's judgment of a person's worth." But it seems one thing to leave to private industry the setting of wages for workers, and quite another to compound this effect with public subsidy. True, the caps that exist for most benefits will ensure that we need not match the average wage for major-league baseball players of over one million dollars per year, but we still underwrite maximum benefits for ballplayers and chief executive officers, while providing for others, such as critical-care nurses and our children's teachers, at far lower levels.

So what is to be done? I think there are three possible answers. First, and most probable, is nothing. Second is continuing incremental change. Third, and least probable, is root-and-branch reform. What would each of the approaches look like?

D. Conclusion: The Prospects for Reform

It may seem odd to describe doing nothing, but some of the effects of current systems should be emphasized so that the costs of this approach are clear. Doing nothing means accepting as appropriate the economic insecurity of millions of Americans. As I have explained, not only do millions lack medical insurance and private pensions, but their numbers are growing. As benefits become more expensive—and as both public and private employers feel the pinch of increased competition and economic slowdown—we are experiencing a process of desocialization of economic security. Risks that were once collective are becoming individual. And the process is beginning at the bottom. The

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472. BERKOWITZ & MCQUAID, supra note 21, at 103.
473. The average salary during the 1992 season was $1,028,667. USA TODAY, Dec. 2, 1992, at 13C.
474. For an interesting comment on the salaries of American CEOs and a comparison with their European and Japanese counterparts, see Robert Reich, Suite Greed, AM. PROSPECT, Winter 1992, at 14-16.
475. This is particularly true with health care, but the private pension system is contracting as well. See Alicia Munnell, Are Pensions Worth the Cost?, 41 NAT'L TAX J. 393, 402-03 (1991). So is unemployment. See supra text accompanying notes 220-22.
better paid, longer term worker continues to be relatively secure. It is the lower paid worker—the woman, the person of color—who is increasingly pushed out of the safety net.

If doing nothing is not acceptable, then a threshold decision must be made: is the proper path incremental reform, or root-and-branch revision? And if it is the latter, what would such a revision look like? Might it begin with the effort to wean benefits from the wage? We have linked wage earning and benefits partly unconsciously, and partly out of the fear of encouraging indolence. But the very system we have in effect already encourages indolence—it simply limits it to the population over sixty-five. That is not to say that everyone over sixty-five is indolent, only that the Social Security system encourages them to be. At the same time, the wage-linked system denies economic security to many single mothers and their children. If they cannot find and hold down full-time jobs, they are effectively excluded from the most valuable benefits. Is this because they are not productive, or does the fact that we have equated productivity with pay insulate us from that hard question?

It is possible, as the discontent of the 1990s burgeons, that we are at the threshold of real change. My fear is that in making that change, we will accept as givens premises that cry out for reexamination. The wage-benefit link is one of those premises. But if we were to rethink that link, how might we construct a system that avoids the pitfalls that encouraged the adoption of this surrogate to begin with?

Clearly, national health insurance in some form is a "wage-unlinkage" that we could pursue without fear of spawning indolence. Some might fear that it will spawn overuse of health resources, but that problem exists in the present system for those fortunate enough to be insured. But casting out the wage link might open the door to more radical reform as well. We could greatly improve the lot of America's children if we could overcome our obsession with their parents' employment or lack thereof. If we could think about productivity without equating it with wage earning, we could ask what sorts of behaviors children and their parents might engage in that might be productive.

476. The Social Security recipient with earnings above a small exempt amount has his benefits reduced. See supra note 276.
477. It is worth noting that truancy and child labor laws prohibit young children from earning a wage, and limit the hours during which older children may work.
478. They may, of course, be covered by Medicaid.
Those children and their parents could be made economically secure. More home-based care for the elderly might be possible if those who would serve as their caregivers did not lose their vital link to the economic security system. In short, we could think about the world as it exists, not as it looked in 1940. There are new needs and new patterns. There are people engaging in productive behaviors who are being punished because their mobility mirrors the behavior of the poor worker of 1940. And there are people engaging in counterproductive behaviors who are being rewarded because encouraging older workers to leave the labor force might have made sense in an economy dependent on heavy industry. Admitting the limitations of the wage as a measure of social value would allow us to think about all of these things anew.

There are few mornings in social policy. Most change is incremental, and that is not always bad. Incremental change cannot fix all of what I identify as broken, and, as is always the case, it is likely to do the least for those who need the most. But there are a half-dozen incremental changes that might undo some of the mischief a contracting benefit model has visited on Americans. These are:

(1) Develop the empirical data needed to assess the effect of waiting periods on benefit entitlement. In the waiting period area there is almost no available data. It is easy to suspect that the combination of a mobile work force and routine waiting periods results in the regular exclusion of many workers from the benefit system. If this is so, Congress could act to shorten or prohibit waiting periods. But initial data development is needed, and is sorely lacking.

(2) Reduce ERISA vesting to three years, or provide for universal immediate vesting of pension credits. As I have demonstrated, current vesting rules exclude many more women than men from pension protection. There is no justification for these limits except cost saving. While cost saving is undeniably important to employers, the current system saves costs to employers and consumers at the expense of the more mobile worker—namely, the woman, the lower paid worker, and the person of color. These workers bear the costs of vesting rules so

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479. Care for the elderly was both needed less and provided more easily in 1940, as there were fewer elderly and more homemakers. Hayghe, supra note 211. Elder care was simply one of the many efforts of "nonworking" women.
that those who are more affluent can be spared. We need to rethink the social consequences of this decision.

(3) Abolish recency requirements. As they are currently constructed, recency requirements are a hopeless patchwork that can exclude longer term contributors to a benefit system while including those who are shorter term. In addition, they are based on archaic assumptions about the connection between employment interruptions and need. Abolishing them will raise the cost of Social Security disability, but, like my two prior recommendations, this is a cost shift, not the creation of a new cost. We shift the cost from the individual to the group, from the family to the society. We are not creating a new cost, but repositioning an old one.

(4) Reduce the thirty-five-year work-life requirement for OASI. This requirement has only been fully phased in since 1991. Its purpose is to prevent "freeriders"—that is, to prevent those who spent part of their work lives in non-Social Security employment (for example, working for a state or municipality) from collecting as much in Social Security as the person who contributed throughout his work life. This is a reasonable goal. But the thirty-five-year requirement is a crude tool at best for this purpose, one that severely penalizes the person who spends any significant time in uncompensated family care. A tool that does less harm to caregivers while protecting the system against double-dippers is surely not beyond the skills of the inventors of the AIME and PIA.

(5) Tax 100% of Social Security benefits. Prior to 1983, Social Security benefits were exempt from income taxation. Since that time, 50% of the benefits paid to retirees with incomes in the $25,000 to $32,000 range and above have been taxed. The rationale for this limit is that 50% of benefits come from the employee and have already been taxed. But the actuaries have proved convincingly that no such facile equation between tax payment and benefit entitlement exists, and President Clinton's current budget proposal would increase this tax above the 50%
level.\textsuperscript{482} Social Security benefits should be treated as any other income. For those who survive on these benefits alone, there should be no tax burden. But for those who have other significant sources of income, paying tax on their benefits is equitable.

(6) Remove all caps from Social Security tax and adjust the rates downwards. For the reasons just given—the lack of any real correspondence between taxes paid and benefits received—the income caps that make the Social Security tax regressive should be abolished. This should allow the rates to be revised downward.

(7) Expand the EITC to reach all low earners. The EITC was conceived as a family assistance measure, but families without dependent children may also need this tax relief, especially in light of today's very high payroll tax rates. The credit should be expanded, and Congress should be careful to maintain the credit amounts at an appropriate level.\textsuperscript{483}

In sum, there is much to be done, whether reform is incremental or more far-reaching. But we can move beyond 1940s models of work and security. And we must.

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\textsuperscript{482} See Staff of the Joint Comm. on Taxation, Summary of the President's Revenue Proposals, Pub. No. JCS-4-93, at 68 (1993).

\textsuperscript{483} For proposals to increase the EITC levels, see id. at 15.