

UNEMPLOYMENT INSURANCE AND WEALTH REDISTRIBUTION

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This Article evaluates the merit of liberalizing unemployment insurance eligibility as a means to achieve progressive wealth redistribution—an idea that has recently gained popularity among policymakers and legal scholars. Unemployment insurance (UI) provides temporary, partial wage replacement to workers who suffer unexpected job loss, but it tends to exclude workers who have very low wages or hours of work, or who quit for reasons considered “personal” (for example, to accommodate family demands). Professor Lester argues that while redistribution to workers who are poor or who have caregiving obligations is a desirable goal, expanding UI is a poor way to do it. First, UI benefits are triggered not by low income potential, but rather by the incidence of job loss (which affects both wealthy and poor workers). Second, a comprehensive and ethical program of support for families with caregiving needs would have design features and goals that diverge sharply from UI. Instead of unemployment insurance, other methods such as direct tax and transfer programs and comprehensive family assistance programs are superior ways to transfer wealth to poor workers and to workers with caregiving obligations.

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INTRODUCTION

In recent years, legal scholars and policymakers have increasingly advocated the expansion and liberalization of unemployment insurance (UI) beyond its traditional bounds.¹ Proposals range from increasing the number of workers who are eligible for UI, to eliminating traditional reasons for disqualifying workers from benefits, to increasing the amount of benefits.

In spite of their diverse nature, most expansionist proposals share two pivotal and related claims about unemployment insurance. First, reformers argue that the structure of UI has failed to keep pace with the evolving complexity of modern labor markets. Indeed, UI was designed to provide wage replacement benefits to workers employed in traditional long-term jobs in the event of unexpected, involuntary unemployment. The postwar influx of women and younger workers into the paid workforce dramatically and permanently altered this occupational paradigm, introducing a significant segment of part-time, temporary, contract, and other types of "contingent" workers into the regulatory landscape.²

Because UI explicitly links eligibility to "labor force attachment," and narrowly construes what counts as involuntary unemployment, it may

1. See, e.g., ADVISORY COUNCIL ON UNEMPLOYMENT COMP., UNEMPLOYMENT INSURANCE IN THE UNITED STATES: BENEFITS, FINANCING, & COVERAGE 16-19 (1995) [hereinafter ACUC SECOND ANNUAL REPORT]; MICHAEL J. GRAETZ & JERRY L. MASHAW, TRUE SECURITY: RETHINKING AMERICAN SOCIAL INSURANCE 188-209 (1999); YOUNG-HEE YOON ET AL., NAT'L COMM'N FOR EMPLOYMENT POLICY, UNEMPLOYMENT INSURANCE: BARRIERS TO ACCESS FOR WOMEN AND PART-TIME WORKERS 33-40 (1995); Stephen Bingham, *Replace Welfare for Contingent Workers with Unemployment Compensation*, 22 *FORDHAM URB. L.J.* 937, 944-47 (1995); Deborah Maranville, *Changing Economy, Changing Lives: Unemployment Insurance and the Contingent Workforce*, 4 *B.U. PUB. INT. L.J.* 291, 301 *passim* (1995); Jerry L. Mashaw, *Unemployment Compensation: Continuity, Change, and the Prospects for Reform*, 29 *U. MICH. J.L. REFORM* 1, 8-11 (1996); Sachin S. Pandya, *Retrofitting Unemployment Insurance to Cover Temporary Workers*, 17 *YALE L. & POL'Y REV.* 907, 929-46 (1999); Lucy A. Williams, *Unemployment Insurance and Low-Wage Work*, in *HARD LABOR: WOMEN AND WORK IN THE POST-WELFARE ERA* 158-74 (Joel E. Handler & Lucie White eds., 1999).

2. This descriptive statement glosses over a tangle of controversies, beyond the scope of this Article, over who falls within the definition of "contingent" worker. For a discussion of these controversies, see Gillian Lester, *Careers and Contingency*, 51 *STAN. L. REV.* 73, 78-90 (1998).

exclude nontraditional workers from benefits.³ As it happens, “UI reciprocity”⁴ has declined by approximately 40 percent since the 1950s.⁵ Reformers lament this drop in the proportion of unemployed workers who receive benefits. They are concerned that the system no longer fully achieves its original goals of protecting a broad base of workers from wage loss and from downward mobility in the event of involuntary unemployment, while stabilizing the economy by injecting funds into it during downturns.⁶

Some reformers further argue that unemployment insurance has failed in its potential to be a more active instrument of wealth redistribution.⁷ For example, some scholars criticize the actuarial features of UI, arguing that by labeling some displaced workers as “voluntarily” unemployed—and excluding them from benefits—the system casts moral aspersions on such individuals, branding them as blameworthy for the state’s decision to deny them benefits.⁸ The demographics of part-time, temporary, and other nontraditional

3. These workers are more likely to have earnings or hours of work below monetary eligibility thresholds, or be disqualified for voluntarily separating from work. I discuss these issues in detail in Part II.B below.

4. There are various methods for measuring reciprocity, though the measure most commonly used in the literature is the ratio of unemployment insurance claimants to the total number of unemployed, or the UI/TU ratio. This ratio tends to inflate estimates of reciprocity by 10 to 15 percent because some fraction of claimants does not ultimately receive benefits. See Laurie J. Bassi & Daniel P. McMurrer, *Coverage and Reciprocity: Trends and Effects*, in *UNEMPLOYMENT INSURANCE IN THE UNITED STATES: ANALYSIS OF POLICY ISSUES* 51, 61 (Christopher J. O’Leary & Stephen A. Wandner eds., 1997).

5. See *id.* at 64 (citing data on the degree of decline in reciprocity). The average reciprocity rate in the United States in 2000 was 38 percent. See *EMPLOYMENT & TRAINING ADMIN., U.S. DEPT. OF LABOR, UNEMPLOYMENT INSURANCE CHARTBOOK*, chart A.13 (May 2001), <http://workforcesecurity.doleta.gov/unemploy/content/chartbook/home.asp>. The cause of the postwar decline is somewhat more complicated—and controversial—than the text may imply. I will return to discuss this issue in more detail *infra* notes 93–99 and accompanying text.

6. See Bassi & McMurrer, *supra* note 4, at 80–81.

7. See, e.g., Williams, *supra* note 1, at 165–66, 168 (arguing that unemployment insurance, while having some potential to redistribute, has not been marshaled to do so, with the effect of further marginalizing and disempowering low-wage women in the labor market); Lucy A. Williams & Margaret Y.K. Woo, *The “Worthy” Unemployed: Societal Stratification and Unemployment Insurance Programs in China and the United States*, 33 *COLUM. J. TRANSNAT’L L.* 457, 516–17 (1995) (criticizing the fact that the American unemployment insurance program has opted not to have a substantial redistributive effect, but rather, to perpetuate class inequity by providing superior benefits to higher earners). Others make this argument less directly, instead simply making plain that their efforts to reform UI are motivated by a cluster of ends that include fighting poverty and ameliorating inequality. See, e.g., Maranville, *supra* note 1, at 297; Elizabeth F. Thompson, *Unemployment Compensation: Women and Children—the Denials*, 46 *U. MIAMI L. REV.* 751, 799 (1992).

8. For the most direct statement of this view in the legal literature, see Williams & Woo, *supra* note 7, at 503–05, 514–19. See also Diana Pearce, *Toil and Trouble: Women Workers and Unemployment Compensation*, 10 *SIGNS* 439, 439–43, 458–59 (1985).

workers—disproportionately women and people of color—bolsters critics' case for liberalization.⁹ Consequently, they argue, we should reform UI so that it better achieves its progressive potential: Relaxing eligibility rules would draw current "misfits" into the scope of coverage, thereby ameliorating the burdens on low-income workers and workers with conflicting family caregiving obligations.¹⁰

I share reformers' normative commitments. Eradicating poverty among low-wage and marginal workers ought to be a central concern for American labor policy. Moreover, the law can and should play an important role in providing feasible ways for families to balance the conflicting demands of work and caregiving obligations, particularly as women continue to seek full participation in the workforce. Despite my sympathies for these *normative* goals, however, in this Article I question whether expanding UI is the best *prescriptive* mechanism for accomplishing them.

My analysis is both theoretical and empirical. Theoretically, I argue that expanding UI does not logically follow from a moral commitment to redistribute wealth to less well-off individuals (such as poor workers or workers who bear substantial caregiving obligations). Indeed, at its core, UI is a scheme to provide compensation for involuntary unemployment. No amount of tweaking, clarifying, or redefining of terms can alter the fact that job loss is the critical moment for triggering reciprocity. As such, it is inevitable that such a system will suffer from both overinclusiveness (providing benefits for well-off unemployed workers) and underinclusiveness (failing to provide benefits for more deserving employed workers) relative to a redistributive goal. Simply put, if we wish to transfer wealth to poorer workers, we should use a more direct surrogate for need than involuntary job loss. Low family income, for example, might be a more suitable criterion for redistribution.¹¹ Similarly, if we want to ease the financial burdens of caring

9. See Maranville, *supra* note 1, at 296 ("Women, minorities and low-wage workers tend to fill precisely those jobs that lack the comparatively stable, predictable characteristics contemplated by the architects of the system."); see also Deborah Maranville, *Feminist Theory and Legal Practice: A Case Study on Unemployment Compensation Benefits and the Male Norm*, 43 HASTINGS L.J. 1081, 1089–90 (1992); Pearce, *supra* note 8, at 444–45; Thompson, *supra* note 7.

10. This Article focuses predominantly on rules and reform proposals dealing with eligibility. These issues seem to me to be the most important from the perspective of the exclusion of part-time and low-wage workers. Other aspects of UI have received plenty of attention from reformers. These include the system of experience rating, replacement rates, and state variations in practice (and federal/state relations more generally). Although discussion of these other areas of analysis is beyond the scope of this Article, I do not mean to suggest that they are unimportant, or could not lead to fruitful reform.

11. Certainly, choosing an appropriate surrogate for low-income potential is itself a complex matter, one that policymakers have struggled with in designing welfare institutions intended to implement progressive redistribution. See Anne L. Alstott, *The Earned Income Tax Credit and the Limitations of Tax-Based Welfare Reform*, 108 HARV. L. REV. 533, 571–76 (1995) (contrasting

for dependent children and elders, we should target needs associated with such caregiving, rather than unexpected job loss, as criteria for transferring wealth.

Empirically, as well, a number of reformist positions suffer under close scrutiny. Proposals to pull more nontraditional workers into the UI framework, for example, involve more than modest institutional modifications. Including a broader swath of workers in UI, particularly workers with very low wages or hours, may result in lower employment, wages, or other non-pecuniary benefits for these workers. Whether and to what extent such repercussions would follow from expanding UI eligibility is a critical and complex empirical question that deserves far greater attention than reformers have given it.

Notwithstanding these arguments, there may be other defenses for using UI as a redistributive mechanism. Most notably, one could argue that political pragmatism constrains us to operate within the scope of existing institutions. Perhaps building on the UI program is the most prudent course to reform ills for which other solutions have not emerged. Such claims are compelling, but still I have doubts. Even if pragmatism may sometimes be the better part of valor in bringing about progressive institutional reform, it must not obscure or displace more principled analyses that expose the limitations of second, third, or fourth-best (albeit pragmatic) solutions. Moreover, my analysis does not, in any event, abandon pragmatism. On the contrary, alternative proposals building on other existing institutions (such as direct tax and transfer programs) are well within our imagination and grasp.

My argument proceeds as follows. Part I offers an overview of unemployment insurance, describing the history, financing, and operation of the program. In this part, I also identify the various criticisms raised by reformers regarding the exclusion of part-time and low-wage workers and briefly describe their proposals for change. As I will explain, I support many of the these proposals, but am skeptical of others. In Part II, I turn to the economic theory underlying the UI system. In Part III, I analyze and critique proposals to use an expanded system of UI as a mechanism for making fiscal

the narrow definitions of income and family used in the tax code with necessarily broader definitions appropriate for welfare programs); Anthony B. Atkinson & John Micklewright, *Unemployment Compensation and Labor Market Transitions: A Critical Review*, 29 J. ECON. LITERATURE 1679, 1692–93 (1991) (discussing problems in designing systems of family means-tested benefits). In this Article, I do not purport to solve these dilemmas, only to emphasize that if our goal is progressive wealth redistribution, then lack of access to wealth—however we might try to identify it—is superior as a surrogate for likely poverty to the noisy signal of unexpected and involuntary job loss.

transfers to low-wage workers and for accommodating the needs of working families.

I. OVERVIEW OF UNEMPLOYMENT INSURANCE

A. Background and History

Unemployment insurance is a joint federal and state program that provides workers with up to twenty-six weeks of partial wage replacement in the event of layoff.¹² The program is financed almost entirely out of a payroll tax levied on employers. One study estimated that UI taxes make up the third largest component of the state and local tax bill (behind property taxes and corporate income taxes) paid by businesses, comprising nearly 15 percent of the total.¹³ Moreover, between 1938 and 1995, the aggregate annual cost of unemployment insurance benefits has ranged between one-fourth and three-fourths of a percent of GNP—not a trivial sum.¹⁴

The federal statute governing unemployment insurance is part of the Social Security Act of 1935.¹⁵ The accompanying Federal Unemployment Tax Act (FUTA)¹⁶ authorizes tax credits for employers in states that develop UI programs in conformance with federal legislation (all states have done so). States failing to comply with federal mandates risk loss of federal administrative funds and higher payroll taxes for state businesses.

12. The level of benefits ("replacement rate") is a function of earnings, with each state setting maximum and minimum amounts. The average replacement rate in 2000 was 47 percent of wages. See EMPLOYMENT & TRAINING ADMIN., *supra* note 5, at chart A.13.

13. See N. Bania and L.N. Calkins, *Interstate Differentials in State and Local Business Taxation, 1971-86*, 10 ENV'T & PLANNING C: GOV'T & POL'Y 147, 149 tbl. 1 (1992) (stating that in 1986, property tax comprised 28.9 percent, corporate income tax, 17.8 percent, and unemployment compensation tax, 14.9 percent of total state and local taxes).

14. See Saul J. Blaustein et al., *Policy Issues: An Overview*, in UNEMPLOYMENT INSURANCE IN THE UNITED STATES, *supra* note 4, at 17-19. To put this in perspective, in 1997, expenditures on K-12 public education were 3.7 percent of GDP and GNP, expenditures on Temporary Assistance for Needy Families (TANF) programs were 1/6 of 1 percent of GDP and GNP, and state UI benefits paid—19.7 billion dollars—were 1/4 of 1 percent of GDP and GNP. These are my calculations, based on BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 268, 721 (1998), and EXECUTIVE OFFICE OF THE PRESIDENT OF THE U.S., BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 1998, at 160-61 tbl.10.1, 217-50 tbl.13.1.

15. 42 U.S.C. §§ 501-504, 1101-1108 (1994 & Supp. V 1999) (authorizing allocation of funds to states that comply with federal requirements, and establishing the Employment Security Administration Account).

16. 26 U.S.C. §§ 3302, 3304 (1994 & Supp. V 1999) (authorizing an employer tax credit when state plans comply with federal guidelines and establishing conditions to be met for approval of state plans).

The Social Security Act of 1935 contains no statement of purpose. The 1936 United States Social Security Board did, however, recommend a "declaration of policy" to be adopted by states in designing their own systems, which focused on encouraging employers to stabilize employment. According to the declaration, the goal of unemployment insurance was to stem the "menace to the health, welfare and morals" caused by unemployment-related economic insecurity.¹⁷ It would do this by encouraging employers to provide more stable employment (by making them bear some of the costs of layoffs through experience rating) and by accumulating funds during periods of employment in order to provide benefits during periods of unemployment.¹⁸

Importantly, the system was designed to help workers maintain an accustomed standard of living. UI was intended to smooth workers' income over time, assuming it would be difficult or impossible to borrow against future earnings to maintain income stability or to save during periods of unemployment. Because then, as now, few American workers had significant savings or income from sources other than wages,¹⁹ UI would be an important way to reduce the hardship of wage interruption. In contrast to general relief (welfare), a worker would not have to wait until savings and resources were exhausted before being eligible for a cash payment.²⁰ Although UI benefits would only partially replace wages, they would still reduce the net depletion of personal resources (as well as unpaid bills, cut-backs on spending, new debt, and so on) caused by unemployment.

Although UI was designed as a poverty-fighting device, it was not intended as a form of aid to poor Americans *per se*. Insofar as eligibility required no proof of the threat of imminent poverty—the system is not means tested—it recognized the pure harm of downward mobility. Further still, much of the rhetoric surrounding passage of the legislation, albeit partly driven by political expediency,²¹ augured that UI would preserve the

17. SAUL J. BLAUSTEIN ET AL., UNEMPLOYMENT INSURANCE IN THE UNITED STATES 46 (1993) (citation omitted) (quoting the declaration).

18. See *Id.*

19. See generally ERIC ENGEN & JONATHAN GRUBER, NAT'L BUREAU OF ECON. RESEARCH, UNEMPLOYMENT INSURANCE AND PRECAUTIONARY SAVINGS (1995) (finding that the median twenty-five to sixty-two-year-old worker has gross financial assets equal to less than three weeks' income); Stephen P. Zeldes, *Consumption and Liquidity Constraints: An Empirical Investigation*, 97 J. POL. ECON. 305 (1989) (finding through empirical analysis that constraints on workers' ability to borrow against the promise of future labor income affects a significant portion of the population).

20. See BLAUSTEIN ET AL., *supra* note 17, at 51.

21. See C. EUGENE STEURLE & JON M. BAKIJA, RETOOLING SOCIAL SECURITY FOR THE 21ST CENTURY: RIGHT AND WRONG APPROACHES TO REFORM 25–27 (1994) (noting that the

dignity of working people who lost their jobs by *distinguishing* them from welfare recipients.²² In addition, because a worker had to lose his job without fault in order to claim benefits, receiving UI would not, in theory, signify a failure of personal responsibility.²³

Unemployment insurance was also very much part of a broader program of Keynesian demand stabilization: Injecting money into the economy through unemployment benefits would stimulate the economy during recessions by minimizing troughs in consumer spending, thus slowing the progress of economic downturns.²⁴ Employers would be deterred from laying off

"earned benefit" feature of UI may have been designed to generate popular support, but may not have been truly consistent with the progressive spirit of the reforms).

22. See Kenneth M. Casebeer, *Unemployment Insurance: American Social Wage, Labor Organization and Legal Ideology*, 35 B.C. L. REV. 259, 316–20 (1994) (describing commentary during the period of enactment that sharply distinguished the chronic poor for whom charity and relief were appropriate, from working people who were unemployed through no fault of their own, for whom unemployment insurance should be an earned benefit); Michele L. Landis, "Let Me Be Next Time 'Tried by Fire': Disaster Relief and the Origins of the American Welfare State 1789–1874," 92 NW. U. L. REV. 967, 1017–21, 1027–32 (1998) (arguing that the formation of the American welfare state was based on a distinction between disaster relief, wherein victims were characterized as having a moral claim to assistance from the state because they were blameless, and poor relief, wherein the poor were more likely seen to be agents of their own misfortune, and noting that a key rhetorical strategy of New Deal advocates was to characterize the depression and resulting unemployment as a disaster akin to war, flood, or fire); see also Philip Harvey, *Joblessness and the Law Before the New Deal*, 6 GEO. J. ON POVERTY L. & POL'Y 1, 39–40 (1999) (tracing the evolution of attitudes about jobless individuals from the late nineteenth and early twentieth century belief that unemployment was a voluntary choice to the pre-New Deal acceptance of the idea that some individuals are involuntarily unemployed and thus deserving of relief from the state).

23. The moralism inherent in these distinctions has met with sharp criticism. See, e.g., Williams & Woo, *supra* note 7, at 482, 516–17 (stating that the American UI program perpetuates class inequality by distinguishing between the "worthy" and "unworthy" unemployed, and by providing superior benefits to higher earners). Others defend against "middle class capture" arguments on both principled and pragmatic grounds. See Nicholas Barr, *Economic Theory and the Welfare State: A Survey and Interpretation*, 30 J. ECON. LITERATURE 741, 757 (1992) (defending middle class as well as lower class entitlement to benefits of the welfare state—with the specific example of providing the middle class with mechanisms for insurance against income interruption due to job loss when market failure prevents private market functioning); Joseph M. Becker, *The Location of Financial Responsibility in Unemployment Insurance*, 59 U. DET. J. URB. L. 509, 542 (1982) (stating that unemployment insurance has a distinctive clientele—the core of the labor force, the regularly employed—and that because the success of the country depends on how satisfied this group is, we ought to be wary of proposals to modify unemployment insurance to perform functions traditionally provided by welfare programs). My Article largely skirts this and related debates about whether the very existence of welfare programs that limit benefits to those who work, whether UI or otherwise, reinforce a morally corrosive social distinction between the "deserving" and "undeserving" beneficiaries of state assistance.

24. A richer description of the "policy-Keynesian" program of aggregate demand stimulation appears in Mark Kelman, *Could Lawyers Stop Recessions? Speculations on Law and Macroeconomics*, 45 STAN. L. REV. 1215, 1235–39, 1296–302 (1993).

workers through firm-level experience rating,²⁵ and labor supply would be stimulated directly through public sector job creation, training subsidies, relocation subsidies, and the like.²⁶

Finally, the program was intended to optimize workers' ability to find jobs that fully utilize their skills and experience, thus preventing skill erosion and tapping labor power as fully as possible.²⁷ While the payment of a weekly benefit might delay a recipient's return to work, the reason for that delay would not necessarily be because the worker preferred leisure, even at a reduced income, to work. The delay would also, in theory, give him an opportunity to engage in a more rigorous job search.²⁸ Rather than having to take the first job that came along just in order to make ends meet, the worker could hold out for a job better matched to his skills and training. Optimizing job matches upon reemployment would also, in theory, minimize career interruptions. Moreover, UI made it easier for at least short-term laid off workers to remain in the area in the event that rehiring would be possible upon recovery. Productivity gains through workforce retention were seen to offset the concomitant dampening of worker mobility.

In essence, then, the United States' system of public provision, that is, the social safety net, was structured as a two-tiered system: UI was designed for workers with stable labor market attachment, without regard to their means, and welfare was designed for workers lacking attachment, and it was based on means.

The mechanism by which UI was to serve its particular function was modeled after an actuarial insurance scheme. I return in Parts II and III to describe the economic theory underlying this model and the normative question of whether this choice of institutional design by the architects of the system was appropriate. First, however, I describe the statutory mechanics of the scheme.

25. I discuss experience rating in more detail *infra* notes 31–35 and accompanying text. Very briefly, however, the idea is that employers are taxed at variable rates, depending on their histories of layoffs. The more layoffs, the higher the tax. Experience rating may (in addition to reducing layoff behavior) also reduce employers' willingness to hire. Thus, the overall effect of experience rating may be to smooth turnover by reducing both hiring and laying off of workers. See ACUC SECOND ANNUAL REPORT, *supra* note 1, at 29.

26. Keynesian demand stimulation policies had detractors even among those who shared the belief that persistent equilibrium unemployment could be reduced through active market intervention. See Kelman, *supra* note 24, at 1235–46 (analyzing these disputes). Although the details of these controversies are beyond the scope of this Article, the major point of disagreement was not over how labor markets work, but rather over how, precisely, different policy interventions work.

27. See BLAUSTEIN ET AL., *supra* note 17, at 61–63. The details in the remainder of this paragraph draw on the same source.

28. I discuss efforts to test this hypothesis empirically *infra* notes 137–139 and accompanying text.

B. Characteristics and Criticisms of Unemployment Insurance

FUTA imposes certain mandates on states as a condition of their receipt of federal administrative funds and tax rebates. Important among them are a federally determined minimum wage base, and the use of firm-level experience rating. States nonetheless have broad latitude to work out the details of their individual programs, giving rise to wide national variations in eligibility requirements and in benefit levels.

Employers in all states must pay unemployment insurance taxes on the first \$7000 of each worker's earnings per year.²⁹ At a rate of 0.8 percent, an employer in a state with the minimum base rate would pay an annual federal tax of \$56 per employee who earned \$7000 or more.³⁰ In addition, each state must impose an experience-rated component of the tax, meaning that an individual employer's tax rate must vary depending on its history of layoffs.³¹ States use a number of different techniques for experience rating,³² but the common goal is to tax each employer in a manner

29. See 26 U.S.C. § 3306(b)(1) (1994). Although numerous states have elected to set a higher wage base, many remain at or near \$7000, including most of the larger states (for example, California and Florida remain at \$7000, while New York has increased the wage base only to \$8500). As of 2000, forty states plus the District of Columbia had set a wage base above the minimum (with the highest, Hawaii, having a wage base of \$28,400). See U.S. Dep't of Labor, *Information Technology Support Center Unemployment Insurance Website*, at http://www.itsc.state.md.us/prog_info/sesatax/wagetax.html (last updated June 29, 2001).

30. The federal unemployment tax imposed on all employers is 6.2 percent of their federal taxable payroll, with a 5.4 percent tax credit for firms in states whose UI schemes satisfy federal guidelines. Because all states meet the guidelines, the federal component of the UI tax—which primarily offsets administrative expenses—is effectively 0.8 percent of federal taxable payroll. See Phillip B. Levine, *Financing Benefit Payments*, in *UNEMPLOYMENT INSURANCE IN THE UNITED STATES*, *supra* note 4, at 321, 323.

31. See generally WAYNE VROMAN, U.S. DEP'T OF LABOR, *EXPERIENCE RATING IN UNEMPLOYMENT INSURANCE: SOME CURRENT ISSUES 6-12* (1989) (explaining how experience rating works).

32. By far the most common method of experience rating is the "reserve-ratio formula." Under this method, employer contributions are put into a pool or "reserve" account to which payments are credited and to which benefits collected by former employees are charged. As the size of the account increases, the tax decreases according to a schedule. Most states have several schedules, however, so rates will depend not only on the size of the employer's account, but also on the total reserves of the states, with rates decreasing as total state reserves increase.

Other less commonly used experience rating formulas include the "benefit-ratio formula," the "benefit-wage-ratio formula," and the "payroll variation plan." Under the benefit-ratio formula, benefits are tied directly to payrolls, without taking contributions into account. Under the benefit-wage-ratio formula, the number of employees separated from each employer is multiplied by the total wages earned in the base periods to determine the employer's "experience factor." The experience factor is then used in conjunction with the average state-wide duration of benefits to determine the employer's tax rate. Finally, under the payroll variation plan, used only in Alaska, employers' tax rates are based on variations in payroll, on the theory that decreasing payrolls indicate an employer's experience with unemployment. See *id.*

proportionate to the costs it imposes on the insurance pool.³³ State tax rates vary significantly, but maximum rates range from 5.4 percent in several states (the lowest maximum tax rate permitted under federal law) to 10.5 percent in Pennsylvania.³⁴

Assuming these costs are at least partially internalized, employers will take them into account when making decisions about high-risk investment or production options that could lead to layoffs.³⁵ Thus, for example, experience rating reduces the incentive that would otherwise exist for firms to engage in strategic layoff cycles, that is, repeatedly hiring workers for the minimum period necessary to achieve eligibility, and then laying them off in the expectation that UI benefits will subsidize their wages during the layoff period.

UI also has a number of features that link an employee's eligibility to her lifetime risk profile. Although almost all American workers are covered by UI (meaning that they fit within the legal definition of an "employee" who is within the system of UI),³⁶ many covered workers who are unemployed at any given time will be *ineligible* for benefits (meaning that their

33. In fact, no U.S. jurisdiction uses perfect experience rating in its UI tax program. Experience rating can be described as "perfect" when the employer is taxed exactly one dollar for every dollar of costs it imposes on the system, and "imperfect," or "partial" when the employer is taxed either more or less than one dollar for every dollar of actual costs imposed. Because, for example, all states set minimum and maximum tax rates, "low risk" firms and industries (like transportation) to some extent cross-subsidize "high risk" firms and industries (like construction). There is a substantial literature on imperfections in experience rating, which I will not detail here. See generally VROMAN, *supra* note 31, at 6–12; Atkinson & Micklewright, *supra* note 11, at 1701–02; Robert Tannenwald & Christopher J. O'Leary, *Unemployment Insurance Policy in New England: Background and Issues*, NEW ENGLAND ECON. REV., May–June 1997, at 3, 9–16.

34. See U.S. DEP'T OF LABOR, ET HANDBOOK NO. 394, http://www.itsc.state.md.us/prog_info/HDBK394_99/lnk98.html (1998). Average state tax rates in 1998 ranged from 0.32 percent (Kansas) to 3.85 percent (Pennsylvania). See *id.*

35. Indeed, employers likely do at least partially internalize the cost of UI taxes. I will discuss this important issue at some length in Part IV below, but my discussion will suggest that workers also likely pay for some of the tax that funds UI. See *infra* notes 182–187.

36. More than 90 percent of all civilian employment is covered by UI. See ACUC SECOND ANNUAL REPORT, *supra* note 1, at 163. Workers legally classified as independent contractors are excluded. Although this Article focuses on eligibility rather than coverage, numerous critics have focused on the latter, attacking employers' strategic avoidance of liability through misclassification of employees as independent contractors, and the exemption of certain classes of employees, such as most farmworkers and household domestic workers. See, e.g., Bassi & McMurrer, *supra* note 4, at 60 (criticizing exclusion of agricultural and household workers); Mark Berger, *The Contingent Employee Benefits Problem*, 32 IND. L. REV. 301, 319–42 (1999); Virginia L. du Rivage, *New Policies for the Part-Time and Contingent Workforce*, in NEW POLICIES FOR PART-TIME AND CONTINGENT WORKERS 106 (Virginia L. du Rivage ed., 1994) (criticizing strategic classification of employees as independent contractors); Laurence E. Norton II & Marc Linder, *Down and Out in Welasco, Texas and Washington, D.C.: Race-Based Discrimination Against Farm Workers Under Federal Unemployment Insurance*, 29 U. MICH. J.L. REFORM 177, 181 (1996) (criticizing exemption of "small farm" workers and informal exclusion of nonexempt farmworkers).

current work histories or reason for job separation bar them from collecting benefits). Eligibility is limited to workers who have some minimum level of employment experience and continuity ("monetary" provisions) and whose unemployment is *involuntary*.³⁷ Most states also require the worker to be actively seeking reemployment ("nonmonetary" provisions).³⁸

In ways that will become clear when I describe the eligibility rules, they systematically exclude part-time workers and workers with weak labor market affiliation.³⁹ As I move through the remainder of this part and identify various exclusions (or potential exclusions) from UI, I will also describe the reform proposals advanced by critics. I agree with most, but not all, of these proposals. I conclude this part by explaining how and why my own views differ.

Monetary eligibility. Recall that UI, in contrast with welfare, is targeted at workers with a stable attachment to the workforce. This is motivated by the desire to provide benefits only to those workers who have "earned" them through some minimum level of past workforce participation.⁴⁰ Monetary eligibility rules determine which workers have sufficient attachment to qualify for benefits. States variously use very low earnings or hours (or some combination of the two) as indicators of low attachment. Workers who tend to be excluded on monetary eligibility grounds are new entrants to the workforce, people returning to the workforce after an extended absence, or workers whose labor force participation is low-wage, part-time, or intermittent. The first two exclusions—new entrants and returners—are relatively

37. Although federal law imposes few requirements, all state laws require both of these criteria to be satisfied. See EMPLOYMENT & TRAINING ADMIN., U.S. DEP'T OF LABOR, UI LAW TABLES, § 400 ELIGIBILITY [hereinafter COMPARISON OF STATE UI LAWS], <http://workforcesecurity.doleta.gov/unemploy/uilawstable.asp> (last visited Sept. 6, 2001) (summarizing eligibility requirements under state laws).

38. Forty-two states have active search requirements. See *id.*

39. Among adults (twenty-five and older), unemployed part-time workers are about half as likely (18.8 percent) as unemployed workers as a whole (36.6 percent) to receive UI benefits, and the gap is even greater for younger workers. See WAYNE VROMAN, U.S. DEP'T OF LABOR, LABOR MARKET CHANGES AND UNEMPLOYMENT INSURANCE BENEFIT AVAILABILITY 36 tbl.3 (1998) (providing 1996 figures). For nonstandard arrangements (meaning contingent workers, that is, workers who do not expect their jobs to last, and temporary workers, that is, temporary help agency workers, on-call workers, and contract workers), adult workers actually receive benefits at about the same rate as workers as a whole. See *id.* at 24 tbl.5, 27 (providing 1994 figures).

Issues of causality are complicated. These data do not distinguish between unemployed workers who fail to receive benefits due to ineligibility, and those who fail to receive benefits because they do not apply for them. I will discuss these issues in more detail *infra* notes 93–99 and accompanying text.

40. See Barr, *supra* note 23, at 768. Another rationale for focusing on attachment may be to screen out workers with a high probability of future separation and therefore a high risk of making future demands on the system. As I will explain *infra* Part II.A, insurance schemes typically screen the highest risk individuals out of the pool of insureds.

uncontroversial. The exclusion of employees with low or irregular wages or hours, however, has drawn criticism.

Most states use some minimum threshold of earnings during a "base period" preceding application for benefits as a surrogate for attachment. Although the base period earnings required for eligibility vary somewhat between the lowest and highest states, most are modest, with the median being about \$1500 (average about \$1700).⁴¹ A minimum wage worker who worked forty hours per week would need to work about seven weeks in a year to be monetarily eligible under a base period earnings requirement of \$1500. Only eight states would require the worker to work more than thirteen weeks in the year to be eligible.⁴² Attachment may also be measured according to hours or weeks worked during the base period.⁴³ Virtually all states also build into their system a distributional requirement, that is, the requirement that a worker's earnings are distributed across at least two quarters, or that earnings outside the high quarter not fall below some minimum.

The method of determining the base period significantly influences eligibility of workers with irregular wages or hours. The base period is usually the first four of the five most recently completed quarters. The insertion of a one-quarter "lag period" historically gave state eligibility officers time to collect the relevant earnings or hours data from employers and tabulate eligibility.⁴⁴ The effect of the lag, though, as well as the accident of the timing of application, is to exclude marginal workers.

41. Contrast Hawaii, which requires only \$130 in earnings during the base period in order to qualify for the minimum weekly benefit, with Washington, which requires \$3502. See WAYNE VROMAN, *Effects of Welfare Reform on Unemployment Insurance*, in URBAN INSTITUTE, NEW FEDERALISM: ISSUES AND OPTIONS FOR STATES 7–8 tbl.1 (providing 1997 figures).

42. See *id.* at 2 n.4. The states with the highest base period earning requirements would require the worker to work 17 weeks (Washington) and 16.5 weeks (Florida), respectively. See *id.*

43. Most states use one of four general approaches. These are as follows:

Multiple High Quarter Wages (about half of states). Workers must earn a certain dollar amount in the highest quarter of the base period, and must also earn some multiple (usually 1.5) of the high quarter earnings in the total base period. In other words, one-third of total base period earnings must be outside the high quarter.

Multiple of Weekly Benefit Amount (fourteen states). All states have a minimum weekly benefit amount, typically some fraction of the high quarter earnings (for example, 1/26). Under this method, the minimum weekly benefit amount is multiplied by a specified factor to determine the minimum total base period earnings required for eligibility.

Flat Amount (six states). Workers must earn some minimum flat amount of wages during the base period.

Duration of Work (six states). Workers must work some minimum number of hours or weeks at a specified minimum weekly or hourly wage. See Walter Nicholson, *Initial Eligibility for Unemployment Compensation*, in UNEMPLOYMENT INSURANCE IN THE UNITED STATES, *supra* note 4, at 95–98 & tbl.3.1.

44. See WAYNE VROMAN, U.S. DEPT OF LABOR, THE ALTERNATIVE BASE PERIOD IN UNEMPLOYMENT INSURANCE: FINAL REPORT 4 (1995) (describing the history of the "first four" base period method).

An example may clarify.⁴⁵ If Sara applies for benefits on June 30 (the last day of the quarter), the base period is the previous calendar year (with the preceding quarter between January and March serving as the lag quarter). If Sara applies on July 1, the base period is the final three quarters of the previous year plus the first quarter of the current year. In either case, Sara's most recent earnings are excluded from the base period. The quantity of excluded earnings (between three and six months' worth) depends on the timing of her application for benefits. While exclusion of an individual's most recent earnings will have no effect on the eligibility of full-time workers with long histories of employment, it could disqualify workers whose earnings or hours are irregular. A worker whose earnings were low in the first of five quarters may be excluded, while another worker with identical total earnings over the five quarters but whose fifth quarter is low will be eligible.

Turning to the amount of earnings or hours required, low wages or part-time hours alone will not typically lead to disqualification. A minimum wage worker qualifies for benefits in all states so long as she works full-time and full-year. Similarly, a half-time (twenty hours per week) worker qualifies for benefits in all states so long as she works for the full year at, say, eight dollars an hour (which exceeds the minimum wage). It is a combination of low wages and low hours that tends to increase the likelihood of disqualification.⁴⁶ In order to qualify for UI benefits, for example, low-wage part-time workers must, on average, work more hours than higher-wage part-time workers.⁴⁷

Reformers argue that monetary eligibility rules should be modified to capture a larger pool of workers, proposing multipronged reform. They begin by advocating the uniform adoption of a moveable base year.⁴⁸ Many states have automated their reporting and processing procedures in the past twenty years, meaning that the insertion of a lag period is no longer

45. This example is adapted from the ACUC SECOND ANNUAL REPORT, *supra* note 1, at 93.

46. A 1994 study by the Advisory Council on Unemployment Compensation (ACUC) staff showed that someone working two days per week, year-round (approximately 800 hours), earning \$8.00 per hour would qualify for benefits in all but two states. The same worker, if earning only the minimum wage (then \$4.25 per hour), would fail to qualify in twenty-nine states. *See id.* at 17.

47. *See id.* at 95–98 tbl.7-2 & fig.7-1. An anomaly that eludes logic is that part-year work is less likely to disqualify a worker than part-time (that is, part-week) work, all other things being equal. A minimum wage worker who works full-time for only twenty-six out of fifty-two weeks qualifies for benefits in fifty states, while a minimum wage worker who works half-time (twenty hours per week) for all fifty-two weeks of the year qualifies for benefits in only forty-three states. *See id.* at 98.

48. *See, e.g., id.* at 17; Maranville, *supra* note 1, at 301.

administratively necessary. Therefore, if an applicant is deemed ineligible using the traditional base period, an alternative base period (ABP) can be employed, typically obtained by dropping the earliest of the five preceding quarters and adding the most recent.⁴⁹ In essence, the use of an ABP increases eligibility for workers with intermittent workforce participation by giving them a second bite at the apple if they initially fail to qualify.⁵⁰ In addition, some reformers call for a move away from earnings-based eligibility criteria in favor of hours-based eligibility,⁵¹ or at least a choice between the two.⁵² Finally, some reformers advocate relaxed distributional requirements,⁵³ the exemption of workforce absences for domestic caretaking activities when assessing a worker's history of attachment,⁵⁴ or straight reductions in the threshold of attachment required for eligibility, regardless of method of determination.⁵⁵

49. Eight states have adopted an alternative base period (ABP): Maine, Massachusetts, Minnesota, New York, Ohio, Rhode Island, Vermont, and Washington. Michigan will follow suit in 2001. California has adopted a variation on the theme, basing the ABP on less recent, rather than more recent earnings or hours. See VROMAN, *supra* note 44, at 4.

50. See *id.* at 5–6 tbl.1 (reporting that in five of the six states that (at that time) had adopted an ABP that substituted the first for the fifth preceding quarter, the ABP increased eligibility by a consistent amount: between 6 and 8 percent, and increased yearly benefits payments by 3 to 4 percent).

Assuming an economy with moderate inflation and persistent productivity growth, one would also predict an increase in eligibility where eligibility is based on more recent earnings. This is simply because workers' recent earnings will tend, on average, to be higher than less recent earnings. See *id.* at 32. Of course a state that switched over to, say, a cross-the-board base period of the immediately preceding four months might adjust the monetary eligibility thresholds upward to compensate for increased volume.

51. See, e.g., Bassi & McMurrer, *supra* note 4, at 81 (proposing abandoning earnings-based in favor of purely hours-based monetary eligibility).

52. See ACUC SECOND ANNUAL REPORT, *supra* note 1, at 17–18 (recommending that individuals who work at least 800 hours per year—which is about 38 percent of full-time—or the earnings equivalent (at least 800 times the minimum wage), be eligible for UI benefits in all states, with the estimated result that the number of individuals eligible for benefits would increase by 5.3 percent, and the total benefits paid would increase by about 3.6 percent). Even though some workers would still meet monetary eligibility requirements based on relatively high earnings, this reform provides the option of qualifying based on hours, and would pull in some workers who currently fall short based solely on insufficient wages. See also GRAETZ & MASHAW, *supra* note 1, at 205 (advocating an attachment requirement under which a worker could qualify either on the basis of earnings—three consecutive months of work at a rate of at least \$500 per month—or on the basis of hours—at least twelve weeks of full-time work, which need not be consecutive, in the past four quarters).

53. See ACUC SECOND ANNUAL REPORT, *supra* note 1, at 17–18.

54. See, for example, Maranville, *supra* note 1, at 302–03, and Williams, *supra* note 1, at 170, who both argue that leave time taken under the Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2601–2654 (1994 & Supp. V 1999), ought to be disregarded in determining whether the claimant satisfies the base period attachment requirements.

55. See Maranville, *supra* note 1, at 303–04 (advocating reduction of attachment thresholds).

Nonmonetary eligibility. The other major criterion of eligibility—nonmonetary—turns on the worker's reason for termination of employment. Workers who voluntarily leave their job without "good cause" or who are discharged for misconduct may not collect benefits.⁵⁶ The laid-off worker's behavior while unemployed is also scrutinized. The unemployed worker who declines suitable employment opportunities not only loses benefits, but may have to forego future benefits until he "earns them back" with more work. These limits on benefits purport to reduce workers' incentive to cause, or fail to avoid, unemployment, otherwise known as "moral hazard."⁵⁷

In contrast to the employer-centered construction of good cause in wrongful termination law, good cause for purposes of UI eligibility focuses on the employee, asking whether the separation is truly involuntary. The standard notion of good cause is a reason "related to" or "attributable to" work (which typically means the result of the an employer's layoff decision, hazardous working conditions, a transfer to unsuitable work, or a unilateral change of working conditions such as wages or hours by the employer). Most states also recognize a limited range of additional reasons, which might variously include sexual harassment, domestic violence, compulsory retirement, leaving to accept other work (but the new job unexpectedly falls through), illness, and joining the armed forces.⁵⁸ Workers who voluntarily leave their employment without good cause must typically work some period of time in order to restore eligibility. Misconduct will disqualify a worker as well. Misconduct must generally be "willful" (or result from persistent negligence). Examples include violation of company rules, insubordination, refusal to perform assigned work, impermissible absences, and testing positive for drug use.⁵⁹ Inability to perform the requirements of the job generally does not disqualify a worker.

A central controversy concerning nonmonetary eligibility is the disqualification of workers who quit because work schedules come into conflict with family obligations.⁶⁰ If an employee quits her job to have a baby or to

56. All states also disqualify workers whose separation from employment is due to a labor dispute, although many states exempt certain kinds of labor disputes, for example, lockouts. For a detailed discussion of the circumstances under which striking and other organized labor activity may disqualify workers, see ROBERT HUTCHENS ET AL., *STRIKERS AND SUBSIDIES: THE INFLUENCE OF GOVERNMENT TRANSFER PROGRAMS ON STRIKE ACTIVITY* (1989).

57. I will expand on the theory of moral hazard, and insurance more generally, *infra* Part II.

58. See COMPARISON OF STATE UI LAWS, *supra* note 37, at 4.24 to 4.25 tbl.401.1; Nicholson, *supra* note 43, at 103.

59. See Amy B. Chasanov, *Clarifying Conditions for Nonmonetary Eligibility in the Unemployment Insurance System*, 29 U. MICH. J.L. REFORM 89, 110–12 (1996) (basing information on 1994 survey of all states conducted by the Interstate Conference of Employment Security Agencies).

60. See Mark R. Brown, *A Case for Pregnancy-Based Unemployment Insurance*, 29 U. MICH. J.L. REFORM 41 (1996); Martin H. Malin, *Unemployment Compensation in a Time of Increasing*

deal with other family-related obligations, she will probably forgo benefits because she separated for “personal” and “voluntary,” rather than “work-related,” reasons. Sometimes, however, the employer triggers the work-family conflict. For example, suppose (quite plausibly) that an employer changes an employee’s work schedule, and the employee requests an accommodation because family responsibilities make it difficult or impossible to switch to the new schedule. Most jurisdictions hold that if the employee defies her employer’s directive because it conflicts with a family obligation and the employer terminates her for doing so, her insubordination will not justify disqualification, at least so long as the family conflict is sufficiently serious.⁶¹ Voluntary quits, however, are a different matter. If the employee quits her job when the conflict arises, even assuming the employer triggered the conflict by unilaterally changing working conditions, UI rules may deem the reason for separation to be personal rather than work-related.⁶² This is because some jurisdictions categorically deny benefits in cases involving quits, even when a change of employment circumstance (for example, hours of work) necessitated the quit.⁶³ Even where the adjudicator has discretion (the approach in most jurisdictions), he or she will often take into account the employee’s efforts to avoid the conflict, for example, whether the employee made reasonable efforts to find an alternative caregiver or other solution. As a result, the worker who defies the employer and provokes termination may fare better (in terms of UI eligibility) than the employee who simply quits when it becomes clear that there is a conflict.⁶⁴

Critics worry about more than just this anomaly, however. They also advocate breaking from the traditional practice of requiring a work-related (that is, employer-triggered) reason for job separation in the first place.⁶⁵ Some, for example, argue that when an employee requests accommodation

Work-Family Conflicts, 29 U. MICH. J.L. REFORM 131 (1996); David S. Rosettenstein, *Unemployment Benefits and Family Policy in the United States*, 20 FAM. L.Q. 393, 398–403 (1986).

61. See Malin, *supra* note 60, at 138.

62. See *id.* at 142, especially note 48, which reviews decisions in numerous jurisdictions. See also Maranville, *supra* note 1, at 317 n.107 (reviewing cases in jurisdictions that have found family conflict to be good cause for quitting). Note that in jurisdictions that do not require a work-related reason, quits due to family conflicts appear more likely to be considered good cause. See Malin, *supra* note 60, at 140 (describing lines of authority in Kentucky, Pennsylvania, and Arkansas).

63. See Chasanov, *supra* note 59, at 108 tbl.4 (reporting that thirteen states categorically deny benefits if a worker quits due to a change in work circumstances).

64. See Malin, *supra* note 60, at 139–47 (giving Florida as an example where the case law starkly presents this anomaly).

65. See *id.* at 167–72; see also Brown, *supra* note 60, at 69; Rosettenstein, *supra* note 60, at 403; Williams, *supra* note 1, at 169–70.

of a work-family conflict, the burden should then shift to the employer to demonstrate a legitimate business reason (for example, that there would be harm to the business) for denying the request, whether or not the employer did anything to trigger the conflict.⁶⁶ Others contend that UI should exempt separations due to pregnancy from the category of a voluntary quit.⁶⁷

Continuing Eligibility. As a condition of receiving benefits, claimants generally must be able and available for, as well as actively seeking, suitable reemployment. A worker unavailable for suitable work usually loses benefits until she becomes available again.

The ability criterion relates to temporary illnesses and disabilities. Most states suspend eligibility if a worker becomes temporarily disabled from work.⁶⁸ As for the availability criterion, most states require workers to be available for any "suitable" work,⁶⁹ although at minimum, FUTA requires all states to permit a claimant to refuse work with wages, hours, or other conditions that are substantially less favorable to the individual than those prevailing for similar work in the locality.⁷⁰ A number of state laws are explicitly more permissive, requiring claimants only to be available for work

66. See Malin, *supra* note 60, at 169–71 (arguing that this shift in the locus of the inquiry is consistent with evolving public justice values that recognize that the demands of the workplace must accommodate family responsibilities, for example, as embodied in the Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2601–2654 (1994 & Supp. V 1999)).

67. See, e.g., GRAETZ & MASHAW, *supra* note 1, at 79 (arguing that because a majority of American women now work, and loss of income through pregnancy has become a major family problem, pregnancy-related quits should be treated as a type of temporary disability, triggering UI benefits); Brown, *supra* note 60, at 69–73 (arguing that pregnancy-related separations should be exempted from "voluntary" quits as a form of accommodation for the biological differences between men and women).

68. A few states protect a temporarily disabled worker from ineligibility if the illness or disability occurred after the claim for benefits was filed, and if during the time of disablement, the worker does not refuse any offer of work that would have been suitable at the time of registration for benefits. Long-term disabled workers generally will already be disqualified because they lack a history of attachment. See Patricia M. Anderson, *Continuing Eligibility: Current Labor Market Attachment*, in UNEMPLOYMENT INSURANCE IN THE UNITED STATES, *supra* note 4, at 125, 126 (describing the ability requirements across states).

69. In thirty-two states, the worker must simply be able to and available for work. See ACUC SECOND ANNUAL REPORT, *supra* note 1, at 103.

70. See 26 U.S.C. § 3304(a)(5)(B) (1994). Most state laws list various criteria according to which the suitability of a work offer is to be judged. These typically include the claimant's prior experience, training, and earnings; the job's distance from claimant's place of residence; risk to the claimant; the claimant's health, safety, and morals; prospects for securing local work in customary occupation; and length of unemployment. See Anderson, *supra* note 68, at 137 (discussing the range of criteria states typically use in defining suitability).

in their usual occupation or work compatible with their prior training or experience.⁷¹

UI administrators monitor workers' availability. All states require claimants to register at regional employment offices. Most also require evidence of active searching, which usually involves periodic meetings with UI staff and submission of a weekly record of contacts with employers. The number of states with active search requirements has grown steadily since the inception of UI.⁷²

UI also disqualifies claimants who reject (or quit) suitable work without good cause, with penalties that range from temporary suspension to total denial of benefits.⁷³ This type of disqualification generally requires the worker to refuse a clear job offer that specifies wages and terms. The question of whether a worker has refused such an offer can be fuzzy, and must be addressed on a case-by-case basis. Thus, for example, adjudicators generally will not penalize a worker who walks past a help-wanted sign on the street without inquiring, but may well penalize a worker who deliberately "sabotages" the search process (for example, seeks only jobs for which he is unqualified and therefore is repeatedly denied offers of employment despite his efforts).⁷⁴

Critics identify several ways in which nonmonetary eligibility rules may disqualify needy workers. First, many states disqualify claimants whose search is limited to part-time work.⁷⁵ A claimant's protestation that compelling

71. Nine states have human capital-matching requirements such as this. See Anderson, *supra* note 68, at 127 tbl.4.1. A related requirement in some states is that the worker be available for work within a particular geographic area. See *id.* at 130. This latter requirement may be motivated primarily by the interest of employers in having workers available for recall when demand improves.

What if a worker refuses jobs for which she is actually well matched? Several states have designed sliding scale determinations of suitability to encourage workers who overestimate the quality of the job they can obtain (that is, set their reservation wage too high) to adjust those expectations downward. Thus, as the number of weeks a claimant collects benefits rises, the wage of jobs the state deems "suitable" for that worker falls. See *id.* at 137–38 (discussing empirical research on the effectiveness of such measures and reporting mixed conclusions).

72. See BLAUSTEIN ET AL., *supra* note 17, at 287 (reporting that the number of states requiring explicit statements of work search activities has grown from fifteen in 1948, to thirty in 1971, to forty in 1990). Researchers have experimented with varying the intensity of work search requirements. The general conclusion is that intensified search requirements reduce UI reciprocity levels. For a summary of this research, see Bruce D. Meyer, *Lessons from the U.S. Unemployment Insurance Experiments*, 33 J. ECON. LITERATURE 91, 112–21 (1995).

73. See Anderson, *supra* note 68, at 140–41 tbl.4.2 (identifying which penalties are used by each state); see also Williams, *supra* note 1, at 161 (noting a trend towards increased severity of penalties since the inception of UI).

74. See Anderson, *supra* note 68, at 138–39.

75. See ACUC SECOND ANNUAL REPORT, *supra* note 1, at 119–20 (surveying state laws and finding that the worker would be ineligible in twenty-four states; nineteen states have no authority

domestic or personal obligations limit her search to part-time work only sometimes excuses disqualification.⁷⁶

The practice of disqualifying workers who voluntarily quit a suitable job may also detrimentally affect part-time and temporary workers. A few states may disqualify a worker who voluntarily quit not only her most recent job, but *any* job during the base period.⁷⁷ Thus the following scenario would be possible: Sam, who holds a part-time job, accepts a second part-time job for a brief spell but then quits the second job. If Sam later loses the first job for reasons that are not his fault, he may be denied eligibility because of the quit. Similarly, statutory language in some states leaves open the possibility of disqualifying or reducing the benefits of a worker who, following an eligibility-triggering separation, accepts but then quits an interim part-time job in order to accept a better job (which somehow falls through, leading the worker to file a claim for benefits).⁷⁸ Although my own search of case law has uncovered no cases in which an unemployed worker otherwise eligible for benefits was disqualified as a result of having quit an interim part-time job in order to accept suitable full-time employment, the possibility might, as Deborah Maranville argues, create disincentives to accepting interim part-time jobs as stop-gap measures pending superior job matches.⁷⁹

Similar complications may arise for temporary help workers. In most states, termination of employment with a temporary help agency upon a worker's completion of an assignment is considered a voluntary, rather than involuntary separation if the employee turns down subsequent temporary assignments from the same agency.⁸⁰ Similarly, in close to half the states, the same outcome results if the worker fails to affirmatively contact the agency for a further assignment.⁸¹ These rules clearly seem designed to bar workers with a pattern of intermittent employment in temporary agency jobs from purposely alternating between temporary assignments and UI. Once again, though, these rules could misfire in the more sympathetic case of a worker who accepts employment with a temporary help agency as an

or conflicting authority on the matter; the worker would be eligible in ten states); Maranville, *supra* note 1, at 321–22 (surveying and listing reasons given in decisions across states).

76. See ACUC SECOND ANNUAL REPORT, *supra* note 1, at 119–20 (finding that in states in which the worker would be eligible, the reasons preventing disqualification include having a history of prior part-time work, a medical condition, or compelling personal circumstances).

77. See Maranville, *supra* note 1, at 304–06 (reviewing state law and finding that three states expressly permit such disqualifications by statute).

78. See *id.* at 308–09 (discussing the possibility of disqualification or reduction of benefits in states that consider voluntary quits from “most recent employment” prior to application for benefits when evaluating a claim).

79. See *id.* at 307–08.

80. See Chasanov, *supra* note 59, at 118 tbl.7.

81. See *id.* at 108 tbl.4.

interim measure between permanent jobs, and then turns down a subsequent temporary assignment in order to accept more suitable employment (from which she is then laid off). This worker might, in theory, find herself disqualified from UI benefits.⁸²

Scholars have urged numerous reforms to reduce disqualification of part-time and temporary workers. Some would abolish the practice that exists in some states of automatically disqualifying otherwise eligible workers who limit their job search to part-time reemployment for compelling personal reasons.⁸³ Others stress that disqualifying or reducing benefits of workers who turn down subsequent temporary assignments, or who accept and later quit interim part-time or temporary jobs, is unsound because it undermines their ability to move into more stable employment.⁸⁴

In summary, the current system of unemployment insurance excludes part-time and low-wage workers in a variety of ways. Monetary eligibility rules limit UI eligibility to workers whose labor market attachment, as measured by earnings and/or hours during a previous period, reaches some minimum threshold. Workers with very low wages and hours tend to be excluded on this basis. Nonmonetary eligibility rules compound this exclusion of workers with weak labor market attachment by disqualifying those who quit their jobs or limit their search upon job loss for "personal reasons," including family-related decisions to reduce work intensity. An employee who quits her job when work-family conflict makes continuation impossible (even, in some cases, when the employer triggered the conflict by unilaterally changing work rules) usually cannot collect benefits. An unemployed full-time worker who decides to limit her search to part-time employment in order to accommodate family caregiving demands may similarly forfeit benefits. Progressive critics urge the expansion of UI, arguing that these exclusions exacerbate the poverty of the lowest-income workers, and impose additional burdens on workers who currently struggle to manage the competing demands of work and family.

82. Again, my own search of the case law has turned up no cases with this holding, although it could arise. See Maranville, *supra* note 1, at 312 n.88 (describing a Washington case with this holding that she and the students in her poverty law clinic successfully appealed).

83. See ACUC SECOND ANNUAL REPORT, *supra* note 1, at 18; Stewart J. Schwab, *The Diversity of Contingent Workers and the Need for Nuanced Policy*, 52 WASH. & LEE L. REV. 915, 928 (1995) (arguing that a part-time worker with family obligations who refuses an offer of full-time employment should receive prorated benefits and not be disqualified).

84. See ACUC SECOND ANNUAL REPORT, *supra* note 1, at 121; Maranville, *supra* note 1, at 312; Pandya, *supra* note 1, at 933–39.

Reformers advocate several kinds of corrective measures. I tend to agree with proposals to eliminate anomalies that create "horizontal inequity."⁸⁵ It seems wrong that workers with comparable labor market histories may be treated differently due to outdated quirks in the method of assessing base period attachment.⁸⁶ Similarly, the system should recognize quits necessitated by unilateral employer changes in work rules as essentially cases of constructive layoff.⁸⁷ Finally, the use of wages as a proxy for labor force attachment leads to the differential treatment of workers who may be identical in their level of work stability, but who differ in their level of earnings.⁸⁸ If the goal of the system is to grant eligibility based on some minimum level of workforce attachment, then it ought not use so noisy a proxy that it leads to these spurious outcomes.⁸⁹ In addition, although I have found no evidence of actual denials for this reason, I agree in principle that workers who have turned down temporary or part-time assignments in order to accept more stable or suitable employment should not be denied benefits if later laid off from the superior job.⁹⁰

There is a difference, however, between arguing that there is *error* in determining who falls on either side of the eligibility bar (in which case feasible reforms designed to help reduce this error seem quite defensible), and arguing that we ought to *move* the bar to a different location. Some proposals aim to move the bar, falling into two categories, broadly defined. The first kind of proposal aims to lower the threshold of wages and/or hours required for eligibility, thus dampening the traditional tendency of UI to exclude workers with minimal attachment to the labor force.⁹¹ The second

85. One problem I have not discussed in the preceding analysis, but which is also worthy of reform on horizontal equity grounds, is the wide variations in UI rules across states. Interstate variation creates unfairness as well as a potential "race to the bottom" as states may succumb to competition for corporate investment by making UI obligations increasingly less onerous for employers. See, e.g., GRAETZ & MASHAW, *supra* note 1, at 194 (raising the race-to-the-bottom argument with respect to interstate variations in wage replacement rates).

86. See *supra* notes 48–50 and accompanying text (discussing alternative base period proposals).

87. See *supra* note 64 and accompanying text (discussing discharge/quit anomaly in cases involving unilateral schedule changes by the employer).

88. See *supra* notes 46–47 and accompanying text (explaining how two workers with identical hours but different wages might receive differential treatment under state eligibility rules).

89. See *supra* note 51 (proposing to move to hours-based eligibility rules).

90. See *supra* notes 77–82 and accompanying text (discussing the possibility of disqualification on the basis that a worker quit an interim stepping-stone job).

91. See *supra* note 55 and accompanying text. Note that Deborah Maranville does not specify how much of a reduction in the required hours or earnings she advocates. I am not categorically opposed to relaxing attachment requirements. For example, I would not oppose a federally imposed ceiling that would affect states with the highest thresholds, such as Washington (which tops the list by requiring a full-time minimum wage worker to have worked seventeen weeks during the twelve-month base period). My principal objection, as I explain more fully in Part

type of proposal does not focus specifically on low-income workers. Instead, it aims to eliminate exclusions, whether arising through monetary or non-monetary rules, that are linked to a worker restricting his or her workforce availability in order to meet domestic obligations.⁹² Both kinds of proposal are premised on the notion that we should strive to make UI more progressive (in terms of redistributing wealth and the burdens of family caregiving), and that these reforms are important steps to doing so. In the remainder of this Article, I critique these arguments.

Before moving on, however, I want to touch on some tangential but important issues relating to the causes of declining UI reciprocity. I mentioned earlier that the influx of women and younger workers into the workforce during the 1960s and 1970s meant that the traditional recipients of UI, men of prime working age with stable jobs, became a smaller percentage of the unemployed, causing a corresponding drop in reciprocity.⁹³ A shift in economic demand as well, from stable manufacturing industries with high reciprocity rates to less stable service-oriented industries, has contributed to the decline.⁹⁴ Also, the rise in two-earner families is likely to have spurred a corresponding decline in the need or tendency among some workers to apply for UI benefits upon becoming unemployed.⁹⁵ Researchers generally agree on these points.

A matter of controversy, however, is the effect of tightened eligibility standards in the 1980s. Reformers who advocate expanding the eligibility pool often assert that states' tightening of eligibility standards was an important cause of the decline in reciprocity. Therefore, they reason, relaxing eligibility is the logical way to effect a return to the status quo ante. Some have hypothesized that during the '80s, state governments either inadvertently or deliberately squeezed out low-wage workers in an attempt to improve the solvency of their UI programs—and perhaps to shift the costs of supporting these workers to the federal government, as they might then qualify for means-tested federal programs such as food stamps.⁹⁶ These

III, is with the notion that we should do so in order to redistribute wealth to the poorest workers. I believe UI is a poor instrument for this policy goal.

92. See *supra* notes 54, 65–67, 83 and accompanying text.

93. See GARY BURTLESS & DAVID SAKS, *THE DECLINE IN INSURED UNEMPLOYMENT DURING THE 1980S*, at 99 (1984) (indicating that the changed composition of the workforce explained much of the drop in reciprocity before 1980).

94. See *id.* at 17.

95. See Daniel P. McMurrer & Amy B. Chasanov, *Trends in Unemployment Insurance Benefits*, MONTHLY LAB. REV., Sept. 1995, at 35 (noting the plausibility of this explanation, although empirical research has not addressed the issue).

96. See, e.g., ADVISORY COUNCIL ON UNEMPLOYMENT COMP., *DEFINING FEDERAL AND STATE ROLES IN UNEMPLOYMENT INSURANCE* 43, 48–51 (1996). For a discussion of the trust

claims, however, are based on contested empirical foundations. Some scholars do believe that tightened eligibility standards had a significant effect on reciprocity in more recent years.⁹⁷ Others, however, have found that changes in state laws had a trivial effect on reciprocity, offering alternative explanations, such as a growing failure on the part of unemployed (even eligible) workers to apply for benefits, probably due to the decline in unionization.⁹⁸ Moreover, a recent effort to test whether tightened eligibility standards have shifted costs from UI to welfare programs found no support for the hypothesis.⁹⁹ My point is not that we should be unperturbed by reciprocity trends. They suggest, after all, that UI is not reaching as many workers as it once did. Instead, I wish to caution against the false logic of arguing that tightened eligibility caused the decline in reciprocity, and that therefore the natural way to reverse that trend is to loosen eligibility.

II. ECONOMIC THEORY OF UNEMPLOYMENT INSURANCE

As I stated earlier, numerous scholars have argued that UI has failed in its potential to be a wealth-redistributive social institution. As a means of better exploiting that redistributive potential, these scholars would extend

fund insolvency crisis of the 1980s, see WAYNE VROMAN, *UNEMPLOYMENT INSURANCE AND TRUST FUND ADEQUACY IN THE 1990S*, at 1–7 (1990).

97. See Bassi & McMurrer, *supra* note 4, at 69–70, and McMurrer & Chasanov, *supra* note 95, at 35–36, which both review empirical controversies on the relationship between tightened state eligibility standards and UI reciprocity, including some suggesting that federal incentives for states to reduce nominal or real benefit levels, as well as federal introduction of taxation of UI benefits, were important causes of reduced reciprocity in the 1980s.

98. See Rebecca M. Blank & David E. Card, *Recent Trends in Insured and Uninsured Unemployment: Is There an Explanation?*, 106 Q.J. ECON. 1157, 1188–89 (1991). Rebecca Blank and David Card estimate that only trivial changes in reciprocity between 1977 and 1987 were attributable to tightened monetary eligibility standards, because increased earnings requirements were offset by increased wages. They argue instead that most of the decline is explained by a shift in the unemployed population from states with high, to states with low, “takeup rates”—rates of application for benefits by eligible unemployed workers. *Id.* The most significant factor affecting state take-up rates, in turn, is the state’s rate of unionization. Unions may increase take-up rates by increasing members’ awareness of eligibility for benefits and expediting their applications. For similarly skeptical data from the early 1990s, see WAYNE VROMAN, *U.S. DEPT OF LABOR, UNEMPLOYMENT INSURANCE, WELFARE, AND FEDERAL-STATE FISCAL INTERRELATIONS* (1996), which finds no relationship between changes in reciprocity and state-level restrictions on monetary eligibility standards in either 1967 to 1980, or 1981 to 1994. *Cf.* Stephen A. Wandner & Andrew Stettner, *Why Are Many Jobless Workers Not Applying for Benefits?*, MONTHLY LAB. REV., June 2000, at 21 (finding based on two surveys in the early ’90s that more than half of those meeting the official definition of unemployed do not file for benefits—either because they believe they are ineligible, or because they are optimistic about finding a job).

99. See VROMAN, *supra* note 98, at 51–59 (finding no relationship between changes in state reciprocity levels in 1967 to 1980, or 1981 to 1994, and state welfare caseloads).

UI eligibility to a broader cross section of workers by pulling in a larger pool of workers whose labor market attachment is very low. Other proposals would marshal UI to distribute more benefits to working families. In order to understand why UI is a poor mechanism for redistribution in these contexts, it helps to understand the insurance-based underpinnings of the system. In this way, we have a baseline against which to evaluate proposals for reform.

One point bears emphasis at the outset. The sharing of risk in an insurance pool, while it increases social utility by reducing uncertainty for risk-averse parties, does not accomplish any systematic wealth redistribution in the sense we typically use the term. Certainly, an insured individual is made “poorer” upon suffering a loss, and insurance provides a distribution to that person from a fund created by collective contributions, but the pool of contributors may comprise people who, *ex ante*, had identical expected lifetime wealth. Thus, the spreading of risks through a private insurance pool tends to be redistributive in a much more constrained, *ex post* sense than what we mean when we talk about the broader equitable goal of social wealth redistribution.¹⁰⁰

Of course, insurance offered through government mandate can be redistributive in the further sense that it makes it possible for individuals who have very high risks of casualty, and who therefore cannot find insurers would be unable to obtain insurance in purely private markets to do so at an actuarially fair (or subsidized) rate. Thus, for example, individuals willing to indemnify them, might find relief through a government-mandated insurance scheme. As I mentioned earlier¹⁰¹ and will explain further below, however, Congress’s aim in mandating a public system of UI appears to have been motivated by the desire to overcome informational market failures (for example, adverse selection problems) that thwarted any significant private provision of unemployment insurance, rather than by an ethic of increasing the inclusiveness of coverage *beyond* what a fully informed private market would offer. The target beneficiaries of the program as originally conceived were stable workers with a strong attachment to the labor force, regardless of means—essentially, those workers who would be able to purchase unemployment insurance at reasonable rates in private markets if there were no market failure. In essence, Congress’s mandate would do little more than “correct” the market, rather than expand the market.

100. Steven Shavell also makes this point in STEVEN SHAVELL, *ECONOMIC ANALYSIS OF ACCIDENT LAW* 191–92 (1987).

101. See *supra* notes 21–23 and accompanying text.

My review of the economic theory of insurance is divided into four parts. First, I will describe the general economic principles underlying insurance. Next, I will relate these general principles to the context of unemployment, focusing primarily on why unemployment insurance is provided through the state. Third, I will present a series of stylized hypotheticals to illustrate the theory underlying existing exclusions from UI. Finally, I will briefly discuss arguments from deregulatory circles.

A. A Brief Review of the Economics of Insurance

Most people are risk averse, meaning they dislike uncertainty about losses that may befall them.¹⁰² There may be uncertainty about frequency, timing, or size of potential loss. Reducing uncertainty, therefore, raises social welfare, not only because it relieves a psychological burden, but also because it frees individuals to engage in risky activities that are socially desirable.

There are many ways to respond to risk. One can simply assume it. Alternatively, one can try to prevent it by reducing hazards. A third option is to avoid it by transferring it to others. Thus someone who is more risk averse could transfer risk to another who is less risk averse in exchange for consideration. When risk transfer is carried out through a social mechanism—by pooling a large number of individuals—we call it insurance.¹⁰³

The price of insurance reflects the size of risk. The higher an individual's risk of a particular hazard, the higher the premium he must pay to obtain insurance.¹⁰⁴ In a perfect market, risk-averse individuals would insure fully against losses, paying a premium that reflected their personal risk characteristics.¹⁰⁵ If the probability of hazard is very high, however,

102. For good discussions of the relationship between risk allocation and social welfare, see SHAVELL, *supra* note 100, at 186–92, and ALLAN H. WILLETT, *THE ECONOMIC THEORY OF RISK AND INSURANCE* 27, 50–59 (1901).

103. See ROBERT RIEGEL & JEROME S. MILLER, *INSURANCE PRINCIPLES AND PRACTICES* 26 (4th ed. 1959) (“Insurance is a social device whereby the uncertain risks of individuals may be combined in a group and thus made more certain, small periodic contributions by the individuals providing a fund out of which those who suffer losses may be reimbursed.”). Insurance may be used to deal with different kinds of uncertainty—for example, fire insurance reduces uncertainty about the frequency and size of loss. With life insurance, however, the uncertainty is not *whether* death will occur, but *when* it will occur. Life insurance reduces the financial uncertainty associated with the possibility of an untimely death. See *id.* at 24–25.

104. Stated formally, the competitive insurance premium, $\pi_i = p_i L + T$, where p_i is the probability of the insured event occurring, L is the magnitude of the insured loss, and T is transaction costs.

105. See Michael Rothschild & Joseph Stiglitz, *Equilibrium in Competitive Insurance Markets: An Essay on the Economics of Imperfect Information*, 90 Q.J. ECON. 629, 633–34 (1976) (modeling this proposition).

insurance may not be cost effective: As the probability of a hazard approaches one, the price of full insurance approaches the cost of simply assuming the loss.¹⁰⁶

There are certain parameters outside of which an insurance pool cannot function efficiently. For example, if risk cannot be measured with a sufficient degree of confidence, insurance may not be provided at all, because there is no way to determine price.¹⁰⁷ Also, when risks are correlated with each other, as with large catastrophes such as earthquakes, efficient premiums will be very high, reflecting the insurer's risk that the undiversified fund will run dry in the event of a mass loss. Information and agency costs may also interfere with full insurance. In this latter group, the most significant barriers are pooling problems such as adverse selection and moral hazard problems.¹⁰⁸

Adverse selection is the phenomenon in which individuals with higher than average risk profiles seek insurance but fail to disclose that they are high risk.¹⁰⁹ If insurance consumers' personal risk characteristics are private information, an insurer is unable to distinguish between high-risk individuals (the insurance market version of "lemons")¹¹⁰ and low-risk individuals, and therefore cannot price insurance efficiently. If the insurer tries to standardize insurance rates by charging an average premium, low-risk individuals will end up subsidizing high-risk individuals.¹¹¹ This equilibrium is unstable because low-risk individuals will soon look to competitors willing to insure a selected pool of low-risk individuals, or drop out of the market

106. An example is in the case of the congenitally ill—the probability of illness occurring is equal to one. Private insurance would be essentially impossible. See Barr, *supra* note 23, at 753–54.

107. See RIEGEL & MILLER, *supra* note 103, at 27; SHAVELL, *supra* note 100, at 198.

108. See generally Jon D. Hanson & Kyle D. Logue, *The First-Party Insurance Externality: An Economic Justification for Enterprise Liability*, 76 CORNELL L. REV. 129, 137–42 (1990); J. Hirshleifer & John G. Riley, *The Analytics of Uncertainty and Information—An Expository Survey*, 17 J. ECON. LITERATURE 1375, 1389–91 (1979); Mark V. Pauly, *Overinsurance and Public Provision of Insurance: The Roles of Moral Hazard and Adverse Selection*, 88 Q.J. ECON. 44 (1974) (reviewing information problems that interfere with efficient insurance).

109. This may occur whether or not the high-risk individuals have very good information about the fact that they are high risk, so long as they are able to guess fairly accurately, or possess some other quality correlated with their risk profile that systematically affects their insurance consumption behavior (such as level of risk aversion). See Rothschild & Stiglitz, *supra* note 105, at 639–40.

110. See George A. Akerlof, *The Market for "Lemons": Quality, Uncertainty and the Market Mechanism*, 84 Q.J. ECON. 488 (1970) (providing a classic demonstration that where the quality of used cars cannot be ascertained, sellers with higher quality cars, because they cannot be fully rewarded for quality, will exit the market leaving behind a "market for lemons").

111. See Hanson & Logue, *supra* note 108, at 139 (explaining how cross-subsidization may be a problem).

entirely to avoid the cost of subsidizing their high-risk counterparts.¹¹² Costs of insurance for the high-risk consumers remaining in the pool will increase, more will drop out, and so on, until the scheme completely unravels. Unless low-risk (overpaying) participants are ignorant, desire to cross-subsidize others out of welfarist motives, or are mandated by the state to participate in a public insurance scheme (such as UI), the pool will collapse.

The alternative strategy of attempting to charge different premiums for low-risk and high-risk individuals will of course also fail: So long as high-risk individuals can masquerade as low-risk individuals and purchase insurance at the lower rate, no insurance carrier will be willing to offer the lower rate. Regardless of strategy, so long as the insurer is unable to overcome the information asymmetry, the pooling equilibrium eventually unravels.

The second type of agency cost is moral hazard. If an individual is fully insured, he may reduce his effort to avoid losses. If the insurer could observe perfectly the insured's behavior, it would be possible to adjust the premium to reflect the insured's level of precaution. The problem, of course, is that it may be difficult or impossible for the insurer to determine whether a candidate for insurance will exercise the optimal precautions once insured. Consequently, there is no way for the insurer to build into the price structure a system of rewards and punishments for individuals who exercise different levels of precaution. As a result, there is an inefficient tendency to overinsure: Not only do coverage and premiums exceed optimal levels, but so do the risky behaviors of insureds.¹¹³ The more complete the indemnification, the higher the likelihood of moral hazard assuming psychic costs are not prohibitive. Various devices, such as partial indemnification, copayments, deductibles, and higher premiums for frequent claimants have been used in private insurance markets to try to overcome moral hazard. If the insured party knows he will bear some of the cost of loss, he will have a greater incentive to take precautions.¹¹⁴

B. Unemployment Compensation as a Type of Insurance

Unemployment compensation has a number of the features of insurance. The program is designed to give individuals protection against a number of

112. If the left side of the equation $[\pi]$ exceeds the right side of the equation $[p_L + T]$, as it would for low risk individuals forced to pay premiums that averaged the high and low competitive premiums, it would be cheaper to self-insure. See Rothschild & Stiglitz, *supra* note 105, at 634–38.

113. See Pauly, *supra* note 108, at 56.

114. See generally Steven Shavell, *On Moral Hazard and Insurance*, 93 Q.J. ECON. 541 (1979) (modeling the optimal insurance policy, under which the cost of insurance factors in the ability of the insurer to observe the level of care by the insured).

uncertain perils, should they come to pass: It partially replaces income for workers who experience involuntary unemployment, helping them to smooth income through periods of temporary wage interruption and to prolong their job searches, thus optimizing job matches upon reemployment.

Unemployment insurance has never been provided exclusively in the private sector.¹¹⁵ Although one might wonder whether this absence is the result of crowding out by government,¹¹⁶ the absence of private insurance before 1935 suggests instead that some kind of market failure was and is now at work. To be sure, the risk of unemployment presents severe versions of some of the information and agency problems I have just described.¹¹⁷

First, lack of full information about risk and consequent adverse selection problems can interfere with private markets. A high-risk individual seeking insurance against job loss in a private market would have an incentive to conceal from insurers private information regarding her risk of becoming unemployed.¹¹⁸ One might suppose that the risk of unemployment could be estimated in much the same way as other personal and economic

115. Some unions privately provide supplemental unemployment benefits (SUBs), negotiated through the collective bargaining agreement, particularly in the manufacturing sector. See generally John W. Budd & Brian P. McCall, *The Effect of Unions on the Receipt of Unemployment Insurance Benefits*, 50 INDUS. & LAB. REL. REV. 478, 481–82 (1997) (analyzing the effect of SUBs on unemployment insurance reciprocity among unionized workers); Andrew J. Oswald, *Unemployment Insurance and Labor Contracts Under Asymmetric Information: Theory and Facts*, 76 AM. ECON. REV. 365, 368 tbl.1 & tbl.3 (1986) (analyzing the low prevalence of SUBs from 1970 to 1980). Other forms of private, supplemental UI may be available elsewhere in the private sector, for example, insurance covering inability to make mortgage payments in the event of unexpected job loss. See Kenneth R. Harney, *Loan Covers Borrowers in Event of Job Loss*, WASH. POST, Dec. 11, 1999, at G1 (describing a new program launched by two insurance companies, in which borrowers can pay an extra one-eighth of a percentage point on their mortgage in exchange for insurance covering six months' mortgage payments should they become involuntarily unemployed).

116. See Michael B. Rappaport, *The Private Provision of Unemployment Insurance*, 1992 WIS. L. REV. 61, 64–72 (arguing that legal restrictions prior to the establishment of government-provided UI, rather than market failure, thwarted private insurance provision); cf. W.F. Young, *Is Insurance a Niche Business? Reflections on Information as a Niche Product*, 1 CONN. INS. L.J. 1, 22–34 (1995) (commenting that government preemption of unemployment insurance devalues information that might be developed in a private market, making it difficult to know empirically whether private insurance is possible).

117. See generally Barr, *supra* note 23, at 754–57, 765–68 (reviewing economic justifications for government provision of unemployment insurance); W. Henry Chiu & Edi Karni, *Endogenous Adverse Selection and Unemployment Insurance*, 106 J. POL. ECON. 806, 806–07 (1998) (demonstrating inhibitory effect of private information on competitive markets for unemployment insurance); Tannenwald & O'Leary, *supra* note 33, at 4 (arguing that adverse selection problems thwart private provision of unemployment insurance).

118. See Chiu & Karni, *supra* note 117, at 819–21 (arguing that a major barrier to private unemployment insurance is private information regarding employees' preferences for work and the imperfect observability of work effort, which may affect the likelihood of lay off). Firms will also have private information about the likelihood they will lay off workers, although experience rating can help regulate behavior here.

risks are measured: by looking at the worker's employment history, the "diversification" of his assets (skills), demographic characteristics, and so on. There may be some difficulties with this, however, because workers' employment habits and preferences tend to vary over their life cycle, making work history a weak predictor of future behavior.¹¹⁹

Unemployment also presents unique problems with respect to moral hazard. As mentioned earlier, moral hazard poses no threat where the psychic costs of casualty outweigh the insurance benefit—for example, suicide—but workers may be highly idiosyncratic in the degree to which they suffer psychic cost due to unemployment. Some workers strongly resist unemployment for reasons of reputation, career progress, aversion to idleness, and so on. Others, by contrast, may prefer unemployment to working if UI fully replaces lost income. A worker who is relatively indifferent between employment and its attendant wages, versus unemployment and its attendant UI benefits, may reduce his work effort or, in the event of job loss, his effort to find a new job.

Finally, the relative unmeasurability of the risk of unemployment is often cited as a reason for the failure of private markets for unemployment insurance.¹²⁰ The ability to predict idiosyncratic demand shifts in specific industrial sectors or to predict broader economy-wide business cycles is notoriously elusive. Neither workers nor employers nor insurers may be able to predict the business cycle with sufficient confidence to estimate the risk of unemployment. On a somewhat different note, unemployment can resemble earthquakes in terms of "mass catastrophe" potential. Although in stable economic times job separations may be relatively constant and random, an economic recession could lead to sectoral crashes, mass unemployment, and a crisis of insolvency in a private insurance fund.

Mandatory public unemployment insurance is able, albeit imperfectly, to overcome these market imperfections. Public provision permits insurance for market-wide losses, akin to offering affordable earthquake insurance where private providers cannot do so.¹²¹ Its mandatory nature overcomes the worst of the adverse selection problems,¹²² because public assistance can "break the bank" (that is, operate subsidized) whereas competitive insurance markets require at least a competitive rate of return.¹²³

119. See Chiu & Karni, *supra* note 117, at 807–08.

120. See, e.g., RIEGEL & MILLER, *supra* note 103, at 27.

121. See Sherwin Rosen, *Unemployment and Insurance*, 19 CARNEGIE-ROCHESTER CONF. SERIES ON PUB. POL'Y 5, 35–36 (1983).

122. Some persist because of imperfections in experience rating, the details of which are analyzed elsewhere. See Chiu & Karni, *supra* note 117, at 820–21.

123. To see why public insurance can solve these sorts of agency problems, consider a hypothetical labor market in which there are two kinds of individuals, high-risk and low-risk. High-risk

Note that public provision of unemployment insurance does not solve moral hazard problems *per se*. Public provision may mean, however, that whereas private insurers would exit the market for failure to overcome persistent problems of moral hazard, the state can operate subsidized. The state may still, of course, try to stem moral hazard using techniques traditionally employed in private markets, such as partial indemnification and monitoring of observable efforts to avoid loss. Several features of unemployment insurance discussed in Part II—holding replacement rates below 100 percent, excluding workers with very low workforce attachment, and scrutinizing job separation and search—are designed specifically to combat persistent problems of moral hazard.

The state's interest in intervening, however, extends beyond the goal of correcting private market failures. In the absence of at least some (even limited) system of relief against unexpected unemployment, there could be widespread problems of social dependency during economic downturns. Similar goals are maintaining aggregate spending power during downturns, reducing dispersal of skilled workers when employers impose temporary layoffs, and discouraging employers from laying off workers in the first place.

C. Exclusions from the Pool

To take stock, the foregoing part explained that insurance is a social device for reducing risk by pooling it within a large group of individuals. Recall also that private insurance typically excludes individuals for whom the probability of hazard approaches one, because the price of insurance

individuals have a 50 percent chance of losing their jobs, while low-risk individuals have a 20 percent chance of losing their jobs. If it were publicly observable whether a hypothetical worker Sally were a low-risk or a high-risk individual, private insurance markets would do quite well in offering Sally insurance against the risk of job loss. A competitive market would offer Sally a premium of fifty dollars if she were a high-risk individual, and a premium of twenty dollars if she were a low-risk individual. For the reasons discussed in the text, however, if the difference between high-risk and low-risk individuals is not observable, the premium will be set somewhere in the middle and low-risk individuals will be driven out of the market.

A public insurance scheme could offer all workers insurance at a flat premium, though what that premium would be could vary. The premium might represent the price of insurance for the lowest-risk individuals, in which case all individuals would purchase it, regardless of whether they were low-risk or high-risk employees. Such an insurance contract would be maximally efficient, because it would insure all individuals who desired insurance. Note, however, that such a scheme would lose money on average. The publicly provided scheme would insure for twenty dollars a person whose risk characteristics would suggest a premium of fifty dollars. Because this loss occurs half of the time, the public insurance scheme would therefore lose fifteen dollars on average, which corresponds to the public subsidy necessary to fund the scheme.

approaches the cost of simply assuming the loss.¹²⁴ As part of its effort to mimic private insurance, the UI system incorporates comparable limitations on the breadth of the risk pool. This feature of UI is perhaps the clearest illustration of its limited, "market-perfecting," goals. By mandating participation, the state attempts to make wage-interruption insurance available to those who would rationally purchase it in a private market, but who are prohibited from doing so because market failure blocks private provision of the desired good. The intended, "perfected," result is an outcome that resembles what a rational private insurance market might provide. If there is a role for more thoroughgoing redistribution, that is the job of other, distinctly redistributive programs.

In this part, I will work through a series of stylized hypothetical examples of workers who might seek protection against income loss in the event of layoff. I hope to illustrate why, assuming a market-perfecting goal animates the unemployment insurance scheme, some workers might be excluded from the system.

First, consider the hypothetical worker who holds the paradigm lifetime contract of employment. This worker faces a low risk of job loss. The potential casualty for this worker is a temporary layoff followed by rehire when demand recovers. One could imagine that this worker would be willing to purchase insurance to reduce the risk of losing income during temporary layoffs of this nature, assuming the layoff might extend over a long enough period to put a strain on the worker's personal savings buffer (and we might especially expect demand for insurance in one-earner families). Assuming that informational uncertainties discussed in Part II.B block private provision of insurance for this worker, there may be a loss of efficiency. A market-perfecting state would try to provide insurance to this worker.

Second, we might imagine a worker who has no guarantee of lifetime employment with a single employer, but who still faces a relatively low probability of unemployment between jobs (this worker's search for subsequent employment usually occurs on the job). In addition to wanting to avoid temporary income loss in the event of unemployment, this worker has a second major concern that financial constraints (assuming inadequate capital markets) will make it hard for her to find an adequate replacement job. If she can hold her finances together for long enough, she can engage in a decent search and land a job commensurate with her skills and experience. In order to maximize her chances of suitable reemployment, this worker might even prefer to remain unemployed rather than accept employment that dramatically underutilizes her skills. In this case, the possible

124. See *supra* note 106 and accompanying text.

casualty is wage loss leading to inadequate job search. Here, too, this worker may wish to contract for insurance that private markets cannot provide. Public insurance against income interruption due to job loss may solve the problem.

The third scenario involves the worker who wants to combine work with other non-labor market endeavors. Let's take an easy case first. Suppose the worker accepts a job with a temporary help agency in order to pursue a personal hobby (say, art). The agency provides a series of temporary assignments of variable length. Periodically, the worker declines assignments in order to have time to pursue her art. This worker's labor market participation, then, is typified by intermittent periods of market work and nonmarket work or leisure. For this worker, periods of unemployment are typically not a "casualty" in the sense of being an unexpected injury. On the contrary, this worker chose a temporary job, fully expecting to be able to exit paid labor on occasion, in order to make time for her other projects. Insurance would be prohibitively costly or impossible in this case because job loss does not represent a *disruption* in expected labor market status.

More difficult is the case of the worker who holds a part-time or temporary job but who would rather have a permanent job, and who is not on a temporary layoff from more permanent or steady employment. Over the course of a year, he is laid off and rehired repeatedly, ultimately working for a total duration of only six weeks. Equity makes a strong case for this worker, because he did not choose temporary employment in order to carve out periods of leisure. Instead, this is the only kind of job available to him, either because he lacks adequate skills to obtain the job he prefers, or because there is a shortage of jobs matched to his skills and abilities. How would a classic insurance paradigm treat this worker? Insurance aims to indemnify against unexpected losses. The problem in this case is that lengthy work interruptions are an intrinsic feature of the worker's labor market participation. Thus, even though work interruption is a hardship for this worker, it is not, precisely, *unexpected*. When the likelihood of a loss-triggering event approaches 100 percent, an insurer will not cover it (or will charge a premium that is essentially equal to the value of the loss). Therefore, the private market would not provide—nor would this worker pay the high price for—insurance against unemployment-based income interruption.

A final example is the worker who divides time between family obligations and work. In one view, loss of employment due to, say, the illness of family member for whom one is responsible is a disruptive and difficult-to-predict event that leads to income loss and attendant hardship analogous

to—or perhaps even worse than—the layoff of the first two hypothetical workers. Perhaps the pool of individuals who have family obligations, or perhaps taxpayers as a whole, would want to insure against the inability to work when family obligations conflict with work schedules. Also, many employers privately provide paid family leave, indicating a demand for such benefits.¹²⁵

But stepping back to examine this scenario from the perspective of a private market for insurance against layoff-related wage interruption, this final worker's hardship has a much more attenuated nexus to the hazards of working life than do the first two workers'. In the first two cases, a layoff (due to a reorganization of the industrial process, or flux in the economy) triggered the casualty. Now, obligations to a child or ailing parent reduce the worker's availability for employment, which in turn leads to the necessity of quitting. Regardless of how one characterizes the provision of care to the family member (as coerced? as an activity that has higher utility for the worker than paid labor?) the insurance story is more complicated. The event that triggers benefits here is not involuntary job loss at the behest of the employer, but shifting events in the non-work-related life of the employee. Thus, insurance pegged against the risk of involuntary layoff may be an imperfect vehicle for insuring against the relevant "casualty." In some cases, unexpected family emergencies will arise that can fit within a plausible model of actuarial insurance. In other cases, the loss of employment stems from a shift in the worker's personal priorities. These latter events have less resemblance to "casualties," and are more difficult to incorporate into a classical insurance model.¹²⁶

In sum, publicly provided insurance against all but the first and second types of loss would probably not mimic private unemployment insurance in any cognizable sense. This analysis, of course, forces the question of whether workers and their employers *ought* to pool risk against the burdens of intrinsically intermittent employment or work-family conflict that some but not all workers bear. This is a question to which I will return in Part III.

125. Note that the Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2601–2654 (1994 & Supp. V 1999), provides workers with up to twelve weeks of leave per year in the event of the birth or adoption of a child, or a serious health condition. The statute, however, does not require employers to continue paying workers while they are on leave. Thus, employers who offer paid leave, or who offer leave exceeding twelve weeks, do so on a voluntary basis.

126. The story is still more complicated than this. I will have more to say on the difficulties of fitting family-conflict related work interruption into the unemployment insurance model, in Part III.B, below.

D. Detractors of Government-Provided Unemployment Insurance

The fact that the government mandates a scheme of unemployment insurance does not, of course, mean it ought to. Not all analysts believe that unemployment and attendant problems ought to or will be corrected through government-mandated insurance. A particular worry of these observers is that government provision has crowded out other mechanisms that might otherwise have emerged to fulfill the goal of UI, such as private savings, spousal labor supply, or help from other networks of family and friends. Arguments against state provision of unemployment insurance fall into two main categories. Some skeptics focus on government failure, distrusting the government's capacity to administer a UI scheme efficiently.¹²⁷ Skeptics in this vein might still favor a private market for unemployment insurance, arguing that claims about private market failure are overstated.¹²⁸ Others distrust the mechanism of risk-pooled insurance more generally, advocating some form of self-insurance in preference to a social mechanism.¹²⁹

Chief among the complaints of skeptics from both camps is that on average, public UI increases, rather than decreases, the social costs of unemployment. In the standard job search model of unemployment, the unemployed worker decides whether to accept a job offer based on whether the wage exceeds his "reservation wage," the wage below which he will elect leisure or home production instead of work. Workers who are unemployed may prefer to be out of work, either because (1) when returns to labor are low, they choose to substitute nonwork for work activities, (2) they are engaged in a rational search for a better job, or (3) they have explicitly or implicitly contracted to be laid off when their employers face slack demand.¹³⁰ By making leisure, home production, or job search relatively less costly, unemployment benefits increase the reservation wage of labor and increase unemployment. There is ample empirical support for the prediction

127. See, e.g., Rappaport, *supra* note 116, at 79–83.

128. See *id.* at 84–94.

129. See, e.g., George E. Rejda, *Unemployment Compensation: A Proposal for an Optional System of Self-Insurance*, 50 J. AM. SOC'Y CLU & CHFC 64, 69–74 (1996); George C. Leef, *Unemployment Compensation: The Case for a Free Market Alternative*, REGULATION, Winter 1998, at 25–26.

130. See Peter G. Gahan, *European Unemployment: The Role of Labor Market Regulation?*, 19 COMP. LAB. L. & POL'Y J. 455, 457–68 (1998) (reviewing UNEMPLOYMENT POLICY: GOVERNMENT OPTIONS FOR THE LABOUR MARKET (Dennis J. Snower & Guillermo de la Dehesa eds., 1997) and WORKING FOR FULL EMPLOYMENT (John Philpott ed., 1997)); Kelman, *supra* note 24, at 1227–34, 1287–96 (describing and criticizing intertemporal substitution/real business cycle and rational search theories of unemployment).

that unemployment benefits increase the duration of unemployment.¹³¹ Both increasing the weekly benefit amount¹³² and increasing the duration of benefits¹³³ lead to increases in the duration of unemployment spells.

The more difficult, and less resolved, question is whether UI actually leads to a net loss of efficiency. Skeptics observe that although the consumption-smoothing benefits of UI are significant,¹³⁴ public provision of UI may crowd out private incentives to smooth consumption.¹³⁵ They also maintain that the social costs of prolonged unemployment outweigh any benefits that may flow from UI.¹³⁶ Continuing attempts to evaluate this question have led to a lively debate in labor economics, tapping the efforts of both theoreticians and empiricists.¹³⁷ Thus, for example, defenders of UI emphasize that an important justification for UI benefits—and the very increase in the duration of unemployment they stimulate—is to give displaced workers the financial means to engage in a more sustained job search, thus increasing their ability to find jobs matched to their individual

131. See Paul T. Decker, *Work Incentives and Disincentives*, in UNEMPLOYMENT INSURANCE IN THE UNITED STATES, *supra* note 4, at 292–98 (reviewing recent empirical studies examining the effect of UI on unemployment spells).

132. See *id.* at 294–95 (estimating the increased duration of unemployment resulting from increasing benefit amount by 10 percent range from 0.5 weeks to 1.5 weeks).

133. See *id.* at 297 (estimating the increased duration of unemployment resulting from increasing benefit duration by one week range from 0.1 to 0.5 weeks).

134. See Jonathan Gruber, *The Consumption Smoothing Benefits of Unemployment Insurance*, 87 AM. ECON. REV. 192, 203 (1997) (estimating that in the absence of a UI program, food consumption by unemployed workers falls by 22 percent—over three times the average drop in food consumption in the presence of an unemployment insurance program).

135. See *id.* at 201–03 (speculating, notwithstanding his finding that the UI program significantly smooths consumption, that existing provision of UI in the United States on average over-supplies insurance relative to what workers would seek if they self-insured, and that public UI may consequently crowd out other forms of insurance against unemployment, such as private savings and spousal labor supply).

136. See, e.g., Dennis H. Snower, *Evaluating Unemployment Policies: What Do the Underlying Theories Tell Us?*, in UNEMPLOYMENT POLICY: GOVERNMENT OPTIONS FOR THE LABOUR MARKET 34–35 (Dennis J. Snower & Guillermo de la Dehesa eds., 1997) (raising doubts that gains from provision of unemployment insurance exceed efficiency losses that arise when unemployment benefits encourage unemployment); Leef, *supra* note 129, at 25 (overall productivity losses due to prolonged unemployment exceed the benefits of extended search opportunity, thus justifying retrenchment of public UI).

137. It may be impossible, of course, to dissociate some of these debates from underlying controversies about the existence and sources of involuntary unemployment. Orthodox economists view unemployment and underemployment as merely transitory phenomena in a labor market that will eventually clear, whereas liberal, or neo-Keynesian, economists tend to see involuntary unemployment and underemployment as equilibrium phenomena in labor markets that persistently fail to clear. These underlying controversies are the subject of an earlier article. See Lester, *supra* note 2, at 91–98, 129–38.

skills and training.¹³⁸ Results of efforts to test the job search hypothesis empirically have been mixed, leaving the matter unresolved.¹³⁹

Another matter to consider is the potential effect of unemployment insurance on workers' incentives to move between different labor market states.¹⁴⁰ If one's willingness to support a program of UI turns on its effects on employment levels, it is insufficient to look solely at workers' movements between employment and unemployment, because it may overstate the degree to which UI benefits increase unemployment. Unemployment insurance may also make it more attractive for individuals who are in the workforce, whether employed or unemployed and looking for work, to stay in the workforce.¹⁴¹ The existence of benefits (assuming the worker is eligible) will make the worker reluctant to leave the workforce because it will result in the loss of those benefits. Conversely, the availability of benefits will encourage workers who have previously stayed at home or otherwise been out of the workforce to enter the workforce—though not necessarily into jobs (they may become unemployed, that is, not working but searching for a job).¹⁴² Empirical evidence verifies that UI affects transitions in multiple

138. See Atkinson & Micklewright, *supra* note 11, at 1700 (stating that UI raises the reservation wage, but encourages people to carry out a more systematic search to obtain information about jobs on offer).

139. See Decker, *supra* note 131, at 293–94 tbl.7.1, 298–99, which reviewed empirical studies testing the hypothesis that UI gives workers extra time to search for a job, leading to more favorable reemployment outcomes as measured by reemployment wages. Although he identified one study estimating that a 10-percentage-point rise in the wage replacement rate increased the reemployment wage by 7 percent for men, and by 1.5 percent for women, he also cited four subsequent studies that have failed to support this finding. See *id.* Atkinson & Micklewright, *supra* note 11, at 1706–21, review the literature prior to the 1980s, reporting similarly mixed findings. An additional study, published since Paul Decker's review, finds weak evidence in favor of beneficial effects on postunemployment wages. See John T. Addison & McKinley L. Blackburn, *The Effects of Unemployment Insurance on Postunemployment Earnings*, 7 J. LAB. ECON. 21 (2000).

Complicating this line of research is the possibility that reemployment wages may be a noisy proxy for a successful search. An extended job search may, for example, allow a worker to find a job that pays the same wage as his previous job, but with superior benefits, security, or job training opportunities.

140. See generally Atkinson & Micklewright, *supra* note 11 (discussing both theoretical and empirical issues on the relationship between UI and labor market transitions).

141. Government statisticians define the unemployed as workers who are without a job and either awaiting recall by their former employer, or actively searching for a new job. In this sense, statisticians draw distinctions between the various individuals who, at any given time, are not working. Those looking for work or awaiting recall are considered "unemployed." Those who are not searching for work are deemed to be out of the workforce. See RONALD G. EHRENBURG & ROBERT S. SMITH, *MODERN LABOR ECONOMICS: THEORY AND PUBLIC POLICY* 560 (5th ed. 1994).

142. It is important to recognize that these studies adopt a fairly orthodox view of the relationship between unemployment insurance and unemployment itself. They assume that unemployment insurance is designed to respond to the real social harm we call unemployment, even though the availability of benefits may distort the behavior of workers within and without the

directions, though there still has only been one study attempting to evaluate these multiple effects in a comprehensive fashion (it suggests that while UI increases unemployment, it also increases labor force participation and employment).¹⁴³

Returning our focus to those who favor eliminating state UI, these critics acknowledge that under any private scheme, unemployment insurance would be prohibitively expensive for some workers. They believe, however, that the state is not obligated to intervene to guarantee its provision.¹⁴⁴ Workers whose high risk of separation renders them excluded from the risk pool, they argue, should receive compensating differentials in their wages.¹⁴⁵ Moreover, they argue, departing from the model of large scale pooling in favor of either separate insurance pools based on risk, or self-insurance, would ameliorate the inefficiency and unfairness that result from mandated cross-

workforce (with the primary debate being whether the distortions impose net costs or benefits on society). Michael Piore, in his comparative review of two studies of the history of unemployment—one European, one American—offers a different view that bears reflection. See Michael J. Piore, *Historical Perspectives and the Interpretation of Unemployment*, 25 J. ECON. LITERATURE 1834 (1987). This perspective, influenced by European social and economic theory, suggests that the social phenomenon of unemployment may in some sense be an artifact of the structure of UI. Government-provided UI was designed around the assumption that the primary model of employment was long-term, stable employment with large-scale industrial employers, with whom unemployment would be an infrequent, unexpected, and temporary disruption in an otherwise stable relationship. In fact, unemployment did not always look this way. Unstable employment was prevalent in the nineteenth and early twentieth centuries. It involved regular and anticipated shifts between industrial employment and dependence on family and community networks of economic support (for example, work within the family, assistance from mutual aid societies). During the Great Depression, however, these institutions proved inadequate to buffer workers from the severe and sustained dislocations of the time, and modern UI was created to fill the gap. A key insight of Piore's analysis is that the advent of modern unemployment insurance not only responded to the shock of the Great Depression, but also importantly, became a causal agent in redefining employment and social institutions linked with work, such as taxation and benefits. UI came to replace the social structures that formerly had buffered workers in their transitions into and out of industrial employment, and served also to further catalyze the movement towards the postwar model of stable industrial employment. With the advent of changed worker demographics, the decline of large-scale industrial employment, and the recession of the 1970s and 1980s, the late twentieth century witnessed yet another crisis in the economy, only this time, the New Deal system of unemployment insurance was inadequate to the task (and it continues to serve a dwindling fraction of the American workforce). Meanwhile, former social institutions adapted to an economy characterized by regular and predictable transitions in and out of industrial employment have all but disappeared, leaving employment that falls outside the traditional industrial model vulnerable to interruptions for which there are no obvious buffering mechanisms. See *id.* at 1836–37, 1846–49.

143. See Kim B. Clark & Lawrence H. Summers, *Unemployment Insurance and Labor Market Transitions*, in *WORKERS, JOBS, AND INFLATION* 279–323 (Martin Neil Baily ed., 1982).

144. See Leef, *supra* note 129, at 22 (“[T]hat some part of a risk pool might prove to be uninsurable does not lead to the conclusion that there can be no free market for insurance of that kind at all.”).

145. See *id.*

subsidization between low- and high-risk groups.¹⁴⁶ Firms and workers would be rewarded in a fashion more closely linked with their own levels of risk, and stronger incentives would exist for high-risk classes to reduce unemployment.¹⁴⁷ Similarly, an absence of government provision might force employers to internalize the costs of the significant benefit of maintaining a trained workforce through the off-season.¹⁴⁸ Also, as noted earlier, private mechanisms—perhaps more efficient than state mechanisms on which we currently rely—might also emerge to provide job retraining and matching functions as well as reemployment incentives (for example, job-finding bonuses).¹⁴⁹

Notwithstanding these criticisms, I am going to assume sound justifications for state intervention. I will assume that workers are risk averse, that many workers will not, in fact, save for a rainy day, making self-insurance unreliable, that the individual and social costs of uncompensated unemployment are undesirable, and that the number of workers excluded from coverage under a purely private system of UI would be excessive.

Even assuming the justification for some public provision of insurance against unemployment-related income loss, however, it does not follow summarily that the state should cover *all varieties* of wage loss due to unemployment. It could try to mimic, as the existing scheme does, some features of private insurance, limiting the range of casualty it covers.¹⁵⁰ Alternatively, it could extend coverage further, as some reformers advocate, to cover workers with very low workforce attachment, or workers who leave or limit their commitment to jobs in order to manage competing family obligations. In the next part, I take up reformers' proposals in more detail.

III. THE CASE FOR (AND AGAINST) EXPANDING UNEMPLOYMENT INSURANCE TO REDISTRIBUTE WEALTH

Unemployment insurance need not be built around an actuarial model. Just because public mandates help overcome market barriers to private insurance does not mean that the system can do *no more* than mimic private insurance. We could expand the pool of eligible workers to include those who would be excluded from private insurance based on their high-risk

146. See *id.* at 23–26.

147. See Rejda, *supra* note 129, at 72.

148. See Leef, *supra* note 129, at 23.

149. See Gruber, *supra* note 134, at 203–04 (discussing job-finding bonuses); Leef, *supra* note 129, at 23 (discussing private employment agencies).

150. For a discussion of the actuarial and nonactuarial features of various components of the welfare state, see Barr, *supra* note 23, at 745–47.

characteristics, albeit relying on deeper subsidies and cross-subsidies than are currently required to run the program.¹⁵¹ Reformers would make this move, believing that it would redistribute wealth to workers who especially need assistance. As I shall argue, though, the argument for using UI to achieve these redistributive goals is not as comfortable as it may initially appear.

A. Relaxing Attachment Requirements

Consider the case for expanding eligibility by reducing the minimum required level of base period attachment.¹⁵² The nub of arguments for expanding UI to include workers with a high likelihood of job separation is that it is unfair to exclude these workers because they tend to be the poorest workers, and thus may have the greatest need for income replacement between jobs. To be sure, expanding UI may be very appealing if it lessens the hardships suffered by workers at the bottom of the income scale.

For example by analogy, inclusion of individuals with high health risks in state subsidized medical insurance schemes is not based solely on solving informational market failures. It may also be motivated by a desire to provide a safety net to those who are sure to benefit from services but who would be unable to get insurance even assuming there was a private market for health insurance.¹⁵³ One could argue that many unstable or low-wage

151. Recall that currently, UI operates largely unsubsidized, although state and federal governments bear some of the administrative costs of running the program. If benefits were paid out to a wider array of workers under an expanded program, UI trust funds may be inadequate to cover the costs, requiring the system to raise additional revenues. These additional funds might come from taxpayers through general revenues, or come from higher taxes on employers, with workers and consumers potentially bearing some of the incidence of the increased tax through reduced wages and higher prices, respectively.

152. Recall that I favor reforms that would eliminate differential treatment of workers with identical attachment (as measured by amount workforce participation) but different wages. The case I mean to raise here is the substantive argument for reducing the level of attachment required (although some such proposals focus on reductions in wage thresholds because many states currently measure attachment using wages as a proxy).

153. For arguments asserting or implying that morality requires the state to provide health insurance to "high risk" people, see, for example, Norman Daniels, *Health-Care Needs and Distributive Justice*, 10 PHIL. & PUB. AFF. 146, 165, 175 (1981). Norman Daniels applies John Rawls's theory of justice to the healthcare context, and argues that healthcare institutions should be included on the list of basic institutions regulated by a fair equality of opportunity principle, and further, that no persons should face barriers, financial or otherwise, to initial access to the healthcare system as a whole. See *id.*; see also Donald W. Light, *The Practice and Ethics of Risk-Rated Health Insurance*, 267 JAMA 2503, 2507-08 (1992) (arguing that actuarial fairness in health insurance is morally unfair because it reduces access to life opportunities and increases suffering for those disadvantaged by risk, pain, and illness); Deborah A. Stone, *At Risk in the Welfare State*, 56 SOC. RES. 591, 623-33 (1989) (arguing that the use of health-risk classification for rationalizing

workers, through no fault of their own, are particularly vulnerable to income interruption, and therefore would especially benefit from UI protection. In this sense, they are analogous to the blameless congenitally ill.

Even in cases in which the victims are not “blameless,” we might be willing to protect them. In a humane society, we may for good reason want to avoid denying access to social programs based on desert or blame-centered arguments. First, we may be wrong: Identifying moral responsibility for many kinds of harm is prohibitively complex. Second, even if we can identify moral responsibility quite clearly, we need not punish it. The spate of recent “employee lifestyle statutes” in various states is an example of existing commitments to making basic employment protections available to all workers, notwithstanding that some may be more needy due to their own risky behavior. At least twenty-eight states recently have passed legislation prohibiting employers from discriminating (for example, in health plan coverage) on the basis that an employee smokes.¹⁵⁴ There may be strong compassion-based arguments for offering benefits to needy workers, even when other, less “blameworthy” individuals are required to subsidize them.

Moreover, expanding the pool of workers eligible under UI need not be seen as a particularly heroic departure from the status quo. Rather, it could be characterized as a difference in degree rather than a difference in kind. Clearly, publicly mandated insurance is already more redistributive than private markets would be—it mandates participation of workers whose risk of unemployment is sufficiently low that they would self-insure in a private market.¹⁵⁵ Furthermore, because experience rating is imperfect—tax rates have a floor and ceiling—industries with the highest records of layoffs are to some extent subsidized by industries with the lowest records of layoffs. Seasonal industries are a well known example: seasonal workers in some states may routinely work for only part of the year, enough to satisfy eligibility requirements, and then collect unemployment insurance in the off-season.¹⁵⁶ Absent at least some concern that in private markets, low-risk

healthcare treats disadvantaged individuals as undeserving, and has the negative societal effect of saddling people who are already disadvantaged with additional, self-fulfilling burdens).

154. See Deborah Yim, California’s “Lawful Off-Duty Conduct” Clause: A Flawed Approach to Protecting Against Employee Lifestyle Discrimination 16–17 (2000) (unpublished manuscript, on file with author) (reviewing and discussing lifestyle statutes in various states).

155. I distinguish the minimalist “ex ante” type of redistribution we see in insurance from more active “ex post” wealth redistribution *supra* note 100 and accompanying text.

156. Note that fourteen states (Arkansas, Colorado, Delaware, Indiana, Maine, Massachusetts, Minnesota, Mississippi, North Carolina, Ohio, Pennsylvania, South Dakota, Wisconsin, and West Virginia) have enacted special provisions designed to restrict eligibility that arises in this fashion. Some states do this by listing certain industries as seasonal. Others measure the length of regularly recurring periods of employment, and restrict workers’ eligibility for benefits to the season in which they ordinarily work. See Nicholson, *supra* note 43, at 96–97 tbl.3.1.

individuals, businesses, or industries would simply opt out, there probably would be no publicly mandated UI. In this sense, UI already involves some redistribution.

This said, I am doubtful as to whether, if we believe that redistribution to low-income workers is normatively desirable, expanding UI is the right way to do it. Advocates of expansion tend to conflate the goal of smoothing the income of low-wage and low-attachment workers who suffer unexpected unemployment with the goal of ameliorating poverty among the working poor. Expanding the pool of workers eligible for UI by reducing minimum attachment requirements, however, would be both overinclusive and underinclusive from the perspective of poverty reduction. For example, the expanded pool would include workers who have high wages but irregular hours (for example, construction workers). Even assuming expansion pulled in mainly low-wage workers, those workers would not necessarily be poor. Only a small fraction of low-wage workers live in households below the official poverty line, because many low-wage workers are secondary earners—the domestic partners and teenage children of the primary breadwinners—in well-to-do households.¹⁵⁷ Thus, relaxing minimum attachment requirements would confer a benefit on workers from well-off, as well as poor, families.¹⁵⁸ To a lesser extent, UI would also be underinclusive in redistributing wealth to poor workers. Some workers with

157. See Mark D. Turner, *Does the Minimum Wage Help or Hurt Low-Wage Workers?*, in THE URBAN INSTITUTE, THE LOW-WAGE LABOR MARKET: CHALLENGES AND OPPORTUNITIES FOR ECONOMIC SELF-SUFFICIENCY 87 tbl.1 (forthcoming 2001), available at http://www.urban.org/welfare/lowwage_labor.html (finding that only 16.4 percent of workers whose wage was between \$5.15—the minimum wage—and \$6.14 in 1998 lived below the poverty line); see also RICHARD V. BURKHAUSER ET AL., INST. FOR RESEARCH ON POVERTY, PUBLIC POLICIES FOR THE WORKING POOR: THE EARNED INCOME TAX CREDIT VERSUS MINIMUM WAGE LEGISLATION 15–19 (1995) (finding that only 22 percent of low-wage workers in 1989 lived in households below the official poverty line, with low-wage workers defined as those earning less than half the average private sector hourly wage).

158. This latter point implicitly assumes that the appropriate redistributive goal is to target individuals who lack access to wealth (and the consumption power that goes with it). Consequently, the family is probably an appropriate unit of analysis (and indeed is the designated distributive unit under the prevailing income tax scheme). Perhaps, however, low-wage workers from affluent families have a stronger moral claim to wealth transfers than this argument presupposes. Indeed, if one's redistributive scheme targeted behavioral incentives rather than consumption levels, the family unit may cease to be the most natural distributive unit. For example, the goal of maximizing incentives for workforce participation by secondary-earner women might militate in favor of adopting the individual earner—rather than the family—as the appropriate distributive unit. Others have argued that gender equality will better be achieved by targeting individuals rather than families in wealth redistributive programs. See, for example, Vicki Schultz, *Life's Work*, 100 COLUM. L. REV. 1881, 1939, 1947 (2000), and my earlier reference to the work of others on this issue, *supra* note 11.

steady jobs experience the hardship of poverty.¹⁵⁹ Yet so long as they remain employed, they will receive no cash benefits from UI.¹⁶⁰

Under- or overinclusiveness need not be fatal if the social program in question is better than the alternatives. In this case, however, the alternatives are appealing. A transfer program targeted more directly at workers of low means, regardless of job stability, strikes me as a more attractive institutional choice for improving the lot of the working poor. There are numerous models of protection against the risks of personal and financial hardship due to job loss that depart from an actuarial insurance model. For example, both a negative income tax scheme and the closely related Earned Income Tax Credit (EITC) use the income tax system as a way to transfer wealth to poor families.¹⁶¹ Of course, wealth transfers through the income tax system will be associated with their own inefficiencies and are themselves imperfect tools.¹⁶² For purposes of wealth redistribution,

159. In 1998, 1.6 percent of all full-time wage and salary workers in the labor force for twenty-seven weeks or more fell below the poverty line based on low earnings alone. See U.S. DEP'T OF LABOR, A PROFILE OF THE WORKING POOR 1998, at 11 tbl.8 (2000).

160. They will, of course, receive the benefit of being insured against the hazard of wage loss due to unemployment, but the insurance value of UI may be offset by UI taxes if workers bear the incidence of that tax. See my fuller discussion of this issue *infra* notes 164–188 and accompanying text.

161. A negative income tax involves giving taxpayers, without regard to income, a lump sum payment, or demogrant, which is gradually offset by positive tax rates. The Earned Income Tax Credit (EITC) does not involve demogrant. Instead, low-income families receive a refundable tax credit against earned income, with the credit being phased out at higher incomes. For a description of the two kinds of programs, see HARVEY S. ROSEN, PUBLIC FINANCE 169, 172–73 (5th ed. 1999). Several commentators have, in recent years, defended the use of a negative income tax, or a reformed EITC, as an efficient mechanism for redistributing wealth. See, e.g., Daniel Shaviro, *The Minimum Wage, the Earned Income Tax Credit, and Optimal Subsidy Policy*, 64 U. CHI. L. REV. 405, 459–73 (1997) (arguing that a negative income tax is more efficient than the minimum wage for making progressive transfers to poor individuals or households, although criticizing the design of the EITC itself, particularly the phase-out rules); George K. Yin et al., *Improving the Delivery of Benefits to the Working Poor: Proposals to Reform the Earned Income Tax Credit Program*, 11 AM. J. TAX POL'Y 225, 294 (1994) (asserting that the EITC, in its current form, has shortcomings, but believing that it is, in general, an important program for low-income working families). But see Alstott, *supra* note 11, at 554–59 (cautioning that proponents have overstated the virtues of relying on tax-based transfer programs for progressive redistribution, and criticizing EITC in particular because it provides no benefits to nonworkers, and skews benefits in favor of full-time over part-time workers, thus implicitly devaluing the choice among poor people to engage in nonmarket activity).

162. See, e.g., Alstott, *supra* note 11, at 551–53, 559–89 (describing inevitable tensions between work incentives and progressivity; between benefits based on family means and the creation of a marriage penalty; between integrating the EITC with the tax system and achieving the distinctive goals of a welfare program, especially with respect to defining income and family; and between encouraging participation and preventing fraud); Shaviro, *supra* note 161, at 459–69 (discussing in detail the challenge of designing phase-out rules that do not produce perversely high marginal tax rates for some low income workers, resulting in a reduction of work effort); Yin

however, they are likely to be less imperfect tools than UI. Such programs have the advantage of targeting poor workers based directly on their wealth, or access to wealth, rather than on job loss per se.

Another important problem with expanding UI to achieve redistributive ends relates to the incidence of the UI tax.¹⁶³ "Tax incidence," that is, where the ultimate burden of a tax falls, is a function of how the tax affects wages, prices, and profits. In the simplest scenario, the market actor who nominally pays a tax also bears the burden of the tax. In the case of the UI tax, which is nominally paid by employers, this would mean that the owners (shareholders) of the firm would absorb the cost of the tax through a reduced return on their investment.¹⁶⁴ The fact that employers pay the full nominal UI tax (rather than requiring a matching contribution by workers, as in the case of social security taxes), as well as the use of experience rating as a way to discourage employers from laying off workers, suggests that the architects of UI believed that the incidence of the UI tax would fall on employers.¹⁶⁵

One cannot always assume with confidence, however, that the actor who pays a tax also bears its ultimate burden. An employer who must pay a tax on payroll, for example, may try to shift the real burden of the tax "forward," to consumers, by increasing the price of goods produced, or "backward," by reducing the price it pays for inputs (principally labor).¹⁶⁶

Under forward shifting, employers who pay higher than average UI taxes would increase the price of their products relative to other prices. Losses would fall on consumers of goods produced by the high-tax firm, who would then be forced to either pay higher prices or substitute less desirable goods. In this case, even though the employer shifts the payroll tax, workers as a class may still be net beneficiaries of the program. Although con-

et al., *supra* note 161, at 235–52 (discussing problems with compliance and take-up of benefits under the EITC).

163. Most reform proposals fail to address the question of who would bear the cost of expanding UI. The discussion to follow assumes that expanded benefits would be funded under the existing scheme for financing UI benefits. It is possible, however, that reformers contemplate the use of general revenues to fund the expansion, in which case the issue of UI tax incidence would have less salience. (In fact, shifting our focus from UI tax revenues to general revenues does not eliminate the issue of incidence, but merely relocates it.)

164. See generally VROMAN, *supra* note 31, at 18–22 (discussing the theoretical issues concerning the incidence of UI taxes).

165. See Charles E. McLure, Jr., *The Incidence of the Financing of Unemployment Insurance*, 30 INDUS. & LAB. REL. REV. 469, 469 (1977) (making this observation).

166. VROMAN, *supra* note 31, at 19.

sumers include workers, they also include other market actors, who share the cost of the tax.¹⁶⁷

If the tax were shifted fully backwards onto labor, workers would effectively pay for UI benefits.¹⁶⁸ The wages (or the rate of wage growth) of all workers would decline in order to cover the costs of benefits for those workers who become unemployed. The degree of wage reduction would depend on the number of beneficiaries and the amount of benefits paid out.¹⁶⁹

Obviously, which of these scenarios holds true matters a great deal if one is seeking to design regulatory policies with the goal of redistributing wealth.¹⁷⁰ Most of the work done by economists on payroll tax incidence has been theoretical rather than empirical. Arnold Harberger's classic work modeling the incidence of payroll taxes predicted, contrary to the facial assumptions of the UI scheme, that a tax on labor like the UI tax is ultimately borne by workers rather than employers.¹⁷¹ A pithy statement of this conclusion is that "a tax on a factor is borne by that factor."¹⁷² Empirical research on mandated maternity benefits and workers compensation supports the backward-shifting hypothesis in those contexts.¹⁷³

Backward shifting of payroll taxes will not always occur, though. Whether and what shifting is possible depends on informational and institutional characteristics of the market in question. One key prediction, for example, is that the feasibility of backward shifting hinges importantly on how closely a tax is associated with a benefit. Workers are more likely

167. In addition, although consumers include poor workers, they also include workers who are well off, and thus if we are interested in transferring benefits to poor workers, forward shifting would result in such transfers to some extent, that is, to the extent that we would expect non-workers, as well as wealthier workers, to share in the cost of the tax that funds the benefit.

168. See VROMAN, *supra* note 31, at 19.

169. See *id.*

170. Except, of course, to the degree one values the redistributive effect that workers who would not be able to obtain insurance in purely private markets would now, through government mandate, be able to obtain it at an actuarially fair (or subsidized) rate. To return to my overarching point, however, it is not clear as an empirical matter that the group benefited by expanding UI eligibility to less stable workers would be the working poor per se, nor as a normative matter that the beneficiary group would have as compelling a claim to resource transfers as those workers who are the poorest.

171. See Arnold C. Harberger, *The Incidence of the Corporation Income Tax*, 70 J. POL. ECON. 215, 235 (1962); see also Lawrence H. Summers, *Some Simple Economics of Mandated Benefits*, 79 AM. ECON. REV. 177, 180 (1989) (arguing that employees will pay for mandated benefits through lower wages and employment levels).

172. VROMAN, *supra* note 31, at 21.

173. See Price V. Fishback & Shawn Everett Kantor, *Did Workers Pay for the Passage of Workers' Compensation Laws?*, 110 Q.J. ECON. 713 (1995) (finding significant costs of workers' compensation programs passed on to workers in the form of lower wages); Jonathan Gruber, *The Incidence of Mandated Maternity Benefits*, 84 AM. ECON. REV. 622, 630-40 (1994) (finding substantial shifting of costs of mandated maternity benefits programs to workers through lower wages).

to absorb a tax they know is connected to a benefit that they will receive.¹⁷⁴ Given that some kinds of workers are more likely to be eligible for UI benefits than others (and likely know it), those workers may be relatively more willing to absorb the burden of the tax. In the context of UI, then, one might predict backward shifting in industries with frequent layoffs, in which workers have a high likelihood of UI eligibility. For example, construction workers (who tend to be high earners), knowing that they are likely to be eligible for unemployment compensation, will in theory be more willing to pay a compensating wage differential than workers who tend to be excluded from eligibility.¹⁷⁵

Another institutional factor that may affect burden shifting is degree of unionization. An employer may find it more difficult to shift a tax backwards if the workers are represented by a strong union that resists the wage cut, or for some other reason have the market power and will to resist the wage cut. Continuing with the earlier example, there may be differences between unionized and nonunionized construction workers in the degree to which they bear the burden of UI tax in the form of reduced wages.

Another institutional factor, wage controls, may affect the form in which workers bear the burden of a tax that is shifted to them. If minimum wage laws apply to the recipients of a benefit, firms may be unable to shift the cost of the benefit to them in the form of lower wages. Instead, the workers are likely to pay for the benefit through reduced employment levels.¹⁷⁶ Given these various institutional considerations, one might predict that if UI eligibility were expanded to include a broader group of relatively unstable, nonunionized, low-wage workers, these workers would pay for

174. Most payroll taxes are fairly transparently linked to work-related benefits, although one could also conjecture that workers would in theory be more willing to pay a tax that they *believed*, rightly or wrongly, was linked a benefit that they would receive. See VROMAN, *supra* note 31, at 21.

175. See *id.*

176. Christine Jolls gives an example of this phenomenon in the context of the accommodation mandates under the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12,101–12,213 (1994). She argues that although the ADA prohibits both wage and hiring discrimination against people with disabilities, employers are more likely to get away with hiring discrimination than with wage discrimination (due to the level of occupational segregation and the size of the disabled population, for reasons she explains in more detail in her article). As a result, disabled workers pay for accommodation mandates in the form of reduced employment levels, rather than reduced wages. See Christine Jolls, *Accommodation Mandates*, 53 STAN. L. REV. 223, 273–80 (2000).

Note that Professor Jolls allows for a scenario in which the intended beneficiaries of a mandated benefit would in fact enjoy a net distributive gain. When restrictions on both wage and hiring discrimination are binding and only a subset of the workforce (“disadvantaged” workers) is targeted by the mandate, nondisadvantaged workers will subsidize the cost of providing the benefit to disadvantaged workers. See *id.* at 243–54. Analogizing from Jolls’s assumptions, this scenario would be unlikely to occur in the context of UI mandates because there is no legal or other restriction in place to prevent systematic wage or hiring distinctions between workers who are eligible for UI and those who are not.

their unemployment benefits in the form of even lower wages, or if minimum wage laws imposed a floor on wage adjustment, reduced employment levels.

Another consideration is the *benefit* side of UI tax incidence. The taxable wage base has failed to keep pace with inflation in the vast majority of states.¹⁷⁷ Consequently, the UI tax constitutes a higher proportion of low-wage workers' wages than of high-wage workers' wages.¹⁷⁸ At the same time, benefit levels, which are a proportion of current wages, continue to rise with inflation.¹⁷⁹ The ultimate effect of this again depends on the incidence of the tax. If workers pay the tax, low-wage workers pay proportionally higher taxes and receive lower benefits than high-wage workers. If firms pay the tax, they may have a disincentive to hire relatively less-skilled workers.¹⁸⁰ Thus, UI may not only fail to redistribute wealth to the poorest workers, but may be quite regressive.¹⁸¹

Notwithstanding the importance of these issues, empirical studies analyzing the incidence of UI taxes remain few and far between. One reason for this may be that the amount of the tax is small relative to the effects researchers would like to measure (for example, reduced wages), possibly

177. The taxable wage base in 1940 was \$3000, which was equal to average earnings. If the taxable wage base had kept up with inflation (as, for example, in the case of social security), it would be about \$31,000 today. Most states have no indexation requirement, meaning that wage bases lag behind inflation. See Levine, *supra* note 30, at 330.

178. See *id.* at 336–37 (estimating, assuming a taxable wage base of \$7000, that a firm employing a low-wage worker (\$5000) will pay UI taxes of about 2.18 percent of that worker's wages, whereas it would pay a tax of only 0.09 percent on a high-wage (\$75,000) worker's wages, the difference being about twenty-fold). This gap has only widened over the years—in 1954, there was about a five-fold difference. See *id.*

179. See *id.* at 330. Ceilings on weekly benefit amounts, however, introduce some progressivity into the equation. See Christopher J. O'Leary & Murray A. Rubin, *Adequacy of Weekly Benefit Amount*, in UNEMPLOYMENT INSURANCE IN THE UNITED STATES, *supra* note 4, at 168. Also, not all states index their maximum benefit amounts, thus ceilings have on average tended to lag behind inflation over the years. See ACUC SECOND ANNUAL REPORT, *supra* note 1, at 129–30 tbl.9-1 (reporting, based on 1994 data, that eighteen states fail to index maximum benefits amounts).

180. See Levine, *supra* note 30, at 336. On the other hand, some industries may rely on workers who are likely to be ineligible for UI benefits in order to retain the flexibility to lay them off without risking an increased experience rating. The wage of these workers may be adjusted upward to account for this flexibility. I discuss the general phenomenon of hiring contingent workers as a way to reduce regulatory taxes (including UI) and thus increase flexibility in Lester, *supra* note 2, at 97 nn.61–63 and accompanying text.

181. Of course, the latter criticism goes more to current problems with the wage base in various states than to the intrinsic suitability of UI for redistributing wealth. An increase in, and ongoing indexation of, wage bases would essentially eliminate the problem. Other criticisms I raise in the instant discussion and elsewhere in Part III, however, relate to features more intrinsic to UI, and less amenable to such fine-tuning.

leading to noisy or inconsistent results.¹⁸² Earlier studies combined UI taxes with other employer payroll taxes (mainly social security taxes), perhaps overcoming the problem I just mentioned, but in turn sacrificing precision in measuring the incidence of specific taxes. The conclusions of these early studies were, in any event, widely divergent.¹⁸³ More recent studies that isolate UI taxes for purposes of analysis have suggested that workers' wages are adjusted downward to pay for unemployment benefits.¹⁸⁴ However, only one empirical study has tried to take into account differences between firms (rather than, say, industries), an important consideration given that UI tax rates vary from firm to firm due to experience rating. When Patricia Anderson and Bruce Meyer analyzed the relationship between particular firms' UI tax rates and the wages paid to their employees, they found that firms absorbed most of the firm-level variations in tax levels within a particular market,¹⁸⁵ rather than passing them on to workers.¹⁸⁶ Still, the authors did not suggest that workers do not pay for unemployment taxes at all. They found that workers still pay for UI taxes at the "market level," meaning that in markets in which firms pay higher taxes on average, workers will have lower wages on average, and vice versa.¹⁸⁷

My purpose in this discussion is not to resolve with certainty the question of who bears the ultimate costs of UI—although the most current evidence in the (thin) empirical literature suggests that workers and firms share in the costs. Some of the most important empirical questions remain

182. Telephone communication with Wayne Vroman (May 21, 2001). Wayne Vroman is an economist at the Urban Institute who specializes in unemployment insurance.

183. See VROMAN, *supra* note 31, at 21 (discussing studies testing for backward shifting of payroll taxes, where UI taxes were combined with other taxes).

184. See generally David A. Anderson, *Compensating Wage Differentials and the Optimal Provision of Unemployment Insurance*, 60 S. ECON. J. 644, 652–54 (1994); Patricia M. Anderson & Bruce D. Meyer, *The Effects of Firm Specific Taxes and Government Mandates with an Application to the U.S. Unemployment Insurance Program*, 65 J. PUB. ECON. 119 (1997).

185. In Patricia Anderson and Bruce Meyer's definition, a "market" contains several firms (at least five) within a particular locality, with groupings based on correlations between industries, occupations, and skills. See Anderson & Meyer, *supra* note 184, at 128.

186. See *id.* at 134–35. Recall that within "markets" as defined by Anderson and Meyer, firms tend to compete in the same industries and labor markets, thus we would predict mobility of workers between firms. In other words, if a high-tax firm were to try to pass the tax on to workers by reducing their wages, the worker might go to work for a low-tax (and high-wage) firm within the same market.

Even this study may have trouble capturing the nuances of incidence between firms. Query, for example, whether high-layoff firms in competitive markets might be forced to pay higher wages in the first instance. If this were the case, a drop in the relative wages of workers in these firms might not be captured by Anderson and Meyer's study. Of course, whether a firm could afford to adopt a high-wage, high-turnover strategy in the first instance would depend on its particular characteristics. For some, it might be more survival than strategy: Some high-turnover firms might simply be on a downward trajectory, likely to fail in competitive markets.

187. See *id.* at 139.

unsettled or unexamined, such as whether different classes of workers (for example, high-wage versus low-wage) differentially bear the costs of UI. My main point is that many reformers have glossed over these issues, although they strike me as quite critical. It may well be that the policy of mandating wider availability of UI benefits is a good one even if the beneficiaries of the program pay for those benefits—it may be that low-attachment workers would value UI benefits at a level at least equal to the cost to them of paying for those benefits. Or, even if low-attachment workers would not choose individually to pay for UI benefits, we may believe as a society that they would be better off if they received them (perhaps because of the macroeconomic stabilizing effects of broader reciprocity). There is a difference, though, between arguing for wider availability of UI benefits because it would be Pareto-optimal or macroeconomically efficient, and arguing that wider provision of UI benefits would actually *redistribute wealth*.¹⁸⁸

188. One recent proposal is to change the system of financing UI by eliminating employer-by-employer experience rating, thus reducing unfairness that arises to the extent that firms' layoff behavior is at least partly the result of forces beyond their control. Instead, a flat-rate tax would be imposed, ideally increasing the taxable wage base to 100 percent of wages, with 50 percent paid directly by employers and 50 percent deducted from employees' paychecks (though general revenues may need to be tapped). See GRAETZ & MASHAW, *supra* note 1, at 199–202. At the same time, in order to reduce the potentially perverse result that low-risk workers end up subsidizing the unemployment benefits of high-risk workers with relatively higher incomes (for example, lower wage workers in, say, the insurance industry, subsidizing high-wage construction workers), experience rating would be imposed at the industry level, based on average industry layoffs, and average incomes of workers in each industry. The authors argue that reforming the system in this way would maintain income progressivity in the tax scheme, avoid cross-subsidies from low-risk to high-risk industries, and still provide subsidies to groups that have both high risks of unemployment and relatively low incomes. See *id.* at 201.

Without knowing for certain the impact of such reforms, I suspect that they would only partially solve the problems I have just identified. First, the fifty-fifty rate structure does not, of course, tell us who would actually pay the tax. Recall, however, Anderson and Meyer's suggestion that the portion of the current UI tax passed on to workers reflects the industry average, as opposed to the variable firm-level portion. See *supra* note 186. It is possible that moving to a tax that is flat across firms within industries would increase the proportion of the costs of unemployment insurance born by workers. Thus, even if the reforms created more progressivity between workers in high- and low-risk industries, it might permit firms within industries to pass a higher proportion of the tax to workers, thus reducing progressivity as between firms and workers. Second, as I argued earlier, worker income may be a noisy proxy for poverty, making it a potentially ineffective basis for progressive redistribution. Third, while industry experience rating might reduce cross-subsidies between industries, it would not avoid cross-subsidies between low-risk and high-risk firms within an industry. This is likely to be a problem if categories of industry are mutable. Indeed, the structure of industries may morph in response to tax incidence: If the tax on a particular industry becomes sufficiently burdensome, firms may merge across industries in a manner that reduces their collective costs (for example, a stable organization that has historically contracted with construction companies for building projects may vertically integrate, creating an in-house construction unit in order to reduce costs).

Even if we were confident that UI mandates led to a net distributive transfer to their intended beneficiaries, let me re-emphasize the point argued in an earlier portion of this discussion. If our goal is to redistribute wealth to the *least-well-off* workers, UI is not a very attractive policy option, because workers who lose their jobs are not necessarily the same as workers who are poor.

B. Relaxing "Quit" Disqualifications and Job Search Requirements

Consider now the case for modifying UI's nonmonetary provisions so as to limit disqualifications of workers who reduce their workforce participation to manage competing caregiving obligations. Working parents may be particularly affected by unemployment insurance policy, both single parents and second earners who can work only part-time because of family obligations. An expanded UI might do more than simply recognize eligibility in cases involving a worker who quits because she cannot adjust to a unilateral scheduling change initiated by the employer. It might also shift the burden to employers to accommodate workers who themselves request a schedule change due to work-family conflicts (giving the employee "good cause" for quitting if the employer refuses). Further still, it might move us away from the traditional exclusions of workers who quit due to pregnancy, or who restrict their reemployment search to jobs with shorter hours than their previous job (for example, limiting their search to part-time jobs because of rising family demands).

Here, reformers' goals are not limited to transferring wealth to the economically worst off (even though some scholars combine the two goals, speaking of the special hardships of poor mothers).¹⁸⁹ Here, reformers advocate a policy shift that would transfer wealth to working families, even families that are not poor. Perhaps, then, UI eligibility for these workers could be seen as an indirect subsidy of caregiving labor, a subsidy that would recognize burdens borne especially by women.

One might raise the technical objection that to expand UI in this way would effectively convert the factual inquiry from whether the employer caused the job separation, the worker was faultless, and the worker is genuinely seeking reemployment, to the more difficult question of whether the worker's family conflict was sufficiently compelling to justify scheduling accommodations or a waiver of ordinary search requirements. It would also raise difficult factual questions as to where to draw the line in determining how circumscribed a job search may be. Perhaps such hazards are more

189. See, e.g., Williams, *supra* note 1, at 159.

appropriately the subject of a different kind of insurance scheme, pegged against a different kind of risk. But this technical objection is not decisive. States incorporate into their continuing eligibility determinations an assessment of the "suitability" of job offers (a worker may raise as a defense to rejecting a job offer that the job was unsuitable given his training and other human capital). Why not give workers who reject otherwise suitable employment because of family-related constraints a defense to disqualification based not on the fact that the job underutilizes human capital, or undercompensates the worker, but instead on the fact that it "overdemands" the worker's time? Case-by-case inquiry could assess the reasonableness of individual claims. If our concern is to find ways to effectively subsidize families who face work-family conflict, then such reforms might be normatively attractive.

One problem is this. Suppose a new rule were established, allowing a worker to quit without disqualification from unemployment insurance if he could cite compelling work-caregiving conflict as the reason for doing so. The Joneses, a dual full-time earner family, faced with a demanding childcare schedule, decide that one of them must quit for a period, collect unemployment insurance, and search for a part-time job. For both cultural reasons, and because women have lower earnings on average than men, the mother, rather than the father, will be more likely to quit in order to make this accommodation. Certainly, many dual-earner families today make this choice, even without the buffer of UI benefits. To be sure, it seems better that women workers forced to quit to deal with family needs receive a financial buffer than not. Still, I worry that at the margin, expanded unemployment insurance in this realm would reinforce the gendered skewing of work interruption necessitated by family needs. My point is not to justify encouraging working families to endure terrific burdens in the name of promoting a broader agenda of reducing women's workforce interruptions. My point instead is that we ought to consider carefully whether other forms of support for working families might achieve similar goals without requiring a worker to quit in order to collect benefits. Direct provision of childcare subsidies, or subsidies to firms willing to provide on-site daycare, seem preferable to tacking assistance for working families onto a program targeted at involuntary job loss.¹⁹⁰

It may well be, though, that family caregiving needs will always compete with market labor to a significant extent, and that it would still be desirable

190. See, e.g., GRAETZ & MASHAW, *supra* note 1, at 240–45 (advocating replacing the current "hodgepodge" of child subsidies with a more unified scheme involving federal subsidies of 30 percent of the estimated average costs of child care in a worker's locality, as well as a more unified system of tax credits for families with children).

to make insurance benefits available to workers who quit for this reason. It might be possible to solve, at least to some minimally satisfactory level, the quite difficult problems of moral hazard presented in the case of family conflict—that is, distinguishing between the worker who must quit because a sick child makes it impossible to meet work demands, and the worker who decides to quit not because work is impossible, but because she feels a need to spend more time at home. I do, however, suspect that there would be many hard cases, and that drawing such distinctions would be quite difficult.

Moreover, I wonder whether, as an ethical matter, we would *want* to distinguish the two cases. Both individuals may have pressing family needs, and the accident of whether a worker's circumstances make it impossible to work, or just highly undesirable to work, may not be a very satisfying distinction if our goal is to relieve the financial burdens associated with caregiving. Similarly, it is not clear that we should want a family care subsidy that is available only to workers with some minimum level of past workforce attachment, rather than those returning to the workforce after a long hiatus or, for that matter, individuals who *never entered* the paid labor force. Further still, on the search end of the equation, should we distinguish between the worker who is searching for some work, albeit at reduced hours, and the worker who declines to search? Both may feel equally constrained and have equally compelling claims to assistance.

Finally, firm-level experience rating may well be a sensible feature of UI in terms of its goal of preventing employers from using the system to subsidize cycling layoffs. However, expanding UI to include workers with predictable job separations and search constraints due to work-family conflicts might create undesirable hiring disincentives. Firms may resist hiring women in their childbearing years if they face the prospect of increased tax burdens.¹⁹¹ Assuming that some kind of scheme for family leave insurance is

191. Although one could plausibly assume that at least some of the burden of the increased tax would be passed on to women, *see supra* notes 184–187 and accompanying text, it is less clear whether they would pay for it in the form of reduced wages, or reduced employment levels. Jonathan Gruber's study of state laws requiring health insurance companies that provide general hospital and medical coverage also to include coverage of maternity-related hospital and medical expenses concluded that married women workers of childbearing age paid for most of the cost of these benefits in the form of reduced wages. *See* Gruber, *supra* note 173, at 630–31 tbl.3. Christine Jolls, however, raises the possibility that in the case of a benefit that is more difficult to measure than a discrete increase in insurance costs, such as the cost of providing unpaid leave under the Family and Medical Leave Act (FMLA) of 1993, 29 U.S.C. §§ 2601–2654 (1994 & Supp. V 1999), these costs may be more likely to be reflected in reduced employment levels than reduced wages. *See* Jolls, *supra* note 176, at 291, 298–99. UI benefits for work-family conflict related job separations would sit somewhere between these two examples. Like health insurance, it is a paid benefit that will have a direct effect on the level of taxes imposed on the firm. Like

attractive, we might want to incorporate into it very different design features than UI has—for example, an absence of firm-level experience rating.¹⁹²

As we more closely evaluate the ethical bases for distinguishing between workers who must quit versus those who choose to quit, those who have an extensive versus a minimum workforce history, and those who search versus those who do not search for reemployment, the proposition of accommodating only some individuals who experience work-family conflict within the UI system becomes less appealing. Yet, once we acknowledge that an ethical policy would accommodate all such individuals, then we squarely confront how poorly UI fits the task.¹⁹³ To accommodate workers who have never worked or who separate from work because they feel that it is undesirable, though not impossible, to balance work and family needs, would essentially eliminate the UI requirement that job separation be involuntary, at least for the very substantial portion of the workforce with family obligations. To accommodate workers who are unemployed but not looking for work would essentially eliminate the UI search requirements.

At this point, one ought to wonder what's left of the rules designed to promote the basic rationales behind UI. UI was designed to ease the burden of wage interruption due to job loss (largely in the service of stabilizing the economy in the face of sectoral shifts and possible mass dislocations), and to facilitate workers' reemployment in jobs well matched to their skills and abilities, thus optimizing economy-wide utilization of human capital. A welfare program aimed at easing the financial burdens of family caregiving, however, may be quite unconcerned about sectoral shifts, mass dislocations, human capital investment, and the like. Thus the tension between the goals and optimal design of a comprehensive family benefits scheme, and the goals and optimal design of an unemployment insurance scheme, is quite sharp. An expansion designed to offer benefits in cases of family conflict will be partial at best if it abides by the rules of UI; a comprehensive and ethically sensible program of family caregiving

leave under the FMLA, it will also result in the difficult-to-monetize costs of workplace disruption upon the departure of the worker who separates in order to collect a benefit.

192. See, e.g., Samuel Issacharoff & Elyse Rosenblum, *Women and the Workplace: Accommodating the Demands of Pregnancy*, 94 COLUM. L. REV. 2154, 2214–20 (1994) (advocating a separate insurance scheme for pregnancy leave, modeled after UI but different in the important respects that it would not be experience rated, and in that a portion of the benefits would be paid to the employer to underwrite the costs of maintaining the worker on the benefits rolls and securing temporary replacements). But see Brown, *supra* note 60, at 77 nn.171–73, 78 n.174 and accompanying text (advocating exempting pregnancy-related quits from experience rating within the existing UI system).

193. I wish to emphasize here that providing assistance to both working and nonworking parents would not eliminate the additional need for work-linked accommodations of the sort I mentioned earlier (such as subsidies to firms that provide on-site daycare).

subsidies, on the other hand, will have an extremely attenuated relationship to the rules and purposes of UI.

C. Other Functions of UI

As I recalled in the preceding part, UI was created in the service of a number of public-minded goals, not solely to provide relief for individuals and families that experience income disruption. The system's goal of smoothing workers' income was designed partly to buffer fluctuations in consumer spending (and thus stabilize the economy), and to facilitate efficient job matching. One might argue that, to the extent declining reciprocity has led to dwindling *de facto* coverage of unemployed workers in the United States, the original goals of UI are underrealized. With lower reciprocity, there will be a thinner buffer against slower spending during recessions, leading to a more volatile economy. While it is unclear whether the stabilizing effect of UI has in fact declined,¹⁹⁴ one could argue that expanding unemployment insurance would nonetheless increase stability relative to its current level.¹⁹⁵ Furthermore, the goal of allowing workers a fuller opportunity to search for optimal job matches in the hopes of maximizing economy-wide utilization of human resources may be underrealized. Increasing eligibility might help workers with the weakest skills strengthen their foothold in the labor market by allowing them to search for jobs that offer transferable skills or training.

Another goal of UI was to provide benefits for working people, partly as a dignitary matter. Actuarial insurance, while adopting the purportedly neutral, technocratic rhetoric of actuarialism, still effectively embodies value judgments.¹⁹⁶ Thus, an actuary may speak of "good risks" rather than

194. See generally LAWRENCE CHIMERINE ET AL., U.S. DEP'T OF LABOR, UNEMPLOYMENT INSURANCE AS AN ECONOMIC STABILIZER: EVIDENCE OF EFFECTIVENESS OVER THREE DECADES (1999) (reviewing previous research and adding quantitative analyses, concluding that contrary to received wisdom, there is no evidence that UI has declined in its effectiveness and relative importance as an automatic stabilizer over the past twenty-five years). Note that the authors nevertheless argue that expanding the eligibility base could enhance the stabilizing effect of UI.

195. I have found only one study attempting to assess how liberalizing UI eligibility rules to achieve broader reciprocity among temporary and part-time workers would affect macroeconomic stability. Wayne Vroman, advocating reforms similar to those I mention (and endorse), *supra* text accompanying notes 86–90, estimates that they would increase overall reciprocity as measured by the UI/TU ratio by 14 to 18 percent (requiring additional payouts of between 7 and 9 percent), and also have a modest stabilizing effect on the economy (perhaps a 10 percent improvement). The reason the stabilization gain would be so modest is because these changes would dominantly affect low-wage workers. For a fuller discussion, see VROMAN, *supra* note 39, at 51–60.

196. See generally Tom Baker, *Insuring Morality*, ECON. & SOC'Y (forthcoming 2001).

“good people,” but this category still carries moral valence and is held distinct from “bad risks” and, implicitly, “bad people.”¹⁹⁷ For workers with marginal attachment to the workforce, disenfranchisement from the cadre of workers deemed eligible for benefits that are earned on the basis of their workforce participation may impose a dignitary harm. Furthermore, exclusion of workers with the lowest workforce attachment arguably devalues those from groups that tend to be overrepresented in low-wage, intermittent jobs, or who are most heavily burdened with the labors of caregiving. To the extent we believe that the law has expressive value, making unemployment insurance available to all workers may serve to affirm the idea that we value all workers equally.

These are hardly trivial concerns. As discussed in detail in Part II.B, given that many states base monetary eligibility on wages earned rather than on hours worked, workers with the lowest wages are most likely to be excluded on this basis.¹⁹⁸ Wages, of course, vary across demographic groups. It should come as no surprise, then, that at least as far as monetary eligibility is concerned,¹⁹⁹ there are significant class, race, and gender differences between eligible and ineligible unemployed workers. Unemployed men are more likely to meet monetary eligibility requirements than unemployed women, and unemployed whites are more likely to meet them than unemployed blacks.²⁰⁰

Reforming monetary eligibility rules to be based on hours worked rather than on wages earned may increase reciprocity by as much as 15 percent, and would likely also reduce the class, gender, and race differences described.²⁰¹ Even with such reforms, those who work the lowest hours would still fall below the attachment threshold and be excluded from benefits.

197. See *id.*

198. See Bassi & McMurrer, *supra* note 4, at 77 tbl.2.3. In addition, unemployed workers who did not receive UI benefits between 1989 and 1991 (for whatever reason, including the possibility that they did not apply) are more likely to fall below the poverty line. See *id.* at 74 tbl.2.2.

199. To my knowledge, there are no empirical studies examining the demographic characteristics of workers ineligible for benefits based on nonmonetary factors (for example, voluntary quits or discharges for good cause).

200. See Bassi & McMurrer, *supra* note 4, at 76–78 tbl.2.3 (indicating that overall, between 1989 and 1991, 56 percent of unemployed workers met monetary eligibility requirements, but the percentage of white men who met the requirements was 64 percent, white women, 54 percent, black men, 47 percent, and black women, 35 percent).

201. See *id.* at 81 (basing this argument on a proposal to allow all workers with at least 800 hours of work in the base period to meet state monetary eligibility requirements). There would be offsetting reductions in the number of high-wage workers who qualify despite very low hours. Note that there may still be gender, race, and class differentials in a scheme based on hours of work, rather than on wages, although I cannot find a study that has tried to make any projections in this regard.

Although I support moving to an hours-based attachment criterion, the question of whether to reduce the eligibility threshold to even fewer hours is more difficult.

In thinking about whether these efficiency (stability, job matching) and dignitary concerns would justify expanding UI, even absent redistributive efficacy, I return to the important question of whether UI is the only way to achieve these goals. Direct transfers through a negative income tax or similar income-tax based scheme could have a stabilizing effect similar to UI, because transfers would increase as income fell, thus helping to buffer fluctuations in income. Of course, a negative income tax or income tax credit could create work disincentives similar to those caused by UI programs. If this is a concern, however, such a program could incorporate work requirements.²⁰² As for the problem of credit constraints forcing workers to accept inferior jobs due to inadequate job search, an income tax-based transfer may be more effective than UI in ameliorating this, as the most constrained workers are those with the least wealth.²⁰³ Finally, direct transfers to low-income workers could also serve a dignitary and expressive function. Because eligibility for transfers could be linked not only to means but also to workforce participation, even when very marginal, it could fulfill an enfranchisement function similar to that hypothesized to exist for UI. Similarly, provision of more comprehensive family caregiving benefits, not strictly conditioned on job loss, would serve to recognize the costs of caregiving and the value of this kind of labor.

The fact remains that UI reciprocity has declined precipitously since the inception of the program. Certainly this decline is partly due to changes in the economy, which have produced a shift from the formerly dominant model of stable, industrial, often unionized, employment, to a more service-oriented economy, in which jobs are less stable.²⁰⁴ Moreover,

202. See, e.g., DENNIS J. SNOWER, INT'L MONETARY FUND, UNEMPLOYMENT BENEFITS VERSUS CONDITIONAL NEGATIVE INCOME TAXES, IMF WORKING PAPER NO. WP/95/65 (1995) (arguing that negative income tax conditioned on work would be more equitable and efficient than various European models of unemployment compensation); see also Dennis Ventry Jr., *The Collision of Tax and Welfare Politics: The Political History of the Earned Income Tax Credit, 1969-99*, 53 NAT'L TAX J. 983, 1011 (2000) (reviewing empirical studies on the effect of the EITC on labor supply and reporting that although the balance of studies in the early- to mid-1990s suggested that high marginal tax rates in the phase-out range created work disincentives, more recent studies using tax return microdata conclude that the credit provides unambiguous incentives for single workers, as well as married men, to participate in the labor force, and produces statistically significant increases in aggregate labor force participation).

203. See SNOWER, *supra* note 202, at 4.

204. See *supra* notes 93-95 and accompanying text (discussing controversies over causes of the decline in reciprocity). See also my discussion of Piore, *supra* note 142, which discusses the possibility that UI itself played a systematic role in creating the current hardship associated with

the demographics of workers have changed, as women and younger workers have entered the workforce, often as secondary earners in what at one time would have been a traditional sole-breadwinner family unit.²⁰⁵ The end result is that UI serves fewer workers than it once did. I have argued that expanding UI to include workers with very low attachment would destabilize the actuarial model of insurance we currently have without very effectively fulfilling the countervailing redistributive ideals reformers hope to advance through expansion. But in arguing for alternative methods of achieving these redistributive ends, where does this leave UI? Does this imply that UI as we know it, once a form of security for a substantial portion of the American workforce, has outlived its usefulness?

I do not think this conclusion is inevitable. Even if some workers at any given time will be ineligible for UI benefits, the promise of income security in the event of job loss is nevertheless an important benefit for those who can claim it, and still has a significant stabilizing effect on the economy.²⁰⁶ Acknowledging, though, that those workers excluded from UI may have compelling claims to income assistance due to the hardships of job loss, perhaps a more fruitful approach would be to abandon outmoded notions of a monolithic ideal.²⁰⁷ As the demographics of the workforce and the nature of jobs become more heterogeneous, the welfare needs of workers become more varied as well. The future of the employee welfare state may well lie in the flexible and eclectic deployment of complementary employee benefit programs when attempts to push the limits of existing programs would prove futile or inferior.

instability, by having replaced earlier familial and community institutions geared to facilitating and buffering transitions in and out of predictably unstable employment.

205. See *supra* note 93.

206. See generally Gruber, *supra* note 134.

207. An alternative, of course, is to radically reinvent UI. The reconstructive project of Michael Graetz and Jerry Mashaw is an example of this approach, wherein implementation of their reform agenda would transform UI into a very different kind of social program. See generally GRAETZ & MASHAW, *supra* note 1. Among other reforms, Graetz and Mashaw would federalize UI or reduce interstate variations through stronger federal regulations, broaden eligibility to include the highest risk workers, eliminate firm-level experience rating, and relax the historical commitment to the notion of a self-financing. See *id.* I share with these authors the belief that a humane social welfare state requires a multiplicity of strategies and coordination between different welfare institutions (their project goes well beyond mine in addressing the full gamut of institutions that make up the American scheme of social insurance). I differ from these authors, though, in being more skeptical about the potential benefits of an extensive restructuring of UI itself. Whereas Graetz and Mashaw are optimistic about the hope for omnibus reform to make UI more unified and inclusive, I fear (as I have tried to illustrate in this Article) the hazards of trying to do too much with one program.

CONCLUSION

In this Article I have identified and critiqued an increasingly popular argument within legal scholarship that advocates transforming UI from an essentially actuarially-based insurance scheme into a program of social assistance that redistributes wealth more aggressively. While these efforts reflect a laudable normative commitment, I have argued, UI is an inapt mechanism for achieving such goals, both as a matter of logic and of actual effectiveness. A far better means for redistributing wealth would attack the problem more directly, through, for example, the expansion of redistributive tax and transfer programs.

My critique is not intended to trivialize pragmatic considerations in trying to advance new public policies. Indeed, there may be sound strategic reasons for working within existing institutions such as UI, rather than advocating new programs that must be created from whole cloth. "Stealth" activism through incremental reform may have a greater chance of political success than direct appeals for new redistributive legislation. But one might also raise countervailing strategy-based concerns. We might, for example, prefer to build on other extant programs that would better achieve the goals reformers desire.²⁰⁸ Or, on a somewhat different note, we might justly worry that backing into subsidies for working families through the UI system simply avoids more open political debate about the need for comprehensive family accommodation measures.

Ultimately, I worry that reformers have failed to grapple with whether they would want a program, the beneficiaries of which are limited to those who suffer loss of employment. To be sure, there are plenty of reasons why we might want to create a program of benefits that insures against the hardships of unexpected job loss, but it may be a different program than one designed to make fiscal transfers to the working poor or working families. Viewing the problem in this light, reform advocates would do well to broaden the scope of their project to include an assessment of the types of reform instruments best suited to achieving their overarching goals. Although in this Article I do not develop in detail what programs would be optimal, I have made some suggestions as to plausible alternatives that avoid some of the most readily apparent failings of an expanded UI. Thus, for example, direct tax and transfer programs designed to subsidize workers with low

208. The EITC, although not without tides of criticism over the years, is an example of the popular and political success of a direct tax and transfer subsidy program targeted at low-income working families. See Ventry, *supra* note 202, at 1002-17 (chronicling the emergence and rise in political popularity of the EITC, as well as the reasons for its continued bipartisan support and survival, despite a wave of conservative criticism during the early 1990s).

income may be a better fit for reformers' redistributive goals, as might a tailored program of family leave insurance, based on a non-experience-rated tax of all employers, designed to smooth income of individuals whose work-family conflicts lead to interruptions in paid employment.

Reconstructing UI as an instrument for targeted redistribution requires a careful effort to link the proposed reforms with their ultimate goal—a task some reformers brush past too lightly. If we aspire to provide subsidies to the working poor, or to alleviate the burdens of caring for dependent family members, UI is a clumsy vehicle.
