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Classification of U.S. Working People and Its Impact on Workers= Protection
a report submitted to the International Labour Office

by Alan Hyde*

Introduction

* Professor and Sidney Reitman Scholar, Rutgers University School of Law, Newark, NJ 07102-3192. Phone 973-353-3163. Email hyde@andromeda.rutgers.edu. This report was prepared at the request of the International Labour Office. Opinions are the authors. Stephen Willborn and Ellen Dannin commented on an earlier draft.

0.1. *Overview of the U.S. labor market.* The U.S. labor market is performing at its historic high point. In the words of the most recent Economic Report of the President: A...the number of workers employed is at an all-time high, the unemployment rate is at a 30-year low, and real (inflation-adjusted) wages are increasing after years of stagnation. Groups whose economic status has not improved in the past decades are now experiencing progress. The real wages of blacks and Hispanics have risen rapidly in the past 2 to 3 years, and their unemployment rates are at long-time lows; employment among male high school dropouts, single women with children, and immigrants, as well as among blacks and Hispanics, has increased; and the gap in earnings between immigrant and native workers is narrowing.[@] Indeed, matters have improved even in the year since the above report issued. The unemployment rate has been steady at 4.1 percent for three months, and both employment and earnings continue to rise.² This job growth reflects private sector strength, almost entirely in the service sector. Manufacturing employment has been declining steadily in recent years, though the decline may be bottoming out. The job growth does not represent government deficit spending (indeed, formerly large federal deficits have been eliminated) or any new kind of targeted job creation.

¹ Economic Report of the President 1999, Chapter 3, Benefits of a Strong Labor Market, at 99, available at <http://www.gpo.ucop.edu/catalog/erp99.html> (text only, but easy to access) or <http://www.gpo.gov/usbudget/fy2000/maindown.html> (text and tables, but takes a long time to download).

² Bureau of Labor Statistics, The Employment Situation News Release: November 1999, <http://www.bls.gov/news.release/empsit.news.htm>

While this job growth is remarkable and clearly has benefited nearly all Americans, its benefits are unequally distributed. Indeed, income inequality is at its highest level since the Census began tracking these data in 1947. Until 1997 or so, real incomes were stagnant for most Americans. While, as noted, these have recently begun to increase, incomes at the top are increasing faster and inequality is therefore increasing.³ The unemployment rate for blacks is 8.1 percent, and for Hispanics, 6.0 percent.⁴

The income gap between whites and blacks, which declined significantly from 1965-1975, stabilized in that year and has not decreased since that time. The median incomes of non-Hispanic white and Asian families are nearly double that of black and Hispanic families, and the median wealth of non-Hispanic white households is ten times that of black or Hispanic households.⁵

About 13.9 percent of the workforce is represented by labor unions, a percentage that continues to decline.⁶

0.2 Introduction to ways of classifying workers. For most practical purposes in the United

³ The Economic Policy Institute in Washington, DC, tracks inequality in its annual volume *The State of Working America* and in monthly updates at <http://epinet.org>

⁴ Bureau of Labor Statistics, cited supra n.2

⁵ The Economic Report of the President for 1998 contains in Chapter 4 a thorough discussion of Economic Inequality Among Racial and Ethnic Groups, <http://www.gpo.ucop.edu/catalog/erp98.html> (text only but easily readable); <http://www.gpo.gov/usbudget/fy1999/maindown.html> (text and tables but takes a long time to download).

⁶ The percentage was 14.1% in 1997 and 20.1% in 1983, the first year of this data series. U.S Department of Labor Press Release 99-21, Jan. 25, 1999, <http://stats.bls.gov/newsrels.htm>

States, there are only two legal forms for rendering services in exchange for money. One can be an *employee*, or *self-employed*. In popular speech in the US, the groups are often referred to by the forms on which their income is reported to the Internal Revenue Service: employees are referred to as *W-2*'s or *doing W-2 work*,⁶ while the self-employed are referred to as *1099*'s. The subset of self-employed persons who render services for money (roughly one-half to two-thirds) are sometimes referred to as *independent contractors*, in order to distinguish them from owners of small businesses, farmers and ranchers; however this refinement affects only data collection, not any legal rights.

There are a few other ways in which an individual rendering services for money might be classified, but they are numerically insignificant and their discussion best deferred to Part V of this study. Briefly, one may receive small amounts of money for services and still be classified as a *volunteer* or *student intern*. Such individuals are not employees and fall outside most labor regulation. They will be discussed in Part 5.1 and 5.2. Much more significant numerically are those individuals not legally permitted to work, typically immigrants not lawfully in the country or not authorized to work, who may in fact be paid in cash and not reported to any governmental authority either as employees or self-employed. While such arrangements are illegal, they do occur. They will be discussed in Part 5.3.

0.3 *Relationship between worker classification and contingent work*. Issues of worker classification are often discussed in the United States with reference to another distinction with which they have, in a strict juridical sense, nothing to do. That is the entire discussion, perhaps the most

controversial matter in contemporary American labor studies, that starts with a stylized contrast between a *career* job and a *contingent* job. While definitions are controversial, for present purposes this category of discussion will include any discussion that identifies an ideal-typical career job: one that the holder expects to last for a long time, perhaps his entire working life; compensation will normally increase over time or eventually level off, but rarely be decreased; and the job will be part of an internal labor market with promotion ladders that probably involve some returns to experience. Such discussions then contrast any or all of the following *contingent* jobs that are less likely to persist, less likely to be part of internal labor markets, and less likely to be well-compensated or include retirement benefits or health insurance: temporary employment, part-time employment, on-call employment, or other *nonstandard* or *nontraditional* or *alternative* or *contingent* work. Depending on definitions, this *contingent work* category may include as few as two percent or as many as forty percent of the American workforce.⁷

⁷ The low figure is the number of respondents who tell government researchers that their job won't last. Depending on which of three alternative measures is used, this figure is between 1.9 and 4.3 percent of the total workforce. Bureau of Labor Statistics, Contingent and Alternative Employment Arrangements, USDL 99-362, <http://bls.gov/news.release/conemp.nws.htm> The high figure is the author's very conservative estimate of the percentage of the workforce with nothing holding them to their current job: no contract, promotion ladders, or unvested benefits, and a substantial likelihood that they will be involuntarily separated within the next year or so.

Some version of this stylized contrast lies behind the vast majority of current writing about work in the United States.⁸ Current controversies include the descriptive or empirical: have career jobs, however defined, been declining in importance in the United States?⁹ If yes, what has caused this change?¹⁰ Is the apparent increase, in relatively more contingent work, a good or bad thing?

⁸ An excellent overview of the literature is Gillian Lester, *Careers and Contingency*, 51 *Stanford Law Review* 73-145 (November 1998).

⁹ Arguing yes: Daniel Aaronson & Daniel Sullivan, *The Decline of Job Security in the 1990s: Displacement, Anxiety, and their effect on wage growth*, 22 *Federal Reserve Bank of Chicago Economic Perspectives* 17-43 (#1, 1998)(Displaced Worker Survey: increasing rates of job loss for individuals with more than five years tenure); Annette Bernhardt et al, *Job Instability and Wages for Young Adult Men*, 17 *Journal of Labor Economics* S65-S90 (#4, Pt.2, Oct.1999)(comparing cohorts of young white men from National Longitudinal Surveys, finding significant increases in job instability and declining returns to job changing); Johanne Boisjoly, Greg J. Duncan, & Timothy Smeeding, *The Shifting Incidence of Involuntary Job Losses from 1968 to 1992*, 37 *Industrial Relations* 207-231 (#2, April 1998)(panel data from Panel Study of Income Dynamics and National Longitudinal Study: increases in involuntary job loss for all groups); David A. Jaeger & Ann Huff Stevens, *Is Job Stability in the US Falling? Reconciling Trends in the Current Population Survey and Panel Study of Income Dynamics*, 17 *Journal of Labor Economics* S1-S28 (#4, Pt.2, Oct. 1999)(increase in the number of workers aged thirty and over with less than ten years tenure; little change in share of employed individuals with less than one year); Henry S. Farber, *The Changing Face of Job Loss in the United States, 1981-1993*, 1997 *Brookings Papers on Economic Activity: Microeconomics* 55-128 (Displaced Workers Surveys; higher overall rates of job loss in the 1990s, particularly for older workers); Stephen J. Rose, *Declining Job Security and the Professionalization of Opportunity*, National Commission for Employment Policy Research Report No. 95-04, May 1995 (Panel Study on Income Dynamics: pronounced decline in men reporting only one change of employers over ten-year study); Kenneth A. Swinnerton & Howard Wial, *Is Job Stability Declining in the U.S. Economy?*, 48 *Industrial and Labor Relations Review* 293 (1995)(Current Population Survey; declining probability 1983-91 that workers at given level of seniority will remain with their employer for four more years); Peter Cappelli et al, *Change at Work* 173-93 (New York: Oxford University Press, 1997)(reviewing evidence).

Arguing no: Cynthia Bansak & Stephen Raphael, *Have Employment Relationships in the United States Become Less Stable?*, University of California at San Diego Economics Discussion Paper No. 98-15 (June 1998)(Survey of Income and Program Participation: no increase in one- and two-year separation rates); David Neumark, Daniel Polsky, & Daniel Hansen, *Has Job Stability Declined Yet?: New Evidence for the 1990s*, 17 *Journal of Labor Economics* S29-S64 (#4, Pt.2, Oct. 1999)(Current Population Survey: modest decline in job stability in first half of 1990s; sharp declines in stability for workers with more than a few years of tenure, but not clear that this is a long-term trend). With all respect to these researchers, it is the opinion of the present author that this focus on the trends concerning one-and two-year tenures completely misses the point. It is thus fair to say that *all* researchers agree that there are fewer and fewer Americans who have spent ten years or more on their present jobs, although to some extent this simply reflects the impressive job creation referred to in paragraph 0.1: the addition of new workers in new jobs obviously lowers median tenure in the workforce.

¹⁰ Marianne Bertrand, *From the Invisible Handshake to the Invisible Hand?: How Import Competition Changes the Employment Relationship*, National Bureau of Economic Research Working Paper 6900 (<http://www.nber.org/papers/w6900>)(US employers who sell in markets with high import competition are likelier to have more volatile wage policies in which wages are predicted more by current wages at other employers, and less by

Specifically, are contingent jobs an important contributor to the relatively low unemployment rate in the U.S.?¹¹ Do contingent jobs represent a way-station into the labor market for new workers, who then move on to more permanent arrangements? Do contingent jobs provide cushions, as job losers make a transition into different employment?¹² Or, conversely, do many people find themselves trapped, against their will, in contingent jobs? Can contingent jobs be converted to more stable jobs?¹³ Conversely, is the growth of contingent jobs responsible for major psychological and social costs?¹⁴

orderly progression from the wage at the time of hiring).

¹¹ Alan B. Krueger & Jörn-Steffen Pischke, *Observations and Conjectures on the U.S. Employment Miracle*, National Bureau of Economic Research Working Paper 6146 (1997)(<http://www.nber.org/papers/w6146>); Rebecca M. Blank, *Contingent Work in a Changing Labor Market*, in *Generating Jobs: How to Increase Demand for Less-Skilled Workers* (Richard B. Freeman & Peter Gottschalk eds.)(New York: Russell Sage Foundation, 1998).

¹² Henry S. Farber, *Alternative and Part-Time Employment Arrangements as a Response to Job Loss*, 17 *Journal of Labor Economics* S142-S169 (#4, Pt.2, Oct. 1999)(job losers are significantly more likely than nonlosers to be in temporary jobs, including on-call work and contract work, one year later, but likelihood of temporary employment decreases with time since job loss).

¹³ Stephen A. Herzenberg, John A. Alic, & Howard Wial, *New Rules for a New Economy: Employment and Opportunity in Postindustrial America* (Ithaca: ILR Press) (1998).

¹⁴ Richard Sennett, *The Corrosion of Character: The Personal Consequences of Work in the New Capitalism* (New York: Norton, 1998).

These questions lie outside this study, although they are often raised in connection with discussions of worker classification. However, it is important to remember that *nearly all contingent jobs in the United States--however these are defined--are held by people classed as employees who are fully protected by all U.S. labor laws applicable to employees.* As we shall see, it is entirely possible in the United States to be an employee, classed as an employee for all purposes, have income reported to the Internal Revenue Service on Form W-2 (the form for employees), and yet be employed at will, have no legal or factual expectation of continued employment, no union, no practical way of obtaining union representation, and no health insurance or pension.¹⁵ Only a tiny fraction of contingent jobs under any definition are held either by self-employed individuals, or by individuals in the triangular relationships, that are the subjects of Parts 2 and 3 of this study, respectively.

Conversely, as we shall see in Part 3, many individuals working as independent contractors consider these arrangements stable and do not describe themselves as contingent.

¹⁵ The median US *employee* has been with his or her current employer for 3.6 years (a historic low). The median US *employee in the service sector* has been with his or her current employer for 2.4 years. Bureau of Labor Statistics, Current Population Survey, Employee Tenure Summary, USDL 98-387, September 23, 1998, <http://www.bls.gov.news.release/tenure.news.htm>

0.4 *Example of contingent jobs classified as Aemployee@jobs: retail sales.* Retail sales jobs--one of the specific jobs that the ILO requested be discussed in each national study--offer an interesting example of jobs that have become more contingent, while rarely raising any issues of classification. As recently as a generation ago, a substantial number of sales jobs in department stores, discount stores, and supermarkets were held by longtime employees for whom these were careers. While good data are not obtainable, all observers believe, and many microlevel studies confirm, that many of these jobs have been converted to jobs that will be held by young people entering the labor market, often held on a part-time basis, and will then be turned over to new young people entering the labor market. A few industries have employment separation rates as high as department stores.¹⁶ However, this conversion, of career jobs to part-time jobs held for a short time, almost never raises classification issues. Virtually all these workers, likely to depart soon, and whether working full- or part-time, are Aemployees@ of the retailer. Very few individuals working in department stores are carried as self-employed independent contractors, or employees of temporary agencies or other intermediaries.¹⁷ Consequently, the retail industry will not be discussed further in this study, as it raises no issues of worker classification.

¹⁶Barry Bluestone et al, *The Retail Revolution: Market Transformation, Investment, and Labor in the Modern Department Store* 82-97 (Boston: Auburn House, 1981)(quoted material at 84). See also Chris Tilly, *Half a Job: Bad and Good Part-Time Jobs in a Changing Labor Market* (Philadelphia: Temple University Press, 1996); Nona Y. Glazer, *Women's Paid and Unpaid Labor: The Work Transfer in Health Care and Retailing* (Philadelphia: Temple University Press, 1993).

¹⁷This fact appears by inference in all the studies cited in the previous note, and was confirmed by Robert Pajkovski, research associate, United Food and Commercial Workers International Union, July 15, 1999.

0.5 *Background influence of the Acontingency vs. careers@debate* Although the issues of worker classification do not map precisely onto the issues of contingency vs. careers, the latter debate lies behind almost all specific policy, empirical, and definitional controversies relating to worker classification. For each classification addressed in this report, defenders of contingent jobsB on the grounds that they make the US economy flexible and responsive, help create jobs, lower unemployment, provide way stations in and out of permanent employment for young people and displaced workersB can provide a suite of recommendations to make triangular or temporary or self-employed work still more flexible and contingent. Equally, skeptics about contingent jobsB such as unionsB can provide a suite of regulatory recommendations that would make the classification in question less flexible, more expensive, and less attractive to employers. It would be inaccurate to suggest that there is any academic or political consensus in the United States on these questions.

Consensus is made more difficult by a legal oddity in the United States: there is no convenient legal concept for distinguishing white-collar work from blue-collar work (or professional/managerial from production/service, or highly-compensated from less-highly-compensated) work. This accounts for the occasional references in this Report to well-compensated computer programmers, managers, and similar individuals who raise few problems of protection in any legal system. The distinctly American problem in the background of each section is that there is often no convenient way of taxing, regulating, or otherwise discouraging, say, independent contract status among house cleaners, without creating problems for firms hiring well-paid interim managers on independent contract, to the mutual

satisfaction of each. The development of worker classification that would permit attention to the most dependent workers is obviously not beyond human imagination, but it is not a current feature of US employment regulation. Nor would such new classifications be easy to develop through existing regulatory institutions, by which is meant, in particular, low Congressional and judicial respect for technical administrative agencies, and active Congressional intervention on behalf of favored industries or even individual firms. This political pattern will recur throughout this Report.

0.6 Two perspectives on worker classification issues. Issues of worker classification addressed in this study can normally be addressed from either of two equally valid perspectives: from the mountain, or from down on the ground.

From the mountain of macroeconomics, economic theory, or legal theory, issues of worker classification are, as we shall see, not very important in the United States. Let us perform a thought-experiment that does not represent a currently realistic political outcome in the United States. If all self-employed persons could suddenly be converted to employees, and all persons in triangular relations converted to employees of the ultimate purchaser, no jobs would be created or destroyed. Hardly anybody's working conditions would automatically change by operation of law, or, as a practical matter, change very much. (In theory, an independent contractor being paid below the minimum wage would, if suddenly reclassified as an employee, now be entitled to that minimum wage. As we shall see, there are very few independent contractors being paid below the statutory minimum wage. The biggest change in working conditions would come about, as we shall see, through the operation of nondiscrimination rules

that govern employee benefits: our new employees would have to be offered such benefits). Again, this comes about because U.S. law permits Δ employment Δ that will not last long and that includes few benefits. Self-employment as a percentage of the workforce, as we shall see, has been remarkably stable over time, so has not contributed much, for good or ill, to the U.S. job creation Δ miracle Δ . Certain triangular relations, such as direct employment by temporary agencies, are growing, by contrast, but are still such small percentages of the workforce as to be of little moment in large questions of job creation, wage inequality, or union density.

By contrast, on the ground--for identifiable individuals--classification issues may, in particular contexts, be crucially important. Whether a particular individual is an employee or self-employed may determine as a practical matter whether she is in a union, and this may be her only hope of obtaining health insurance or a good job at all. A particular employer may owe a lot of money to employees and the government, if it is found to have misclassified employees.

So, throughout this study, it will be important to keep both perspectives in mind. Put another way, there is no intellectual or political consensus in the United States to attempt to convert contingent jobs into more stable jobs, but if there were, reclassifying workers would be only a minor part of the strategy, which would still have to address millions of jobs held by Δ employees Δ . On the other hand, to understand how the system works, one must understand how it works, not only for large macroeconomic issues like how to create more jobs, but also for very individual concerns.

I. Employment relationships

1.1 *Introduction.* It is helpful to present a kind of baseline picture of employment in the United States before discussing alternative relations.

The chief source of data on the precise aspects of employment relations are three special Supplements on Contingent and Alternative Work Arrangements to the Current Population Survey (CPS), a monthly survey of households conducted jointly by the Bureau of the Census and the Bureau of Labor Statistics. In February of 1995, 1997, and 1999, some sixty thousand households were asked detailed questions about their employment relations of the previous week. The 1999 data were just released as this report was completed; there was little change from 1995 to 1999.¹⁸

¹⁸A press release summarizing the 1999 data is at <http://www.bls.gov/news.release/conemp.nws.htm>. The 1997 data are available at http://www.bls.census.gov/cps/pub/conemp_0294.htm and <http://www.bls.census.gov/cps/contwkr/1997/suppovrw.htm>. The 1997 data are analyzed in Susan N. Houseman, *Flexible Staffing Arrangements: A Report on Temporary Help, On-Call, Direct-Hire Temporary, Leased, Contract Company, and Independent Contractor Employment in the United States* (August 1999) (<http://www2.dol.gov/dol/asp/public/futurework/conference.htm>). The 1995 data are analyzed in Sharon R. Cohany et al, *Counting the Workers: Results of a First Survey*, in Kathleen Barker and Kathleen Christensen, *Contingent Work: American Employment Relations in Transition* (Ithaca: ILR Press 1998); and Arne L. Kalleberg et al, *Nonstandard Work, Substandard Jobs: Flexible Work Arrangements in the U.S.* (Economic Policy Institute and Women's Research & Education Institute, Washington, DC, 1997).

Some 85.9% of workers described their work relations so as to suggest that they would normally be legally classed as employees:

regular full-time	67.8%	
regular part-time	13.6	
direct-hire temps	2.8	individuals hired directly by the employer for whom they render services, but who describe the relationship as temporary
on-call workers	1.7	individuals who work for one employer, but only when called, such as substitute teachers, some nurses

85.9

We may now see, as noted before, that the category of *employee* in the United States includes both individuals who have worked at stable jobs for many years, and individuals who do not know whether they will work tomorrow.¹⁹

¹⁹The management and economic literature now recognizes that for many employers, the practical choice is between hiring a *temporary worker* employed by an outside contractor, or hiring a *temporary worker* carried as one's own employee. See, e.g., Joseph M. Milner & Edieal J. Pinker, *Optimal Staffing Strategies: Use of Temporary Workers, Contract Workers, and Internal Pools of Contingent Labor*, W.E. Simon School of Business Working Paper CIS 97-7, University of Rochester, December 1997 (modeling choice).

1.1.1 *Basic legal elements of the employment relationship.* An American classed as an employee normally holds a suite of legal rights that do not apply to the self-employed. These rights are summarized in this section.²⁰ It is conventional in U.S. discussions of this type to observe that the precise definition of employee varies from statute to statute, so that it is possible to be an employee covered by one statute and not covered by another.²¹ It is the opinion of the current writer that this point has been wildly overstated. As this study will show, most individuals who are classed as employees for any labor statute, or tax statute for that matter, are employees for all of them. In fact, it is almost impossible to identify any significant class of individuals who are employees for one purpose and not another, and the Dunlop Commission surely did not identify any. At any rate, this baseline picture is of the individuals who are employees for all relevant legal purposes. Such employees are protected by the following statutes.

National Labor Relations Act (NLRA or Wagner Act) of 1935: protects, against employer retaliation, the right to join a union or engage in other concerted activity.

²⁰A fuller treatment is Anthony P. Carnevale et al, *Contingent Workers and Employment Law*, in Barker and Christensen, *supra* n.18, at 281-305.

²¹See, e.g., Commission on the Future of Worker-Management Relations (Dunlop Commission), *Report and Recommendations* 37 (December 1994) (regulatory morass).

Fair Labor Standards Act (FLSA) of 1938: creates machinery for federal minimum wages and requires one-and-a-half times normal pay for overtime hours worked by nonexempt employees.²²

Equal Pay Act of 1963 prohibits gender-based differences in wages and benefits.

Civil Rights Act of 1964: Title VII of this comprehensive statute prohibits employment discrimination on the basis of race, color, sex, religion, or national origin, in hiring, firing, or other employment decisions.

It was substantially amended in 1972 and 1991, and reaches facially neutral employment practices, which have a disparate impact on protected groups, unless justified by business necessity. It also has been construed to outlaw sexual harassment of female or male employees.

Age Discrimination in Employment Act of 1967 prohibits discrimination against individuals over 40.

Occupational Safety and Health Act (OSHA) of 1970 requires private sector employers to comply with standards of the Department of Labor and also a general duty to provide a workplace free from

²²There are many exemptions from the Fair Labor Standards Act, found mostly in Section 13, 29 U.S.C. § 213. In many ways, this section is the single most revealing text in U.S. employment law. It rolls on for pages, listing numerous employees who need not receive overtime pay or even minimum wage. The exemptions were each clearly drafted by lawyers for the relevant employers. No attempt has been made to put the exemptions into uniform style, and no logic underlies them other than the political strength of relevant employer groups.

recognizable hazards that are causing or are likely to cause death or serious physical harm.@

Federal Mine Safety and Health Act (MSHA) of 1977 establishes analogous obligations for mines.

Employee Retirement Income Security Act (ERISA) of 1974 does not require employers to offer retirement or health benefits, but does provide, for such benefits voluntarily offered by employers, standards for their administration, and for the acquisition of legal enforcement rights in employees.

Nondiscrimination rules require as a general matter that all employees be offered the kinds of benefits provided for top management, though there are many exceptions to these rules. (These nondiscrimination rules are practically the only reason that a highly-compensated employee might strongly prefer employee status over independent contractor status, as we shall see in Parts 3 and 6).

Worker Adjustment and Retraining Notification Act of 1988 (WARN) requires large employers to give 60 days notice of plant closings or layoffs affecting more than fifty employees.

Americans with Disabilities Act (ADA) of 1990 requires reasonable accommodation of disabled workers and prohibits discrimination.

Family and Medical Leave Act (FMLA) of 1993 requires employers of more than fifty employees to grant unpaid leave to employees who have given birth to or adopted a child, or who themselves, their spouse, or children have developed serious medical conditions requiring ongoing care.

In addition, each of the fifty states normally administers Unemployment Insurance programs and Workers= Compensation programs, insurance programs that compensate unemployed or injured workers respectively. Coverage of these programs varies but is normally restricted to employees. States are also permitted to exceed many federal labor standards, and frequently require higher minimum wages, or extend nondiscrimination provisions, for example to parents, or on the basis of sexual orientation.

This package may not be remarkable by international standards. For example, conspicuously absent are any requirements that employment termination be fair or reasonable or for cause, or that retirement income, health insurance, paid vacations, or severance pay be provided by the employer. Nevertheless, it might still appear that the package would be a valuable one to low-paid individuals who are excluded from it if they are working as independent contractors (individuals who will be considered more fully in Part 3).

Specifically, if a low-paid worker is excluded from minimum wage, maximum hours, antidiscrimination, unemployment insurance, and workers= compensation protection, an observer might be tempted to conclude that such exclusion served only the interest of the employer. It is true that there is no advantage to low-income workers in being excluded from the above programs, except in cases where such exclusion is what enables them to work in the first place, that is, where they would not be hired at all if the employer had to pay overtime pay and the insurance premiums for compensation or

unemployment insurance programs.

However, it must be noted that all these programs have serious weaknesses that make them of limited utility to low-income workers. In other words, for low-income workers, in some cases, a possible first-best state would be a kind of effective labor standards enforcement that does not exist in the US and will not exist in the foreseeable future (and that state would be first-best only if it did not result in the abolition of that worker's job). When the real-world choice is between ineffective labor standards programs that might discourage some job creation but will help the worker little, or work without labor standards, at least some rational workers under this constrained choice might rationally select work without labor standards, either as an independent contractor or illegally.

1.1.2. Inadequacies of current labor standards regulation for low-income individuals.

This large topic lacks comprehensive academic treatment, but a significant quantity of recent writing suggests that the lowest-income workers derive little current benefit from labor standards programs.²³ Resources appropriated to enforce existing labor standards are so inadequate as to amount to effective repeal of the statutes. The enforcement resources of the Wage and Hour Division (WHD) of the Department of Labor are smaller today than twenty years ago. Declining enforcement rates contribute directly to wage inequality. The Wage and Hour Division has no authority to order anyone to do

²³This paragraph summarizes Howard Wial, Minimum-Wage Enforcement and the Low-Wage Labor Market, prepared for conference on Raising the Floor: Some Strategies for Upgrading Low-Wage Labor Markets, MIT Task Force on Reconstructing America's Labor Market Institutions, April 16, 1999. Paper available at their URL: <http://mitsloan.mit.edu/iwer>

anything. At most it can sue an employer in court to recover back wages and civil fines. Successful prosecution of such suits normally requires testimony in open court from affected workers. Low-wage workers are unlikely to report violations, be willing to testify, or let their identities as complainants be known to employers. While violations in theory might be provable by auditing the employers' records, there is no effective penalty for falsifying records and little incentive, for an employer that chooses not to comply with the Fair Labor Standards Act, to keep accurate records. As a result, most cases are settled after a telephone call for quite a bit less than the employer owes. (In a telephone interview with a Department of Labor official, this author used the phrase "labor standards enforcement" and was informed that they don't call it that--they speak of "compliance").

Telephone interviews conducted by this author with Department of Labor personnel revealed a deep cynicism about enforcing labor standards. As mentioned, the legislation is riddled with exemptions enacted by Congress at the behest of particular industries.²⁴ Department staff stated that any planned, well-publicized campaign to remedy employment violations in a particular industry will engender successful legislation to exempt that industry. Two recent examples were mentioned to me more than once. After some well-publicized accidents involving teenagers driving pizza delivery vans, the WHD began a well-publicized campaign to enforce standards that prevented minors under age 18 from driving trucks and automobiles at work. Congress responded by amending the FLSA to permit 16- and 17-

²⁴Fair Labor Standards Act ' 13, 29 U.S.C. ' 213.

year olds to drive as part of the job.²⁵ Congress also has provided that computer programmers and software engineers do not have to be paid overtime.²⁶ The political ability of employer groups to maintain legal *employee* status for their workers, and nevertheless exempt them from employment regulation, is an important alternative to reclassifying those workers as *self-employed*. The entire matter of inadequate enforcement of labor standards has received little public attention.

1.2 *Disguised employment relations?* The International Labour Office specifically requested a discussion of *disguised employment relations*. This term is not generally used in the United States. If this means individuals carried on the books as independent contractors but legally capable of reclassification as employees, their legal problems will be deferred to Part 3 of this study. If the phrase means employment of individuals who are paid in cash and not carried on firm records or reported to the taxing authorities, this kind of employment, largely limited to aliens not legally permitted to work, will be discussed in Part 5.3. If the phrase means employees who cannot determine the identity of their

²⁵Since then, the 16-year olds have again been forbidden from driving for their job, but 17-year olds still can. P.L. 105-334 (1998).

²⁶P.L. 101-583 (1990), 29 U.S.C. ' 213 (17). Uncompensated overtime work can thus be required of individuals without a college degree, without any regular employment or guaranteed salary, and making as little as \$150 per week. See 29 CFR ' 541.3(a)(4).

employer, this does not appear to be an important problem in the United States. Employees know who reports their income to the Internal Revenue Service on Form W-2. Some problems may arise when more than one entity is potentially an employer, and we now turn to these in Part 2.

II. *Triangular Relationships*

2.1 Definitions and taxonomy The ILO's term *triangular relationship* is not in general use in the United States. For purposes of this report, it will be used to refer to all employment relationships in which the individuals rendering services are legally *employees* of one entity, that provides services under contract to another. All of these are legally relations of *employment*. The individuals are *employees* of some employer. They retain all the rights and legal protections discussed in the previous section. They have no serious danger of having no employer at all, and thus lacking legal recourse for compensation for their labor or injuries. Sometimes the entity that is their legal *employer* may not be the employees' first choice, for example where another entity is more extensively capitalized, or more susceptible to union pressure. Still, all the individuals discussed in this section are employees of some employer, and can in theory enforce rights to unionize or to labor standards, against that entity.

This rubric includes an enormous variety of working relationships in the United States: some long-established, some new and growing; some fair by any standard that is prepared to recognize employment as fair, and some exploitative. No useful purpose is served in the U.S. context in lumping them all together, as we shall see. They are lumped together here to conform to the standardized format of this report, but will then be considered individually.

Some important *triangular relationships* frequently encountered in the U.S. and discussed more fully below are:

a. *subcontracting in the construction industry*. An Owner of property, wishing to construct a building, retains a General Contractor with few employees of its own. The General Contractor then subcontracts work to specialty subcontractors: demolition, structural steel, electrical, carpentry, plumbing, and other firms--that directly employ the individuals working on the site. These relationships are long-established and present no pressing regulatory issues.

b. *employees of temporary help agencies*. There has been a great deal of attention to the growing (but still small) number of employees who are legally employees of a temporary help or temporary service agency, that then refers them to work on the premises of another employer. Best-known are clerical employees, but manufacturing, security, transportation, technical, professional, and even

managerial employees are also provided on this basis.

c. employee leasing or professional employee organizations These employ the entire permanent workforce working at another entity. That entity then no longer has any statutory ^Aemployees.[@] The employee leasing firm or professional employee organization (PEO) then handles payroll services, tax withholding and other record keeping, hiring and firing. In essence, one firm outsources its personnel services to another. The difference between these employers and the temporary help agencies is that the temporary help agency typically dispatches an individual to many employers over the course of a year, while the employee leasing firm takes over the personnel services for a more stable workforce. There has been little academic or legal attention to employee leasing firms (in contrast to temporary help agencies), and they are known largely by self-description.

d. subcontractor to replace or supplement incumbent employees. It is common for an employer, with a directly-hired workforce, also to contract with subcontractors to provide additional employees. There is essentially no data available on these arrangements. They may not be included in statistics on temporary help employees, for example if the employees don't perform business services and the contractors don't identify themselves in business surveys as in the ^Ahelp supply services industry[@]. This may well be the case if the contractor is supplying manufacturing or maintenance employees. They are not employee leasing arrangements since the client firm continues to employ some employees of its own.

To repeat, the relationships discussed in this section share the characteristic that the individual rendering services is normally an employee of *somebody*, just not of the ultimate recipient of her services. Some other working relationships in the U.S. present a more complicated mix in which the individual rendering services through an intermediary may herself be self-employed, or wrongfully classified as self-employed. Examples include janitorial services, restaurant waiters, grocery store deliverymen, farm labor, and high-end managers and consultants. Discussion of these industries is best deferred to Part 6, the discussion of specific case studies.

2.2 Construction Industry

The construction industry has long been characterized by *Acontingent@employment* in which employees, while remaining within the same industry, performing the same kinds of tasks, may work for many different employers, and also experience periods between jobs. It has evolved important institutions for coping with these patterns, including strong unions; union-administered benefits, hiring halls, training, and standard setting; financial responsibility among fragmented employers; and particular bargaining and contractual institutions. Academic interest in the industry, once strong, has waned in recent decades. This is perhaps a shame, as there has been little recent close attention to the institutions developed to deal with contingent construction work, and their potential adaptation to more recent forms of contingent work.

As compared with other triangular relations, construction industry employment in the U.S. has two distinctive features. First, it has institutions for the provision of retirement and health benefits and the reduction of economic risk to employees. Second, for purposes of labor laws, contracting employers are nevertheless regarded as legally independent, to a unique degree.

The construction industry consists almost entirely of small establishments. About 70% of construction establishments in the Census of Construction Industries (most recently conducted in 1992) have no payroll (1.35 million establishments). These are normally independent contractors and will return in Parts 3 and 6.2 of this report. Of the 634,030 establishments with payrolls, 82% (519,252 establishments) have fewer than 10 employees. The largest construction companies, with 500 or more employees, employ only about 6% of the industry's payroll employees.

Construction employees who are represented by a labor union are likely to have health insurance, paid vacation, and a pension; construction employees who are not represented by a union normally do not.²⁷ Essentially all the pension plans cover multiple employers and by law are jointly administered by the union and management. Each employer for whom the employee works pays a bargained amount per hour of work into the plan. Under such arrangements, work that is really quite

²⁷Health insurance: 87.1% of union members have it, 80.8% through an employer- or union-provided plan. Of nonunion construction workers, only 41.4% get health insurance through work, while another 20.2% either provide their own insurance or are covered by another family member's. Pensions: 67% of union construction workers have; only 22% of nonunion construction workers. The source for these, and the figures in the preceding paragraph, is The Center to Protect Workers' Rights, *The Construction Chart Book* (2d Ed. April 1998), charts 3, 26, and 27.

contingent-- it will not last long at any individual employer--is not usually thought of as contingent work, since the employee has health insurance and retirement savings. It is possible that some day similar arrangements may become available for other employees who render services to multiple employers, although the legal and practical barriers to union organizing in some of these industries are severe, as we will see in the next section on temporary employees. Indeed, even in the construction industry, the future of employee benefits through multiemployer bargaining is by no means secure. Only 24 percent of construction workers are unionized. The percentage of construction workers who report that they are unincorporated self-employed individuals without payroll is growing rapidly, now comprising almost 20 percent of construction workers, up by over a third in the last quarter-century.²⁸ The Dunlop Commission heard sharply divergent testimony as to whether these phenomena represented preferences of construction workers or of employers; it did not resolve the issue and called for further research into the decline of collective bargaining and possible changes in labor law.²⁹ Obviously these matters cannot be comprehensively explored in this Report.

²⁸Id. Charts 14 and 21.

²⁹Commission on the Future of Worker-Management Relations, Fact Finding Report 97-98 (May 1994).

A second unusual aspect of triangular relations in the construction industry is the somewhat artificial assumption of the complete legal independence of each employer working on the same job site. A general contractor and the specialty subcontractors (who are likelier to be the legal employers) are all treated, for purposes of the National Labor Relations Act, as separate employers. Unions representing employees at one or more subcontractors cannot strike to force a nonunion contractor at the same construction site to hire union labor or contribute to union insurance or pension funds. This would violate legal prohibitions on secondary boycotts.³⁰ In some other industries, employers working together on a common enterprise are sometimes described, for purposes of the National Labor Relations Act, as *allies*,³¹ or subcontractors performing *related work*, that is, *contributing to normal operations* at another enterprise,³² or joint employers.³³ Such designations increase the susceptibility of the second employer to union pressure in complicated ways.³⁴ However, these terms

³⁰National Labor Relations Act ' 8(b)(4), 29 U.S.C. ' 158(b)(4); National Labor Relations Board v. Denver Building and Construction Trades Council, 341 U.S. 675 (1951).

³¹NLRB v. Business Machine and Office Appliance Mechanics, 228 F.2d 553 (2d Cir. 1955), cert. denied 351 U.S. 962 (1956). Congress approved the *ally* doctrine in Conference Report, Labor Management Reporting and Disclosure Act of 1959, H.Rep. 1147, 86th Cong., 1st Sess. (1959) at 38.

³²Local 761, International Union of Electrical etc. Workers v. NLRB(General Electric Co.), 366 U.S. 667 (1961).

³³Clients of temporary help agencies are *joint employers* with the agency of the individuals referred, as will be discussed in Part 2.2.

³⁴The taxonomies of triangular relationships developed under the American law of secondary boycotts are unusually refined, but are not used in other legal contexts. They are used to answer the question of whether an employer who is not the immediate legal employer of particular employees may nevertheless be subjected to strikes or slowdowns to influence its labor policies, normally, to get it to

are not used in labor law decisions concerning the construction industry.³⁵ Curiously, perhaps, some state courts, applying their workers= compensation statutes, are more flexible about treating the multiple employers on a construction site as one, particularly when this takes away tort damages from an injured employee and relegates him or her to the less generous workers= compensation system.³⁶

recognize a union or pressure its contractors to do so. If that employer (the union's preferred target of pressure) is commonly owned and administered with the immediate (Aprimary@) legal employer, or is performing work that but for a strike would have been performed at the primary, then it may be an Ally@ of that primary employer. In such a case, it stands in the shoes of the primary and may be subjected to any lawful economic pressure to which the primary might be subjected.

Other employers who are not allies sometimes do Arelated work.@ Examples include suppliers, transporters of finished products, and subcontractors performing work that is close to that of striking employees, if not their precise work. Such employers may be struck or picketed when they work at the premises of a struck employer, but may not be followed back to their own premises and struck on all their work.

The complexities of analysis in this area often defy belief. This is because Athe statute lacks any coherent theory as to why some neutral [employers] are protected and others are not, and the courts have added little intelligible rationale.@ Clyde W. Summers, Harry H. Wellington, and Alan Hyde, *Cases and Materials on Labor Law* 503 (2d Ed 1982). Nobody seems to advocate adaptation of this taxonomy to deal with other problems of workers in triangular relationships. It would presumably apply necessarily if, say, a national union began an organizational campaign, among clerical workers dispatched by temporary help agencies, by encouraging strikes against the temporary help agency at any location where it worked, or involving all workers at the client firm. It would be difficult to predict the eventual legal resolution of this hypothetical.

³⁵Markwell & Hartz, Inc. v. NLRB, 387 F.2d 79 (5th Cir. 1967), cert. denied 391 U.S. 914 (1968).

³⁶See, e.g., *Nowicki v. Cannon Steel Erection Co.*, 711 N.E.2d 536 (Ind.App.1999)(carpenter employed by general contractor, injured by crane operator employed by a subcontractor, held, crane operator was Adual employee@ of subcontractor and general contractor, so carpenter's injury was by a fellow employee and exclusively within the jurisdiction of workers= compensation).

2.3 Employees directly employed by temporary help agencies

2.3.1 Introduction There has been an enormous amount of academic and journalistic interest in recent years over the class of employees who are employed directly by temporary help agencies and then referred to jobs at the premises of other employers. Although not large numerically^B at most, two or three percent of US workers-- this class appears to be growing rapidly. There are serious deficiencies in the data available on this group and much research ongoing. Much more will be known, even a year after this Report, than is known today. Very little litigation has involved them.

2.3.1 Size and characteristics of temporary employees. The term ^Atemporary employee[@], though frequently used, has no legal significance. Any employee who is employed at-will, that is, the majority of American employees, may be seen as ^Atemporary[@] in the sense that his or her position might be eliminated, or employment terminated, unilaterally by the employer without notice or legal liability. The term is used in data collection but is often defined differently by different researchers. For purposes of this section, this Report will use ^Atemporary employee[@] to refer only to individuals who are legally employees of a temporary help agency, dispatched to work at the premises of other employers. (Some researchers call these temporary help services (THS) employees, and use ^Atemporary employee[@] to

comprise a broader group, including individuals hired directly by an employer, carried as employees of that employer, but whose jobs will nevertheless end soon. As noted, inclusion of this group leads to difficult problems distinguishing them from ordinary employees who are employed at-will, and researchers must typically classify employees on the basis of their subjective assessment of their anticipated longevity).³⁷

³⁷A careful reworking of data from the February 1995 Supplement to the CPS on Contingent and Alternative Work Arrangements constructs a category of "direct-hire temporaries" if they indicated that their job is temporary or that they can not stay in their job as long as they wish for any of the following reasons: they are working only until a specific project is completed, they are temporarily replacing another worker, they were hired for a fixed period of time, their job is seasonal, or they expect to work for less than a year because their job is temporary. Using this definition, the authors classify 2.8 percent of the workforce as "direct-hire temporaries". By contrast, only 1.0 percent of individuals responding to the CPS describe themselves as "agency temporaries," though this figure is probably understated, see *infra* n.38. Susan N. Houseman & Anne E. Polivka, *The Implications of Flexible Staffing Arrangements for Job Stability*, Upjohn Institute Staff Working Paper No. 99-056, revised May 1999 (<http://www.upjohninst.org/publications/wp/99-56.pdf>) Table 1; Houseman, *supra* n.18, at 8-9.

There are two principal sources of statistical information about such temporary employees (employed by temporary help agencies) published by the Bureau of Labor Statistics, and they do not agree. The Current Employment Statistics (CES) series surveys business establishments, asking them to report their number of employees. It has a classification for the temporary help supply services industry.³⁸ The Current Population Survey (CPS) surveys households, and asks workers about their industry of employment. The business survey consistently shows twice as many temporary workers as the household survey. There are at least two reasons conventionally given for this. First, some individuals work at different times for different agencies and may be counted twice or more in the business survey. Second, at least some individuals tell the household survey that they are working in the industry where they are currently working, as opposed to working in the temporary help industry.³⁸ One may question whether either explanation fully explains why the number of employees reported by the business survey as working in temporary help supply services³⁹ quintupled from 1982 (the first year for which data are available) to 1997 (0.5 percent of the labor force to 2.3 percent), while the number of individuals who reported themselves this way changed during the same period only from 0.5 to 0.8 percent of employed workers.³⁹ Researchers normally assume that the CES business survey overstates temporary

³⁸In the February 1995 CPS Supplement, individuals identified as working for a temporary help agency or for a company that contracts out their services were then asked if the employer listed for them in the basic CPS was the temporary help agency/contract company or the business for whom they were doing the work. In February 1995, 57 percent of agency temporaries and 17 percent of contract company workers had incorrectly given the client firm as their employer.³⁹ Houseman & Polivka, *supra* n.37, at 11-12.

³⁹Houseman, *supra* n.18, at 10-11.

employment and the CPS household survey understates it.⁴⁰ Still, it appears that, A[d]espite media attention surrounding agency temporaries, it is interesting to note that on-call, direct-hire temporary, contract company, and independent contractor employment are all quantitatively as important or more important than temporary help agency employment.⁴¹ For example, it is frequently asserted that the large temporary help agency Manpower has become the largest employer in the United States, larger than General Motors. While Manpower does indeed file the largest number of W-2 forms (reports of employee income), so many of them are for individuals working part-time that Manpower is far from the largest purchaser of labor time, indeed purchases less than a quarter of the labor time that General

⁴⁰Blank, *supra* n.11; Anne E. Polivka, *Contingent and Alternative Work Arrangements, Defined*, 119 *Monthly Labor Review* No. 10 at 3-9 (1996). However, there is an argument that even the CES business survey understates temporary help employment. A[I]t is likely that many more individuals experience a spell of temporary employment during the year than are captured in BLS establishment and household surveys, which measure temporary agency employment at a point in time. Susan N. Houseman, *Temporary, Part-Time, and Contract Employment in the United States: A Report on the W.E. Upjohn Institute's Employer Survey on Flexible Staffing Policies* vi (June 1997 revision)(<http://www.upjohninst.org/ptimerpt.pdf>).

⁴¹Houseman & Polivka, *supra* n.37, at 4.

Motors purchases.⁴²

⁴²Lewis M. Segal & Daniel G. Sullivan, The Growth of Temporary Services Work, 11 Journal of Economic Perspectives 117-136 (#2, Spring 1997).

2.3.2. *What are the characteristics of temporary help jobs?* There are no data tracing the work careers of temporary help employees. Critics of the institution suppose workers trapped forever in dead-end jobs, poorly compensated, lacking benefits, and without any possibility of moving into regular employment. Defenders imagine temporary help workers who are being given *try-outs* for permanent employment, frequently move into normal employment at the client employer, or otherwise tailor their time in the workforce to their personal or family needs. Both patterns exist. It is impossible to form a reliable estimate of their frequency.⁴³

One study exploits the longitudinal component of the CPS to try to track workers, who were in all kinds of flexible or alternative work relations at the time of the February 1995 Supplement, in the regular CPS surveys of March 1995 and February 1996. Agency temporaries were much less likely to be employed, less likely to be in the workforce, and more likely to switch employers, than regular full-time employees. However, their experiences were not too different from direct-hire temporaries or on-call workers (each a direct employee of a single employer)--showing once again that a *triangular* relationship is not necessarily a good proxy for contingent work.⁴⁴ In both cases, the data are not easy

⁴³The fact that seventy percent of agency temporaries told the 1997 special CPS survey that they would prefer a job that is permanent or would last for more than one year, see Houseman, *supra* n.18, at 15, does not tell us how many are likely to get their wish. One leading temporary help firm has agreed to open its records to a team of academic researchers studying the careers of temporary employees. This will be an important study, when completed. Laurie Bassi, David Finegold, Alec R. Levenson, Ann Majchrzak, & Mark Van Buren, *The Temporary Staffing Industry and the Career Prospects of Lower Skilled Workers*, Russell Sage Foundation/Rockefeller Foundation program on the Future of Work.

⁴⁴Houseman & Polivka, *supra* n.37, Tables 3 and 4. The differences are not attributable to

to interpret and may partly reflect individual choices by, or characteristics of, the workers studied.

Similarly, as mentioned, there is some evidence that people losing a permanent job often pass through a temporary job (either with a temporary help agency or directly employed) on their way to another more permanent job.⁴⁵

voluntary quits by the workers.

⁴⁵Farber, *supra* n.12.

Certainly THS jobs are less remunerative than full-time jobs. THS workers work about seven hours less per week than the average worker but make 28% less money. They are most unlikely to receive any health insurance or pension benefits.⁴⁶ In the 1997 special survey, 7.3 percent of agency temporaries earned at or near the minimum wage, over twice the rate of regular full-time employees earning such low wages. The differences do not disappear even if one controls for age, education, industry, and similar characteristics. However, it is possible that other characteristics of temporary workers, not captured in the statistics, may influence their low earnings, such as low actual work experience or poor work habits or social skills.⁴⁷

⁴⁶Blank, *supra* n.11 , at 276; Houseman, *supra* n.18, at 23.

⁴⁷Houseman, *supra* n.18, at 21.

2.3.3 *What are the characteristics of temporary help workers?* Workers employed by temporary help agencies are somewhat more diverse than the stereotype, but nevertheless are disproportionately female and young. Forty per cent are men, though this is less than the 56.3% men in the full-time workforce. The average age of THS workers is 35.6 (two years less than the average worker). The THS workforce is 24.6% African-American (the full-time labor force is 11.9% African-American). Although defenders of THS employment often cite its supposed compatibility with parental responsibilities, THS workers have exactly the same number of children as full-time workers.⁴⁸ Despite media attention to THS workers who work in managerial and professional positions, this category has declined in recent years (from 24.3% of THS employment in 1985 to 16.7% in 1995). The most rapid growth of THS employment has been among blue-collar workers, high school graduates, and males.⁴⁹

2.3.4 *Why do employers use temporary help jobs?* Some information about career paths of temporary employees might be inferred from data on why employers hire staff from temporary help agencies (particularly as opposed to creating in-house temporary positions). For example, we might

⁴⁸Blank, supra n.11 , at 266-67 (1995 and 1996 CPS); Segal & Sullivan, supra n.42, at 120 (1993 CPS).

⁴⁹Blank, supra n. 11, at 274 (Table 8.3)(1995 and 1996 CPS). Compare Susan Diesenhouse, *In a Shaky Economy, Even Professionals Are 'Temps'*, New York Times, May 16, 1993, at F5.

learn whether employers view hiring a temp as a tryout for a permanent job.

There is little data on why employers use temporary employees.⁵⁰ In July and August of 1996, the W.E.Upjohn Institute for Employment Research surveyed 550 employers nationwide. 46 percent of establishments surveyed used workers from temporary help agencies. (38 percent hired employees on a short-term basis; 72 percent used part-time workers; 27 percent used on-call workers; and 44 percent used independent contract workers). Firms reported using workers from temporary agencies to fill in during unexpected needs, such as increases in business (52.2%) or unavailability of a regular employee (47%). Many fewer reported resorting to such arrangements to try out employees for permanent employment (21.3%), or to save on wage and benefit costs (11.5%).

In some respects, THS workers in triangular relationships were little different from short-term or on-call employees employed directly by firms. (The Upjohn report uses the term "flexible workers" to cover both these general classifications). While the hourly wage paid to temporary help employees is comparable to that paid regular workers in similar positions, THS employees, like in-house short-term

⁵⁰Management surveys are reviewed in Houseman, *supra* n.18, at 27-37. The American Management Association is analyzing data from a recent survey, as this Report is being prepared. Eric Rolfe Greenberg, Director of Management Studies, American Management Association, 212-903-8052. Another source of data are the Industry Wage Surveys that the Bureau of Labor Statistics conducts periodically for different industries. The temporary help services industry was last surveyed in September 1987. Analyses include U.S. Department of Labor, Bureau of Labor Statistics, Industry Wage Survey: Temporary Help Supply, Bulletin 2313 (September 1988); Harry B. Williams, What Temporary Workers Earn: Findings from New BLS Survey, *Monthly Labor Review* (March 1989) at 3-6, and Katherine G. Abraham & Susan K. Taylor, Firms' Use of Outside Contractors: Theory and Evidence, 14 *Journal of Labor Economics* 394-424 (1996).

hires, do not receive benefits such as paid vacations and holidays, paid sick leave, pensions, or health insurance, and thus are cheaper to the business. For each benefit, though, the THS employees were worse-off than the in-house short-term hires.

[Table 1 =Houseman's Table 13 goes here.]

The gap in benefits between flexible and regular employees occurs not because flexible workers are concentrated in firms providing few benefits, but rather because firms distinguish between flexible workers and regular, full-time workers in determining benefits eligibility.⁵¹ In fact, the more generous the benefits for regular employees, the likelier the firm is to use flexible employees of all types. This relationship was statistically highly significant, suggesting that antidiscrimination rules on employee benefits might lead firms to use THS employees, and that requiring firms to treat temporary employees like regular employees might lower benefits for the latter group. About 43 percent of businesses using temporary-help or short-term work report occasionally or often moving such an individual into a regular position, and this figure too is the same for THS employees in triangular relations, and the employees of the company who are hired on a short-term basis.⁵¹

2.3.5 *Why do employees take temporary jobs?* There is apparently no survey data available

⁵¹Houseman, *supra* n.40. The quoted sentence appears at viii.

on this question. In general, use of temporary employees is predicted better by firm demand variables than by labor supply variables.⁵² Focused ethnographies present a mixed picture.⁵³

⁵²Lonnie Golden & Eileen Applebaum, What was driving the 1982-88 boom in temporary employment? Preferences of workers or decisions and power of employers, 51 *American Journal of Economics and Sociology* 473-494 (1992).

⁵³Psychological studies of temporary employees are reviewed in Kathy M. Beard & Jeffrey R. Edwards, *Employees at Risk: Contingent Work and the Psychological Experience of Contingent Workers*, 2 *Trends in Organizational Behavior* 109-126 (1995). Temporary workers describe their experiences in Kevin Henson, *Just a temp: the disenfranchised worker* (Philadelphia: Temple University Press, 1995); Roger E. Parker, *Flesh peddlers and warm bodies: The temporary help industry and its workers* (New Brunswick, NJ: Rutgers University Press, 1994); Jackie Krasas Rogers, *Just a temp: Experience and structure of alienation in temporary clerical employment*, 22 *Work and Occupations* 137 (#2, May1995).

2.3.5.1 *Case study: happy temps* Vicki Smith interviewed workers and managers at a high technology firm that she calls CompTech. Permanent employees had generous benefit packages, while temporary workers were nominally employees of a temporary help agency with offices on CompTech's premises; were paid slightly above minimum wage; and received no benefits from the firm. They had to leave after 18 months of employment but were often rehired after a mandatory three month leave. Indeed, the average temporary worker had been at the firm for 27 months, which is almost exactly the median tenure for American service workers generally!⁵⁴ For most, even a temporary job with a good company like CompTech was better than their previous jobs. Nearly all (94%) sought permanent positions with CompTech and believed with some justification that a temporary position was the only path to that goal.⁵⁵

⁵⁴As noted supra n.15, the median American employed in the service sector has been at his or her current job 2.4 years.

⁵⁵Vicki Smith, *The Fractured World of the Temporary Worker: Power, Participation, and Fragmentation in the Contemporary Workplace*, 45 *Social Problems* 411-430 (November 1998).

2.3.5.2 *Case study: a local economy of unhappy temps.* Jean McAllister interviewed nineteen experienced employees of temporary agencies who attended a five-day school run by a community organization in Greenville, South Carolina. Each of the participants was the sole, primary, or significant income earner for a household, and most were employed in unskilled jobs such as cleaning, or packing or moving boxes. All these individuals would prefer more regular employment but have been unable to find any employment except with temporary help agencies. In fact, all employers approached by these job-seekers refer them to temporary agencies. All these individuals experience substantial week-to-week variation in income and work schedules. None has health insurance. Many reported being cheated of wages, exposed to unsafe work without relevant training, and sexual harassment. At least two women in the study group are living with men who they want desperately to leave, one because of her husband's criminal activity and the other because her husband beats her. Neither can find work that pays enough to support herself and both fear what destitution might bring.⁵⁶

2.3.6 *Legal status of temporary help employees* As is true with all the employees discussed as triangular employees, employees of temporary help agencies are normally employees of the agency for all labor and employment statutes. The agency will be liable to pay promised wages and benefits (though there will be few benefits); bargain with a union, in the unlikely event that one succeeds in organizing its far-flung employees; refer employees without discrimination; and obtain workers'

⁵⁶Jean McAllister, *Sisyphus at Work in the Warehouse: Temporary Employment in Greenville, South Carolina*, in Barker & Christensen, *supra* n.18, at 221-242. The quoted sentences are at 239.

compensation and unemployment insurance (though few of its employees will ever qualify for unemployment insurance).

The client firm that contracts with the temporary help agency normally gets all the advantages, and none of the disadvantages, of employer status. The biggest legal advantage to being an employer comes under state worker compensation law: the employer is immune from tort suit by an injured employee and liable only under the less generous workers= compensation system. Most states that have considered the question have held that the client firm is an Aemployer@ of some type for purposes of workers= compensation laws (though the precise terminology varies from state to state).⁵⁷ But while the client firm benefits from this major advantage of being an Aemployer,@ it normally acquires none of the corresponding obligations.⁵⁸ There are just a few exceptions. The interpretive regulations to the Family and Medical Leave Act, the newest federal employment statute, specifically address temporary employees. While the leasing or temporary help agency is the primary employer, the client company (called in the regulations the Asecondary employer@) may be required to place the individual in the same or comparable position upon her return from FMLA leave. Also, leased and temporary employees

⁵⁷See, e.g., *Thompson v. Grumman Aerospace Corp.*, 585 N.E.2d 355 (N.Y. 1991)(employee of labor contractor referred to manufacturer was A special employee@ of manufacturer and could not sue it in tort); *Evans v. Webster*, 832 P.2d 951 (Colo.App. 1991)(health attendant referred by temporary help agency was also employed by the woman receiving her services under A loaned servant @ doctrine and therefore could not sue her in tort); *Fox v. Contract Beverage Packers Inc.*, 398 N.E.2d 709 (Ind.App. 1980).

⁵⁸The history of the acquisition of this privileged legal position is traced in George Gonos, *The Contest over A Employer@ Status in the Postwar United States: The Case of Temporary Help Firms*, 31 *Law & Society Review* 81 (1997).

count as employees of the client company for the purposes of determining coverage of the FMLA.

Thus, even if the number of regular workers is fewer than fifty, an employer will still have to provide FMLA benefits to all its workers if the number of temporary employees plus regular employees equals fifty or more.⁵⁹ Temporary and leased employees also count as regular employees for purposes of retirement plans, employer-provided life insurance, and similar fringe benefits, if they have provided their services for a particular client, who primarily controls their work, **A**on a substantially full-time basis for at least a year.⁶⁰ This provision does not apply to health insurance.

⁵⁹The presumption of joint employer status for the temp agency and the client company is 29 CFR ' 825.106(b); the **A**secondary employer's obligation of job restoration is at 29 CFR ' 825.106(e); and the requirement of including employees of temporary agencies in the employer's base of employees is at 29 CFR ' 825.106 (d). Since the statutory definition of employee in the underlying legislation is identical to the Fair Labor Standards Act, query whether any of these regulations might analogously be adopted for that statute too.

⁶⁰Internal Revenue Code ' 414(n), 26 U.S.C. ' 414(n). The Internal Revenue Service has proposed, but then withdrawn, regulations defining **A**substantially full-time basis.[@] The court of appeals refused to apply this section in *Burrey v. Pacific Gas and Electric Co.*, 159 F.3d 188 (9th Cir. 1998), involving a group of employees who had worked continuously at that utility for many years, assigned by PG&E successively to a series of temporary help agencies. The court held that they should first be

evaluated as employees of PG&E. Only if they were held not to be PG&E employees should ' 414(n) be applied.

For purposes of other labor and employment statutes, however, the client firm is not the employer of temporary help employees and may therefore engage in conduct normally forbidden to employers. For example, the owner of a building could legally terminate a temporary help contract for janitors or other workers because of union activity by the janitors, although such retaliation by their own employer would violate the National Labor Relations Act. If the janitors' union attempted to prevent this action by organizing a strike or boycott of the client's business, this action would be an illegal secondary boycott under NLRA § 8(b)(4)(B).⁶¹ The results would be different in each case if the client firm and the temporary agency were found to be joint employers.⁶² However, it is often undesirable for unions to have two employers regarded as joint employers, because of National Labor Relations Board decisions holding that employees of joint employers may not be in the same bargaining unit with employees solely of one of those employers (unless both employers agree, which they never do).⁶³ If

⁶¹Unless, of course, the building owner is found to be allied with or contributing to normal operations at the temporary help agency, neither of which seems likely. The union attempting to organize employees of the subcontractor may, however, call for a consumer boycott of the building owner, so long as the call involves only handbills and media advertising, no pickets and no strikes. *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568 (1988). The techniques opened up by this case—the most substantial victory for the union movement in the Supreme Court in a generation—have been effectively employed by unions organizing janitors through media pressure on the companies whose buildings are cleaned.

⁶²See, e.g., *Holyoke Visiting Nurses Ass'n. v. NLRB*, 11 F.3d 302 (1st Cir. 1993), finding a hospital in violation of the NLRA in requesting that the temporary agency not refer to it a particular nurse who had engaged in union activities.

⁶³*Greenhoot Inc.*, 205 NLRB 250 (1973)(building owner and maintenance company as joint employers of janitors); *Flatbush Manor Care Center*, 313 NLRB 591 (1993)(agency temporaries not to be in same unit as directly-hired employees); *Brookdale Hospital Medical Center*, 313 NLRB 592

the client firm is not an employer, it apparently may request that the agency refer only younger employees: this is not actionable discrimination. The client can't discriminate because it's not an employer. The employer (the agency) isn't discriminating as an employer, since the client's discrimination isn't imputed to it, and isn't discriminating as an employment agency since it's not referring employees to an employer.⁶⁴ There are many anecdotal reports of client firms requesting that temporary help agencies not refer Black or Latino/a employees. While compliance with such a request by the agency would violate the Civil Rights Act, it is possible that the client firm's request would be privileged, even if it is an employer,⁶⁵ since the request does not concern its own employees.

(1993)(same). The Board heard oral argument in December 1996 on three cases that might modify or reverse these holdings, but has not issued its decisions as of the time of this report.

⁶⁴*Brownlee v. Lear Siegler Management Services Corp.*, 15 F.3d 976 (10th Cir.), cert. denied 512 US 1237 (1994). The client in that case was the Royal Saudi Air Force, not a statutory employer.

⁶⁵The Equal Employment Opportunity Commission takes the position that such a request by a client would be illegal. Enforcement Guidance: Application of EEO Laws to Contingent Workers Placed by Temporary Employment Agencies and Other Staffing Firms, EEOC Notice No. 915.002 (12/03/97), available at <http://www.eeoc.gov/docs/conting.txt> .

Finally, most temporary workers fall entirely outside the unemployment insurance programs administered in each state. These programs are limited to employees who have worked a minimum number of weeks or earned minimum amounts within a base period, requirements that typically preclude participation by temporary help workers.⁶⁶

⁶⁶Houseman, *supra* n.18, at 43-44; Deborah Maranville, *Changing Economy, Changing Lives: Unemployment Insurance and the Contingent Workforce*, 4 *Boston University Public Interest Law Journal* 291 (1995); National Employment Law Project, *Mending the Unemployment Compensation Safety Net for Contingent Workers* (October 1997); Sachin S. Pandya, *Retrofitting Unemployment Insurance to Cover Temporary Workers*, 17 *Yale Law & Policy Review* 907 (1999).

2.3.9 *Summary: policy for temporary workers?* Current policy proposals include: proposed federal legislation extending the approach of the FMLA and requiring users of temporary help labor to include them in their workforce for purposes of labor regulatory statutes;⁶⁷ attempts to organize temporary employees into unions by geographical location and temporary status;⁶⁸ voluntary regulation of the temporary agencies, for example by having voluntary agencies certify their compliance with principles of fair conduct;⁶⁹ or having unions or employee groups run their own temporary agencies that would negotiate fairer terms with clients.⁷⁰

⁶⁷Equity for Temporary Workers Act of 1999 (H.R. 2298) and Employee Retirement Income Security Act Clarification Act of 1999 (H.R. 2299), summarized in BNA Daily Labor Report, June 24, 1999. While employers would still be permitted to exclude part-time workers from benefit plans (or provide no benefits to anyone), they would have to treat service rendered by employees of temporary agencies just like service by their own employees. It is impossible to estimate how many employees now referred by temporary agencies would be treated as regular employees, and how many would no longer be employed at all, their work distributed to others. Passage of the legislation is unlikely; versions have been introduced for many years.

⁶⁸Dorothy Sue Cobble, *Making Postindustrial Unionism Possible*, in *Restoring the Promise of American Labor Law* 314 (Sheldon Friedman et al. ed)(Ithaca: ILR Press 1994); Howard Wial, *The Emerging Organizational Structure of Unionism in Low-Wage Services*, 45 *Rutgers Law Review* 671 (1993).

⁶⁹Aaron Bernstein, *A Leg Up for the Lowly Temp*, *Business Week*, June 21, 1999, at 102.

⁷⁰The San Jose AFL-CIO, in the heart of California's Silicon Valley, has been a leader in innovative approaches to organizing contingent labor, including the formation of its own temporary help agency, *together@work*, discussed in Bernstein, *supra* n.69. See also Françoise Carré, *Temporary and Contracted Work: Policy Issues and Innovative Responses* 26-27 (June 1, 1998)(<http://mitsloan.mit.edu/iwer>)(other examples of union-operated temp services); Eileen Silverstein & Peter Goselin, *Intentionally Impermanent Employment and the Paradox of Productivity*, 26 *Stetson*

2.4 Employees employed by employee leasing firms or professional employer organizations

Law Review 1, 36-52 (1996) for discussion of legal issues.

2.4.1. These organizations, though still employing a small percentage of the workforce, appear to be growing. The difference between the PEO and the standard temporary agency is that the PEO employs an entire workforce long-term, under contract with the entity receiving the services. (PEOs used to be known as "employee leasing" firms; "professional employer organization" is now the industry's preferred term). The PEO is the statutory employer and responsible for hiring, firing, payroll services, and compliance with employment regulation. In essence, a firm outsources its entire personnel department. There is no data available on these firms.⁷¹ Legally, they are probably in the same shoes as the more typical temporary help agency: the employer of the relevant individuals, possibly jointly with the client.⁷² Bipartisan legislation is currently being drafted to clarify the tax and regulatory treatment of such firms.⁷³

2.5 *Employees of miscellaneous labor contractors.* There are many other arrangements in

⁷¹The February 1995 Supplement on Contingent and Alternative Work Arrangements to the Current Population Survey attempted to ask whether respondents were employed by an employee leasing company, but respondents had difficulty understanding the question, and it was dropped from the 1997 and 1999 surveys. Houseman, *supra* n.18, at 3.

⁷²A discussion of legal issues that is sympathetic to the industry is H. Lane Dennard, Jr., and Herbert R. Northrup, *Leased Employment: Character, Numbers, and Labor Law Problems*, 28 *Georgia Law Review* 683-728 (1994).

⁷³BNA Daily Labor Report, July 29, 1999, at A-2.

which employees of employing entity E render services to client firm C. There is no purpose for which data on these arrangements is collected overall and probably no purpose in generalizing about them.

However, a very detailed study of such arrangements in the petrochemical industry was made in 1991 under government contract. Its findings suggest that similar research for other industries might be fruitful. After an explosion and fire in a petrochemical complex in 1989 killed 23 workers, Congressional pressure led the Occupational Safety and Health Administration of the U.S. Department of Labor to study the safety implications of the use of employees of independent contractors in the industry. As would be the case for any industry, reliable data was hard to obtain. Employer reports of injuries do not include employees of independent contractors. Surveys of plant managers, workers, and firms were therefore conducted, and supplemented with nine in-depth studies of particular plants.

The results suggested that directly-hired employment had been shrinking in that industry, and had been exactly been offset by the rise of employment of independent contractors, who comprised between one-third and one-half of the industry workforce at the time of the study. Injury and accident rates were quite substantially higher for contract workers. This appeared to reflect both their lack of training and experience, and the nature of the tasks assigned to them, rather than any demographic differences between contract and direct-hire employees. That is, differences diminished for contract employees who were given safety training, although few were. Client firms never gave any safety training to the employees of independent contractors. Such training was allegedly the responsibility of their own employers, the independent contractors, but rarely occurred. Contract laborers were twice as likely as

direct-hire employees to report working days over 12 hours or weeks over 60 hours. Contract workers are younger than direct-hire employees, less educated, lower paid, less experienced, and three times as likely to be Hispanic.⁷⁴ It is interesting to speculate whether similar results would be obtained in surveys of other industries.⁷⁵

⁷⁴John Calhoun Wells, Thomas A. Kochan, & Michal Smith, *Managing Workplace Safety and Health: The Case of Contract Labor in the U.S. Petrochemical Industry* (Beaumont, TX: John Gray Institute, Lamar University System)(July 1991). This study is extremely difficult to locate. It was published only by the small college that undertook it under contract and is not found in most university libraries; mine located a copy at the School of Industrial and Labor Relations at Cornell University. A summary is James B. Rebitzer, *Job Safety and Contract Workers in the Petrochemical Industry*, in Barker & Christensen, *supra* n.18, at 243-259.

⁷⁵For similarly high accident rates among employees of independent contractors in the mining industry, see Denise M. Rousseau & Carolyn Libuser, *Contingent Workers in High Risk Environments*, 39 *California Management Review* 103, 108 (Winter 1997); L.L. Rethi & E.A. Barrett, *A Summary of Injury Data for Independent Contractor Employees in the Mining Industry from 1983 through 1990*, Information Circular 9344, US Department of Interior, Bureau of Mines (1993).

The garment industry has long been structured so actual manufacturing occurs in tiny, poorly-

capitalized shops, working under contract to the nominal manufacturer, and prone to poor labor conditions, heavy employment of undocumented immigrant workers, and sudden bankruptcies. Legal problems representing such workers are discussed in Lora Jo Foo, *The Vulnerable and Exploitable Immigrant Workforce and the Need for Strengthening Worker Protective Legislation*, 103 *Yale Law Journal* 2179-2212 (#8, June 1994).

III. Self-employment

3.0 *importance of the concept.* The line between **Aemployees@** and the **Aself-employed@** has enormous legal significance in the US as it sets the boundary of all the employment statutes listed in Section 1. This contrasts with such designations in the previous section as **Atemporary employee@** or **Acontract labor@**, that lack legal significance.

The legal category of the self-employed also includes farmers, ranchers, and owners of

unincorporated businesses.⁷⁶ In order to exclude these individuals, the subset of the self-employed who render services for money are sometimes referred to as independent contractors. This refinement affects only data collection; the crucial legal distinction is between the employed and the self-employed. An independent contractor might jocularly be defined as just a self-employed individual whom somebody might consider an employee.

The overarching problem in this section is that it is almost never clear *why* a distinction is being made between employees and independent contractors in any particular context. As a result, the boundary line is never clear and might just as well be drawn differently.

3.1.1 *incidence and modalities of self-employment.* The principal statistics on the self-employed come from the 1997 and 1995 CPS Supplements on Contingent and Alternative Work Arrangements.⁷⁷ Respondents who identified themselves as independent contractors, independent consultants, or free lance workers were all classified as independent contractors. This category comprised 6.7% of the workforce in each of the surveys.

⁷⁶Owners of incorporated businesses are legally employees of those businesses.

⁷⁷Cited supra n.18. The CPS has collected data on the self-employed for many years, but the special supplements are the first attempt to distinguish independent contractors from other types of small business operators such as restaurateurs or shop owners.

There are several obvious problems involved in relying on these self-descriptions. First, even if individuals correctly understand their legal status, this legal status itself reflects policy or political judgments. Had these policy judgments been made differently, one would have entirely different statistics on self-employment. For example, it is only since the 1960 census that US individuals have been asked whether they are "self-employed", before that they were asked whether they were "in own business."⁷⁸ Second, as we shall see further, many individuals who render services to customers are described by their employers as self-employed independent contractors, even though the law would regard them as employees, were the issue ever raised. Presumably, these people tell the CPS that they are self-employed, and this inflates that figure. Third, a significant number of respondents are quite confused about their status (not without reason, as we shall see). About 12 percent of those who tell the CPS that they are independent contractors also tell the CPS that they are employees, not self-

⁷⁸Marc Linder, *Farewell to the Self-Employed: Deconstructing a Socioeconomic and Legal Solipsism* 15 (New York: Greenwood Press, 1992). Professor Linder subjects the questionnaires used by the CPS to withering critique in this book at 7-34. Just one of Professor Linder's observations will have to suffice. The CPS's interviewer's manual "expressly instructs the interviewers that '[p]eople who sell Avon and Tupperware products...because they are not considered employees of those companies...are self-employed.'" The elusive passive voice of the directive appears to suggest that the sellers are not considered employees *by those companies*. By this substantive intervention the Bureau of Labor Statistics and Bureau of the Census are, without justification, helping to consolidate the public relations gains secured by these companies in their efforts to evade payment of employment taxes for their low paid workers." *Id.* 20 (an omitted footnote indicates that this language entered the manual between 1985 and 1989). For more on the campaign to classify direct sellers as independent contractors, see Nicole Woolsey Biggart, *Charismatic Capitalism: Direct Selling Organizations in America* 31-41 (Chicago: University of Chicago Press 1989). A private survey in the mid-1970s revealed that nearly 16% of US households had tried direct selling and 8% had a member who had conducted direct sales in the previous year. *Id.* 50.

employed.⁷⁹ This is a legal impossibility. While these problems compromise the utility of the CPS's reports on the number of self-employed, such compromised and confused self-descriptions are the only available data.

Contrary to much popular belief, the percentage of individuals in the workforce who describe themselves as self-employed has been remarkably stable in the past two decades, and is currently at about the *low* point for those two decades.⁸⁰ In the CPS Supplements, the largest groups of the self-

⁷⁹Houseman, *supra* n.18, at 4 n.3.

⁸⁰Before 1970, self-employment declined rapidly. At the beginning of the century, perhaps a quarter of the nonfarm workforce was self-employed, declining to 15% at the end of World War I, 10% in 1960. By 1970 the percentage had dropped below 7%. Since then, it has fluctuated between 6.5% and 8.8%. Robert L. Aronson, *Self-Employment: A Labor Market Perspective 3* (Ithaca, NY: ILR Press, 1991). Self-employment thus has contributed little or nothing to recent growth in jobs in the U.S. Marilyn E. Manser & Garnett Picot, *The role of self-employment in U.S. and Canadian job growth*, 122 *Monthly Labor Review* 10-25 (#4, April 1996). There is some evidence that rates of self-employment respond to changes in the tax rate. Martin T. Robson & Colin Wren, *Marginal and*

employed included computer consultants, freelance writers, insurance and real estate agents, and home builders.⁸¹ The most common occupation for white women independent contractors is real estate sales; for African-American women, nursing aide; for Hispanic women, house cleaner; for white or Hispanic men, manager/administrator; and for African-American men, truck driver.⁸²

Average Tax Rates and the Incentive for Self-Employment, 65 *Southern Economic Journal* 757-773 (#4, April 1999); David M. Blau, A Time-Series Analysis of Self-Employment in the United States, 95 *Journal of Political Economy* 445-467 (#3, 1987).

⁸¹Cohany, *supra* n.18, at 54.

⁸² Kalleberg, *supra* n.18, Table 6, at 14 (from CPS 1995 Supplement).

Additional data on self-employment by type of business may be obtained from census data on unincorporated businesses without payroll. Much the largest group are construction businesses. The highest growth includes door-to-door sales people, maids, janitors, hair dressers, child care workers, taxi and truck drivers. ⁸³ These are precisely the kinds of jobs that prompt the strongest doubts about their classification as self-employment. As self-reported self-employment has grown in these sectors, it has been offset by changes in the opposite direction. For example, while good data are surprisingly scarce, doctors and lawyers in the US are probably likelier to be employees of a larger entity today than two decades ago, when many more were self-employed.

3.1.2 *Who are the self-employed?* It is obvious that the self-described self-employed in the United States are a heterogenous group, including genuine small business owners, independent professionals, and some individuals who look more like employees. In fact, the two standard prototype images used to represent the self-employed have already emerged. For commentators on the political right, the standard self-employed individual is an *entrepreneur* who takes on risk with his independence. For commentators on the political left, the standard self-employed individual is an *economically dependent* janitor, driver, or salesperson who has wrongfully been classed as self-employed by an employer trying to evade labor regulation.

⁸³Linder, *supra* n.78, at 63.

As we shall see, both prototypes exist. Statistically, however, the right= version is more accurate for the group as a whole than the left=B which is why, as a group, the self-employed do not present any pressing need for policy intervention, although some individuals within it may. The self-employed are disproportionately male, older, more educated, and white. They earn more than traditional employees. In two industries (finance, insurance, and real estate; and agriculture), the self-employed outearn traditional employees by over 50 percent. Only 10 percent of self-employed persons in the CPS special supplements are dissatisfied with working as an independent contractor.⁸⁴ They do not, as a group, experience less job stability over the course of a year than do regular full-time employees.⁸⁵ When asked why they prefer working as independent contractors, most overwhelmingly cite personal reasons (such as wanting to be one=s own boss) rather than economic reasons. The median independent contractor has been in such an arrangement for seven years, quite a bit longer for the median for other work arrangements that the CPS considers Aalternative.⁸⁶

⁸⁴Houseman, *supra* n.18, at 15.

⁸⁵Houseman & Polivka, *supra* n.37, at 19-20.

⁸⁶Cohany, *supra* n.18, at 56-61.

There has been much attention to the sharply different rates of self-employment by ethnicity, in particular, the fact that African-Americans are less than one-third as likely as white Americans to be self-employed, a ratio that appears to have been constant for many years.⁸⁷ These studies that focus on ethnicity often present an interesting perspective on the dynamics of self-employment. For example, a recent study finds self-employed Mexican immigrants concentrated in manual occupations that employ no one else. Such individuals would probably be better off as employees; for them, self-employment is negatively correlated with income. However, as the percentage of Spanish speakers in an area rises, the negative impact for earning of self-employment diminishes considerably, suggesting that ethnic markets create opportunities for more remunerative self-employment, such as small business ownership.⁸⁸

⁸⁷Robert W. Fairlie, *The Absence of the African-American Owned Business: An Analysis of the Dynamics of Self-Employment*, 17 *Journal of Labor Economics* 80-108 (Jan. 1999); Robert W. Fairlie & Bruce D. Meyer, *Ethnic and racial self-employment differences and possible explanations*, 31 *Journal of Human Resources* 757-793 (Fall 1996). East Asians (particularly Koreans), Middle Easterners, and Cubans (but not other Hispanic groups) have high rates of self-employment for reasons that cannot easily be explained.

⁸⁸David Spencer & Frank D. Bean, *Self-employment concentration and earnings among Mexican immigrants in the U.S.*, 77 *Social Forces* 1121-1147 (#3, March 1999).

3.2 *Legal and practical consequences of self-employment*. As mentioned, self-employed individuals are excluded from almost all of the federal and state employment protection legislation mentioned in Section 1. There are no limits on the hours they may work or how little they are paid; they may be excluded from benefits available to employees.⁸⁹ (They are, however, included in the Social Security system that pays benefits to retired workers who paid into the system when they worked).⁹⁰ They may form a voluntary association and call it a union, but no legal process requires those hiring their labor to bargain with it.⁹¹ While there are no good data on why employers choose to hire labor in the

⁸⁹There are just a few labor protective statutes that reach independent contractors. The Service Contract Act, ' 8(b), 41 U.S.C. ' 351 et seq., requiring that providers of services to the federal government pay wages at the level prevailing in their area, reaches any person engaged in the performance of a contract...regardless of any contractual relationship that may be alleged to exist between a contractor or subcontractor and such persons. This has been interpreted to require the payment of prevailing wages to independent contractors, 29 C.F.R. ' 4.155. The Department of Labor similarly interprets the Davis-Bacon Act, 40 U.S.C. ' 276a et seq., as requiring the payment of prevailing wages by contractors doing construction work for the federal government, to all persons working for them, 29 C.F.R. ' 5.5(a)(1). Some states, including New York, include some independent contractors in their system of unemployment insurance, N.Y Labor Law ' 511 (including commission drivers, professional musicians, and traveling salespeople in unemployment insurance system). Finally, while independent contractors are not covered by the Civil Rights Act of 1964, which forbids discrimination in employment on the basis of race, color, sex, religion, or national origin, independent contractors may sue to redress at least racial discrimination or harassment under the older, post-Civil War statute known as 42 U.S.C. ' 1981. *Danco, Inc. v. Wal-Mart Stores, Inc.*, 178 F.3d 8 (1st Cir. 1999).

⁹⁰Self-employed persons have been included in the Social Security program since the 1950s. They pay both the employer and employee portions of the social security tax. Since 1990, the employer portion is deductible as a business expense.

⁹¹A labor union of self-employed individuals, fixing their rates of remuneration, might well

form of independent contractors, and presumably a mix of reasons applies, news reports occasionally surface in which it certainly appears that avoiding employment regulation motivated the creation of the independent contractor relationship. For example, the Dunlop Commission studying labor law reform heard testimony about a large Seattle office cleaning contractor which, after its low bid won the contract for a number of commercial buildings, sold the franchise to clean individual floors to a largely immigrant workforce.⁹² (As we shall see in section 6.6, at least some individuals whom employers call independent contractors are really employees and entitled to those legal rights).

violate the antitrust laws. *Federal Trade Commission v. Superior Court Trial Lawyers Association*, 493 U.S. 411 (1990)(refusal of lawyers to accept court appointment to defend indigent criminal defendants until their fees were raised, potential violation of antitrust laws).

⁹²Commission on the Future of Worker-Management Relations, Fact Finding Report (May 1994) at 93 n.2.

Because of the prominent publicity given cases of this type (see also section 6.6 *infra*), it is crucial to understand that there are also significant advantages *to the individual rendering services* in being classified as an independent contractor, even where that individual might legally just as easily be classified as an employee.⁹³ Three advantages stem from the tax laws. In particular cases, the tax advantages of being an independent contractor may or may not outweigh the labor law disadvantages *for the individual worker*.

First, income taxes are withheld from each paycheck of each employee. Taxes are not withheld from payments to self-employed independent contractors. The self-employed are liable for the same taxes as the employed, including taxes that support the social security system. However, they assess themselves and then mail payments of these taxes. The taxes are not withheld from income as it is earned.

⁹³Obviously there are advantages to the individual in being a genuine independent contractor and in being so classified: freedom to work for different clients, to set own hours, to reap potential rewards without sharing them. The statement in text refers to reasons why an individual who might just as easily be classified as an employee perhaps someone who renders services to only one purchaser over the year and is economically dependent on it might nevertheless prefer to be classified as an independent contractor.

Second, self-employed persons thus have many more opportunities than regular employees to disguise or conceal income and thus pay no tax on it. For example, they may accept payments in cash, or disguised as payments for something else. The ability of the self-employed to avoid paying income tax is not a cynical observation by a critic of US tax administration. It is an accepted and articulated part of the federal budget planning process. For example, a provision of the tax laws makes it difficult (though not impossible) for computer programmers to be classified as self-employed.⁹⁴ This provision originated when IBM sought a tax break for its overseas operations. While Congress was happy to grant the tax relief, under Congressional budgeting procedures, the tax relief had to be offset by a comparable increase in revenue. Since it is universally accepted that employees cheat less on their taxes than the self-employed, by classifying computer programmers as employees, Congress estimated, an additional \$60 million would be raised in taxes over five years, enough to offset the break that IBM received.⁹⁵ Employers and workers share billions of dollars each year in income that should have been

⁹⁴Revenue Act of 1978 ' 530(d), discussed *infra* nn. 96 and 108. This important statute also restricts the ability of the IRS to collect taxes on workers improperly classified or to order proper classification of workers. Its history is complex. It was originally designated a one-year moratorium, then extended several times, and finally made permanent by Tax Equity and Fiscal Responsibility Act of 1982, ' 269, PL 97-248, 96 Stat. 324, 552. It has never been codified in the Internal Revenue Code but is reproduced in the notes following 26 U.S.C. ' 3401. The substantial 1991 and 1996 amendments are discussed *infra* n.96.

⁹⁵David Cay Johnston, *How a Tax Law Helps Insure a Scarcity of Programmers*, New York Times, April 27, 1998, at D1. One might suppose that classifying programmers as employees would be inconvenient for businesses that would then have to pay premium wages for work weeks longer than 40 hours. However, this potential problem was solved by provisions exempting computer programmers from this aspect of the Fair Labor Standards Act, discussed *supra*, n.26.

paid as taxes.⁹⁶

Third, self-employed persons may deduct an unlimited range of business expenses from their

⁹⁶The Department of the Treasury estimates that approximately \$2.6 billion is lost each year in unpaid social security, Medicare, and federal unemployment insurance taxes by reason of employees misclassified as independent contractors, and that the same misclassification is responsible for an additional annual loss of \$1.6 billion in income tax underpayment. Subcommittee on Oversight, House Ways and Means Committee, Hearing on Employment Classification Issues, June 4 and 20, 1996, No. 104-84, at 138-39. Employers who purchase services from *incorporated* independent contractors need not report such payments to the Internal Revenue Service. They are supposed to report payments made to *unincorporated* independent contractors, but many do not. If an employer is found by the IRS to have misclassified employees as independent contractors, the IRS may not collect back taxes, or even require reclassification of the workers, if the employer's misclassification was longstanding standard industry practice, or if the employer had been audited in the past for employment tax purposes and had not been assessed for the misclassification at that time. Revenue Act of 1978 ' 530. As amended by the cynically misnamed Small Business Job Protection Act of 1996, PL 104-188, standard industry practices may involve less than 25 percent of the industry and longstanding may be less than ten years; the legislation placed other, similar restrictions on the IRS. See Statement of Donald C. Lubick, Acting Assistant Secretary (Tax Policy), Department of the Treasury, before the Subcommittee on Taxation and IRS Oversight, Committee on Finance, U.S. Senate, June 5, 1997, available at <http://www.ustreas.gov/press/releases/pr1727.htm>

income, while employees are subject to limitations under Internal Revenue Code ' 67. It is normally assumed that the self-employed substantially overstate their business expenses. Self-employed persons, but not employees, are permitted under Internal Revenue Code ' 162(1) to deduct a specified percentage of their expenses for health insurance.

3.3 *Distinguishing Aself-employed@from Aemployee@* The line between employees and the self-employed is a standard textbook example of vagueness and uncertainty in American law. This observation is not restricted to critics of the American legal system. It is commonly made by authoritative lawmakers.

For example, the US Supreme Court recently held that a trash hauler for a county, an independent contractor, allegedly terminated after public criticism of the county commissioners, might sue under the US Constitution for infringement of his right to free speech, just as if he were a public employee:

The brightline rule proposed by the [county] and the dissent would give the government carte blanche to terminate independent contractors for exercising First Amendment rights.

And that brightline rule would leave First Amendment rights unduly dependent on

whether state law labels a government service provider's contract as a contract of employment or a contract for services, a distinction which is at best a very poor proxy for the interests at stake. Determining constitutional claims on the basis of such formal distinctions, which can be manipulated largely at the will of the government agencies concerned, is an enterprise that we have consistently eschewed.⁹⁷

⁹⁷Board of County Commissioners v. Umbehr, 518 U.S. 668 (1996).

Unfortunately, despite these fine words, the substantive rights of working people commonly do depend on their characterization as employees or independent contractors, characterizations that are indeed manipulated largely at the will of the hiring party and are indeed a very poor proxy for the interests at stake. Analysis is made even more complicated by the multiplicity of legal tests that are used to distinguish employees from independent contractors.⁹⁸ This Report will address only the three most important tests currently employed: the common law approach applied to the Employee Retirement Income Security Act and National Labor Relations Act, and, increasingly, to the Civil Rights Act and other federal statutes; the twenty-factor test of the Internal Revenue Service; and the economic realities test applied under the Fair Labor Standards Act. As mentioned earlier, it is the opinion of this author that much too much has been made of this multiplicity of standards. They are now normally applied so that a given individual who is an employee for one statute is normally an employee for all of them.

⁹⁸One book takes fifteen pages merely to list the standards that have been applied under thirty or more federal statutes. Marc Linder, *The Employment Relationship in Anglo-American Law: A Historical Perspective* 253-73 (New York: Greenwood Press, 1989).

3.3.1 *The Common Law Approach* Common law courts judge-made law in the absence of statute most often distinguish employees from independent contractors in personal injury cases. To oversimplify, the hiring party will be liable for most injuries caused by its employees, but not for injuries caused by independent contractors. In order to make this distinction, common law courts normally examine the hiring party's right to control the means and manner of the worker's work. If the hiring party can actually control the means and manner of work, it is fair to hold it liable for resulting injuries, and in such cases, the provider of services is called an employee. If the hiring party cannot control the individual's manner of work, it seems unfair to hold it liable, and such arrangements are called independent contracting. In this context, the distinction, and the test employed to make it, make excellent sense, particularly since, as Professor Linder has shown, the test was applied flexibly with an eye toward other aspects of appropriate compensation for injury.⁹⁹ It is true that this common law approach will result in different sets of truck drivers, for example, being treated differently. Drivers who are ordered by their employer to follow prescribed routes at prescribed speeds will, for that reason, be likelier to be employees (to oversimplify considerably), and the employer liable if someone is injured by the driver. Drivers free to set their own order of route and able to control the time in which work is done will be likelier to be solely responsible for the results of their negligence. Thus different truck drivers will be treated differently under the common law test, but the differences will bear some relationship to the underlying legal question, namely liability for negligence.

⁹⁹See generally Linder, *supra* n.98, at 133-70.

Such New Deal era statutes as the Fair Labor Standards Act (1935) and National Labor Relations (Wagner) Act (1935) were drafted to cover **A**employees[®] but did not specifically adopt the common law definition. Neither statute was ever actually applied to independent contractors.¹⁰⁰ However, in 1947, Congress specifically exempted **A**independent contractors[®] from the statutory definition of **A**employee[®] under the National Labor Relations Act (but not the Fair Labor Standards Act). Congress did not define these terms, apparently believing that the distinction was obvious and unproblematic. Some years later, the Supreme Court held that common law definitions should be applied.¹⁰¹ There is absolutely no reason of policy **B**none has ever been offered-- why the reach of statutes like the Civil Rights Act or pension legislation should turn on whether individuals work under their own direction, without supervision **B**in which case they may be discriminated against, sexually harassed, and their retirement savings made contingent on not competing with the company. Nevertheless, the U.S. Supreme Court in recent years has specifically ordered the application of the

¹⁰⁰The most notorious decision permitted so-called **A**newsboys[®] (**A**generally mature men[®]) selling newspapers on the street to unionize, but only after finding that the newspaper companies **A**have the right to exercise, and do exercise, such control and direction over the manner and means in which the newsboys perform their selling activities as establishes the relationship of employer and employee for the purposes of the Act.[®] *Stockholders Publishing Co.*, 28 NLRB 1006, 1022-23 (1941), findings applied to unfair labor practice proceeding sub nom. *Hearst Publications, Inc.*, 39 NLRB 1245, 1256 (1942), enforced 322 U.S. 111 (1944). Newspaper carriers continue to be treated, wrongly, as self-employed and excluded from workers compensation. Marc Linder, *What's Black and White and Red All Over? The Blood Tax on Newspapers* **B**or, *How Publishers Exclude Newscarrriers from Workers= Compensation*, 3 *Loyola Poverty Law Journal* 57-111 (1997); Marc Linder, *From Street Urchins to Little Merchants: The Juridical Transvaluation of Child Newspaper Carriers*, 63 *Temple Law Review* 829 (1990).

¹⁰¹*NLRB v. United Insurance Co.*, 390 U.S. 254 (1968)(upholding Board finding that insurance agents were employees, in the circumstances present).

common law *right to control* test under the copyright law¹⁰² and Employee Retirement Income Security Act.¹⁰³ Most lower courts apply the same approach to the various antidiscrimination statutes.

The effect is expressly and intentionally to make the application of the statutes turn on factors *unrelated* to the purpose of the statute. The point is illustrated by the most recent Supreme Court decision. The insurance company, whose policies were the only products sold by Darden, refused to pay him the retirement benefits they had promised, after he went into competition with them. This action by the insurance company would violate federal law (ERISA) as to an employee; the retirement benefits of an employee, who had worked as long as Darden had, must be *vested* (nonforfeitable). The sole legal issue was whether Darden was (as he argued) an employee, or (as the insurance company argued) an independent contractor. The intermediate Court of Appeals proposed developing a definition of employee that looked to the purposes of ERISA. Under their proposal, Darden would be an employee if he could show *that* he had a reasonable expectation that he would receive benefits, (2) that he relied on this expectation, and (3) that he lacked the economic power to contract out of [the plan's] forfeiture provisions.¹⁰⁴

¹⁰²Community for Creative Non-Violence v. Reid, 490 U.S. 730 (1989).

¹⁰³Nationwide Mutual Insurance Co. v. Darden, 503 U.S. 318 (1992).

¹⁰⁴Darden v. Nationwide Mutual Ins.Co., 922 F.2d 203, 205 (4th Cir. 1991), reversed 503

The Supreme Court reversed this reading of the statute and ordered the application of the common law approach, developed for entirely different purposes. Then, as if to assure continued uncertainty and litigation, the Court directed courts applying this “common law” test to consider at least twelve independent factors:

- (1) the skill required;
- (2) source of the instrumentalities and tools;
- (3) location of the work;
- (4) duration of the relationship between the parties;
- (5) whether the hiring party has the right to assign additional projects to the hired party;
- (6) the extent of the hired party’s discretion over when and how long to work;
- (7) the method of payment;
- (8) the hired party’s role in hiring and paying assistants;
- (9) whether the work is part of the regular business of the hiring party;
- (10) whether the hiring party is in business;
- (11)

U.S. 318 (1992).

the provision of employee benefits; and (12) the tax treatment of the hired party.¹⁰⁵

The *Darden* decision has been cited hundreds of times in decisions under various federal statutes.

Coverage of these decisions is obviously beyond the scope of this Report. Most observers think that current applications result in most borderline cases being deemed independent contractors. This is almost always true as to insurance agents.

¹⁰⁵Darden, 503 U.S. at 323-24, quoting Reid, 490 U.S. at 751-52.

A common law approach for defining employees is not neutral among governmental decision-makers. It is self-consciously a preference for judicial, rather than administrative, determination of employee status. Determining whether an individual is a common law employee is a determination of pure agency law [that] involved no special administrative expertise that a court does not possess.¹⁰⁶ So a judicial holding that gives an employee a common law meaning is self-consciously a decision not to defer to decisions by such agencies as the National Labor Relations Board, Department of Labor, or Internal Revenue Service. As we shall see, US courts typically are more willing to define an individual as self-employed, and thus outside regulatory coverage, than the relevant regulatory agencies. (Of course, at the same time, a common law definition privileges judicial authority over employer authority; it creates, as we shall see further in section 6.6, the possibility that an employer might call individuals self-employed but a court nevertheless could find them employees.) Moreover, a common law approach removes any presumption that a given individual is legally an employee. In judicial proceedings, the burden of proof lies with the complainant, so it is normally either the regulatory agency or the individual that must prove employee status. Finally, a common law approach precludes reliance on many economic factors. A regulatory agency that were free to adopt its own definition of employee might employ different criteria involving the size of different businesses or wages of the individual. A court cannot incorporate such factors into a common law analysis.

¹⁰⁶National Labor Relations Board v. United Insurance Co., 390 U.S. 254 (1968). Agency law refers to the common law of agency, not to modern administrative agencies.

3.3.2 *The Internal Revenue Service's Twenty Factor Test* The Internal Revenue Code, like employment statutes, lacks a definition of "employee" or "independent contractor," so, like the employment statutes, presumably incorporates common law definitions. The Internal Revenue Service has developed an unloved twenty factor test designed to implement the common law approach.¹⁰⁷

¹⁰⁷The twenty factors that each constitute evidence of employment are:

1. Instructions. A worker who is required to comply with others' instructions about when, where, and how he or she is to work is ordinarily an employee.
2. Required training.
3. Integration into normal business operations.
4. Services rendered personally.

Since 1978, the IRS has been prohibited by statute from issuing any public guidance, such as regulations or revenue rulings, on the classification of workers for employment tax purposes.¹⁰⁸

5. Not hiring, supervising, or paying one's own assistants.
6. Continuing relationship.
7. Set hours of work.
8. Full time work that restricts the individual from other work.
9. Work on employer's premises.
10. Set sequences or orders of work.
11. Required oral or written reports.
12. Payment by time, rather than by job.
13. Reimbursement of business and traveling expenses.
14. Furnishing tools and materials.
15. No significant investment by worker.
16. No possibility of profit or loss.
17. Working for only one firm.
18. Services not generally available to public.
19. Subject to discharge.
20. Freedom to resign.

¹⁰⁸Revenue Act of 1978, ' 530, discussed supra n.94.

3.3.3. *The Fair Labor Standards Act's economic realities test* The broadest definition of employee under any statute is that of the Fair Labor Standards Act. Typically, it defines "employee" as "any individual employed by an employer," but, atypically, it goes on to define "employee" as "suffer or permit to work."¹⁰⁹ The interpretation of this language has varied considerably over time. Some courts have seemingly held that any individual "economically dependent" on an entity purchasing his services is for that reason an "employee" of that entity for purposes of the Fair Labor Standards Act.¹¹⁰ No doubt thinking of these decisions, the Dunlop Commission recommended that this "economic realities" test be applied to define the coverage of all federal labor statutes.¹¹¹ However, careful analysis of recent

¹⁰⁹Fair Labor Standard Act ' 3(e)(1) ("employee") and 3(g) ("employ"), 29 U.S.C. ' ' 203(e)(1) and 203(g).

¹¹⁰See, e.g., *Dole v. Snell*, 875 F.2d 802, 804 (10th Cir. 1989), quoting *Doty v. Elias*, 733 F.2d 720, 722-23 (10th Cir. 1984); *Secretary of Labor v. Lauritzen*, 835 F.2d 1529, 1542-45 (7th Cir. 1987)(Easterbrook, J., concurring), cert. denied 488 U.S. 898 (1988).

¹¹¹Commission on the Future of Worker-Management Relations (Dunlop Commission), Report and Recommendations 38 (December 1994).

judicial decisions reveals that the *Economic Realities* test does not usually yield meaningfully different results than the *Common Law* approach of other federal statutes.¹¹² It has recently been forcefully argued that it is supposed to be applied much more broadly than has usually been the case.¹¹³

¹¹²Lewis L. Maltby & David C. Yamada, *Beyond Economic Realities: The Case for Amending Federal Employment Discrimination Laws to Include Independent Contractors*, 38 *Boston College Law Review* 239 (1997). Judicial decisions are voluminous, but, for an example of one recent decision that seems most typical of current judicial interpretation, see *Herman v. Express Sixty-Minutes Delivery Service, Inc.*, 161 F.3d 299 (5th Cir. 1998), finding courier drivers to be independent contractors and therefore not entitled to overtime pay relying entirely on the fact that they could set their own hours, reject deliveries, were paid on commission, and tended to work for short periods. The court admitted that the drivers' low investment, skills, and initiative required, all pointed to status as employees (but found these factors outweighed), and did not discuss economic dependence at all.

¹¹³Bruce Goldstein, Marc Linder, Laurence E. Norton II, & Catherine K. Ruckelshaus, *Enforcing Fair Labor Standards in the Modern American Sweatshop: Rediscovering the Statutory Definition of Employment*, 46 *UCLA L.Rev.* 983 (1999).

3.4 *Current policy proposals.* There is widespread dissatisfaction with the current complexity of defining “self-employed,” but sharp division over the possible direction of reform. Employer groups and Congressional Republicans have proposed amending the tax code to essentially let the purchasers of services “check the box” whether those individuals are employees or independent contractors.¹¹⁴ Organized labor favors legislation that would make all individuals employees, unless the purchaser of their services exercises no control, the individuals make their services available to others, and they assume entrepreneurial risks.¹¹⁵ Another, more neutral reform proposal recommends that a broadened definition of self-employment be linked to measures that encourage better compliance with income reporting and tax payment rules, and that the choice between “employee” and “self-employed” classification be neutral of tax consequences.¹¹⁶ Unfortunately, abolition of “self-employed” status would be difficult in the US, as awkward problems would be created regarding independent

¹¹⁴Such legislation passed the House of Representatives in 1997 as the Independent Contractor Tax Simplification Act, HR 1972. It was not included in the Senate version of the underlying legislation and did not become law.

¹¹⁵Legislation introduced 4/22/99 by Reps. Kleczka (D-Wis) and Houghton (R-NY). This is not a particularly progressive proposal. The test would still permit classification as independent contractors of many individuals with low skills who are economically dependent on a single entity. Indeed, it seems to track the *Express Sixty Minute* courier service case discussed supra n.112, in which low-skilled individuals did not have to be paid overtime because the employer did not control their driving, they had a theoretical right to drive for other companies, and they were paid on commission.

¹¹⁶New York State Bar Association, Tax Section, Report on Recent Developments Regarding Worker Classification With Revised Proposals for Reform, February 24, 1998, 98 Tax Notes Today 39-36.

professionals or other skilled individuals, who in fact render services to hundreds of individuals over the course of a year.¹¹⁷ A more useful and realistic reform proposal might provide that any individual who renders services to just one purchaser over a year and makes less than the national median is an *employee* for purposes of all employment and tax regulation. Such a proposal is not currently politically realistic in the United States.

IV. Self-Employment in Situations of Economic or Other Dependency

¹¹⁷Examples might include a physician, lawyer, physical therapist, plumber, or painter who works for many different people. Is each of those recipients of his or her services a statutory employer? Would each patient, client, or customer be legally responsible for deducting the doctor or plumber's tax payments, or for providing a safe workplace? Despite its title, even Professor Linder's book *Farewell to the Self-Employed*, cited *supra* n.78, has trouble with such individuals, as well as with small entrepreneurs, franchisees, street jewelry sellers, and others, see 143-50.

4.0 The ILO requested discussion of this category. It does not exist as a distinct classification in the United States. Under most approaches, the fact that a given worker is economically dependent on a given purchaser of his or her services is at least relevant evidence that that individual is not self-employed at all, but rather an employee.¹¹⁸ For purposes of the Fair Labor Standards Act, in the opinion of some judges and commentators, this factor alone ought to be dispositive proof of employee status.¹¹⁹ However, some economically dependent persons have been held to be self-employed independent contractors, for example if they control the means and manner of their work, are paid on commission, and retain a theoretical right to work for others.¹²⁰ If they are independent contractors, their rights are not affected by their economic dependence: they need not be paid minimum wage or overtime (unless their work is rendered pursuant to certain federal contracts); their unions need not be recognized; they may be discriminated against on the grounds of sex or age, or sexually harassed; they need not be offered benefits offered to regular employees.

¹¹⁸See supra n. 110.

¹¹⁹Supra nn. 110, 113.

¹²⁰This is the likely classification for certain drivers and door-to-door sellers, for example. See *Express Sixty-Minute Delivery Service*, supra n.112.

V. Alternative Classifications for Persons Rendering Services

5.1. *students and student interns.* Some individuals rendering services are not legal employees because they are students or student interns, rendering services as part of their own learning process. Medical interns and residents until this year could not use federal labor laws to compel recognition of their union, a decision recently reversed by the National Labor Relations Board.¹²¹ Sexual harassment of a student intern does not violate the civil rights laws.¹²² Classification is complicated due to a Supreme Court decision that these students need not be enrolled in a formal educational program.¹²³ Learners may also be exempt from the Fair Labor Standards Act.¹²⁴

¹²¹Boston Medical Center Corp., 330 NLRB No. 30, 162 LRRM 1329 (1999)(medical interns, residents, and fellows are employees). See also Yale University, 330 NLRB No. 28, 162 LRRM 1393 (1999)(ordering factual hearing on employee status of graduate students working as teaching assistants).

¹²²O'Connor v. Davis, 126 F.3d 112 (2d Cir. 1997)

¹²³Walling v. Portland Terminal Co., 330 U.S. 148 (1947) (Trainees on a seven-day course need not be paid if training for their benefit and employer gets no immediate advantage.); 29 U.S.C.

' 214(a) (learners and apprentices exempt from Fair Labor Standards Act.

¹²⁴29 CFR ' 520.200 (regulations on student interns).

5.2 *volunteers* Both charitable and profit-making enterprises sometimes receive services from volunteers who are not paid for these particular services. The litigation concerning charitable enterprises usually concerns individuals who work only for that enterprise.¹²⁵ Another line of cases involves individuals who are employees, but who have rendered additional services as volunteer for which they are not entitled to be paid.¹²⁶ Thousands of individuals work as volunteers for on-line service providers

¹²⁵Compare *Tony & Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290 (1985)(people working in commercial ventures run by religious foundation are employees for purposes of Fair Labor Standards Act where they are economically dependent on foundation) with *Williams v. Strickland*, 87 F.3d 1064 (9th Cir. 1998)(individual restoring furniture at Salvation Army Adult Rehabilitation Center, receiving room, board, therapy, and counseling, not an employee; may be required to apply for public assistance and then turn over to Salvation Army). It is not easy to reconcile these cases.

¹²⁶*Benshoff v. City of Virginia Beach*, 180 F.3d 136 (4th Cir. 1999)(employed firefighters not employees when they serve on volunteer rescue squads); *Roman v. Maietta Construction Inc.*, 147 F.3d 71 (1st Cir. 1998)(employee not serving as an employee when he worked on the boss's son's race car). The analysis in these cases is rather impressionistic.

like America On-Line and Prodigy; a well-publicized lawsuit now claims compensation for them.¹²⁷

¹²⁷Lisa Napoli, *Despite a Passion for the Net, Many On-Line Volunteers Want Pay*, New York Times, April 19, 1999, at C1, col.2; Lisa Margonelli, *Inside AOL's Cyber-Sweatshop*, Wired, October 1999, at 138-139.

5.3 *undocumented workers*. Certain immigrants are not legally in the United States, or are legally in the United States but are not legally permitted to work. Nevertheless, it is quite common for such individuals to be employed illegally, for example in restaurants, small manufacturing, gardening and landscaping, and other day labor. Most employment statutes apply to these undocumented workers, despite the fact that it is not legal for them to work at all.¹²⁸ The rationale is that if employers faced no liability under the employment laws for undocumented workers, they would have an additional incentive to employ them, contrary to public policy. Thus, in theory, employers must comply with the Fair Labor Standards Act, Occupational Safety and Health Act, and unemployment insurance programs for undocumented workers, and recognize their unions. The practical problems encountered in enforcing these statutes for undocumented immigrants are of course quite severe.¹²⁹

VI. Case Studies of the Practical Effects of Worker Classification

¹²⁸See, e.g., *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 891-92 (1984)(undocumented alien workers are ~~employees~~ for purposes of National Labor Relations Act).

¹²⁹See Foo, *supra* n.75; Jennifer Gordon, *We Make the Road by Walking: Immigrant Workers, the Workplace Project, and the Struggle for Social Change*, 30 *Harvard Civil Rights-Civil Liberties Law Review* 407 (1995); Peter Kwong, *Forbidden Workers: Illegal Chinese Immigrants and American Labor* (New York: The New Press, 1997).

6.0 *Introduction* We have concluded a brief summary of worker classification issues in the U.S. as seen ~~A~~from the mountain.[@] As promised, it is difficult to resist the conclusion that worker classification issues are not terribly important in a macroeconomic sense. Unlike countries that regulate closely the substantive terms of employment contracts, the United States permits, and thus experiences, wide variation in the substantive terms under which employees, employees in triangular relations, and independent contractors are employed. Changing any individual's classification might change how he or she pays taxes, but would change few individuals' conditions of employment.

In this section, however, we will discuss individuals for whom the classification issues do matter, and try to explain why. Sections 6.1 and 6.2 deal respectively with truck drivers and construction workers, two groups for which discussions were specifically requested by the ILO. Section 6.3 deals with taxi and limousine drivers; 6.4, farm laborers; 6.5, household domestics; and 6.6, temporary and self-employed contractors in the high technology sector.

6.0 Truck Drivers

In theory, truck drivers should represent an excellent occupation for testing the practical

importance of classification for levels of protection, since all four categories covered in these reports are represented:

employees: many truck drivers are employees of trucking companies, and many, though not all, of these are represented by the International Brotherhood of Teamsters. Teamster representation is now largely limited to drivers of the Less-than-Truck-Load (LTL) sector, working out of terminals, picking up and delivering all day long, and carrying loads of less than 10,000 lbs (4540 kg).¹³⁰

employees in triangular relationships: many truck drivers work for small trucking companies

¹³⁰Michael H. Belzer, *The Motor Carrier Industry: Truckers and Teamsters Under Siege*, in *Contemporary Collective Bargaining in the Private Sector* (Industrial Relations Research Association Series)(Paula B. Voos ed. 1994). Truck drivers for the prominent Federal Express delivery company are employees, but nonunion, because Congress in 1996 granted the company's request that "express companies" be removed from the National Labor Relations Act and placed under a separate statute, the Railway Labor Act, otherwise applying only to railroads and airlines, and permitting union organization only in nationwide units. It is difficult to explain the American practice of legislative favors for single companies-- favors largely purchased by those companies through contributions to politicians-- to people familiar with legal systems that adhere to the norm that laws should be general. On the Federal Express exemption, see Richard Rorty, *Achieving Our Country* 141 n.1 (Cambridge, MA: Harvard University Press, 1998); James W. Brosnan, *Fed Ex bests labor in Senate vote*, [Memphis] *Commercial Appeal*, Oct. 4, 1996, at B4, 1996 WL 11066592.

and perform services under contract. For example, large manufacturers rarely employ their own truck drivers; normally the drivers work for a contractor.

owner-operators: the trucking sector has many genuinely self-employed individuals, known as *owner-operators* because they own their own trucks. This includes the stereotyped *cowboy* who owns his own truck and prefers self-employment to being anyone's employee. Most work in the full Truck Load (TL) sector, in which an entire truck is filled with the products of one manufacturer and taken to one distribution center. In this kind of trucking, no one needs to invest in terminals, or facilities to break down and transfer loads, so owner-operators may work efficiently. Owner-operators could affiliate with the Teamsters but rarely do. However, many are affiliated with the Owner Operator Independent Drivers Association, a genuinely independent association. It maintains a web site with information about medical, accident, life, and dental insurance and provides legislative representation.¹³¹

¹³¹<http://www.ooida.com>

dependent *independent* contractors: the literature does not reflect a major problem with truck drivers wrongly classified as self-employed owner operators, but undoubtedly some such individuals are in fact highly dependent on particular customers or intermediaries. Some owner-operators are not the classic cowboys but instead work under contract to very large entities. For example, Landstar System Inc., a trucking company with over \$1.3 billion annual revenue and known only through self-description, uses as drivers 8000 owner-operators (whom Landstar calls business capacity owners). Other, similar companies lease trucks to drivers (I do not know whether Landstar's drivers own or lease their trucks). Its 1000 agents are also self-employed. Agents invest about \$10,000 in an office and compatible computer system and manage their own offices. Landstar's corporate headquarters handles accounts payable and receivable.¹³² The legal status of these individuals must be a somewhat open question. Under the newer judicial decisions, they may be self-employed: they control the means and manner of their own work; they have entrepreneurial risk; they may work for others.¹³³ However, perhaps some of these individuals are in fact economically

¹³²Calling All Entrepreneurs, Traffic World, October 5, 1998, 1998 WL 9999541.

¹³³North American Van Lines, Inc., v. National Labor Relations Board, 869 F.2d 596 (D.C. Cir. 1989) found drivers to be independent contractors where they controlled their route, stops, and dress; held partial equity interest in their cabs; and could decide how frequently they would drive. The court was not impressed by the evidence of substantial control of the drivers by NAVL, including

dependent on Landstar and, under older approaches that have not been in favor lately, might for that reason be its employees.

monitoring, incentives, and discipline, and considered this compatible with status as independent contractors.

Unfortunately, there are no data available, and nobody has more than the vaguest idea, how many truck drivers work under each arrangement.¹³⁴ Around 1.3 million people are reported to be truck drivers in business establishment surveys. About 400,000 are represented by the Teamsters. I heard estimates of the number of owner-operators ranging from 140,000 to 350,000. Nor do any analyses exist of the practical impact that classification has on individual drivers, nor have any surveys been done of drivers to determine which classification they would prefer.

About the only significant legal difference between employees and owner-operators in the trucking industry involves the National Labor Relations Act: employee drivers may compel recognition of their union; owner-operators may not. Another potential legal difference between employee and independent contractor has been eliminated in this industry: all *employees* of motor carriers are exempt from the overtime, minimum wage, and other provisions of the Fair Labor Standards Act.¹³⁵ Other

¹³⁴A useful collection of data is Michael H. Belzer, *Paying the Toll: Economic Deregulation of the Trucking Industry* (Washington, DC: Economic Policy Institute, 1994).

¹³⁵The regulations exempting truck drivers from the Fair Labor Standards Act are at 29 CFR ' 782.0 et seq. The exemption was last studied in 1981 by the Minimum Wage Study Commission, which found it acceptable since 80% of over-the-road drivers were unionized. Report of the Minimum Wage Study Commission (1981). This figure was too high at the time and has become smaller since. Belzer, *supra* n.134, at 20-21.

legal differences between employees and independent contractors are also probably mostly theoretical. The exclusion of independent contractors from the Occupational Safety and Health Act is of little moment given regulation of motor safety through the Department of Transportation.

Employer and union officials told me that the maintenance of different classifications may genuinely accommodate different individuals, with unionized Teamsters preferring less risk, higher compensation per mile, and more evenings at home, while owner-operators prefer more risk and the possibility of more income. This is plausible, but cannot be confirmed in the absence of data on actual earnings, worker preferences, and safety and accident rates for each worker classification.

One recent study conducted by labor unions found sharp differences between employee truck drivers and owner-operators in a particular local market. The report estimates that twenty years ago, most drivers of container trucks at the ports of Seattle and Tacoma were employees of trucking companies. Today, such employees may make up only 30% of the workforce, while the other 70% (about 1000 drivers) are carried as independent contractors of trucking companies. A survey of all drivers revealed that the independent contractors earned on average only \$8.51 an hour (equivalent to starting pay of a fast-food worker in that region), averaged fourteen hours of uncompensated overtime per week, almost never had employer-provided health insurance and rarely purchased their own, and tend to defer maintenance on their trucks for lack of funds.¹³⁶

¹³⁶AFL-CIO, King County Labor Council AFL-CIO, & Teamsters Local 174, *Bustling Ports, Suffering Drivers: How inefficient trucking practices threaten the economic health of Puget Sound*

6.2 Construction Workers

American construction workers are either *employees* or *self-employed*. Most of the employees are in triangular relations as the ILO uses the term: they work for subcontractors who contract their labor to general contractors or building owners. (A half million construction workers are employees of their own incorporated business without payroll). Some observers report construction workers working as employees of professional employer organizations (PEOs), although this must still be a very small group. Because of specialized labor law doctrines in the construction industry, discussed above, employers are legally isolated from each other to a somewhat artificial degree, and the ultimate recipient of the services of employees in these triangular relations has few responsibilities to them.

Essentially all the self-employed are genuinely self-employed: painters, carpet layers, and home builders who work for themselves, keep their own paper work, take a succession of jobs in which they work, as independent contractors and not employees, for general contractors or building owners.

ports and what we can do about it, <http://207.5.92.23/teamsters174/index2/html>

There are no large construction employers like the trucking company Landstar (discussed in section 6.1) or Microsoft Corp. (discussed in section 6.6), that maintain work staffs of thousands of individuals classed as independent contractors.

As mentioned above, 1.35 million construction employers have no payroll: these are self-employed individuals. In New England and the lower Mississippi Valley, between a quarter and a third of all construction employment is in proprietorships without payroll.¹³⁷ The 1996 Current Population Survey revealed 1.52 million unincorporated self-employed in construction, and another half million incorporated self-employed.¹³⁸ The largest percentages of self-employed were carpet layers (56%), managers (45%), painters (45%), and carpenters (32%). The earnings distributions for unincorporated self-employed construction workers were strikingly similar to private employees generally, but the self-employed construction workers are unlikely to have health insurance or retirement savings, or any feasible way of obtaining these privately.¹³⁹

There may be considerable overlap between the employee and self-employed groups, and this may explain some of the numerical discrepancies between the business and household surveys. Union officials made clear that the ability to work additional jobs as an independent contractor, or to have their

¹³⁷From 1992 Census of Construction Industries, as reported in *Construction Chart Book*, supra n.27, at 3.

¹³⁸As mentioned, owners of incorporated businesses are technically employees of those businesses, but for practical purposes they may be considered self-employed.

¹³⁹*Construction Chart Book*, supra n.27, at 21.

own companies, was very valuable to members of construction unions. They did not point out, but as this report observed above, this would permit construction workers to disguise income and deduct more business expenses. The attractiveness to their very members of adding some self-employment to union construction work must influence the unions' acceptance of self-employment in the industry, and perhaps the same is true for the Teamsters in the trucking industry.

It is difficult to avoid the conclusion that the trucking and construction industries are not the best US industries in which to study the impact of worker classification on worker protection, though there may be local markets that better show this impact. Both are industries in which, so long as the law recognizes any category of self-employment, there will be genuine self-employment here. The lone cowboy with his own truck, hired out for many different jobs over the year, the plumber who installs heaters and sinks in many different buildings over the year, are hard to classify as employees. Their income comes from many different sources and no entity is really their employer, so their income is reported (if at all) on many Form 1099's. This opens up the possibility that they may disguise some of this income or overstate their business expenses, but this affects the taxing authorities more than the labor regulators. In fact, an individual who does some work for unionized companies with access to union benefits, and other work as a self-employed individual, may have the best of both worlds. While better data could certainly be imagined, it does not appear that, as a group, self-employed truck drivers or construction workers, or such individuals in triangular relations, present especially pressing problems of poverty or exploitation. There is no widespread practice of misclassifying trucking or construction employees as independent contractors in order to avoid unionization or labor regulation. (There is no

data available on the relationship between classification and accidents.) We turn our attention to some other industries in which these problems are more apparent.

6.3 Taxi and Limousine Drivers

Taxicab drivers in New York City can be divided among several employment categories. Before 1979, about 22% of drivers were employees of a fleet and represented by a labor union. Drivers received benefits including health insurance, pensions, employer contributions to social security, scholarships, legal services, unemployment and disability insurance. The remaining 78% of drivers owned their own taxis. In that year, the New York City Taxi and Limousine Commission (hereafter "TLC") repealed the long-held industry prohibition against the leasing of livery cabs. As a result, employee-drivers have essentially disappeared from the yellow cab sector in which drivers pick up passengers by being hailed on the street. Today, such cabs are typically leased by self-employed drivers from the owner of the medallion (the official permission to operate a yellow taxi) or from a minifleet which consists of two taxicab owner-operators under two medallions.¹⁴⁰ In the black car

¹⁴⁰Bruce Schaller, The Leasing of Taxicabs to Drivers As Independent Contractors, white paper prepared for Service Employees International Union Local 74 (March 1999), available at <http://www.schallerconsult.com/taxi/taxifb.htm>, the source for all the statistics in this section.

section of the industry. Cars hired by telephone that pick up at the door. Drivers are normally employees, but nonunion.

The effect of the elimination of yellow taxi employees and replacement by lessees has been dramatic. Driver compensation has dropped about 11% since the 1979 TLC reform. Drivers pay the owner a lease of US\$104, for a 12 hour shift, paid in advance by day or week.. This lease fee was capped by the TLC in 1996, because of gross disparities in income between the drivers and the owners. However, it is still a tremendous hurdle to overcome. Drivers work very long shifts. New York City drivers undertake about 35 jobs a day, as compared with London drivers who average about 20 jobs a day, under similar arrangements.¹⁴¹ The length of the shift encourages work-related accidents that haunt the industry today. Meeting the terms of the medallion lease is only one expense for cab drivers. Indeed, while many medallion owners supply the insured car, they also try to charge drivers for damages and ordinary wear. Cab drivers have never recouped the wage and compensation package they had prior to 1979.

Dramatic turnover and attrition has deeply affected driver and passenger safety and quality of service, including a scarcity of experienced drivers who know the city and drive safely. Some 43% of licensed drivers in 1994 stopped driving cabs within four years. Turnover in cabdrivers, already high compared with other industries, is today estimated at 30%. Accident rates among taxi drivers shot up

¹⁴¹Interview, Kevin Fitzpatrick, NYC Taxi Workers Alliance, October 29, 1999.

sharply between 1990 and 1994, presumably in part reflecting inexperienced drivers, although rates have declined more recently, reflecting increased policing of taxi drivers. Accident rates among lessee drivers are actually the *lowest*. The highest rates are among the employees of fleets, today typically nonunion and the least experienced.

New Yorkers currently rate taxis as the lowest in value, safety and service among all transportation means in New York City. The City has instituted dramatic increases in checking of cabs by police for overcharging passengers, outdated licenses and the enforcement of traffic laws. The surviving union continues to advocate the reinstatement of employment relations in the industry.

6.4 Farm Labor

Agricultural laborers in California are substantially disadvantaged by triangular relationships that are largely responsible for continued low rates of unionization and poor working conditions.

Farms often hire labor through farm labor contractors (FLCs) or custom harvesters. The contractor provides crews of 20 to 50 workers, and the farm owner deals only with the contractors. This system long predates modern labor regulation, and originated in the nineteenth century when the workers, then as now, spoke no English and needed a bilingual contractor as a go-between. Regulation recognizes the FLC system. For example, under California's Agricultural Labor Relations Act, the landowner or farm operator, not the FLC, is the employer for collective bargaining purposes.¹⁴² Also, beginning in the 1960s, the U.S. Department of Labor and some state governments began registering FLCs. In California, they must pay a \$350 annual licensing fee, post a \$10,000 bond, and be fingerprinted and tested for their knowledge of pesticide safety and labor law. Nevertheless, unionization rates are very low and rates of violations of employment laws very high. Coordinated federal-state labor law enforcement in California in 1992-93 found major violations committed by nine out of ten FLCs inspected. Unions have found it almost impossible to organize crews of FLCs, and

¹⁴²Cal.Labor Code ' 1140.4(c). Agricultural workers are excluded from the National Labor Relations Act and their collective bargaining thus regulated only at the state level.

employers facing unions often substitute compliant FLCs and custom harvesters.¹⁴³

6.5 Domestic Household Labor

¹⁴³Philip L. Martin, Collective Bargaining in Agriculture, in *Contemporary Collective Bargaining in the Private Sector* (Industrial Relations Research Association Series) 512-16 (Paula B. Voos ed.)(1994).

Another industry with an interesting mix of employment and self-employment consists of paid household work: housekeepers, cleaners, and child care workers who work in individual houses. (Some of these individuals are referred by employment agencies, so there are also triangular relations here). Paid household workers were originally excluded from New Deal labor and employment legislation of the 1930s.¹⁴⁴ However, in 1950 they were added to the Social Security System, so payments into the fund are supposed to be made for them, whether they are considered employees or self-employed.¹⁴⁵ In 1974 they were included in the Fair Labor Standards Act, so must be paid minimum wage and may not work more than forty hours a week without extra compensation.¹⁴⁶ They are typically covered by state unemployment insurance but not by workers' compensation for injury, though there are exceptions to both generalizations.¹⁴⁷ They are still excluded from the National Labor Relations Act's definition of employee, although the historic lack of success of attempts to form unions of household workers makes the exclusion rather theoretical.¹⁴⁸ It would be the rare household that

¹⁴⁴Peggie R. Smith, *Regulating Paid Household Work: Class, Gender, Race, and Agendas of Reform*, 48 *American University Law Review* 851-924 (April 1999).

¹⁴⁵Edward D. Berkowitz, *America's Welfare State* 58-60 (1991) describes the process of incorporating domestic workers into Social Security.

¹⁴⁶Fair Labor Standards Act Amendments of 1974, PL 93-259, 88 Stat. 55, 62, codified at 29 U.S.C. ' 206(f)[minimum wage] & 207(l)[maximum hours]. Domestic workers residing in the household are exempt from the forty-hour maximum week. 29 U.S.C. ' 213(b)(21).

¹⁴⁷State laws are reviewed in NOW Legal Defense and Educational Fund, *Out of the Shadows: Strategies for Expanding State Labor and Civil Rights Protections for Domestic Workers* (1997).

¹⁴⁸National Labor Relations Act ' 2(3), 29 U.S.C. ' 152(3). On attempts to form unions, see Phyllis M. Palmer, *Domesticity and Dirt: Housewives and Domestic Servants in the United States, 1920-1945* (1989); Donna L. Van Raaphorst, *Union Maids Not Wanted: Organizing Domestic Workers 1870-1940* (1988); Smith, *supra* n.144.

would employ enough people to be an employer for purposes of the Civil Rights or Family and Medical Leave Acts. So the practical effect of calling a household worker an employee is: the employer must normally withhold income tax payments, pay Social Security taxes and unemployment insurance premiums, and observe the Fair Labor Standards Act.

However, many household workers are treated as self-employed. In such cases, taxes are not withheld; they are supposed to make their own payments of taxes and into social security funds; income is supposed to be reported but often is not; and fair labor standards do not apply. Finally, many household workers are immigrants not legally permitted to work. Such individuals are paid in cash and no reports or payments are made to the government.

Ethnographies suggest that it is usually the domestic worker who specifies whether the arrangement will be as employee, self-employed, or off the books.¹⁴⁹ Many, even those legally permitted to work, prefer to work as independent contractors, or off the books, estimating: (1)(accurately) that they are unlikely to be caught by taxing authorities; (2)(often in error) that their taxes are higher than they really are, and figuring they need the money now; and (3) that they will never need to draw on Social Security old age benefits, because they will have returned to another country, or for some other reason. Of course, immigrants not legally permitted to work have yet another reason to work off the books, reporting income neither as an employee nor as self-employed.

¹⁴⁹See, e.g, Mary Romero, *Maid in the U.S.A.* 148 (New York: Routledge, 1992)(describing tax avoidance efforts by domestic workers); Smith, *supra* n.144, at 921 n.428.

Household surveys reveal about 1.13 million employees in private homes, while only about three hundred thousand households report household wages to the taxing authorities. Clearly, even as to household workers legally able to work, income is not reported and payments to Social Security are not being made (again, the reporting obligation pertains both to independent contractors and employees).¹⁵⁰

And of course many household workers are immigrants unable to work legally; estimates as to their number vary widely.¹⁵¹

Household workers thus present in microcosm all the problems that haunt worker classification issues in the United States. Should they all be classified as employees, requiring, perhaps paternalistically, many to save for retirements in ways they choose not to? (There is no current political support for this proposal). Should they all be classified as independent contractors, making them fully responsible for paying their own taxes, although we know that even fewer will pay taxes at all as independent contractors? (There is some political support for this proposal).¹⁵² Should the Internal

¹⁵⁰Smith, supra n.144, at 921n.428 (quoting Internal Revenue Service analysis). Before 1994, half a million households reported payments to household labor. In that year, Congress simplified the reporting and payment requirements and added a line to the standard report of income filed by individual taxpayers asking for the amount of taxes owed on wages paid to household help. It was anticipated that this would lead to more reports of such wages. However, the changes had precisely the opposite effect, and now only around three hundred thousand households report paying such wages. David Cay Johnston, *Despite an Easing of Rules, Millions Evade Nanny Tax*, New York Times, April 5, 1998, at 1.

¹⁵¹Smith, supra n.144, collects some guesses at 923 n.437.

¹⁵²Johnston, supra n.150.

Revenue Service make more effort to enforce the obligations of households toward their domestic employees? If yes, what current area of enforcement should be curtailed? There is no consensus on these questions.

6.6 High-Technology Industry's Use of Temporary and Self-Employed Labor

6.6.0 Introduction A great deal of publicity has concerned the allegedly heavy use by high-technology industry of temporary and self-employed workers. Defenders of these job classifications

often consider them critical to achieving explosive growth in a high-technology district. Opponents consider them devices for exploitative and illegal treatment of workers, pointing to a successful lawsuit against Microsoft Corporation by some of its employees. Like other such debates discussed in this report, this debate in part seizes on the classification issues as a poor proxy for the real issues of contingent jobs vs. career jobs. High-technology firms do appear to employ a lot of temporary and self-employed labor, because it is convenient, but many of these individuals could be converted into regular company employees, as appears to be occurring in Microsoft's case. However, this is one industry in which classification issues do matter. Because of the importance in this industry of compensation through stock options, classifying more individuals as employees would give them more rights to participate in benefits plans from which they could not be excluded. Indeed, this was the point of the *Microsoft* litigation.

6.6.1 *Is Contingent Labor Necessary to Achieve High Technological Growth?* The thesis linking the phenomenal growth of Silicon Valley (Santa Clara County), California, to its short-term employment contracts, has been made in an influential book by AnnaLee Saxenian.¹⁵³ (As with any other discussion of contingent or noncareer jobs in the U.S. context, classification issues were not an important index of contingent status: it is not important for Saxenian's thesis whether the professionals, engineers, and managers that she describes were hired as regular employees, through temporary help

¹⁵³AnnaLee Saxenian, *Regional Advantage: Culture and Competition in Silicon Valley and*

services, or as self-employed consultants.) The book compares Silicon Valley's explosive growth in the 1970s and 1980s to the slower growth of the similar high technology region around Boston, Massachusetts=Route 128, and attributes Silicon Valley's comparative success largely to its reliance on short-term labor contracts. (Both regions began the 1970s with similar mixes of products, levels of economic activity, government spending, and ties to universities). Professionals in Silicon Valley moved rapidly among established firms, rivals, spin-offs, and new start-up companies, while their counterparts in Boston pursued more traditional careers in the internal labor markets at Digital or Wang. This labor mobility in California assisted rapid growth for two broad sets of reasons. First, it permitted firm flexibility, and start-ups of new companies, in an uncertain and fast-changing business environment. For example, programmers can be hired to write script for new programs, as needed, without the necessity of adding them to the firm for any longer term. Second, rapid labor mobility spreads information. As Intel produced each generation of basic chip, its specifications were well-known to former employees, firms licensing Intel technology, and so on, and new start-ups could bring co-processors, compatible hardware, and software programs to the market, available as soon as each generation of chips hit the market. Saxenian's book contains many similar stories.

Route 128 (Cambridge, MA: Harvard University Press, 1994).

Saxenian's basic thesis, linking Silicon Valley's explosive growth to its pattern of short-term employment contracting, cannot be said to have been rigorously proven.¹⁵⁴ Nevertheless, it seems to make sense to many people familiar with high-technology districts, and has been quite influential in the U.S. Some of the current U.S. academic skepticism about employment regulation, and attraction to contingent or other flexible jobs, comes from scholars normally sympathetic to working people, but who believe that high-growth, high-technology districts are made possible by temporary and self-employed labor, particularly in highly-compensated work. Of course, nobody would argue that temporary work and self-employment as legal concepts are necessary to replicate Silicon Valley. As mentioned, if forced, companies could replicate these employment arrangements by hiring regular employees and terminating them after a short time. Certainly other institutional arrangements can and do spread information rapidly among competitors, such as a governmental agency like Japan's Ministry of Trade, academic publication, informal know-how sharing, or formal licensing of technology. However, in the American legal and political context, most observers believe that a high-velocity labor market is a cheap

¹⁵⁴Curiously, neither Saxenian nor anyone else seems actually to have shown that labor turnover rates for engineers in northern California in the 1970s and 80s were any higher, or job tenures shorter, than for their counterparts in Massachusetts. Another, potentially devastating, critique of Saxenian was made to me by Professor Daniel J.B. Mitchell of UCLA. If one assumes some completely exogenous reason for Silicon Valley's success: California sunshine or optimism, for example—the observed patterns of labor contracting are exactly what one would predict, but as an effect, not a cause: new firms form, so people report shorter times at their current employment and higher rates of separation; new firms succeed, so employees prefer payment in stock options; etc. Santa Clara County reports employment by temporary agencies at three times national levels—though, as mentioned above, measuring employment by temporary agencies is particularly error-prone, *supra* TAN 37-40. Rates of self-employment are unremarkable, close to the national average of 7%. Chris Benner, *Silicon Valley Labor Markets: Overview of Structure, Dynamics and Outcomes for Workers*, Task Force on Reconstructing America's Labor Market Institutions, Working Paper 07, <http://mitsloan.mit.edu/iwer>

and convenient device for facilitating new start-up firms and spreading technological information.

Workers in such a labor market, and their legal problems, have begun to be studied carefully.

6.6.1 *High-end Independent Contractors* We noted above that self-employed individuals, taken as a class, are as remunerated, stable, and satisfied as other US workers. Two recent studies of high-end independent contractors, neither limited to Silicon Valley, reinforce the point. Specialized staffing agencies refer project managers-- people with experience in marketing, personnel, or design-- who are hired to head teams at companies with particular projects (design a particular marketing program; design a new compensation system). Once hired, the individuals are treated as independent contractors. Companies turn to these agencies when they need particular skills or experience, when they need to hire more rapidly than their own bureaucracies permit, and when they anticipate that need for these particular skills will be satisfied and the individuals then let go. Some of the independent contractors loved the change and challenges, some sought permanent employment and used temporary work as a way-station, some were contractors in order to limit their hours of work. All appreciated being relieved of responsibility for the politics and layered bureaucracy of traditional corporations. All were well-compensated, though many received benefits through a spouse.¹⁵⁵ A second study interviewed 52 technicians (programmers, hardware engineers, technical writers, systems administrators) who work as independent contractors. They were also highly satisfied; viewed formal organizations as inherently irrational social systems that are abusive of technical professionals, made

¹⁵⁵Jeffrey L. Bradach, *Flexibility: The New Social Contract Between Individuals and Firms?*, Harvard Business School Working Paper 97-088 (May 1997).

more money than they thought they would as employees. Only four expressed a desire to return to permanent employment; most had turned down such offers.¹⁵⁶

¹⁵⁶Gideon Kunda, Stephen R. Barley & James Evans, Why Do Contractors Contract? The Theory and Reality of High End Contingent Labor, Task Force on Reconstructing America's Labor Market Institutions Working Paper 04, <http://mitsloan.mit.edu/iwer> An amusing look at the life of some young, highly successful Silicon Valley programmers who work exclusively as independent contractors is Po Bronson, The Nudist on the Late Shift 98-138 (1999).

6.6.2 *Low-end Temps* Silicon Valley's is a highly unequal economy even by US standards, and many low-level jobs are filled by THS workers. A small sample of sixteen low-end temps revealed near-unanimity about the advantages of temp work (control of hours, low stress and commitment) and disadvantages (lack of benefits).¹⁵⁷ Janitors are overwhelmingly Mexican or other Latin American immigrants and work for cleaning contractors. They fall into three groups: employees of companies under contract to Service Employees International Union Local 1877, who make around \$7 per hour and have health insurance; employees of nonunion contractors, who make less than \$5.50 per hour and have no benefits; and small crews, mostly middle aged women, who work for self-employed contractors and are paid in cash, often well below the legal minimum wage.¹⁵⁸

6.6.3 *The Microsoft Litigation* The most famous litigation concerning worker classification issues has involved the Microsoft Corporation, located in Redmond, Washington (not Silicon Valley). It is an unusually revealing look at the array of classification techniques employed by one very large company, and some practical consequences of these classifications. It is also the best single introduction to the practical mechanisms available for protecting employees who have been excluded from employment protection due to misclassification by their employer.

¹⁵⁷C.N. Darrah, *Temping at the Lower End: An Incomplete View from Silicon Valley*, Task Force on Reconstructing America's Labor Market Institutions Working Paper 10, <http://mitsloan.mit.edu/iwer>

¹⁵⁸Christian Zolniski, *The Informal Economy in an Advanced Industrialized Society: Mexican Immigrant Labor in Silicon Valley*, 103 *Yale Law Journal* 2305, 2314-15 (#8, June 1994).

The plaintiffs worked full-time at, and exclusively for, Microsoft, as software testers, production editors, proofreaders, formatters and indexers. (The named plaintiffs' job was to translate Microsoft manuals into Spanish). However, they were excluded from certain benefit programs and classified successively as independent contractors, and, later, temporary agency employees. When first hired as independent contractors, they were told they were responsible for their own taxes, and no taxes were withheld.

The Internal Revenue Service, presumably applying its infamous twenty-factor test, determined that the plaintiffs were employees for purposes of the tax laws, and that Microsoft would thereafter be required to withhold taxes. Microsoft did not contest the determination that the plaintiffs were employees. It agreed to pay back taxes and also to pay the plaintiffs any overtime for which, as employees, they should have been compensated. These were no small concessions by Microsoft. As mentioned above, the IRS has no authority to order workers reclassified, or collect back taxes if the employer had a reasonable basis for its misclassification. Microsoft converted some individuals to permanent employment. Others were required to become employees of a new temporary employment agency, though they would continue to work full-time at Microsoft.

The stakes were raised however when plaintiffs sought to participate in stock purchase plans that Microsoft maintained for employees. Plaintiffs' theory was that, since the IRS had ruled that they had always been employees for purposes of the tax laws, they necessarily had the right to participate

in stock purchase or other benefits plans open to employees. Microsoft argued that their status for tax purposes did not control their rights to benefits, and that the plaintiffs had been hired with the specific understanding that they would not be eligible for the stock purchase plan.

The courts eventually ordered the plaintiffs admitted to the stock purchase plans, but through a circuitous path that has created much uncertainty as to the application of the case beyond its specific facts. The court of appeals declined to reach the issue of whether an IRS determination of employee status would always be controlling for employee benefits purposes, since Microsoft had conceded that these individuals were employees under a common law test. Future employers may not concede this point. Second, the court noted that the terms of Microsoft's stock purchase plan incorporated a provision of the Internal Revenue Code requiring that all employees be able to participate in the plan. However, the court of appeals initially declined to order that the plaintiffs be included in the stock purchase plans. It noted that, while the plaintiffs were improperly excluded from the plan, they never had paid for any stock either, and left to the trial court the determination of an appropriate remedy.¹⁵⁹ Subsequently, the trial judge limited the relevant class of plaintiffs to those working before 1990, in the precise positions that the IRS had found to have been misclassified. The court of appeals reversed this ruling, and held that its rulings applied to *all* Microsoft employees wrongly characterized, whenever they were hired, and whether the misclassification was as independent contractor or as employee of a

¹⁵⁹Vizcaino v. Microsoft Corp., 120 F.3d 1006 (9th Cir. 1997), cert. denied 522 U.S. 1098 (1998).

temporary agency.¹⁶⁰ As to the individuals forced to become employees of the temporary help agency, the court stated that an individual might be a common law employee both of an agency and of its client. The issue is whether these individuals are employees of Microsoft under the *Darden* factors.¹⁶¹ It is irrelevant whether they might also be employees of someone else.

¹⁶⁰Vizcaino v. United States District Court, 173 F.3d 713 (9th Cir. 1999).

¹⁶¹Referring to the *Darden* case, discussed supra n.105.

While the Microsoft litigation continues, it has already pointed out several unresolved issues in the law of worker classification and its relationship to benefits.¹⁶² First, does the case apply to many employers other than Microsoft? Employer counsel have been telling clients that benefits plans can normally be created that treat different groups of employees differently. This is not true without limit, however. The *Microsoft* court expressly relied on a provision of the tax code requiring that stock purchase plans be open to all employees. There are many nondiscrimination rules relevant to employee benefits, too complex to summarize here, but requiring as a general matter that benefits available to top company employees be available to all.¹⁶³ As noted above, many companies hire through temporary agencies in the first place in order *not* to extend benefits, typically health insurance and pensions, but also stock purchase plans, to everyone working for them. Indeed, it is the employers with the most generous benefits for some of their workers who are *most* likely to hire other workers from temporary help agencies.¹⁶⁴ If many or all such individuals are now employees of the company, they will not always be excluded from benefits plans. Companies may face pressure to reduce the levels of benefit to

¹⁶²New developments in the case are posted on the web site of the plaintiff employees= organization, the Washington Alliance of Technology Workers, <http://www.washtech.org>

¹⁶³Good summaries and critiques of the nondiscrimination rules on employee benefits are Joseph Bankman, Tax Policy and Retirement Income: Are Pension Plan Anti-Discrimination Provisions Desirable, 55 University of Chicago Law Review 790, 795-800 (1988), and Joseph Bankman, The Effect of Anti-Discrimination Provisions on Rank-and-File Compensation, 72 Washington University Law Quarterly 597, 599-601 (1994). These rules are inordinately complex. There are different rules for different kinds of benefits. Some employees may be excluded from benefits. Other benefits may be linked to compensation, so that while all employees may participate, more highly-compensated will receive more benefit.

¹⁶⁴Supra n.51.

everyone, if they must be extended to all. Like strawberry jam, employee benefits can become thinner as they are spread more widely.

Of course, even as broadened by the court of appeals, the Microsoft plaintiff class applied only to common law employees of Microsoft, presumably people, like the plaintiffs, who had worked only at Microsoft, and for some period of time. Many people referred by temporary agencies, working at a particular client only for short periods, are still employees only of the agency, not of the client. However, relationships like Microsoft's sometimes jokingly called "permatemp" relationships are not so rare, either. Presumably the "CompTech" temps described in Vicki Smith's article, who had worked at CompTech an average of 27 months,¹⁶⁵ and the employees working at Pacific Gas and Electric Company for many years but carried as employees of a succession of temporary agencies,¹⁶⁶ would be plausible candidates to be employees of CompTech and PG&E, under the *Microsoft* holding.

¹⁶⁵Supra n.55

¹⁶⁶Burrey v. Pacific Gas & Electric Co., supra n.60. In that case, "temporary" better described the agencies than the employees. The holding of the case was that the trial court should first determine whether the plaintiffs were employees of PG&E before examining the provision of the Internal Revenue Code on leased employees.

Second, what exactly is the relationship between an employee determination under the tax laws and one under the employment laws? As noted, the *Microsoft* court refused to address this question. We noted above that commentators sympathetic to the labor movement have often stressed the supposed confusion caused by a multiplicity of statutory tests for an employment relationship. As Americans say, you have to be careful what you ask for because you might get it. If friends of the labor movement ask for a single standard definition of employee, they might get it and it might be narrower than they like. The *Microsoft* case suggests that American law may now be close to that single definition of employee, and that it is the common law definition. Surely the premise of the entire *Microsoft* litigation was that the IRS's determination of employee status would also apply to questions of employee benefits. It is possible that the case marks one step in an increasing convergence into a single analysis for employee status, focusing on common law questions about the control of means and manner of work. This would have the advantage of a unified approach, and the disadvantage of an approach divorced from the purposes of employment law, subject to employer manipulation, and likely to create an inappropriately large class of the self-employed.¹⁶⁷

Third, what kind of relief is appropriate when an employer misclassifies individuals who are

¹⁶⁷This is what I meant by saying above, text accompanying n.21, that the supposed conflict among standards has been exaggerated by friends of working people. If the issue were really only one of conflicting standards, it may easily be resolved by conforming all statutes to the definition of self-employed most easily invoked unilaterally by employers. Indeed, this appears to be happening. The issue is not the multiplicity of standards, but rather the unification of analysis around a standard that is easily manipulated by employers and self-consciously advances no policy purpose.

really its employees? The restrictions that § 530 places on the Internal Revenue Service¹⁶⁸ have now given rise to an equal and opposite overreaction in *Vizcaino v. Microsoft*. With hindsight, all the plaintiffs will assert that, had they been told they were really employees, they would have bought the maximum permissible quantity of Microsoft stock, probably at its lowest selling price. The mechanism for determining what relief is owed each individual of the court of appeals= broad class= every misclassified employee= defy belief. Microsoft hardly merits much sympathy, but many employers might find themselves in Microsoft's position. One's sense of the propriety of subjecting them to large bills for back benefits doubtless reflects one's sense of the importance of the problem of classification of workers in American life.

CONCLUSION

7.0 *Summing up.* By some standards, the US system for classifying workers is a simple one: one is either an employee, or self-employed independent contractor. There are no other classifications, for most purposes. No legal meaning attaches to such descriptions as dependent contractor, permanent employee, regular employee, temporary employee, and the like. There are only employees entitled to a modest suite of rights, and independent contractors entitled to fewer.

In practice, however, even this two-category system is inordinately complex. Many of its

¹⁶⁸Supra n.96

complexities could only be hinted at in a report of this length. It is true that only around ten percent of the workforce is considered either self-employed or the employee of something other than the recipient of the services. However, within this ten percent, a substantial number of individuals might plausibly claim to be employees instead, because they are economically dependent on a single entity that exerts major control of their work. The practical consequences of such potential misclassification resist generalization. For some individuals, classification as self-employed, or an employee of a different entity, might put them beyond the reach of union organization, or minimum wage laws, maximum hours laws, unemployment insurance, or benefits available to (other) employees. Others might welcome self-employed status to evade taxes or social security contributions, or to retain tort suits against dangerous work. Many individuals may simultaneously enjoy benefits and incur costs due to misclassification.

Generalization is made even more difficult by the numerous individual exemptions and provisions from employment and revenue statutes, so that potential differences between employment and self-employment are made less meaningful in particular cases. This is true for truck drivers and computer programmers, for example, where in both cases employees need not be paid premium pay for overtime work. Other legislative attempts to equalize treatment between the employee and self-employed (e.g. domestic workers) or employee and employee of a contractor (e.g. agricultural employees in California) have been failures, as affected individuals cannot make effective use of relevant protective legislation, no matter how they are classified.

While complete understanding of the meaning of worker classification should ideally involve

even more such localized studies, these could proliferate indefinitely, and it is time instead to evaluate the US classification system. It is true, as noted in paragraph 0.1, that the recent job-creating performance of the US labor market has been impressive, and one hesitates to suggest changes. Still, it is difficult to see that the current definition of "employee" is functional for any purpose. A significantly broader definition would reduce uncertainty, eliminate some anomalous exclusions from legal protection, and would not disadvantage any legitimate employer interest.

7.1.1 Current classification law contributes little or nothing to the US job creation

Miracle. There can hardly be any doubt that the remarkable ability of the US economy to generate new jobs reflects in part the fact that many of these jobs are low-paying and can later be eliminated. This flexibility, so important to the booming US service and technology sectors, owes little or nothing to worker classification, but rather reflects the general US unwillingness to use law to stipulate anything but minimal employment standards. Self-employment in the US is not even growing. It has contributed nothing overall to recent job creation. Hiring through temporary agencies, by contrast, is growing. However, it is still such a small part of the labor market (perhaps two percent) that it has contributed little to US job growth. More to the point, if the firm receiving the services of the temporary worker became her legal employer (or joint employer) as well, costs to that firm would not necessarily increase. It could still pay low wages and provide no vacations or health insurance. It could still employ at will or eliminate the job at a later date. It would not even necessarily take on administrative expense: it could even hire through temporary help agencies or outsource its personnel administration to an

independent contractor, if these entities could do the job more cheaply. The main practical impact of making the client firm an employer or joint employer would be that the temporary employee might have to be included either in a union, or in certain employer benefit plans. Perhaps at the margin some such jobs would no longer be created, if the client firm were the legal employer or joint employer, but most probably would.

7.1.2 Current US classification poorly identifies appropriate targets of legal protection.

As we have seen, US *employees*, *self-employed*, and employees in triangular relations are all amorphous and diverse classifications. Each includes dependent individuals who may need legal shelter from the employment market, and many others who are doing very well. Attempts over the last few years by unions and other advocacy organizations to focus attention on exploited temps or self-employed people may have backfired, as all of these groups include many satisfied individuals.

7.1.3 Current US classification is potentially expensive and uncertain. Consider the Microsoft Corporation, which learned to its dismay that: (1) employers are not necessarily free to classify workers however they like. Some individuals, working under the close direction of a single entity, just are its *employees* as a matter of law, irrespective of any documents they signed or company designation. (2) This legal determination, however, is hard to predict and involves weighing many factors that different people may weigh differently. (3) An employer that compensates employees through stock options or other benefit plans may face enormous liability for guessing wrong.

7.1.4 *Current US classification results in anomalous regulatory failures that advance no policy goal and make law appear irrational.* It is true that it is very hard to find major cases of large groups disadvantaged by the current classification scheme. Large groups of individuals living in poverty but excluded from labor regulation due to their misclassification as self-employed simply cannot be identified; as indicated, the self-employed group is small and not growing, and few are near poverty. The injustices, if any, of US worker classification law are dwarfed by the injustice of employees, perhaps fifteen or twenty percent, holding jobs that pay wages at poverty level. A national initiative to improve that situation could not rationally focus just on employees of temp agencies; these employees would be a small subset of the larger group of employees who are poorly-paid and lack insurance against uncertainty. Again, as noted repeatedly, there is no US inclination at the moment to increase protection for poorly-paid employees. The politically dominant consensus reflects rather some concern that increasing such protection might slow the creation of jobs, and at best, the hope that such jobs are important way-stations into employment and will eventually help their holders into better jobs. However, if new policies were to be created for such jobs, it would be irrational to target them just on temporary employees.

The injustices of the US definition of *“employee”* are rather of the smaller, nagging, revulsion-
against-
irrational-
inequality kind.

Why is the
worker
employed by a
contractor or
dispatched by
an agency an
employee of
the client firm if
he or she is
injured by the
client's
negligence, but
for no other
purpose? Why
does that client
firm receive the
benefit of
immunity from
suit for its
negligence,
when it

undertakes
none of the
legal obligations
of an
employer?
Why is the
client firm
privileged to
demand
contractors
without unions,
but suddenly
neutral if those
unions try to
picket that
same client?
Why exactly do
we think that
Congress
meant that
employers are

free to harass
student interns
sexually, and in
what way is it a
satisfying
answer to be
told that such
interns are not
common law
employees?

7.3.0 *Two reform proposals.* It is not possible to abolish the status of self-employment (and therefore not possible to abolish the basic US two-category scheme). There simply are many Americans who render services to many others over the course of the year, receive income from many sources, no one of which appropriately bears any responsibility for the worker's health, safety, or savings. These are the self-employed. It is, possible, however, to restrict that category to individuals who really belong in it.

7.3.1 *A broadened definition of employee* American political experience is that any definition of “employee” that involves judicial weighing of multiple factors will exclude many people from labor statutes. Congress is free to adopt simpler, more inclusive definitions, though these are not currently politically feasible in the US. Possible definitions might presume employee status and place the burden of proof on anyone attempting to demonstrate self-employment; require that the self-employed in fact render services to multiple payers over a given time period; require some kind of minimal capitalization for a self-employed business; or some flat rule that persons earning less than the median national income are to be treated as “employees” for labor regulation, irrespective of their status in tort or tax law.

This author’s preferred approach might incorporate four basic principles:

1. All employment and labor regulation ought presumptively to apply to all human beings who work, that is, render services for money or other compensation. Exemptions must always be justified.
2. A justified exemption from employment or labor regulation is an exemption that evidence suggests is likely to lead to fuller or more meaningful employment. Examples include: reduced minimum wages that can be shown to help create jobs for unemployed people; contingent jobs that are way-stations into or between more stable employment.
3. Blanket exemptions from employment regulation under abstract categorizations, developed

for purposes unrelated to job creation or improvement (such as *independent contractor* status), are never justified.

4. Certain basic protections should be definitively, not merely presumptively, extended to all persons who work. This proposal is elaborated in the next section.

7.3.2 Minimal protections that apply to all working people, whether employed or self-employed. Certain minimal standards of justice might be extended by legislation to all individuals who render labor for money, irrespective of their status for other purposes. The ILO Declaration on Fundamental Principles¹⁶⁹ would be a good starting point. ILO Declarations rarely, if ever, figure in US domestic employment law, but this issue might be a good opportunity to change this practice. In paragraph 2, the ILO

Declares that all Members, even if they have not ratified the Conventions in question, have an obligation, arising from the very fact of membership in the Organization, to respect, to promote and to realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions, namely:

(a) freedom of association and the effective recognition of the right to collective

¹⁶⁹ILO Declaration on Fundamental Principles and Rights At Work and Its Follow-Up, adopted

bargaining;

(b) the elimination of all forms of forced or compulsory labour;

(c) the effective abolition of child labour; and

(d) the elimination of discrimination in respect of employment and occupation.

by the International Labour Conference at its Eighty-sixth Session, Geneva, 18 June 1998.

The last three are certainly rights that should apply to all working individuals, irrespective of their status as employees or self-employed.¹⁷⁰ As noted above, none appears to be a serious social problem in the US^Bthere are few reported examples of large-scale forced labor, child labor, or discrimination involving the nominally self-employed. But just for that reason, the principal that some employment rights are so fundamental as to belong to all working people, irrespective of their classification for other purposes, might start with these rights.

¹⁷⁰As noted supra n.91, a labor union,[@]in which genuinely self-employed individuals, such as doctors or lawyers, sought to fix their rate of remuneration, would raise difficult issues under US antitrust laws.