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Con contributi di

MARINO REGINI, Università di Milano

LUIGI MARIUCCI, Università di Bologna

BRUNO CARUSO, Università di Catania

ANNA ALAIMO, Università di Catania

KATHERINE V.W. STONE, Cornell University of New York

ALAN HYDE, University of New Jersey

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SOMMARIO

Tendenze comuni e differenze nella regolazione del mercato del lavoro e delle relazioni industriali in Europa*

Marino Regini

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1. Premessa.

Nell'ultimo decennio, nei paesi europei si sono verificati profondi mutamenti nella regolazione del mercato del lavoro e delle relazioni industriali. Ma in nessun paese (forse con l'eccezione della Gran Bretagna) si è realizzata una pura e semplice de-regolazione, come molti all'inizio del decennio auspicavano e molti altri temevano. Per questo si può parlare di una intensa attività di ri-regolazione, nel senso di continui aggiustamenti dei meccanismi che regolano il funzionamento del mercato del lavoro e i rapporti fra le parti sociali.

La domanda che mi pongo in questo paper è se questi aggiustamenti vadano in un'unica direzione di fondo, che segnala un processo di progressiva convergenza fra le economie europee. O se invece in Europa permangano divergenze che non sono solo l'effetto di diversi assetti istituzionali ereditati dal passato, ma che vengono continuamente riprodotte perché corrispondono a differenti strategie degli attori.

A un primo livello piuttosto superficiale, sembrerebbe di poter identificare alcune comuni tendenze di fondo in questo processo di ri-regolazione. Ad esempio, un generale processo di flessibilizzazione degli ingressi nel mercato del lavoro (e in misura molto minore delle uscite). O una tendenza al decentramento della contrattazione come meccanismo di determinazione dei salari. O, ancora, un diffuso ricorso a patti sociali (a livello macro-nazionale ma anche a livello territoriale) per regolare le relazioni industriali, coinvolgendo le parti sociali in politiche di sviluppo e di riforma del mercato del lavoro e del welfare.

Ma, a uno sguardo altrettanto superficiale, non si faticherebbe a individuare significative controtendenze. Per riprendere gli stessi esempi, negli ultimi anni alcuni paesi come Francia e Spagna sembrano avere invertito la precedente tendenza a favorire un ampio ricorso al lavoro temporaneo. Gli accordi triangolari sulle politiche dei redditi in Italia, Irlanda, Portogallo, Norvegia, apparentemente segnalano una ricentralizzazione del sistema contrattuale in questi paesi. Quanto ai più recenti patti sociali per lo sviluppo, sembrano ottenere qualche risultato significativo a livello territoriale, mentre a livello nazionale si va dal fallimento dell'Alleanza per il lavoro in Germania al valore prevalentemente simbolico del patto di Natale in Italia. Senza contare, naturalmente, che in alcuni paesi come la Francia non ne sono mai stati siglati e che anche in Italia imprenditori e governi hanno di recente cambiato rotta al riguardo.

Dunque, le risposte dei paesi europei alle pressioni per una ri-regolazione dei mercati del lavoro e delle relazioni industriali sembrano andare in direzioni differenti. È possibile districarsi nella babele apparente del *policy-making* europeo per individuare alcune alternative di fondo nei processi di ri-regolazione del mercato del lavoro e delle relazioni industriali? In un libro recente a cui mi permetto di fare riferimento (*Modelli di capitalismo*), ho provato a farlo, esaminando le tendenze di mutamento in tre aree di policy in dieci paesi europei. In questo paper riprenderò quell'analisi, naturalmente aggiornandola, per due di queste aree, e ne aggiungerò una terza, proseguendo in ciò negli esempi che ho fatto prima. Le prime due aree di policy considerate sono le misure per flessibilizzare il mercato del lavoro, e la riorganizzazione del sistema di contrattazione dei salari. La terza area è quella della stipulazione di patti sociali per lo sviluppo.

2. I diversi modi di flessibilizzare il mercato del lavoro.

Per ciò che riguarda il mercato del lavoro, farò riferimento alla regolazione degli ingressi e delle uscite, cioè delle modalità di assunzione e di licenziamento, trascurando un altro aspetto - quello

dell'orario di lavoro - che pure ha subito ovunque notevoli trasformazioni.

Negli ultimi 10-15 anni, le direzioni di mutamento per quanto riguarda la regolazione degli ingressi e delle uscite dal mercato del lavoro hanno evidenziato differenze marcate.

Certo, in nessun paese dell'Unione europea (con le parziali eccezioni di Francia e Spagna, a cui accennerò più avanti) la legislazione o la contrattazione recenti hanno prodotto ulteriori rigidità nel mercato del lavoro. Ma in alcuni casi – come in Gran Bretagna e Irlanda, ma anche, in misura minore, in Olanda, Danimarca e Svezia – la flessibilità ha sempre di più assunto il ruolo di un nuovo principio generale di funzionamento del mercato del lavoro, di un criterio guida che sottende tutte le diverse misure legislative o negoziate, al di là del variabile grado di successo che queste possono avere.

In un secondo gruppo di paesi europei, invece, gli interventi di de-regolazione del mercato del lavoro, che pure si sono verificati, sono stati accompagnati da altri interventi di ri-regolazione. Oppure – ed è il caso più interessante – sono stati concepiti come deroghe, limitate e parziali, a criteri di funzionamento del mercato del lavoro che non vengono messi in discussione in quanto tali. Cioè come esperimenti controllati, volti a iniettare dosi di flessibilità in questo o quel segmento del mercato del lavoro ma in quanto tali passibili di verifica e revoca, mai di estensione generalizzata. Cercherò ora di mettere in luce queste differenze fra i due gruppi di paesi, esaminando sinteticamente i mutamenti avvenuti in ciascuno di essi.

Cominciamo con il primo gruppo di paesi. In Gran Bretagna e in Irlanda, la radicale deregolazione del mercato del lavoro che era avvenuta negli anni ottanta non ha reso necessari ulteriori interventi nel periodo più recente. Il basso livello di tutela legislativa per gli occupati stabili rende meno convenienti per le imprese i contratti atipici, che, secondo dati del 1999, sono peraltro in forte aumento. Caratteristica del caso inglese, comunque, non è tanto l'entità della deregolazione del mercato del lavoro quanto la sua generalizzazione.

In Olanda, Danimarca e Svezia, la flessibilizzazione del mercato del lavoro è avvenuta in modo altrettanto generalizzato, ma nel quadro di un sistema di tutele di welfare che non è stato radicalmente ridimensionato. Mentre nei due paesi insulari si tratta di una flessibilità senza rete, in questi paesi dell'Europa del nord la flessibilità è resa possibile dal funzionamento di politiche attive del lavoro e dalla solidità del sistema di protezione sociale. In Olanda, in particolare, la legislazione lavoristica è ispirata a una valorizzazione dell'autonomia delle parti, entro un quadro minimo di riferimenti non derogabili. Per i licenziamenti serve l'autorizzazione degli Uffici del Lavoro, ma il 95% delle richieste di licenziamento da parte delle imprese sono accolte entro tre mesi. Inoltre, si è avuta una liberalizzazione generalizzata del lavoro a part-time e del lavoro interinale, che non è limitato a casi particolari e non ha una durata massima. Nel 1999 è entrata in vigore la legge sulla "flexi-curity", che promuove la flessibilità nel mercato del lavoro aumentando le tutele dei lavoratori atipici.

In Danimarca è tradizionalmente alta la flessibilità in uscita, la cui regolazione è demandata alla contrattazione fra le parti ed è sostenuta da sussidi di disoccupazione eccezionalmente generosi. Nel 1990, inoltre, sono stati flessibilizzati anche gli ingressi, deregolando il lavoro tramite agenzia. Infine, i principi ispiratori delle politiche attive del lavoro in Svezia comportano maggiore attenzione alle opportunità di reimpiego che alla salvaguardia dei posti di lavoro. Le regole svedesi sono più stringenti che negli altri paesi di questo gruppo, ma con tendenze a una flessibilizzazione generalizzata.

In tutti questi paesi del primo gruppo, dunque, gli ingressi nel mercato del lavoro sono stati ampiamente liberalizzati e le uscite involontarie sono relativamente più facili che nell'altro gruppo di paesi che discuterò ora, per un orientamento in tal senso della legislazione o dell'amministrazione, o per la tradizione di delega all'autonomia delle parti sociali.

Vediamo allora le tendenze che si osservano in questo secondo gruppo di paesi. In Italia, come sappiamo, vi è stato un aumento della flessibilità sia in uscita (con la riforma della CIGS e con la deregolazione dei licenziamenti collettivi nel 1991) sia soprattutto in entrata (i CFL dal 1984, il lavoro interinale dal 1997), ma con strette limitazioni legislative e contrattuali. Un esempio sono le restrizioni all'utilizzo dei CFL per le basse qualifiche, o i vincoli all'uso del lavoro interinale. Più in generale, vi è una preferenza per misure di flessibilizzazione rivolte selettivamente a gruppi o aree svantaggiate, che non tocchino però il quadro regolativo generale. Il libro bianco presentato dal Ministero del Lavoro nell'ottobre 2001 mira fra l'altro ad aumentare la flessibilità in uscita, ma, come ben sappiamo, ha incontrato forti resistenze sindacali e a oggi non si è ancora tradotto in norme di legge.

In Germania, la tutela dai licenziamenti è stata in un primo tempo ridotta per gli impiegati e per gli occupati nelle piccole imprese, anche se estesa per gli operai delle medie e grandi imprese. Nel 1999, questa tutela è però stata reintrodotta per tutti i lavoratori di aziende con più di cinque dipendenti. I contratti a tempo determinato sono stati consentiti da una legge del 1985. Successive leggi del 1990, 1996 e 2001 hanno però posto vincoli sempre più stringenti alla durata di questi contratti e alla loro rinnovabilità. In ogni caso, indagini recenti indicano che i due terzi delle imprese tedesche non ne fanno uso, mentre è in aumento il ricorso al lavoro tramite agenzia, regolato in modo più favorevole nel 1997.

In Francia, l'uso dei contratti atipici è stato liberalizzato nel 1985-6, ma già una legge del 1990 ne aveva ristretto l'uso, aumentandone i costi. A fronte di un forte aumento nel ricorso al lavoro a tempo determinato e a quello interinale, avvenuto nonostante ciò, nel 2001 viene approvata una nuova legge sulla "modernizzazione sociale", che ha come obiettivo il controllo della flessibilità sia in entrata sia in uscita. I licenziamenti collettivi erano stati facilitati negli anni '80, ma le leggi del 1989 e del 1993 hanno aumentano i vincoli, imponendo alle imprese di accompagnarli con un 'piano sociale'. In pratica, l'85% dei piani sociali presentati da imprese con più di 300 dipendenti vengono bloccati dalla pubblica amministrazione, e la legge del 2001 li subordina all'adozione da parte dell'azienda dell'orario settimanale di 35 ore.

Anche in Spagna i contratti a tempo determinato sono stati consentiti nel 1984 quasi senza restrizioni, ma negli anni '90 si è cercato a più riprese di limitare il ricorso a questo strumento. Nel 1998 governo e Comisiones Obreras firmano un accordo per limitare l'incidenza del lavoro temporaneo e spingere verso la conclusione di contratti a tempo indeterminato; obiettivo che viene sostanzialmente confermato dalla riforma del mercato del lavoro del marzo 2001, varata con decreto nonostante l'opposizione dei sindacati. La riforma conferma anche quanto previsto da una legge del 1997 (che recepiva un accordo triangolare), cioè la possibilità di ricorrere a un tipo di contratto permanente più flessibile per i lavoratori con meno di 30 o con più di 45 anni.

Infine, anche in Norvegia inizialmente la flessibilità in entrata era stata fortemente favorita, tanto che a metà anni degli anni '90 il 14% dei dipendenti erano occupati con un contratto atipico. Ma nel 1995 sono stati introdotti vincoli al lavoro temporaneo e nel 1999 sono stati ridefiniti i limiti al lavoro in affitto. Inoltre, rimane bassa la flessibilità in uscita.

Dunque, per tirare le fila, l'elemento del controllo e della limitazione, che rende gli interventi selettivi e mirati anziché generalizzati, è ciò che più distingue l'approccio di questo secondo gruppo di paesi alla de-regolazione del mercato del lavoro da quello seguito dal primo gruppo. Gli interventi sono in questi casi rivolti a gruppi sociali specifici quali i giovani, o a particolari aree geografiche come quelle meno sviluppate (ad esempio mediante patti territoriali), oppure hanno un orizzonte temporale delimitato, dopo il quale l'esperimento può essere revocato. Si tratta di una differenza di metodo, di approccio di *policy-making*, che ha tuttavia conseguenze rilevanti sui risultati, cioè sull'estensione e sulle caratteristiche degli interventi operati nei mercati del lavoro dei diversi paesi.

Esiste un *trade-off* fra le due alternative di flessibilizzazione, nel senso che ciascuna delle due presenta costi e benefici per ogni attore, così che la scelta dell'una o dell'altra non dipende semplicemente dai rapporti di forza fra attori diversi, ma costituisce un dilemma per ciascuno di loro. Una flessibilizzazione generalizzata del mercato del lavoro comporta una diminuzione dei costi per le imprese e la possibilità di una più rapida variazione in risposta ai mutamenti del mercato; quindi, potenzialmente, maggiore competitività e maggiore occupazione. D'altro canto, una politica di flessibilità selettiva e mirata può raggiungere almeno in parte gli stessi obiettivi, senza pregiudicare quelle tutele della forza lavoro centrale che garantiscono la sua cooperazione e l'interesse delle imprese a investire in formazione.

Peraltro, va detto che non sempre politiche di flessibilizzazione generalizzata determinano una maggiore precarietà della forza lavoro, e che non sempre, all'opposto, l'adozione di misure selettive e controllate la rende effettivamente più tutelata. Un'indagine dell'Eurobarometro condotta nel 1996, ad esempio, rivela che solo il 43.9% dei lavoratori danesi e il 66.5% di quelli irlandesi hanno una percezione di insicurezza del proprio posto di lavoro, contro il 69.6% dei lavoratori italiani, il 71.8% dei tedeschi e addirittura il 78.7% dei francesi. Al di là dei molti e variabili fattori che possono agire sulla psicologia collettiva, colpisce comunque il fatto che i lavoratori si sentano più insicuri proprio nel paese in cui vi è stato un maggiore irrigidimento della regolazione del mercato del lavoro, e proprio nell'anno in cui la legge Robien sulla riduzione dell'orario di lavoro mirava a evitare licenziamenti. Tornerò su questo punto nelle conclusioni.

3. La riorganizzazione del sistema di contrattazione dei salari.

Anche la struttura contrattuale, ovvero il sistema di contrattazione collettiva dei salari, ha conosciuto negli ultimi dieci anni tendenze nettamente divergenti fra i paesi dell'Unione europea. Gli anni ottanta erano stati segnati da una generale e potente spinta al decentramento; una spinta particolarmente accentuata in Gran Bretagna ma anche in Svezia, cioè proprio nel paese che a lungo aveva utilizzato il primato della contrattazione centralizzata per perseguire politiche di solidarietà salariale. Anche i paesi nei quali il livello contrattuale centrale continuava a essere predominante (Austria, Norvegia, Finlandia, Belgio, Olanda) non sembravano immuni da processi di decentramento nella determinazione dei livelli salariali.

Negli anni novanta, questa tendenza si è però apparentemente rovesciata in diversi paesi europei, per effetto di un crescente ricorso ad accordi triangolari che avevano l'obiettivo di concordare politiche dei redditi capaci di far recuperare competitività alle economie nazionali. È emblematica da questo punto di vista l'esperienza italiana, che ha visto i governi concludere con le parti sociali due importanti accordi triangolari sulle politiche dei redditi (nel 1992 e nel 1993), confermati, almeno a livello simbolico, dal patto di Natale del 1998. Ma numerosi altri paesi europei

(Olanda, Irlanda, Norvegia, Finlandia, Portogallo, Grecia) hanno intrapreso o ripreso con successo, in questi stessi anni, esperienze di concertazione centralizzata delle politiche dei redditi.

Tuttavia, a ben guardare non si tratta di veri processi di ri-centralizzazione. Come appare chiaramente dai contenuti dell'accordo triangolare del luglio 1993 in Italia, non viene riproposta una periodica contrattazione centralizzata come nelle classiche esperienze scandinave. Il modello che questi accordi introducono è diverso da quello verticistico basato su una determinazione dettagliata a livello centrale dei salari e delle condizioni di lavoro - modello che negli anni '80 era entrato in crisi in Svezia principalmente perché le imprese lo trovavano incompatibile con le loro esigenze di flessibilità. I nuovi accordi triangolari introducono regole e procedure che danno ordine al sistema contrattuale, ma non svuotano di contenuto i negoziati di categoria e di azienda, né impediscono alle imprese di delineare strutture di incentivazione autonome.

Il livello contrattuale centrale influenza la dinamica salariale complessiva, ma lascia al tempo stesso alla negoziazione decentrata il compito di determinare i livelli salariali relativi. Per cogliere questa tendenza, Traxler (1995) l'ha concettualizzata come *organized decentralization*, contrapponendola alla *disorganized decentralization* del sistema contrattuale che caratterizza paesi come la Gran Bretagna, gli Stati Uniti e la Nuova Zelanda.

Inoltre, il modo in cui si effettua il decentramento contrattuale va considerato congiuntamente con l'esistenza o meno di diversi meccanismi informali per coordinare la dinamica salariale. Tali meccanismi consentono ad alcuni paesi di rientrare nella categoria delle *coordinated market economies*, che secondo l'analisi di Soskice (1990, 2001) presentano risposte alle sfide comuni nettamente diverse da quelle delle *uncoordinated market economies*. Da questo punto di vista, le politiche dei redditi elaborate dai paesi che negli anni '90 hanno dato vita a esperienze di concertazione non rappresentano altro che strumenti per rafforzare il coordinamento centrale della dinamica salariale.

Il decentramento contrattuale, che negli anni '80 costituiva una tendenza generalizzata, assume dunque nel decennio successivo due direzioni assai diverse fra loro.

Da un lato, abbiamo paesi nei quali la negoziazione a livello di settore e di azienda avviene nel quadro di una ricentralizzazione complessiva del sistema contrattuale; o nei quali le tendenze a delegare a livelli inferiori e periferici i compiti di determinazione dei salari vanno di pari passo con un rafforzamento delle funzioni di coordinamento complessivo. Un esempio è l'Irlanda, dove cinque successivi accordi triangolari pluriennali hanno delineato le *guidelines* per la contrattazione salariale che deve poi svolgersi a livello aziendale, talvolta stabilendo le percentuali massime di aumento. Un altro esempio è la Norvegia, dove la spinta imprenditoriale al decentramento, sull'onda dell'esempio svedese, è stata sconfitta nel 1986, e dove il patto sociale quinquennale del 1993 ha riaffermato la politica dei redditi e il ruolo del coordinamento centrale.

Ma rientra in questo primo gruppo anche l'Italia, con la nuova architettura contrattuale stabilita nell'accordo triangolare del luglio 1993 e confermata dal patto di Natale del dicembre 1998. E vi rientra sicuramente l'Olanda, dove il processo di decentramento a livello di settore e di azienda è stato guidato dal centro a partire dagli accordi di Wassenaar del 1982, e dove un accordo triangolare del 1993 ha incoraggiato il decentramento ma ha rafforzato al tempo stesso il coordinamento e la consultazione di vertice, attraverso l'aumentato prestigio della Fondazione del Lavoro bipartita e del Consiglio Nazionale dell'Economia tripartito.

Dall'altro lato, abbiamo invece un secondo gruppo di paesi nei quali le tendenze al decentramento della contrattazione salariale non sono state in alcun modo guidate dal centro, né controbilanciate da un rafforzamento dei meccanismi di coordinamento esistenti. In Gran Bretagna, le spinte al decentramento, già forti negli anni '80, continuano senza provocare alcuna controtendenza significativa. Di conseguenza, la contrattazione avviene ormai quasi solo a livello di azienda: si calcola che soltanto per il 10% dei dipendenti coperti da contrattazione collettiva, i livelli salariali e le condizioni di lavoro siano stabilite a livello di settore. Inoltre, è stata fortemente favorita la contrattazione individuale.

Ma anche Francia e Spagna, che pure non vengono investite da una spinta di portata pari a quella inglese, vedono una progressiva diminuzione di importanza dei contratti di settore e un aumento di quelli aziendali, in assenza di politiche dei redditi centrali che guidino la dinamica salariale. In Francia, le leggi Auroux dei primi anni '80 avevano reso obbligatoria la contrattazione aziendale, e da allora questa si è andata espandendo a scapito degli accordi di categoria, che diminuiscono di importanza anche per la debolezza dei sindacati nel farli rispettare. L'accordo interconfederale del 1995, poi, ha favorito ulteriormente il decentramento. In Spagna, la frammentazione della struttura contrattuale non è stata sostanzialmente intaccata né dalle modifiche allo Statuto dei lavoratori del 1994, che incentivano la contrattazione decentrata, né dall'accordo triangolare del 1997. A tutt'oggi la maggioranza degli accordi vengono raggiunti senza coordinamento fra loro.

In Danimarca e soprattutto in Svezia si era invece prodotta, negli anni '80, una drammatica rottura del sistema di contrattazione centralizzato tipico dei paesi nordici. Benché i meccanismi informali di coordinamento salariale rimangano ancora molto forti in questi paesi, le spinte al decentramento non sono state né guidate dall'alto né compensate da nuove regole. In Danimarca, i contratti di settore tendono sempre più a stabilire solo le retribuzioni minime anziché quelle complessive, lasciando alla contrattazione di azienda e individuale il ruolo chiave (nel settore privato, quest'ultima riguarda ben il 48% dei dipendenti), senza nuovi meccanismi di coordinamento oltre a quelli informali tradizionali. In Svezia, dopo la rottura della contrattazione interconfederale negli anni '80, i sindacati difendono ora la contrattazione di settore, ma gli imprenditori premono con successo per accrescere il ruolo di quella aziendale.

In Germania, infine, il tradizionale assetto contrattuale non è stato fondamentalmente modificato, ma un deciso decentramento verso il livello aziendale costituisce da tempo un obiettivo prioritario delle associazioni imprenditoriali, che esercitano forti pressioni in questa direzione. I meccanismi informali di coordinamento salariale rimangono rilevanti, ma si osserva una crescente accettazione da parte dei consigli di azienda di salari inferiori a quelli contrattati a livello di settore, e una diffusa defezione di imprese dalle loro associazioni (alcune di esse danno addirittura vita a nuove associazioni concorrenti), al fine di non rispettare gli accordi collettivi.

4. I patti sociali per lo sviluppo.

La terza e ultima area di policy che prendo in esame in questo paper è la stipulazione di patti sociali. A cavallo degli anni '90, in larga misura nel tentativo di rispettare quei criteri di convergenza che, prima e dopo Maastricht, guidano il processo di unificazione economica, diversi paesi europei - particolarmente Italia, Irlanda, Portogallo, Grecia, inizialmente Olanda, cioè i paesi che da quei criteri sono più lontani – hanno dato vita a una lunga stagione di "patti sociali per lo sviluppo e la competitività". In una prima fase, questi patti si concentrano di fatto su quella poli-

tica dei redditi di cui ho appena parlato come strumento per ricentralizzare, o quantomeno coordinare, la contrattazione salariale. Si tratta di uno strumento chiave per consentire ai governi di ridurre drasticamente il tasso di inflazione e il deficit pubblico (cioè i due più importanti criteri di convergenza), ma relativamente semplice da gestire e di effetto sicuro, una volta garantita la collaborazione delle parti sociali nel contenere le richieste dei propri rappresentati. È uno strumento che appare del tutto appropriato gestire in modo centralizzato, a livello nazionale e intersettoriale, con pochi attori e un unico "tavolo" di negoziazione.

Nella seconda metà degli anni '90, tuttavia, la situazione economica dei principali paesi europei e le priorità dei loro governi cambiano profondamente. Anche per il successo delle politiche precedenti, si entra in un periodo di disinflazione e di basso deficit pubblico, mentre peggiora notevolmente la performance dei mercati del lavoro europei, afflitti da elevata disoccupazione, rigidità e incapacità di creare nuova occupazione. Che si accetti l'analisi neoliberista di una sclerosi delle economie europee formulata dall'OCSE, o quella riformista della rottura dell'equilibrio fra regime di welfare e funzionamento del mercato del lavoro, le priorità dei governi europei, e in modi differenti anche delle parti sociali, diventano comunque la riforma del mercato del lavoro e dei sistemi di sicurezza sociale.

Questi due temi entrano dunque prepotentemente nell'agenda della concertazione, dove sostituiscono gradualmente le politiche dei redditi. È emblematico il caso italiano, in cui, agli accordi sulla politica dei redditi del 1992 e 1993, subentrano il negoziato sulle pensioni del 1995, il patto per il lavoro del 1996-97 e il patto per lo sviluppo del Natale 1998. Ma un analogo spostamento dell'agenda politica è osservabile in Germania con l'Alleanza per il lavoro, in Spagna con l'accordo triangolare del 1997, e in vari altri paesi.

Tuttavia, riforma del mercato del lavoro e del welfare sono obiettivi assai più complessi e difficili da raggiungere per via concertata che non le tradizionali politiche dei redditi. Se, nel solco dei precedenti accordi triangolari, vengono affrontati soltanto al centro, con la partecipazione dei pochi attori tradizionali e "intorno a un unico tavolo", la questione che inevitabilmente si pone a questo tavolo diventa: quanto ridimensionamento del welfare e quanta deregolazione del mercato del lavoro possono essere concessi in cambio di quali compensazioni, tutele e coinvolgimento delle parti sociali. Si ripropone cioè la vecchia logica di scambio politico, che prevede concessioni su un fronte in cambio di compensazioni su un altro, che era stata in parte superata dagli accordi triangolari dei primi anni '90 e che appare impraticabile nel nuovo contesto.

Salvo situazioni di emergenza o di grande debolezza di alcuni di loro, gli attori centrali della concertazione trovano dunque difficoltà assai maggiori a perseguire quella strada in questo periodo. A volte una soluzione può essere trovata nell'ampliare il numero degli attori coinvolti e delle sedi di incontro, per cercar di allargare il consenso alle misure di riforma e per trovare possibili strumenti di compensazione in sedi diverse da quelle centrali (ad es. programmi di formazione o reti locali di protezione sociale); oppure per dividere il fronte di opposizione alle riforme e per complicarne la dinamica.

In questo periodo più recente, oltre a quelle dei governi cambiano anche le priorità delle imprese, che ritengono di non avere più bisogno di concertare le scelte di politica economica. In una fase di disinflazione, infatti, la richiesta di decentramento del sistema contrattuale si fa più pressante di quella del suo coordinamento. Inoltre, appare sempre più chiaro che i meccanismi di regola-

zione concertata dell'economia non consentono di deregolare il mercato del lavoro e di ridimensionare il sistema di sicurezza sociale in modo così radicale come vorrebbero molte imprese.

Di fronte alle resistenze sindacali a tagliare in modo marcato il sistema di protezione sociale ereditato dalla fase precedente, alcuni governi hanno tentato la strada delle "riforme senza consenso sociale", cioè per via parlamentare: nel 1994-95, il primo governo Berlusconi per il sistema pensionistico, Kok in Olanda per l'assicurazione contro le malattie, Juppé in Francia ancora per le pensioni; nel 1996, Kohl in Germania e i governi svedese e belga; e oggi, probabilmente, l'attuale governo italiano. In diversi casi, questi tentativi di soluzione unilaterale sono falliti, ma talvolta la strategia di "allargamento dei tavoli e degli attori coinvolti" è riuscita a dividere il fronte sindacale. In Germania, ad esempio, i sindacati hanno firmato nel 1996 numerosi accordi sul welfare a livello di *Laender,* proprio mentre a livello nazionale falliva l'Alleanza per il lavoro; e nel 2000 il raggiungimento di un accordo sui prepensionamenti con il sindacato dei chimici è stato utilizzato per bloccare le richieste più radicali dell'IG Metall.

Dunque, anche la stagione dei patti sociali per lo sviluppo, che nello scorso decennio sembravano avviati a diventare lo strumento principe per la ri-regolazione delle relazioni industriali europee (secondo il *First report of the European Commission on industrial relations*, "social pacts mark a new stage in industrial relations in Europe"), segna il passo in numerosi paesi. E segnala anche in questo caso una diversità di risposte fra i paesi europei nei quali la concertazione non ha mai avuto cittadinanza (Gran Bretagna, Francia), quelli in cui è stata praticata a lungo, attraverso formali accordi triangolari o mediante una diffusa quanto informale regolazione congiunta senza accordi espliciti, ma in cui appare oggi in crisi (Italia, Germania), e quelli nei quali continua a godere di buona salute (Olanda, Irlanda, in parte Spagna).

I sistemi di regolazione concertata dell'economia, basati su espliciti patti sociali o su una diffusa rete di accordi, si dimostrano particolarmente permeabili alle pressioni e al tempo stesso più capaci di coinvolgimento. La loro parola d'ordine implicita, la scommessa sulla loro tenuta, è che questo coinvolgimento di diversi gruppi sociali nelle decisioni non produca solo un rallentamento del (o peggio un intralcio al) processo decisionale, ma sia anche la condizione perché quelle decisioni abbiano successo, perché non vengano continuamente contestate. Ma è su questo *trade-off* (rallentamento vs. maggiore probabilità di successo del processo decisionale) che si gioca oggi la sfida fra i diversi modelli di regolazione dell'economia e delle relazioni industriali.

5. Conclusioni.

Dunque, nel ri-regolare i loro mercati del lavoro e le loro relazioni industriali, i paesi europei si sono mossi in direzioni differenti. Certo, nessun paese europeo presenta più quelle caratteristiche di centralizzazione contrattuale, elevata regolamentazione del mercato del lavoro ed espansione del welfare, tipiche degli assetti neo-corporativi degli anni '70. Ma permangono (o si sono ricreate) differenze rilevanti fra quei paesi che hanno perseguito una strada di semplice deregolazione del mercato del lavoro e delle relazioni industriali e quelli che hanno ricercato a fatica una strada diversa. Gli elementi distintivi di questa seconda strada sembrano essere quelli della ricerca di un maggiore coordinamento salariale per controbilanciare gli effetti del decentramento, di un maggiore controllo per garantire il carattere selettivo e sperimentale dei processi di flessibilizzazione, e di un coinvolgimento delle parti sociali nella riorganizzazione delle relazioni industriali e del welfare.

Come possiamo concettualizzare queste alternative fra cui oscillano i processi di ri-regolazione dei mercati del lavoro e delle relazioni industriali in Europa, in un modo che consenta a ciascuno di noi di interpretarne la possibile portata e anche, perché no, di orientarsi normativamente?

Può venirci in aiuto la letteratura ormai ampia sulle "varietà di capitalismo", la quale ha dimostrato che, per le economie avanzate, esistono due modelli principali di competitività, sia pure con diverse varianti e casi intermedi (Hall e Soskice 2001). Il primo si basa fra l'altro su una deregolazione radicale del mercato del lavoro e delle relazioni industriali, ottenuta attraverso un esercizio di autorità unilaterale che implica rinuncia alla ricerca del consenso e un decentramento dei meccanismi decisionali. Il secondo su una ri-regolazione consensuale mirata al coordinamento salariale e all'investimento in formazione. Nel primo caso viene imboccata una *low road* alla competitività, basata su un "low-wage, low-skill, low-worker involvement, low-product quality equilibrium" (Soskice 1999); nel secondo caso, una *high road,* che comporta invece alti salari, elevata qualificazione, alto grado di cooperazione e produzione diversificata di qualità (Streeck 1991). Del primo tipo è il modello di competitività anglosassone, che si basa sulla separazione fra ricerca e settori ad alta tecnologia da un lato, e produzione e servizi a bassa qualità e qualificazione dall'altro; del secondo tipo sono invece i modelli tedesco e giapponese, che si basano su una più stretta integrazione e su una valorizzazione più ampia delle risorse umane.

Non solo le associazioni che rappresentano il lavoro, ma anche governi preoccupati di coniugare competitività e consenso, dovrebbero essere interessati a che si affermi il più possibile un modello di competitività del secondo tipo - anche se spesso né le prime né i secondi adottano comportamenti congruenti con una simile scelta. La funzione "produttiva", e non più soltanto "redistributiva", che i sindacati in particolare si dovrebbero auto-assegnare è quella di favorire un modello di competitività basato su elevata qualità dei prodotti - elevata qualificazione - elevata cooperazione. E di impedire così che le economie europee debbano confrontarsi sugli stessi mercati con i paesi meno sviluppati, che basano la propria competitività sui bassi costi e le basse garanzie di welfare - non fosse altro perché una gara con quei paesi su queste basi è perdente in partenza.

D'altro canto, i due modelli di competitività comportano tipi diversi di flessibilità della forza lavoro. In generale, i nuovi modelli organizzativi delle imprese europee richiedono, assai più che nella fase taylor-fordista, un buon grado di qualificazione della forza lavoro, la sua versatilità e flessibilità interna (nel senso di capacità di lavorare in mansioni diverse e in orari legati all'andamento discontinuo della domanda), la sua cooperazione attiva. Ma queste esigenze contrastano con la tentazione di molte imprese di risolvere i propri problemi di competitività precarizzando il lavoro, aumentando la sua flessibilità esterna, e comprimendone i costi. Potremmo dire che le loro esigenze di lungo periodo (e di conseguenza la loro capacità di imboccare la *high road*, o la "strada maestra" alla competitività) contrastano con una logica di breve periodo per risolvere i problemi più urgenti (ovvero la tentazione della *low road*, cioè di una "scorciatoia pericolosa"). Queste esigenze contrastanti sono compresenti all'interno del mondo imprenditoriale, e anche all'interno di una stessa azienda. Il prevalere dell'una o dell'altra tendenza può dipendere in larga misura dall'azione dei poteri pubblici e da quella del sindacato.

È in questo quadro, e non in quello certo importante ma troppo ristretto e difensivo della tutela degli occupati, che si dovrebbe porre per il mondo del lavoro europeo la questione dei tipi di flessibilità da favorire (e non semplicemente da "concedere"). Il problema da cui partire è il seguente: vi è una contraddizione intrinseca fra i diversi tipi di flessibilità del lavoro, nel senso che il tentativo di massimizzare la flessibilità di un tipo può impedire il conseguimento di altri tipi di

flessibilità. La contraddizione principale è quella fra flessibilità numerica (e salariale) da un lato e flessibilità funzionale (e temporale) dall'altro. Troppa flessibilità del primo tipo non consente di averne abbastanza del secondo, in quanto comporta mancanza di fiducia e cooperazione nel luogo di lavoro, scarsa disponibilità a condividere le informazioni, resistenza al mutamento tecnologico-organizzativo da parte dei dipendenti, e un disincentivo a investire nello sviluppo delle risorse umane da parte delle imprese.

Tuttavia, fiducia, cooperazione, condivisione delle informazioni, disponibilità al mutamento, investimento in formazione, sono proprio le caratteristiche necessarie per imboccare una *high road* alla competitività. È per questo motivo che un sistema di protezione del posto di lavoro o del reddito, vuoi garantito giuridicamente come in molti paesi europei vuoi sanzionato socialmente come in Giappone, viene tradizionalmente considerato una componente importante di tale modello di competitività "alta". Infatti, dove per qualunque ragione la flessibilità numerica è molto elevata, le imprese tendono a sotto-investire nello sviluppo delle risorse umane, e i dipendenti non sono incoraggiati ad aggiornare le conoscenze utili all'azienda e a identificarsi con questa.

Dunque, in quei settori delle economie avanzate potenzialmente capaci di mantenere o di imboccare una *high road* alla competitività, una eccessiva flessibilità numerica non è opportuna, mentre vanno incoraggiate in ogni modo forme di flessibilità funzionale. Questi obiettivi possono richiedere non già maggiore deregolazione, ma mutamenti nei meccanismi e nei livelli di regolazione del mercato del lavoro che sono difficili da immaginare senza l'imposizione di quelli che Streeck (1994) chiama "vincoli benefici". Si potrebbe ad esempio pensare a un intervento delle istituzioni e dei sindacati, che, pur lasciando la gestione della formazione continua interamente al sistema delle imprese, introducesse un sistema di vincoli e soprattutto di incentivi al fine di coinvolgere l'intera forza lavoro (e non soltanto alcuni gruppi cruciali) nel processo di riqualificazione, nonché di orientare tale processo verso una modernizzazione del patrimonio professionale che comprenda anche conoscenze teoriche più vaste, e non soltanto quelle immediatamente spendibili nel proprio ambiente di lavoro. Per usare ancora la terminologia di Streeck, la flessibilità in questo caso non dovrebbe prendere la forma di un "riaggiustamento verso il basso delle condizioni di impiego", quanto quella di un "decentramento dei meccanismi regolativi volto a consentire una maggiore varietà di risultati".

Tuttavia, non è pensabile che un intero sistema economico possa rispondere alla "sfida della globalizzazione" imboccando la *high road*, che costituisce un'alternativa praticabile solo per settori e imprese cruciali ma quantitativamente limitati. E ciò vale a maggior ragione per l'economia italiana, che, come sappiamo, ha tradizionalmente basato la sua competitività su una combinazione di prezzo, versatilità e design dei prodotti. La soluzione a questo dilemma più comunemente praticata per ciò che riguarda il mercato del lavoro è, come è noto, quella del dualismo. La ricetta a cui il Giappone, ad esempio, si è tradizionalmente ispirato è stata quella di combinare una elevata flessibilità funzionale e temporale per la forza lavoro centrale costituita da dipendenti con garanzia di impiego a vita, con una estrema flessibilità numerica e salariale per quella vasta "periferia" costituita dai lavoratori temporanei e precari. I sindacati europei si sono tradizionalmente opposti a questa ricetta, ma una certa dose di dualismo nell'economia va probabilmente riconsiderata realisticamente, e accettata a condizione che sia controllata, consensuale e tutelata.

Cambiamenti anche piuttosto radicali nel regime di regolazione del mercato del lavoro, consistenti nell'aumentare la flessibilità numerica e salariale, possono cioè essere accettabili se soddi-

sfano alcune condizioni. Una prima condizione è che tali mutamenti facciano parte di "esperimenti controllati", cioè siano mirati in modo selettivo a gruppi specifici (come i giovani) o a particolari aree geografiche (solitamente quelle meno sviluppate), e abbiano un orizzonte temporale delimitato. Una seconda condizione è che siano l'esito di processi di concertazione che coinvolgono non soltanto le tradizionali parti sociali, ma anche altri attori, quali istituzioni locali, camere di commercio, istituzioni finanziarie, ecc. In questo senso, in diversi paesi tra cui l'Italia, si sono sperimentate diverse soluzioni, che hanno fino ad ora prodotto risultati non univoci. Gli esempi più noti di un tale tipo di approccio sono naturalmente i patti territoriali e i contratti d'area. Questi esperimenti si inseriscono in una più generale tendenza verso forme di "micro-regolazione" delle attività economiche e danno vita di fatto a un "dualismo controllato" nel regime regolativo del mercato del lavoro, basato su deroghe specifiche alle regole esistenti, e non su una deregolazione generalizzata.

La terza condizione, forse la più importante, è che la ri-regolazione del mercato del lavoro avvenga entro un sistema di garanzie e di politiche attive capaci di offrire a tutti i lavoratori una tutela sul mercato, al tempo stesso che diminuisce per alcuni la tutela del posto di lavoro. Come ho ricordato parlando delle tendenze alla flessibilizzazione, nei paesi nordici il mercato del lavoro è sottoposto solo a poche regole di carattere generale, e ciononostante i lavoratori avvertono una minore insicurezza di quanto avvenga per i loro colleghi dei paesi mediterranei e dell'Europa continentale. Questo dimostra che la flessibilità è tanto più accettata quanto più il lavoratore si sente tutelato sul mercato del lavoro. Come sostiene Salvati in un recente commento al Libro bianco del Ministero del Lavoro, "non si può passare dalla logica mediterranea di tutela del posto a quella nord-europea di tutela sul mercato del lavoro se non si dà una soluzione adeguata ai problemi degli ammortizzatori sociali, della formazione e dell'assistenza sul mercato. L'unificazione del mondo del lavoro cui ci siamo riferiti con lo 'Statuto dei lavori' non avrebbe senso, sarebbe percepita come una unificazione al ribasso, come un regresso rispetto al sistema di tutele oggi esistente se non fosse appoggiata a nuovi e più solidi diritti".

La conclusione che mi sento di proporre è che forse occorrerebbe procedere con maggiore coraggio e sistematicità su questa strada di dualismo controllato, che comporta però iniziative contemporanee su tutti questi fronti. L'obiettivo di una ri-regolazione concepita come "decentramento dei meccanismi regolativi volto a consentire una maggiore varietà di risultati" (Streeck 1987) dovrebbe cioè significare che per le aree o gruppi di soggetti occupabili più deboli possono – in modo controllato e sperimentale – essere concesse misure di flessibilità numerica e salariale più estese. Ma che tali misure vanno necessariamente accompagnate da vincoli e incentivi esplicitamente mirati a incanalare i settori forti del sistema produttivo verso un modello di *high road* alla competitività. Inoltre, che esse vanno attuate entro un quadro di tutele sul mercato che traducano in pratica lo slogan della "flexi-curity", ovvero flexibility and security, che in Olanda ha avuto successo perché il primo obiettivo di questo binomio non è stato perseguito separatamente dal secondo.

Solo in questo modo una più estesa flessibilizzazione del lavoro potrebbe essere accettabile dai sindacati perché servirebbe davvero anche al mondo del lavoro nel suo complesso, e potrebbe costituire l'oggetto di un grande compromesso sociale per l'Europa agli inizi del nuovo millennio.

Where is Labour Law Going? Collective and Individual Labour Relations*

Luigi Mariucci

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1. How to restore freedom to labour law after the bloodbath.

I find it extremely hard to pass from commemoration to the agenda. But I think that labour law experts, as individuals and as a community, should ask themselves a few questions.

The first "why" concerns the fact that the assassinations of Massimo D'Antona and Marco Biagi were similar in all respects but one. Massimo's death was a sudden, unexpected blow, at a time when the Red Brigades had been inactive for nearly ten years, whereas Marco's was a death foretold. From the summer of 2000 to September 2001, in fact, Marco had been given police protection, but it had inexplicably been removed just when he became most exposed to risk – following publication of the "White Paper on the Labour Market" – despite repeated requests on his part, especially after receiving detailed death threats. And what is even more incredible is that he was not given this protection in the last week before his death, when a weekly news magazine (Panorama) had pointed out, on the basis of a report by the secret services, the risk of a carbon copy of the assassination of D'Antona. Why Marco was not given protection, which would at least have forced the terrorists to step up their organisation of the attack on his life, why he was left there, defenceless, outside his own home, to be killed exactly as Massimo had been, remains a mystery that requires an explanation. It is impossible to accept the reply of the current Ministry of the Interior, according to which it all depended on a "glitch" in the system, not least because the Labour Ministry has made the contradictory statement that protection had been asked for. One of the two is obviously lying and the truth of this must be proved.

I also think that labour law experts should ask themselves why labour law should be "bathed in blood". Why, that is, after the serious injuries to Gino Giugni and the killing of men such as Ezio Tarantelli and Roberto Ruffilli twenty years ago, in the so-called "Years of Lead", Massimo D'Antona and Marco Biagi should have been killed, one nearly three years after the other. We have to ask ourselves the reason for this particular rage against labour law experts. I know that some of us feel that the two spheres – terrorism on the one hand and what we could call scientific debate on the other – should be radically separated. But I am unable to split the two. I need to reflect about the reasons for this terrorism, to recover my inner freedom. Otherwise I would no longer feel able to continue my job with full intellectual freedom. A great comfort to me in this arduous task is the lesson I was taught by the Professor under whose supervision I took my degree and whom I have always considered to be not so much a "master" – because only pupils wish to be trained by a master – but rather a constant source of inspiration for my repeated and at times contradictory attempts to understand what is happening in labour law and other spheres of the social and political scene, according to a totally personal, Popperian falsification of errors: I refer to Federico Mancini, who in fact took pleasure in defining himself the "founder of a family" and not a "master", and who in 1981 collected some of his writings in a small volume published by "Il Mulino", dedicated to his daughter Susanna, with the tragically prophetic title of "Terroristi e riformisti"(Mancini 1981).

I have therefore devoted myself to a task that I know will appear repugnant to many of my friends and colleagues, but one that seems to me to be necessary at this time: I have read the documents written by the Red Brigades claiming responsibility for the slaying of Massimo and Marco. The analysis has led me to the following conclusions. In Italy, there exists a residual group of left-wing terrorists called the Red Brigades, whom investigators are inexplicably unable to discover and dismantle and who nourish a particular grudge against those who undertake the task of defining new labour regulations and planning labour law, experts whose several activities in relation to

the various political stages represent an element of "equilibrium". This point must be made clear. For the Red Brigades, the centre-right and centre-left political line- ups are two tactical versions of a single strategic plan pursued by the "imperialistic bourgeoisie" and "monopolistic capital". According to them, since the current phase is – to use their own term – still one of "strategic retreat", it is pointless to seek converts or less still to spread their roots throughout the country. What counts is to act through what they call "political-military units" which in concrete terms does not consist of striking "one man, one structure, one state apparatus", but a "project" and thus "the personnel who construct a political equilibrium that favours the advance of the programmes of the imperialistic bourgeoisie". Hence the parallelism between Biagi and D'Antona, despite their individual differences[1].

The labour law community would do well to reflect on this reality, as Federico Mancini did when dealing with "terrorists and reformers". Only in this way will we be able to restore labour law to its natural role: that of an open forum, an extraordinary observatory of what is happening in the world outside and also a source of initiatives. If we do not succeed in understanding why labour law has been so brutally bathed in blood we will no longer be able to do our jobs freely and we will perhaps unconsciously abandon the field to a gang of assassins. We therefore need to construct a solid analytical basis for regular counteraction, which I would define as conceptual, cultural and political self-defence. This seems to me to be the only way to restore meaning to working in the field of labour law, abandoning the vicious circle of technicalities received with general indifference and the tragic visibility of the blood periodically shed in the labour law environment. It is the only way for us to regain complete freedom in our research and the proposals we make.

2. Where we come from. The Principles and Methods of Labour Law.

If, therefore, Marco were here in front of me, the first thing I would say is: "let's stop for a moment and think, let's take a short break from this frenetic activism and start by remembering where we came from". We became involved in labour law at a historic moment, between the "hot autumn" of 1969 and the coming into effect of the Workers' Statute. We were attracted to labour law on account of the central role taken by the regulation of labour relations with respect to social, institutional and political dynamics. So all of us young labour lawyers – Piergiovanni Alleva, Marcello Pedrazzoli, myself, Gian Guido Balandi, and Marco Biagi – grew up in the Bologna school founded by Federico Mancini, each with his own degree of sensitivity and outlook, in a pluralistic logic of which Federico was very proud. As I have mentioned elsewhere, we were alike and yet different at the same time. Alleva was soon caught up in his work handling labour disputes for the CGIL legal office and writing monographic studies; Marcello Pedrazzoli and Gian Guido Balandi devoted themselves during the sit-ins at the Law Faculty to a long seminar on "the alternative use of law" as Norberto Bobbio recently recalled; I and others led the study groups in the Faculty and a committee formed to investigate the health and safety conditions in a small chemicals plant in Bologna (the Longo plant) the result of which was a platform of demands and a conflict: we picketed the factory, the first picket of workers and students ever to be seen in Bologna. Scelba's old Flying Squad [the Police, *Note of the Translator*] swooped down, we took a thrashing and then, after a protest demonstration outside the Police Headquarters, some of us were arrested. That factory, with its abysmal health and safety conditions, was shut down years

[1] For a careful analysis, see Biacchessi (2001).

ago: it was transferred to the industrial belt near Casalecchio, and appears to have become a model technological enterprise. We were young and deeply committed to the "movement", but even then, each according to his own lights, our problem was not one of encouraging conflict as an end in itself, following the logic of mere antagonism, but rather of attempting to work out more efficient rules to make the conflict constructive. I still remember that when I was working on my dissertation on Art. 28 of the Workers' Statute, which perhaps undeservedly won the first prize to be awarded by the Brodolini Foundation, my first task was to deal with the more radically critical stance taken against the Statute whose slogan was "no to a Workers' Statute drawn up by employers and trade unions". When I was co-opted by Federico, who simply said in his priceless way "Dear Gigi, let's call each other by our first names", he gave me a lively description of the group of so-called pupils he had not "recruited" but to whom he had decided to offer the opportunity of a university career. "You will be part of a mixed bunch", Federico said, "That's the way I like it, I want you all to be different": He painted a brief but masterly portrait of some people I already knew and finally said: "The only one you don't know is Marco Biagi: he's the youngest of you all but he's got more sense of concrete reality than anyone else". Marco in fact arrived later: his first job was as editor in chief of "Quale giustizia", the journal for the judges who were defined as "progressive" at the time.

What I want to say is that even then, despite our differences, we were working on planning and constructing more advanced points of balance.

What, after all, is the job of a labour lawyer if not that of trying to find the most effective ways to regulate labour relations? I have always been reluctant to use the term "reformism" to define this approach. Not because of Marxist conditioning – quite the opposite in fact. When I was a boy Ugo La Malfa taught me that the term "reformism" referred to ideological diatribes between Socialists and Communists and that independent left-wingers should define themselves as "reformers": I have always remained profoundly faithful to his teaching.

I would not like this to be taken as an attempt to recall our collective biography. It is a return to our roots in search of a compass, so that we can proceed further.

Going backwards in this search, the aim of which is to find useful indications for the future rather than to reflect on lost time, I have found four principles, or rather methodological indications, which I am convinced are still valid today and which I will briefly summarise as follows.

"No scholarship is possible without conviction, without a view of totality". These are not the words of a left-wing follower of Hegel, but of a moderate Labourite whom life has taught the need for hard realism, Otto Kahn Freund[2]. They state that labour law is a window that opens out onto the world, not a self-contained technical discipline, and that to deal correctly with labour law, even though one has shed any ideological frame of mind, it is still necessary to have an idea of society and the great world outside.

"In a steady working relationship, a worker on his own, a worker left to defend himself against his employer, is a *capite deminutus*": this was written by Mancini in a well-known essay published in 1970 (now in Mancini 1976, p. 191), recalling a famous judgement passed by the Italian Constitutional Court. The statement enshrines the idea, which I think is still highly topical, that effective

[2] Cf. "Il pluralismo e il diritto del lavoro", edited by G.G. Balandi and Silvana Sciarra (1982), p. 203, note 6.

regulation of employment relationships always involves relations between the individual and collective dimensions. The point of balance may, of course, vary depending on the time and phase. The pendulum may tend to swing towards either the collective or the individual side (Vardaro 1987; Simitis 1990), but what is essential is that dialectic tension be maintained between the two poles.

"The foremost task of a trade union is to give voice to the inherently conflictual nature of labour relations, the worker's perennial refusal to be considered as a seller of wares". This is Mancini again (Mancini 1976, p.210), and it is a crucial statement because it alludes to a principle, or methodological indication, that cannot be revoked: "labour is not a commodity" (Grandi 1997). In an age of globalisation, when all exchanges between people boil down to market logic, an age obviously destined to self-destruction unless the necessary deterrents are quickly found, this apparently innocuous and universally accepted formula ("labour is not a commodity") takes on an intensely critical tone, as happ ened more than a century ag o with Proudhon's phrase "property is theft".

Finally, reflecting about the relationship between tradition and innovation, that is, the thin line separating excessive conservatism and ossification of thought from indiscriminate faith in innovation, Otto Kahn- Freund comes to mind again, with the extraordinary teaching and testament he left in the essay "Heritage and Adjustment" (Kahn-Freund 1979). Although he lashed out against the British trade unions, calling for radical renewal of their policies, (and I would point out that their turning a deaf ear to his advice led to a historic defeat under the Thatcher government), Kahn-Freund recalls the "moral and political collapse of the powerful German trade unions in the last days of the Weimar Republic" and states that "National Socialism would have encountered stronger resistance… if there had been a less institutionalised, less hyper- organised, more spontaneous and active trade union movement", concluding that safeguarding the concept of a trade union as a "movement" is "a positive guarantee of freedom" (Kahn-Freund 1979, p.20). I think it is worthwhile learning this lesson, concluding that juridical research becomes sterile when one loses a taste for innovation and the willingness to rethink one's position. But the rigour used to oppose conservatism must also be applied to critical supervision of the process of constant revision.

3. Application of the principles: the system of collective labour relations.

In applying the principles outlined above to the current labour relations scenario in Italy, the first point I wish to deal with is the topic of trade union representation. After a long period of debate regarding trade union representation and representativeness, after a popular referendum which did not result in any legislation referring to the private sector, the following rule is applied: "works councils may be formed by workers in any production unit, within the framework of the trade union associations that have signed collective agreements applied in the production unit involved" (Art.19 of the Workers' Statute). This rule implies that works councils in an enterprise are legitimate if the employer signs a collective agreement. That is all: no mention is made of the rules governing the legal effect of collective agreements, or the procedure whereby works councils are formed. In the public sector, which has virtually been privatised, precise regulations exist, starting with verification of the actual representativeness of the unions. This disparity in terms of regulation is unacceptable: it is no coincidence that Massimo D'Antona devoted a posthumously published paper to the topic (D'Antona 2000, p.305 ff.).

I should also like to point out that in Italy the so-called "concertation" method has become a pillar of government policy and a guarantee of social cohesion: in the 1970s and 80s, it was through concertation that a whole series of issues, including automatic entitlement to index-linked pay, were solved, and in the 90s an income control policy was introduced which allowed Italy to meet the requirements laid down for participation in the Euro.

I also note that in the last decade Italy has seen a whole series of political and institutional reforms, passing on the one hand from a system of proportional representation to a majority-based, bipolar system, however imperfect this may be, and on the other to state organisation of a federal nature. Having been deeply involved in this process of innovation, I can state that we are still far from having reached an acceptable balance in the modernisation of our institutions[3]. One the one hand, in fact, the majority bipolar system is construed by the current government according to a simplified, at times brutal, interpretation of the principle of majority, as if the problem of democracy were solved by the principle of majority alone, and were not a complex, many-sided system founded on "constitutional" government by the majority: the opposition rightly complains that government policy undermines the foundations of the constitutional pact in areas such as justice, legality, freedom of information, education, the tax system, social rights and labour. On the other hand, the transformation of the country into a federal state, following the reform of Art. 5 of the Constitution introduced by Constitutional Law n. 3/2001, is taking place in what could euphemistically be called a confused or even chaotic manner. And at the same time the country is involved in the fundamental reform of the nation-state required for the consolidation of the European Union. As far as federalism is concerned I will confine my remarks to the following observation. Some years ago, during a tour of Europe I spent some time in the Federal Republic of Germany. On the Schollsengart in Stuttgart everything I saw was regionalised: the State Theatre, the headquarters of the Regional Parliament, the Treasury, Culture and Sport Ministry buildings, the policemen and even their dogs. Everything was regionalised except labour law, the basic system of which remains a national discipline in Germany, whereas the mechanisms whereby the rules laid down by the federal State are applied are handled at a regional level[4].

Hence a further point: Europe is a complex social and institutional model. It is not, therefore, acceptable to give a simplified version of the social aspect of this model, implying homogenisation to the lowest common denominator[5].

On the basis of these observations I think that the first reform measures needed in Italian labour law should be the following: a discipline regulating trade union representation and the legal effect of collective employment contracts, a clear approach to implementation of the reform of Art. 5 of the Constitution with a view to introducing administrative rather than legislative federalism, confirmation of the usefulness, or better necessity, of the concertation method, and a reform of the collective bargaining system focusing on achievement of a reasonable balance between national contracts and the role of bargaining at a local or enterprise level.

In the "White Paper on the Labour Market" I was surprised to read statements to the contrary. Union Representation is not a government issue. Concertation is over. Federalism is implemented

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[3] I have attempted to draw conclusions on the topic in an essay entitled "Società e istituzioni negli anni novanta" (Mariucci 2001a).
[4] I have dealt with this in "Il federalismo in Europa. Appunti di viaggio" (Mariucci 2000).
[5] See the remarks made on this topic by Roccella (2002).

via the legislative power of each region over the whole system of employment relations.

National collective bargaining is to be dissolved in an indistinct system of local bargaining. Individuals can derogate from the legislative and contractual norms regarding employment. My natural reaction was that the text was not proposing a reform but a restructuring of the system of employment relationships and a sort of rootless Americanisation[6]

4. Individual employment relations: flexibility in hiring.

In the field of individual employment relations, there is a hiatus between the "White Paper" and the implementing Bill n. 848 of 15 November 2001, above all as far as method is concerned. In the Anglo-Saxon tradition, in fact, there is first of all a Green Paper formulating various options, on which opinions are gathered; it is not until later that a White Paper is published and any necessary legislative measures are taken. Here, on the other hand, we took a short cut and started off with the White Paper. What is more, when discussion of the text (published in October 2001) was just starting, the government issued Bill n. 848 (on November 15th 2001). Marco Biagi himself recognised the irregularity of this: "In the European Union and Anglo-Saxon countries," Marco writes, "it is the analysis made in a Green Paper that opens the debate. The White Paper only comes later and finalises the analysis. This is followed by legislative proposals. Our Government has proceeded in a different fashion; perhaps it could have been taken further with better results… Is the philosophy behind the White Paper contradicted by the Government's recent request to Parliament to be delegated powers in many issues affecting the labour market? I do not think so. Although, to be honest, I have no difficulty in stating that I was personally surprised by the political acceleration the government gave to translation of this document" (Biagi 2001). What Marco modestly defines as "acceleration" is in reality an extreme forcing of both method and contents. The truth is that the plan laid out in the White Paper has entered the whirlpool of the political arena, characterised by the Berlusconi government's need to stress that it has delivered on its promises for the "first 100 days".

The contents of Bill n. 848 of November 15th are, to be frank, frightening, even to a disenchanted labour law expert like myself. The Government is asking Parliament to delegate the power to legislate, via decrees to be issued within a year, with the possibility of making amendments in the subsequent two years, on a total of nineteen issues which cover practically the whole of individual employment relations, with obvious repercussions on collective relations. These range from the authorisation of employment agencies, with total liberalisation of private agencies, to a repeal of Law n. 1369 of 1960 regarding the contracting out of labour, to be replaced by a contract for the supply of labour, and to liberalisation of the partial transfers of undertakings (and workers), from the introduction of a series of flexible forms of employment (ranging from job on call to occasional and casual work, besides the introduction of further flexibility in part-time contracts) to regulation of co-ordinated work ("third category" workers, not subordinate nor autonomous) based on a procedure of certification, which in practice means making this type of employment available until structural modifications in the system of dismissals and arbitration are introduced. Were the text to be approved by Parliament in the version presented so far, the Government would be

[6] I have used these expressions in "La forza di un pensiero debole. Una critica del libro bianco del lavoro" (Mariucci 2001b). The term "destructuring" has also been used by Carinci (2002).

authorised to rewrite the whole of labour law for three years, via the initial decrees and subsequent amendments. How, I ask, can this be seen as representing a simple "acceleration"? The term "subversion" used by others is perhaps excessive[7]. I would define it as a total "upheaval" of classical labour law.

In my opinion the whole plan laid out by Bill n. 848/2001 is unacceptable from a functional point of view. What is the sense, even for private enterprise, of creating an infinite number of flexible forms of employment, supplementing fixed-term and part-time employment, work and training contracts, apprenticeships and temporary jobs with even more flexible contracts such as the supply of labour, job on call, occasional employment, casual work etc.?[8] But my main objection concerns another aspect – the basic approach to labour policy.

Here there is a crucial disagreement with the very philosophy behind the Government's plan. I find the obsessively repetitive litany about the virtues of flexibility and competitiveness unbearable. Where are we heading in a world that has turned "flexibility" and "competitiveness" into exclusive values and has betrayed enlightenment by viewing material interests as its guiding light? For labour law "competitiveness" can never be a value in itself: at most it can be a constraint to be taken into account. The same applies to "flexibility". Flexibility is not a value but a constraint and possibly an instrument. The only value is "stability" (Gallino 2001; Napoli 2002): only when a worker has steady employment and income prospects can he plan his future, start a family, have children, a home, a town, friends; only then can he try to find an element of security, however provisional it may be, in the precarious destiny we have been granted.

This may appear extremely idealistic. I take the liberty to object, however, that the sin of idealism is always better than that of cynicism. I know quite well that ideas never saved men, and at times have ruined them, as Machiavelli said. But it is just as true that the exclusive dimension of interests and conflicts of interest has been even more destructive.

5. Ambiguities and criticism of the proposal for a new "Jobs' Statute".

It is commonly believed that the combination of the "White Paper" and the subsequent Bill n. 848 2001 was not the right way to go about laying the bases for discussion of the problem of new regulations concerning employment relationships. I must say straight away that I have never liked the expression "Jobs' Statute" (Statuto dei lavori, in Italian)". It alludes to a projection onto a juridical plane of the concrete forms of labour produced by the market. It seems to be a sort of return to the statutes of guilds, a restoration of co-operative forms of labour that were dismantled, albeit in a contradictory fashion, by the French Revolution, equating the worker and the citizen under the banner of formal equality.

It may be a coincidence, but in speaking of a "Jobs' Statute" mention is also made of a singular new employment contract – the so-called "residence contract" for non-EU immigrants introduced by a recent Bill. Despite the admirable intention of providing immigrants with a clear position as regards employment the moment they set foot on Italian soil, I find the "residence con-

[7] See "Un disegno autoritario nel metodo, eversivo nei contenuti" by Alleva, Andreoni, Angiolini, Coccia, Naccari (2002).
[8] Similar criticism has been made by Treu (2002).

tract" formula odious: it gives the idea that there is someone, an employer, who by giving someone a job is also able to condition the subjective position of the worker, by guaranteeing his residence permit. Conceptually this appears to be a return to the idea of servitude.

This is another reason why I prefer the "Workers' Statute" formula to the "Jobs' Statute". It refers to men, the people who actually work, it has a subjective dimension and is entirely sufficient.

It is in any case clear that Bill n. 848 2001 has jeopardised any possibility of balanced discussion about new employment regulations that are capable of dealing with the functional crisis of the discrimination represented by Art. 2094 of the Italian Civil Code. The bill in fact proposes generalised flexibility in both hiring and firing.

This does not mean that it would not be a good idea to revise the criterion of subordination as the discriminating element in application of labour law. Various hypotheses have been formulated on this topic[9]. Personally, I claim to be an incorrigible "Barassian", despite the fact that I recently expressed harsh criticism of Barassi's ideas and actions. I am a Barassian in the sense that I agree that, in the ultimate analysis, work can be classified as either subordinate or autonomous. So I am in total disagreement with those who, blinded by the crisis of the Fordist model of mass production, deem it necessary to pass to regulation of employment *sans phrase* (Pedrazzoli 1998). I disagree. I consider work to be unfortunately still *avec phrase*: we are witnessing a global expansion of subordinate employment of unheard-of proportions. This is the most significant social phenomenon currently taking place. So I feel it is groundless to state that the social and juridical figure of the "subordinate" employee is a thing of the past only because great industries in developed countries have been re-dimensioned, the Tayloristic model of the organisation of labour is in crisis, and there has been an increase in flexible work or co-ordinated work, just as home- work expanded in the past as a subspecies of artisan labour. A case in point is the spread of a huge new form of subordinate employment in a global sense, via the multitudes of immigrants who enter or try to enter Italy and other European countries, willing to do any kind of work to make a living.

So in both theory and practice I am against discussion of new "Jobs' Statutes", of concentric circles and re-modulation of protective measures, unless it is based on firm premises. The "subordinate" employment of the past is in reality expanding geometrically in new forms, due to the primacy of the market logic that currently dominates the global scene. Here in Italy we can do two things. Either introduce special protection for workers who fall into neither of the two categories, as provided for in the "Smuraglia" Bill [this was a Bill presented to the Parliament some years ago in order to regulate co-ordinated work, *Note of the translator*], or modify the current wording of Art. 2094 by taking out the expression "under the direction of" and thus restoring the essential meaning of the criterion of subordination – the alienation of labour.

None of this, however, has anything to do with the withdrawal of protection by Bill n. 848 2001 as regards the regulation of dismissals.

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[9] See the accurate reconstruction of the debate by Biagi, Tiraboschi (1999). See also Ghezzi (ed.) (1996); Perulli (1997); AAVV (1998); Napoli (1998); Romagnoli (1999).

6. Flexibility in firing: the issue of Art. 18 of the Workers' Statute.

It has been stated by various people that the proposed changes to Art. 18 of the Workers' Statute via Arts. 10 and 12 of Bill. n. 848/2001 are a "false problem" or a "minor problem". If that were true, why was the problem raised? In reality it is not true: it is a real problem[10]. The modifications of Art.18 of the Workers' Statute proposed in Bill n. 848/2001 are in fact both structural and insidious. The Government is not courageous enough to propose a direct amendment, restoring the compensation for unfair dismissal provided for by Law n.604 of 1966, but is indirectly withdrawing the effectove protection afforded by Art. 18 of the Statute. If there were any truth in their thesis that a reduction in protection against unfair dismissal will favour an increase in employment, a structural reform of Art. 18 would be necessary, as has been proposed by those who are of the opinion that it is the labour market itself that provides the best protection for labour[11].

The amendments being proposed are indirect but that does not mean that they are less insidious. The first structural modification of Art. 18 of the Workers' Statute is proposed by Art. 12 of Bill n. 848, which introduces equity arbitration, giving the arbitrator the power to opt between reinstatement or compensation. Evidently it is not possible to imagine an arbitrator as having greater decision-making powers than a judge. So it is clear that the real intention is to change the structure of the protection against unfair dismissal, thus making the time limit laid down for the other amendments to Art. 18 via Art. 10 of Bill n. 848 (a four-year "trial period") appear Pharisaic to say the least. If we then take a look at the specific reasons given in Art. 10 for derogating from Art.18, it becomes even more evident. The first is that it will lead to a reduction in the amount of shadow economy employment. No one can believe that firms employing workers without paying contributions are going to be encouraged to regularise their positions just because reinstatement is to be replaced by compensation. This one example will suffice. Some time ago an Albanian worker fell to his death from scaffolding on a building site near the centre of Bologna. He was not on the company's books. Nobody will believe that the irregular employment of this Albanian depended on the problem of finding an alternative protection against unfair dismissal. It clearly depended on something else: the fact that hiring a worker without paying contributions and tax costs the company about two thirds less than a regular worker would.

Let us take a look at the second derogation from Art. 18 introduced by Art. 10 of Bill n. 848. Here it is stated that reinstatement protection against unfair dismissal will be withdrawn in enterprises employing more than 15 workers. Irrespective of the fact that the vast majority of firms in Italy have an average of 5 employees, no one is going to believe that an employer who has about 13-14 employees will hesitate to cross the threshold just because his employees would acquire a right to real protection against unfair dismissal. He is more likely to be worried that by employing more than 15 workers he will have to comply with a number of provisions laid down by the Workers' Statute such as the setting up of trade union delegations, the right to hold workers' assemblies, paid time-off for workers representatives, etc.). It is no coincidence that a Minister of the Republic, Mr Bossi, recently stated that it would be preferable to raise the threshold from 15 to 20 employees.

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[10] A highly effective analysis has been made by Caruso (2002) of Massimo D'Antona's ideas on dismissals.

[11] This is a simplification of the interesting thesis of Ichino (1996). A more problematic reconstruction of the relationship between the economy and labour law has been proposed by Del Punta (2001).

Finally, let us examine the last circumstance derogating from reinstatement protection against unfair dismissal, relating to the transformation of fixed-term work relationships into permanent ones. It is easy to imagine that this would encourage companies to offer only fixed- term contracts, thus determining a new dualism in the labour market which could only be remedied by extending compensation protection against unfair dismissal to all workers.

From a logical viewpoint, the Government's recent proposals to amend the discipline I have just described make matters even worse. The latest suggestion, in fact, is to derogate from reinstatement in the event of conversion of fixed-term contracts into permanent ones only in the Southern regions of Italy. Besides the delicate constitutional problems this would cause, given that the principle of equality applies to the whole country, there is a practical objection to this: if the introduction of flexibility concerning dismissals were really useful to increase employment rates, why was it first proposed for the whole country and then only for the South?

To be quite frank, as a rational policy to increase employment none of this makes sense. It does, however, make sense from another point of view – a clash of powers, a sort of *redde rationem* between different visions of society and its possible development.

If this is how matters stand, the only thing to do is to take sides, which has nothing to do with the technical work of labour law experts. I am on the side of the great number of people from all walks of life who, calm and convinced of the rightness of their action, took part in the demonstration in Rome on March 23rd organised by the CGIL and then the general strike of April 16th: I did not see any factiousness or sectarianism, no demagogy or crowd swaying typical of 20th century iconography, but an immense number of individuals peacefully gathered together to make claims of which they are rightly convinced and who deserve to win for that reason.

7. Conclusion.

To conclude I need to go back to my roots once more.

I remember that when he last spoke in public about these issues, when he was presented with two volumes written in his honour (the speech was subsequently published with the title "Dal diritto di frontiera al diritto senza frontiere") Federico Mancini said: "Then I left the country and it was from that moment on, 1982, that the directions taken by labour law started to become obscure to me. Obviously, obscure does not mean extraneous…But it was like, how can I say?, flashes of light illuminating a detail, perhaps an important one, a perspective, possibly a crucial one, but certainly not the whole picture. And I would like to know *where labour law is headed*, *all* of labour law, in an age of deregulation of the economy and reduction of the working class to an increasingly broad minority almost ignored by development. No one can doubt that European countries need to rewrite several clauses of the social contract that accompanied and made possible their progress after the Second World War. Well, I hope to find in the essays making up the first of these two volumes some hint, some attempt to answer questions that have tormented me for some time now: is there, among the conquests of the past, a hard nucleus of institutions that are capable of resisting this rewriting? In more explicit terms, which of the freedoms, rights and obligations about the use and usefulness of which we have reflected and agreed or disagreed from the years of my youth to those of maturity, which of these subjective situations will prove to be short-lived and which will survive?" (Mancini 1998). Federico was asking "where labour law is headed" and we spoke about it in one of our last conversations on the beach at Numana, as I

have mentioned elsewhere. Personally, I think Federico had already supplied an answer to the question in an article he wrote 20 years ago, which was published in the book I mentioned earlier, "Terroristi e riformisti". Dealing with amendments to be made to the Workers' Statute, Mancini stated: "For a new form of support of civil liberties to germinate, it may be necessary to get rid of the old roots; unless, of course, this is inadvisable on account of the fact that the norms embodying it have acquired deep social roots or an emblematic value. So, if the remarks I have made so far are correct, the articles of the Workers' Statute that transform every job into a sort of impregnable fortress seem to be becoming rather outdated. I think, however, it would be suicidal to pursue a policy that attempted to modify these articles using means other than sober administration of the rights and procedural mechanisms they provide for" (Mancini 1981, p.150). It would be hard to put it better today.

I wish to add that what is being discussed in labour law today is not an economic issue relating to the distribution of income. It is not, as it was 15 years ago, a question of how to reform or abolish index-linked pay, i.e. an important part of a worker's wages. What is being discussed is a question of rights. What is being discussed is whether the rights of people who work, of workers and citizens, are in themselves worth more than the market, or whether it really all boils down to a question of commodities.

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The Future of Labour Law: Traditional Models of Social Protection and a New Constitution of Social Rights*

Bruno Caruso

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1. Foreword: Intell 6 and its Logo.

I am particularly happy and honoured to give this keynote address at the opening of the 6th Intell international conference for a number of reasons – some of a personal and others of a general nature – which I will outline very briefly.

The first personal reason is that this international conference, organised here in Catania, would have given great joy to a friend who is no longer with us, Massimo D'Antona. Massimo took part in the 1st conference in Hanover and came back very enthusiastic, transmitting his enthusiasm to all those who collaborated with him. Commemorating tragic deaths has unfortunately become a sad recurrence among the Italian community of labour law scholars, almost a literary genre; and to exorcise this strange curse I do not wish to dwell on the topic at length; I will, however, take the opportunity to devote a thought (interpreting, I believe, the sentiments of all present) to another friend who is no longer with us, Marco Biagi.

The second personal reason that makes me both happy and proud is the fact that this conference, which has brought together labour law scholars from all over the world almost every year since 1994, is being held in Sicily, in the heart of Mediterranean Europe, and more specifically in Catania.

The reason for my pride is in a way represented by the conference logo: Sicily and a small dot (Catania and its Law Faculty) irradiating from Europe all over the world. The intention of the logo is certainly not that of representing a post-modern version of a sort of atavistic Sicilian pride: the insular feeling of being at the very centre of the world which is typical of not fully conscious and rather insecure collective identities, despite our ancient roots.

The aim of the logo is to depict a post-modern existential dimension which binds together in a subtle web the speeches that I imagine will be made in the seminars and workshops to be held in the next few days, and which is one of the great issues of our epoch. It is a dimension which we feel particularly familiar with here in Sicily, a land that has constantly been impoverished by abandonment and emigration, marked by dramatic invasions in the past and more recently by anonymous waves of tourists: how does one form, and above all preserve, an identity in a supranational dimension that transforms regional and national identities, and in a world that globalisation is tending to transform into what has been called a "sandy windy desert where it is becoming increasingly difficult to leave traces and mark out lasting paths" and "where identities can be adopted and discarded as if one were just changing costumes"? (Lash 1985 quoted by Bauman 1999, 33).

It is a known fact that the problem of identity concerns above all the individual, and as such one of the primary dimensions of individual fulfilment – work – which for this very reason should never be considered as a commodity, the subject of abstract, aseptic mercantilist relationships (Von Prondzynsky 2000, Grandi 1997); but the problem of identity also concerns territories and the communities living in them, and the sense of shared values and objectives which should not be fear and exclusion of others, of those who are different, of foreigners; the issue of identity also affects the apparently rarefied world of ideas, organised into scientific disciplines. The search for a lost identity consequently also concerns labour law which, as a lively, perceptive branch of law, is readily affected by the anxieties and contradictions of our modern world and is today seeing its reference values, its mission, its scientific paradigm, being clouded in a phase of great transformation (Supiot et al 1999; id. 1996); a phase in which it is difficult not only to govern but also to

understand the nature of the processes taking place, given their unstable, volatile nature and the multiple levels at which government is applied.

In short, the logo represents a strong aspiration to an identity which concerns not only individuals but also scientific communities, institutions and local communities, in a world in which the complexity of the whole does not, or at least should not, deny the identity of its single, individual components.

2. The key words: uncertainty and identity. The challenge for Labour Law.

It is not by chance that my keynote address should start with a reference to identity, because what the most recent and aware lines of thought in labour law bear witness to is a phenomenon typical of the transfiguration of individual and collective identities. We are today facing a great transformation marked by uncertainty and instability, practically the opposite of the labour law and welfare system we were familiar with, at least in Europe, up to a few decades ago.

Although European labour law and welfare systems differ (Ferrera 2000), featuring the characteristic traits of various models of capitalism and national systems of industrial relations (Mendras 1999, 235 ss.; Regini 2000, 13 ss.), they represented a convergent response by governments and states to the bewilderment and anxiety of the post-war period; in the collective imagination, they meant an answer to a widespread need for certainty, protection, and also identity, often collectively perceived and experienced via participation in trade unions, political parties and other institutions of representative democracy. There was nothing comparable in the USA, where the demand for security after the Second World War only led to a surrogate of the systems we have in Europe; a surrogate represented by systems of company protection and stable employment in those enterprises, steadily decreasing in number and size, in which trade unions were capable of protecting workers on the basis of mere power relationships and supporting legislation (going back to the New Deal) which bore in itself the seeds of its own weakness.

This need for protection led to a conscious sacrifice of a large amount of individual liberty in the whole of Europe, in the sense that nation states and collective representations were delegated with providing an umbrella of legal and contractual rules, the individual power to modify which was intentionally limited.

In exchange for this conscious and consensual relinquishment of individual freedom in labour relations, a series of rules were laid down, contributing towards the construction of work and life projects based on three fundamental securities:

The security of steady employment with a single employer, public or private, possibly handed down from father to son through an intergenerational link which, above all in Latin Europe, represented one of the main factors of economic and social cohesion within the family.

The security of slow but sure career and income prospects within a company or public administration, based on the progressive, linear, uniform accumulation of experience, know-how and professional skills, in a rigidly predetermined scheme of a training and knowledge acquisition period followed by a working career.

The security of a retirement pension, substantially comparable to the salary received at the height of one's working career.

It was, in short, a compromise based on the one hand on acceptance of a reasonable amount of coercion in employment relationships, implicit in the subordinate nature of the contract and the externally imposed rules it involved, in exchange for widespread social protection that would confer immunity to market uncertainties, guaranteed essentially by the state, even outside the work relationship proper.

Against these certainties guaranteed, to different but converging extents, by the labour law and welfare systems of the various European states in the "splendid" thirty years after World War II, there has been a sort of revolution, above all an ideological and cultural one, in the name of the free market, individual autonomy, and rediscovery of the contract. In certain contexts and at a certain stage in history, (the '80s – the America of President Reagan and the England of Margaret Thatcher) this forced processes of change to take place, but it also triggered off a sort of critical mass in the '90s.

This time it was on the wave of real structural transformations: not only the technological and digital revolution, the dematerialisation of production processes, competitive market globalisation, the crisis of the tax system and the loss of national sovereignty due to new institutions of regional and global governance and the spread of multinational enterprises, but also to new migration and demographic dynamics with their repercussions on traditional welfare systems and, last but not least, the greater presence of women in labour markets and its repercussions on the traditional division of roles in the workplace and at home.

The result of all this is a variegated, differentiated process; its effects are at times considered to be general but they are merely symptomatic of contradictory processes that are probably distorted by a unilateral interpretation in an apocalyptic or apologetic sense.

As many are starting to recognise at the beginning of the third millennium, however, it is a process for which it is possible to plot the costs and benefits, advantages and disadvantages, on an ideal graph, possibly taking as a reference parameter the classical values of labour law: security, solidarity, individual dignity and liberty, and equality.

I think this is one of the many possible ways to identify a common thread linking the specific topics for discussion in the seminars to be held in the next few days, that is, the redistributive effects of federal systems, the separation between work and housework, and immigration policies.

I will confine myself to pointing out a few of the critical factors produced by the phenomenon that has effectively been summed up in the phrase "universal deregulation" (Bauman 1999), one of the most widely debated epiphenomena of which is the digital economy. I use this term in a purposely generic sense without any technical meaning, as I am conscious of complex implications and necessary distinctions which it evokes (process of real de regulation, but also re regulation, flexible regulation, flexibility etc.) (Sciarra 1999, 369 ss., Regini 2000, 52 ss., Collins 2001, 205 ss).

One frequently mentioned advantage is a new strategic collocation of human resources to promote the competitiveness of post-Fordist enterprise; some numerically significant professional groups have proved capable of reviving the glorious individual contract of the 19th century (which was considered to dispense equality and not hierarchy) by virtue of a bargaining power based on the flexibility of acquired knowledge, a capacity for fast adaptation to changes in production, high-quality performance, interrelational skills and initiative. And individual capacity is recognised

as being one of the new frontiers of equality in the labour market, on which a large number of European institutions are basing their employment strategies (Lisbon summit).

This renewed centrality of individual capacity and responsibility, which in a sense recalls the old ideological debate regarding the centrality of the skill or profession (Trentin 2002), has certainly done nothing, at least in Europe, to renew the bases of trade union representation, the incapacity of which to intercept these new professional figures is one of the factors contributing towards the crisis it is going through. But this is not the point I wish to make. The effects of major interest are to be seen by taking a look at the labour market and the forms of transactional exchange. The increase in the utility of labour has not led to a statistically significant increase in traditional autonomous labour either in the USA or in Europe, but it has certainly led to greater complexity and diversity in the legal and contractual ways in which companies hire top-quality employees, not least by means of a progressive hybridisation of the patterns of labour and commercial law, that is, a hybridisation between freedom and dependence, between equality and hierarchy (Brown Deakin Nash Oxenbridge 2000; Barnard Deakin Hobbes 2001, Collins 2000, Davies Freedland 2000), that means a totally new way of considering loyalty and trust in work relationships (so much so that it has been defined as a process of refeudalisation: Supiot 2000, 341).

As regards the traditional labour contract the phenomenon has therefore made things more complicated, in that this new centrality of the individual introduces a new bargaining power on the supply side, even in formally subordinate labour relations, bringing to light a need for differentiation in individual treatment and well-being that only an individual contract can meet, given that the classical tools of labour market regulation in many European systems (laws that cannot be derogated from and collective contracts with a distributive function) were devised to achieve just the opposite, that is, equalisation and uniform distribution of material assets (both horizontally between the workers themselves and vertically with respect to the power of the enterprise) and not selective, cumulative, fiduciary distribution of non-material assets (capacities and skills). This is not a topic I intend to develop, but all this means that the work contract exalts not only traditional opposing and conflictual elements but also ties of collaboration based on trust between the parties to the contract.

This is therefore a positive element (a new way of considering labour) but it has generated a complication (how can this new way of considering labour be reconciled with the traditional instruments and the traditional identity of labour law?)

Although it may seem strange, a second positive element of innovation in universal deregulation is, in my opinion, represented by the spread of short-term or temporary forms of employment (temp, contingent, or short jobs), which are typical of the post-material economy but are also spreading, according to recent statistics, in the old economy. A close analysis of this phenomenon (Hyde 2001) suggests that it is useless to indulge in unilateral judgements concerning the increase in precariousness and inequality connected with it.

The various types of temporary job, with their varying degrees of regulation, the first among which is the supply of labour by agencies, have led to better employment rates and this, I will recall, is an economic objective that in many systems, including the Italian one, guarantees a right enshrined in the constitution (the right to work).

But a positive aspect of the spread of short-term jobs, above all in highly dynamic economic sec-

tors where there is a strong towards the starting up of enterprises (e.g. in Italian industrial districts), is also the circulation of practical experience, a reduction in the lack of symmetry in information and thus contractual costs for enterprises, and a refinement of the mechanisms of mutual selection between enterprises and workers in the genetic phase of the employment relationship which ensures, perhaps just as effectively as legal norms protecting job stability, the psychological relationship of mutual trust that will lead to prospects of stability: "trust beyond the contract", as Deakin puts it.

From the field of human resource strategy, such considerations are also starting to enter the new theoretical models for labour contracts I mentioned previously (Collins 2000, Hyde 2001, Stone 2001).

A third element that cannot but be listed among the advantages of the great deregulation is the trend towards a reduction (one that supporters of the free market still do not consider to be sufficient) in the once dominating role of universal and inderogable regulations laying down rigid, uniform patterns that are often incompatible with the social, cultural and territorial differentiation caused by the new organisational and economic processes. One point must be made, however: flexible adaptation of standard labour protection laws is positive provided that it represents a conscious response, governed by the social actors involved, to the impossibility of handling differentiation in markets and labour with rigid, uniform regulatory apparatus. I will return briefly to the value of the "concertation" method in my concluding remarks.

A last beneficial aspect of deregulation in Europe, with all the differences in national administrative systems and types of response, is the new trend towards taking the monopoly of management of the economy away from state-run public administration, which is now only entrusted with the task of regulation by means of agencies and via forms of intervention governed by private rather than administrative law. In this case, above all in certain European systems, administrative deregulation has led to a re-regulation, in the form of public private partnerships, of public services which has extended to cover third-sector activities. This type of partnership has provided greater management efficiency by labour law and its canonical tools (e.g. local public service reform and the privatisation of public administration employment in Italy), but it does present new problems of accountability and guarantee against risk (e.g. in the event of bankruptcy) (Dahrendorf 2002) (as well as a gradual re-publicising of the third sector (Diamanti 2002).

On the other hand, picking through the deluge of literature about globalisation, one easily comes across precise, inexorable accountants who point out the costs of universal deregulation (Gallino 2001, Bauman 1999, 61 ff):

On a general level, the radical growth of planet-wide uncertainty (concretely represented today by repeated stock exchange crashes), amplified by phenomena such as world disorder (fundamentalist terrorism, the proliferation of local ethnic or religious wars), which generate old and new fears and jeopardise fundamental individual rights and freedoms for subjects who all basically fall into a new or perhaps old category: the foreigner (Spire 1999, Sassen 2002, 37 ff, Bauman 1999, 55, 81), rights and freedoms that were previously held to be consolidated and universally recognised (Bosniak 2000).

The recrudescence in new strains and with new and more dangerous spreading mechanisms (monopolistic control of the mass media) of old political viruses: populist movements and governments being installed even in regions of what was once Europa Felix (Amato 2002, 99 ff., Mény -

Surel, 2000, id. 2002).

Then we have new protectionist and isolationist tensions that not even the most fervent supporters of universal deregulation seem able to resist (see, for example, the Bush administration's industrial policy after September 11th).

There is also an increase in absolute and relative inequality, in segmentation, in poverty and social exclusion, both in national markets and on a world-wide scale, that conjures up the worrying image of an hourglass society (a drastic reduction in the middle class and upward and downward polarisation of social stratification).

Finally, to go back to issues that will be dealt with in our seminars, changes in types of employment and the internal organisation of enterprises, which increasingly depend on the instability of the market with evident phenomena of risk transfer from enterprises to labour; phenomena that jeopardise not only the primary protection network (welfare systems, employment protection legislation, collective representation and the coverage of collective bargaining), but also the secondary network made up of communities and human relationships, especially the family, leading to processes of upheaval and alienation (the consequences of temporal and geographical flexibility (Sennet 2000, 13 ff), the new imperatives of women being forced to work or be available for work: these are all issues that raise anxieties and worries and lead to a demand for labour policies oriented towards what has been called family-friendly flexibility, as has been successfully experimented in Sweden, Holland and France) (Gonas 2002, Tyrkko 2002, Appelbaun, Bailey, Berg, Kalleberg 2002, Cappelli, Costantine, Chadwick 2000).

3. The mirror and the pieces. Can we complete the jigsaw?

Faced with these diversified and contradictory effects of universal deregulation, it is perhaps a good idea to give up any thought of a homogeneous, solidly structured identity for labour law like those built up around the New Deal in America and the plurality of labour law and welfare systems in Continental Europe, however different their respective models may have been.

It is perhaps time to realise that the mirror reflecting that homogeneity (the hegemony over state and society of the Fordist model of production) has definitely been shattered and the image reverberated is a necessarily fragmented one, because globalisation generates more differentiation than homogeneity.

I think that the positive disintegration of labour law debate (Collins 1997) is a methodological point of arrival from which the debate to be held in the next few days should start.

This fragmentation of identity has understandably created dismay and pessimism in those who had associated the destiny of a compact labour law and the security it provided with a model of social emancipation, based on the continuous re-invention of legislative, institutional and contractual planning in a scenario featuring the primacy of politics and law over the economy (which is the postulate behind all reformist strategies), under the aegis of classical and unfailing values that the bourgeois revolution and the welfare state based on the of rule law made up of civil liberties, equality and solidarity subsumed, as in the Nice charter, in the value of individual dignity.

Are we then to agree with those who, from different standpoints, with the certainty of the apologist or the pessimism of the labour law scholar in crisis (Arthurs 1996, 2001, 1998, Simitis 1997), speak of the end of labour law, or law *tout court*, in its current guise, as one speaks of the end of

modern history faced with the disruptive, relentless vitality of the market economy and globalisation?

I think that the terms of the question are rather more complex than these alternative but converging diagnoses make out, at least in the European perspective.

In a fine recent essay Alain Supiot (2000) attempted to invert the dominating dogmatic premise that appears to inform all remedies in the legal and social field – the unvarying objective dominion of the economy over the law, whereby law is to be judged by its capacity to promote or contrast the free play of market forces, historically or geographically.

Hence the market is seen as a sort of universal equivalent against which national and regional labour law systems are negatively or positively assessed, in terms of adaptation or obstruction.

Inverting the terms of the problem, Alain Supiot asks whether the market has a juridical foundation, and if so what it is, and he attempts to provide plausible answers, starting from recognition of the fact that labour cannot be considered as a "thing" separate from the "individual", a mere object of mercantilistic considerations, along with recognition of the primacy of worker status over the work contract, with all the ensuing implications (not least in terms of rediscovery of the propositive, rationalising function of the law).

I do not wish to go so far: it is an ongoing theoretical debate in Italy, and concerns not only labour law (Irti 1998).

I only want to stress that strong affirmation of the humanistic foundation of labour law may perhaps be a way to put the fragments of the mirror together again, even though it may be impossible to reconstruct a unified whole. I think this may be an indispensable common platform to give new life to the best part of labour law, the spirit of rationalistic, pragmatic and intelligent reformism that inspired some to lay down their lives in defence of their beliefs.

If this is true, it seems evident that the future prospects for labour law scholars are not represented by a sinister notice saying "closed due to completion of work"; indeed, our order book would seem to be almost too full.

4. From labour law to European social law. The (blurred) outlines of a micro and macro identity; from "policies"....

I will confine myself to outlining a few issues that confirm my position and concern labour policies and their contents on the one hand and the tools (procedures) to achieve them on the other. I state at once that my view, if not Eurocentric, is a specifically European one.

In speaking of European specificity, I refer above all to the attempt to construct a supranational institutional dimension (with a completely original constitutional system unlike any of the federate models known to history: Rossi 2002, Weiler 1999, Jeorges Meny Weiler 2000, Grewal 2001) that does not deny the cultural, social and institutional pluralism that has marked the history of the Continent. I also refer, however, to the fact that in this task of delicate institutional engineering the DNA of the social issue (the future constitution of which the Nice charter is only a foretaste) has already been inoculated, as it is part of the core business of its policies.

This event is of great significance not only now but also in the light of future enlargement of the

European Union: a recent report compiled by a group of experts on the state of industrial relations in Europe shows what this enlargement will mean in terms of simple economic statistics (Experts' Report 2002, Biagi 2002). The expected enlargement of Europe from 15 to 27 members will mean a 28% increase in the population of the Union, but only a 5% growth in the overall GDP, or in other terms an 18% reduction in the GDP pro capita. The result will obviously be an enormous increase in inequality and the rich/poor divide between the nations and regions of the Union, with the imaginable risk of social dumping.

By this I only wish to stress the reach of the challenge that Europe seems to have accepted at a time when, unlike other supranational institutions such as Nafta, social policies are institutionally and constitutionally becoming the objective of the new entity.

Is there, then, a common denominator on which to hinge the challenges Europe is preparing to take up along with many other post-Fordist economies (changes in the labour market, demographic trends, technological changes in the knowledge-based economy, the effects of globalisation)?

As far as policies are concerned, I think that there are two guiding lights that have given visibility and identity to EU social strategy, above all in the 90s, and have to a great extent dictated the concrete actualisation of the policies, especially those regarding employment:

First of all the decision to balance requests for flexibility and competitiveness on the part of enterprises and markets with incentives for the co-ordinated spread of new tools and dynamic rather than static security networks, not only in labour relations but also in the labour market itself. The attempt is also to utilize well-know experiences, deeply entrenched in the old economy: I am speaking of bilateral bodies which exercise semi-public functions concerning income and other types of uncertainties in sectors as building industry where employment insecurity is a cyclical and structural factor (Hyde 2001, Experts' Report 2002). Hence the proposal of means for safeguarding not jobs as such but individual capacities and professional assets rooted in a career (social capital), with all that this implies in terms of a new way of considering the individual's right to self-determination; as well as protection of the new forms of atypical, para-subordinate or semi-independent workers, with differentiated means (not just an enlargement of old forms of protection); and finally by the provision of new rights that will guarantee a balanced alternation between the workplace and family life, via family-friendly policies. But please take note: the aims I have just listed are those the EU has outlined in policy statements, guidelines and social directives of a general nature; but the outlines are so broad that they may lead to the implementation of policies by nation states (whose role in this sense is still far from being marginal) that may contain vastly different accents and nuances. In Italy, to recall current developments, both the centre-right government which proposes amendment of the law against unfair dismissal and neo-liberal reform of the labour market as contained in the White Paper, and the presenters of the document shortly to be discussed during the round table debate, outlining a proposal for future opposition legislation aiming among other things at the distribution of protection between the various types of jobs, state that they are guided by the same principle of flexibility in security advocated by Europe. This shows that policies and strategies at a European level are one thing, whereas the problem of co-ordinating the various entities and the instruments they use is another. But I will return to this topic later when I speak on methods and procedures.

The second guiding light in European social strategy is the new era of equality launched with

directives issued in 2000 (and others yet to come) in which the decision to contrast old and new forms of discrimination (by sex, age, handicap or ethnic origin) has become increasingly clear and firm. In its apparently conventional form (social directives) it contains highly innovative elements (the possibility of stating a general principle of non-discrimination, the concept of discrimination as violation of individual dignity and therefore an absolute right to protection against disadvantage or humiliation due to subjective individual characteristics; the explicit attribution in certain situations of positive rights: Barbera 2002, Skidmore 2002, Barnard Deakin Hobbs 2001, 471 ff) which with all probability will lead to renewed activism on the part of national constitutional courts and law courts regarding equality and redistribution policies.

5. …. to "procedures".

As I was saying, the European social plan features two procedural strategies that are closely linked to the contents (I would even go so far as to say that they are an integral part of them) and contribute towards restoring the plural, fragmented identity of European labour law at the beginning of this new century.

Firstly, social concertation, which is strongly supported at different levels in Europe, supranational, national and local. This method should ensure transparency, democracy of choice and consensus regarding institutional labour policies. I do not agree with the view that involvement of the social parties at the various complex levels at which social strategies and policies are worked out and applied represents a surrogate for a lack of democracy in EU political institutions (Lo Faro 2000); I see it rather as the embryo of a new, specifically European model of governance with a view to a balancing of interests, adopting formulas that have been widely experimented at a territorial and enterprise level, as shown by the season of social pacts.

Here again we need to state things clearly: concertation is a means, not an end in itself; it is not a universal remedy to our problems of uncertainty and identity, nor does it guarantee that the contents of the legislative and institutional policies and strategies will adequately meet the values and principles I mentioned previously. It may indeed represent a new, more sophisticated means of coercion and hierarchical selection of interests through a contract that does not generate but probably strengthens new inequalities. It may therefore be one of those cases in which a contract is transformed from a means to achieve equality into a way to exercise power (Supiot 2000)

As Italy has shown recently, concertation may in fact boil down to an aseptic institutional method that transforms trade unions into para-public organisations, guarantors of a social consensus on externally imposed choices that has been neither verified nor demonstrated. In this case concertation becomes a replacement for regulatory activity that is still applied in a top-down direction. This idea of concertation, or social dialogue if you prefer, is a far cry from that of concertation seen as a tool whereby the necessary mediation between different, possibly conflicting, demands and interests (currently competitiveness and efficiency on the part of enterprises vs. worker security) goes through a laborious and pragmatic process of conciliation in which those ultimately affected (the actual employers and workers in flesh and blood) are not passive receivers of the decisions made but active subjects whose will has in some way been channelled at various levels by collective representation. There cannot, therefore, be real concertation without prior definition of the channels of representation and the criteria of true representativeness: this is a lasting principle that 20th-century labour law, as Massimo D'Antona clearly recognised, has bequeathed to our new century.

The second method, again one that characterises social policy and the relative institutional strategies in Europe, is newer and has been experimented more recently; it has been imported from international relations and seems to be being positively applied in European employment strategy starting from 1997 Luxembourg job summit: I refer to the open method of co-ordinating policies that is fundamentally based on soft law (guidelines, recommendations as means of sanctioning) and the priming of virtuous processes of imitation and adaptive reproduction of best practices, or benchmarking. In the opinion of some experts (Expert's Report 2002, Biagi 2002, De la Porte, Pochet, Room 2001; Verma Slinn 1999, Treu 2001, Syrpis 2001) the open method of co-ordination (OMC) is the best way to integrate the various systems, in a process in which common strategies and objectives are not set above the diversity of tools and national identities; a method which should guarantee the co-ordination of intervention and governance at the various complex levels at which the demand for governance presents itself. The effectiveness of the method has yet to be demonstrated: but we must recognise that it is a pragmatic response in Europe to the problems created by the new level of pluralism and the co-existence of plural identities, of different levels of governance, of different territories, a response that avoids the pursuit of artificially harmonious unified structures. In short it is one of the possible methodological responses to the serious problem of reconciling difference and equality in the construction of new federal-based institutional arrangements, against the constantly latent risk of competitive Balkanisation.

6. Humanism and labour law. Do traditional values still count?

My address is obviously open and necessarily circular, so to conclude I will go back to where I started: the problem of identity. This is a problem that is particularly felt either in phases of growth and change or in periods of great bewilderment and the crisis of consolidated values and the usual reference points.

I cannot say which of the two components is prevalent in the identity crisis currently affecting labour law.

There is one thing, however, that I can say: I think it is impossible to give reassuring answers to this question by creating artificial identities ranging from the nostalgic, if not ideological, vindication of a lost identity based on the egalitarian and redistributive acquisitions of the "short century", to the opposite extreme represented by the discovery of the philosophy of the free market, competitiveness and individual autonomy as the only reference paradigm for labour law. Together with many others, I am convinced that individual liberty is not only the result of individual responsibility and effort to assert merit and achieve efficiency and competitiveness. It is also this, but it will only be achieved if the fundamental premises of individual liberty are guaranteed, that is, conditions of equality (of wealth, resources and also capacities and opportunities) and solidarity, and for this to continue to happen there is still a need for political community and the certainties this provides. And labour law contributes to these.

I will therefore conclude by recalling that whatever identities our discipline assumes in the future, however polyhedric and fragmented they are, its foundation will remain the same, that is, its essence as a discipline forged round the human being and his primary needs: hence a humanistic foundation that is reflected in a balanced mixture (albeit a historically changing one) of the three components that mould human dignity: liberty, equality and solidarity; it is no coincidence that these are the timeless, boundless reference values of the new European constitution that is being constructed.

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Financial participation and share ownership by workers: the situation in Italy*

Anna Alaimo

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1. Financial participation by workers in the European Union

This *paper* will examine the current situation and future prospects of Italian legislation regarding the financial participation of workers in enterprise (in particular in the form of share ownership).

Although most of the information and observations that follow will focus on Italy, some initial reference will be made to evolution within the European Community; the increasingly marked influence of EU social law on national labour systems[12] makes it inevitable to introduce the topic from a European perspective, taking into account the main issues that have been raised – and apparently continue to be raised – at a Community level.

From the early 1990s onwards a considerable amount of attention has been paid in the EU to the topic of financial participation (henceforward referred to as f. p.) by workers; significant official initiatives have been taken by European institutions (in particular the Commission and the Council of Europe), and various studies have been conducted by important European research institutes, in some cases based on i*nput* from the institutions themselves[13].

Investigation of the topic started with a famous report on f. p. by workers in EU member states published in 1991 – the so-called PEPPER *Report* (*Promotion of Employee Participation in Profits and Enterprise Results in the Member States of the European Community*)[14] – solicited by the Commission as preliminary to the 1992 Recommendation (Rec. CE 92/443, 27th July 1992)[15]. A second updated version of the Report was issued in 1996 (*PEPPER Report* II)[16], and the Commission recently resumed the issue with a *Working Paper* published in July 2001[17].

As stated in the introductory pages, the *Working Paper* follows in the wake of the *PEPPER Reports* of 1991 and 1996 and the Council of Europe Recommendation of 1992 and aims at initiating a process of consultation, above all with the social partners, prior to adoption of a future Communication by the Commission.

Whereas the interest shown by EU institutions in f. p. by workers has so far led to a simple Recommendation – typical of *soft law* – in the near future it would appear destined to generate a simple Communication: an atypical act, the only aim of which is to establish a "line of political action or to state the specific position taken by the institutions"[18].

Despite the "weak" nature of EU intervention, it is useful to highlight the main themes and problems regarding f. p. that appear to be emerging. I will refer not only to Commission's *Working*

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[12] Cf. ARRIGO (1998), pp. 167 and ff. and, more specifically, on the process of "Europeanisation" of Italian labour law, CORSO (1996).
[13] Cf. in particular, two recent studies by the European Foundation for the improvement of living and working conditions, Dublin: Recent Trends in Employee Financial Participation in the European Union; Employee Share Ownership and Profit Sharing in the European Union, both to be found at: http://www.eurofound.ie; also, the study carried out, on the request of the Commission, by the European Centre for Employee Ownership on the connections between European work councils and f. p. by workers (see EWCs and Financial Participation, 2001).
[14] 3 UVALIC (1990).
[15] See ALAIMO, 1996; ROCCELLA, 1992; TOSI, LUNARDON, 1992.
[16] PEPPER II, Com (96) 697 final.
[17] Financial Participation of Employees in the European Union: 27th July 2001, SEC (2001) 1308.
[18] POCAR (2000), pp. 306-307.

Paper but also to a recent study carried out on the request of the Commission by the *European Centre for Employee Ownershi*[19], as well as the results of the process of consultation with the social partners initiated by the *Working Paper*, which has almost been concluded (UNICE, ETUC and the European Federation of shareholding employees – set up in Brussels in 1998 – have already supplied the Commission with written observations on the *Working Paper*).

Two issues in particular seem to emerge from official documents, the observations made by the social partners on the *Working Paper* and the study mentioned above.

A) The first is the transnational spread of f. p. by workers, i.e. its spread among multinational groups and in particular in what are called Community-scale enterprises.

The *Working Paper* identifies three obstacles to the transnational spread of f. p. schemes: a) the different tax systems in the various Member States; b) the different compulsory contribution systems; c) social and cultural barriers (which the Commission indicates with the expression "cultural deficit") against the spread of f. p. in some States.

From the study carried out by the *European Centre for Employee Ownership* – a study of f. p. in four large multinational companies (Gucci, Pearson, *Air France* and DSM), which specifically investigates the connections between financial participation and the activity of European Works Councils – it emerges, on the other hand, that only rarely (in particular in the case of the Gucci company) is the intention of applying f. p. schemes in all the companies in the group the main reason for the setting up of the EWC; in most cases, in fact, f. p. has no connection with the activity of EWCs: it has not been a subject for discussion within the councils, nor have any agreements been stipulated by them regarding financial participation.

The study draws the conclusion, however, that EWCs will in the future be a forum in which the modes of application of the various f. p. schemes can be discussed, especially if the schemes applied in certain places are to be extended to companies operating in different EU countries.

From a strictly juridical viewpoint, however, it is obvious that *homogeneous* application of f. p. schemes would require a common discipline, a juridical statute (i.e. a single system of rules) within the EU system, similar to the single European Company model recently introduced by EU Regulation n. 2157/ 2001[20].

It is, in fact, evident that only a statute of this kind – adopted via action that is directly binding for all Member States – would provide transnational enterprise with a uniform set of norms that could be applied in all Member States.

However, as is clear from the direction that EU institutions have taken, the orientation is quite the opposite: whereas in the early '90s – while the 1992 Recommendation was being formulated – the Commission had declared its intention of setting up a working group to design *a discipline at a European level,* this has not come about: the Commission has tended towards *soft* regulatory intervention, more recently passing to the planning of initiatives in favour of the adoption of acts (such as the announced Communication) that are quite atypical and the only aim of which is to

[19] See EWCs and Financial Participation, 2001.
[20] Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE).

establish lines of political action and state the position of Community institutions regarding the issue.

Although the possibility of collective bargaining by EWCs in relation to f. p. schemes may respond to the need to create «supranational co- ordination and connection of collective relationships within a group»[21], for example the co-ordination of wage policies and/or "fidelity" policies for all the group's employees, it would not be suitable for the creation of a single set of norms to be applied directly to labour relations in *all* the companies in the group. EWC agreements are, in fact, known to have compulsory effects and so they are not effective as regards the employment relationships of the employees of the companies involved[22].

As regards transnational regulation of f. p. schemes, the most we can hope for, then, is the spread of framework agreements, that is, bargaining of a policy-oriented nature, leaving implementation of the various types of f. p. in the various companies in the group to be regulated by current legislation and possibly collective bargaining at a national level.

B) The second important issue that is emerging in the EU in relation to f. p. is the connection between f. p. and participation in decision- making processes.

Participation in decision-making as a necessary consequence of f. p. was already outlined in the 1992 Recommendation: both the Recommendation itself and the enclosure recommended respect of workers' rights to information, consultation and participation[23]. Greater emphasis was placed on this connection by the consultation process following the 2001 *Working Paper*. As was to be expected, it was above all the ETUC that focused its observations on the profile of worker participation and involvement in the enterprise, declaring the indications in the Commission's *Working Paper* to be inadequate in this respect. They specifically requested the future Communication to include explicit reference to the right to information and consultation and the appointment of workers' representatives on company boards[24].

This is in my opinion an important indication; it points to a trend that national legislation would be advised not to ignore.

2. Share ownership by workers: the situation in Italy.

Unlike other EU countries, where *ad hoc* legislation regarding f. p. was introduced some time ago[25], or an organic system of regulation was developed following *input* from the Community[26],

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[21] GUARRIELLO (1992), p. 32.
[22] Ead., p. 63.
[23] Rec., point 3, part II; encl. point 2.
[24] The position of Etuc on the document of the Commission has been transmitted with a Communication of the 23rd of November; it can be consulted on the Internet page: http://home.pi.be/~pin13904/ParticipFinEN.pdf. On the position of Etuc and Unice, see, more extensively, TIRABOSCHI (2002), pp. 213-215.
[25] I refer above all to France and Great Britain: following a legislative tradition of almost twenty years, they have recently renewed their legislation on the subject – in 2001 and 2000 respectively (for the French law, see France: New Law on Employee Participation, 2001 and for Great Britain law, see http://www.inlandrevenue.gov.uk/shareschemes/).
[26] Belgium, for example, passed its own law on profit sharing and share ownership by workers in June 2001 (cf. Belgium Employment - New Governments Draw Up Employment Agenda, 1999; BLANPAIN, 2002); for recent comparative analyses, see FERRANTE (2000);

the topic of share ownership by employees in Italy is still regulated by outdated laws (Articles 2349 and 2441, last paragraph, Italian Civil Code)[27]. Recently these have been supplemented by a few sporadic provisions (Art. 13, par.1, letter b), n. 2 of Legislative Decree n. 505, 23rd December 1999, which amended Art. 48, par. 2, letter g of the T.U.I.R. on income tax; Presidential Decree n. 917, 22nd December 1986; Arts. 137, par. 3, and 141, of legislative decree n. 58, 24th February 1998), all, however, lacking in those organic features that adequate legislative regulation should by now possess.

The only two pages devoted to the topic of "economic democracy"[28] in the White Paper on the labour market by Minister Maroni[29] had no follow- up in the labour market Bill (N° 848) passed in 2001); nor is there any hint in Bill N° 2145, 2001 which introduced a reform of compulsory and supplementary national insurance contributions, even though legislative reference to f. p. by workers has more than once been made in the Italian system, in connection with the introduction of norms regulating voluntary contributions or reforms of certain aspects of the compulsory contribution system[30].

As the White Paper states, there has up to now been no organic legislation relating to f. p. and share ownership by workers. Although a number of bills have been presented in Parliament, from the 12th legislature onwards, no legislation has as yet been passed to deal adequately with the numerous issues that the f. p. phenomenon interferes with: from its connection with the process of privatisation of public enterprise – in relation to which most f. p. schemes in Italy have been introduced –; to its link with participation in decision-making processes, and in particular the opportunity for shareholding employees to take part, with voting powers, in shareholders' meetings, and the inclusion of their representatives on company boards; and finally to regulation of the modalities of collective stock management[31].

It is, however, true to say that there have been some signs of legislative consideration of the phenomenon in Italy since the second half of the '90s. But this has been in the form of sporadic legislative intervention – provisions with very broad, general spheres of reference.

Some normative provisions regarding share ownership by employees have therefore been inserted in laws whose scope was much broader and more general in nature: on the one hand,

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FESTING M., GROENING Y., KABST R., WEBER W. (1999 and http://home.pi.be/~pin13904/WHATSNEW.htm; http://home.pi.be/~pin13904/THE%20NEW%20EO%20BELGIAN%20LAW.pdf); and for a comparison with English law, see GUAGLIANONE (2001). For a comparative analysis of the situation in Italy, Great Britain and the U.S.A, focusing on the connection between f. p. and decentralised bargaining, see DEL BOCA, KRUSE, PENDLETON (1999).

[27] Cf. GHERA, 1997, pp. 11 and ff.

[28] Pp. 86-87. Among the most recent contributions on the topic of economic democracy, see BONFANTI, 2001; MARRONCELLI, 2001; FERRARO, 2000; RODOTÀ, 1997.

[29] 8 Libro Bianco sul mercato del lavoro in Italia (White Paper on the Labour Market in Italy), October 2001, on which – besides the numerous comments in Italian – see LO FARO (2002).

[30] Cf. Law N° 299, 17th August 1999, concerning the conversion of lump sum funds into stock, subsequently destined for company retirement pension funds, and suppressed Art. 2, par. 15, of Law N° 335, 8th August 1995, on the notion of taxable income for contribution purposes.

[31] 0 Of interest on account of the specific consideration given to this profile are the regulations proposed by Bill N°. 898, submitted to the Italian Senate by Senator Montagnino and others on 28th November 2001.

reforms of the compulsory and voluntary pension contributions system and harmonisation of the tax and contributions regulations concerning income from subordinate employment (Laws N° 335, 1995; 314, 1997; and 505, 1999); on the other, provisions regarding brokerage and listed companies (Law N° 58, 1998).

Regulations occasionally inserted in laws with much broader scope have thus s*eparately* referred to the two different, most typical types of impact by f. p.: on the one hand wages and lump sum payments on retirement; on the other shareholding worker participation in decision- making processes.

3. Legislation regarding tax and contribution relief.

As regards the first of the two types mentioned (wages and lump sum payments on retirement), it is worthwhile recalling the sequence of provisions which introduced tax and contribution relief for employee share ownership schemes between 1995 and 1999[32].

The outcome of these provisions and subsequent additions has been the development of legislation favourable to f. p. by workers. It comprises a series of promotional regulations – in the form of tax and contribution incentives for f. p. schemes – that can be considered as complying with the types of law in existence in a number of other EU countries (cf., *retro*, § 2) and the suggestions made in EC Recommendation 92/443 regarding financial incentives for f. p.

The first relief provisions were introduced by Law N° 335, 8th August 1995, which enlarged the range of exemption from contributions, ex Art. 12, Law N° 153, 1969, excluding from taxable income "the difference between the market price of shares in the employing company or controlling or controlled companies and the reduced price offered to employees according to current law (Art. 2, par. 15, Law N° 335, 1995)". This was replaced by new regulations issued in 1997 when, on the occasion of unification of the notion of taxable income for tax and contributions purposes (Law N° 314, 1997), it was established that in the event of increases in company capital provided for by the only two civil code provisions that referred to stock ownership by workers (Arts. 2349 and 2441) the "value of stock" held by employees was not to be assessed as taxable income (either for tax or contribution purposes). The latest relief provisions, which are still in force, are those made by Law N° 505, 1999 which, reformulating Art. 48 of the T.U.I.R., established that taxable income was not to include either *the value of stock offered to employees* (up to a total amount not exceeding four million lire in the tax year – letter g), or *the difference between the value of the stock at the moment it was assigned and the amount paid by an employee to purchase such stock* (letter g bis); this difference – typical of what are called stock option schemes – is a lucrative source of income for employees who become shareholders.

4. Share ownership and participation in decision-making processes.

The other impact of recent provisions regarding share ownership by employees is, as we have seen, the participation of shareholding employees in decision-making processes.

Here again, the few provisions still in force were inserted into legislative measures with a broader scope – Law N° 58 (listed company reform) passed by the Government in 1998, familiarly known

[32] DI NUNZIO (2000).

as the "Draghi Reform". Once more, therefore, legislative reference was due to a broader, more general reform, on this occasion concerning listed companies.

Legislative references to this profile (i.e. the participation of shareholding employees in decision-making processes) are, however, very few; as such, they would appear to confirm certain interpretations that undervalue the phenomenon of f. p., according to which one should "not make out too close a connection between the problems and suggestions of financial participation with those concerning worker participation in company management organisms"; these are two phenomena that "should be considered and assessed as rigorously separate and distinct, as there is no immediately consequential link between them"[33].

Although this can be held to be true as legislation stands today, legal policy seems to be developing a different idea, attaching greater value to worker participation in decision-making. As seen previously, the EU has provided various *inputs* to promote this profile, and at a national level various Bills have been presented to support the connections between f. p. and participation by workers in company management. As an example, it is worthwhile recalling that one of the most recent and organic Bills concerning share ownership by employees – Bill N° 18, 2001, known as the Pizzinato Bill, which was presented during the current legislature – states that the primary aim of the proposal is to "allow active participation" by workers in the life of the company, in compliance with Art. 46 of the Constitution", thus retracing the idea of participation expressed when the Constitution was originally drawn up[34].

5. Employee participation in shareholders' meetings and associations of shareholding employees.

The provisions laid down by the above-mentioned T.U. (in particular Arts. 141 and 137, par. 3) exclusively concern the participation of shareholding employees in shareholders' meetings but not the participation of their representatives in other company organisms such as board meetings and auditors' committees (even though the need for the latter was taken into account in certain important collective contracts dealing with share ownership by employees in the late '90s: the 1996 and 1998 Alitalia agreements; the Meridiana agreement in 1997; the Dalmine agreement in 2000).

The two provisions made by the T.U. to reform listed companies that refer to shareholding employees therefore only deal with shareholders' associations (Art. 141, which is a general regulation concerning shareholders' associations, thus affording general protection to minor shareholders) and the votes that shareholding employees can delegate to these associations so as to participate in shareholders' meetings (Art. 137, par. 3). Art. 137, par. 3 establishes in particular that company statutes can include provisions to facilitate the collection of votes delegated by shareholding employees. The two provisions are, in fact, connected; as is clearly seen from the opening of Art. 141, the basic task of shareholders' associations (and thus associations of shareholding employees) is to collect proxies so as to allow them to take part and vote in meetings via the associations.

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[33] SCHLESINGER, 2000, p. 188.

[34] The same inspiring ratio was behind two recent bills presented by National Alliance deputies: Bill 2023 C, submitted to the Chamber on 23rd November 2001 by the Honourable E. Cirielli (AN) and Bill n. 741 S, submitted to the Senate on 12th October 2001 by Senator Pedrizzi (AN).

It is obviously not possible here to deal thoroughly with the issues involved in delegating votes. It is, however, worthwhile recalling that the right to vote – and therefore the "weight" – that shareholding employees can exercise in shareholders' meetings via their associations, has been the subject of recent study, evaluation and proposal by a group of experts. Following an initial meeting in Genoa on 5th March 2002, the group drew up a Report on "*Exercise of the right to vote by shareholding employees in the shareholders' meetings of listed companies*"[35]. The Report is to be examined by the Finance Commission of the Chamber of Deputies (to which a number of Bills regarding share ownership by employees have been presented), which commissioned the report as a fact-finding investigation of implementation of Law N° 58, 1998.

Without going into any detail regarding the problems of delegating votes to associations of shareholding employees, (about which the reader is obviously referred to the Report itself), it is worthwhile pointing out the two main drawbacks that the current proxy mechanism presents, drawbacks which are analysed in the Report.

a) The first drawback derives from the legal provision regarding shareholders' associations, according to which these associations vote, "even in a diverging manner, in compliance with the indications expressed in the proxy form by each member" (Art. 141, par. 4). The possibility of a diverging vote clearly runs the risk of undermining the *voice* of shareholding employees' associations at shareholders' meetings; as the Report states, for these associations "to represent a real counterbalance to major shareholders, they should appear from the outside to be compact structures", that is, they should express a homogeneous vote.

It should be recalled that the above-mentioned Pizzinato Bill (n. 18 S) proposes that an association delegated to vote on behalf of shareholding employees should exercise its function "on the basis of the prevailing orientations of the association" (Art. 3, par. 3) and this provision obviously tends towards eliminating any possibility of a divergent vote. The Bill also eliminates the equation of shareholders' associations and associations of shareholding employees, proposing to create an autonomous "association of shareholding employees", suggesting different criteria for its constitution than the general regulations laid down by Art. 141, Law N° 58, 1998 (Art.2).

The differentiation made is certainly an appreciable one: it gives appropriate weight to the different interests shareholding employees may have as compared with other possible minority groups of shareholders. In fact – unlike other minority shareholders, mostly with short-term interests (almost always linked to the profitability of investing in shares) – shareholding employees may well share some of the interests typical of entrepreneurial-capitalistic shareholders: long-term interests linked to the success and maximisation of productivity and company profits. This is the case above all when workers are not allowed to transfer their shares for a certain period of time, that is, when they are bound by stability mechanisms to remain shareholders for minimum periods, which are not usually short (three years is the period usually laid down in share ownership schemes offered by Italian companies in the last few years[36]).

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[35] To be found at: http://www.autostradeazionisti.it

[36] For justification of a general differentiation between treatment of shareholding employees and other minority shareholders, see: ALAIMO, 1998, pp. 203-211.

b) The second drawback of the current proxy mechanism – again highlighted by the Report – concerns the formalities and time required to collect the proxies (certification of the deposit and thus ownership of shares; the compilation of proxy forms and transmission to Consob (the Italian securities and exchange regulator, etc…). This takes an extremely long time which is "difficult to compress in the interval between the date on which the shareholders' meeting is called and that on which it is actually held"[37].

Here again the Pizzinato Bill proposes useful solutions, simplifying the procedures for collecting proxies: for example, it accepts digital signatures to delegate votes and self-certification to demonstrate possession of shares as an alternative to bank certification of share deposits (Art. 3, par. 4 and 5).

One last proposal for more active participation by shareholding employees' associations in the life of companies deserves attention.

It is contained in both the Pizzinato Bill (Art. 6), and the expert Report mentioned previously[38], and consists of giving associations of shareholding employees rights typical of trade union representations: the right to premises in which to hold their meetings (Art. 27, Law N° 300, 1970) and the right to advertise them (Art. 25, Law N° 300, 1970). Once more, the proposal is an appreciable one: the conferring of rights similar to those of trade union representations facilitates the pursuit of certain aims typical of associations of shareholding employees. These aims are clearly listed in the statutes and mainly consist of affording general protection of the interests of the members and promoting greater participation for them in strategic decisions made by their companies. Obviously, being able to summon and meet shareholding employees in the workplace would give these associations the opportunity to provide their members with information about the topics to be discussed in shareholders' meetings and facilitate the collection of proxies.

6. Specific representation of shareholding employees on boards of directors and auditors' committees: between labour law and company law.

Finally, passing from employee participation and voting rights *in shareholders' meetings* to participation by their specific representatives *in board meetings and auditing committees*, it should first be pointed out that there are as yet no legal provisions to regulate the situation.

It is no coincidence that the intention of allowing specific representatives of shareholding employees to take part in boards of directors and auditors, expressed in the late 90s in a series of collective agreements concerning f. p. by workers[39], has in many cases remained a "dead letter", on account of the difficulty of identifying the technical and legal modalities for their appointment. In company law there is, in fact, a fundamental principle whereby shareholders' meetings are entitled to appoint directors and auditors (Arts. 2383, par. 1, and 2400, par. 1, Civil Code). The logical consequence of this principle is that the appointment of directors and auditors cannot be devolved to specific subjects (such as associations of shareholding employees, for example) or specific categories of shares.

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[37] Report, cit. p. 10.
[38] Report, cit. point 25.
[39] Cf. above-mentioned Alitalia agreements, 1996 and 1998; Meridiana agreement, 1997 and Dalmine agreement, 2000.

It is true that, according to Art. 2368 of the Civil Code, company statutes may contain "special clauses" regarding appointments to company offices, and so it is possible to facilitate the appointment of representatives of minority shareholders on the board of directors and auditing committees. It is also true, however, that the legitimacy of these clauses is not clear even to commercial law, although the prevailing idea is that, in order not to exceed the limits of legitimacy, they should "only contribute towards shaping the decisions of the shareholders' meeting, not deprive it of authority"; they should, that is, preserve the meeting's formal power to appoint directors and auditors[40]. Therefore clauses that devolve the nomination of board and committee members to *specific subjects* or *specific categories of shares* are illegal; those which provide, *within shareholders' meetings*, for *voting systems such as to ensure minority shareholders of access for their representatives to the board of directors and auditing committees* (voting by list, scaled votes, cumulative votes etc…) are legal[41].

There are, on the other hand, a number of bills that have been presented to the current government, providing for the participation of specific representatives of shareholding employees in company organisms[42]. And it is obvious that, despite that fact that the rule whereby the shareholders' meeting is responsible for appointing directors and auditors is a cardinal principle of the legal set-up of joint stock companies, a future law on share ownership by employees could – as a source of the same rank – introduce derogations from this fundamental rule. So legal provision for specific representation of shareholding workers on the board of directors (and possibly auditing committees) might also pivot on a mechanism of appointment outside the shareholders' meeting.

It should, however, be pointed out that – if we neglect the various bills currently being examined by the two branches of Parliament – there are no visible signs in this direction in the legislation recently passed concerning company law.

There is, for example, no reference to specific representatives of shareholding employees in Law N. 366, 3rd October 2001, which delegates the reform of company law to the Government.

It is therefore legitimate to hold that any proposal concerning the participation of representatives of shareholding employees on boards of directors and auditing committees should cross the threshold of at least two significant issues connected with company law.

The first concerns the legal treatment of minority shareholders and the possibility of legislative perpetration of forms of discrimination between one minority and another: a legislator attempting to support the minority of shareholding employees may be accused of constitutional illegitimacy in the form of discrimination between different categories of shareholding minorities.

The second issue – a no less important one – is the probable future revision of the models of management and control of joint stock companies laid down by Law n. 366, 2001 (Art. 4, par. 8). As an alternative to the current system – which hinges on the presence of a board of directors

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[40] CASELLI (1991), p. 21.

[41] For an in-depth treatment of the subject, see ALAIMO (1998), pp. 200-201, text and notes.

[42] 1 Bill 2023 C (AN), which provides for "the exercise of collective representation in company organisms" (Art. 1, c. 1, letter a), n. 4); Bill C 1003 (AN), submitted to the Chamber on 21st June 2001, which provides for the nomination of 2 or 3 board members by shareholding employees (Art.1); Bill n. 18, submitted by Senator Pizzinato and others – which provides for the nomination of representatives of shareholding employees on auditing committees (Art. 5).

and a committee of auditors – the law allows for a different arrangement of company organisms (a management board and a supervisory board or, alternatively, a board of directors within which a management control committee is nominated). It is evident that any legislation regarding the participation of specific representatives of shareholding employees will inevitably have to take these possible legislative reforms of the organic structure of joint stock companies into account.

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f.p. schemes; avoidance of unreasonable risks for employees; distinction between wages, salaries and incomes from f.p. schemes; compatibility with worker mobility); it considers the profile of the main obstacles to the use and development of employee f.p. at a transnational level and examines, finally, the perspectives of a wider dissemination of f.p.

Income Inequality in the Digital Era*

Katherine V.W. Stone

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In the past decade, there have been changes in the workplace as momentous as those that occurred at the turn of the last century when artisan production gave way to industrial era production systems. Guided by the postulates of scientific management and personnel management, early 20th century industrialists repudiated the labor relations systems of the past and constructed a new labor relations system in its place. They erected a system of industrial practices comprised of job ladders, internal promotion schemes, seniority, welfare benefits, and inducements for long-term employment -- a system known as an internal labor market -- that has dominated major U.S. firms throughout the 20th century. At the end of the 20th century, the internal labor market job structures themselves began to dissipate. Employers, faced with increased competition in the product market and technological change in production methods, began to seek more efficient and effective ways to organize the workplace. They sought flexibility rather than stability in their work force. Out of their efforts have emerged a new constellation of features that are increasingly defining the new digital era workplace– an explicit rejection of job security combined with promises of training and opportunities for human capital development, a flattening of hierarchy, opportunities for lateral movement within and between firms, market-based pay with steep performance incentives, opportunities to network with firm constituencies, an emphasis on quality and customer satisfaction at all levels, and plant-specific dispute resolution mechanisms to foster and preserve a perception of fairness. Taken together, these features mean that attachment between the employee and the employer has been severed, and employees now operate in a boundaryless workplace.[43]

The new employment system promises both freedom and vulnerability to the working population. For some, it signifies an escape from the rigid hierarchies of the past, hierarchies that were often racially or gender biased in their operation. It also promises to free many from the mind-numbing narrowness of work tasks that were required by the precisely defined job classifications of the past. Yet the new system also creates great vulnerability. It shifts many of the risks of the employment relationship from the firm to the individual. Gone is the individual job security and reliable income and benefits of the past. Individuals must manage their careers, market their talents, and take their compensation as the market measures their value. The new workplace also generates serious concerns about workplace fairness and social justice. Elsewhere I have documented the ways in which the changing work practices generate new forms of discrimination that are difficult to eradicate, new dangers for employees to forfeit their own human capital and intellectual property, new difficulties for union organizing, and new impediments to collective representation and voice.[44] In this paper I discuss the impact of the changing workplace on income distribution.

The changes in the employment relationship have been accompanied by a marked deterioration in income distribution. The U.S. income distribution has become considerably more unequal since 1970, a trend that accelerated in the 1980s and 1990s. The growing gap between rich and poor stands as a persistent reminder that current economic arrangements are not moving in the direction of economic justice. The dramatic extent of inequality offends our sense of decency and

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[43] Katherine V.W. Stone, *The New Psychological Contract: Implications of the Changing Workplace for Labor and Employment Regulation,* 48 UCLA Law Rev. 519 (2001).
[44] Id.

undermines social cohesion. In recent years, many economists have analyzed the trends in income distribution in order to isolate the causes of the current trends. In this paper I review the existing evidence and theories about the causes of rising income inequality. I suggest that the changing nature of the employment relationship is contributing to, or perhaps even driving, rising income inequality. The following chapter presents and evaluates several policy proposals for redressing inequality or ameliorating its effects.

A. The Causes of Rising Income Inequality.

A.I What Really Happened?

While there are many ways to measure income inequality, all measures tell the same story: There has been an increase in income inequality in the United States since 1970 and a particularly sharp increase in the late-1980s and mid-1990s. For example, the share of total income going to those in the highest ten percent of the income distribution -- called the top decile -- increased from under 32 per cent in 1970 to nearly 42 per cent in 1998. Of this, the lion's share of the increase went to those in the very top. The share of total income going to the highest one per cent of the population has more than doubled between 1970 and 1998, from 5 per cent to 11 per 1998. And the share going to the top 0.1 per cent more than tripled in that period, rising from under 2 per cent to 6 per cent.[45]

Since the late 1970s, only those with incomes in the highest 7 or 8 percent have seen increases in their hourly pay.[46] The income of wage-earners in all other groups experienced declines. The share of income going to the bottom 20 per cent -- the bottom quintile-- has declined most severely. The attached Table shows that between 1979 and 1999, the incomes of those in the bottom quintile declined in absolute terms by 9 percent, shrinking from 5.7 per cent of total income to 4.2 per cent. In the same period, the share of total income going to the middle quintile declined from 16.4 per cent to 14.7 per cent, while those in the highest quintile grew from 44.2 percent to 50.4 percent. According to the Center for Budget Priorities, "In 1999, for the first time in the years CBO has examined, the top fifth of the population is expected to receive slightly more after-tax income than the rest of the population combined."[47]

[insert Table]

One measure of inequality economists use is to compare the income of those in the top ten percent of the income distribution with those in the lowest ten percent, a number known as the 90/10 ratio. Between 1970 and 1998, the 90/10 ration for men increased from 3.85 to 5.31, and

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[45] Thomas Piketty and Emmanuel Saez, *Income Inequality in the United States, 1913 - 1998,* NBER Working Paper 8467, Figure 1 (September, 2001).

[46] Gary Burtless, Robert Z. Lawrence, Robert E. Litan and Robert J. Shapiro, GLOBALPHOBIA: CONFRONTING FEARS ABOUT OPEN TRADE 77-78 (Brookings Institute, 1998).

[47] Isaac Shapiro and Rocbert Greenstein, *The Widening Income Gulf,* Center on Budget Priorities (September 9, 1999). See also, Frank Levy, THE NEW DOLLARS AND DREAMS at 199, Table A.1.

for women increased from 3.41 to 4.33. This indicates substantial increase in inequality between those at the top and those at the bottom of the income distribution.[48] Or to put it the contrast even more starkly, as of 1999, the share of income of the top one percent, some 2.7 million Americans, is approximately the same as that of the 100 million Americans with the lowest incomes.[49] This dramatic rise at the very top of the income distribution has generated a small group earning mega-salaries, a group known as the "Working Rich".[50]

In addition to comparing the top to the bottom, economists also measure inequality by looking at whether there has been a dispersion or a convergence between the bottom and the middle of the income distribution. To measure growing inequality in the lower part of the income distribution, economists compare the share of total income going to the group in middle, those in the fifty per cent decile, with the share going to the bottom, the ten per cent decile. This comparison, the 50/10 ratio has increased in the past thirty years. The 50/10 ratio for men increased from 2.14 to 2.43 between 1970 and 1998, and for women it increased 1.98 to 2.08 in the same period. These numbers reveal that while the income spread between the top and the bottom has also been increasing dramatically, inequality between the middle and the bottom has also been increasing, but not by as much.[51]

Another measure of income inequality is a number known as the gini coefficient. The gini coefficient measures how far a particular distribution of income departs from a distribution of total equality. If income were distributed equally amongst everyone, the gini coefficient would be zero. If income were distributed totally unequally -- i.e., if one person had all the income and everyone else had none -- the gini coefficient would be 1. A gini coefficient of greater than zero indicates the presence of inequality, and the closer the coefficient is to 1, the greater the amount of inequality present. In the U.S., the gini ratio for men has increased from 0.305 to 0.401 between 1970 and 1998; for men and women combined it has increased from 0.326 to 0.393. These are the largest gini ratios of any industrial country.[52] By all these measures, aggregate income inequality in the U.S. has increased dramatically in the past two decades.

Yet another measure of income inequality compares the executive pay levels to those of the average wages or salaried full-time worker. This inquiry reveals that the ratio of top CEO pay to average pay of a full-time worker has widened substantially, particularly since 1980. As recently as 1980, an average CEO of a large American company earned 42 times the earnings of the average worker; twenty years later, in 2000, the same CEOs earned 419 times an average worker's pay.[53] Between 1970 and 1999, the pay of the top-paid 100 CEOs increased by more than 400 per cent while that of the average salaried worker remained flat.[54]

When the income distribution figures are broken down in more detail, two features stand out.

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[48] U.S. Census Bureau, Current Population Reports, "The Changing Shape of the Nation's Income Distribution," Table 1, page 3 (June, 2000).
[49] Shapiro and Greenstein, supra. at 2. See also, Piketty [check].
[50] Piketty and Saez, at___ & Figure 4.
[51] Piketty, supra. at ___.
[52] Id.
[53] Robert H. Frank, *Higher Education: The Ultimate Winner-Take-All Market?*, paper on file with author. [check Business Week, April 17, 2000] [There is a similar statistic in Robert Frank, Luxury Fever (1999), reporting that in 1973, CEOs of large companies earned 35 times that of the average worker, and in 1999 they earned about 200 times as much. p. 33)
[54] Piketty and Saez, supra. at Figure 18.

First, there has been a dramatic increase in the incomes of the highest earners. Indeed, the higher the income group, the greater the increases. For example, the per cent increases for the top 5 per cent of the income distribution was considerably greater than the increases for those between the 90th and the 95th percentile. Second, the returns to education have increased dramatically. Wages of lower skilled workers – those workers with only a high school diploma or less – have declined precipitously in the past three decades, while those with college degrees or higher educational attainment have increased disproportionately. For example, male high school drop-outs experienced a decline of 20.8 per cent in their real median income between 1967 and 1999. Males with a high school diploma but no additional schooling experienced declines of 6.5 per cent. Yet in the same period, males with a college degree or more have seen a rise in their median incomes of 13.4 per cent. Or, to put it differently, a college educated man earned 149.7 percent of what a high school graduate earned in 1967, and 181.4 per cent in 1999.

The change in the education wage premium for women has also been pronounced. In 1967, women who completed college earned 151.1 per cent of women who had only completed high school; by 1999, college-educated women earned 181 per cent of their high school educated peers.[55] Concomitantly, occupational wage differentials have moved in a direction that indicate a rising returns to education. Between 1970 and 1987, incomes of professionals and managers rose considerably while those of clerical, craftsmen, operatives, and laborers fell.[56]

A.II The Theories.

A.II.1. Skill-Biased Technological Change.

Economists agree about the facts of growing inequality, but they disagree about its cause. Some of the factors cited to explain the phenomenon are the decline of unions, the decline in the minimum wage in real dollars, increased international trade, rising trade deficits, the shift from manufacturing to service sector production, and technological change. Of these, the most frequently cited explanation is that technological advances, particularly the advent of computerized technologies, have created greater demand for higher skilled and more educated workers and diminished demand for less skilled and less educated workers. By means of a simple application of the laws of supply and demand, this theory posits that skill-biased technological change has driven up the wages of the higher skilled and driven down those of the lower skilled.[57]

The skill-biased technological change explanation has become the overwhelmingly dominant explanation for rising income inequality. However, there is a growing chorus of economists who suggest it is not the sole explanation. For example, Thomas Piketty and Emmanuel Saez challenge the skill-biased technological change thesis on the ground that the timing of the shifts in income disparities does not support it. Using IRS data to examine changes in the U.S. income distribution since 1913, Piketty and Saez found that income distribution narrowed during World War I due to wage controls, remained compressed until 1970, and then began to widen steadily. Piketty and Saez contend that widening income disparity cannot be simply a response to technical change or

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[55] Francine D. Blau, Marianne A. Ferber, and Anne E. Winkler, THE ECONOMICS OF WOMEN, MEN AND WORK 267-268 (4th Ed.) (Prentice-Hall, 2002).

[56] Juhn, Murphy, & Pierce, *Accounting for the Slowdown in Black-White Wage Convergence,* in Marvin H. Kosters, WORKERS AND THEIR WAGES, 107, 135-139 & Table 4-7.

[57] See, e.g. Frank Levy, THE NEW DOLLARS AND DREAMS: AMERICAN INCOMES AND ECONOMIC CHANGE, 86-87 (Russell Sage, New York, 1998); Burtless, et. al., GLOBAPHOBIA, supra. at 83-84.

changes in the supply of educated workers, because otherwise inequality would have increased immediately after the wartime wage controls were removed rather than remain compressed until 1970. Similarly, they contend that the huge increase in the incomes of the top since the 1970s is not compatible with the explanation based solely upon the advent of computerized technology because the increase is highly concentrated among the very highest earners. The theory cannot account for the rise of the Working Rich. Piketty and Saez instead posit that changing social norms is an important factor in explaining the recent increase in income inequality, particularly in the rise of mega-incomes for the very top earners. They argue that the redistributive policies of the New Deal period and pressures from labor unions constrained wage inequality in the U.S. from WWII until the mid-1970s. In recent years, those social norms and union pressures have subsided, allowing the incomes of the "Working Rich" to rise.[58]

Economist David Howell also challenges the skill-biased theory on grounds of its timing. Unlike Piketty and Saez, Howell focuses on the bottom of the income distribution rather than the top. He shows that the largest decline in the wages of those at the bottom of the income distribution occurred between 1979 and 1983, a time before there was significant computerization in the workplace. While wage dispersion increased after 1983, the shift away from low skilled labor had already occurred.[59] Like Piketty and Saez, Howell argues that institutional factors explain the collapse of wages for those in the lower 70 percent of the income distribution in the 1980s and 90s. He argues that the ideological shift toward laissez faire markets and the globalization of production ushered in a host of public policies that undermined workers' bargaining power. Some of these policies were a decline in the real minimum wage, an increase in legal and illegal immigration, welfare reform, and public and private policies that undermined unions.[60]

Some economists have challenged the skill-based technological change theory on other grounds. For example, some point out that if skill-biased technological change were the *sole* explanation, we would expect to observe similar trends in the income distribution in other countries that experienced similar technological advances during the same period. France and Canada are examples of countries that have production processes akin to the U.S. but have not experienced growing income inequality. In France, for example, the share of total income going to the highest decile declined between 1970 and 1998 from almost 33 per cent to 32 percent, with a dip to 30 percent in the mid 1980s. In Canada, in the 1980s, family inequality, as reflected in the gini coefficient, actually fell. Other countries that experienced the same technological changes have experienced vastly different effects on their national income distributions.[61]

Despite such counter-factual evidence, the international comparison does not entirely refute the skill-biased technological change thesis. After all, each country has its own set of wage setting

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[58] Thomas Piketty and Emmanuel Saez, *Income Inequality in the United States, 1913 - 1998,* 26-28, NBER Working Paper 8467, (September, 2001).

[59] David R. Howell, *Theory-Drive Facts and the Growth in Earnings Inequality*, 54 Rev. of Rad. Poli. Economics 54, 64-70 (1999).

[60] David Howell, *Skills and the Wage Collapse,* American Prospect piece.

[61] On income inequality in France, see David R. Howell, *Theory-Driven Facts and the Growth in Earnings Inequality,* 31 RRPE 54, 62-63 (1999); Piketty and Saez, supra. n. ___, ___ & Figure 19. On inequality in Canada, see David Card & Richard B. Freeman, *Small Differences that Matter: Canada vs. The United States,* in Richard B. Freeman, ed., WORKING UNDER DIFFERENT RULES, 189, 193 (Russell Sage, 1994). For other cross country comparisons, see Blau and Kahn; Pontesson.

institutions and traditions that mediate with differing degrees of success whatever effect technological change might have on the income distribution. Thus, it is possible that even with a shift toward higher technology production processes, the impact on a country's income distribution could differ due to differences in institutions and policies that are available to combat the dis-equalizing effects.[62]

Francine Blau and Larry Kahn conducted an exhaustive comparative study of income distribution in Western Europe and concluded that technological change alone does not explain differing experiences with inequality -- that it is also necessary to factor in the differential role of labor laws, unions, and other wage setting institutions.[63] Blau and Kahn's findings are consistent with those of Piketty and Saez and Howell to the effect that public policies and private practices can exacerbate or mitigate the dis-equalizing impact of skill-biased technological change.

Barry Bluestone and Bennett Harrison also dispute the skill-biased technological change thesis. They argue that if it were correct, we would expect to find the most wage growth in science and technical fields. But this is not the case. Rather, they show that between 1979 and 1995, "the real winners in the earnings derby were not those on the forefront of the new computerized technologies, but medical doctors (up 43 percent), lawyers (24 percent) sales representatives and brokers (24 percent), and managers (15 percent)."[64] Bluestone and Harrison conclude that inequality must be seen as a combination of factors such as deindustrialization, deunionization, global trade, immigration, and the trade deficit.[65]

A.II.2. The Shift From Manufacturing to Service Industries.

Another approach to explaining rising income inequality attributes the change to the shift in the United States from manufacturing to a service sector economy in the past twenty years. The argument is that manufacturing jobs are generally higher paid than service sector jobs, so that as the United States has undergone "de-industrialization," the incomes of those at the bottom have deteriorated. As Frank Levy and Richard Murname write, former craftsmen and basic industry factory workers have "become 'hamburger flippers' in the service sector -- rather than engineers and market specialists."[66]

The reason why lower skilled service jobs have generally paid less than lower skilled manufacturing jobs is that service jobs, such as waitressing, lawn-cutting, or work in dry cleaning establishments, tend to be labor-intensive and thus subject to intense wage competition. Further, productivity grows slowly in service jobs because they are less likely to be automated. They are also less

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[62] See Richard B. Freeman & Lawrence F. Katz, *Rising Wage Inequality: The United States vs. Other Advanced Countries*, in Freeman, WORKING UNDER DIFFERENT RULES, supra, 29, 51-56.

[63] See Francine D. Blau and Lawrence M. Kahn, US LABOR MARKET PERFORMANCE IN INTERNATIONAL PERSPECTIVE THE ROLE OF LABOR MARKET INSTITUTIONS (New York, Russell Sage Foundation, forthcoming); Bjorn Gustafsson and Mats Johansson, *In Search of Smoking Guns: What Makes Income Inequality Vary Over Time in Different Countries*, 64 Am. Sociological Review 585 (1999) (explaining different experience with inequality in Sweden, the United States and Finland in the 1980s on the basis of differences in trade union density).

[64] Barry Bluestone and Bennett Harrison, GROWING PROSPERITY: THE BATTLE FOR GROWTH WITH EQUITY IN THE TWENTY-FIRST CENTURY 193 (Houghton Mifflin, 2000).

[65] Id. at 196.

[66] Frank Levy and Richard J. Murnane, *U.S. Earnings Levels and Earnings Inequality: A Review of Recent Trends and Proposed Explanations,* 30 J. of Econ. Lit 1333, 1347 (1992).

likely to be unionized. Thus the shift from manufacturing jobs to service jobs since the 1970s has led to more blue collar men and women in low-wage service jobs, and hence more inequality.[67]

While the shift away from manufacturing accounts for some of the increased inequality, it cannot tell the whole story. This is because there has been an increase in inequality within the service sector as well as within the manufacturing sector. Between 1979 and 1996, both the service and the goods producing sectors experienced the same pattern of widening disparities. As Frank Levy explains, "In economic terms, there was a surge in skill bias in both sectors that widened the earnings gap between men who had not gone beyond high school and men who had at least some college."[68] This leads back to the skill-biased technological change and the increasing returns to education factors discussed above. To the extent that these factors were also found to be incomplete, other factors must be explored.

A.II.3. Income Dispersion Within Firms.

One aspect of the widening income distribution that is inconsistent with the increasing-returns-to-education hypothesis is that there has reportedly been in increase in earnings inequality within groups that are similar as to age, education, occupation, and other observable characteristics. Several economists have hypothesized that there has been a growth in wage dispersion within industries, and even within firms.[69]

A recent series of case studies financed by the Sloan Foundation test the skill-biased technological change thesis by exploring the impact of technological change on industry and firm-level income distribution. These researchers found that in industries that experienced technological change in the past twenty years, technological factors were not the sole, or even dominant, cause of either widening income disparities or lowering incomes at the bottom tiers. Rather, several found that changing work practices are a significant factor in explaining widening income disparities.[70]

Clair Brown and Ben Campbell, for example, found that amongst semiconductor fabrication plants, there has been considerable technological change that upgraded some skills and downgraded others. Brown and Campbell also found a shift to the use of higher-skilled workers, but they did not find that it was correlated with compensation levels or wage differentials. Rather, they found no systematic relationship between the implementation of new technologies, the returns to education, or wage inequality in the industry. Clair and Campbell conclude that the impact of new technology is filtered through a company's culture and overall employment system history.[71]

In a study of employment in the retail food industry, John Budd and Brian McCall similarly found that despite considerable technical change between 1984 and 1994, wage inequality did not increase. There the new technologies, such as the use of scanners at check-out counters, were not

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[67] Frank Levy, THE NEW DOLLARS AND DREAMS, 60-62.
[68] Id. at 62.
[69] For a summary of some of these studies, see Levy and Murname, *Earnings Levels and Earnings Inequality,* 30 J. of Econ. Lit. 1333, 1367 (1992).
[70] Harry C, Katz, *Industry Studies of Wage Inequality: Symposium Introduction*, 54 Indus. & Labor Relations Rev. 399 (2001).
[71] Clair Brown and Ben Campbell, *Technological Change, Wages, and Employment in Semiconductor Manufacturing,* 54 Indus. & Labor Relations Rev. 450, 463 (2001).

skill-biased upward, but rather lowered the skill requirements. As a result, Budd and McCall found that in grocery stores, deskilling technologies led to the lowering of wages throughout the distribution. They also found no increased returns to education in the grocery industry.[72] This study, like that of the semiconductor industry, demonstrate that not all technological change is skill-biased, and even when it is, it does not always lead to widening wage differentials

Thomas Bailey, Peter Berg and Carola Sandy studied the steel and apparel industries, where they found that workers in firms that used high performance work practices received higher pay. They defined high performance practices as participation on self-directed teams, assignment to high autonomy work tasks, and opportunities to communicate across departmental boundaries. Bailey, Berg, & Sandy found that those workers who were on self-directed teams or engaged in other high performance practices received not only higher pay, but also more variability in the pay. They posit that these results could be explained by the fact those workers in the high performance settings were given greater training and/or because employers used the incentives to elicit greater discretionary effort.[73]

Some of the researchers in the Sloan project found that skill-biased technological change can have an indirect effect on income inequality. Rosemary Batt, for example, found that for telecommunications services and sales workers, there has been significant wage dispersal since the break-up of the Bell system in 1983. In the same period, the introduction of new technologies have made many new marketing and service offerings possible. Analyzing data from 354 service and sales centers, Batt concluded that business strategy and human resource policies were more significant than skill-biased technology per se in explaining patterns of wage inequality. For example, she found that firms engaged in what she terms "customer segmentation" – a practice separating residential and business consumers, and differentiating between high volume and low volume business consumers. The firms she studied hired workers with high school degrees to service residential consumers, but only hired college graduates to service large businesses. They did so because they believed that the latter customers required service personnel with greater skills in manipulating information systems and more adept at social interaction. These latter workers have higher human capital and provide higher value added, and accordingly showed significantly higher earnings. Batt concludes that the business strategy of customer segmentation might be an indirect mechanism through which skill-based technical change is translated into wage differentials.[74] Batt also found significant wage differentiation between call center establishments. Establishments that utilized variable pay and other high performance work practices had higher overall wage levels than those that did not.

The impact of changing work practices on intra-firm wage structures is illustrated most vividly in a case study by Larry Hunter, et. al. on human resource practices in the banking industry in the 1980s and 1990s. In that period, banks were adopting a host of new technologies, such as new

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[72] John W. Budd and Brian P. McCall, *The Grocery Store Wage Distribution: A Semi-Parametric Analysis of the Role of Retailing and Labor Market Institutions,* 54 Indus. & Labor Relations Rev. 484 (2001).
[73] Thomas Bailey, Peter Berg, and Carola Sandy, *The Effect of High-Performance Work Practices on Employee Earnings in the Steel, Apparel, and Medical Electronics and Imaging Industies,* 54 Indus. & Labor Relations Rev. 525 (2001).
[74] Rosemary Batt, *Explaining Wage Inequality in Telecommunications Services: Customer Segmentation, Human Resource Practices, and Union Decline,* 54 Indus. & Labor Relations Review 425 (2001).

hardware and software systems for handling accounts and ATMs for customer service. Also in that period, deregulation led to greater consolidation in the industry and intensified price competition among banks. With the repeal of the Glass-Steagall Act in 199?, banks and other financial institutions were able to diversify their services, so that banks began to compete with brokerage houses and mutual funds to sell investment products as well as checking accounts and loans[75]

Hunter and his co-authors report on the human resource restructuring undertaken by two banks in the face of this increased competition and technological change. In both banks, there was a growing gap in the functions and the earnings between the bank tellers and the "platform workers," the people who open accounts or receive loan applications. Tellers remained responsible for providing routine services such as check cashing, while the job of the platform worker was redefined. Those in the latter jobs, renamed "Personal Banker" or "Financial Specialist," became responsible for promoting sales of a variety of banking products and providing financial counseling to high-yield customers who required personalized services. To appeal to the high-end of the customer population, the banks required a college degree for the position. They selected polished workers with a professional demeanor for these new positions. These newly professionalized jobs paid considerably higher than the teller jobs. Thus like Batt's call center workers, the banks' impetus to hire college graduates was not skill-biased technological change but rather a desire to engage in strategic customer segmentation, by which the more profitable customers were routed to the more professional types of workers.[76]

In one respect, the trend of customer segmentation and the preference for college-educated workers to service profitable customers reported by both Hunter and Batt is a feedback loop in the widening income distribution story. As firms confront a more income-dispersed customer base, they adopt marketing practices that further disperses the income distribution.

These studies and others of their ilk suggest that the adoption of the high performance work practices of the boundaryless workplace operate independently of, but often in conjunction with, technological change to provide at least a partial explanation for the rising inequality of the past twenty years. When jobs are redesigned to provide greater flexibility, their skill requirements also increase. When this occurs, changes in firm-level income distribution that mirrors changing differential skill levels is a response not to changing technology but to new employment practices.[77]

A.II.4 The Impact of Digital-Era Employment Practices on Wage Inequality.

It stands to reason that a departure from internal labor markets leads to more dispersion in pay levels. In internal labor markets, wages were not set by the external labor market, but rather by institutional factors such as seniority and longevity. Internal labor markets, like labor unions, thus have been a force for wage compression as well as a cushion from external labor market forces.

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[75] Larry W. Hunter, Annette Bernhardt, Katherine L. Hughs, and Eva Skuratowicz, *Its Not Just the ATMs: Technology, Firm Strategies, Jobs and Earnings in Retail Banking,* 54 Indus. & Labor Relations Review 402 (2001) (Special Issue on *Industry Studies of Wage Inequality*).

[76] Id. at 419-21.

[77] Thomas Bailey, 1988. See also, Peter Capelli, *Are Skill Requirements Rising? Evidence from Production and Clerical Jobs,* ___ Indus. & Labor Relations Rev. 515 (1993).

The dismantlement of internal labor markets together with the decline in unions removes pressure for wage compression. Instead, wages are increasingly pegged to other factors.

There are two respects in which the new workplace produces widening disparities in income, between and within categories of workers, and between as well as within firms.[78] First, new compensation practices such as incentive pay schemes, skill-based pay, and market based pay almost by definition generate wide pay differentials within firms. In jobs where performance is highly variable, the trend is to base wages on individual performance wherever possible. Thus in today's workplace it is not uncommon for workers doing identical tasks to have different pay.[79] In jobs where performance is routine and predictable, benchmarking can be used to set wages according to the going rate for the particular job, and thus break the lock-step wage patterns of internal labor market or union compensation schedules.

Benchmarking, which began as a technique for evaluating work design and enhancing technical efficiencies, has also become a mechanism by which compensation levels are reassessed and pegged to market rates. With benchmarking, an expert identifies discrete tasks or functions that are performed within a firm and compares them to the same functions in other firms. The comparison yields information about work design and also about costs. Thus, firms can compare their labor costs for a particular portion of their work processes. A firm can identify the "going rate" for a particular collection of tasks, and then apply that rate inside its own operations so as to set the rate for those jobs in accordance with the external market. Benchmarking thus removes the protective shield of internal wage-setting devices and makes workers within the firm vulnerable to competition from similarly tasked workers on the outside. In other words, benchmarking imports the wage dispersion of the external labor market into the wage structure of the firm.[80]

The second respect in which new employment practices generate intra-firm inequality is through the talent wars to obtain superstars. As Robert Frank and Philip Cook have documented, a large number of occupations have become "winner-take-all markets" in which the very best commands a price far beyond that of its nearest competitors.[81] The top firms want those top performers and are willing to pay a disproportionate price to get them. As part of the talent wars, firms use the carrot of off-the-scale salaries and generous compensation packages to lure and retain those it sees as top perfomers, regardless of the impact such big disparities could have on others. Over time, such practices lead to vast disparities between employees at the same level as similarly situated employees are differentially rewarded.[82] The talent wars also foster gaping earnings disparities between individuals in different levels, because the more highly skilled occupations are those in which competition for talent are most aggressive.

Thus current digital era human resource practices are contributing to income inequality. Both the tendencies toward wage dispersion within firms and toward income tournaments at the top are features of the new workplace that accelerate the other processes generating income inequality.

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[78] FRANK LEVY, THE NEW DOLLARS AND DREAMS: AMERICAN INCOMES AND ECONOMIC CHANGE 2 (1998) (summarizing data on rising income inequality in the 1980s and 1990s); *see also* ROBERT FRANK & PHILIP J. COOK, THE WINNER-TAKE-ALL-SOCIETY 211–31 (1995) (discussing the increasing gap in income between the top and the bottom in the U.S. labor market).

[79] See Peter Capelli, THE NEW DEAL AT WORK, at ____.

[80] Capelli, in ??

[81] ROBERT FRANK & PHILIP J. COOK, THE WINNER-TAKE-ALL SOCIETY, supra.

[82] *See, e.g.*, DAVID LEBOW ET AL., RECENT TRENDS IN COMPENSATION PRACTICES 8 (1999) (reporting on a Federal Reserve study that found firms are increasingly using compensation systems that permit greater differentiation among employees).

A.II.5. The Impact of Globalized Production on Income Inequality.

While changing human resource practices and skill-biased technological change are factors in the widening income distribution, so too is the increase in global production and the policies of trade liberalization. With increased global trade and the relaxation of import barriers, goods produced with low-cost labor are able to out-compete domestically-manufactured items. As a result, domestic low wage workers are forced to compete with low wage workers in developing countries for jobs. The same results flow from direct foreign investment and the use of foreign subcontractors, in which domestic manufacturers shift production to low-wage countries for those part of their operations that can utilize foreign, low-wage labor. Workers for any company whose goods are traded in the global market, or whose company makes goods that compete with goods traded in the global market, is vulnerable to downward pressure on wages.[83] According to Bluestone and Harrison, "To the extent that companies move their facilities to take advantage of cheaper unskilled labor or outsource domestic production to cheaper offshore sites, transnational investment adds to the effective supply of low-skilled labor available to American firms, accelerating the entire dis-equalizing process."[84] M.I.T. economist Frank Levy claims that increased global trade has two effects on wages. It both decreases the demand for blue collar workers domestically, and it makes the demand for all types of employment –white and blue collar alike – more elastic because firms have greater freedom to substitute overseas production for domestic production. In both respects, global trade increases job insecurity and strengthens management's bargaining power vis-a-vis all but the most highly skilled employees.[85]

David Howell also argues that trade liberalization enhances inequality because it leads to more global wage competition for low-skilled labor. He contends that the more certain types of labor can be outsourced or are otherwise exposed to low-wage, foreign competition, the more firms will be tempted and able to reduce the wage for that type of labor. This can explain the observed increases in intra-firm wage as well as overall wage differentials. According to Howell, "Jobs least sheltered from downward pressures (those least difficult to outsource, that require no idiosyncratic skills, etc.) experience declining relative (and real) earnings."[86]

The factors of technological change, new employment practices and global production are often inter-related. Several economists have found that flexible wage practices are most frequently adopted by firms that are most exposed to foreign trade.[87] For example, Princeton economist Marianne Bertrand finds that companies that face competitive pressures from the global marketplace have adopted flexible wage policies.[88] A study of British confectionary companies also found

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[83] Adrian Wood, NORTH-SOUTH TRADE, EMPLOYMENT AND INEQUALITY: CHANGING FORTUNES IN A SKILL-DRIVEN WORLD (Oxford Univ. Press, 1994).
[84] Bluestone and Harrison, GROWING PROSPERITY, supra. at 195.
[85] Frank Levy, supra, at 91-92. Gary Burtless, Robert Lawrence, Robert Litan and Robert Shapiro dispute the claim that increased trade generates increased income inequality. They argue that earnings inequality is growing in industries that are not affected by trade to the same degree as it is in industries that are affected by trade. Thus they conclude that the impact of skill-biased technological change dwarfs any adverse impact that trade might have on income inequality. However, Burtless and his co-authors do not explain how they are determining which industries they define as trade sensitive, thus making it difficult to evaluate their claim. Burtless, et. al., GLOBALAPHOBIA, at 79-84.
[86] Howell, supra. n. ___ at 77- 79, n. 10.
[87] *See* Mason, *supra* note 182, at 211–12.
[88] *See* Marianne Bertrand, *Changes in the American Workplace*, *in* PROC., 52D ANN. N.Y.U. CONF. ON LABOR & EMP. L. (1999).

that those firms whose products competed in a global market were more likely to adopt the boundaryless job structures.[89] That is, increasing global competition subjects many firms to increased market pressure, that in turn induces them to adopt the kinds of boundaryless work practices that involve a dispersal of firm-level incomes. And as firms dismantle internal labor markets and rely on an external labor market for their hiring needs, they have less incentive to protect their workers from the dynamic of decline.

A.III Rising Income Inequality: Why Explanations Matter.

A multi-factored understanding of rising inequality means that no one public policy can reverse the dynamic. If skill-biased technological change were the whole story, then we might understand the present level of income inequality as a transitory phenomenon -- the result of a time lag. With the dizzying pace of technical change, the theory suggests, some people failed to get skills, or the right skills, to succeed. Whether due to individual ineptitude or institutional failure, their poverty is the result of inadequate education, training, or talent. The solution, in this view, is to improve training and education for the ill-equipped and hope that their those coming after them obtain better, or at least more current and flexible, skills.

Once we move beyond the skill-biased explanation to a multi-factored one, we are forced to abandon a singular emphasis on training policy and instead entertain a wide range of policy proposals at the macro-economic and political level. A number of proposals of this sort are presented and evaluated in the next section. Before turning to the policy proposals, it is necessary to address the argument, frequently asserted, that the trend toward more inequality cannot be reversed at all without compromising economic growth.

Many economists argue that unequal income distribution is a necessary but regrettable dimension of economic policies that enhance growth. In this view, the rise of digital technology, the growth of the service sector, trade liberalization, deregulation of domestic economic life, new workplace practices and the weakening of labor unions all enhance growth and overall welfare, but have a negative impact on equality. If so, then it is at least arguable that we must choose between overall growth and equality. Or, if we choose growth, at the very least, we must identify tools that can compensate for the resulting inequities without derailing or diminishing growth.

Some economists have challenged the growth-inequality syllogism on the grounds that in some circumstances, inequality can serve as an impediment to growth.[90] Bluestone and Harrison go further, and argue that best antidote for rising inequality is to generate more growth. They claim that if the government pursued macro-economic policies that encouraged economic growth, then eventually much of the present income inequality would disappear. They present evidence to show that in periods of high growth, the bottom groups in the income distribution fare relatively well. However, they also opine that current policy-makers are too obsessed with controlling inflation and supporting moderate growth, rather than generating the red-hot growth that would be necessary to reverse the dis-equalizing effects of technological change, trade liberalization, deunionization, and deindustrialization.[91]

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[89] add cite.
[90] Kanbur, Thornbeck, Blau & Kahn
[91] Bluestone and Harrison, Growing Prosperity, supra. at 202-204.

While growth might well be the solution to rising inequality, it is necessary to consider other ameliorative policies. As history demonstrates, economic growth can be an elusive aspiration, less a beacon for policy-makers than a frustrating mirage. Too many other factors intervene. Wars, droughts, attacks on the World Trade Center, foreign currency crises, and shifting political winds all affect economic growth. There is no simple formula for success. So while growth, or rather equitable growth, can be a powerful antidote to rising income inequality, other policies must also be considered. To those we now turn.

B. Promoting Equality, Opportunity, and Stability in the Digital Workplace.

Growing inequality threatens the integrity and moral authority of the social order. Those locked out of the world of economic opportunity are locked into a perpetual underclass, often exhibiting anti-social behaviors such as drug use, alcoholism, and crime. The social problems that result from the widening chasm between social strata can undermine the legitimacy of our governmental institutions. If, as I argued above, the emerging digital era job structures play a role in generating income inequality, then we must confront a choice. We can redress inequality by seeking to arrest the spread of new workplace practices or we can develop a plausible macro-economic and political program for redistribution. The former approach would probably be futile as well as detrimental to overall growth – a sort of Twentieth-First Century Ludditism. Instead, it is more feasible to devise policies to redress the rising inequality and vulnerability that are created by the new work practices. To preserve an acceptable level of equality and cohesion in society, redistribution need to be placed prominently on the national political agenda.

There are a myriad of proposals currently circulating to address the widening income distribution, many of which have been tried in some form or other in recent years. The most frequently discussed reform proposals are: increasing the minimum wage, expanding the earned income tax credit, providing wage subsidies, providing cash grants to the poor, and establishing a system of universal citizen stakeholding. The first three are redistributive measures that are employment-centered and require participation in the labor market by beneficiaries, while the latter two are redistributive measures that operate independently of labor market participation. In this chapter, I describe and evaluate each of these. I then discuss proposals that, while not explicitly redistributive, are designed to give individuals the flexibility they need to participate in today's labor market. These include proposals for training, child care, and insurance portability. I also present a European proposal that employees be able to accumulate "social drawing rights" that they can use to ease career transitions. This proposal is designed to help individuals cope with the insecurity that results from the flexibilization of work. While these latter proposals do not directly address issues of income distribution, they would help individuals navigate and prosper in the new labor market. I conclude that these types of proposals, combined with some of the more explicitly redistributional ones, are necessary to address the twin problems of worker vulnerability and deteriorating income distribution in the digital era.

B.I Redistribution Through the Labor Market.

B.I.1 The Minimum Wage.

One of the best known social programs for redistributing income is the minimum wage. Enacted in 1935 as part of the Fair Labor Standards Act, the federal minimum wage sets a floor for wage

rates for all employees whose job is involved in interstate commerce.[92] While the minimum wage level has been raised from time to time, it is not indexed for inflation. The level of the minimum wage level peaked in 1969 at over $7.50 per hour in 1999 dollars, but has never came close to that level since. The minimum wage declined sharply in the 1980s because Congress failed to adjust it for nine years, reaching a low in 1989. There were several increases in the minimum wage in the 1990s that somewhat reversed the trend. However, even with the increases of the 1990s, inflation has so eroded the minimum wage that today it is21 per cent lower than it was in 1979.[93]

The federal minimum wage has long been popular with the public but anathema to economists. Mainstream economists contend that the minimum wage raises wages above the competitive level, thereby causing employers to reduce employment. This results in a loss in employment opportunities for workers whose value to employers is less than the legislatively set minimum, and it also results in a sub-optimal level of output. Thus the criticisms of the minimum wage are primarily directed at its efficiency-defeating impact.

Economists David Card and Alan Krueger conducted an empirical study of fast food industry workers that challenged the claim that increases in the minimum wage will lead to declines in employment opportunities. Prior to 1992, New Jersey and Pennsylvania had the same minimum wage. But when the minimum was raised in New Jersey in 1992 without a raise in Pennsylvania, Card and Kreuger found that the predicted drop in employment in the New Jersey fast food restaurants did not materialize. Rather, employment in the New Jersey establishments increased relative to those in Pennsylvania. This led them to hypothesize that sometimes small increases in the minimum wage could lead to expanded employment opportunities and thus to increased efficiency.[94]

The Card and Kreuger finding initially generated considerable controversy within the economics profession because it appeared to challenge one of the basic tenets of the neoclassical model. However, many economists have come to concede that modest increases in the minimum wage appear might not be detrimental to employment. This may be particularly true in an period in which the minimum wage has failed to rise with inflation. If the minimum wage is set at a level below the competitive wage rate, then arguably increases would not lead to employment losses.[95]

For present purposes, the efficiency effects of the minimum wage are not as important as its distributional effects. The widespread popularity amongst the public of the minimum wage stems not from its impact on overall production but from its impact on wages. It is widely believed that the minimum wage causes wages to rise above the level they would otherwise be, and that a raise in the minimum wage would raise wages even higher. Card and Kreuger tested this hypothesis by looking at the distributional impact of the increase in the federal minimum wage in 1990

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[92] 29 U.S.C. §§ 201-219.
[93] See *The Minimum Wage: Increasing the Reward for Work, A Report by the Natinal Economic Council,* Chart 2 (March, 2000).
[94] David Card and Alan B. Kreuger, MYTH AND MEASUREMENT: THE NEW ECONOMICS OF THE MINIMUM WAGE 20-69 (Princeton Univ. Press, 1995).
[95] cite AEA panel with Paul Samuelson, et. al.; Francine D. Blau and Larence M. Kahn, *Institutions and Laws in the Labor Market,* in O. Ashenfelter and D. Card, HANDBOOK OF LABOR ECONOMICS, Vol. 3 1400, 1442 (1999).

and 1991. They found that the raise in the minimum wage, while small, provided a significant boost to the economic well-being of many low-income earners.[96] They also found that the 1990 and 1991 increases in the minimum wage affected overall income distribution. They report that the increases "rolled back a significant fraction of the cumulative rise in wage dispersion from 1979 to 1989 . . . [and] led to significant increases in the 10th percentile of family earnings, and to a narrowing of the gap between the 90th and 10th percentiles of family earnings."[97] Rebecca Blank similarly found that the increases in the federal minimum wage in 1996 and 1997 also helped low income families.[98]

These findings support the popular belief that the minimum wage is an effective mechanism for redistributing income toward the lower end of the income distribution. None of these studies demonstrate that increases in the minimum wage help eliminate poverty. Because less than half of the poor work, and because those that do work often work part-time or intermittently, increases in the minimum wage do not translate into significantly higher incomes for the poor. Rather, the minimum wage is best understood as a means of protecting the wages and labor standards of the working poor, who otherwise could face a downward spiral as employers bid down the price of labor of those working at or near the bottom of the income distribution.[99]

B.I.2 The Earned Income Tax Credit.

The largest federal redistribution program presently is the earned income tax credit (EITC). The EITC benefits primarily the working poor – the fastest growing portion of the labor force. It is a refundable tax credit for low income working families with children. Eligible individuals who earn less than the specified target amount get a tax credit for each dollar earned up to a set maximum benefit. The credit can be either a reduction in tax liability, or if liability is less than the credit, a check from the IRS for the difference. At present, a family with two or more children with parents working at the minimum wage would receive a rebate through the EITC that would be the equivalent of a $2 per hour increase in pay.

Between 1975 when the EITC began until 1999, the size of the program grew from $3.9 billion to $31.9 billion. It is currently the largest federal welfare program in the United States, dwarfing other federal programs for the poor, such as food stamps that came to $19 billion in 1999, and Temporary Assistance for Needy Families (TANF) that came to $16.7 billion in 1999. Unlike these other welfare programs, the EITC enjoys considerable popular and political support. It is widely regarded as a successful anti-poverty program that includes work incentives. In 1998, the EITC raised an estimated 4.4 million Americans above the poverty line.[100]

The original EITC, proposed by Senator Long in 1975, gave taxpayers with children a ten percent supplement for wages up to $4000, and phased out the supplement for incomes between $4000 and $8000. The EITC remained essentially unchanged until the Tax Reform Act of 1986, when the

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[96] Id. at 276-277.
[97] Id. at 279.
[98] Rebecca M. Blank, *Fighting Poverty: Lessons from Recent U.S. History*, 14 J. of Econ. Perspectives 3, 14 (2000).
[99] See Timothy J. Bartik, JOBS FOR THE POOR: CAN LABOR DEMAND POLICIES HELP? 278-284 (Russell Sage, 2001).
[100] Council of Economic Advisors, 1998. See also, Bartik, supra, at 77-80; Katherine S. Newman, NO SHAME IN MY GAME: THE WORKING POOR IN THE INNER CITY 271 (Random House, 1999).; Council of Economic Advisors, 2000.

amount of the supplement was increased to equal its real value in 1975, with indexing for future inflation. The EITC was expanded again in 1990, as part of the overall tax bill that raised rates and limited deductions for high income taxpayers. Congress further expanded the EITC on several occasions in the 1990s, with the goal of using the credit to raise every full-time wage workers' pay to the poverty level. In 1998, it was modified to provide a modest amount of benefit for taxpayers without children. At present, a wage-earner with two children earning $8500 a year can receive approximately $3370, bringing them above the poverty line.[101]

The EITC is widely viewed as a valuable policy tool for redressing inequality. Rebecca Blank says the expansion of the EITC in the 1990s "may be the most important anti-poverty policy implemented during this decade."[102] Timothy Bartik says there is "little doubt that the EITC's effect is to truly raise net wages after taxes for many of the working poor."[103] Barry Bluestone and Teresa Ghilarducci state that the ETIC not only raises wages, but also provides "wage insurance for the temporary poor in an era of job instability and earnings insecurity." They contend that EITC benefits not only the entrenched underclass of long-term unemployed, but also those whose wages are falling or who are at risk of temporary unemployment due to corporate restructuring.

Some economists have expressed concern that the EITC could lower wages by inducing employers to hire the same workforce for less and simply letting the government pay the difference. In that event, the EITC would prove to be a subsidy for low-wage employers. However, to counter that potential negative consequence, Bluestone and Ghilarducci argue that the EITC should be combined with raising the minimum wage and indexing it for inflation.[104] Rebecca Blank also advocates that the EITC should be expanded and combined with an increased minimum wage. She warns that increases in the minimum wage alone could lead to increased unemployment. However, if raising the wage floor were combined with an expansion of the EITC, Blank contends that the latter policy would induce more nonworkers to join the labor force, and thus the combination could combat the negative employment effects of the former. She advocates such a combination because it "makes full-time, full-year work much more attractive."[105]

Francine Blau and Lawrence Kahn also argue that the EITC is a valuable approach to ameliorating income inequality, but they see it as an alternative rather to than as a complement to the minimum wage. Blau and Kahn analyze the minimum wage, as do most economists, as a policy that distorts the labor market and reduces employment opportunities at the bottom. They prefer the EITC because it raises after-tax wages of low income workers without interfering in the labor market. It enables employers to hire more workers without increasing their employers' labor costs, and thus unlike the minimum wage, it would not induce employers to reduce employment levels.[106]

Whether or not it is combined with a minimum wage hike, the earned income tax credit has the

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[101] V. Joseph Hotz & John Karl Scholz, *The Earned Income Tax Credit,* NBER Working Paper No. 8078, at 1-8 (January, 2001); Joel F. Handler, *Low Wage Work "As We Know It,"* in Joel F. Handler & Lucie White, HARD LABOR, 3, 13-14 (1999).
[102] Rebecca M. Blank, IT TAKES A NATION: A NEW AGENDA FOR FIGHTING POVERTY, 113 (1997).
[103] Bartik, JOBS FOR THE POOR, supra. at 80.
[104] Barry Bluestone and Teresa Ghilarducci, *Making Work Pay: Wage Insurance for the Working Poor,* 28/ 1996 Public Policy Brief (1996).
[105] Blank, IT TAKES A NATION, supra. at 114-116.
[106] Francine D. Blau and Lawrence M. Kahn, US LABOR MARKET PERFORMANCE IN INTERNATIONAL PERSPECTIVE: THE ROLE OF LABOR MARKET INSTITUTIONS (New York, Russell Sage Foundation, forthcoming).

potential to redistribute income to the lower end of the income distribution. If it were expanded, it could have significant redistributive impact. Further, because its benefits are based on annual income, it assists individuals who move in and out of the labor market during the course of the year, making it a redistribution program that addresses the precarious employment experience of the digital era.

The EITC is not beyond criticism, however. It is expensive, and if it were expanded it would cost even more. And because benefits are only paid once a year as an income tax refund, the credit does not provide cash for emergencies. Its lump sum pay-out can also dampen the program's ability to encourage recipients to seek full-time work. Also, the program has lower than expected participation rates, presumably because there are many who would be eligible who do not file income tax returns. In addition, it has a high error rate, again possibly attributable to the complex IRS forms that need to be completed to obtain benefits. Many of these short-comings could be cured with better information and more user-friendly filing requirements.

B.I.3 Wage Subsidies.

a. Targeted Subsidies

Rather than give subsidies to employees to bring their earnings above the poverty level as the EITC does, some analysts have proposed a government subsidy paid to employers to raise the wages of low-income workers. In the past, wage subsidies have been used to assist certain targeted groups for a limited period of time. In 1979, Congress enacted the Target Jobs Tax Credit, and in 1996 it enacted the Work Opportunity Tax Credit, both of which gave private-sector employers a subsidy to employ certain targeted groups, such as welfare recipients, disadvantaged youths, and ex-criminals. The results of these programs were mixed. Several researchers found that they had a negative effect on the employment of the targeted workers. They surmised that the subsidy stigmatized the targeted job-seekers and thus made employers reluctant to hire them despite the financial inducement to do so. According to economist and former Clinton appointee, Lawrence Katz, sending in a welfare recipient to a job interview with a wage subsidy voucher is like saying, " 'Hi. I'm a lemon -- give me a job!' " Others, however, claim that the stigma factor was exaggerated, and some have found that the programs yielded positive effects on the job opportunities of some categories of disadvantaged workers.[107]

b. The Phelps Proposal

One of the most ambitious wage subsidy proposals has been put forward by Edmund Phelps in his 1997 book, REWARDINGWORK. Phelps' proposal is aimed to assist all who lie at the bottom of the income distribution. Rather than a time-limited and target wage subsidy, Phelps proposes a

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[107] On the negative consequences of targeted wage subsidies, see Lawrence F. Katz, *Wage Subsidies for the Disadvantaged*, NBER Working Paper 5679 (1996); Gary Burtless, *Are Targeted Wage Subsidies Harmful?* 39 Industrial and Labor Relations Review 105 (1985). On the positive effects of targeted wage subsidies amongst certain discrete populations, see Katherine Newman, NO SHAME IN MY GAME, THE WORKING POOR IN THE INNER CITY 270-71 (1999); John H. Bishop and Mark Montgomery, *Does the Targeted Jobs Tax Credit Create Jobs at Subsidied Firms*, 32 Indus. Relations 289 (1993). See also, David Whitman, *Take This Job and Love It,* U.S. News & World Report, October 14, 1996.

universal, unlimited one. It is an ambitious and expensive program, costing taxpayers an estimated $125 billion in 1997 -- up to$132 in 1998. This enormous sum, he claims would be offset by increased taxes and by the savings from reduced crime, unemployment benefits, Medicaid, welfare payments, and the elimination of the EITC.[108]

Phelps' proposal grows out of his analysis of income inequality. He points out that in 1990, those in the bottom tenth of the income distribution -- some 12 million in all -- earned less than $4 an hour and, due to part-time work and/or spells of unemployment, had annual earnings of $1,200 on average. The next portion of the income distribution did not do much better. Phelps calculates that those in the bottom third of the income distribution suffer from serious economic disadvantage.[109] In addition to the concern about absolute deprivation, Phelps maintains that it is important to redress the relative deprivation of low-paid workers. As he says, "The pay of America's lowest lifetime earners has become so remote from the pay of the median earner as to make them a class apart, with radically diminished possibilities next to those in the mainstream."[110]

Phelps attributes the problem of low wages of the working poor to their low productivity.[111] In addition, he contends, the advent of information-intensive production increases the low-wage workers' disadvantage. The less well-educated are not likely to be selected for jobs that involve handling and/or processing information, so that "the flow of new technical information widens the gap between low-wage and median-wage workers." Similarly, employers are unwilling to invest in training for low-educated workers, so their relative disadvantage in the labor market increases. For these reasons, Phelps argues, neither traditional welfare programs nor employment-based social insurance can reverse the low-wage cycle of low-educated workers.[112]

Instead of programs that ameliorate the problems of the nonworking poor, Phelps proposes a solution for the working poor: that the federal government pay employers to raise the wages of their low-income employees. For example, an employer whose employees cost $4 an hour in wages, benefits, and payroll taxes would receive a subsidy from the state to bring up that workers wages to some set minimum amount, posited at $7. To avoid perverse incentives, he proposes that the subsidy be structured to decline as hourly wages increase. As Phelps explains, "The subsidy is thus like a matching grant rewarding the firm for as many workers as it employs, particularly workers whose private productivity is low (as evidenced by the low hourly labor cost that firms are willing to incur for their services)."[113]

Unlike the targeted wage subsidy programs attempted in the past, Phelps' proposal would give subsidies to employers of all types of low-wage workers. He claims that the subsidy would not only pull up wage rates, but also reduce unemployment by giving employers an incentive to hire some whom they would not have employed otherwise. He justifies the subsidies on the ground that existing wages reflect only a worker's private productivity to an individual employer. The

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[108] EDMUND S. PHELPS, REWARDING WORK (1997).
[109] PHELPS, Id. at 23-26.
[110] Id. at 103.
[111] Id. at 65.
[112] Id. at 68.
[113] Id. at 106.

subsidy, on the other hand, would bring up the wage to his "social productivity" – the contribution of the employee to society.[114] Phelps explains that the employment has third party effects that go beyond the private benefit conferred on the worker and the employer. The social benefit of employment is the benefit workers confer on the rest of society "from their position as participants in the business life of their community and the country, earning their own keep and supporting their children and setting an example for others growing up in their neighborhood."[115] Ideally, he says, the size of the income subsidy should make the wage equal to the worker's external productivity– the private benefit and the social benefit that the worker provides. In this way, he argues, wage subsidies would have benefits for the taxpayers who would be called upon to pay for the proposal.

Phelps' proposal conditions the subsidy on having a job. He justifies this approach by arguing that a redistributive program should encourage labor market participation because employment is more than a means of self-support -- it is a form of personal development and community building. Phelps is critical of proposals for redistribution that give people an incentive not to join the labor force, and thus "do nothing to restore jobholding as the means of self-support and the vehicle for personal growth and the sense of belonging and being needed."[116]

c. Critiques of Wage Subsidies

A number of analysts have voiced criticisms of wage subsidies. Some have criticized the Phelp's wage subsidy proposal for its extremely high cost. While it is predicted to produce large increases in both employment and wages, the price tag of over $132 billion makes it an expensive gamble should such positive results not be forthcoming.[117]

Yale Law School Professor, Anne Alstott, has attacked wages subsidies of all types.[118] She argues that targeted subsidies have multiple failures, including encouraging displacement of nontargeted workers, stigmatizing the targeted workers, creating perverse incentives for employers to engage in workforce churning, and incurring high administrative costs. Unlike these, she says, the Phelps' proposal is elegantly simple, ambitious, and bold.[119] By giving coverage to all low wage workers throughout the workers' entire career, the Phelps' plan solves many of the administrative problems and creates fewer perverse incentives than more limited and targeted wage incentive programs.

Despite such praise, Alstott is sharply critical of Phelps' proposal. She contends that by requiring work, the program could discourage individuals from obtaining additional education and training and hence could impede their labor market opportunities in the future. In addition, she argues that the program is not well targeted. Because it gives subsidies to all low-wage earners, it assists middle-class teens and secondary earners as well as the poor. Third, she claims the program has serious administrative costs because employers will have an incentive to fraudulently understate

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[114] Id at 106–09.
[115] Id. at 124.
[116] Id. at 112.
[117] Bartik, JOBS FOR THE POOR, supra. at 242-244.
[118] Anne L. Alstott, *Work vs. Freedom: A Liberal Challenge to Employment Subsidies*, 108 YALE L.J. 967, 1056–58 (1999).
[119] Id. at 1042- 43.

wages and overstate hours. Fourth, she claims that employers will have an incentive to displace higher paid workers with lower paid ones. Fifth, the program gives workers a disincentive to move to higher wage positions because, while they will earn more, the marginal gain will be small. And finally, because the program assists employers who can utilize low-wage workers, she claims it will aid employees in the suburbs more than those in the cities.

While Alstott characterizes these problems as "damaging facts,"[120] it would be equally plausible to see them as challenges to be faced in program design. None seem as damaging to society as the existing maldistribution of income. Indeed, some of her objections seem exaggerated. For example, any disincentive that a wage subsidy raised to participation in training programs could be more than offset by the enhancement to an individual's labor market opportunities that follows from actual labor force participation.

As to claim that the proposal causes geographic distortion, it is not necessarily bad economics for firms that have lower labor costs to locate on the periphery of cities. Regional economists have found that in information-intensive economies, cities have agglomeration economies in producer service sectors, not in manufacturing.[121] Further, there are many low wage jobs in cities -- such as low-skilled jobs in hotel, restaurants, and hospitals -- that would be candidates for Phelps' wage subsidies.

Alstott's concern about fraud is serious but not unique to the wage subsidy proposal. Potential for fraud has plagued tax programs and social welfare programs for years, and the antidote is for Congress to design and fund meaningful compliance systems. Although Alstott quite rightly states that the Phelps proposal would require accurate information on employers' wage rates and hours worked, it seems like a reporting system for that purpose could be designed. While one can take issue with Alstott over whether the wage subsidy glass is half full or half empty, she has a more fundamental critique of the wage subsidy program. Her main argument is that assistance that is conditioned on employment interferes with an individual's freedom to determine one's own trade-off between remunerative and nonremunerative activities. According to Alcott, there is no reason to privilege labor market participation – some individuals may want or need to spend their time taking care of children or pursuing other objectives. To enable individuals to make a choice about how to spend their time, Alstott advocates a program of cash allowances, or a negative income tax for the poor, as preferable forms of redistribution. I address Alstott's liberty-based argument later in this chapter, in the context of a discussion of cash grants to the poor.

B.I.4 Comparing the EITC with the Wage Subsidy Proposal.

Assuming that both the EITC and the Phelps' wage subsidy proposal are viable mechanisms for redistributing income, the question remains, which is preferable. As Lawrence Katz notes, "In a simple Coasian world without transaction costs or imperfect information, it should not matter whether wage subsidies are provided to employers or equivalent earnings supplements provided to workers." But Katz goes on to say, "There are many reasons why the side of the market in which the subsidy is provided could matter in practice."[122]

One way that the side of the market matters is that targeted wage subsidies paid to employers

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[120] Id. at 1045.
[121] Saskia Sassen, GLOBAL CITIES; Matthew Drennan…
[122] Lawrence F. Katz, *Wage Subsidies for the Disdvantaged,* NBER Working Paper 5679, at 6 (July, 1996).

identify who is being subsidized and implicitly suggests they are bad workers. The EITC, by ensuring payments to the employees directly, avoids any stigmatizing effects of targeted wage subsidies. But, Phelps' proposal for a universal low-wage subsidy avoids the problem as well.

The two programs potentially differ in terms of the economic incentives and effects they create. Where there is in effect a minimum wage acts that is a constraint on the downward movement of wages, employee-side subsidies such as the EITC can raise earnings effectively because employers cannot simply reduce wages to offset the amount of the subsidy. Yet without the ability to reduce wages, employers may not have an incentive to increase employment. Conversely, in the presence of a constraining minimum wage, employer-side wage subsidies can permit employers to lower wages when they could not have done so previously without violating the minimum wage. In that event, the subsidy could have the effect of lowering wages but increasing employment. Thus the choice between the programs might turn on which is the dominant objective.

It has also been argued that the two types of subsidies differ in terms of their ability to target benefits to the intended beneficiaries. Wage subsidies paid to employers of low-wage workers could have the unintended effect of assisting many who are not truly needy. Low wage workers include teenagers and secondary earners in middle class households. In this light, the EITC is preferable because it operates through the income tax, which is a more reliable mechanism for identifying the needy.[123] By operating through the income tax system, the EITC might also be preferable to employer-paid subsidies in terms of ease of administration and discouragement of cheating, although the case is by no means clear.[124]

There is a danger that any form of wage subsidy will induce employers to lower wages and then hire subsidized workers to replace unsubsidized ones, thereby giving the employer a windfall rather than raising the low-wage worker's earnings. This danger is more serious with the Phelps plan than the EITC. With the Phelps plan, the employer knows which workers are eligible for the subsidy, and can downwardly adjust their wages to offset the subsidy while keeping the unsubsidized workers pay at a level sufficient to keep them employed. With the EITC, the employer does not know which workers are subsidized, because the employer does not know the workers' total family income. In that case, if the employer lowers wages, it risks losing its unsubsidized workers who will refuse to work at the lower pay rate. The fact that employers cannot know which worker is eligible for the subsidy under the EITC is therefore an advantage in the ability of the subsidy to actually raise wages of the program's beneficiaries.[125]

There is one additional factor that argues in favor of the EITC over wage subsidies. As Alstott points out, the Phelps proposal would only assist full-time workers, and thus would impose a full-time work requirement on its beneficiaries. The EITC, on the other hand, assists those whose work is part-time. Thus the EITC permits workers to retain the benefit while adjusting their work schedules to their own life exigencies. For these reasons, Alstott claims, the EITC at least partially realizes her goal of perserving each individual's freedom to spend their time as they choose. In

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[123] Stacy Dickert-Conlin and Douglas Holtz-Eakin, *Employee-Based Versus Employer-Based Subsidies to Low-Wage Workers: A Public Finance Perspective,* in David Card and Rebecca M. Blank, eds. FINDING JOBS: WORK AND WELFARE REFORM 262, 269 & 291 (Russell Sage Foundation, 2000).

[124] Anne Alstott argues that the it is a close question which of the two programs -- employee-paid or employer-paid subsides -- is superior in terms of ease of adminsitration and prevention of fraud. Alstott, Work and Freedom, at 1052-54.

[125] See Rebecca Blank, *Enhancing the Opportunities, Skills, and Security of American Workers*, in DAVID T. ELLWOOD, ET. AL., EDS. A WORKING NATION: WORKERS, WORK AND GOVERNMENT IN THE NEW ECONOMY 105, 117-118 (Russell Sage Foundation, 2000).

addition, as Bluestone and Ghilarducci point out, the EITC benefit is triggered by low income rather than low pay, so that it assists workers who suffer temporary layoffs or other employment transitions. Thus it is responsive not only to the low pay, but also to the other vicissitudes and vulnerabilities of the boundaryless workplace.

B.II Non-Workplace Centered Redistributive Measures.

Some policy analysts propose that the problem of growing inequality be addressed through measures that provide cash grants to those outside the labor market or on the lowest rungs without conditioning benefits on labor market participation. Some advocate a return to the federal welfare program, AFDC, that Congress abolished in 1996, a system that focused assistance on the nonworking poor with dependent children. Yet others propose a negative income tax -- using the tax system to provide cash grants to the working and nonworking poor, with a phase-out of the benefit as income rises. Yet others have proposed a stakeholder program that would give a cash grant to every young adult in the country upon the attainment of majority, financed by the federal income tax. Unlike the proposals discussed in the previous section, these proposals do not condition public assistance on participation in the labor market.[126]

B.II.1 Cash Grants.

The policy of giving public assistance to the disadvantaged goes back many centuries and has taken many forms. In the United States, since the 1930s there has been a federal welfare program that provides cash grants to the disadvantaged. The Social Security Act of 1935 contained a program called Aid to Dependent Children, later remained Aid to Families with Dependent Children (AFDC), that provided cash grants to poor women to enable them to stay out of the labor market to raise children. The program was expanded considerably during the Great Society's war on poverty in the 1960s and 70s, and in the 1970s it was supplemented by a federal program to provide Food Stamps to the needy. However, as welfare was expanding, it also began to lose political support. By the 1980s and 90s, American values had shifted considerably, so that the goal of keeping women out of the labor force in order to raise children was no longer palatable to large numbers of the population. Rather, women who were on welfare were stigmatized, seen as lazy, opportunistic, or simply caught in a cycle of dependency. By the mid-1990s, political support had evaporated for "welfare as we know it."[127]

In 1996, Congress repealed AFDC and replaced it with the Personal Responsibility and Work Opportunity Act, which established a program called Temporary Aid for Needy Families, or "TANF." TANF rejected the premise that public assistance should be a source of long-term support for the needy, and instead adopted the premise that it should be a transition into the labor force. Accordingly, TANF places a five year lifetime time limit for an individual receiving federal welfare, and requires states to pressure recipients to find work. The program operates through block grants to the states and gives them wide discretion about how to structure their welfare programs.[128] Under TANF, states have broad discretion to decide who is eligible for benefits and in what amount. However, states are prohibited from giving federal assistance for any individual

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[126] Alstott, Work and Freedom, at 977-987.

[127] See Michael B. Katz, THE UNDERSERVING POOR: FROM THE WAR ON POVERTY TO THE WAR ON WELFARE 66-69 (Pantheon, 1989). For an excellent overview of AFDC and discussion of criticisms of such programs, see Rebecca Blank, IT TAKES A NATION, supra. at 133-177. For an account for the waning political support for cash assistance in the 1980s and 90, see Blank at 123-126.

[128] Pub. L. No. 104-193 (1996).

beyond 60 months. In addition, states are required to demonstrate that they are attempting to move beneficiaries who have been collecting benefits for 24 months into work activities. The states face fiscal penalties if they fail to meet specified targets set for the percentage of recipients participating in a work or work-related activity. Thus, under TANF, public assistance is no longer a universal program of aid to the poor. Rather, it is a time-limited safety net for those who fall outside the labor market, to tide them over and help them get back in.[129]

Anne Alstott argues for a return to an outright cash grant program. She terms TANF "unconscionable" for imposing a work requirement and a time limit on welfare recipients. She argues that both the nonworking and the working poor would fare better under a system of unconditional cash grants or an negative income tax than they would under a redistributive program that requires participation in the labor market, such as the EITC or the employment subsidy proposals. Her argument is that cash grants give the working poor a choice as to how to allocate their time between work and leisure. With a cash grant, a low wage earner can choose to enhance her standard of living by working full-time, or choose to live frugally and not work at all, or strike some balance in between. According to Alstott, this kind of choice is an important aspect of freedom. For example, a cash grant would give a mother the freedom to choose to forgo earnings in order to spend time with her children while her children were young, choice that employment subsidy denies.[130]

There is, however, a serious problem with the outright cash assistance approach to income redistribution that Alstott does not address. Since the English Poor Laws if not before, public charity has been permeated with judgements about the moral character of the poor. Public charity has long distinguished between the worthy poor and the unworthy poor in determining how to distribute public largesse. This point was made comically in the long-running Broadway musical, *My Fair Lady,* when Eliza Doolittle's ne'er-do-well pauper father, Alfred Doolittle lectures Professor Henry Higgins on the plight of the *undeserving* poor. As Doolittle says, speaking from personal knowledge, the lazy, the drunks, and the ne'er-do-wells, unlike the deserving poor, receive neither charity nor sympathy from the public. In a more serious vein, social historian Michael Katz writes,

The undeserving poor have a very old history. They represent the enduring attempt to clasisify poor people by merit. This impulse to classify has persisted for centuries partly for reasons of policy. Resources are finite. Neither the state nor private charity can distribute them in unlimited quantities to all who might claim need. On what principles, then, should assistance be based? Who should – and the more difficult question, who should not – receive help?[131]

We see this distinction at work when victims of natural disasters and terrorist attacks are treated more generously derelicts and drug addicts.

The impulse to distinguish between the worthy from the unworthy poor frames modern welfare policies. For example, it is out of scepticism about the spending habits of the poor, that public

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[129] See Mark Greenberg, *Welfare Restructuring and Working-Poor Family Policy*, in Joel H. Handler & Lucie White, eds., HARD LABOR: WOMEN AND WORK IN THE POST-WELFARE ERA 24 - 32 (M.E. Sharpe, 1999).
[130] Alstott, at 987-88.
[131] Michael Katz, supra. at 9. For a history of attempts to classify the deserving from the underserving poor prior to the twentieth century, see Katz, supra. at 11-16.

and private charity efforts often involve the distribution of goods, such as food, shelter, or clothing, rather than distributions of cash. Because of an implicit moral judgment that the able-bodied poor are unworthy rather than merely unfortunate, public charity has usually been structured not only to provide subsistence to the poor, but also to change their behavior, beliefs and character. Hence public and private charities often couple assistance with intrusive inquiries into the private conduct of recipients. The requirements that the recipients of public relief perform work for their dole is justified not merely in instrumental terms, but also in moral ones. The working population has a deep resentment of those on welfare and it is a moral resentment, a belief that "I work, they should work too."[132]

Because of the history of moralizing and coercion that pervades outright cash assistance, it is a program that breeds mutual distrust and ill-will between the givers of assistance – i.e., the taxpayers – and the recipients – the needy. It fosters not social cohesion, but its opposite. As a result, political support for non-work based income redistribution has almost entirely evaporated. In this context, it is difficult to see how proposals for ameliorating income inequality by increasing cash assistance to the needy are likely to succeed.

In addition, it is not clear that the cash grant approach is ultimately beneficial to the poor. Unconditional cash grants create incentives for individual to stay out of the labor force. While they may be useful, indeed necessary, for certain limited periods to enable care-giving for children or aging parents, they are not a means to foster independence and dignity over the long term. In today's world, work plays a central role in one's sense of identity and connection to the larger world that cash assistance programs cannot deliver.

Katherine Newman, in NO SHAME IN MY GAME, paints a vivid portrayal of the way work creates personhood and paves the way to fulfillment in our society. She interviewed inner city youths in Harlem, New York who held jobs at a fast food hamburger establishment. She found that the jobs provided them with not only a regular source of income, but also self-respect, direction, a connection to the larger world, and a means to a richer life. For example, one black teenager girl, told her,

When I got in there, I realize it's not what people think. It's a lot more to it than flipping burgers. It's a real system of business. That's when I really got to see a big corporation at play. I mean, one part of it, the foundation of it. Cashiers. The store, how it's run. Production of food, crew workers, service. Things of that nature. That's when I really got into it and understood a lot more."[133]

Newman found that in numerous respects, those in Harlem who have jobs inhabit a different world than those who do not. Job-holders not only have more money, they have more stability, develop a sense of responsibility, and become part of a social system that spans outward from the workplace to the larger community. "What they have that their nonworking counterparts lack is both the dignity of being employed and the opportunity to participate in social activities that

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[132] See Robert H. Haveman, *The Clinton Alternative to "Welfare as We Know It": Is it Feasible?* in D. Nightingale and R. Haveman, eds., THE WORK ALTERNATIVE: WELFARE REFORM AND THE REALITIES OF THE JOB MARKET 185, 194 (Urban Institute Press, 1995).
[133] KATHERINE S. NEWMAN, NO SHAME IN MY GAME 103 (1999).

increasingly define their adult lives. This community gives their lives structure and purpose, humor and pleasure, support and understanding in hard times, and a backstop that extends beyond the instrumental purposes of a fast food restaurant."[134] Newman concludes by observing that:

Our culture confers honor on those who hold down jobs of any kind over those who are outside the labor force. Independence and self-sufficiency – these are virtues that have no equal in this society. But there are other reasons why we value workers besides the fact that their earnings keep them above water and therefore less in need of help from government, communities, or charities. We also value workers because they share certain common views, experiences, and expectations. The work ethic is more than an attitude toward earning money – it is a disciplined existence, a social life woven around the workplace.[135]

If we understand work as producing not merely income but, as Newman's work vividly demonstrates, a means to personhood, then it makes sense to design public redistributive policies to further rather than hinder that goal. Public largesse is not infinite, so if our redistributive dollars are spent on unconditional cash grants, there will be little available to encourage labor market participation and assist the working poor. While Alstott characterizes the choice between employment-linked redistribution like wage subsidies and the EITC and unconditional cash grants as a choice between "work and freedom," it is equally possible to pose the choice as one between dignity and dependency. Dependency is not real freedom, but rather "the liberty of the outcast."[136] Viewed from that perspective, the employment-linked programs do not "lure people into the labor market," as Alstott contends, but are instead programs that offer individuals the opportunity to experience a richer and more meaningful way of life.

B.II.2 Stakeholder Proposals.

A variation on the cash assistance proposal that avoids the political, historical and sociological pitfalls of cash assistance programs is the proposal for the state to establish a system of universal stakeholding. Bruce Ackerman and Anne Alstott, in the recent book, THE STAKEHOLDER SOCIETY, propose a program which would give every child in America a "stake" of $80,000 upon reaching maturity. The stake could be used to finance a college or technical education, open a business, buy a home, or any other use that the individual chooses. If an individual uses it to finance a college education, they would receive it at age eighteen; otherwise they would have to wait until they reached age twenty-one. The only requirement for obtaining the stake would be the completion of high school and U.S. citizenship. Initially the stake would be paid with a 2 per cent tax on wealth. And those who receive a stake would be required to pay it back, with interest in their estate when they die. Thus while the initial federal outlays would be substantial, over time the repayments would accumulate in a fund to finance future stakes.[137]

Ackerman and Alstott argue that their stakeholder proposal would give young adults significant resources at a time when they most need resources to shape their economic prospects. Thus, they claim, it is a step toward providing equality of opportunity, comparable to the public education system that at one time represented a commitment to providing all children with the tools

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[134] Id. at 120-212.
[135] Id. at 119.
[136] Guy Standing, GLOBAL LABOUR FLEXIBILITY: SEEKING DISTRIBUTIVE JUSTICE 341 (McMillan Press, 1999).
[137] BRUCE ACKERMAN & ANNE ALSTOTT, THE STAKEHOLDER SOCIETY (Yale University Press, 1999).

for building their futures. Ackerman and Alstott also argue the proposal helps to solidify a meaningful sense of citizenship by giving each citizen a concrete stake in his country. In this regard, they compare their proposal to the G.I. Bill that gave citizen-soldiers funds to start out in life.

In keeping with the goal of redressing inequality and at the same time creating a robust form of citizenship, Ackerman and Alstott also advocate that Social Security be transformed into a citizen pension rather than a pension linked to employment status. This way, they argue, the issue of old age financial security would express our society's "commitment to the ideal of a dignified old age," not to a particular role in the labor market.[138]

Ackerman and Alstott claim that their citizenship stakeholder proposal would help to equalize opportunity, and would partially overcome those aspects of inequality that stem from inter-generational privilege.[139] While it would not affect relative incomes in the short run, it is a measure for equalizing opportunity over the long run.

B.III Assessing Non-Employment Linked Proposals for Redistribution.

While the foregoing proposals for cash assistance and universal stakeholding both involve redistributive measures that do not depend upon employment, they differ greatly in their ability to position people in the labor market. The cash assistance program is more a safety net than a redistributive measure – it would shore up the very bottom of the economic ladder without affecting the labor market directly. If the cash grant were sufficiently generous, it might make it more difficult for employers to obtain low wage labor and thereby indirectly exert an upward pressure on wages. However, neither Alstott nor others are proposing a cash grant large enough to do that. Thus the cash assistance proposals would create an alternative to the labor market rather than revise the distributive outcomes generated by the labor market.

The stakeholder proposal, on the other hand, does more than simply provide assistance to the poor. It endows individuals with tools they can use to play a meaningful role in society, whether through education, training, or entrepreneurial activity. And because the stake is a one-time grant to young adults, it does not create long-term disincentives to joining the labor force. Rather, it creates opportunities for those who otherwise would not have them. It does not discourage labor market participation but rather operates as an enabler of more widespread and robust labor market participation. The proposal is not directly redistributive -- it is available to all young adults, regardless of their means -- but because it is financed through a wealth tax, it would be redistributive at its funding source. In addition, because the proposed benefits are available to all without a means-test, it would encounter less political resistence than cash grant programs. For all these reasons, the stakeholder proposal is an approach to long-run inequality that has great promise. It addresses the mechanisms by which inequality is perpetuated, and thus presents a more fundamental solution to inequality than the proposals considered thus far.

B.IV Addressing Vulnerability in the Boundaryless Workplace.

All of the foregoing proposals have some potential for redressing the glaring income inequality that has arisen in the past twenty-five years by raising incomes of those at the bottom. Of the

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[138] *Id.* at 140–54.

[139] ACKERMAN & ALSTOTT, THE STAKEHOLDER SOCIETY 24–34.

proposals discussed, the EITC, together with a rise in the minimum wage, seems to offer a promising approach to short-term redistribution, and the proposal for universal stakeholding, by enabling low wage workers to enhance their human capital at an early stage in their work lives, would be redistributive over time.

The proposals considered thus far involve after-the-fact adjustments to the operation of the current global labor market and dynamics of the digital era firm. None of the proposals will induce firms to generate more equalizing compensation practices in their day-to-day operations, none will reverse the trend toward more and more winner-take-all markets for talent, and none will directly assist workers as they navigate the tumultuous new world of work. There are, however, policies available that address the problem of inequality by addressing individuals' vulnerability in their role as workers.

This section will consider some recent U.S. policies that attempt to assist in labor market transitions -- worker training allowances, portability of benefit plans, publically provided child care. It will then discuss a European proposal that attempts to address the problem of increased worker vulnerability directly: the proposal for social drawing rights.

B.IV.1 New Approaches to Economic Transitions.

a. Training

A number of policies have been discussed and/or attempted in recent years that would help ease transitions necessitated by the boundaryless workplace. These include requirements for benefit portability, worker retraining accounts, and expanded federal funding for child care. In 1998, Congress enacted the Workforce Investment Act[140] (WIA), as a complement the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 that ushered in welfare reform. The WIA provides federal funds for states to establish "career centers" that are to be one-stop delivery systems for the unemployed and job seekers. These One-Stop career centers administer unemployment insurance but they also do a lot more. They provide a clearing house for job placement services, offer job training information, provide computer training and run workshops on resume writing, and offer free faxing and Internet access. They also provide information on labor market trends, the availability of training providers, and evaluations of local training options. According to Linda Angello, New York State's Labor Commissioner. "We've been working hard to change our image from the unemployment people to the employment office. There's been a change in philosophy and a change in the way we do business."[141]

Under the Act, localities are required to establish a Workforce Investment Board comrpised of local employers to match the One-Stop career services to the local job market. WIA also provides funds for Individual Training Accounts (ITAs) for workers who require job training.[142] Training can include occupational skills training, one-the-job training, cooperative education, private sector training, skilll upgrading and retraining, entrepreneurial training, job readiness training, and adult education and literacy activities.[143]

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[140] 29 U.S.C. § 2801 (West 2000).
[141] Susan Saulny, *New Jobless Centers Offer More Than a Benefit Check,* THE NEW YORK TIMES, September 5, 2001, page A-1.
[142] For a description of the Workplace Investment Act, see Nan Ellis, *Individual Training Accounts Under the Workforce Investment Act of 1998: L Is Choice a Good Thing?* 8 Geo. J. on Poverty Law and Policy 235 (2001).
[143] 29 U.S.C. 2864 (West, 2000).

At present, most cities are in the process of establishing One-Stop centers. New York City opened a One-Stop center in Queens a year ago, and plans five more in the next two years. Los Angeles has opened 18 centers, Chicago has 17, and San Fransisco has only three. In Austin, Texas, three One-Stop centers and four satellite offices have been established. These centers have utterly transformed the old employment offices, which used to be primarily surveillance mechanisms to ensure that recipients were able, available and actively searching for work, more like a parole office than a place to get assistance. The new centers offer job search facilities and counseling that are not only attuned to the local labor market, but also to the local populations. Large city centers are offering service in many languages to deal with their diverse populations. Their services are designed to provide assistance in finding employment at all levels, including offering workshops on self-employment. One worker, a former CNN employee laid off last May, said of her experience with the Queens One-Stop, "My experience was remarkable. I was very impressed. They treated us like professionals rather than problems."[144]

One commentator has criticized the program for its over-reliance on the principle of consumer choice.[145] Under the statute, individuals are given vouchers to pay for training on the theory that it will help create a market based system for training services. Nan Ellis is critical of the use of vouchers for job training on the grounds that job-seekers too often cannot make informed choices about either their labor market prospects or about the quality of the training options available to them.[146] Instead, she suggests that there be additional mechanisms to ensure that the centers provide job-seekers with reliable information about the training opportunities, in readable and comprehensible form, together with critical evaluations of each one, and that job counselors be trained to help job-seekers select appropriate training options.

While the WIA is quite new, and One-Stop centers are just being established in most locations, it is a program that could help workers weather career transitions. If the One-Stop centers do ensure informed and reasoned choice amongst job-seekers, they have the potential to be effective mechanisms for dealing with the vicissitudes of the boundaryless labor market. If they were funded at a level that enabled them to offer significant and on-going training programs for all that wanted them, and if they included local unions and community groups on their Workforce Investment Boards, they would begin to resemble the Worker Retraining and Upskilling Centers advocated in Chapter 10, above.

b. Child Care

In addition to the WIA, there have been some expanded support for child care as part of the work-to-welfare programs established under the Personal Responsibility and Work Opportunity Act. A 1996 enactment established the Child Care Development Block Grant, to consolidate four federal programs that made funds available for child care for AFDC recipients moving into the workforce and for certain other low-income working families. The new program gives block grants to the states to establish and design their own child care programs. The program is poorly funded – about $3 billion – but the law permits states to use some of their TANF funds for child care as

[144] Saulny, supra, NEW YORK TIMES, September 5, 2001 at B-6.
[145] Ellis, *Individual Training Accounts, supra,* 8 Geo. J. on Poverty Law and Policy 235, 241.
[146] Id. at 251-52.

well.[147]

These programs do not go nearly far enough. Lack of affordable quality child care is a major impediment to full labor force participation for women. The new welfare philosophy that mandates workforce participation cannot succeed without providing the necessary infrastructure of child care. Adequate child care is necessary for women throughout the income distribution, but especially for those at the bottom. When women are forced to miss work to stay home with a sick child, or leave work early to attend doctor's appointments, and when women are forced to fill gaps for school holidays and snow days, they are penalized in the labor market. The new workplace requires flexibility on the part of employees but it does not promise them flexibility in return. Without reliable child care, women are not only penalized in the old-fashioned days for missing days or coming in late, they experience new types of penalties as well. Women with children are often unable to take advantage of after-hours training opportunities, unable to engage in informal networking in bars and cafes after work, and are less available for travel. Even though some enlightened employers are willing to give employees flex-time or make other accommodations, without funded and reliable child care, women workers will always be living on the edge and sometimes falling off.

Child care needs to be understand as part of the social infrastructure required for our economic system to operate. One we abandoned a cash grant approach to welfare and chose instead to encourage work, then we became obligated to ensure that the preconditions for women's participation in the workforce are in place. We finance a public education system in order, in part at least, to enable individuals to be productive members of society, and we provide a system of junior colleges and adult education programs to provide lifetime learning possibilities. For the same reasons, we need to finance adequate child care.

c. Benefit Portability

The boundaryless workplace is not a frictionless one. When workers cross boundaries between firms, they often pay a cost in terms of insurance protection. In the United States, most forms of social insurance are employer-centered. The federal government mandates old age assistance and provides some insurance against disability and accidental death through through the social security program. In addition, states provide insurance against workplace injury in the workers compensation systems and insurance against unemployment through their unemployment insurance programs. However, these programs provide bare bones programs at best. Thus since the mid- twentieth century, most American workers looked to their employer for medical insurance, long-term disability insurance and meaningful pension coverage. For a complex set of reasons that included good actuarial practices, avoidance of adverse selection, and the desire to encourage worker loyalty and attachment, most employer-sponsored benefit plans have been structured to bind the worker to the firm. Thus, for example, until 1980s, most pension plans were defined benefit plans, with long vesting periods and back-loaded benefit formulae. These plans encouraged long-term service and penalized workers who were mobile. Similarly, most health insurance plans had waiting periods and exclusions for pre-existing conditions, features that

[147] See Mark Greenberg, *Welfare Restructuring and Working-Poor Family Policy: The New Context,* in J. Handler and L. White, eds., HARD LABOR 24, 33-34 (1999).

made it risky for a worker to change jobs. In the boundaryless workplace, in which workers change jobs frequently, benefit portability has become an urgent problem.

There have been modifications to the laws and practices governing pensions and health insurance in the past two decades that address the issue of portability. First, in the area of pensions, there has been a general shift to from defined benefit plans to defined contribution plans. The latter are inherently more portable because the benefits continue to accumulate in the employees account until she reaches retirement, no matter where she works. Sums accrued in defined benefit plans, on the other hand, are forfeited if an employee leaves before her benefits vest, and are frozen in amount if she leaves after they have vested.

Second, in the Employee Retirement Security Act of 1974 ("ERISA") Congress set a maximum vesting period of ten years and, in 1986, lowered the maximum for defined contribution plans to five. Prior to 1974, most plans had no vesting period, so all benefits were forfeited if an employee left the employer.

Third, in 1992, Congress expanded the situations in which employees who changes jobs could "rollover" assets accumulated in their accounts to a new plan without incurring taxes or penalty liability. This change was applicable to defined contribution plans, enhancing their portability.

Fourth, since the late 1970s, Congress has expanded the possibilities for individuals to engage in individual tax-preferred retirement savings, through expanding the use of IRAs, providing for 401(k) plans, providing for medical and Roth IRAs (for educational savings), and establishing other such mechanisms. And finally, the recent move to cash balance plans and other hybrid plans is a move that increases portability for younger and mobile workers, although the process of conversion can have catastrophic effects on older, long-term workers.[148]

In addition, in the health insurance area there has also been some movement toward greater portability. In 1985, Congress enacted the Consolidated Omnibus Budget Reconciliation Act (COBRA) that requires employers who have health insurance plans to offer departing beneficiaries the opportunity to continue their coverage for 18 months. While employees are generally required to pay for their COBRA coverage themselves, it nonetheless means that they do not lose their health insurance when they terminate employment. In 1996, Congress further expanded portability with enacting the Health Insurance Portability and Accountability Act (HIPAA). HIPAA requires group plans to reduce waiting periods for pre-existing conditions when employees move from one health plan to another. It also raised the tax deductability of health insurance premiums for individuals who were self-employed. These provisions make it easier for an individual to retain health coverage as they move between workplaces.

Despite these recent changes, benefits are not yet fully portable, and thus remain an impediment to individuals who have peripatetic work lives. Some proposals to further increase pension portability include the total elimination of vesting requirements, requiring service credit transfer when a participant moves between employers, and expanding the ability of employees to use IRAs. Another approach is to encourage the formation of multi-employer pension plans that op-

[148] For an excellent discussion of the barriers to portability in pension and health insurance plans, and recent changes to make plans more portable, see Katherine Ulrich, *You Can't Take It With You: An Examination of Employee Benefit Portability and its Relationship to Job Lock and the New Psychological Contract,* in ___ Hofstra J. of Labor and Employment ___ (2001) [forthcoming].

erate on a regional basis in which all employees in a locality can participate. This kind of community-based pension plan could be sponsored by a geographically-based citizen union, of the type discussed in Chapter 10. Alternatively, converting social security into a citizen's pension and increasing its amount, as Ackerman and Alstott propose, would provide near-perfect pension portability.

In the area of health insurance, portability could be increased by national health insurance, but that option seems beyond political reach. Another measure that would to enhance portability would be an amendment to the Internal Revenue Code to permit full deductions for individuals for the cost of health insurance premiums. This change would permit individuals to select their own health insurance plan and thus side-step the employer-sponsored plan altogether.[149]

The programs described above for job training, child care, and benefit portability together have the potential of helping enable individuals to participate in the new labor market in a meaningful way. They work in conjunction with programs like the EITC and the minimum wage to alleviate some of the problems that stand in the way of success in the boundaryless workplace. But like the EITC and the minimum wage, they need to be expanded in scope and funding in order to realize their full potential. Even then, however, they cannot ensure success for everyone – the new workplace presents new challenges and will generate a new mix of winners and losers. Those who are not flexible, who have personal situations or personality traits that lead them to require stability, certainty, and routine, will not fare well. The proposal for universal stakeholding would provide some measure of assistance to permit individuals, at a crucial time in their life-cycle, to start with a solid foundation. All these measures are a far cry from the old safety net of AFDC and general relief. Yet they have the potential for providing a new kind of safety net – a safety net of empowerment and opportunity for change, rather than a safety net of minimal subsistence and stasis.

B.IV.2 The European Proposal for Special Drawing Rights.

A very different approach to the problems of inequality and vulnerability flexibility has emerged in Europe. In 1996, the European Commission convened a group of labor relations experts to consider the impact of changes in the workplace on labor regulation in Europe. The group, of which Alain Supiot was the chair, studied the changing industrial relations practices in Europe and in 2000 issued its report, known as the Supiot Report. The Report describes a changing employment landscape in Europe that mirrors changes I have described in the United States -- a movement away from industrial era job structures toward more flexible industrial relations practices. It finds that the new work practices have entailed a loss of job and income security for European workers. The Report calls for new mechanisms to provide workers with "active security" by which they mean mechanism that equip individuals to move from one job to another. They contrast this need for active security from the welfare type of security of the past:

Rather than making welfare a type of compensation made available after supposedly unavoidable economic damage has been done, it should be turned into something which gives individuals and intermediary groups their own resources, which, in turn, will enable them to equip themselves with active security to cope with risks. . .

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[149] This proposal is put forward by Marina v.N. Whitman, NEW WORLD, NEW RULES: THE CHANGING ROLE OF THE AMERICAN CORPORATION 174-75 (Harvard Business School Press, 1999).

It therefore follows that security in the form of guarantees of a minimum standard of life, as traditionally provided by social security systems, has to be supplemented, because of the need for economic flexibility, by the objective of shaping, maintaining, and developing people's competencies during their lifetimes.[150]

The Supiot Report contains a number of suggestions for changes in the institutions regulating work to provide active security. Their most visionary, and most controversial, proposal is for the a creation of "social drawing rights" to facilitate worker mobility and to enable workers to weather transitions. The concept of social drawing rights is derived from existing arrangements in which workers have rights to time off from work for specified purposes such as union representation, maternity leave, and so forth. The report makes an analogy to sabbatical leaves, maternity leaves, time off for union representatives and training vouchers to observe that "we are surely witnessing here the emergence of a new type of social right, related to work in general."[151]

Under the proposal, an individual would accumulate social drawing rights on the basis of time spent at work. The drawing rights could be used for paid leave for purposes of obtaining training, working in the family sphere, or performing charitable or public service work. It would be a right that the individual could invoke on an optional basis to navigate career transitions, thereby giving flexibility and security in an era of uncertainty. As Supiot writes, "They are *drawing* rights as they can be brought into effect on two conditions: establishment of sufficient reserve and the decision of the holder to make use of that reserve. They are *social* drawing rights as they are social both in the way they are established. ... and in their aims (social usefulness).[152]

The purpose of the social drawing rights is to enable all individuals the flexibility to take time away from the workplace in order to manage transitions and build human capital. This approach responds to the new conditions of work lives, in which careers unfold in unpatterned ways and require an individual to operate both inside and outside the formal labor market at different and unpredictable times. Social drawing rights would smooth these transitions and give individuals the resources to retool and to weather the unpredictable cycles of today's workplace. Like the Ackerman-Alstott proposal for stakeholder grants, it would be an equalizing measure not because it is overtly redistributive but because it would help to equalize opportunity. Like the Ackerman-Alstott proposal for stakeholder grants, the proposal for social drawing rights would be a social investment in the ability of all to participate as equals in the emerging economic order.

The Supiot Report does not specify in detail how the social drawing rights would be funded, other than to suggest that they be funded by a combination of contributions from the enterprise, the state, social insurance funds, and perhaps individual savings. The question of funding may not be a major concern in Europe because most European countries already make substantial expenditures on social welfare that could, at least theoretically, be redeployed in this fashion. But to transpose the idea of social drawing rights to the United States would require a major reorientation in our social policy.

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[150] Alain Supiot, BEYOND EMPLOYMENT 197 (Oxford University Press, 2001).

[151] Id. at 56.

[152] See Alain Supiot, et. al., BEYOND EMPLOYMENT 56 (Oxford Press, 2001); Alain Supiot, et. al., *A European Perspective on the Transformation of Work and the Future of Labor Law,* 20 Comp. Lab. L. & Pol. Jo 621628 (1999). See also, David Marsden & Hugh Stephenson, *Discussion Paper, Labor Law and Social Insurance in the New Economy: A Debate on the Supiot Report,* Centre for Economic Performance, (London School of Economics, July 2001).

In the United States, we have precedents for the concept of paid time off with reemployment rights to facilitate career transitions or life emergencies. There are well established precedents for paid leaves for military service, jury duty, union business, and other socially valuable activities. Some occupations also offer periodic sabbatical leaves. The concept is also built into the idea of temporary disability in state workers compensation and other insurance programs, which provide compensation and guarantee reemployment rights for temporary absences. The recent Parental Leave Act extends the concept of leave time to parenting obligations, although it does not mandate that such leave time be compensated. These programs all reflect and acknowledge the importance of subsidized time away from the workplace to facilitate a greater contribution to the workplace. They could serve as the basis for developing a more generalized concept of career transition leave.

Like the stakeholder proposal, the proposal for social drawing rights an innovative policy proposal to date that is directly responsive to the needs of individuals in the face of the changing workplace. It has the potential to realize the ideal of freedom while at the same time equalizing opportunity, creating conditions of success, and reinforcing the central role of work in our lives. For these reasons, it deserves to be taken seriously on both sides of the Atlantic.

Employee Organization and Employment Law in the Changing US Labor Market: America Moves Toward Shorter-Time Jobs*

Alan Hyde

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The two most distinctive features of the US labor market over the last decade are (1) its remarkable capacity to generate new jobs, keeping unemployment at historic lows; and (2) sharp statistical trends toward shorter job tenures. While these two facts are obviously related (Katz and Krueger 1999; Blank 1998), it would be wrong to think that we have a tight, agreed-on economic model of their relationship. The US in the 1990s saw the creation of many new jobs in the service sector that are held for shorter periods than their equivalents in past decades. These kinds of jobs are unlikely to lose importance. Employment law and policy is more likely to accommodate to them, than to change them.

I. The Picture: Job Creation and Short Jobs.

I.A. Some Numbers.

I.A.1 US Unemployment and Earnings.

The bare facts about low US unemployment are not controversial. The unemployment rate in March 2001 was 4.3%, the forty-seventh consecutive month that it has been below 5%. Despite some signs of economic slowdown, the unemployment rate has barely changed (yet). The rate for adult men is 3.8%; for African-Americans, 8.6%, both among the lowest figures ever recorded. Average hourly earnings have also not begun to fall, indeed, rose 6 cents over the previous month. (BLS 2001). While wages were flat for most income groups (except the highest) in the early years of the Clinton recovery, they began to move in 1997. By 1999, real median household income had reached the historic high of $40, 816, an increase of 13.3% since 1993 (Economic Report of the President 2001: 188-92).

Where have all these new jobs come from? They were created entirely through decisions by private employers. They do not much reflect government initiatives to create jobs, which have played a fairly negligible role in the US economy of the 1990s. Nor do they reflect Keynesian deficit spending. On the contrary, the 1990s were a decade in which the US federal government ended its current account deficit and began running a surplus. The new jobs are almost entirely held by employees in the service sector. Manufacturing employment dropped slightly in the 1990s and public employment did not expand. Contrary to popular belief, the percentage of the workforce that is self-employed is at its historic *low* point (6.7 percent) (BLS 1999). So the new jobs are almost entirely held by employees, in the service sector.

I.A.2 Shorter Job Tenures; Increased Involuntary Separations.

There is also no dispute about the leading indicators of short job tenures, although there is fierce disagreement about their meaning. The median US worker has been with his or her current employer for 3.5 years, the lowest figure ever recorded. The median man has had his job for 3.8 years, the median woman 3.3, two figures that have been drawing closer: as the man's has decreased, the woman's increased until 1998 but has been stable since. More than a quarter of the workforce has been with its present employer for less than a year. Some median job tenures for subsections of the workforce: private sector, 3.2 years; public sector, 7.2 years; service occupations, 2.5 years (BLS 2000).

When scholars turn their attention to different surveys and data bases, disputes arise about the precise timing and long-term significance of the trend to shorter job tenures (see Neumark 2000). It is not worth our tracking these disputes here, many of which center around trends in one- to

three-year job tenures. The important point is that *all* indicators (involuntary separations, job tenures, perception of insecurity) point in the same direction (though to different degrees).

Moreover, the decline in really long job tenures is quite dramatic in all the studies. Jaeger and Stevens (1999) and Neumark et al (1999), despite expressed skepticism of significant change in the labor market, nevertheless found declines in the percentage of workers with more than eight or ten years tenure. Valletta (2000) found a higher rate of involuntary job loss for workers with high tenure. Farber (1997a) analyzed the Current Population Survey and found "a substantial decline between 1979 and 1996 in the fraction of workers who are in long-term employment relationships. Overall, the fraction of workers aged 35-64 who had been in their jobs more than 10 years fell by about 5.6 percentage points over this period with the majority of the decline occurring in the last three years." To pick just one telling example, the percentage of male workers between the ages of 40 and 44 who have been with their current employer for more than ten years declined from 46.3 percent in 1991 to 39.1 percent only seven years later (BLS 2000).

The numbers on involuntary terminations tell a similar story. Such terminations increased the years *before* 1992 (Boisjoly et al 1998; Valletta 2000). Most observers believe that this trend increased in the 1990s.

I.A.3 Interpreting the numbers: the changing labor market story.

It is possible that this decline in the percentage of workers with long job tenures may not actually represent much change in any individual's job. The US economy has been creating many jobs. It has also been creating many new firms, and those new firms create disproportionate numbers of new jobs (Krueger and Pischke 1997). If many workers are employed by new firms, a smaller percentage will be employed for long tenures, as Daniel J.B. Mitchell observed to me. Nor do the studies above permit much inference about trends over the next decade or longer.

However, most US observers tell a very different story about the decline in long job tenures and higher involuntary termination of long-tenured workers (e.g. Kruse and Blasi 2000; Cappelli 1999; Cappelli et al 1997; Herzenberg, Alic, and Wial 1999; Lester 1998; Osterman 1999). In this version, the numbers do reflect changes in individual jobs. Specifically, they reflect the elimination of career jobs inside the internal labor markets of large firms. These jobs were typically held by white men hired by large US corporations in the 1950s and 1960s. They worked either in unionized manufacturing positions, or in white-collar or supervisory roles. Their compensation increased gradually with time and was heavily back-loaded in the form of health and retirement benefits, designed so that each job would be held by an individual for his entire working life until retirement.

There is no good statistical proxy for just this kind of job, and perhaps the best evidence of their disappearance (better, failure to replicate) is the management literature summarized in Stone (2001). One possible proxy, not previously used for this purpose, might be the existence of a defined-benefit pension plan, guaranteeing a precise monthly payment after retirement. Such a defined-benefit pension was in many ways a good index of a career job. The trend in recent years has been away from such pension plans (Kruse 1995). Even in private establishments with over a hundred employees, where four out of five employees participate in retirement plans, only about half those employees have defined benefit pensions (US Department of Labor 1999b). In businesses with fewer than a hundred employees, only 15 percent have defined benefit pensions (US Department of Labor 1999a). It is thought that most of these individuals are older individuals

whose defined benefit pensions are "frozen": they remain in place, but new funds are not being added to them, and new employees are not enrolled in defined benefit plans.

However measured, obviously many individuals continue to hold such career jobs. Nobody believes they have disappeared, and talk of their disappearance is normally a straw figure set up for demolition. But it is quite clear that, of the millions of new jobs created in the US economy in the 1990s, few are of the traditional career type.

I.B. Some Imperfect Proxies for the New Short Jobs, and How to Use Them.

It would be nice to be able to present data on the entire class of noncareer, short term, service sector jobs now being created in the US. Unfortunately, there is no way of doing this. Whatever statistical proxy we use in this paper will inevitably bias the results. As a result, researchers are often in the classic position of embracing one portion of elephant anatomy and believing they have a grasp on the beast.

I.B.1 Service Sector Jobs.

As mentioned, nearly all the US job creation in the 1990s was in the service sector (Meisenheimer 1998). However, service sector jobs are quite varied. Some rapidly growing service sectors are well-compensated (legal, computer, engineering, and managerial services). Some have internal labor markets. In general, service jobs as such are not necessarily bad jobs (Herzenberg, Alic, and Wial 1999; Meisenheimer 1998).

I.B.2 "Contingent" Jobs (as described by employees).

Professional labor statisticians devoted a great deal of effort in the 1990s to coming up with a measure for "contingent" jobs. The results were disappointing, and not much more will be heard from this category in the future.

The basic contrast, which runs through nearly all current US writing on jobs, contrasts "career" and "contingent" jobs. This contrast is clear at the extremes but hard to document with precision. A career job is part of an internal labor market in which more skilled, or supervisory jobs, are effectively open only to those promoted from within, and in which the compensation package reflects an implicit contract in which the employee will remain on the job for life. Career jobs normally involve increasing compensation that may reflect returns to experience, returns to firm-specific human capital, or merely an "efficiency wage" contract in which the employer and employee prefer a contract with back-loaded benefits.

Career jobs are often contrasted with jobs that are not part of internal labor markets and will not last a long time. Sometimes, these jobs are called "contingent" jobs, a term that lacks legal meaning or much precision of any kind. While "contingent" jobs thus cannot yet be defined or counted, the features of the ideal type are fairly clear. They are "dead-end". They are not portals of entry to any internal labor market. There will be more turnover, little prospect for promotion, few benefits, wages right around the market rate--in short, little to tie the employee to the firm. The job itself only exists as needed by a particular employer.

The Current Population Survey on three occasions in 1995, 1997, and 1999, asked people whether their jobs were contingent, specifically, whether their jobs were "temporary" or whether they could "continue to work for your current employer as long as you wish" (Cohany et al 1998).

Under the broadest definitions, no more than 5 percent of the workforce describes itself as contingent under this definition (BLS 1999). Since about 15 percent of the US workforce saw their jobs disappear forever between 1993 and 1995 alone (Farber 1998), the Current Population Survey questions on "contingent" work tell us more about cognitive dissonance than about labor markets.

I.B.3 Alternative or Flexible Work Arrangements.

A larger and more useful category has been constructed by researchers, using those CPS surveys, called workers in "alternative" or "flexible" arrangements. This adds together employees of temporary help agencies; temporary employees hired directly by firms; employees who work "on call" (like substitute teachers); employees of contractors who contract to supply the labor of those employees; and self-employed individuals working as independent contractors. Together these five groups make up 18.6 percent of respondents. If part-time workers (13.6 percent) are added in, we get a group of workers comprising 26.3 percent of the workforce (Houseman and Polivka 1999).

The advantages and disadvantages of this category come from its reliance on the juridical form in which labor is rendered. This is an advantage if people can accurately sort themselves into one of the above categories. This is largely but not entirely true. For example, more than half of agency temporaries incorrectly name, as their employer, the client where they render services, not the agency (Houseman and Polivka 1999:434-35). About 12 percent of those who tell the CPS that they are independent contractors also tell the CPS that they are employees, not self-employed (Houseman 1999:4 n.3). This is a legal impossibility.

The disadvantage of this category is that the juridical form is not a very good index of job security, or of any other aspect of employment. It is true that, as a group, workers in "flexible" arrangements are less likely to have long job tenures: they make up 40.8 percent of those with a year of tenure or less, although they are only 26.3 percent of the workforce. Still, the group of workers in juridically "flexible" relations is not the same as the group of workers facing job instability. The most important omission is "regular" full-time employees. Studying workers in "alternative" or "flexible" arrangements tells us nothing about them. Most observers think that those "regular" employees face sharply increased risk of job elimination or involuntary termination. We cannot learn about their jobs if we focus only on the form. *Nearly all "contingent" jobs in the US--however these are defined--are held by statutory "employees" who are fully protected by all US labor and employment laws applicable to "employees"*.

I.B.4 Independent contractors.

On the other hand, some groups in juridically "flexible" relations do not face unusual job insecurity and do not present particularly pressing targets for policy reform (though specific individuals or subgroups may). Specifically, independent contractors (self-employed individuals who don't own farms or businesses) are disproportionately male, older, more educated, and white. They earn more than "employees." In two industries (finance-insurance-real estate, and agriculture) the self-employed outearn traditional employees by over 50 percent. Only 10 percent of independent contractors in the CPS special supplements are dissatisfied with that way of working (Houseman 1999:15). They do not, as a group, experience less job stability over the year than do supposedly regular full-time employees (Houseman and Polivka 1999:443-44). And, as mentioned, despite all the excitement in recent years about "consultants" and people "working for

themselves," independent contractors currently make up their historic *low* as a fraction of the workforce (6.7 percent). In short, of all the proxy groups on which one might focus to take the measure of the US job market, independent contractors are probably the worst.

I.B.5 Employees of temporary help agencies.

Perhaps because of the difficulty of generalizing about "service jobs created in the 1990s," there has been what may seem like disproportionate attention to the temporary help services industry as a kind of model of truly contingent services work. Only about 2-2.5 percent of the US workforce is employed at any given moment by a temporary help services employer. However, the sector quintupled from 1982 (the first year it was identified as a separate statistical group) to 1997. (Its percentage of the workforce has been level since 1997). Moreover, the number of individuals who work as a temp at some time in the year is higher than the number doing so on the date of any particular survey (Houseman 1997). Data on this group, finally, closely approximates the work experience of such larger groups as on-call workers, direct-hire temporary employees, and employees of a contract company, that is, employees in "flexible" or "alternative" work relations (Houseman and Polivka 2000). So this paper, too, will sometimes generalize, from the data on employees of temporary help agencies, to a larger class of contingent service employees, about which less is known.

The problem with focusing on temporary help employees is that theirs are pretty bad jobs, even by the standards of other employees in "flexible" arrangements. So normally one can generalize from this group in only one direction. If one finds aspects of temporary help employment that are not as bad as one thought, then probably things are no worse for other individuals in the new job market, such as other employees in "flexible" arrangements or even "regular" employees. For example, we shall see that temporary help jobs are *not* usually traps that individuals can never escape, and are often portals of entry into regular employment. If this is true of employees of temp agencies, it's probably true for everyone. By contrast, temp jobs are poorly paid and almost invariably lack benefits like health insurance or retirement plans. We cannot, however, generalize from this aspect of temporary help employees to the US workforce as a whole.

I.B.6 Individuals employed "at will".

If counting temporary help employees gives us too few employees to represent the "contingent"--no more than 2.5 percent of the workforce--counting employees who are employed "at will" gives us too many. Around 77 percent of US workers are legally employed "at will." The exceptions are those in the public sector (15.5 percent of the workforce) and those working under union contracts (around 9 percent of the private sector, or 7.6 percent of the total workforce). Of the rest, some are protected by antidiscrimination laws that may make it difficult as a practical matter for an employer to fire them, and a few others by employment contracts, formal or informal. Still, the overwhelming majority of the US workforce has no legally-enforceable job security.

In the discussion that follows, I want to focus on the 30-50 percent of the workforce (my estimate) that holds jobs where there is a quite realistic chance either of the employee's discharge, or the elimination of the job, within the next couple of years. Mindful that the median employee in the private sector has been with his or her present employer only 3.2 years, I will call these "short jobs," a term chosen precisely because it has no legal or statistical meaning.

II. Why Short Jobs?

The usual candidates that appear to explain the trend toward shorter jobs and the decline of internal labor markets are:

(1) the decline of sheltered US markets and rise of international competition;

(2) a genuinely uncertain business climate following the oil shocks of the 1970s;

(3) pressure from institutional and other investors dissatisfied with steady but slow returns on investment; and

(4) weak unions unable to oppose, either politically or through industrial action, the dismantling of internal labor markets.

Three other factors sometimes cited seem less important to me.

(5) Whatever the explanatory force in other contexts of that vague bugaboo "globalization," it appears to explain little about the US labor market, where trade continues to constitute a relatively small fraction of economic activity. See, however, Bertrand (1999), finding that firms facing import competition are more likely to have wages that respond to market forces, rather than orderly progression from a given baseline. The more significant factor, mentioned as (1) above, is not global trade as such, but the decline in the number of US employers operating as monopolists or oligopolists and thus able to share rents with their employees. Obvious US examples include automobile, steel, tire, and business equipment manufacture.

(6) Immigration levels into the US have been at historic highs. Over 11 million people immigrated to the US in the 1990s (and were counted by the Census in 2000; presumably the total group of immigrants is even larger). This is more than the entire foreign-born population of the US in 1970. This immigration might appear to increase labor supply in a way that would increase employer power (to impose contingent work on unwilling employees, for example). Nevertheless, almost everyone who has gone looking for labor market effects of immigration into the US in recent years has failed to find them (Gaston and Nelson 2000 review the evidence).

(7) Employee demand does not seem to be an important factor shaping the short jobs that we have. Seventy percent of agency temporaries tell the CPS special survey that they would prefer a job that would last longer than a year (Houseman 1999:15). Of course, some of the other short jobs are more desirable. Some individuals prefer consulting work or other work with frequent turnover, and others adjust to it (Kunda et al 2002; Bronson 1999:98-138; Bradach 1997). When some employers offer short jobs, workers will sort themselves. But nobody believes that employee demand really is driving the menu of choices offered (Golden and Applebaum 1992).

In truth, with hindsight, it is more difficult to explain why internal labor markets so dominated large corporate practice in the 1950s and 1960s than it is to explain why the system fell apart in the 1980s and 1990s. The mythology of the internal labor market was that executive and managerial services at higher levels could only be provided by career employees who had worked their way up through the ranks, been trained by the company, had seen all the company's facilities, and so on. Economists obligingly dubbed this "firm-specific human capital." Today, companies have learned that absolutely any service or expertise can be purchased in the market on a short-term basis, including a chief executive officer (Bradach 1997). What prevented companies from learning this lesson earlier?

I believe that the internal labor market, though with antecedents in the 1920s (Jacoby 1985), really flourished as a way of organizing work for the generation of men who entered the work force following military service in World War II. To manage this generation, it required no unusual perspicacity to see that high effort could be induced around themes of loyalty to (and by) the organization, jobs defined by location in a stratified bureaucracy, and lifetime employment. The link became particularly apparent when jobs were actually defined in military ways. For example, plaintiffs seeking to break down AT&T's highly sex-segregated job ladders in the 1970s learned of entire ladders in the organization that began with service in the Army Signal Corps. While the practice of internal labor markets thus arose almost naturally, their theory became synthesized only later, when the system came under challenge. New kinds of workers entered the workforce in the 1960s and 1970s: immigrant engineers and professionals whose immigration was enabled by the 1965 amendments to the immigration law, new women workforce entrants, other civil rights claimants. They saw access to higher jobs blocked by older white men, many of whom lacked engineering or professional degrees but had simply risen through the ranks (Cappelli et al 1997:16-19). The "firm-specific human capital" story arose to explain why this was not (as might have appeared) discrimination. Rather, these senior employees were said to represent both the employers' reaping their earlier investment in "firm-specific human capital" and, at the same time, upholding their end of an implicit contract. This rationale for internal labor markets has now disappeared with the retirement of the World War II generation.

Greater use of short jobs undoubtedly responds to all four factors mentioned above (loss of oligopoly, business uncertainty, investor pressure, weak unions). It is not possible to untangle them, and by now, altering any one of the four would be unlikely by itself to impede the growth of shorter jobs.

My own belief is that genuine uncertainties in the business climate are more important than weak unions. Management in the US has fought unions, and union density has shrunk. Unions are less able to protect members. This undoubtedly affects wages. But it is less clear to me that it affects whether jobs are long- or short-term. First, the actual practice of US trade unionism has never impeded layoffs. Union organization is actually associated with tendency to lay off (Turnbull 1988; Medoff 1979). Unions create incentives for employers to lay off marginal labor in order to preserve jobs and standards for a core, although such incentives are strong for employers whether or not they bargain with unions (Bewley 1999). In other words, employers that need to maintain flexibility in hiring or shedding labor do not *for that reason* have to oppose unionization (Katz and Krueger 1999).

Second, genuine uncertainty and the desire to protect some labor standards also drives the clients of temporary help firms. The heaviest users of temporary employees are not awful, rapacious, cutthroat hirers of labor who hire temps in order to keep labor standards down, for everyone, although such employers do exist (e.g. McAllister 1998). Rather, use of temporary employees is *highly* associated with *generous* employee benefits. Firms hire temps because their standard compensation package is above industry standards, and therefore too expensive to extend to a new employee, when business conditions make it unclear that a new addition to the workforce is really a permanent need (Houseman 1997: viii).

Third, surveys of employers using temporary help cite unexpected needs (52.2%) or unexpected absence of regular employees (47%) far more frequently than saving on wage and benefit costs (11.5%) as reasons for hiring temps (Houseman 1999). Finally, one frequently encounters *both*

generous compensation *and* short job tenures in booming but uncertain economic sectors, such as the US high technology sector (Hyde, 2000; forthcoming).

III. How Short Jobs Contribute to Economic Growth and Low Unemployment.

When it became evident in the mid-1990s that the US was generating new jobs, but that they were disproportionately short jobs in the services sector, there was a debate about whether these were "bad" or "lousy" jobs. That debate is largely over inside the US. Short jobs are here to stay, and the debate has shifted to policy initiatives that respond to that fact (taken up in Section V of this paper).

As this section will describe in greater depth, short jobs can be remunerative and satisfying. They are important in shifting the phases of economic cycles. During recessions, employers will create short jobs who would never create jobs that they could not later eliminate. Likewise, individuals who lose jobs in a recession can pass through short jobs on their way to something better. Rapid turnover of employees can contribute to economic growth in other ways than merely improving the match of employees to jobs. Specifically, employee turnover is positively associated with the spread of information among firms, enabling firms to learn about best practices elsewhere and to improve productivity. There is no evidence that rapid turnover is associated with adverse psychological consequences.

The principal drawback of short jobs, in the eyes of some, is not seen as a drawback within the US: they do appear to be associated with inequality. However, there is no effective political constituency in the US now that advocates addressing social inequality, at least, not if that means improving job stability for a minority of the workforce and thus condemning others to unemployment. The result is that there is likewise no political constituency for ending short jobs, or converting them to more stable jobs. Rather, current policy debates assume the continued popularity of short jobs and address their implication for existing and future programs of employment and labor law.

III.A Flexibility.

Little needs to be said about the most familiar economic defense of short jobs. In any microeconomic model, gains are achieved by eliminating impediments to adjustment. Labor markets stand out for being slow to adjust. In the quip of William Nordhaus, if auction markets adjust at the speed of light, labor markets adjust at 55 miles per hour. Labor markets characterized by internal labor markets, or wages above market-clearing levels (so-called "efficiency wages") are indeed slow to adjust, so anything that reduces those tendencies should achieve some gains through match.

While there is much truth to this familiar story, it would be wrong to suggest that there is an agreed-on economic model of the gains from labor market deregulation. Labor markets are full of idiosyncratic features: cultural traditions, specific wage comparisons, all the ways in which human beings are unlike other factors of production. It is thus by no means unusual for countries to shred safety nets or other "impediments" to "labor market adjustment" and achieve no measurable gains in job creation, wealth, or any other desired goal (Esping-Andersen 2000; Freeman 1994). If there were no more to the American job creation story than increasing the speed of adjustment, there would be little reason for other countries to emulate it. The goal of this brief

essay is to move *beyond* the "flexibility" paradigm in understanding some economic consequences of shorter job tenures. The first step is to understand that, in the US economy, job changes are not necessarily signs of "bad match", as in conventional labor economics. They are an expected part of the system.

III.B Shifting the phases of economic cycles.

Short jobs turn out to be an important part of softening the blows of business cycles on workers. Farber (1999) found that workers who lost their jobs were likelier than other workers to be temps or self-employed in the year following job loss. However, the likelihood of regular employment increased with the time since job loss, so that by four years after job loss, job losers had regular jobs at the same rate as those who hadn't lost jobs. Part-time jobs, too, were similarly important as part of the transition from job loss to reemployment full-time.

We can see that temporary or alternative jobs are *transition* jobs, here, from job loss to full-time employment. This casts new light on the spike in temporary jobs in the early years of the Clinton recovery from the (first) Bush recession. The concern about the "future of lousy jobs" was overstated. In the early period of a recovery, employers will understandably be wary about creating new jobs, particularly employers who (as is typical of users of temporary labor) pay generously. If the temporary job form is available, employers will use it in uncertain times. As the recovery becomes more robust, some of these jobs will become permanent.

Similarly, in slowdowns, the temporary jobs will be shed first. In fact, this appears to be happening in early 2001. I mentioned that, despite the current economic slowdown, the unemployment rate has risen overall only to 4.3% from its low of 3.9%. However, one sector in which employment has been falling faster than the average is precisely temporary help services, which began declining in September 2000 and declined for six consecutive months thereafter, shedding 273,000 jobs (BLS 2001).

III.C Transitions.

The implication of the last section is that people rarely stay in temporary jobs forever. Much of the concern about "contingent" work over the last decade invoked just this image of low-skilled workers, trapped forever in a succession of temp jobs, unable ever to secure regular employment. There are such individuals (e.g. McAllister 1998), and there should be much better policies to build paths into regular employment for them (Section V.B.). But it would be a mistake to make policy on the erroneous assumption that this is the most common pattern.

Surprisingly, temporary help jobs turn out sometimes to function like the "portals of entry" into the internal labor markets of another era. Smith (2001) studied temporary workers at a California high technology firm who seemed to think they had about as good a job as they could get. They had worked at the firm for a median of 27 months (almost exactly the median job tenure for a US service worker, which is 2.5 years). Nearly all (94 percent) sought permanent positions at that firm, and believed with some justification that a temporary position was the only path to that goal. About 43 percent of employers surveyed report "occasionally" or "often" moving temporary help employees into a permanent position (Houseman 1997).

A study currently underway (Finegold, in process) reviews the histories of 25 thousand individuals who were assigned by the large agency Manpower. While the study is not yet published, two of its authors shared preliminary findings with me by telephone in April 2001. The vast majority work

as temps for a very short time, often in transition into, or out of, the workforce. Around 25 percent of everyone who had worked for Manpower between August 1999 and February 2000 were in permanent employment by March 2000. Around 60 percent will eventually make that transition.

III. D Endogenous growth through information diffusion.

A final contribution of short jobs to economic growth is more speculative, but is attracting increasing attention. When employees leave jobs to go to a competing firm, they carry information with them. The spread of such information across the boundaries of the firm plays an important role in economic growth.

This was first observed in the literature on "Silicon Valley," the high-technology district around Stanford University in California, which has combined exceptional economic growth with unusually high rates of job turnover and start-up firms. Saxenian (1994) argues that precisely this network economy enabled Silicon Valley to surpass the rival computer, semiconductor, and software firms around Boston's Route 128. At the time of her study, Boston's engineers pursued orderly careers up the job ladders at Digital or Wang, while their counterparts in California formed start-ups, skipped to rivals, or put together projects involving knowledge that necessarily became shared among networked or rival firms (see also Langlois 1992).

In the economic literature on endogenous economic growth, information is the most important factor in economic growth, specifically, information that is nonrivalrous and nonexcludable (Romer 1990). Employee mobility is probably the most important single mechanism of diffusing such information. Schools of course teach basic science, but no US region would thereby reap much advantage over any other US region. Moreover, if information taught in schools were the key to growth, US regions should lag many European and Asian regions. Technology can be licensed, but that mode of information transfer seems to assume information from which others *can* be excluded, or else there would be nothing to license.

Studies have begun to document the role of mobile employees in spreading the information that enables economic growth. A classic is Collins (1974), showing that no laboratory ever succeeded in building a particular kind of laser known as a TEA laser, without having employed someone who had worked in a laboratory that had previously built a TEA laser. While every aspect of building such a laser had been published in academic journals, it proved impossible to replicate unless someone had actually seen it done. The most important recent study, of the manufacture of hard drives (mostly in Silicon Valley), is by the Federal Reserve Bank of Minneapolis (Franco and Filson 2000). Of sixty-eight firms entering that industry over a twenty-year period (1977-97), forty were started by former employees of existing firms, and those forty included all but four of the start-ups that generated revenue, accounting for 99.4 percent of the total revenues of the start-up group. The greater the existing firm's technological know-how (measured by the range and capacities of its products), the greater the likelihood of employees leaving to start a start-up, and the longer the start-up will survive. Start-ups included both innovators, and firms that basically imitated the older firm. The result was that the price of disk drives fell while firm profits increased. Cooper (2001) is a formal economic model of this process.

This may appear to be a theory that applies, if at all, only to laser scientists and disk-drive engineers. I do not believe that to be true. Economic growth involves more than new lasers and disk drives. It also involves many small-scale productivity improvements in which companies improve

the way in which they do what they do. (On the role of information in improving productivity in service industries, see Herzenberg, Alic, and Wial 1999:83-106). Ordinary working people, even supposedly "unskilled" laborers, know a great deal about the best way to do their jobs, more than their bosses know (Juravich 1985; Kusterer 1978). When they change jobs, they inevitably take that knowledge to the new employer, which should be able to benefit from it (unless it makes no effort to learn). Some of the new short jobs are short precisely because they are the form in which one employer acquires information from another. This is a harder process to document, but I have no doubt that research over the next decades will confirm the crucial role of employee mobility in the information diffusion necessary to endogenous economic growth.

III.E Stress.

There is no literature documenting particular psychological stress associated with rapid turnover jobs, unless you count Richard Sennett, *The Corrosion of Character* (1998), which purported to find such stress based on a sample of a single case, a man Sennett sat next to on an airplane. Contrary to the metaphor in Sennett's title, character, like most things, normally "corrodes" due to inactivity, not excessive activity. By contrast, individuals who were very loyal to their companies and attached to their careers had the most psychological difficulty adjusting to change in Heckscher (1995). There is some psychological literature on stresses attending work as a temporary help service employee (Beard and Edwards 1995). This raises the two-way generalization problem referred to above in connection with all the studies on temps: these are not very good jobs, but the workers holding them are not very skilled, and it is not clear how satisfied they would be on other jobs to which they might realistically aspire.

Future studies will no doubt refine our understanding of the psychology of job changes. They will uncover individuals who would function better in traditional career jobs. However, they will reveal others who strongly identify with a particular profession or craft, regard organizations as dysfunctional from a technical or scientific perspective, strongly dislike intraorganizational "politics," and prefer constant new challenges and freedom from organizations, particularly where they are well-compensated for this choice (see, e.g., Kunda et al 1999; Bronson 1999:98-138; Bradach 1997 for interviews with such individuals). In nostalgia over the loss of career jobs, it is important not to forget such powerful critiques of them as Melville's "Bartleby the Scrivener" or Pessoa's *Livro do desassossego*.

III.F Inequality.

By now, everyone knows that the US has inequalities of income and wealth unprecedented in the modern age. Apparently one must return to ancient empires to find their equal. Essentially all of the increase in national income over the past thirty years has gone to those in the top third (Ellwood 2000). Increasing economic returns to education have probably played the biggest role in this expanding inequality. In 1979, a male college graduate in the US earned an average 30 percent more than his high school equivalent. By 1995, the difference had increased to 70 percent (Slaughter 1999:610). The spread of information technology has contributed to rising returns to education and thus these distributional effects (Autor, Katz, and Krueger 1998).

However, the short jobs associated in the US with information technology, and other uncertain business climates, have probably also contributed to inequality, particularly when accompanied by the decline of traditional internal labor markets. At least some alternative work arrangements, such as temporary and part-time work, are comparatively unremunerative. The growth of such

jobs has contributed directly to increasing inequality. A society more committed to equality than the US might think long and hard before adopting policy initiatives that made it easier to create short jobs.

Short jobs need not be (indeed are not) inevitably bad jobs, and their relationship to income distribution is complicated. It might well be possible for a society experiencing unacceptably high unemployment, but more committed to equality of distribution than the US, to proceed in the following way. It might eliminate impediments to the creation of short jobs (by permitting temporary help agencies, or reducing the burdens on the formation of new businesses (Krueger and Pitschke 1997)). At the same time, it might insist on policy initiatives to encourage transition, from short jobs into more stable employment (Herzenberg, Alic, and Wial 1999).

Such an experiment may or may not be feasible, but it will have to be conducted someplace other than the US. There is no effective political constituency within the United States devoted to reductions in inequality of income or wealth. Likely Congressional initiatives will move in precisely the opposite direction, by reducing progressive aspects of the income tax and eliminating the tax on estates. Recent analysis of 128 thousand European and American responses to surveys about happiness, correlated annually with statistics on inequality and unemployment, shows a large, negative, and significant effect of inequality on happiness in Europe, but not in the US. The only group in the US that seems at all negatively affected by inequality is Democrats in the upper half of income, and the effect even on them is slight. Individuals in the lower income half, and of course Republicans, are completely unaffected by measures of inequality, though the lower income half is affected by the rate of unemployment (Alesina, Di Tella, and MacCulloch 2001).

A safe prediction therefore is that US politicians will do nothing to disturb the current legal infrastructure supporting short jobs (Section IV). They may support some initiatives that build on the good features of short jobs (low unemployment, phase-shifting effects, diffusion of information) to make them more attractive (Section V).

IV How the US Employment Laws Support Short Jobs.

The explosion of short jobs in the US results from decisions of private employers that were not impeded by US law. There was no legal or policy decision to encourage them. The terms "deregulation" and "neoliberalism," standard in European discussions, are completely inapposite in the US. There was no "deregulation," because there was so little regulation in the first place. The little regulation of employment contracts that the US had in the 1960s and 70s remains completely intact after the 80s and 90s (though there is some evidence of diminished resources for enforcement, Wial 1999). There is no "neoliberalism," just the same old economic liberalism.

US requirements of substantive terms of employment contracts are quite light. Workers must receive minimum wage, and one-and-half-times normal pay for overtime hours. Many workers are exempt even from this requirement. Most of the exemptions are in Section 13 of the Fair Labor Standards Act, 29 U.S.C. §213. In many ways this is the single most revealing text in U.S. employment law. It rolls on for pages, listing numerous employees who need not receive overtime pay or even minimum wage. Each exemption was clearly drafted by lawyers for the relevant employers. No effort is made to put the exemptions into uniform drafting style. There is no pretense of equal application of the laws and no logic underlying the exemptions except the political strength of relevant employer groups.

This weak regulation has three particularly important implications for policy and regulatory aspects of US job creation. First, employers can create low-paid and rather temporary jobs without resorting to any particular institutional form (legal or illegal). Second, the scope for additional regulation is quite limited, since the general flexibility of the system makes regulation easy to evade. Third, it is quite difficult under US law to target particularly needy or dependent workers.

IV.A The Incredible Lightness of Regulating the Employment Relation.

The first point is just another way of restating that most contingent workers, however defined, are statutory employees, protected by all employment and labor laws. When a US employer wants to create a new position that will be paid the minimum wage, lack retirement or health benefits, and may be terminated if business turns down, it simply does it. There is no need to resort to subterfuge, such as calling such individuals "independent contractors", or to pay them "off the books". About the only workers who are routinely paid in cash, "off the books", are immigrants whose immigration status does not legally permit them to work.

Too much has been made in recent years of individuals "carried on the books" as independent contractors but "really" employees. The Dunlop Commission studying reform of the labor laws 1993-4 heard testimony about immigrant office cleaners who paid for the "franchise" to clean each floor (Commission on the Future 1994:93 n.2). There has been a great deal of publicity about individuals whom Microsoft called "freelancers" but who were eventually held by the tax authorities to be "employees."

In truth there is rarely any labor or employment law advantage to the employer in misclassifying employees in this way, and no systematic effort to do so. The main practical difference between paying an individual as an "employee" or "independent contractor" has to do with the tax laws. There were only two effects of finding the individuals at Microsoft to be "employees." First, in the future their taxes must be withheld by their employer. Second, they had to be permitted to participate in one very unusual employee stock purchase plan that by statute--unlike any other benefit plan--must be open to all employees. It is rarely appreciated that they lost on every other claim they made to be included in Microsoft benefit programs, such as health insurance, pensions, and the self-directed stock purchase plans known as "401(k) plans."

IV.B Evasion of Law.

There appears to be one important exception to the generalization that use of alternative work arrangements is rarely driven by a desire to evade employment laws. Use of temporary help agencies appears to have been spurred by legal doctrines permitting individuals to challenge their discharge. In 1991, the Civil Rights Act of 1964 was amended to increase damages for victims of discrimination and provide clearly for trial by jury. It appears that this influenced the rapid growth of the temporary help sector over the next few years. Employers have candidly told researchers that they value the ability to have the agency get a particular individual out, without having to create a paper record or be vulnerable to a discrimination suit. Similarly, use of temporary help employees often jumps in the year following a particular state adoption of legal grounds for challenging discharge (Autor 2000; Miles 2000).

The ease with which employers can refashion employment contracts places constraints on regulatory responses. Regulation of one kind of employment contract simply creates incentives for employers to use another.

IV.C The Absence of a Category for Needy or Dependent Workers.

Countries that specify a greater range of terms of employment contracts develop tests and vocabularies for distinguishing white collar from blue collar, professional from production, or highly-compensated from low-compensated work. An oddity of US employment law is that these terms mostly lack legal meaning. Although this Chapter was supposed to deal generally with short jobs and their impact on the US labor market, the occasional reference to computer programmers, managers, and similar individuals who present few problems of protection in any legal system, reflects this fact. There is often no convenient way in the US of taxing, regulating, or otherwise discouraging, say, independent contractor status among house cleaners, without creating problems for firms hiring well-paid project leaders as independent contractors, to the mutual satisfaction of each. The development of legal classifications that would permit attention to the most dependent workers is obviously not beyond human imagination. But it is not a current feature of US employment regulation.

IV.D Weak Regulatory Institutions in Employment Law.

Nor would such classifications be easy to develop through existing regulatory institutions. Distinct features of the current US political scene include: low Congressional and judicial respect for technical administrative agencies, such as the Department of Labor, and active Congressional intervention on behalf of favored industries or even individual firms. These factors are not exogenously given. Obviously, they reflect the political weakness of organized labor and its allies, even in Democratic administrations and Congresses.

For example, after some prominent accidents involving teenagers driving pizza delivery vans, the Department of Labor's Wage and Hour Division began a well-publicized campaign to enforce standards that prevented minors under age 18 from driving trucks at work. Congress responded by amending the Fair Labor Standards Act to permit 16-year olds (later raised to 17) to drive on the job. Truck drivers at the large Federal Express company are not unionized, as a result of the company's successful effort in 1996 to have Congress classify it as an "airline" whose employees may only be organized in nationwide classes. It is difficult to explain the US practice of legislative favors for single companies, favors largely purchased with campaign contributions, to people familiar with legal systems that adhere to the norm that laws should be general. Resources appropriated to enforce existing labor standards are so inadequate as to amount to effective repeal of the statutes. The enforcement resources of the Wage and Hour Division are smaller than twenty years ago, and its declining enforcement rates have contributed directly to US wage inequality (Wial 1999).

We turn now to current private and public policy initiatives to deal with the new world of short jobs, retain their contribution to low US unemployment, but make them better jobs for workers, particularly low-paid workers. The point of the foregoing is to help explain why this section emphasizes new organizations, and new voluntary policies, but says little about new regulatory initiatives.

V New Institutions in the New Labor Market.

V.A New Labor Market Intermediaries.

Even the US labor market has not yet become the kind of labor market in neoclassical models, in which the entire nation "shapes up" each morning like a group of unemployed longshoremen. New intermediaries have arisen to help broker labor contracts. The most important numerically are the temporary help agencies (already discussed), and the new job sites on the internet. It is possible that this need for intermediaries creates opportunities for employee organizations, either unions, or new forms of employee organization. This hope has not yet been realized.

It's common even in conventional labor economics to observe that labor markets are full of information asymmetries and other information that can be produced only by incurring high search costs. This chapter is not the first to "bring information into labor markets." Still, this insight is normally applied to a stock, limited set of information asymmetries. Typically, the worker knows whether he or she will shirk or not, but the employer doesn't know this. Or, in the models of ownership of intellectual property, the worker may develop valuable ideas, but neither the employer nor worker knows this in advance.

In a high-velocity labor market like the contemporary US, the information problems are considerably more complex and serious. Consider the complex of high technology industries in Silicon Valley. The employer may effectively know nothing about potential workers. The workers may know nothing about potential employers. And these very low levels of knowledge are then divided by the thousands annually, as firms with rapid employee turnover must repeatedly choose among employees who repeatedly move among firms.

Consider first the hiring employer. It needs employees with particular technical skills to be applied first to known, but thereafter to unknown, technical problems. Past work experience will be an imperfect source of information and educational attainment no help at all. Potential employees may describe the programs they created or products they designed on past jobs, but little objective evidence will be available to evaluate their claims. The best programmer may have only a high school degree, not a Ph.D. in computer science from Stanford. Most relevant information about employee ability can be learned only on the job, and the short job tenures that are the subject of this entire chapter are in part explained as informational devices.

If conventional labor economics has simplified the employer's informational needs, it has positively neglected the employee's. However, the employer's "reputation"--the usual cure-all in conventional labor economics--conveys little information to an employee selecting among competing startups and perhaps evaluating them against an offer from a more established company. "You can't really know whether an e-commerce company is going to fly," said a 25-year-old tech-support worker handing in a resume at a job fair. "It's a roll of the dice--just like investing in the Nasdaq." (Ethan Smith 2000).

V.A.1 Websites and similar job search vehicles.

Literally thousands of websites devoted to job placement have sprung up in the last five years or so. These include formal job boards, websites offering searchable databases of job listings and resumes, employer-initiated searches that target promising ("passive") candidates through their online credentials ("talent mining"), usenet bulletin boards and listservs, and systems internal to companies. It is probably impossible to get an accurate count of the number of websites, which

is certainly in the thousands, let alone an overall picture of how they are used. Autor (2001) cites estimates of twenty-nine million jobs posted on-line (not necessarily unique) and over seven million resumes.

Benner (2000) calls dice.com the "most prominent site in the Silicon Valley high-tech recruiting industry. While the name actually stands for Data-processing Independent Consultants' Exchange, the gambling metaphor that accompanies the Dice imagery actually captures fairly well the type of high-rolling lifestyle that high-end contractors aspire to." Each month, twenty thousand distinct job seekers make over three million visits to the site (see Teuke 1999).

These online resources, like rapid turnover and short tenures, make labor markets more like classical markets than ever before. Individuals can advertise their skills to employers as well as the reverse, and each has access to unprecedented levels of information. Particularly telling is the heavy use by *employed* workers, some seven percent of whom told the Current Population Survey in December 1998 that they had used the web to search for new jobs that month (Kuhn and Skuterud 2000). This is believed to be many times the quantity of job searches by employed workers that took place before the internet (Autor 2001). More efficient matches to jobs should raise productivity.

New labor market intermediaries offer some potential for eliminating inefficiencies connected with information asymmetry, poor matches, and preferences falsified by employers or employee organizations. They might even help address the collective action problems that show up as adverse selection problems, by raising the quality and quantity of information available about worker preferences. For example, it is unusual for Silicon Valley firms to offer pensions. Suppose that this reflects adverse selection: firms fear that a high-tech firm that institutes pensions will become a magnet for time-servers. If even high-tech workers start to want pensions, firms will be able to see that this demand is really widespread, and may worry less about adverse selection. (This example is hypothetical; to date, the information transmitted through the new labor market intermediaries is that pensions and benefits are less important to high-tech workers than many have supposed. This general fact will become important when we discuss the fate of groups trying to market benefits to mobile workers).

Autor (2001) raises some cautionary notes about the efficiency advantages of web-based job sites. When applying for jobs becomes cost-free, employees will apply to jobs for which they would have considered themselves unqualified (if they had to pay to apply). The cost of distinguishing among these candidates is borne partly by employers, who must pay for additional information, and partly by other employees who must implicitly pay more to establish their qualifications. "A standard result of signaling models is that high quality workers pay to acquire a signal that distinguishes them from others. If the price of the signal falls, lower quality workers also acquire it and employers face more difficulty separating wheat from chaff." Autor suggests possible responses. Employers might make greater use of, at the least, screening services (to find out whether individuals really have the credentials advertised). They might rely more on intermediaries like employment agencies to certify employees. They will do more of their own talent mining, or place greater reliance on personal contacts. Finally, employees may post richer on-line resumes that will include "project portfolios, dockets of customer evaluations, and even standardized personality assessments."

V.A.2 Will unions organize the new service workers?

The need for new labor market intermediaries in the new US labor market seems to create an opportunity for unions, which have found it very difficult to organize new jobs in the service sector. It is not obvious why this should be so difficult. It is true that US unions achieved some of their greatest successes among manufacturing firms with internal labor markets. Some of these successes are not particularly relevant to today's short service jobs: job stability; diminished turnover; returns to seniority; benefits aimed at senior employees, like health insurance and pensions (Freeman and Medoff 1984). An employer in the uncertain services sector might be expected to resist strongly, both such union demands, and unions themselves (Freeman and Rogers 1999).

But this is far less than the whole story of US unions. Unions also have strong traditions in the representation of contingent services workers. Consider unions in the construction and building trades. Many construction workers work, over the course of a year, for many different contractors, on many jobs. Despite this uncertainty, construction workers are not usually included in discussions of "contingent" work. The difference is the union. Construction workers who are represented by a labor union typically have health insurance (87.1 percent), paid vacations, and a pension (67 percent). Construction employees who are not represented by a union normally have no health insurance (only 41.4 percent get it through work) or pension (only 22 percent have one) (Center to Protect Workers' Rights 1998: charts 3, 26, 27). The employer on a unionized construction job pays contractual amounts, per hour worked, into trusts, jointly administered by the union and employers, that pay health, vacation, and retirement benefits. In many ways, this kind of unionism is the best model for today's contingent service workers. (Construction unions often operate hiring halls that provide labor to contractors on request. While this can facilitate administration of the benefits plans, it is not necessary to them).

A large academic literature by scholars sympathetic to labor unions has suggested numerous models for the organization of low-wage, mobile, service employees, reviewed in turn in more detail in Hyde (1998, 2002) and Stone (2001). Among the more interesting theoretical models include:

i) regional craft association, once employed by waitresses (Cobble 1991);

ii) ns for low-wage service workers based on particular aspects of their work organization (Wial 1993);

iii) unions with a strong community component, such as the successful organizing of janitors by the Service Employees International Union through "Justice for Janitors" campaigns involving community participation through political leaders, ethnic festivals, and demonstrations (Martínez Saldaña 1993);

iv) unions that train employees and function as job referral agencies (Silverstein and Goselin 1996).

A union organized on any of these lines (or any other) could then administer benefit programs for workers; provide more reliable information about employers than websites; and provide political representation for worker interests. There have been organizing efforts along all the above models in recent years, with only modest success. Among the more interesting is the Washington Alliance of Technical Employees (Washtech), a project of the Communication Workers, designed

to give voice to, and train, freelance and temporary workers at Microsoft and other Seattle information technology firms (duRivage 2000).

As a general matter, US labor law could be made much more facilitative of union organizing of all types, as has been much discussed (the best introduction is still Weiler 1990). Apart from these general impediments to unionization, the chief specific legal impediment, to the organizations proposed for mobile employees, is the lack of authority in the National Labor Relations Board to certify a bargaining unit with multiple employers. Such bargaining takes place, but is voluntary with the employer, who is free to withdraw from multiemployer bargaining at any time except when new contract negotiations are actually underway.

The Board has retreated from some extensions of this doctrine that have really impeded union organization among temporary help workers. For years, the Board took the position that including temporary help employees in a bargaining unit with regular employees was a kind of multiemployer bargaining that required the mutual consent of the temporary help agency and the client firm. The Board will now certify a unit of all employees working at the client, including regular employees and those jointly employed by the temp agency, to bargain with the client. It will also certify a unit of all the temporary employees working at various locations but referred by the same temp agency, in order to bargain with that temp agency. It is possible that these changes will spark new union organizing among temporary help employees. However, they represent the outer limits of the Board's power. A unit of all the temps working at many different clients, to bargain with those clients, is a multiemployer unit, voluntary with each client. *M.B. Sturgis, Inc.*, 331 NLRB No. 173 (2000). Nor does the Board have authority to force any client, and the temp agency, to bargain jointly with the employees whom they employ jointly.

V.A.3 New forms of employee organization?

It is sometimes asserted that the mobile service workers of today's economy require a completely new form of employee organization. I do not share this view. I think that most would be better served by organization along the lines of a traditional construction or entertainment union, providing bargaining with employers, benefits administration, job referral, and training, than any of the rival organizations that have emerged so far. For lower-wage contingent workers, there really are no rivals to union representation.

However, salaried workers without unions, particularly in information technology, have taken action through several alternative forms in recent years: Working Today, which designs and markets benefits to mobile individuals, many self-employed (Horowitz 2000); informal action on computer networks (Bishop and Levine 1998); web sites for disgruntled employees; ethnic or gender caucuses organized with assistance from employers; and informal ethnic networks that assist employees across firm lines (Saxenian 1999). The achievements of these groups are modest and do not require extended treatment here (see Hyde, 2002; 1993).

V.B New Definitions of Career.

Low-wage, contingent service jobs can be portals of entry to something better. The best of all worlds might be to retain the ease of creation of such jobs, to enable labor market entry and transition during recessions or early recoveries, but to link them to more defined careers at the same or other employers. Herzenberg, Alic, and Wial (1999:123-48) review recent voluntary multiemployer efforts to use the more contingent job as training for more stable work elsewhere.

V.C New Portability for Benefits?

The US system of private pensions is a disgrace. It consists of taxpayers paying employers to take money out of employee paychecks, and turn it over to financial intermediaries, for investment in the kinds of investment securities through which top managers are compensated. This increases demand (hence the price) of investment securities and has helped sustain the US stock market, as well as enrich executives who are increasingly compensated in stock options and bonuses. The law makes corporate managers fiduciaries of the employee retirement savings that they hold in trust, but this only partly mitigates the basic conflict of interest, integral to the system, of having employers control large funds for investment purposes. There is remarkably little academic or political criticism of the basic system.

Public provision of benefits is limited to the Social Security system, providing small retirement benefits to those who have previously paid into the system (and additional programs for the disabled), and the Medicare and Medicaid systems, public health insurance for the elderly and poor, respectively. Most people who are not poor therefore believe in theory that they should obtain health insurance, and additional retirement income, through their employer. However, both are becoming more difficult to obtain. Moreover, employee behavior turns out to be inconsistent with their professed desires. The new trends toward increased job mobility exacerbate the difficulty of obtaining and maintaining coverage through the employer.

In recent years, the percentage of the workforce enrolled in retirement or health plans has been dropping. About 44 percent of civilian workers participate in a company pension plan, down from about half in 1975. The proportion of full-time workers in firms with more than 100 employees who participate in a company health plan declined from 92 percent in 1989 to 76 percent in 1997. The comparable figures for small firms are 69 and 64 percent (1990-1996) (statistics available at the Bureau of Labor Statistics' web page).

Workers in the new short jobs are particularly unlikely to participate in these benefits. Only 4.3 percent of agency temporaries participate in a pension plan through their employer; the figure for on-call workers and temps directly hired by employers is around 20 percent. The figures are similar for health insurance. Only 7.3 percent of agency temporaries obtain health insurance through their employer, and only about 20 percent of on-call workers. he disparity, between workers in flexible and regular relations, remains large even when controlled for age, education, union status, and occupation, suggesting that employers simply don't offer these benefits to workers in flexible arrangements (Houseman 1999:24).

It is idle to point out that universal enrollment of the population in pension and health plans would simultaneously solve the problems of limited enrollment and of portability. Such a solution is politically infeasible in the US. Politically feasible proposals instead normally exacerbate either or both problems. The trap has been noted repeatedly in this brief chapter. Provision of health insurance and retirement benefits is voluntary with employers. Any regulation, making either more expensive, creates incentives for employers to switch to a less expensive program, or forego the benefit altogether.

For example, as mentioned earlier, employers have rushed in recent decades away from pension plans guaranteeing a defined benefit, and toward plans in which the employer merely makes defined contributions. Employers have made this change for their own benefit. Defined benefit

plans place heavy administrative and fiduciary duties on employers, who bear the risk of the investments' loss of value. By contrast, in defined contribution plans, the employer's obligation is largely complete when the contribution is made. Risks thereafter are borne by employees. The most popular retirement plan in recent years is the very flexible "401(k)" plan, named after a section of the tax code, to which employees may make their own contributions, along with the employer's. Employees are permitted to choose among several different investment options, such as different stock portfolios or a fixed-income fund.

The trend toward 401(k) plans and away from defined-benefit pensions has clearly been driven by employers, for their own benefit. Still, it is sometimes asserted that 401(k) plans better meet the needs of mobile workers in the new workforce, in a way that the older pensions do not. In Silicon Valley, for example, defined benefit pension plans are almost unknown, while 401(k) plans are common. But the claim that this better serves workers mistakes form for substance. 401(k) plans are bad for employees, who do not invest enough in them, do not invest wisely, and cash them in when they change jobs. As a result, despite the boom in the US stock market in the 1990s, the total value of all 401(k) plans was no higher at the end of the decade than it had been at the beginning.

It is true that old-fashioned defined benefit plans are normally forfeited when an individual leaves employment within five years, and that this plan has a major impact given today's short job tenures. However, after five years, the benefit is nonforfeitable ("vested"). If a worker leaves the firm after five years, the defined benefit pension will be frozen. No new contributions will be made, and the worker will be guaranteed only the percentage of retirement benefit associated with his or her actual years of service. However, the benefit will be there.

Defined contribution plans, such as 401(k) plans, are normally not portable from employer to employer. There is no legal impediment to making such plans portable. Most US professors at large colleges and universities are enrolled in the TIAA-CREF plan, a defined contribution plan which is fully vested from the first day, and fully portable if the professor moves to another university that participates in TIAA-CREF. When federal legislation on pensions was first enacted in 1974, the pension experts around Ralph Nader, major proponents of some legislation, favored encouraging such portable plans for all workers, but this proposal was not adopted. Rather, when a worker leaves an employer with a 401(k) plan, the worker must choose between receiving a cash distribution of the account, or instructing the corporate trustee to "rollover" the balance into an individual retirement account or a plan at the new employer's. If the employee elects the cash balance and is under the age of 59 1/2, a 10 percent penalty tax will be placed on the withdrawal. It is thus remarkable that a large study by the leading US benefits consulting firm showed that 68 percent of participants in 401(k) plans, who switch jobs between the ages of 20 and 59, take a cash distribution of their retirement savings (Hewitt Associates 2000). As a general matter, employees do not contribute to their plans at the level to which they aspire, or which would be appropriate given their aspirations for retirement (Laibson 1998).

The problem of low US participation in, and contribution to, benefits plans, will be solved, if at all, by the private market. There is no realistic political possibility of greater mandated coverage, and current controversies over the administration of the public Social Security program turn around whether it, too, should be privatized.

Some organizations have supposed that this is an opportunity for unions, or other new forms of employee organization, to grow by marketing and administering benefits to a mobile workforce. The group Working Today (Horowitz 2000), mentioned above, has received substantial foundation support in pursuit of this model. I believe it unlikely to succeed, for two reasons. First, there appears to be remarkably little demand among US workers for better benefits programs. As mentioned, they do not participate adequately in the programs that they have. In my interviews in Silicon Valley, I have spoken to several founders of job placement services or contractors for technical labor who had intended to offer generous health or retirement benefits to workers, and discovered that they had overestimated worker demand for such benefits. (I should mention that these are firms that provide ordinary programmers, many on temporary visas, who make $40-50 thousand per year--not contracted project leaders or CEOs, in other words). I have failed to find anyone who has uncovered unanticipated worker demand for benefits. Second, there is absolutely no theoretical or practical reason to suppose that democratic employee organizations would have any advantage over private firms in the marketing of benefits.

VI Conclusion.

The US labor market has generated a remarkable number of new jobs, despite continuing labor force entry by immigrants and others. The jobs have been created by private employers, mainly in the service industries, without substantial public expenditure or deficit. The new jobs are nowhere near so bad as the stereotype of hamburger flipper would have it. For many people, they represent portals of entry into the labor market and will be succeeded by regular employment in careers that will span several employers. Little is known about such careers and they represent a pressing research agenda. It is true that the new jobs will probably not last so long as the old and will carry less generous benefits oriented to older workers, such as pensions or health insurance. The very rapidity of employee turnover, however, now seems to be making its own contribution to economic growth, by increasing the efficiency of labor market adjustment and information diffusion.

The labor market intermediaries that so far have benefited the most from these trends are temporary help agencies and internet job sites. Employee organizations so far have failed to find opportunities that they can exploit. This kind of labor market may not appear desirable to some outside the US, but it appears to enjoy domestic political support (or at least no articulate political opposition). Its emphasis on growth, low unemployment, and social mobility, and indifference to inequality, seem to accord with US political traditions and values.

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