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Precarious Work and Precarious Welfare: How the Pandemic Reveals Fundamental Flaws of the U.S. Social Safety Net

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Almost all forms of social insurance in the United States are tied to employment. The employment link to social insurance has proven to be a catastrophe during the COVID-19 pandemic and the resulting economic downturn, in which almost twenty percent of the American workforce lost their jobs. The linking of social insurance to employment is an institutional design choice as the system evolved during and since the New Deal. It was to ensure that social insurance would not provide a disincentive to take low-wage jobs, and would therefore not destabilize racialized labor regimes (especially in agriculture), traditional family structures, or labor relations in industry. As a result, however, only about half of all unemployed workers receive unemployment insurance benefits (UI) when they lose their jobs, and just twelve percent of part-time workers receive UI. In July 2020, the percentage of uninsured adults nearly doubled, to sixteen percent, on account of job losses

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and states' failures to expand eligibility for Medicaid. These systemic weaknesses exist because the interests and voices of workers were largely absent from the program design and legislative debates.

In this Article, we explain how the pandemic brought into sharp focus the institutional design flaws in tying the American social welfare system to employment. We show that, in contrast to experiences in other industrialized countries, these design flaws have magnified hardship for the least privileged members of American society and amplified inequalities of race, class, immigration status, and gender. After describing the major achievements of the March 2020 federal legislation, we propose solutions to help complete the unfinished work of the New Deal, and to remedy the failings built into the system. We explore the necessity of broadening eligibility and the tax base to fund social insurance by eliminating the distinction between employees and independent contractors. More specifically, we consider the comparative approaches of (1) building on the model of Old Age and Disability Insurance (known popularly as Social Security), (2) Universal Basic Income; and (3) Flexsecurity, a European social insurance program intended to preserve employment during recessions and life events.

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INTRODUCTION

Social insurance—a term used to describe an array of programs to insure against common risks to economic security—alleviates the risk of extreme economic hardship from recession, accidents, illness, caregiving, and old age. Universal, mandatory social insurance programs spread the risk of both ordinary and unusual life events broadly, reducing their impact on any given person or family.

Most social insurance in the United States is tied to employment or to a family relationship with a current or retired employee. That is, health insurance, retirement income, and income support during periods of involuntary unemployment, temporary or permanent disability or illness, or inability to work because of family care responsibility are available mainly to those who themselves have a long history of stable paid employment or who are married to someone who does.¹ And, in many states or for many jobs, especially poorly paid jobs, many basic forms of social insurance are not available at all.² Eligibility requires both paid work and employee status; independent contractors are typically ineligible.³ The United States’ meager social insurance coverage is the global outlier. Data from the Organization for Economic Co-operation and Development (OECD) indicate that thirty-two countries—many of which are industrialized nations—offer universal health coverage of some form,⁴ while the United States does not.

1. KAREN M. TANI, *STATES OF DEPENDENCY: WELFARE, RIGHTS, AND AMERICAN GOVERNANCE, 1935-1972* 155-88 (2016).

2. *Id.*

3. *Id.* at 113-50 (discussing welfare eligibility and claiming welfare rights).

4. These countries are: Australia, Austria, Bahrain, Belgium, Brunei, Canada, Cyprus, Denmark, Finland, France, Germany, Greece, Hong Kong, Iceland, Ireland, Israel, Italy, Japan, Kuwait, Luxembourg, the Netherlands, New Zealand, Norway, Portugal, Singapore, Slovenia, South Korea, Spain, Sweden, Switzerland, the United Arab Emirates, and the United Kingdom. See *Measuring Health Coverage*, ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT [OECD], <http://www.oecd.org/els/health-systems/measuring-health-coverage.htm> [https://perma.cc/P2DU-2ZZZ] (last visited Aug. 13, 2020) (listing the current healthcare systems of multiple countries); see also Kelly Montgomery, *Differences Between Universal Coverage and Single-Payer*, VERYWELL HEALTH (Apr. 27, 2020), <https://www.verywellhealth.com/difference-between-universal-coverage-and-single-payer-system-1738546> [https://perma.cc/6V5N-F3N7] (comparing and contrasting universal coverage and single-payer systems).

Furthermore, the United States is virtually alone in providing no federally mandated paid sick time or paid family leave.⁵

The employment link to social insurance proved to be a catastrophe during the COVID-19 pandemic and the resulting economic downturn. As of mid-July 2020, almost 20 percent of the American workforce had lost their jobs; over thirty-one million people were unemployed, a level of unemployment not seen since the Great Depression.⁶ Job loss caused an estimated 5.4 million people to lose health insurance between February and May 2020 alone.⁷ Although employment rebounded as the economy reopened in autumn of 2020, unemployment remained high as successive spikes of COVID-19 cases prompted new shutdowns.⁸ With confirmed COVID-19 cases in the United States exceeding 31 million and deaths exceeding 566,000 as of this writing in April 2021,⁹ the end to the pandemic's health hardships has not come even as the spread of vaccines, reopening of the economy, and federal stimulus payments mitigated some economic

5. AMY RAUB, PAUL CHUNG, PRIYA BATRA, ALISON EARLE, BIJETRI BOSE, JUDY JOU, NICOLAS DE GUZMAN CHORNY, ELIZABETH WONG, DANIEL FRANKEN & JODY HEYMANN, WORLD POLICY ANALYSIS CTR., PAID LEAVE FOR PERSONAL ILLNESS: A DETAILED LOOK AT APPROACHES ACROSS OECD COUNTRIES 4 (2018), https://www.worldpolicycenter.org/sites/default/files/WORLD%20Report%20-%20Personal%20Medical%20Leave%20OECD%20Country%20Approaches_0.pdf [https://perma.cc/PX8B-CXET]; AMY RAUB, ALISON EARLE, PAUL CHUNG, PRIYA BATRA, ADAM SCHICKEDANZ, BIJETRI BOSE, JUDY JOU, NICOLAS DE GUZMAN CHORNY, ELIZABETH WONG, DANIEL FRANKEN & JODY HEYMANN, WORLD POLICY ANALYSIS CTR., PAID LEAVE FOR FAMILY ILLNESS: A DETAILED LOOK AT APPROACHES ACROSS OECD COUNTRIES 11, 22 (2018), https://www.worldpolicycenter.org/sites/default/files/WORLD%20Report%20-%20Family%20Medical%20Leave%20OECD%20Country%20Approaches_0.pdf [https://perma.cc/D9HL-JQP6].

6. Patricia Cohen, *Rise in Unemployment Claims Signals an Economic Reversal*, N.Y. TIMES (July 23, 2020), https://www.nytimes.com/2020/07/23/business/economy/unemployment-economy-coronavirus.html?campaign_id=2&emc=edit_th_20200724&instance_id=20542&nl=todaysheadlines®i_id=13501916&segment_id=34235&user_id=00159c00191e4568ddcb95b231f50b01 [https://perma.cc/KV69-MYJ6]. Other estimates of job loss during the pandemic were less dire. Nevertheless, economists have found that the pandemic-related recession hit small businesses, which disproportionately employ people of color, especially hard, and predicts that recovery will be slow. See Elizabeth Weber Handwerker, Peter B. Meyer, Joseph Piacentini, Michael Schultz & Leo Sveikauskas, *Employment Recovery in the Wake of the COVID-19 Pandemic*, U.S. BUREAU LAB. STAT.: MONTHLY LAB. REV. (Dec. 2020) <https://www.bls.gov/opub/mlr/2020/article/employment-recovery.htm> [https://perma.cc/44VB-MLXA] (reporting that the number of people unemployed peaked at twenty-three million in April before falling to eleven million in November).

7. Stan Dorn, *The COVID-19 Pandemic and Resulting Economic Crash Have Caused the Greatest Health Insurance Losses in American History*, FAMILIES USA (July 13, 2020), <https://www.familiesusa.org/resources/the-covid-19-pandemic-and-resulting-economic-crash-have-caused-the-greatest-health-insurance-losses-in-american-history> [https://perma.cc/7X5C-2H23].

8. See generally *Civilian Unemployment Rate*, U.S. BUREAU OF LABOR STATISTICS, <https://www.bls.gov/charts/employment-situation/civilian-unemployment-rate.htm> [https://perma.cc/D4LH-XBUX] (tracking unemployment rates from January 2001 to January 2021).

9. See *Coronavirus Resource Center*, JOHNS HOPKINS UNIV., <https://coronavirus.jhu.edu> [https://perma.cc/U5AU-HKRG] (last visited Nov. 16, 2020).

hardships. The pandemic demonstrated that dramatic job losses pose a huge crisis for a social insurance system so closely tied to employment.

The problematic linking of social insurance to employment is the result of a flawed institutional design of the United States' social insurance system. When Congress and other policymakers developed the system during and following the New Deal, they tied most social safety net programs to paid employment or to families supported by a breadwinner, and kept benefits low.¹⁰ While these choices were made to enhance administrability and to ensure the programs' political survival, they were also motivated by a desire to ensure that the availability of social insurance would not disincentivize workers from accepting low-wage jobs.¹¹ The flaws in this system have been revealed at many points in history, especially during recessions. For example, unemployment insurance benefits (UI) are an imperfect safety net because only about one-third of unemployed workers receive UI when they lose their jobs.¹² Only about 12 percent of part-time workers receive UI, either because they worked too few hours before becoming unemployed or are deemed ineligible for benefits under the "able and available for work" eligibility requirements.¹³ Similarly, in 2018, 8.5 percent of people lacked health

10. See JACOB HACKER, *THE DIVIDED WELFARE STATE: THE BATTLE OVER PUBLIC AND PRIVATE SOCIAL BENEFITS IN THE UNITED STATES* 106-11, 206-20 (2002) (describing the origins of modern pension and health benefit provision and regulation in the New Deal era); Alice K. Harris, *In the Nation's Image: The Gendered Limits of Social Citizenship in the Depression Era*, 86 J. AM. HIST. 1251, 1262-65 (1999) (describing how a contributory system, based on payroll taxes and with an exclusion for domestic and agricultural workers, would omit many females and African Americans); Edwin E. Witte, *Old Age Security in the Social Security Act*, 45 J. POL. ECON. 1, 11 (1937) (describing the original design and exclusions of the old age benefit plan that, as originally designed, envisioned forty-nine million people "gainfully employed" of whom only twenty-six million would be eligible for benefits).

11. See JAMES D. BROWN, *AN AMERICAN PHILOSOPHY OF SOCIAL SECURITY: EVOLUTION AND ISSUES* 3-24 (1972) (describing the employment basis); ROBERT C. LIEBERMAN, *SHIFTING THE COLOR LINE: RACE AND THE AMERICAN WELFARE STATE* 180-83 (1998) (describing the design of unemployment insurance and the role of discretionary decisions determining eligibility and the power of states to set benefits). See generally IRA C. KATZNELSON, *FEAR ITSELF: THE NEW DEAL AND THE ORIGINS OF OUR TIME* 260 (2013) (arguing that votes of southern senators were crucial to enactment of New Deal legislation, including the Social Security Act (SSA), and that they insisted on states' ability to set levels of support for both unemployment insurance and the Aid to Dependent Children program, so that "southerners could vote for the bill that brought much needed funding to their poverty-stricken region while protecting the character of its racial arrangements").

12. Brian Galle, *How to Save Unemployment Insurance*, 50 ARIZ. ST. L.J. 1009, 1023 (reporting that fewer than one in three workers who lost their jobs during the previous decade received UI); see also Walter Nicholson & Karen Needles, *Unemployment Insurance: Strengthening the Relationship Between Theory and Policy*, 20 J. ECON. PERSP. 47, 48 (2006) (finding that during 2004, only about thirty-four percent of all unemployed workers received UI).

13. See NAT'L EMP'T LAW PROJECT, *PART-TIME WORKERS AND UNEMPLOYMENT INSURANCE* 1-3 (2008) (finding that a number of states have legislated to say that part-time workers are eligible for UI); Galle, *supra* note 12, at 1026 (critiquing the failure of UI systems to provide UI to part-time workers who lose their jobs).

insurance,¹⁴ often because they lived in states that did not expand Medicaid and earned slightly too much to qualify for subsidized insurance or because they were immigrants.¹⁵ In July 2020, the percentage of uninsured adults nearly doubled to 16 percent, on account of job losses and states' failures to expand eligibility for Medicaid.¹⁶ The link between American social insurance and employment has exacerbated economic inequality because access to benefits depends on having a well-paid, full-time job as an employee, typically for a large company. For many workers, and for a disproportionate number of workers who are Black, Brown, female, single parents, or immigrants, social insurance benefits are out of reach.

In this Article, we explain how the pandemic brought into sharp focus the flaws in tying the American social insurance system to employment. We focus in particular on two forms of social insurance that are most in need during the pandemic-induced recession: UI and paid leave for illness and caretaking. As we discuss below, in contrast to experiences in other industrialized countries, the dearth of universally available social insurance has magnified hardship for the least privileged members of American society and amplified inequalities of race, class, immigration status, and gender. As we explain, the pandemic-induced crisis prompted Congress in March and December 2020 and March 2021 to pass legislation to address some of these structural failures. However, most of these reforms are both temporary and inadequate. Although the legislation passed in March 2021 is an important start on reforming the social insurance system, much legislative work remains to be done, and we explore possibilities that Congress and the White House should consider.

In Part I, we examine the structure of the U.S. social insurance system and how that structure has contributed to the rise of precarious work. We then discuss in Part II how, as a result of the pandemic coupled with increasing economic precarity, the flawed American social insurance system has exacerbated inequality. Part III explains how the federal legislative responses to the pandemic began to address the flaws in the system but still failed to remedy larger, structural problems. In Part IV, we suggest where to go from here. Given that businesses and federal, state, and local governments spend nearly as much money in direct expenditures, administration, and tax subsidies on social insurance as many countries with more protective and

14. Edward R. Berchick, Jessica C. Barnett & Rachel D. Upton, *Health Insurance Coverage in the United States 2018*, CENSUS.GOV (Nov. 8, 2019), <https://www.census.gov/library/publications/2019/demo/p60-267.html> [<https://perma.cc/Y9V9-EL5B>].

15. Rachel Garfield, Kendal Orgera & Anthony Damico, *The Uninsured and the ACA: A Primer*, KAISER FAMILY FOUND. (Jan. 25, 2019), <https://www.kff.org/uninsured/report/the-uninsured-and-the-aca-a-primer-key-facts-about-health-insurance-and-the-uninsured-amidst-changes-to-the-affordable-care-act> [<https://perma.cc/PV23-GD64>].

16. Dorn, *supra* note 7, at 3, 11.

equitable systems,¹⁷ we propose alternative institutional designs that will make social insurance and income protection more equitably available. Our basic point is this: it has long been clear to scholars and to anyone who is unemployed or working a low-wage job that tying social insurance to employment is inequitable and makes it needlessly difficult for people to access the income support they need to confront the vicissitudes of life. However, the COVID-19 pandemic makes it clear that public health, the economy, and simple justice demand a change, and that change is possible. Universal, mandatory social insurance programs should broadly spread the risk of life events to everyone. Social insurance coverage should not be considered a privilege, but should be a fundamental right of social citizenship in order to protect public health and provide a foundation for families to build stability and security.

I. STRUCTURAL INEQUALITY IN AMERICAN SOCIAL INSURANCE

Until the New Deal, most American social welfare provision (with the exception of military pensions) was local, piecemeal, and based on principles of poor relief, not entitlement. New Deal legislation centralized some programs, but substantial state and local control remained, along with the patchwork protections of entitlement and poor relief.¹⁸ Many programs made eligibility turn on labor market participation, unless one's social position as a wife and mother required work inside the home. Today, many American social welfare benefits are funded through tax expenditures (i.e., tax deductions for employer-provided health and retirement plans) and public-private partnerships.¹⁹ When considered together, these semi-private programs combined with direct government expenditures are comparable in size to welfare regimes in other industrialized nations.²⁰ The fundamental difference between the American system and others is that the institutional design of the American social insurance system undermines political support for the welfare state, increases the complexity and decreases the efficiency of the social welfare system, and hides regressive policies from public

17. See HACKER, *supra* note 10, at 16-18 (comparing U.S. social insurance expenditures in GDP percentages to similar expenditures and related GDP in other countries). See generally CHRISTOPHER HOWARD, *THE WELFARE STATE NOBODY KNOWS: DEBUNKING MYTHS ABOUT U.S. SOCIAL POLICY* (2007).

18. See TANI, *supra* note 1, at 57-80 (2016). See generally JILL QUADAGNO, *THE COLOR OF WELFARE: HOW RACISM UNDERMINED THE WAR ON POVERTY* (1994).

19. See *infra* Part I.C & D (describing the structure of social welfare programs).

20. See HOWARD, *supra* note 17, at 25 (“[T]he American welfare state . . . compares favorably with some of the largest welfare states in the world.”); Monica Prasad, *American Exceptionalism and the Welfare State* *The Revisionist Literature*, 19 ANN. REV. POL. SCI. 187 (2016) (reviewing the revisionist literature, which argues that “the American welfare state is not small after all; it is different”).

scrutiny.²¹ The result is a highly inefficient and unequal system that does very little for the most disadvantaged in American society. Those left out include people with very low incomes or precarious labor market connections, the long-term unemployed, immigrants without legal status, and single-parent families headed by a person unable to find a job that pays enough to support both the family and a hired caretaker.

In this Part, we briefly survey the development of the American social insurance system from the New Deal onward to show how program design choices of the 1930s created the potential for class, gender, and racial inequities in eligibility. We show how the growth of tax-subsidized employer-provided insurance, which was once widely available to middle- and upper-income workers, contracted with the decline of good middle-class jobs after 1970. Yet, legislators did not adapt policy to the new economy after 1970, when jobs increasingly failed to offer social insurance to workers who most needed it, and the growth of single-parent and dual-earner families revealed the hardships caused by the dearth of paid caretaking leave.

A. *The Origins of American Social Welfare Systems*

The political rhetoric of the New Deal addressed economic and social security directly as a right of citizenship. President Franklin D. Roosevelt focused not only on the right to a job, but also on the right to a decent income, education, housing, and medical care as a necessary foundation to American citizenship.²² Although his political priority in drafting what became the Social Security Act of 1935 (SSA) was to address unemployment,²³ the program to provide pensions for the elderly became the great success of the legislation.²⁴ Even so, the New Deal and later post-war government programs

21. Prasad, *supra* note 20, at 191-93; *see also* SUZANNE METTLER, *THE SUBMERGED STATE: HOW INVISIBLE GOVERNMENT POLICIES ARE UNDERMINING AMERICAN DEMOCRACY* 88-110 (2012) (discussing tax policy and healthcare reform).

22. NELSON LICHTENSTEIN, *STATE OF THE UNION: A CENTURY OF AMERICAN LABOR – REVISED AND EXPANDED EDITION* 30 (2013).

23. *See* BROWN, *supra* note 11, at 8-16; Witte, *supra* note 10, at 30 (stating that until the SSA was introduced in Congress, “the principal interest of nearly all committees and individuals concerned with its formulation was in unemployment insurance. Once this bill was introduced, however, the major interest, both in and outside of Congress, shifted to old age security.”); Interview with Barbara N. Armstrong, Professor, Sch. of Law, Univ. of Cal., Berkeley, in Berkeley, Cal. 105 (Dec. 19, 1965), <https://dlc.library.columbia.edu/catalog/cul:t76hdr7vnb/bytestreams/content/content?download=false&filename=content.pdf> [<https://perma.cc/FUP2-7WSG>] (recalling that the Committee on Economic Security was fighting about the design of UI, but on the Old Age Insurance program, “[t]hey really didn’t pay much attention” to the details because they believed they were simply going to drop it before the legislation was introduced).

24. *See* Frank Newport, *Social Security and American Public Opinion*, GALLUP (June 18, 2019), <https://news.gallup.com/opinion/polling-matters/258335/social-security-american-public-opinion.aspx> [<https://perma.cc/Z9PV-F36K>] (showing substantial majorities in favor of benefits not being reduced and the popularity of Social Security benefits in general); *see also* TANI, *supra* note 1, at 113-50 (discussing

became a down payment on the broader ideal of social insurance: providing some economic security, particularly to families, for income losses resulting from old age, disability, and unemployment.²⁵ But the political compromises made in enacting the SSA, and the ways that employers and state governments have responded to its requirements in the years since, have meant that full-time work as an employee earning well above the minimum wage remain crucial to obtaining access to social insurance.

The SSA created two of the major social insurance programs that remain today, both of which were styled as insurance against risk rather than as assistance to the needy.²⁶ Insurance protects against economic loss by broad risk-spreading; assistance, in contrast, is available only to needy.²⁷ The Committee on Economic Security (CES), the cabinet-level group appointed by the Roosevelt Administration to develop the SSA, deliberately moved toward insurance and broad eligibility. It did not, however, include advocates of a radical, redistributivist welfare policy.²⁸ Thus the theory emerging behind this new legislation was one of social insurance—spreading the risk of common but catastrophic events broadly to reduce the individual economic threat to all Americans.

The CES proposed an Old Age Insurance program (OAI) that today is known as Old Age and Survivors Insurance (OASI) or just as Social Security. OAI was premised on the “conviction that any old age insurance plan in the United States should be national, compulsory, and contributory, and provide benefits as a matter of right.”²⁹ The old age insurance system had to be national because labor mobility impeded the administration of the few state-based and the several employment-based systems that existed at the time.³⁰ That is, if a person worked in three different states for half a dozen different

the history of political attacks on means tested programs created by SSA, such as Aid to Families with Children).

25. Jill Priluck, *The Second Bill of Rights How Franklin D. Roosevelt Envisioned Social and Economic Rights as Human Rights*, LAPHAM’S Q. (June 11, 2018) <https://www.laphamsquarterly.org/roundtable/second-bill-rights> [https://perma.cc/9K5A-ZG8Y].

26. Some of the most extensive analyses of and arguments in favor of social insurance in the 1930s were proposed by Professor Barbara Nachtrieb Armstrong. Barbara N. Armstrong, *The Nature and Purpose of Social Insurance*, 170 ANNALS AM. ACAD. POL. & SOC. SCI. 1, 4 (1933). See generally BARBARA N. ARMSTRONG, *INSURING THE ESSENTIALS* (1933).

27. The SSA also created assistance programs for the needy. The Old Age Assistance program channeled federal funds to states in a matching grant system to provide pensions for needy persons over age sixty-five. Each state was allowed to set its own standards for eligibility. By contrast, the Old Age Insurance program, today known as Social Security, was financed by payroll taxes without government contribution. Jill S. Quadagno, *Welfare Capitalism and the Social Security Act of 1935*, 49 AM. SOC. REV. 632, 634 (1984).

28. *Id.* at 640. For discussion on the voices urging a more redistributivist vision for social security than that of FDR and the CES, see EDWIN AMENTA, *WHEN MOVEMENTS MATTER: THE TOWNSEND PLAN* 81-104 (2006).

29. BROWN, *supra* note 11, at 10.

30. JILL QUADAGNO, *THE TRANSFORMATION OF OLD AGE SECURITY* 112 (1988).

companies, each with a separate pension system, they might have paid contributions to as many as three different state plans and six different company plans, which made collecting nine separate small pensions unduly complicated and often impossible. The national OAI system would simplify administration. By tying eligibility for OAI to contributions made by workers and employers, the SSA provided that only wage earners would receive retirement insurance, and the contributory structure that tied benefits to wages meant that OAI would not undermine existing wage levels.³¹

In contrast, the unemployment insurance (UI) part of the SSA was designed as a program funded and administered by the states, with national benefits as a backstop. The unemployment benefits system designed in 1935 remains in effect today, with some modifications.³² UI benefits for short-term unemployment are paid out of trust funds for each state.³³ Benefits for medium-term unemployment are covered jointly by states and the federal government, and benefits for extended unemployment during economic crises are paid by the federal government.³⁴ The state Trust Funds are supported by per-employee taxes on employers.³⁵ The size of the tax is determined, in part, by the number of that firm's employees that have filed for unemployment benefits.³⁶

The fundamental choice in designing the SSA was whether to build social insurance on the basis of payroll contributions tied to employment or taxes paid by all.³⁷ In the OAI title, the reliance on payroll contributions proved to be less problematic than in the UI title because OAI was administered nationally, with uniform national payroll tax rules, and because eligibility for a pension could not be contested by employers.³⁸ Such a system for UI was introduced in Congress as the Lundeen Bill in 1934. It would have required the federal government to pay for UI through taxes on inheritances, gifts, and corporate income, and would have offered benefits equal to the

31. *Id.* at 113.

32. For a discussion on the operation of the UI system today, see Galle, *supra* note 12, at 1009. Galle is particularly clear on how the ways in which states have modified UI systems since the 1930s have weakened states' abilities to address the recession of 2008-2012.

33. *Id.* at 1015.

34. U.S. GOV'T ACCOUNTABILITY OFFICE, UNEMPLOYMENT INSURANCE: STATES' REDUCTION IN MAXIMUM BENEFIT DURATIONS HAVE IMPLICATIONS FOR FEDERAL COSTS 6-7 (2015).

35. *See generally* Galle, *supra* note 12 (explaining the finance and administration of UI).

36. *Id.* at 1016.

37. *See* AMENTA, *supra* note 28, at 81-104 (coverage of debates over the design of the SSA, and particularly over whether benefits should be more universally available and funded by a broad-based tax, or more narrowly available and funded by payroll taxes).

38. *See* BROWN, *supra* note 11, at 12 (explaining the desirability of the national, compulsory, and contributory design of OAI in contrast to the state design of UI, and saying "[o]ne shudders to think what the present social security system would be today if any such combination of state and industry election . . . had received any further consideration. If frozen into law, the idea would have resulted in a monstrous patchwork of coverage, with impossible problems of assuring adequate and equitable benefits, actuarial and financial stability, or progressive improvement.").

average local wage in a claimant's area for their duration of unemployment; it would also have included part-time workers.³⁹

But the UI system preferred by welfare capitalists, the Roosevelt Administration, most members of the CES, and even the American Federation of Labor (AFL), was a federal-state system, funded by taxes on employers.⁴⁰ Senator Robert F. Wagner and Representative David J. Lewis proposed this approach in a 1934 bill.⁴¹ Supporters of the Wagner-Lewis approach thought that the experience-rating insurance system of workers' compensation programs (in which the size of the employer's premiums increased in relation to the number of their employees that had filed claims) could be adapted to the problem of unemployment and could dissuade employers from laying off workers during economic slumps.⁴² When the federal-state approach, including experience rating, was enacted in the UI title of the SSA, Congress gave states the power to compete to attract business by setting low payroll taxes and stingy eligibility rules, which reduced the usefulness of UI in relieving poverty or supporting consumer spending during recessions. Furthermore, both strict eligibility rules and the experience-rating system, which gave employers an incentive to contest claimant eligibility, created complexities in UI administration.

Those who favored a broader national system of UI doubted that unemployment could be reduced by a system of employer incentives. They were skeptical that employers had the ability or willingness to avoid layoffs during economic hard times.⁴³ Professor Barbara Nachtrieb Armstrong of the University of California, Berkeley, School of Law, an expert recruited to advise the CES, was a leading scholarly advocate for a national UI program like that adopted for old age insurance.⁴⁴ Although CES Executive Director Edwin Witte later attributed the rejection of a federal UI system to doubts about its constitutionality,⁴⁵ Armstrong did not share Witte's pessimism.⁴⁶

39. QUADAGNO, *supra* note 30, at 108-09; Kenneth M. Casebeer, *Unemployment Insurance American Social Wage, Labor Organization and Legal Ideology*, 35 B.C. L. REV. 259, 297 (1994); Quadagno, *supra* note 27, at 638.

40. Edwin E. Witte, *Development of Unemployment Compensation*, 55 YALE L.J. 21, 29 (1945).

41. Quadagno, *supra* note 27, at 641.

42. Interview with Barbara N. Armstrong, *supra* note 23, at 42-44; Witte, *supra* note 40 at 29; Casebeer, *supra* note 39 at 269-93.

43. Casebeer, *supra* note 39 at 269-93; Quadagno, *supra* note 27, at 638.

44. Interview with Barbara N. Armstrong, *supra* note 23, at 37 (Claiming she was not alone in this view, Professor Armstrong noted that Bryce Stewart, a member of the group working on UI, had "a good understanding of the problems of his field of unemployment insurance, and he believed in a straight national unemployment system, and he did not believe in what Congress did, i.e., the adoption of a state unit system.").

45. Witte, *supra* note 40, at 33.

46. In her oral history, Armstrong insisted that her views on the constitutionality of a national UI system were shared by a number of professors of constitutional law, including Thomas Reed Powell of Harvard, Dudley McGovney of Berkeley, and Douglas Blount Maggs, of Duke. Interview with Barbara N. Armstrong, *supra* note 23, at 75-76.

Some speculated that President Roosevelt believed the state system of UI would be replaced by a uniform national system in the long run, which prompted Professor Armstrong to remark bitterly, “The long run gets to be very long when you have allowed vested interests to develop in states.”⁴⁷ History proved Professor Armstrong right. Studies of UI in the three decades following its adoption found no evidence that experience rating achieved economic stabilizing and counter-cyclical effects, probably because coverage was paltry and benefits were low.⁴⁸

Nevertheless, during the periods of robust economic growth after World War II, the gaps in the system created by the SSA were obscured from political attention. Post-war labor activism led to increases in employer-provided benefits to stave off further government intervention to provide more general welfare support.⁴⁹ Unions negotiated for health and pension benefits, and non-union employers began to offer such social insurance to induce worker loyalty and ward off unionization.⁵⁰ This undermined a potential alliance between labor and the state that could have created a social insurance system independent of employers.⁵¹ The growing private system of social insurance tied to employment was supported through a complex web of regulatory and tax policy.⁵²

From the 1940s through the 1970s, this hybrid system of employment-linked social insurance benefits provided significant economic security to some, but not all. During this period, many more workers held jobs that offered health, disability, and pension benefits, as well as good wages, than do today.⁵³ The mid-century economy also produced strong employment growth and rising family income between World War II and the mid-1960s. By the late 1970s, nearly half of private wage and salary workers had private pensions and most Americans had access to health care through their jobs.⁵⁴ But by the end of the twentieth century, the institutional design flaws in the American social insurance system—the lack of compulsory, universal UI, the meager provision for old age insurance, and the lack of family support

47. *Id.* at 99.

48. See William Papier, *What's Wrong With Unemployment Insurance?*, 37 J. RISK & INS. 63, 65 (1970) (summarizing studies conducted by researchers at University of Illinois and Princeton University showing that benefits between 1945 and 1960 replaced only fifteen cents on the dollar of wage loss of the unemployed) (citing RICHARD A. LESTER, *THE ECONOMICS OF UNEMPLOYMENT COMPENSATION* (1962)); see also Gillian Lester, *Unemployment Insurance and Wealth Redistribution*, 49 UCLA L. REV. 335, 342-43 (2001).

49. JENNIFER KLEIN, *FOR ALL THESE RIGHTS: BUSINESS, LABOR, AND THE SHAPING OF AMERICA'S PUBLIC-PRIVATE WELFARE STATE* 204 (2010).

50. *Id.* at 205-06.

51. *Id.*

52. HACKER, *supra* note 10, at 8.

53. See KLEIN, *supra* note 49, at 258-59.

54. *Id.*; HACKER, *supra* note 10, at 153, 214.

through paid family leave or income provisions—would become all too apparent as stable, full-time, well-paid employment began to unravel.

B. *Inequality in the Social Insurance System*

Three core features of the SSA, and American labor and employment law in general, resulted in systemic inequality in access to social insurance protections. One feature is the employment link to social insurance described above. The second is the assumption that unpaid (traditionally female) household and caregiving labor enables (traditionally male) workers to participate in paid labor without neglecting their dependents. The third is the series of decisions Congress made to exclude domestic and agricultural workers, independent contractors, immigrants, and part-time workers from many legal protections, including in part the SSA. The result was pervasive inequality based on gender, race, and wage levels.

A gendered conception of wage labor and the privatization of care within families underwrote the social insurance system.⁵⁵ The SSA built on programs that had been developed in states decades before that provided pensions for some retired workers in paid employment, especially in the military, firefighting, and policing, and assistance for mothers who did not have a husband to provide support for their children (sometimes known as “mothers’ pensions”).⁵⁶

As the SSA was drafted and enacted in 1935, it preserved the gendered assumption that paid employment would entitle anyone who had contributed to the system, regardless of financial need in old age, to a pension. It also gave those with secure workforce attachment possible eligibility for UI, without regard to financial need, in case of a temporary involuntary layoff.⁵⁷ Without a history of paid employment, however, only those with financial need and with children would be entitled to income support.⁵⁸ Thus, OAI was not means-tested, but Aid to Dependent Children, which was enacted in the SSA to replace mothers’ pensions, was.⁵⁹ This “two-channel” welfare state

55. See generally Alice Kessler-Harris, *In the Nation's Image: The Gendered Limits of Social Citizenship in the Depression Era*, 86 J. AM. HIST. 1251 (1999).

56. See generally THEDA SKOCPOL, *PROTECTING SOLDIERS AND MOTHERS* (1992); SUSAN M. STERETT, *PUBLIC PENSIONS: GENDER & CIVIC SERVICE IN THE STATES, 1850-1937* (2003).

57. See Casebeer, *supra* note 39, at 319; Galle, *supra* note 12 (summarizing the eligibility rules for UI and noting that exclusions from eligibility tend to be for part-time and seasonal workers, independent contractors, those with very little earnings in the base period, those fired for cause, and those who have collected the maximum amount or for the maximum duration).

58. This is implicit in the structure of the SSA; as explained above, UI and OAI are contributory and anyone who has paid into the system and meets other eligibility rules receives a benefit without regard to financial need. Old Age Assistance and Aid to Families with Children, however, were available only to those who demonstrated financial need and satisfied other eligibility requirements. See Casebeer, *supra* note 39, at 318-19.

59. STERETT, *supra* note 56, at 180 (observing that the Aid to Dependent Children title was drafted hurriedly by the federal bureau that was responsible for the welfare of children and that they “did not see

closely tracked gender, with income support as a matter of right going to wage workers, who were mostly men, and less generous, means-tested poor relief going to single parents of children, who were mostly women.⁶⁰ In sum, family economic security rested on the organization of families built around a breadwinner and a homemaker.⁶¹

For those families supported by a breadwinner with a good job, some employers pay compensation—a so-called “family wage”—that is theoretically sufficient to support a homemaker responsible for caring for the household and family.⁶² The family wage model depends on two workers for economic security: one in the wage labor market, and one providing full-time labor at home to care for the family.⁶³ As feminist theorists often point out, the homemaker wife enables the “self-sufficient” independent labor of the wage worker.⁶⁴ Work in paid employment is based on a gendered infrastructure in which someone other than the economic actor provides care for the household and children.⁶⁵ Yet, the state provides social insurance benefits only to replace the loss of a breadwinner’s income in the case of unemployment, disability, or death.⁶⁶ It provides little support to families to meet caregiving needs in the event of the loss of a homemaker.⁶⁷ And for those families where neither parent earns enough to support the family and both therefore work in paid labor, the government provides few resources to meet caregiving needs.⁶⁸ When families’ resources are inadequate to cover both breadwinner and caregiving responsibilities, they are largely on their own.⁶⁹ Even though the social insurance system is built around essential labor at home, single wage earners with children, mostly women, have no recourse

it as controversial, or even as the bureau’s top priority. Mothers’ pensions had had the support of the charity workers and middle-class women activists who always worried about poor women, whereas the elderly in the 1930s had popular spokesmen and mass movements to support making old age pensions into something other than poor relief.”).

60. See Barbara Nelson, *The Origins of the Two-Channel Welfare State Workmen’s Compensation and Mothers’ Aid*, in *WOMEN, THE STATE, AND WELFARE* 123, 145 (Linda Gordon ed., 1990).

61. As originally written, the SSA excluded the spouses and dependents of workers from benefits under the OAI program, although the statute was amended in 1939 to include dependents and surviving spouses of deceased covered workers, thus making it the OASI program. Quadagno, *supra* note 27, at 634; GEOFFREY KOLLMAN, CONG. RESEARCH SERV., *SOCIAL SECURITY: SUMMARY OF MAJOR CHANGES IN THE CASH BENEFITS PROGRAM* (2000), <https://www.ssa.gov/history/reports/crsleghist2.html> [<https://perma.cc/CM9J-JP6B>]. In 1956, it was amended to provide benefits for permanently disabled people, making it the OASDI program that exists today. *Id.*

62. Catherine Albiston & Lindsey T. O’Connor, *Just Leave*, 39 *HARV. WOMEN’S L.J.* 1, 10-11 (2016); Ann Orloff, *Gender in the Welfare State*, 22 *ANN. REV. SOC.* 51, 59 (1996).

63. Albiston & O’Connor, *supra* note 62, at 11-12; Nancy Fraser, *After the Family Wage Gender Equity and the Welfare State* 22 *POL. THEORY* 591, 591-92 (1994).

64. See generally CAROLE PATEMAN, *THE SEXUAL CONTRACT* (1988).

65. Albiston & O’Connor, *supra* note 62, at 12.

66. *Id.*

67. *Id.*

68. *Id.* at 4-5, 13-14.

69. *Id.*

to resources from either their employers or the state to compensate for the absence of that labor at home.

The SSA excluded a wide array of workers from eligibility for the OAI and UI programs based on politics, administrability, and assumptions about which workers and employers would be willing to pay the payroll taxes to fund the programs. Those originally excluded were agricultural and domestic workers (disproportionately affecting Black workers, who predominated in farm and domestic labor in the South) and self-employed people.⁷⁰ The exclusion of these workers from the SSA as well as other minimum labor standards laws fell most harshly on people of color, women, recent immigrants, and low-wage workers.⁷¹ They were more likely to work in non-union jobs, domestic work, agricultural jobs, casual jobs, or very small worker-owned businesses that provided no benefits. They therefore did not benefit from the generous tax subsidies for employer-provided benefits.⁷² In all, nearly half of the working population was excluded from coverage as the programs were originally designed, although coverage of the OASI program was expanded in 1950 and 1954 to those employed in agricultural and domestic work, self-employed workers, and professionals.⁷³

The linking of social insurance to paid employment, the gendered assumptions about paid work and family structure, and the gaps in the protections of the SSA have long exacerbated inequality. The precarious position of these workers has only become more salient as many more workers, even white workers, men, and two-parent households who previously felt economically secure, began slipping into precarity in the 1970s.

C. *What Happened to Social Insurance When the Economy Moved from Good Jobs to Bad Jobs to No Jobs*

Huge holes in the social safety net were revealed when massive changes in labor relations and the global economy after 1970 fundamentally undermined the structural foundation of workers' economic welfare in the

70. LIEBERMAN, *supra* note 11, at 34; Marc Linder, *Farm Workers and the Fair Labor Standards Act Racial Discrimination in the New Deal*, 65 TEX. L. REV. 1335, 1364-66 (1987) (describing the reasons why agricultural workers were excluded from coverage); John Brueggemann, *Racial Considerations and Social Policy in the 1930s Economic Change and Political Opportunities*, 26 SOC. SCI. HIST. 139, 164 (2002); Gareth Davies & Martha Derthick, *Race and Social Welfare Policy The Social Security Act of 1935*, 112 POL. SCI. Q. 217, 226 (1997).

71. LIEBERMAN, *supra* note 11, at 34.

72. *Id.* at 23-66 (describing the reasons for and contours of exclusions of agricultural, domestic, casual workers, and self-employed from SSA programs); HACKER, *supra* note 10 at 261 (noting that African Americans, Hispanics, and others who work "on the margins of the employment based system" have been hit especially hard by the decline of employer-provided health insurance).

73. Quadagno, *supra* note 27, at 634; KOLLMAN, *supra* note 61.

United States.⁷⁴ Globalization, deregulation, and deunionization allowed firms to eliminate the internal labor markets and unions that previously had ensured stable employment with good wages and benefits.⁷⁵ Unions were forced into concessionary bargaining, giving up wage and benefit gains they had previously won or fighting just to preserve the benefits that existed.⁷⁶ Semi-skilled, well-paid unionized jobs, especially in the industrial manufacturing sector, declined sharply. With them, the social insurance supports connected to this form of employment, such as pensions and health care, declined as well.⁷⁷ Financialization of corporate management pushed restructuring to squeeze out short-term gains, including by cutting jobs, wages, and benefits, and substituting low-wage contractors for company employees.⁷⁸

The labor market became polarized between low-wage, low-skill jobs and well-paid jobs that required significant education or skills. Work arrangements without security or benefits grew, including temporary or contract work, part-time work, employment with no standard hours or guarantee of minimum income, and independent contractor status.⁷⁹ In short, the labor market shifted from good jobs—full-time permanent employment that paid a wage sufficient to support a family and provided paid leave, health insurance, and retirement benefits—to bad jobs lacking these characteristics.⁸⁰ Work became precarious.⁸¹ Half of the jobs created between 1995 and 2013, and about 60 percent of those created between 2007 and 2013, were non-standard jobs. Today, more than 17 percent of workers in the

74. See, e.g., ARNE KALLEBERG, GOOD JOBS, BAD JOBS 1-18 (2011); William Lazonick & Mary O'Sullivan, *Maximizing Shareholder Value: A New Ideology for Corporate Governance*, 29 *ECON. & SOC'Y* 13, 15-17 (2000); Matt Vidal, *Reworking Postfordism: Labor Process Versus Employment Relations*, 5 *SOC. COMPASS* 273, 276-78 (2011).

75. Jeremy Pilaar, *Reforming Unemployment Insurance in the Age of Non-Standard Work*, 13 *HARV. L. & POL'Y REV.* 327, 337 (2018).

76. See JEFFERSON COWIE, STAYIN' ALIVE: THE 1970S AND THE LAST DECADE OF THE WORKING CLASS 16-17, 272 (2010).

77. See *id.* at 15, 361-64.

78. Neil Fligstein & Taek-Jin Shin, *The Shareholder Value Society: A Review of the Changes in Working Conditions and Inequality in the United States, 1976 to 2000*, in *SOCIAL INEQUALITY* 401-03 (Kathryn Neckerman ed., 2004); JACOB S. HACKER, THE GREAT RISK SHIFT: THE NEW ECONOMIC INSECURITY AND THE DECLINE OF THE AMERICAN DREAM 13-14 (2d ed. 2019).

79. See DAVID WEIL, THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT 24-25 (2014). See generally DAVID PEDULLA, MAKING THE CUT: HIRING DECISIONS, BIAS, AND THE CONSEQUENCES OF NONSTANDARD, MISMATCHED, AND PRECARIOUS EMPLOYMENT 2-3 (2020).

80. KALLEBERG, *supra* note 74, at 10, 17; Arne L. Kalleberg, Barbara F. Reskin & Ken Hudson, *Bad Jobs in America: Standard and Nonstandard Employment Relations and Job Quality in the United States*, 65 *AM. SOC. REV.* 256, 273 (2000).

81. Arne L. Kalleberg, *Precarious Work, Insecure Workers: Employment Relations in Transition*, 74 *AM. SOC. REV.* 1, 2 (2009).

United States are in these precarious jobs,⁸² and 10.1 percent of workers rely on short-term, independent contractor jobs for their primary income.⁸³

At the same time, basic income itself became less secure as layoffs increased, and more jobs featured variable and uncertain hours that did not always produce a reliable income. In his book, *The Great Risk Shift*, political scientist Jacob Hacker draws on a measure of income volatility, or instability, to gain insight on the increasing risks experienced by American workers.⁸⁴ The share of Americans experiencing a 50 percent or greater drop in family income over a two-year period has been steadily rising since the late 1960s, such that the average person is roughly twice as likely to see their income drop by half as an average person was forty years ago.⁸⁵ Moreover, income instability is increasing across all educational levels; no one is immune.⁸⁶ Wages are not growing to offset this risk; wage growth has stagnated since the 1970s, and in many areas real wages have declined.⁸⁷ At the same time, the 1990s evisceration of welfare protections further eroded the safety net that shores up basic income.⁸⁸ This welfare legislation imposed work requirements even for single parents caring for children, lowered benefits, and set time limits on how long one could receive welfare protections, undermining the efficacy of this support system.⁸⁹

Unemployment insurance, workers' compensation, and other legally-mandated employment protections apply only to those with the legal status of employee. At the same time, employers typically limit eligibility for company-provided paid sick leave, and health, pension, and disability plans to full-time, regular workers. As a result, precarious work leaves workers outside the protections of the employment-driven system of social insurance and without protection from the risks "associated with economic life."⁹⁰ Fewer and fewer workers have access to health care or pensions through their

82. Arne L. Kalleberg & Steven P. Vallas, *Probing Precarious Work: Theory, Research, and Politics*, in *PRECARIOUS WORK* 1-30 (Anne L. Kalleberg & Steven P. Vallas eds., 2018) (defining precarious work as "work that is uncertain, unstable, and insecure and in which employees bear the risks of work (as opposed to businesses or the government) and receive limited social benefits and statutory protections").

83. U.S. BUREAU OF LABOR STATISTICS, NEWS RELEASE: CONTINGENT AND ALTERNATIVE EMPLOYMENT ARRANGEMENTS, May 15, 2017 (June 7, 2018), <https://www.bls.gov/news.release/pdf/conemp.pdf> [<https://perma.cc/6R3F-HHFV>].

84. HACKER, *supra* note 78, at 14-16.

85. *Id.* at 19.

86. *Id.* at 27-28.

87. Jay Shambaugh & Ryan Nunn, *Why Wages Aren't Growing in America*, HARV. BUS. REV. (Oct. 24, 2017), <https://hbr.org/2017/10/why-wages-arent-growing-in-america> [<https://perma.cc/H54A-7XC2>].

88. Kathleen Kost & Frank Munger, *Fooling All of the People Some of the Time: 1990s Welfare Reform and the Exploitation of American Values*, 4 VA. J. SOC. POL'Y & L. 3, 88 (1996-1997).

89. *See id.* at 108-11.

90. ARNE L. KALLEBERG, *PRECARIOUS LIVES: JOB INSECURITY AND WELL-BEING IN RICH DEMOCRACIES* 13 (2018).

employers.⁹¹ Access to employer health insurance is shrinking: in the 1970s, approximately 80 percent of the U.S. population had private insurance, mostly through their employers.⁹² Now, employer insurance is only available to the most affluent workers, and its availability has declined dramatically for the lower end of the income scale.⁹³ Access to defined benefit pension plans is also shrinking dramatically.⁹⁴ Plans such as defined contribution plans or 401(k) plans that shift the risk to employees are displacing defined benefit pension plans.⁹⁵ Even those workers who retained pension benefits paid increasing contributions for rising health care costs and 401(k) investments, which shifted the risk of market variability to them.⁹⁶

At the same time jobs were changing, the restructuring of families exposed the weakness of a social insurance system premised on the male breadwinner and female homemaker model. Beginning in the 1970s, women—particularly married white women with young children—poured into the workforce in record numbers.⁹⁷ In addition, the proportion of single-parent families increased dramatically as the result of no-fault divorce reforms and out-of-wedlock childbearing.⁹⁸ By 2012, only 21 percent of children lived with families that fit the male breadwinner and female homemaker model, and 22 percent of children lived in families that relied on only one parent for both breadwinning and caregiving, almost all headed by women.⁹⁹ Today, most families lack an adult at home available to provide care when needed, and families face dramatically increased risk to income security from the loss of any caregiver.¹⁰⁰ Families that do not fit the

91. HACKER, *supra* note 10, at 153-55, 262.

92. Jacob S. Hacker, *Privatizing Risk without Privatizing the Welfare State: The Hidden Politics of Social Policy Retrenchment in the United States*, 98 AM. POL. SCI. REV. 243, 252 (2004).

93. MATTHEW RAE, DANIEL McDERMOTT, LARRY LEVITT & GARY CLAXTON, *LONG-TERM TRENDS IN EMPLOYER-BASED COVERAGE*, Peterson-KFF Health Sys. Tracker (APR. 3, 2020), [HTTPS://WWW.HEALTHSYSTEMTRACKER.ORG/BRIEF/LONG-TERM-TRENDS-IN-EMPLOYER-BASED-COVERAGE/](https://www.healthsystemtracker.org/brief/long-term-trends-in-employer-based-coverage/) [[HTTPS://PERMA.CC/4KWJ-CSXB](https://perma.cc/4KWJ-CSXB)].

94. Hacker, *supra* note 92, at 255.

95. *Id.*

96. Marc Kronson, *Employee Costs and Risks in 401(k) Plans*, COMPENSATION & WORKING CONDITIONS, Summer 2000, 12, 12-13, <https://www.bls.gov/opub/mlr/cwc/employee-costs-and-risks-in-401k-plans.pdf> [<https://perma.cc/P7L9-QTNY>].

97. Catherine Albiston, *Institutional Perspectives on Law, Work, and Family*, 3 ANN. REV. L. & SOC. SCI. 397, 399-401 (2007).

98. Albiston & O'Connor, *supra* note 62, at 13.

99. See JONATHAN VESPA, JAMIE M. LEWIS & ROSE M. KREIDER, U.S. CENSUS BUREAU, *AMERICA'S FAMILY AND LIVING ARRANGEMENTS: 2012*, 25 tbl.10 (Aug. 2013), <http://www.census.gov/prod/2013pubs/p20-570.pdf> [<https://perma.cc/S5NL-VXMM>].

100. See KALLEBERG, *supra* note 74, at 14; Ann O'Leary, *Risk Sharing when Work and Family Clash: The Need for Government and Employer Innovation*, in *SHARED RESPONSIBILITY, SHARED RISK: GOVERNMENT, MARKETS, AND SOCIAL POLICY IN THE TWENTY-FIRST CENTURY* 161, 163-64 (Jacob S. Hacker & Ann O'Leary eds., 2012).

breadwinner and homemaker model face tremendous challenges meeting economic and caregiving responsibilities with little outside support.

In this Section, we have suggested how American social insurance protection was tied to work and the worker, leaving the invisible homemaker and caretaker implicit in the family wage breadwinner ideal. When the nature of work, work-provided benefits, and family structures shifted, the absence of any institutionalized social support for the caregiving necessary to enable wage work became all too clear. Other industrialized countries responded by enacting support for caregiving from paid family leave to universal preschool and childcare, and many instituted universal health care as well.¹⁰¹ The United States, however, has not adopted new social policies to help families cope with these rapid demographic changes.¹⁰² This failure to adapt has left the majority of Americans, and especially the most vulnerable, in a precarious situation when disaster strikes.

D. Social Insurance Policy Has Failed to Respond to Economic and Social Changes Since 1970

Although social insurance, the family wage, and reliable income have eroded, along with the family structure to which these benefits were tied, no new American social insurance policies have emerged to take the place of these benefits. In a phenomenon Jacob Hacker calls “policy drift,” American social insurance policies have not responded to the rise of new or newly intensified social risks or to the disappearing social safety net that was once tied to employment.¹⁰³ Highly paid workers, especially those who work for large employers, are more likely to have benefits such as health care, pensions, and paid sick and family leave.¹⁰⁴ By contrast, low-wage workers are less likely to have these benefits, and non-standard workers, including

101. See Montgomery, *supra* note 4; OECD, *supra* note 4.

102. O’Leary, *supra* note 100, at 162 (identifying the United States and Papua New Guinea as the only countries among 185 nations studied by the International Labour Organization that provide no statutory cash benefits during maternity leave); see, e.g., INT’L LABOUR ORG., MATERNITY AND PATERNITY AT WORK: LAW AND PRACTICE ACROSS THE WORLD 16 (2014), http://www.ilo.org/wcmsp5/groups/public/—dgreports/—dcomm/—publ/documents/publication/wcms_242615.pdf [<https://perma.cc/V72W-DR7L>].

103. Hacker, *supra* note 92, at 246.

104. Elise Gould, *Union Workers Are More Likely to Have Paid Sick Days and Health Insurance*, ECON. POLICY INST. (Mar. 12, 2020), <https://www.epi.org/blog/union-workers-are-more-likely-to-have-paid-sick-days-and-health-insurance-covid-19-sheds-light-on-inequalities-among-the-poorest-and-least-empowered-workers> [<https://perma.cc/4SDS-FAD4>]; *Higher Wage Workers More Likely Than Lower Wage Workers to Have Paid Leave Benefits in 2018*, U.S. BUREAU OF LABOR STATISTICS (2018), <https://www.bls.gov/opub/ted/2018/higher-wage-workers-more-likely-than-lower-wage-workers-to-have-paid-leave-benefits-in-2018.htm> [<https://perma.cc/4SDS-FAD4>]; *Higher Paid Workers More Likely to Have Access to Retirement Benefits Than Lower Paid Workers*, U.S. BUREAU OF LABOR STATISTICS (2017), <https://www.bls.gov/opub/ted/2017/higher-paid-workers-more-likely-to-have-access-to-retirement-benefits-than-lower-paid-workers.htm> [<https://perma.cc/4SDS-FAD4>].

independent contractors, have very little protection at all.¹⁰⁵ Moreover, the private social insurance benefits that exist leave even those workers who have them at greater risk.¹⁰⁶ This is true across the range of the major employee benefits—health, pensions, and paid leave.¹⁰⁷

For health insurance, two-thirds of Americans rely on some form of private health plan, including 54 percent who obtain access to health care through their employers, which shifts the cost, and at least some of the risk of rising premiums, to employees.¹⁰⁸ A substantial proportion of Americans remain uninsured; nearly one in ten Americans were uninsured in 2018, despite a significant increase in coverage after the Affordable Care Act (ACA).¹⁰⁹ Tellingly, it is adults age nineteen to sixty-four—who are typically not eligible for state provided health care and must rely on the private market—who are most likely to be uninsured.¹¹⁰ Before recent legal changes in the ACA, Americans with preexisting conditions were hard pressed to find an affordable health insurance option in the private market, if they could find an option at all.¹¹¹

When it comes to retirement income, it has always been assumed that OAI would be only a supplement to private savings or employer-provided pensions.¹¹² But private pensions have become less generous, riskier, and rarer. For example, federal law allowed tax-deferred compensation plans after the late 1970s, which encouraged employers to substitute defined contribution pension plans (such as those established under section 401(k) of the Internal Revenue Code) for defined benefit plans.¹¹³ Defined contribution plans shift the risk of underinvestment and market volatility onto workers, many of whom do not earn enough to fund their retirement through this vehicle.¹¹⁴ In sum, the retirement benefits provided under the SSA are insufficient on their own to fund a good standard of living during retirement years, and the various tax incentives and subsidies for private pension programs benefit only upper-income workers. The result is that old age support is unequal.

105. See *supra* note 104; Veena B. Dubal, *Wage Slave or Entrepreneur: Contesting the Dualism of Legal Worker Identities*, 105 CALIF. L. REV. 65, 67 (2007).

106. See generally HACKER, *supra* note 10.

107. See *infra* notes 108-109 and accompanying text.

108. HACKER, *supra* note 10, at 6.

109. Berchick et al., *supra* note 14, at 1.

110. *Id.* at 7 tbl.4.

111. Sam Berger & Emily Gee, *Latest ACA Repeal Plan Would Explode Premiums for People with Pre-Existing Conditions*, CTR. FOR AM. PROGRESS (Apr. 20, 2017), <https://www.americanprogress.org/issues/healthcare/news/2017/04/20/430858/latest-aca-repeal-plan-explode-premiums-people-pre-existing-conditions> [<https://perma.cc/99JS-KS87>].

112. HACKER, *supra* note 10, at 85-87.

113. *Id.* at 163-69.

114. *Id.*

As for paid leave, what little exists follows predictable patterns of inequality. The U.S. Bureau of Labor Statistics indicates that access to paid sick leave is greater for full-time rather than part-time workers, high earners compared to low earners, public sector relative to private sector workers, and those who work for larger employers relative to smaller employers.¹¹⁵ Only 18 percent of American private-industry employees have access to paid family leave through their employer, with more access among highly-paid occupations, full-time workers, and workers in large companies.¹¹⁶ Lawmakers have also created dependent care accounts through which families can set aside limited tax-free funds to offset the costs of health care and childcare.¹¹⁷ As with pensions, the risk of inadequate savings or inadequate funds to cover these expenses falls entirely on families. Ironically, expenditures on these forms of welfare provisions are substantial, but they are deeply regressive because they primarily benefit those with enough income to save substantial amounts and take advantage of tax breaks.¹¹⁸ This approach does little for families most in need: low-wage working families, for whom these policies are largely irrelevant. Although some states have adopted paid leave programs, these are recent and only provide partial benefits.¹¹⁹

Countries with paid leave provisions reduce the impact of ordinary illnesses and caregiving realities of life on family and worker economic stability and welfare. Paid leave policies shift some of these costs onto employers and the state, or spread the risk of these costs through state-mandated leave programs paid for by employee payroll deductions. What these policies recognize is that these forms of insecurity for working families are nothing new; workers face them every day, just not all at the same time.

As confirmed U.S. COVID-19 cases near 32 million and deaths exceed 566,000,¹²⁰ it has become glaringly obvious that the whole country is affected by a system in which so many people, and disproportionately the most

115. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, BULL. NO. 2791 NATIONAL COMPENSATION SURVEY: EMPLOYEE BENEFITS IN THE UNITED STATES 119-20 (2019).

116. SARAH A. DONOVAN, CONG. RESEARCH SERV., R44835, PAID FAMILY LEAVE IN THE UNITED STATES (2020), <https://crsreports.congress.gov/product/pdf/R/R44835> [<https://perma.cc/9ZN3-RJSB>].

117. See Ron Lieber, *Dependent Care Accounts, Hamstrung by Limits, Are Still Worth Exploring*, N.Y. TIMES (Nov. 7, 2014), <https://www.nytimes.com/2014/11/08/your-money/taxes/dependent-care-accounts-hamstrung-by-a-28-year-old-limit-are-still-worth-exploring.html> [<https://perma.cc/G474-P5YB>].

118. HACKER, *supra* note 10, at 36-39.

119. Diana Boesch, *Rhetoric vs. Reality Not All Paid Leave Proposals Are Equal*, CTR. FOR AM. PROGRESS (Oct. 10, 2019), <https://www.americanprogress.org/issues/women/reports/2019/10/10/475625/rhetoric-vs-reality-not-paid-leave-proposals-equal> [<https://perma.cc/6Q26-RQV3>].

120. *COVID-19 Dashboard by the Center for Systems Science and Engineering (CSSE) at Johns Hopkins University (JHU)*, JOHNS HOPKINS UNIV. & MED. CORONAVIRUS RESEARCH CTR., <https://coronavirus.jhu.edu/map.html> [<https://perma.cc/WVG6-MA23>] (last visited Apr. 17, 2021).

economically vulnerable, lack sick leave or paid family leave to address their own health crises and those of their family. The COVID-19 pandemic multiplied the individual costs of this lack of paid leave by millions. Universal paid leave could have reduced the inequality-amplifying effects of crises like COVID-19. Although many workers will lose their jobs in the current economic downturn, a few weeks of paid leave to recover from illness and care for ill family members may make the difference between bridging this public health challenge and complete economic disaster for many working families.

In short, American social welfare provision continues to follow the uneasy alliance between minimalist, often means-tested state provision and hidden, heavily subsidized, private provision of social insurance. This patchwork and largely privatized system of American social insurance leaves substantial sectors of the population without health insurance, adequate retirement income, or paid leave, and without adequate income support in our current economic crisis. Moreover, the most vulnerable workers, those who do not earn enough to benefit from tax subsidies, pay for private insurance, or save for retirement, are left with virtually no protection at all. This system left Americans extremely vulnerable to economic disaster when the pandemic struck, forcing the state to shore up income and social protection through hastily enacted, temporary legislation. In the end, this legislation transferred millions of dollars to corporations, while simultaneously leaving millions of Americans out in the cold.

E. Inadequate Economic Security from UI

The political compromise at the heart of UI—that federal law should not deprive states of the power to define eligibility in such a way as to incentivize work—has meant that UI benefits are often difficult to access, are unavailable to many, and do not come close to replacing wages. Thus, whereas in the 1950s approximately half of unemployed persons typically received UI, by 2015 less than one-quarter of unemployed people received UI, ranging from 10.9 percent of Floridians to 70 percent of North Dakotans.¹²¹ Compared to other countries, American income support from UI is modest to stingy. American support is well below the five-year average support for OECD countries.¹²² Moreover, American support payments start below the average for the first two years of unemployment, and cease altogether after that, whereas most other countries provide at least modest support for the long-term unemployed.¹²³

121. Pilaar, *supra* note 75, at 329, 333-34.

122. Herwig Immervoll & Stefano Scarpetta, *Activation and Employment Support Policies in OECD Countries. An Overview of Current Approaches*, 1 IZA J. LAB. POL'Y 1, 5 tbl.1 (2012).

123. *Id.*

UI benefits, even when they are available, typically replace only a fraction of workers' lost wages. States calculate a person's weekly benefit amount as a percentage of their pre-unemployment earnings, subject to a cap.¹²⁴ The caps range from \$823 a week in Massachusetts to \$235 in Mississippi to \$190 in Puerto Rico.¹²⁵ Nationally, the average cap on weekly benefits was \$300 in 2012,¹²⁶ and the states with the lowest caps are concentrated in the Southeast.¹²⁷ Moreover, the majority of workers who are separated from their jobs do not receive UI; the share of unemployed workers who receive UI has fallen from 45 percent in the mid-twentieth century to 30 percent in the first decade of the twenty-first, which is less than half of the rate of UI coverage and payment of other countries.¹²⁸ The percentage of unemployed who were receiving UI in March 2020 ranged from a high of 65.9 percent in Massachusetts to a low of 7.6 percent in Florida.¹²⁹

Policymakers' insistence that UI not disincentivize work has created a complex and difficult to administer system for determining eligibility. Workers are eligible for partial wage replacement only if they become unemployed without having been fired for cause or having voluntarily quit, and only upon proof of having worked in covered employment for a statutorily required period of time before the date of unemployment.¹³⁰ Accordingly, before receiving benefits after first filing, workers and their former employers have to establish each of these criteria.¹³¹ In order to remain eligible to continue receiving benefits each week, state unemployment agencies have to verify that workers are making efforts to find work.¹³²

These compromises in the UI system's institutional design have proved to be a huge challenge in the pandemic. The process for determining initial and continuing eligibility and for setting each worker's weekly benefit amount has resulted in catastrophically high workloads for state agencies and corresponding delays and backlogs in processing claims. For reasons that will

124. Galle, *supra* note 12, at 1027.

125. Drew DeSilver, *Not All Unemployed People Get Unemployment Benefits; In Some States, Very Few Do*, PEW RESEARCH CTR. (Apr. 24, 2020), <https://www.pewresearch.org/fact-tank/2020/04/24/not-all-unemployed-people-get-unemployment-benefits-in-some-states-very-few-do> [<https://perma.cc/T9E2-NUQU>].

126. CONG. BUDGET OFFICE, UNEMPLOYMENT INSURANCE IN THE WAKE OF THE RECENT RECESSION 6 (2012).

127. DeSilver, *supra* note 125.

128. Galle, *supra* note 12, at 1013 (citing U.S. Department of Labor statistics); DeSilver, *supra* note 125 (reporting that 29 percent of unemployed Americans received UI in March 2020).

129. DeSilver, *supra* note 125.

130. See OFFICE OF UNEMP'T INS., U.S. DEP'T OF LABOR, UNEMPLOYMENT COMPENSATION: FEDERAL-STATE PARTNERSHIP 11-12 (2019), <https://oui.doleta.gov/unemploy/pdf/partnership.pdf> [<https://perma.cc/B668-9RVF>].

131. OFFICE OF UNEMP'T INS., U.S. DEP'T OF LABOR, UNEMPLOYMENT INSURANCE FACT SHEET 2, https://oui.doleta.gov/unemploy/docs/factsheet/UI_Program_FactSheet.pdf [<https://perma.cc/4RG9-HDLM>].

132. *Id.*

become clear as the challenges to establishing eligibility are described below, any reform must include simplifying and rationalizing eligibility determinations.

Virtually all states determine a claimant's monetary eligibility by examining the first four of the last five calendar quarters prior to when the claimant filed for unemployment as a "base period," and most require wages in at least two of the quarters.¹³³ The base period earnings threshold varies substantially by state, ranging from \$130 in Hawaii to \$4,860 in Ohio.¹³⁴ About half of the states also require that claimants earn a given multiple of their highest-quarter earnings over their base period.¹³⁵ Part-time workers struggle to meet states' monetary eligibility requirements and are significantly less likely to receive UI benefits than their full-time counterparts.¹³⁶ Because they typically earn lower wages, they must work more hours to become eligible, hours that may be impossible to obtain.¹³⁷

To establish non-monetary eligibility for UI benefits, claimants must meet the distinct statutory requirements of "able to work" and "available to work."¹³⁸ "Able to work" means possessing the physical and mental fitness to perform some form of suitable work in their geographical area.¹³⁹ "Available to work" means being both ready and willing to work. Therefore, claimants must show that there are no circumstances making it impossible for them to commit to employment in their area.¹⁴⁰ They must also demonstrate that they are "actively seeking" work by registering with their local unemployment agency, reporting at the agency every week, and in many states, making a given number of weekly outreaches to employers on their own time.¹⁴¹ Workers who lack childcare are disqualified from receiving UI in many states because they are not "available to work."¹⁴² Thus, a loss of childcare can both cause a worker to lose a job and be ineligible for UI or any

133. EMP'T & TRAINING ADMIN., U.S. DEP'T OF LABOR, 2016 COMPARISON OF STATE UNEMPLOYMENT INSURANCE LAWS 3-5-3-7 (2016), <https://oui.doleta.gov/unemploy/pdf/uilawcompar/2016/complete.pdf> [<https://perma.cc/82SG-K4SG>].

134. *Id.* at 3-6; OHIO DEPT. OF JOB & FAMILY SERVS., HOW OHIO'S UNEMPLOYMENT INSURANCE BENEFIT AMOUNTS ARE CALCULATED (2020), <https://unemployment.ohio.gov/PDF/HowOhioUCBenefitsAreCalculated.pdf> [<https://perma.cc/GJ8V-LU2X>].

135. EMP'T & TRAINING ADMIN., *supra* note 133, at 3-5-3-7.

136. Pilaar, *supra* note 75, at 340.

137. *Id.* at 346.

138. Lee G. Williams, *Eligibility for Benefits*, 8 VAND. L. REV. 286, 290 (1955).

139. Louise F. Freeman, *Able to Work and Available for Work*, 55 YALE L.J. 123, 128 (1945).

140. *Id.* at 124.

141. Pilaar, *supra* note 75, at 347.

142. Robert Iafolla, *Without Child Care, Back-to-Work Parents Have Few Legal Options*, BLOOMBERG L.: DAILY LAB. REP. (July 7, 2020), <https://news.bloomberglaw.com/daily-labor-report/without-child-care-back-to-work-parents-have-few-legal-options> [<https://perma.cc/ZE46-GQS2>].

other income support.¹⁴³ As will be explained below, the pandemic-induced closures of schools and childcare centers has prompted a catastrophe for many families that the UI system has failed to address.

Driven by the desire to avoid federal penalties on state UI trust fund insolvency, states have resorted to increasingly punitive disqualification provisions.¹⁴⁴ Unlike the early decades of UI, when disqualification was limited to four to six weeks, most states now disqualify claimants who refuse suitable work for the entire duration of their unemployment and also require them to earn a given multiple of their weekly benefit amount to requalify.¹⁴⁵ Frequently, conflicting authority between state statutes, rules, and case law as to the definition of suitable work leads to inconsistent decisions among claims processors, making the eligibility determination process as unpredictable as it is high-stakes for claimants.¹⁴⁶

Most states disqualify claimants who leave their work voluntarily without good cause to the same extent, and some also cut their benefits by a given multiple of their weekly benefit amount or by a given percentage.¹⁴⁷ At the same time, many restrict good cause to reasons involving fault on the part of the employer while ruling out virtually all personal reasons.¹⁴⁸ As a result, claimants forced to quit their jobs for reasons such as pregnancy, moving with a spouse, or caring for a sick family member or a young child, are disqualified from benefits.¹⁴⁹ These punitive disqualification provisions depart from the original aim of disqualification, which was to establish a causal connection between a claimant's unemployment and a lack of suitable work.¹⁵⁰ Thus, the United States' primary protection against income loss from unemployment does not cover many people who lose their jobs, and even those who are covered will likely find that the income replacement from UI is grossly inadequate.

Although increasingly precarious work is a global phenomenon, other industrialized nations faced these changes by designing social welfare systems based on more universal principles and risk sharing than the American approach that tied so many protections to one particular form of employment. As a result, when Americans lost access to standardized, traditional forms of employment, they also began to lose access to the social

143. *Id.*

144. Galle, *supra* note 12, at 1035.

145. EMP'T & TRAINING ADMIN., *supra* note 133, at 5-37-5-39.

146. Amy B. Chasanov, *Clarifying Conditions for Nonmonetary Eligibility in the Unemployment Insurance System*, 29 U. MICH. J.L. REFORM 89, 101 (1996).

147. EMP'T & TRAINING ADMIN., *supra* note 133, at 5-10-5-12.

148. *See id.* at 5-2.

149. Martin H. Malin, *Unemployment Compensation in a Time of Increasing Work-Family Conflicts*, 29 U. MICH. J.L. REFORM 131, 140 (1996).

150. *See* Paul H. Sanders, *Disqualification for Unemployment Insurance*, 8 VAND. L. REV. 307, 311 (1955).

insurance benefits tied to that employment. Even as workers continued to work for wages, because that wage work took an increasingly varied form, social insurance protections began to erode for many workers, especially those at the bottom of the wage scale. This development, combined with lack of union protection or political power to demand employer provision of social insurance, left American workers vulnerable to what Jacob Hacker calls “The Great Risk Shift” from government and employers to individual workers.¹⁵¹ Now workers individually bear far more of the risk of injury, illness, unemployment, and inadequate income in old age, especially those workers who do not make enough to benefit from social insurance benefits tied to tax expenditures. And for people who live in poverty, the changes to anti-poverty programs that put time limits on access to benefits, require recipients to work without providing adequate childcare, make eligibility requirements more stringent, and adopt punitive policies that tend to criminalize poverty have made social insurance benefits entirely inaccessible.

II. AMPLIFYING INEQUALITY

COVID-19 entered a landscape of increasing economic precarity, shrinking social insurance protections, and deep inequality in access to employment-connected sources of social protection such as health insurance, pensions, and paid sick and family leave. The pandemic tremendously exacerbated economic inequality and threats to economic security. Risks of unemployment, illness, work-related injuries, and family care responsibilities have converged on the American workforce with a vengeance. At the same time, research makes clear that many Americans lack adequate savings to weather a prolonged spell of unemployment on their own. For example, a 2018 Federal Reserve survey found 40 percent of American adults wouldn’t be able to cover a \$400 emergency with cash, savings, or a credit-card charge that they could quickly pay off.¹⁵²

The COVID-19 emergency has been much larger than a one-time \$400 emergency. In mid-2020, the United States experienced the highest level of unemployment since the darkest days of the Great Depression, with an estimated 23.6 percent of the workforce out of work.¹⁵³ The pandemic also brings significant health care risks to those who contract the virus and suffer complications, which may require weeks of hospitalization and recovery.

151. See generally HACKER, *supra* note 78.

152. BD. OF GOVERNORS OF THE FED. RESERVE. SYS., REPORT ON THE ECONOMIC WELL-BEING OF U.S. HOUSEHOLDS IN 2018 (May 2019), <https://www.federalreserve.gov/publications/2019-economic-well-being-of-us-households-in-2018-dealing-with-unexpected-expenses.htm> [https://perma.cc/E8L9-7V45].

153. ALEXANDER BICK & ADAM BLANDIN, REAL-TIME LABOR MARKET ESTIMATES DURING THE 2020 CORONAVIRUS OUTBREAK 2 (May 11, 2020), https://alexibick.weebly.com/uploads/1/0/1/3/101306056/bb_covid.pdf [https://perma.cc/8E2Y-A62R].

Nearly 10 percent of Americans lack health care coverage to protect them against this risk.¹⁵⁴ Even those workers who have steady employment may need time off to care for a family member who falls ill, or to recover from their own illness if they contract COVID-19. And with schools closed, families face a loss of childcare. Yet a substantial proportion of the workforce has no access to paid sick days or paid family leave.

Early research about the effect of COVID-19 on employment and economic security reveals complex effects across the global economy, but nearly all these effects interact with existing inequities based on race, class, and gender.¹⁵⁵ Growing inequality from the pandemic is not inevitable, however. Countries that updated their social insurance policies to address the changing labor economy were better prepared for the effects of the pandemic shutdowns, and the current economic crisis multiplies the protective effects of these policies. Similarly, rapid and effective policy responses by some countries have reduced the inequality-amplifying effects of the pandemic downturn. In the United States, however, the lack of social insurance protections not only leaves millions of people facing severe economic consequences, but also means COVID-19 has massive inequality-amplifying effects. In short, the pandemic produced exactly the kind of economic crisis that prompted the enactment of the Social Security Act in 1935. And now, as then, the hardships are greatest for low-wage workers, especially Black and Brown workers, single-parent households, and recent immigrants, all of whom are least likely to have the jobs that provide social insurance.

A. *Inequality by Class*

Although many workers across the income spectrum have been affected by pandemic-related shutdowns, low-wage workers have disproportionately lost their jobs and economic security as a result of COVID-19. About half of lower-income adults report household job or wage loss as a result of the pandemic, compared to 42 percent of middle-income adults and 32 percent of upper-income adults.¹⁵⁶ Low-wage workers tend to be concentrated in industries hardest hit by pandemic shutdowns, including hospitality, retail,

154. Garfield et al., *supra* note 15, at 7.

155. Richard Blundell, Monica Costa Dias, Robert Joyce & Xiaowei Xu, *Covid-19 and Inequalities*, 41 FISCAL STUD. 291 (2020).

156. KIM PARKER, JULIANA MENASCE HOROWITZ & ANNA BROWN, PEW RESEARCH CTR., ABOUT HALF OF LOWER INCOME AMERICANS REPORT HOUSEHOLD JOB OR WAGE LOSS DUE TO COVID-19 4 (Apr. 2020),

https://www.pewsocialtrends.org/wp-content/uploads/sites/3/2020/04/PSDT_04.21.20_covidfinance_FULL.REPORT.pdf [<https://perma.cc/WV3N-HZRX>].

entertainment, and travel industries.¹⁵⁷ Poorly paid service workers in these industries were more likely to lose their jobs entirely because these industries were largely shuttered.¹⁵⁸ By contrast, the ability to continue to work remotely is more common in industries with more highly educated and better paid workers.¹⁵⁹

In addition, many routine low-paid jobs have suddenly become dangerous for workers because they may contract COVID-19 at work. Ironically, workers deemed “essential”—grocery and retail workers, health care workers, mass transit workers, meat packing and food processing workers—are at high risk of exposure to the virus at work, but also earn low wages and often lack basic protections such as health insurance and paid leave.¹⁶⁰ Epidemiologists find that infection rates and disease outcomes of COVID-19 seem to be drastically worse for socioeconomically marginalized groups.¹⁶¹ Moreover, despite these hazardous working conditions, workers’ compensation programs in most states do not cover community-spread illness even if contracted at work.¹⁶² As a result, there is no guarantee that income protection from workers’ compensation will be available to essential workers who contract the virus.¹⁶³ Retail employers that provided hazard pay to workers at the beginning of the pandemic have largely withdrawn this extra financial support, even where their profits have soared.¹⁶⁴ Instead, excess profits are being diverted to stock buybacks that benefit shareholders rather than workers.¹⁶⁵ Thus, these workers are essential but not protected. They

157. Alan Berube & Nicole Bateman, *Who Are the Workers Already Impacted by the COVID-19 Recession?*, BROOKINGS (Apr. 3, 2020), <https://www.brookings.edu/research/who-are-the-workers-already-impacted-by-the-covid-19-recession> [<https://perma.cc/VLM2-C9AA>].

158. Thomas Franck, *Hardest-Hit Industries Nearly Half the Leisure and Hospitality Jobs Were Lost in April*, CNBC (May 8, 2020, 9:34 AM), <https://www.cnbc.com/2020/05/08/these-industries-suffered-the-biggest-job-losses-in-april-2020.html> [<https://perma.cc/E4CA-ZN6Y>].

159. Alexander W. Bartick, Zoe B. Cullen, Edward L. Glaeser, Michael Luca & Christopher T. Stanton, *What Jobs Are Being Done at Home During the COVID-19 Crisis? Evidence from Firm-Level Surveys* 3 (Nat’l Bureau of Econ. Research, Working Paper No. 27422, 2020), https://www.nber.org/system/files/working_papers/w27422/w27422.pdf [<https://perma.cc/4NP9-JTWY>].

160. Adie Tomer & Joseph W. Kane, *How to Protect Essential Workers During COVID-19*, BROOKINGS (Mar. 31, 2020), <https://www.brookings.edu/research/how-to-protect-essential-workers-during-covid-19> [<https://perma.cc/F97W-7ERW>].

161. See Tanya Albert Henry, *Data from 10 Cities Show COVID-19 Impact Based on Poverty, Race, AMA* (Aug. 5, 2020), <https://www.ama-assn.org/delivering-care/health-equity/data-10-cities-show-covid-19-impact-based-poverty-race> [<https://perma.cc/S48D-YGH3>].

162. Josh Cunningham, *COVID-19 Workers’ Compensation*, NAT’L CONFERENCE OF STATE LEGISLATURES (Dec. 9, 2020), <https://www.ncsl.org/research/labor-and-employment/covid-19-workers-compensation.aspx> [<https://perma.cc/R8S7-JWW5>].

163. *Id.*

164. Michael Corkery & Sapna Maheshwari, *Virus Cases Rise, but Hazard Pay for Retail Workers Doesn’t*, N.Y. TIMES (Nov. 19, 2020), <https://www.nytimes.com/2020/11/19/business/retail-workers-hazard-pay.html> [<https://perma.cc/F97C-7UN6>] (reporting Amazon profits are up 200 percent even as Amazon discontinues two dollars per hour hazard pay).

165. *Id.*

continue working for limited wages at much higher risk than professional workers who more likely have sufficient health protection and economic security should they become sick.

B. Inequality by Gender

The pandemic economic crisis also has had disproportionate effects by gender. Some commentators argue that the gender effects are so severe that the pandemic could scar the employment and earning prospects of an entire generation of working women.¹⁶⁶ Women account for the majority of workers in the leisure and hospitality industries hardest hit by the pandemic shutdown.¹⁶⁷ This fact helps explain why the unemployment rate for women in May 2020 (14.3%) was higher than the rate for men (11.9%), even though women were less likely than men (3.4% as compared to 4.1%) to be unemployed in February 2020, before the onset of the pandemic in the United States.¹⁶⁸

In addition, the pandemic laid bare the degree to which the American economy depends upon an invisible gendered infrastructure of childcare, schooling, and care at home. COVID-19 has precipitated the collapse of the childcare industry on which women's labor force participation depends.¹⁶⁹ Childcare centers and schools across the nation have closed, leaving families with full-time caregiving responsibility for their minor children.¹⁷⁰ Many parents must facilitate remote learning for school-age children while often continuing to work full time.¹⁷¹ The resulting stress on parents, especially women, has been unprecedented.¹⁷² A preliminary study, "The Impact of

166. Patricia Cohen & Tiffany Hsu, *Pandemic Could Scar a Generation of Working Women*, N.Y. TIMES (June 3, 2020), <https://www.nytimes.com/2020/06/03/business/economy/coronavirus-working-women.html> [https://perma.cc/CT5M-QQY4].

167. Rakesh Kochhar, *Unemployment Rose Higher in Three Months of COVID-19 Than It Did in Two Years of the Great Recession*, PEW RESEARCH CTR. (June 11, 2020), <https://www.pewresearch.org/fact-tank/2020/06/11/unemployment-rose-higher-in-three-months-of-covid-19-than-it-did-in-two-years-of-the-great-recession> [https://perma.cc/2ZX8-4UBH].

168. *Id.* Even these high rates likely underestimate unemployment because of an error in the classification of certain workers as employed but absent from work instead of employed on temporary layoff. Rakesh Kochhar, *Unemployment Rate is Higher than Officially Recorded, more so for Women and Certain Other Groups*, PEW RESEARCH CTR. (June 30, 2020), <https://www.pewresearch.org/fact-tank/2020/06/30/unemployment-rate-is-higher-than-officially-recorded-more-so-for-women-and-certain-other-groups> [https://perma.cc/NUW9-WR73].

169. *See, e.g.*, Cohen & Hsu, *supra* note 166; Sean Doocy, Yoonjeon Kim & Elena Montoya, *California Child Care in Crisis The Escalating Impacts of COVID-19 as California Reopens*, CTR. FOR THE STUDY OF CHILD CARE EMP'T (July 22, 2020), <https://cscce.berkeley.edu/california-child-care-in-crisis-covid-19> [https://perma.cc/7JFP-Q73P].

170. Emily Sohn, *When Child Care Centers Close, Parents Scramble to Adapt*, N.Y. TIMES (June 10, 2020), <https://www.nytimes.com/2020/06/10/parenting/virus-day-care-bright-horizons.html> [https://perma.cc/EHF3-AGKP].

171. *Id.*

172. *See* Cohen & Hsu, *supra* note 166; Jessica Grose, *School's Out. Parental Burnout Isn't Going Away*, N.Y. TIMES (June 23, 2020), <https://www.nytimes.com/2020/06/23/parenting/parental-burnout->

COVID-19 on Gender Equality,” by researchers at the National Bureau of Economic Research states:

An even more important channel for differential impacts on women and men is that in the course of the pandemic, most US states along with other countries have decided to close schools and daycare facilities. Worldwide more than 1.5 billion children are out of school right now. This has dramatically increased the need for childcare. In addition, grandparent-provided childcare is now discouraged due to the higher mortality rate for the elderly, and given social distancing measures, sharing childcare with neighbors and friends is very limited also. Thus, most families have no choice but to watch their kids themselves. Based on the existing distribution of childcare duties in most families, mothers are likely to be more affected than fathers. Single mothers, of which there are many in the United States, and who are often in a disadvantaged economic position to begin with, will take the biggest hit.¹⁷³

When the school and childcare infrastructure collapsed, women picked up the slack, resulting in a second wave of labor force departures in the fall of 2020. Bureau of Labor Statistics data shows that in September 2020 alone, 865,000 American women left the labor force—four times the number of men who left the labor force that same month.¹⁷⁴ Available data indicates that mothers left the labor force in record numbers because of school closures while fathers did not.¹⁷⁵ In general, when there is a caregiving crisis in the family, cultural expectations suggest women will be the fallback plan.¹⁷⁶ As sociologist Jessica Calarco put it, “Other countries have social safety nets; the U.S. has women.”¹⁷⁷

coronavirus.html [https://perma.cc/FCQ6-CVHQ]; Deb Perelman, *In the Covid-19 Economy, You Can Have a Kid or a Job. You Can't Have Both*, N.Y. TIMES (July 2, 2020), https://www.nytimes.com/2020/07/02/business/covid-economy-parents-kids-career-homeschooling.html [https://perma.cc/D3PF-K6DU].

173. Titan Alon, Matthias Doepke, Jane Olmstead-Rumsey & Michèle Tertilt, *The Impact of COVID-19 on Gender Equality* 1 (Nat'l Bureau of Econ. Research, Working Paper No. 26947, 2020), https://www.nber.org/system/files/working_papers/w26947/w26947.pdf [https://perma.cc/4F3S-HRW8].

174. CLAIRE EWING-NELSON, NAT'L WOMEN'S LAW CTR., FOUR TIMES AS MANY WOMEN THAN MEN DROPPED OUT OF THE LABOR FORCE IN SEPTEMBER 1 (Oct. 2020), https://nwlc.org/wp-content/uploads/2020/10/september-jobs-fs1.pdf [https://perma.cc/R39S-8UUW]; see also Isaac Chotiner, *Why the Pandemic is Forcing Women Out of the Workforce*, NEW YORKER (Oct. 23, 2020), https://www.newyorker.com/news/q-and-a/why-the-pandemic-is-forcing-women-out-of-the-workforce [https://perma.cc/7N8J-T2CD].

175. Ernie Tedeschi, *The Mystery of How Many Women Left Work Because of School Closures*, N.Y. TIMES (Oct. 29, 2020), https://www.nytimes.com/2020/10/29/upshot/mothers-leaving-jobs-pandemic.html [https://perma.cc/4W87-3V54].

176. Claire C. Miller, *When Schools Closed, Americans Turned to Their Usual Backup Plan Mothers*, N.Y. TIMES (Nov. 17, 2020), https://www.nytimes.com/2020/11/17/upshot/schools-closing-mothers-leaving-jobs.html [https://perma.cc/YR7T-X9F2].

177. *Id.* (quoting Jessica Calarco, a sociologist at Indiana University studying the effects of the pandemic on women).

Women already perform the bulk of housework and childcare, even when they work full time.¹⁷⁸ In addition, a much larger proportion of full-time working fathers than full-time working mothers have a partner at home who works part-time or not at all and therefore can absorb increased household labor.¹⁷⁹ As a result, scholars argue that the pandemic will likely disproportionately affect women, especially if they are working at home, because women spend more time on active childcare and homeschooling.¹⁸⁰ The collapse of childcare and schooling is likely to hit households headed by single mothers especially hard because they rely on only one adult and are often economically disadvantaged to begin with.¹⁸¹

The lack of state-mandated paid sick time or paid family leave only amplifies these unequal effects to increase gender inequality. COVID-19 has made clear how lack of paid leave creates impossible challenges for workers, including choosing between working sick or losing their jobs, and coping without the care and economic support their families need. Workers who lack paid leave are more likely to go to work sick, more likely to forgo medical care for sick family members, and more likely to experience unemployment.¹⁸² By contrast, in addition to protecting income for workers who must take time off because they are sick, access to sick leave decreases the probability of job loss by 25 percent.¹⁸³

Lack of paid leave also amplifies patterns of inequality driven by caregiving more generally. Caregiving for children and sick or elderly family members is not optional, and someone must bear the cost of that care. Wealthier families are better able to absorb the cost of private caregiving, but lower-paid workers have few options other than providing the care themselves at the expense of their paycheck. Two-parent families can share care and earning responsibilities, whereas single-parent families must meet both responsibilities with one adult earner. The collapse of school and daycare resources has thus amplified patterns of inequality driven by gender and caregiving more generally. Even before the pandemic, women disproportionately provided care to children and sick family members, and disproportionately bore the economic costs in terms of lost employment and

178. Suzanne M. Bianchi, Liana C. Sayer, Melissa A. Milkie & John P. Robinson, *Housework Who Did, Does or Will Do It, and How Much Does It Matter?*, 91 SOC. FORCES 55, 56-58 (2012).

179. See Alon et al., *supra* note 173, at 13.

180. *Id.* at 17; Abi Adams-Prassl, Teodora Boneva, Marta Golin & Christopher Rauh, *Inequality in the Impact of the Coronavirus Shock Evidence from Real Time Surveys* (IZA Inst. of Labor Econ., Discussion Paper No. 13183, 2020), <http://ftp.iza.org/dp13183.pdf> [<https://perma.cc/XUB9-UHS4>].

181. Alon et al., *supra* note 173, at 1.

182. LeAnne DeRigne, Patricia Stoddard-Dare & Linda Quinn, *Workers Without Paid Sick Leave Less Likely to Take Time Off for Illness or Injury Compared to Those with Paid Sick Leave*, 35 HEALTH AFF. 520 (2016).

183. Heather D. Hill, *Paid Sick Leave and Job Stability*, 40 WORK & OCCUPATIONS 143, 159 (2013).

lost income.¹⁸⁴ Now those costs are catastrophic, not only in terms of greater job loss among women, but also in terms of much greater demands on working women for caregiving and household labor.¹⁸⁵

C. *Inequality by Race*

Workers displaced by the COVID-19 pandemic are disproportionately people of color. Among both men and women, Asian, Black, and Latinx workers all experienced larger increases in unemployment than did white workers; Latina women in particular experienced the largest increase in job loss.¹⁸⁶ Overall, unemployment statistics indicate that about one in five Black, Asian, and Latinx workers were unemployed in May, compared to about 13.5 percent of white workers.¹⁸⁷ Other measures show even more alarming rates; April 2020 upper-bound estimates of unemployment rates are 31.8 percent for Black workers and 31.4 percent for Latinx workers.¹⁸⁸

Structural differences in the segments of the modern economy help explain these racially disparate effects. For example, “remote work is much more common in industries with better educated and better paid workers.”¹⁸⁹ By contrast, women and racial minorities, especially Latinx workers, are overrepresented in sectors of the economy where COVID-19 closures have hit hard.¹⁹⁰ According to the Bureau of Labor Statistics, “highly exposed sectors” include “Restaurants and Bars, Travel and Transportation, Entertainment (e.g., casinos and amusement parks), Personal Services (e.g., dentists, daycare providers, barbers), other sensitive Retail (e.g., department stores and car dealers), and sensitive Manufacturing (e.g., aircraft and car manufacturing).”¹⁹¹ Not only is unemployment higher among workers in these sectors, but also wages are considerably lower in these sectors

184. Elizabeth L. Doran, Ann P. Bartel & Jane Waldfogel, *Gender in the Labor Market: The Role of Equal Opportunity and Family-Friendly Policies*, 5 RSF J. SOC. SCI. 168, 168 (2019).

185. Joan C. Williams, *Real Life Horror Stories from the World of Pandemic Motherhood*, N.Y. TIMES (Aug. 6, 2020), <https://www.nytimes.com/2020/08/06/opinion/mothers-discrimination-coronavirus.html> [https://perma.cc/3L99-ZX74].

186. Kochhar, *supra* note 167.

187. Kochhar, *supra* note 168.

188. Robert W. Fairlie, Kenneth Couch & Huanan Xu, *The Impacts of COVID-19 on Minority Unemployment: First Evidence from April 2020 CPS Microdata* (Nat'l Bureau of Econ. Research, Working Paper No. 27246, 2020), https://www.nber.org/system/files/working_papers/w27246/w27246.pdf [https://perma.cc/3CY6-SWMR].

189. Bartick et al., *supra* note 159, at 1.

190. Matthew Dey, Mark A. Loewenstein, David S. Piccone Jr. & Anne E. Polivka, *Demographics, Earning, and Family Characteristics of Workers in Sectors Initially Affected by COVID-19 Shutdowns*, U.S. BUREAU OF LABOR STATISTICS (June 2020), <https://www.bls.gov/opub/mlr/2020/article/demographics-earnings-and-family-characteristics-of-workers-in-sectors-initially-affected-by-covid-19-shutdowns.htm> [https://perma.cc/52YG-HEZM].

191. *Id.*

compared to other areas of the economy.¹⁹² A report published by the Brookings Institute in June 2020 found that job loss resulting from social distancing measures was concentrated among lower-wage workers.¹⁹³ Two sectors—retail and leisure/hospitality—which even in good times offer low wages, were hit especially hard, with retail suffering a 17.1 percent rate of unemployment and leisure/hospitality experiencing a 39.3 percent rate of unemployment in April 2020.¹⁹⁴ Together, these industries lost eight million jobs in April alone.¹⁹⁵

The grim reality for many workers of color is much higher unemployment rates and fewer resources to cope with long stretches of unemployment. Unemployment itself can also have a scarring effect on workers' future prospects in the labor market in terms of wages and reemployment.¹⁹⁶ To the extent that women and people of color disproportionately experience unemployment as the result of the pandemic, they also may disproportionately experience these long-term negative effects.¹⁹⁷ In this way, the unequal effects of pandemic-driven unemployment amplify already existing inequalities by race, class, and gender.

III. THE FEDERAL LEGISLATIVE RESPONSE TO THE PANDEMIC

Faced by this unprecedented disaster, in March of 2020, Congress enacted two major pieces of legislation to provide relief to people and businesses hit by the COVID-19 pandemic: the Families First Coronavirus Relief Act (FFCRA), and the Coronavirus Aid, Relief, and Economic Security (CARES) Act. In December 2020, Congress extended the

192. *Id.*

193. Molly Kinder & Martha Ross, *Reopening America Low-wage Workers Have Suffered Badly from COVID-19 so Policymakers Should Focus on Equity*, BROOKINGS (June 23, 2020), <https://www.brookings.edu/research/reopening-america-low-wage-workers-have-suffered-badly-from-covid-19-so-policymakers-should-focus-on-equity> [<https://perma.cc/FSJ8-2NNG>].

194. *Id.*

195. *Id.*

196. See generally Christopher J. Ruhm, *Are Workers Permanently Scarred by Job Displacements?*, 81 AM. ECON. REV. 319 (1991); Paul Gregg, *The Impact of Youth Unemployment on Adult Unemployment in the NCDS*, 111 ECON. J. F626 (2001); Kory Kroft, Fabian Lange & Matthew J. Notowidigdo, *Duration Dependence and Labor Market Conditions Evidence from a Field Experiment*, 128 Q.J. ECON. 1123 (2013); Stefan Eriksson & Dan-Olof Rooth, *Do Employers Use Unemployment as a Sorting Criterion When Hiring? Evidence from a Field Experiment*, 1014 AM. ECON. REV. 1014 (2014).

197. Some research suggests, however, that Black male workers are already so disadvantaged that there is little additional negative effect in terms of unemployment. Professor David Pedulla found that Black male workers with continuous employment histories fare no better than unemployed workers, both black and white. See PEDULLA, *supra* note 79, at 105. These findings are complicated by workers' intersectional identities across race and gender. For example, unlike Black men, Black women are doubly disadvantaged by unemployment and race. Pedulla's work suggests that these differences are driven in part by employers' assumptions about why a particular applicant has been unemployed. See *id.* at 108. It is too soon to tell how the pandemic will affect these narratives, and whether post-pandemic narratives will vary by race and gender.

protections and benefits of these laws for a few more months, and in March 2021, Congress extended it for a few more. In some respects, this legislation was a significant departure from the inadequate social insurance system described above. In particular, unlike the social insurance system as it evolved during and after the New Deal, the pandemic response legislation recognizes that paid sick leave and paid caretaking leave are essential to public health and family wellbeing. And the legislation also, for the first time, provides unemployment benefits for independent contractors, relatively generous benefits to all unemployed citizen workers, and one-time direct payments to all taxpayers with modest incomes.¹⁹⁸ In other respects, however, the legislation is built on the old system and has replicated some of its flaws. Furthermore, the protections of these laws will expire in 2021. Thus, the question of how to fix the social insurance system to address the new normal of precarious work, as well as the pandemic-induced recession, remains unsolved.

In this Part, we analyze this new legislation, as well as pending legislation, and its likely effect on economic insecurity and inequality in the United States. In the debates over whether and how to respond to the devastating economic effects of the pandemic, two broad philosophical approaches have emerged. One focuses on protecting Americans from the harms of economic disaster associated with the pandemic by replacing income lost as the result of economic shutdowns and the shutdowns of schools and daycares across the nation.¹⁹⁹ This social insurance approach spreads the risk of harm from the pandemic across society and focuses on collectively protecting Americans affected by those harms. Policies such as expansion of unemployment, paid sick and family leave, and direct stimulus checks are examples of this approach.

A different approach focuses on shoring up organizational market actors by channeling funds through the market.²⁰⁰ Examples include small business loans, as well as business loans for operating costs and to encourage (but not require) employers to keep employees on the payroll. Those who supported this approach expressed deep concern about anything more than minimal income replacement for unemployment to avoid undermining incentives to work, even as millions of jobs disappeared nearly overnight. In this view, the appropriate approach was to channel funds to employers, rather than displaced workers. This is a particular form of selective neoliberalism, in which businesses get assistance, but individuals are assumed to be responsible for and able to ensure their own well-being through private resources or the drastically shrinking labor market even in the face of

198. Families First Coronavirus Relief Act, Pub. L. No. 116-127, 134 Stat. 177 (2020); Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, 134 Stat. 281 (2020).

199. See, e.g., *infra* footnotes 211–17, 241–45 and accompanying text.

200. See, e.g., *infra* footnotes 254–61 and accompanying text.

unprecedented catastrophe. Neoliberal approaches such as this place the risk of illness, injury, unemployment, and old age squarely on the shoulders of individuals, regardless of their ability to absorb these risks.

As discussed below, there are elements of both social insurance and neoliberal approaches in the legislative responses to the pandemic. Efforts to bolster social insurance replicated and magnified the institutional design flaws in our existing system of social welfare provision. Neoliberal expenditures to businesses were problematic as well, replicating power embedded in financial relationships among large businesses and banks while leaving many small businesses without protection. The result, predictably, was uneven and inadequate expenditures that did not fully protect Americans from the economic and public health disaster of the pandemic.

A. *Families First Coronavirus Relief Act*

The FFCRA was drafted and enacted in a rush—only a week passed between when it was introduced and when it was signed into law on March 18, 2020, and it passed with huge majorities in both houses of Congress with relatively little debate.²⁰¹ Indeed, given that some provisions are significant departures from past practice, only a sense of crisis due to a once-in-a-century global pandemic could explain the ease with which the FFCRA became law.

The FFCRA provides the first ever federal guarantee of paid sick leave and partially paid family leave in the United States. The legislation requires that an employer provide paid sick time of up to two weeks to the extent that the employee is unable to work (or telework) due to a need for leave because:

- (1) The employee is subject to a Federal, State, or local quarantine or isolation order related to COVID–19.
- (2) The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID–19.
- (3) The employee is experiencing symptoms of COVID–19 and seeking a medical diagnosis.
- (4) The employee is caring for an individual who is subject to an order as described in subparagraph (1) or has been advised as described in paragraph (2).
- (5) The employee is caring for a son or daughter of such employee if the school or place of care of the son or daughter has been closed, or the child care provider of such son or daughter is unavailable, due to COVID–19 precautions.

201. *H.R.6201 – Families First Coronavirus Response Act*, CONGRESS.GOV, <https://www.congress.gov/bill/116th-congress/house-bill/6201/actions> [<https://perma.cc/DM4S-AGY7>] (last visited Mar. 4, 2021).

(6) The employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor.²⁰²

In addition to these two weeks of paid leave, the FFCRA amends the Family and Medical Leave Act (FMLA), which had previously required employers to allow employees to take unpaid leave.²⁰³ The amendment requires employers to provide an additional ten weeks of paid leave “because of a qualifying need related to a public health emergency.”²⁰⁴ For purposes of the amendment, public health emergency “means the employee is unable to work (or telework) due to a need for leave to care for the son or daughter under 18 years of age of such employee if the school or place of care has been closed, or the child care provider of such son or daughter is unavailable, due to a public health emergency.”²⁰⁵ This provision is meant to address the massive and widespread collapse of the school and childcare system on which most working families depend.

The FFCRA represents significant progress in some ways. By lowering the employee service tenure eligibility requirement to thirty days, rather than the twelve months ordinarily applicable under the FMLA, the Act acknowledges the new reality of precarious labor.²⁰⁶ The legislation also prohibits employers from retaliating against employees for taking paid leave, which research shows is a concern that discourages workers from taking leave even when they have it.²⁰⁷

However, later amendments restricting pay substantially undermined the potential positive effects of this legislation. Pay is capped at \$511 per day for sick leave taken for COVID-19 quarantine, testing or symptoms, but only \$200 or two-thirds pay (whichever is smaller) for caring for others, even though lost wages do not vary with the reason a worker needs leave.²⁰⁸ Also, although the FFCRA created a new qualifying reason to take family leave, only this new reason is paid, and it is paid at the lower wage replacement rate.²⁰⁹ All other previously covered leaves under the FMLA, including leave to care for seriously ill family members, remain unpaid.²¹⁰ The relatively meager wage replacement approach is consistent with the neoliberal view that social insurance protections should not replace private, individual

202. Families First Coronavirus Response Act § 5102, 134 Stat. at 195-96.

203. § 3102, 134 Stat. at 189-91.

204. *Id.*

205. *Id.*

206. *Id.*

207. RUTH MILKMAN & EILEEN APPELBAUM, UNFINISHED BUSINESS: PAID FAMILY LEAVE IN CALIFORNIA AND THE FUTURE OF U.S. WORK-FAMILY POLICY 15 (2013); Albiston & O'Connor, *supra* note 62, at 1.

208. Families First Coronavirus Response Act, §§ 5102, 5110, 134 Stat. at 195-96, 200.

209. *Id.* § 3102, 134 Stat. at 189-91.

210. *Id.*

responsibility for economic security nor undermine the incentive to work. It treats payments as a potential moral hazard, rather than social insurance protection from loss due to the harms of the pandemic.

This difference between sick leave and pay (or not) for caregiving devalues those who provide care, mostly women, and continues to exacerbate already existing care-based gender inequality. The differential pay structure for different forms of leave tracks the devaluation of caregiving, specifically the way in which the assumption of caregiving is invisibly folded into wage labor without any compensation for the time dedicated to that care. When a worker herself becomes ill, she is entitled to up to two weeks of paid leave at a maximum of \$511 per day.²¹¹ A worker who must miss work to care for children who are out of daycare or school because of the pandemic, however, receives only \$200 per day total, or two-thirds of her pay, whichever is smaller, for those same first two weeks, and an additional \$200 per day for family leave for up to ten additional weeks if eligible.²¹² Finally, a worker who must miss work to care for a seriously ill family member, including one with COVID-19, receives nothing.²¹³ The lost wages in each case are the same; only the reason for missing work is different. Workers who are ill themselves are entitled to recover pay at the maximum amount allowed in the statute.²¹⁴ Workers caring for others only recover a fraction of that amount, and only if the reason they are caring for others is the shutdown of care institutions outside the home, such as daycare or schools.²¹⁵ Workers who miss work to care for seriously ill family members are not recognized as workers at all in terms of their lost wages.²¹⁶ Instead, the care they provide remains uncompensated, part of the assumed obligations of care and love that remain invisible in the American privatized welfare regime. This new pandemic response legislation replicates the old social insurance system's gendered assumptions and reliance on uncompensated women's labor through diminished or nonexistent support for wages lost for caregiving.

Because of regulatory details, the FFCRA actually provided little relief for most workers affected by COVID-19 shutdowns. Department of Labor regulations stated that notwithstanding the language of the statute, paid sick leave and paid family leave are not available to workers whose employers closed in response to a shutdown order and therefore did not have work for them.²¹⁷ The department indicated that these employees "may" be eligible for

211. *Id.* §§ 5102, 5110, 134 Stat. at 195-96, 200.

212. *Id.*

213. *Id.* § 3102, 134 Stat. at 189-91.

214. *Id.* §§ 5102, 5110, 134 Stat. 177, 195-96, 200.

215. *Id.* §§ 3102, 5102, 134 Stat. at 189-91, 195-96.

216. *Id.* § 3102, 134 Stat. at 189-91.

217. 29 C.F.R. § 826.20(a)(2) (2020).

UI.²¹⁸ As a result, the vast majority of employees affected by COVID-19 shutdowns cannot make use of paid sick leave or paid family leave to maintain their income, even if they otherwise would qualify for paid time off under these statutes. Instead, these employees lose their jobs and the social insurance benefits associated with them, and must rely on the limited term and meager provisions of unemployment, to the extent they are eligible.

In addition, coverage of the FFCRA is far from universal, and several loopholes allow employers to escape many of these provisions, even for workers who meet the eligibility requirements. The law excludes employers with five hundred employees or more, which constitutes more than half the workforce, including employers like UPS and Wal-Mart that remain open during this crisis.²¹⁹ Many federal workers are also not covered by the expanded family leave provisions.²²⁰ Employers with fewer than fifty employees are exempt from providing paid sick and family leave “when the imposition of such requirements would jeopardize the viability of the business as a going concern.”²²¹ To deny their employees access to leave, a small business need only self-certify that its viability is threatened and retain that self-certification in its files.²²² No independent authority determines whether that self-certification is valid, and the legislation provides no private right of action against small employers that were not covered by the FMLA prior to this legislation.²²³ Healthcare workers, who are disproportionately at risk of contracting COVID-19 on the job, can be excluded from these benefits, including sick leave benefits, at their employers’ discretion.²²⁴ It is hard to fathom why Congress would allow employers to deny health care workers sick leave, because this forces frontline workers to either go to work sick or risk losing their jobs. Finally, the FFCRA is a short-term legislative fix that expired on December 31, 2020.²²⁵ In short, this law failed to change the structural reality around precarious work, inadequate paid leave, and economic inequality and insecurity in the United States.

218. *Families First Coronavirus Response Act Questions and Answers*, U.S. DEP’T OF LABOR, <https://www.dol.gov/agencies/whd/pandemic/ffcr-a-questions> [<https://perma.cc/TVF8-LMEW>] (last visited Aug. 6, 2020).

219. See Editorial Board, *The Companies Putting Profits Ahead of Public Health*, N.Y. TIMES (Mar. 14, 2020), <https://www.nytimes.com/2020/03/14/opinion/sunday/coronavirus-paid-sick-leave.html> [<https://perma.cc/Z83L-76J2>].

220. 29 C.F.R. § 826.40(c)(3) (2020).

221. *Id.* § 826.40(b)(1).

222. *Id.* § 826.40(b)(2).

223. *Id.* § 826.151(b).

224. See Families First Coronavirus Relief Act, Pub. L. No. 116-127, § 5102, 134 Stat. 177, 196 (2020) (“Except that an employer of an employee who is a health care provider or an emergency responder may elect to exclude such employee from the application of this subsection.”).

225. *Id.* § 5109, 134 Stat. at 198.

B. *The CARES Act*

On March 27, 2020, Congress enacted the second major COVID-19 relief package, the Coronavirus Aid, Relief, and Economic Security Act (CARES Act), a roughly two-trillion-dollar package of stimulus aid to stave off economic collapse from job loss.²²⁶ Like the FFCRA, it was drafted, enacted, and signed into law extremely quickly, and by overwhelming margins in both houses, in response to a sense of crisis.²²⁷ And, like the FFCRA, the CARES Act is a short-term fix. Some of its protections lapsed on July 31, 2020, and others were scheduled to sunset at the end of 2020; on December 27, 2020 legislation was signed to extend them for a few more months.²²⁸ But even with the extensions, the legislation does not fully or permanently address the underlying or systemic issues that the pandemic exacerbated.

The CARES Act provided two principal forms of payments that we discuss here: direct payments to people and forgivable loans to businesses. The direct payments took two forms. One was a one-time \$1,200 payment made directly to low-and moderate-income people, with an additional \$500 granted per child.²²⁹ The other involved three different types of expanded UI. One lengthened eligibility for UI benefits from the usual twenty-six weeks to thirty-nine weeks (this is known as Pandemic Emergency Unemployment Compensation or PEUC).²³⁰ The second way the CARES Act changed UI was to increase the UI payment by temporarily adding an additional \$600 weekly benefit.²³¹ This is known as Federal Pandemic Unemployment Compensation (FPUC); it lapsed at the end of July 2020, but was reinstated (at a reduced amount of \$300) in December 2020.²³² Third, for the first time ever, Congress made independent contractors eligible for UI, by creating a new form of federally funded UI known as Pandemic Unemployment

226. Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, 134 Stat. 281 (2020).

227. The bill passed in the Senate by a vote of 96-0 and two days later was passed by the House on a voice vote and was signed by the President on the same day. Carl Hulse & Emily Cochrane, *As Coronavirus Spread, Largest Stimulus in History United a Polarized Senate*, N.Y. TIMES, (Mar. 26, 2020), <https://www.nytimes.com/2020/03/26/us/coronavirus-senate-stimulus-package.html> [<https://perma.cc/CA32-7HMB>]; *H.R. 748 – CARES Act*, CONGRESS.gov, <https://www.congress.gov/bill/116th-congress/house-bill/748/actions> [<https://perma.cc/WR6N-SGPC>] (last visited Mar. 4, 2021). For the extension, see Consolidated Appropriations Act, 2021, Pub. L. No. 116-260 (2020).

228. Emily Cochrane, Nelson D. Schwartz & Gillian Friedman, *Trump Signs Pandemic Relief Bill After Unemployment Aid Lapses*, N.Y. TIMES (Dec. 27, 2020), <https://www.nytimes.com/2020/12/27/us/politics/trump-signs-pandemic-relief.html> [<https://perma.cc/CA32-7HMB>].

229. Coronavirus Aid, Relief, and Economic Security Act § 2201, 134 Stat. at 335.

230. *Id.* § 2102, 134 Stat. at 335.

231. *Id.* § 2104, 134 Stat. at 281, 318.

232. Rachel Siegel, Jeff Stein & Mike DeBonis, *Here's What's in the \$900 Billion Stimulus Package*, WASH. POST (Dec. 27, 2020, 4:58 PM), <https://www.washingtonpost.com/business/2020/12/20/stimulus-package-details> [<https://perma.cc/9K6V-MWCC>].

Assistance (PUA), with its own eligibility requirements.²³³ The expanded eligibility for ordinary UI to thirty-nine weeks (PEUC) and the PUA for independent contractors both were set to expire at the end of 2020,²³⁴ but were extended in December 2020 and were further extended in March 2021 to a total of eighty-six weeks.²³⁵

More than twenty million people received the \$600 weekly benefit before the program expired on July 31, 2020.²³⁶ Studies found that the \$600 weekly benefit top-up increased income by an annualized \$842 billion in May 2020, amounting to an estimated 2.8 percent boost in GDP.²³⁷ UI benefits were 14.6 percent of total wage and salary income, which was several times larger than the pre-coronavirus high of 2.5 percent in 2010.²³⁸ However, there are significant gaps in eligibility for the PUA, FPUC, and PEUC benefits under the CARES Act. Undocumented workers are ineligible, as (in many states) are those who are still working, even if they are not working as much or earning as much, as are new entrants to the job market.²³⁹

Most of the CARES Act funds went to businesses, mainly in the form of forgivable loans, to enable them to survive the closures and to encourage

233. Coronavirus Aid, Relief, and Economic Security Act § 2104, 134 Stat. at 318.

234. *Id.*

235. See *Pandemic Unemployment Assistance*, CAL. EMP'T DEV. DEP'T https://edd.ca.gov/about_edd/coronavirus-2019/pandemic-unemployment-assistance.htm [<https://perma.cc/97X8-SBGK>] (last updated April 22, 2021).

236. Jeff Stein & Erica Werner, *McConnell Says Stimulus Deal Could Take a Few Weeks, Putting Millions with Expiring Jobless Aid in Limbo*, WASH. POST (July 24, 2020, 2:33 PM), <https://www.washingtonpost.com/business/2020/07/24/unemployment-benefits-congress-coronavirus> [<https://perma.cc/JPA5-DJQN>].

237. Josh Bivens, *Cutting Off the \$600 Boost to Unemployment Benefits Would Be Both Cruel and Bad Economics*, ECON. POLICY INST. (June 26, 2020), <https://www.epi.org/blog/cutting-off-the-600-boost-to-unemployment-benefits-would-be-both-cruel-and-bad-economics-new-personal-income-data-show-just-how-steep-the-coming-fiscal-cliff-will-be> [<https://perma.cc/6BWY-7T86>] (reporting Bureau of Economic Analysis data); *The Unemployment Pandemic Addressing America's Jobs Crisis Hearing on the Coronavirus Aid, Relief, and Economic Security Act Before the Subcomm. on the Coronavirus Crisis of the H. Comm. on Oversight & Reform*, 116th Cong. (2020) (statement of Jason Furman, Professor, Harvard University), <https://docs.house.gov/meetings/VC/VC00/20200618/110811/HHRG-116-VC00-Wstate-FurmanJ-20200618.pdf> [<https://perma.cc/E29H-BRQN>].

238. *Id.*

239. JOHN PALLASCH, U.S. DEP'T OF LABOR, ADVISORY: UNEMPLOYMENT INSURANCE PROGRAM LETTER NO. 13-20 (Mar. 22, 2020); JOHN PALLASCH, U.S. DEP'T OF LABOR, ADVISORY: UNEMPLOYMENT INSURANCE PROGRAM LETTER NO. 17-20 (Apr. 10, 2020); *Total and Partial Unemployment TPU 5*, CAL. EMP'T DEV. DEP'T, https://www.edd.ca.gov/uibdg/Total_and_Partial_Unemployment_TPU_5.htm [<https://perma.cc/4Q2F-YYXC>]. California established a program, administered by nonprofit organizations and funded largely by foundations and other private money, to provide unemployment assistance to undocumented workers. Press Release, Office of Governor Gavin Newsom, Governor Newsom Announces Initiatives to Support California Workers Impacted by COVID-19 (Apr. 15, 2020), <https://www.gov.ca.gov/2020/04/15/governor-newsom-announces-new-initiatives-to-support-california-workers-impacted-by-covid-19/> [<https://perma.cc/2LQ6-4MLZ>]. The \$500 lump sum (\$1,000 for a family) is plainly inadequate to support unemployed persons for the duration of the shutdown.

them to keep workers on the payroll.²⁴⁰ The principal program is the Paycheck Protection Program (PPP), which provided loans to for-profit and non-profit organizations with fewer than five hundred employees to cover payroll, health benefits, rent, and core operating costs.²⁴¹ And, for employers with 500 to 10,000 employees, the CARES Act created a loan program (known as Main Street) to encourage keeping employees on the payroll.²⁴²

The PPP program replicated long-standing inequities in access to finance and expertise among American businesses, with those having greater connections to banks and lawyers getting benefits from the program and those without seeing little benefit.²⁴³ When the first tranche of PPP money ran out in mid-April, the major national and regional banks had given loans to all their private banking and commercial clients, while a significant percentage of small business applicants received no money.²⁴⁴ In late April, Congress funneled another \$300 million into PPP,²⁴⁵ and unflattering news coverage about well-funded businesses receiving PPP loans prompted a few to promise to return the funds.²⁴⁶

The CARES Act provided money for other needs, although the common theme for all the programs was that the amount of money provided was significantly less than actual or projected need. For example, although the CARES Act provided billions of dollars for state and local governments, their COVID-19-related expenses and revenue losses have been staggering and

240. See Peter Whoriskey, Douglas MacMillan & Jonathan O'Connell, *Doomed to Fail' Why a \$4 Trillion Bailout Couldn't Revive the American Economy*, WASH. POST (Oct. 5, 2020, 12:30 PM), <https://www.washingtonpost.com/graphics/2020/business/coronavirus-bailout-spending> [<https://perma.cc/7YPX-N6DP>] (reporting that more than half of COVID-19 relief spending "went to businesses which in many cases were not required to show they were impacted by the pandemic or keep workers employed").

241. MOLLY F. SHERLOCK, JANE G. GRAVELLE, KATELIN P. ISAACS, SEAN LOWRY & JULIE M. WITTAKER, CONG. RESEARCH SERV., IN11329, CARES ACT ASSISTANCE FOR EMPLOYERS AND EMPLOYEES—THE PAYCHECK PROTECTION PROGRAM, EMPLOYEE RETENTION TAX CREDIT, AND UNEMPLOYMENT INSURANCE BENEFITS: ASSESSMENT OF ALTERNATIVES (PART 2) 2-3 (2020), <https://crsreports.congress.gov/product/pdf/IN/IN11329> [<https://perma.cc/TW5R-J3RS>].

242. Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, § 4003, 134 Stat. 281, 470-76 (2020).

243. See Emily Flitter & Stacy Cowley, *Banks Gave Richest Clients Concierge Treatment' for Pandemic Aid*, N.Y. TIMES (Apr. 22, 2020), <https://www.nytimes.com/2020/04/22/business/sba-loans-ppp-coronavirus.html> [<https://perma.cc/YL4A-F83B>].

244. *Id.*

245. Paycheck Protection Program and Health Care Enhancement Act, Pub. L. No. 116-139, 134 Stat. 620 (2020).

246. Ben Popken, *Which Companies Are Returning Their PPP Loans? Here's the List*, NBCNEWS.COM (last updated July 7, 2020, 12:43 PM), <https://www.nbcnews.com/business/business-news/which-companies-are-returning-their-ppp-loan-here-s-list-n1194566> [<https://perma.cc/PLM6-TRHW>].

dwarf the federal funding.²⁴⁷ And in the December extension of CARES Act benefits, Congress did not include relief for state and local governments.²⁴⁸

In this new legislation, we see the stark contrast between two approaches. On the one hand, grants to individuals and expanded UI represent a social insurance regime designed to compensate for income lost as the result of economic disasters. On the other hand, much of the legislation takes a piecemeal approach of neoliberal privatization and individualization of responsibility for protection against even the most catastrophic events that result in unemployment. Social insurance compensation, such as the stimulus checks, expansions to unemployment, and funds expended by businesses to pay employees through the PPP, helped compensate or protect workers against income loss as the result of the pandemic. Although workers may be better off than they would have been without the stimulus bill, this legislation does not completely fill the hole, and these provisions have expired or are about to expire. Funneling piecemeal relief through employers rather than paying displaced workers directly has its price. Workers whose employers closed as a result of the pandemic are largely left to fend for themselves, ineligible for paid family or medical leave, receiving only a fraction of lost wages from UI, and forced to compete for sustenance with millions of other displaced workers in a dramatically curtailed labor market.

This approach gives enormous power to employers to put downward pressure on wages, working conditions, and benefits. In addition, workers, predominantly women, who are displaced because they must provide care to children out of school, or sick family members, receive either a fraction of their lost wages for a short period of time, or no compensation at all, reflecting the general privatization of care in the American social insurance regime. Rather than support displaced workers who are stepping up to provide this desperately needed care, the CARES Act takes for granted that millions of women will leave the workforce and provide this care for free, no matter the economic hardship to their families as a result of their lost wages. Social insurance approaches take the stance that when economic disaster strikes, Americans should spread the risk broadly across society and help those displaced and harmed by that disaster. Neoliberal approaches assume every individual is responsible for their own welfare, even though most Americans could never save enough to protect themselves from economic disasters such as a major health crises or economic downturn, let alone a pandemic.

247. Yucel Ors & Michael Wallace, *Local Governments Report Progress on Coronavirus Relief Funds, but Few Unobligated Dollars Remain for Cities and Towns Waiting for Aid*, NAT'L LEAGUE OF CITIES (Aug 3, 2020), <https://citiesspeak.org/2020/08/03/cares-act-coronavirus-relief-fund-not-enough-to-support-local-government-reopening-and-recovery> [<https://perma.cc/2KFU-JTCV>].

248. Siegel et al, *supra* note 232.

C. Continued Assistance for Unemployed Workers Act

By the summer of 2020, Democrats and Republicans became sharply divided on what more Congress should do to address the crisis.²⁴⁹ In May, the Democratic-controlled House of Representatives passed a coronavirus relief bill, and in August, the Republican-controlled Senate passed a starkly different one.²⁵⁰ In October, the House passed another relief bill, but the Senate refused to act on it.²⁵¹ Negotiations over a bill that could pass both houses stalled, even after the CARES Act Pandemic Unemployment Compensation benefits lapsed on July 31, 2020, and after the election delivered the White House to the Democrats in November 2020.²⁵² Finally, after months of fitful negotiations between House Democratic leaders, Senate Republicans, and the Treasury Secretary, on December 21, 2020, Congress passed an omnibus Consolidated Appropriations Act, which included extensions and renewals of some of the CARES Act programs.²⁵³ One part of the consolidated legislation, the Continued Assistance for Unemployed Workers Act (CAUWA), extended unemployment benefits.²⁵⁴ President Trump surprised lawmakers by saying the \$600 lump-sum payments in the legislation should be \$2,000, and hinted that he might veto the whole bill.²⁵⁵ In response, the House promptly passed separate legislation providing for \$2,000 payments.²⁵⁶ The Senate enacted a different version to which the

249. Emily Cochrane, *Here Are the Differences Between the House and Senate Coronavirus Relief Bills*, N.Y. TIMES (July 28, 2020), <https://www.nytimes.com/2020/07/28/us/politics/coronavirus-relief-bills-house-senate.html> [https://perma.cc/9SJT-BBGN].

250. There are several pieces of legislation pending. *E.g.*, The Heroes Act, H.R. 6800, 116th Cong. (2020); SAFE TO WORK Act, S. 4317, 116th Cong. (2020); American Workers, Families, and Employers Assistance Act, S. 4318, 116th Cong. (2020); Continuing Small Business Recovery and Paycheck Protection Program Act, S. 4321, 116th Cong. (2020); Safely Back to School and Back to Work Act, S. 4322, 116th Cong. (2020); TRUST Act, S. 2733, 116th Cong. (2020); Restoring Critical Supply Chains and Intellectual Property Act, S. 4324, 116th Cong. (2020); Supporting America's Restaurant Workers Act, S. 4319, 116th Cong. (2020).

251. See Kelsey Snell, *Congressional Leaders Remain at an Impasse on COVID-19 Relief*, NPR (Dec. 8, 2020, 12:24 PM), <https://www.npr.org/sections/coronavirus-live-updates/2020/12/08/944199072/democrats-and-some-republicans-push-to-add-stimulus-checks-to-covid-19-relief-bill> [https://perma.cc/W7RR-PKPV].

252. *Id.*

253. Consolidated Appropriations Act, 2021, Pub. L. No. 116-260 (2020).

254. *Id.* This is Division N of the legislation, which is 5,593 pages long. See also Andrew Taylor, *\$900B COVID Relief Bill Passed by Congress, Sent to Trump*, AP (Dec. 22, 2020), <https://apnews.com/article/congress-900-billion-coronavirus-bill-75389549d3eaf2f3828b16d45c9706e6> [https://web.archive.org/web/20210219172824/https://apnews.com/article/congress-900-billion-coronavirus-bill-75389549d3eaf2f3828b16d45c9706e6].

255. Luke Broadwater, Emily Cochrane, Astead W. Herndon & Maggie Haberman, *Trump's Attack on Coronavirus Relief Divides G.O.P. and Threatens Recovery*, N.Y. TIMES (Dec. 23, 2020), <https://www.nytimes.com/2020/12/23/us/politics/trump-coronavirus.html> [https://perma.cc/U7BX-CTHK].

256. Caring for Americans with Supplemental Health (CASH) Act, H.R. 9051, 116th Cong. (2020).

House refused to agree.²⁵⁷ On December 27, 2020, the President signed the Consolidated Appropriations Act, narrowly averting a government shutdown.²⁵⁸

The CAUWA title of the Consolidated Appropriations Act extends and in some respects expands all three of the forms of UI that the CARES Act had adopted.²⁵⁹ First, it expands PEUC, the thirteen-week extension of ordinary state UI, by adding another eleven weeks, so that employees who are eligible for ordinary state UI can collect benefits for fifty weeks total, rather than the usual twenty-six.²⁶⁰

Second, the CAUWA reinstates the FPUC supplemental income to UI that had expired on July 31, 2020.²⁶¹ Democrats had favored extending the \$600 weekly supplemental benefit; however, Republicans proposed cutting it to \$200 per week and eventually replacing it with a combined federal-state benefit that would be capped at 70 percent of a worker's prior income.²⁶² Ultimately, the parties compromised, settling on extending UI at \$300 per week until March 14, 2021.²⁶³

Third, Congress extended and expanded PUA—the new unemployment benefit for independent contractors and the self-employed.²⁶⁴ Under the CAUWA, PUA is extended to March 14, 2021, which means that with the time delay between application and payment, PUA benefits can be granted until April 5, 2021.²⁶⁵ Congress also created a new benefit, the Mixed Earner Unemployment Compensation (MEUC), to fill a gap in the PUA program.²⁶⁶ Under the original PUA program, workers who worked both as employees and as contractors had to choose whether to apply for UI as an employee or PUA as a contractor, and in many cases collected only a paltry benefit based

257. Catie Edmondson, *No Realistic Path' for Quick Vote on \$2,000 Stimulus Checks*, *McConnell Says*, N.Y. TIMES (Dec. 30, 2020), <https://www.nytimes.com/2020/12/30/us/politics/congress-2000-stimulus-payments.html> [<https://perma.cc/X3NG-YMCK>].

258. Cochrane et al., *supra* note 228.

259. The unemployment benefits provisions of CAUWA are summarized clearly and succinctly in Tom Spiggle, *What the New Coronavirus Relief Bill Does for Unemployment Insurance*, FORBES (Jan. 4, 2021, 10:32 AM), <https://www.forbes.com/sites/tomspiggle/2021/01/04/what-the-new-coronavirus-relief-bill-does-for-unemployment-insurance/?sh=bae573b85d2b> [<https://perma.cc/XFQ7-8NPP>].

260. S. COMM. ON FIN., 116TH CONG., CONTINUED ASSISTANCE TO UNEMPLOYED WORKERS (Dec. 21, 2020), <https://www.finance.senate.gov/imo/media/doc/UI,%202012-21-20,%20Section%20by%20Section%20COVID%20Relief%20Continued%20Assistance%20to%20Unemployed%20Workers.pdf> [<https://perma.cc/SS2H-AWFD>]; JOHN PALLASCH, U.S. DEP'T OF LABOR, ADVISORY: UNEMPLOYMENT INSURANCE PROGRAM LETTER NO. 9-21 6-7 (2020).

261. *See* PALLASCH, *supra* note 260, at 10.

262. *See* Cochrane, *supra* note 249.

263. *See* PALLASCH, *supra* note 260, at 10.

264. *Id.* at 6.

265. *Id.*

266. *Id.* at 11.

on a portion of their pre-unemployment earnings.²⁶⁷ MEUC allows any worker who earned at least \$5,000 as a contractor to choose PUA and receive an additional \$100 per week.²⁶⁸ Like PUA, MEUC expires on March 14, 2021.²⁶⁹ States can elect whether to participate in the MEUC program, but the CAUWA requires all states comply with new and stricter eligibility verification requirements for all PUA benefits.²⁷⁰

Although both the House and the Senate passed separate bills over the summer that would have given another round of \$1,200 direct payments, the Consolidated Appropriations Act provides only \$600 (with the same phase-out for taxpayers with incomes above \$75,000 as the original legislation). However, after Democrats won a narrow majority in the Senate in January 2021, President-Elect Biden announced his intention to ask Congress to enact a huge new stimulus package shortly after he takes office.²⁷¹

There is one other way in which the CAUWA expands eligibility to address a glaring inequality. The CAUWA allows persons with Social Security numbers to receive supplemental benefits even if their spouse lacks a Social Security number.²⁷² The CARES Act, in contrast, made such people ineligible for coverage, presumably in order to ensure that no funds reached a household with an undocumented person.²⁷³ The inequity of denying benefits to an otherwise eligible person who needs money simply because of whom they are married to is plain; after all, such people would have been eligible for the CARES Act benefits if they were not married or if their spouse was a citizen.²⁷⁴ Critics of the exclusions for undocumented people pointed out that most undocumented people work, and those who do not (typically

267. Anita Hassan, *Lawmakers Aim to Close Gap That Prevented Gig Workers from Getting Relief Aid*, NBC NEWS (July 20, 2020, 3:36 PM), <https://www.nbcnews.com/politics/congress/lawmakers-aim-close-gap-prevented-gig-workers-getting-relief-aid-n1234381> [<https://perma.cc/CV4F-ZZEW>].

268. PALLASCH, *supra* note 260, at 11.

269. *Id.*

270. *Id.* at 3-4.

271. Jeanna Smialek, *A Look Inside What's in Biden's \$1.9 Trillion Stimulus Plan*, N.Y. TIMES (Jan. 14, 2021), <https://www.nytimes.com/2021/01/14/business/economy/biden-stimulus-plan.html> [<https://perma.cc/74RA-5W6S>].

272. Heather Long, Ashlyn Still & Leslie Shapiro, *Calculate How Much You Would Get From the \$600 (or More) Coronavirus Checks*, WASH. POST (Dec. 28, 2020, 10:30 AM), <https://www.washingtonpost.com/graphics/business/coronavirus-stimulus-check-calculator> [<https://perma.cc/SX8B-RPYH>].

273. Muzaffar Chisthi & Jessica Bolter, *Vulnerable to COVID-19 and in Frontline Jobs, Immigrants Are Mostly Shut Out of U.S. Relief*, MIGRATION POLICY INST. (Apr. 24, 2020), <https://www.migrationpolicy.org/article/covid19-immigrants-shut-out-federal-relief> [<https://perma.cc/2DKU-48KH>].

274. Ryan Zamarripa, *A Phase 4 Coronavirus Relief Bill Must Include Protections for Undocumented Immigrants*, CTR. FOR AM. PROGRESS (Apr. 16, 2020, 9:00 AM), <https://www.americanprogress.org/issues/economy/news/2020/04/16/483329/phase-4-coronavirus-relief-bill-must-include-protections-undocumented-immigrants> [<https://perma.cc/4US4-A2KE>].

the very old, the infirm or disabled, and children) need financial support regardless of their citizenship status.²⁷⁵

Among the many other forms of stimulus and relief spending in the Consolidated Appropriations Act is \$285 billion to replenish the Paycheck Protection Program.²⁷⁶ This time, however, publicly traded companies are ineligible, as are companies with more than three hundred employees or those that cannot demonstrate a 25 percent loss in business during at least one quarter in the last year.²⁷⁷ The legislation includes \$10 billion for childcare centers, continues a federal moratorium on evictions through January 31, 2021, increases monthly food stamp (SNAP) benefits by 15 percent, and provides additional money for other nutrition programs, such as Meals on Wheels for the elderly.²⁷⁸ The bill provides some money to state and local governments to distribute and administer the COVID-19 vaccine.²⁷⁹

The new legislation does not extend the mandate in the FFCRA that employers must provide emergency paid sick leave or paid family leave to employees.²⁸⁰ Employees have no right to such leave after December 31, 2020.²⁸¹ Yet, employers may voluntarily provide the leave after this date under the terms laid out in the FFCRA and receive a federal tax credit for doing so through March 31, 2021.²⁸² Accordingly, workers do not have a right to leave, even in times of desperate need, but may be granted it if their employer elects to offer leave in exchange for a federal tax subsidy.

None of the coronavirus relief and stimulus legislation permanently protects workers from the risks inherent in our existing social insurance system. The benefits, as noted above, lapse. Undocumented workers are entirely ineligible. Some workers in contingent or precarious labor will lose all eligibility for UI when the legislation expires.²⁸³ Childcare remains in crisis at a time when an estimated one of every five adults is a primary

275. *Id.*

276. Zach Montague, *A Look at What's in the Stimulus Package Trump Signed*, N.Y. TIMES (Dec. 28, 2020), <https://www.nytimes.com/2020/12/28/business/economy/second-stimulus-package.html> [<https://perma.cc/39YF-JXTQ>].

277. *Id.*

278. *Id.*

279. *Id.*

280. *COVID-19 and the American Workplace*, U.S. DEP'T OF LABOR, <https://www.dol.gov/agencies/whd/pandemic> [<https://perma.cc/BD9U-JZ26>] (last visited Mar. 10, 2021).

281. *Id.*

282. *U.S. Department of Labor Publishes Guidance on Expiration of Paid Sick Leave and Expanded Family and Medical Leave for Coronavirus*, U.S. DEP'T OF LABOR, <https://www.dol.gov/newsroom/releases/whd/whd20201231-1> [<https://perma.cc/RJH2-RDJF>] (last visited Mar. 10, 2021).

283. Tami Luhby & Katie Lobosco, *There's a Race to Pass the Stimulus by March 14. Here's What's at Stake*, CNN (Mar. 6, 2021, 12:28 PM), <https://www.cnn.com/2021/03/01/politics/stimulus-programs-expiring-deadline/index.html> [<https://perma.cc/JT8G-P3SS>].

caretaker for another person.²⁸⁴ Those who are still working remain at risk of illness and yet workers' compensation benefits, for example, will be unavailable or inadequate for those who have become sick during the pandemic.²⁸⁵ Hundreds of thousands have died, in some cases leaving behind bereaved dependents with no source of support.²⁸⁶ Meanwhile, as a *New York Times* headline proclaimed, "Markets Boomed in a Year of Human Misery," as highly paid workers have worked safely at home and job losses were concentrated in the low-wage sectors of the economy.²⁸⁷ As economic analyses show, the stimulus legislation did what it was intended to do; it propped up the economy and helped some avoid catastrophe. But it did not address the causes of inequality, and when the support payments and eviction moratoria expire, the inequalities in the labor market and the social insurance systems tied to it will remain.

D. *The American Rescue Plan*

As this Article went to press, Congress passed the American Rescue Plan, a nearly \$2 trillion pandemic relief package largely directed at low- and middle-income Americans.²⁸⁸ This legislation implemented, albeit temporarily, many of the structural reforms we advocate for in this Article.

First, the legislation includes several provisions that maintain basic income during episodic unemployment. It extends federal expanded unemployment benefits with a \$300 weekly supplement through September 6, 2021, including extending Pandemic Unemployment Assistance, which covers gig workers and independent contractors.²⁸⁹ In addition, the first \$10,200 of UI benefits for the 2020 tax year are not taxable for most low- and middle-income households, so that recipients will not have to pay taxes on all of the benefits they have received during the pandemic.²⁹⁰ The legislation also provides another round of direct payments of about \$1,400 to individuals in low- and middle-income households.²⁹¹ Unlike prior pandemic

284. Mina Kim, *Forum Caregivers Shoulder Increased Burdens During Pandemic*, KQED (Jan. 3, 2021, 10:00 AM), <https://www.kqed.org/forum/2010101881441/caregivers-shoulder-increased-burdens-during-pandemic> [https://perma.cc/5QUC-VFR4].

285. See Cunningham, *supra* note 162.

286. Nikita Stewart, *He Is Sixteen and His Mother Died of Covid-19. What Happens to Him Now?*, N.Y. TIMES (Aug. 13, 2020), <https://www.nytimes.com/2020/08/13/nyregion/coronavirus-ny-parents-dead.html> [https://perma.cc/8RXE-WY67]; Ashton M. Verdery, Emily Smith-Greenaway, Rachel Margolis & Jonathan Daw, *Tracking the Reach of COVID-19 Kin Loss with a Bereavement Multiplier Applied to the United States*, 117 PROC. NAT'L ACAD. SCI. 17695-17701 (2020).

287. Neil Irwin & Weiyi Cai, *Why Markets Boomed in a Year of Human Misery*, N.Y. TIMES (Jan. 1, 2021), <https://www.nytimes.com/2021/01/01/upshot/why-markets-boomed-2020.html>? [https://perma.cc/QU8S-8BFF].

288. American Rescue Plan Act of 2021, H.R. 1319, 117th Cong. (2021) (enacted).

289. *Id.* §§ 9011, 9013, 9016.

290. *Id.* § 9042.

291. *Id.* § 9601.

relief measures, this legislation extends eligibility for this direct support to dependent college students and recipients of SSI and SSDI.²⁹² Finally, the legislation provides an important new tax credit for low-and middle-income families with children, up to \$3,600 per child up to age six, and \$3,000 per child up to age seventeen.²⁹³ This is a “refundable” tax credit, meaning that people will receive the benefit as a payment from the government if their income is too low to receive the full amount in the form of a reduction of taxes owed. Unlike previous tax credits, therefore, households with very low or no income are allowed to claim it and will receive the economic support.²⁹⁴ The legislation also strengthens the earned income tax credit for families without children.²⁹⁵ This new legislation could reduce child poverty by half.²⁹⁶

Second, the legislation expands access to caregiving resources. To encourage employers to provide paid sick and family leave, the bill provides payroll credits that cover the cost of wages paid to workers on leave up to the levels specified in the CARES Act and FFCRA.²⁹⁷ Other provisions provide similar credits to self-employed individuals.²⁹⁸ The legislation also allows families to claim up to half of their childcare expenses as a refundable tax credit.²⁹⁹ The legislation does not, however, expand eligibility and access to paid sick and family leave, or make previous expansions permanent.

Third, the legislation strengthens access to health care outside the employment relationship. It increases the ACA premium subsidies, ensuring that no one pays more than 8.5 percent of their income for health insurance coverage through the ACA marketplace.³⁰⁰ It also provides workers who lose their jobs with subsidies to cover the cost of extending coverage through their employer.³⁰¹ These provisions ensure that workers who lose their jobs do not also lose the health benefits that typically are tied to that employment.

292. *Id.*

293. *Id.* § 9611.

294. *Id.* § 9611(a).

295. *Id.* § 9621.

296. Zachary Parolin, Sophie Collyer, Megan A. Curran & Christopher Wimer, *The Potential Poverty Reduction Effect on the American Rescue Plan*, CTR. ON POVERTY & SOC. POLICY AT COLUMBIA UNIV. (Mar. 11, 2021), <https://www.povertycenter.columbia.edu/news-internal/2021/presidential-policy/biden-economic-relief-proposal-poverty-impact> [<https://perma.cc/VC7R-2YMG>].

297. This tax credit is refundable, so it may operate as a subsidy to employers who provide this leave. H.R. 1319 § 9641 (a maximum of \$511 per day for sick leave, \$200 per day for family leave); *see also* Consolidated Appropriations Act, 2021, Pub. L. No. 116-260 (2020) (allowing employers to claim paid sick and paid family leave credit through March 31, 2021).

298. American Rescue Plan Act of 2021, H.R. 1319 §§ 9642, 9643 (2021) (enacted). The tax credit is also refundable for self-employed individuals.

299. *Id.* § 9631.

300. *Id.* § 9661.

301. *Id.* § 9501.

Finally, the legislation provides other forms of poverty relief. It extends the 15 percent increase in food stamp (SNAP) benefits that had been adopted in prior COVID relief legislation to the end of September 2021.³⁰² Of the various emergency assistance funds appropriated in the bill, \$22 billion are scheduled to be put toward emergency assistance for renters who are in arrears on rent payments and another \$4.5 billion is to be used to help low-income people pay energy and water bills.³⁰³

Touted as one of the most significant anti-poverty programs in a generation, this legislation does more than shore up the financial security of American working families. It offers an alternative vision of what family security might look like, detached from the increasing precarity of the labor market and offering stable and predictable support for income, caregiving, and health care. These provisions, however, are only a temporary legislative response to an unprecedented social crisis and pandemic. American families have been experiencing the social crisis of precarity for a very long time, and that precarity will continue if some of these provisions do not become permanent.

E. The Path Not Taken: Other Countries' Responses to COVID-19

Other countries' responses to the global pandemic provide examples of more egalitarian and economically protective policies than the U.S. legislation discussed above. Several countries have focused on maintaining employment by subsidizing private sector salaries to prevent businesses from laying off their workers.³⁰⁴ France, Germany, Britain, Denmark, and other European countries have adopted this approach to shore up consumer spending and keep workplaces in "suspended animation" rather than destroying existing employment relationships.³⁰⁵ Although unemployment increased in these countries, it did so at a far slower pace than in the United States, and unemployment rates are not expected to reach anything close to American levels.³⁰⁶ Maintaining employment in the short term also helps the government avoid paying long term unemployment and welfare costs for

302. *Id.* § 1101. The SNAP increase had been scheduled to end in June.

303. *Id.* §§ 2911-12, 3201.

304. For example, South Korea, Germany, the Netherlands, and Denmark all adopted income support programs such as these early on. See Matt Apuzzo & Monika Pronczuk, *Covid-19's Economic Pain Is Universal. But Relief? Depends on Where You Live*, N.Y. TIMES (Mar. 23, 2020), <https://www.nytimes.com/2020/03/23/world/europe/coronavirus-economic-relief-wages.html> [<https://perma.cc/8PBN-TDWU>].

305. Edward Hadas, *Welfare States Will Be Big Covid-19 Winners*, REUTERS (May 13, 2020, 7:03 AM), <https://www.reuters.com/article/us-health-coronavirus-welfare-breakingvi/breakingviews-hadas-welfare-states-will-be-big-covid-19-winners-idUSKBN22P25E> [<https://perma.cc/Y747-JDFH>].

306. *Id.*

workers who would otherwise be permanently displaced by the pandemic.³⁰⁷ And paying people who stay home helps slow the spread of the virus and may prevent an economic depression.³⁰⁸ Short-term deficit spending to accomplish this goal may yield long-term economic gains for these countries. By supporting businesses and maintaining employment relationships rather than allowing widespread unemployment and business failures, these countries may have a smoother transition back to a functional economy.

By contrast, the American approach has been to provide quite modest loans to encourage employers to keep workers on the payroll but without requiring it or covering the full cost of payroll.³⁰⁹ Mainly, Congress has left workers to rely upon relatively meager unemployment benefits, to the extent they are eligible at all.³¹⁰ This decision overwhelmed the unemployment system, resulting in significant delays before many workers received benefits.³¹¹ Confusing new rules and lack of guidance also resulted in inappropriate denial of benefits for many workers.³¹² Similarly, the limited and convoluted Paycheck Protection Program failed to achieve the ambitious goals of keeping small businesses afloat and their workers employed.³¹³ Faced with this economic crisis for millions of Americans, many elected leaders demanded that the economy, including public schools, reopen.³¹⁴ Predictably, COVID-19 infection and transmission rates skyrocketed.³¹⁵ Austerity in income support, the necessity of securing employment in order to access many social safety net benefits, and potential liability waivers for

307. See Apuzzo & Pronczuk, *supra* note 304; Michael Birnbaum & Karla Adam, *Europe Seeks to Limit Coronavirus Crisis with Unprecedented Offers to Pay Private Sector Salaries*, WASH. POST (Mar. 24, 2020, 2:12 PM), https://www.washingtonpost.com/world/europe/europe-seeks-to-limit-coronavirus-crisis-with-unprecedented-offers-to-pay-private-sector-salaries/2020/03/24/1f099a5a-6abe-11ea-b199-3a9799c54512_story.html [<https://perma.cc/8R5M-EP2B>].

308. Birnbaum & Adam, *supra* note 307.

309. See *supra* notes 247-255 and accompanying text.

310. See OFFICE OF UNEMP'T INS., U.S. DEP'T OF LABOR, *supra* note 130 and accompanying text.

311. Nelson D. Schwartz, Tiffany Hsu & Patricia Cohen, *Stymied in Seeking Benefits, Millions of Unemployed Go Uncounted*, N.Y. TIMES (Apr. 30, 2020) <https://www.nytimes.com/2020/04/30/business/economy/coronavirus-unemployment-claims.html> [<https://perma.cc/2BZ9-RBXB>].

312. Carolyn Said & Kathleen Pender, *California Legislators Rip into EDD for Unemployment Payment Delays, Technology Woes*, S.F. CHRON. (July 30, 2020, 6:55 PM), <https://www.sfchronicle.com/business/article/California-legislators-rip-into-EDD-for-15447502.php> [<https://perma.cc/AJB7-P7CK>].

313. Stacey Cowley, Emily Flitter & David Enrich, *Some Small Businesses That Got Aid Fear the Rules Too Much to Spend It*, N.Y. TIMES (May 2, 2020), <https://www.nytimes.com/2020/05/02/business/economy/loans-coronavirus-small-business.html> [<https://perma.cc/HY75-KBKD>].

314. Peter Baker, Erica L. Green & Noah Weiland, *Trump Threatens to Cut Funding If Schools Do Not Fully Reopen*, N.Y. TIMES (July 8, 2020), <https://www.nytimes.com/2020/07/08/us/politics/trump-schools-reopening.html> [<https://perma.cc/RB3J-MZQ8>].

315. Only India and Brazil report more daily new cases. *New COVID-19 Cases Worldwide*, JOHNS HOPKINS UNIV. & MED. CORONAVIRUS RESEARCH CTR., <https://coronavirus.jhu.edu/data/new-cases> [<https://perma.cc/3V2Z-3DZJ>] (last visited Mar. 10, 2021).

employers leave low-wage workers little choice but to return to work and shoulder the risk of contracting COVID-19 alone.

Even after the public health restrictions of the pandemic ease, some predict that millions of jobs will be lost forever.³¹⁶ If the economic recovery that follows the pandemic is like the Great Recession of 2008, many of the jobs that come back will be non-standard, part-time, and precarious jobs with limited social benefits or statutory protections,³¹⁷ making the institutional design flaws of American welfare provision all the more apparent. The question is whether the pandemic recession will provide the impetus for Congress and the President to reimagine the American social welfare provision and implement enduring, universal, mandatory social insurance against the common risks of everyday life.

IV. WHERE WE SHOULD GO FROM HERE

Social welfare regimes develop in path-dependent patterns that make change both hard to imagine and difficult to achieve. But, as the New Deal proved, change may be most possible in a crisis, and promising policy improvements in social insurance have been on the horizon for a while. We propose solutions to help complete the unfinished work of the New Deal, and to remedy the failings built into the system that made social insurance eligibility depend on whether a worker is a full-time employee in a sector covered by social insurance, or a contractor, part-timer, or otherwise outside the protections of the social insurance system. Our proposals seek to remove the incentives hiring entities have to hire workers as exempt contractors as opposed to covered employees. By making social insurance benefits universally available and by expanding the tax base that funds them, we seek both to reduce the class, race, and gender inequities in coverage and to distribute the cost of funding protections equitably.

We seek, in short, to return to the vision of social citizenship that T.H. Marshall so famously articulated.³¹⁸ Along with civil and political rights (e.g., freedom of the person and freedom of speech, the right to vote, the right to due process of law),³¹⁹ Marshall posited that the concept of fundamental

316. Handwerker et al., *supra* note 6 (reviewing empirical studies and economic analysis of the employment effects of the Great Recession of 2009-2011 and the COVID-19 recession with particular focus on those who have been laid off and concluding that a significant number of people will become long-term unemployed because of permanent job loss).

317. *Id.*; Fligstein & Shin, *supra* note 78, at 402; Mina Kim & Lisa Pickoff-White, *Rep. George Miller Proposes New Rules for Part-Time Work*, KQED NEWS (July 17, 2014), <https://www.kqed.org/news/142008/rep-george-miller-proposes-new-rules-for-part-time-workers> [<https://perma.cc/WW27-WXQ9>].

318. T. H. MARSHALL, *CLASS, CITIZENSHIP, AND SOCIAL DEVELOPMENT* ch. IV (1964).

319. *Id.* at 71-72.

rights of all citizens³²⁰ once included “social” rights: “the whole range from the right to a modicum of economic welfare and security to the right to . . . the life of a civilized being according to the standards prevailing in the society.”³²¹ Although civil and political rights developed in modern history, “social rights, which had been rooted in the membership of the village community . . . were gradually dissolved by economic change until nothing remained but the Poor Law.”³²² The economic rights of social citizenship, Marshall argued, were “an aid, not a menace, to capitalism, because it relieved industry of all social responsibility outside the contract of employment.”³²³ Thus, according to Marshall, the advent of universal social provision in the twentieth century was neither merely better abatement of poverty, nor an ambitious attempt to equal income through redistribution, but rather “a general reduction of risk and insecurity, an equalization between the more and the less fortunate at all levels—between the healthy and sick, the employed and the unemployed, the old and active.”³²⁴ Along these lines, President Roosevelt responded to widespread economic disaster during the Depression by calling for economic security as a basic right of citizenship.³²⁵

Universal benefits that tie social insurance and economic security to citizenship broadly defined, rather than to employment, would respond to both our current crisis and the underlying structural flaws in American social welfare provision.³²⁶ Importantly, ensuring basic economic security as the foundation of membership in American society would not require radical increases in the resources dedicated to welfare. In fact, the United States spends about the same proportion of its GDP on social welfare benefits as do other industrialized countries; the difference is that it does so in a highly regressive manner dependent on tax breaks and subsidies for patchwork private systems that tend to benefit the wealthy but do little for low-wage workers most at risk.³²⁷ Reform requires reorganizing spending to spread risk broadly and support social insurance protections for all in America, not just

320. We are not referring to *legal* citizenship, but rather to anyone who is a resident and member of the society. For an excellent introduction to the challenges of balancing obligations to members of society with universal moral obligations to all of humanity, see SARAH SONG, IMMIGRATION AND DEMOCRACY 1-10 (2019). Thus, we would define citizenship broadly to include anyone living and lawfully working in the United States or anyone who has resided in the United States for an extended period of time. Figuring out how broadly to define citizenship is the topic for another paper. We note that proposals to create UBI, e.g., TANI, *supra* note 1, also define eligibility to include more than just U.S. citizens, recognizing the universal moral obligations Song addresses.

321. MARSHALL, *supra* note 318, at 72.

322. *Id.* at 73.

323. *Id.* at 88.

324. *Id.* at 102.

325. See Harris, *supra* note 10, at 1260.

326. See *supra* note 74.

327. HACKER, *supra* note 10, at 7.

those with the income and ability to make use of benefits subsidized by tax breaks.

Other democratic industrialized countries, and some of our own policies, offer models of what this approach might look like. This model includes universal policies to protect against the major but predictable risks of everyday life, such as universal health care, basic income protection for displaced, injured, and retired workers, family support for caregivers, and paid sick and family leave. Below, we discuss reforms that would bring the American system closer to Marshall's vision of social citizenship rights.

A. *Improving on the Social Security Model*

Both the political popularity of the Old Age and Survivors Insurance (OASI) aspect of the Social Security Act and its effects in reducing destitution during old age make it a partial model for our proposed improvements to the social safety net. Although Social Security (as OASI is now popularly known) operates as an intergenerational wealth transfer (payroll taxes paid today fund benefits for the currently retired), it is perceived as a form of retirement savings and an entitlement rather than charity or even a tax system. Unemployment was designed similarly, to be a contributory system, but employers have figured out how to evade its costs by classifying workers as contractors while paying workers so little to make savings in anticipation of future unemployment impossible.³²⁸ When the app-based ride-hailing companies Uber and Lyft advised their workforce that they should apply for federal PUA because they were ineligible for UI, it revealed this gaping hole in social insurance protection.³²⁹ Tax systems that fund unemployment and other social insurance benefits must be broadened so that eligibility may be correspondingly broadened.

The pandemic, and the economic crisis it precipitated, have made clear why income protection during periods of economic dislocation should not turn on the concept of "employee" status.³³⁰ A solution would be to allow independent contractors to pay directly into state unemployment insurance programs.³³¹ There is precedent for such voluntary arrangements in the

328. See, e.g., Michael Reich, *Pay, Passengers, Profits: Effects of Employee Status for California TNC Drivers* (Univ. of Cal., Berkeley, Inst. for Research on Labor & Emp't Working Paper No. 107-20, 2020), <https://irle.berkeley.edu/files/2020/10/Pay-Passengers-and-Profits.pdf> [<https://perma.cc/G5WX-KPXX>].

329. Greg Iacurci, *Some Uber, Lyft Drivers Fear Companies Will Use Unemployment Benefits Against Them*, CNBC (May 23, 2020, 10:15 AM), <https://www.cnbc.com/2020/05/23/uber-lyft-drivers-fear-unemployment-benefits-will-be-used-against-them.html> [<https://perma.cc/99H8-WRV3>]; *How the CARES Act Can Help Drivers Who Are Unemployed Due to COVID-19*, LYFT (Apr. 20, 2020), <https://www.lyft.com/hub/posts/how-the-cares-act-can-help-drivers-who-are-unemployed-due-to-covid-19> [<https://perma.cc/3VLU-3N7C>].

330. See discussion *supra* Part I.C.

331. Pilaar, *supra* note 75, at 355.

United States and abroad. California, for example, leaves independent contractors out of its State Disability Insurance program but gives them the choice to pay for Disability Insurance Elective Coverage, which covers Disability Insurance and Paid Family Leave.³³² Denmark allows independent contractors to pay into its public unemployment fund in lieu of private insurance, and Germany extends the same option to former employees who are now self-employed.³³³ Germany and the United Kingdom also provide tax-funded, means-tested jobseeker assistance funds to unemployed independent contractors who are ineligible for public unemployment insurance.³³⁴ Moreover, everyone benefits from expanded UI coverage because, as economists have shown, unemployment benefits increase household consumption during periods of unemployment, bolstering the economy.³³⁵ Therefore, eligibility for UI should be extended even if benefits are not increased in order to obtain the welfare-improving effects of UI.

When Congress enacted the Social Security Act in 1935, the insistence that its programs be funded by contributions (levied in the form of payroll taxes) rather than general treasury revenue was criticized by the Left and by Black workers:

That old-age insurance and unemployment compensation would be paid for by payroll taxes, critics noted, meant that the employers' costs would be transferred to the consumer via higher prices. These programs were effectively financed with an indirect sales tax imposed on the most economically vulnerable, who of course were disproportionately black.³³⁶

This meant that Black workers paid for programs for which they, excluded as agricultural and domestic workers, were ineligible. Whether to fund such programs by payroll taxes or by some other tax system is a complex question beyond the scope of this Article. What is important is that the system be designed in a way to provide universal eligibility and universal contributions to ensure fairness, as well as to achieve the popularity and political

332. *Self-Employed/Independent Contractor*, CAL. EMP'T DEV. DEP'T, <https://edd.ca.gov/Disability/Self-Employed.htm> [<https://perma.cc/6D2Q-QLJG>] (last visited Aug. 13, 2020).

333. Werner Eichhorst, Michela Braga, Ulrike Famira-Mühlberger, Maarten Gerard, Thomas Horvath, Martin Kahanec, Marta Kahancová, Michael Kendzia, Monika Martišková, Paola Monti, Jakob Louis Pedersen, Julian Stanley, Barbara Vandeweghe, Caroline Wehner & Caroline White, *Social Protection Rights of Economically Dependent Self-Employed Workers* 109-10, 113-14 (IZA Inst. of Labor Econ. Research Rep. No. 54, 2013), http://ftp.iza.org/report_pdfs/iza_report_54.pdf [<https://perma.cc/Y7ZG-XM85>].

334. *Id.* at 113-14, 119-20.

335. Peter Ganong & Pascal Noel, *Consumer Spending During Unemployment Positive and Normative Implications*, 109 AM. ECON. REV. 2383 (2019).

336. Brueggemann, *supra* note 70, at 150. On the effect of the design of the Social Security Act on African Americans, *see generally* LIEBERMAN, *supra* note 11, ch. 2.

untouchability long enjoyed by Social Security's Old Age Insurance system.³³⁷

The Old Age Security and Disability Insurance (OASDI) program of Social Security recognizes that disruption of employment is a predictable risk for nearly every employee. These disruptions include old age, of course, but also serious illness and disability, ordinary illnesses such as the flu or a cold, care needs associated with the arrival of a new child in the family, care needs associated with the serious illness or disability of family members, and long-term health problems in old age. American social insurance policy does not protect all workers against these predictable, mundane risks, but instead relies on a patchwork of public and private social insurance policies as permeable as Swiss cheese. The holes in this policy have become apparent as nearly everyone faces economic challenges as a result of the pandemic. Yet American social insurance programs are far from universal. For example, unlike virtually every other industrialized country in the world, the United States has no federally mandated paid sick leave, maternity leave, or family leave policy. It provides only modest income support in old age and has largely deregulated the private pension system to shift all economic risks of inadequate return on retirement savings, to the extent they are possible, onto workers.³³⁸ Medicare provides some basic health protection in old age, but most individuals need private supplemental insurance to cover basic care. Medical problems create economic hardship for families every year, even those who are insured.³³⁹ Assistance with the astronomical costs of long-term care needs at the end of life are available only to the very poor, as they are not covered by Medicare.³⁴⁰ These life events are not so-called labor market inefficiencies; they are ordinary life risks against which our employment policies and social insurance provisions provide little protection, especially compared to the policies of other countries. Social policies that respond to these concerns spread the costs associated with these risks more broadly and provide a stable foundation for the economic security of families.

A basic start would be to adopt policies to address these risks. Cease efforts to “privatize” OASDI, which would shift even more risk onto

337. LIEBERMAN, *supra* note 11, at 177 (noting that OAI and UI both enjoy significant political support, and that OAI has generated “reverential support” and has been expanded over time. However, UI unlike OAI, has not become “a program of broad political favor and generous income support,” but rather is “an accepted and essential part of the American economic and political landscape.”).

338. See Deborah Thorne, Pamela Foohey, Robert M. Lawless & Katherine Porter, *Graying of U.S. Bankruptcy: Fallout from Life in a Risk Society*, 90 SOC. INQUIRY 681 (2018).

339. Margot Sanger-Katz, *Getting Sick Can Be Really Expensive, Even for the Insured*, N.Y. TIMES (Mar. 21, 2018), <https://www.nytimes.com/2018/03/21/upshot/getting-sick-is-really-expensive.html> [<https://perma.cc/2ZX5-W7LT>].

340. See SANDRA R. LEVITSKY, CARING FOR OUR OWN: WHY THERE IS NO POLITICAL DEMAND FOR NEW AMERICAN SOCIAL WELFARE RIGHTS 25-26 (2014) (“Medicare provides acute care coverage for most of the nation’s elderly, but very little assistance for patients with chronic illnesses, and Medicaid, a means-tested health care program, provides long-term care assistance for only the very poor.”).

Americans, and bolster the old age economic security program. Federally mandate a minimum of job protected sick days for all workers, and provide federally mandated paid maternity and family leave. Create a system of universal health insurance, which may, but does not necessarily require, a single payer approach. Provide health coverage for the costs of long-term care at the end of life. Regulate private pension provision to prohibit underfunding and abandoning pensions, and to ensure sufficient contributions by both employer and employee. These policies address the predictable events of everyday life by sharing their risk across society, rather than placing them on the shoulders of individuals, many of whom are the least able to absorb their costs. These policies also recognize that it is unrealistic to expect even middle-class Americans to self-insure and save enough to protect against these risks on their own.

B. Universal Basic Income

Even universal social insurance, however, may not be enough to create a subsistence floor for the least-well off Americans, those who cannot work because they provide full-time care to children or other family members, or those who lose employment because of economic or technological changes or a pandemic. Rather than recognizing the next generation as a valuable contribution to society and a public good, the United States has almost entirely privatized the cost of caring for children by placing it on individual families.³⁴¹ Moreover, as income volatility and precarity increases, more workers will face calamitous drops in income during their lifetimes. Tying subsistence income to employment in the absence of a sufficient safety net also gives employers enormous power to control workers and to push wages as low as possible.

Policies to provide a subsistence floor and predictable income exist. The earned income tax credit is one. This tax policy provides an income credit primarily to low-and moderate-income working parents.³⁴² But because it is tied to earned income, this approach does little to benefit full-time caregivers or those unable to find work or qualify for available jobs, and it has been

341. Nancy Folbre, *Children as Public Goods*, 84 AM. ECON. REV. 86, 86 (1994); Ann O'Leary, *supra* note 100, at 161.

342. The income credit is equal to a percentage of their earnings up to a maximum, which then declines at an income phaseout point with each additional dollar of income until no credit is available. The maximum credit for a family with three children in 2020 is \$6,660. Because the credit is refundable, a low-income taxpayer can get money back even when the refund exceeds what was withheld from her pay. *What is the Earned Income Tax Credit?*, TAX POLICY CTR., <https://www.taxpolicycenter.org/briefing-book/what-earned-income-tax-credit> [<https://perma.cc/A8C9-87VV>] (last visited Aug. 13, 2020). A helpful survey of state EITCs is Kim S. Reuben, Frank Sammartino & Kirk J. Stark, *Upward Mobility and State-Level EITCs: Evaluating California's Earned Income Tax Credit*, 70 TAX L. REV. 477 (2017).

criticized for failing to provide a steady source of income.³⁴³ Nevertheless, expanding this universal benefit would provide a subsistence floor under increasingly volatile and precarious income from work.

A more extensive, but not unthinkable, possibility is universal basic income.³⁴⁴ Universal basic income (UBI) is a periodic, regularly recurring, payment of unrestricted cash (or cash-equivalents, but not in-kind goods or services) to all persons, without regard to age, ability, or any other measure of deservingness.³⁴⁵ It provides a subsistence floor of income as a foundation to social citizenship. There are many ways to design and fund UBI programs, but all of them share the feature of universal eligibility.

UBI provides modest compensation for individuals engaged in full time care work, a valuable subsidy for low-wage workers, and a predictable non-means tested safety net when income varies or disappears.³⁴⁶ This benefit is most valuable to low-wage workers and those unable to find work or unable to work due to economic recession, disability, old age, or care responsibilities. Indeed, some have suggested that the Earned Income Tax Credit could and should be modified to create a form of UBI.³⁴⁷ Nevertheless, universal, rather than means-tested, basic income grants also provide predictable, reliable income with which individuals could take risks to invest in education, to start up small businesses, or to start a family.³⁴⁸ Moreover, as noted above in connection with the discussion of the Old Age Insurance aspect of Social Security, universal policies build broad based political support and are not vulnerable to political attacks on means-tested programs we have seen in the past.

A UBI program would dramatically simplify the administration of compensation in times of unemployment or reduced employment. The difficulty states have experienced in administration of UI during the pandemic, the administrative hassles and technological difficulties that have

343. See Sara S. Greene, *The Broken Safety Net: A Study of Earned Income Tax Credit Recipients and a Proposal for Repair*, 88 N.Y.U. L. REV. 515, 515 (2013) (advocating that EITC benefits be paid out regularly rather than in an annual lump sum).

344. For a recent look at different design proposals for UBI, see Miranda P. Fleischer & Daniel Hemel, *The Architecture of a Basic Income*, 87 U. CHI. L. REV. 625 (2020). For an exploration of how UBI could address widespread job loss, see Cynthia Estlund, *Three Big Ideas for a Future of Less Work and a Three-Dimensional Alternative*, 82 L. & CONTEMP. PROBS. 1 (2019).

345. Fleischer & Hemel, *supra* note 344, at 635.

346. *Id.*

347. See, e.g., Benjamin A. Leff, *EITC for All: A Universal Basic Income Compromise Proposal*, 26 WASH. & LEE J.C.R. & SOC. JUST. 85, 140-42 (2019).

348. Indeed, some studies of the EITC have found that because it comes as a lump sum, a significant number of recipients use the money in ways that they believe will improve their chances at upward mobility. Reuben, Sammartino & Stark, *supra* note 344; see also Timothy M. Smeeding, Katherin R. Phillips & Michael O'Connor, *The EITC: Expectation, Knowledge, Use, and Economic and Social Mobility* (Ctr. for Policy Research, Working Paper No. 13, 2000), <https://ssrn.com/abstract=1807997> [<https://ia601509.us.archive.org/22/items/ssrn-id-186690/SSRN-id186690.pdf>].

caused delays in processing claims, and the huge amount of staff time spent in determining eligibility, all point to the need for a system of universal eligibility.³⁴⁹ The complexity of managing the UI system has, as we have shown, resulted in only a small fraction of the total eligible population receiving UI.³⁵⁰ Research has likewise shown that eligibility determinations in Social Security disability programs has resulted in a high number of erroneous denials of benefits to people who are in fact eligible.³⁵¹

Moreover, the pandemic has also shown the importance of making a UBI system national. It would eliminate race-to-the-bottom incentives for states to compete for business and to reduce taxes by making their UI benefits paltry. The United States can engage in debt-financed countercyclical spending to bolster income during recessions. However, states cannot run such large deficits and therefore must reduce spending during lean years, which exacerbates the effects of recession.³⁵² Making UBI national would eliminate the August 2020 issue over whether the President can unilaterally increase UI benefits but require states to fund the increased benefits that the Executive Order commanded.³⁵³ And, finally, the reasons why UI was created as a state program—constitutional doubts about the power of Congress to make UI a federal program and political compromises with Southern senators whose votes were necessary to enact the SSA—no longer present insurmountable obstacles to creating UBI as a national program.

To be sure, objections to UBI must be addressed. One is that UBI will undermine the incentive to work. Recent experiments with relatively modest UBI, however, did not find that UBI reduced labor force participation.³⁵⁴ Advocates of a \$500 monthly UBI point out that it would be the equivalent of full-time work at \$3 per hour, which is not a sum likely to induce indolence.³⁵⁵ Indeed, at that level, it would be important that UBI not entirely supplant other social insurance programs, such as food stamps (SNAP),

349. See discussion *supra* Part I.E.

350. *Id.*

351. Fleischer & Hemel, *supra* note 344, at 657 (citing Hugo Benitez-Silva, Moshe Buchinsky & John Rust, *How Large Are the Classification Errors in the Social Security Disability Award Process?* 48 (Nat'l Bureau of Econ. Research, Working Paper No. 10219, 2018), https://www.nber.org/system/files/working_papers/w10219/w10219.pdf [<https://perma.cc/W7A7-DULK>]).

352. See *State Balanced Budget Requirements*, NAT'L CONFERENCE OF STATE LEGISLATURES (Apr. 12, 1999), <https://www.ncsl.org/research/fiscal-policy/state-balanced-budget-requirements.aspx> [<https://perma.cc/NX7J-ZN5H>].

353. See Maggie Haberman, Emily Cochrane & Jim Tankersley, *Trump Sidesteps Congress on Coronavirus Relief Actions*, N.Y. TIMES (Aug. 8, 2020), <https://www.nytimes.com/2020/08/08/us/politics/trump-stimulus-bill-coronavirus.html> [<https://perma.cc/QA4W-K75Q>].

354. MINISTRY OF SOC. AFFAIRS & HEALTH, THE BASIC INCOME EXPERIMENT 2017–2018 IN FINLAND: PRELIMINARY RESULTS, 9 REP. & MEMORANDUMS 29 (2019), <http://julkaisut.valtionuusto.fi/handle/10024/161361> [<https://perma.cc/AT2U-4JWH>].

355. Fleischer & Hemel, *supra* note 344, at 670.

Section 8 housing subsidies, the EITC, cash income support for elderly or disabled people, or perhaps even ordinary UI for the short-term unemployed, lest UBI make them worse off than they currently are.³⁵⁶ A second objection is that UBI would reduce the pool of workers willing to take on poorly paid unpleasant jobs that nevertheless must be done.³⁵⁷ Because any wages earned would be on top of UBI, rather than substituted for it, the wage incentive for work for these jobs would remain, however.³⁵⁸ What would be removed by UBI is the coercion of the alternative of abject poverty to these jobs. In our view, as in the view of many advocates of UBI, this is a feature, not a bug.³⁵⁹ Sufficient social income will free people from the coercion to take dangerous jobs, or to sacrifice the welfare of their children or family, simply to avoid homelessness and starvation; this is a worthy goal of economic policy.³⁶⁰ Without this coercion, wages might indeed need to rise to induce workers to take on these jobs to compensate for the unpleasant or dangerous work involved, which would perhaps be a more efficient allocation of risk anyway.

C. Flexsecurity

Another policy approach is to move away from employment-tied social welfare benefits toward flexsecurity, a policy approach actively encouraged by the European Commission after the economic crash in 2008.³⁶¹ Flexsecurity is a portmanteau of flexibility and security; it represents policies intended to preserve employers' flexibility in response to economic challenges while providing economic security to workers.³⁶² Flexsecurity responds to the changing global economy by allowing employers some flexibility, within limits, to adjust their employment as their needs require, while relying on the state to provide adequate income support during employment transitions, skills training, and effective labor market policies.³⁶³ The basic pillars of flexsecurity are:

- Flexible and reliable contractual arrangements from the perspective of the employer and the employee, of 'insiders' and 'outsiders';

356. *Id.*

357. *Id.*

358. *Id.*

359. *See id.*; Leff, *supra* note 347, at 140-42.

360. *See* Fleischer & Hemel, *supra* note 344, at 660; Andre Gorz, *Beyond the Wage-Based Society*, in *BASIC INCOME: AN ANTHOLOGY OF CONTEMPORARY RESEARCH* 298 (Karl Widerquist et al. eds., 2013).

361. Jason Heyes, *Flexicurity, Employment Protection and the Jobs Crisis*, 25 *WORK, EMP. & SOC'Y* 642, 643 (2011).

362. *Id.* at 643-44.

363. *Id.*

- Comprehensive lifelong learning strategies to ensure the continual adaptability and employability of workers;
- Effective active labor market policies that help people cope with rapid change, reduce unemployment spells, and ease transitions to new jobs; and
- Modern social security systems that provide adequate income support, encourage employment, and facilitate labor market mobility.³⁶⁴

These proposals provide support to displaced workers and reduce their dependence on any particular job, and thus help reduce the power disparities between employers and workers. The best outcomes occur when these kinds of policies are coupled with strong employment protections such as restrictions on unjust terminations and temporary contract work, and short-time working measures.³⁶⁵ Short-time working measures allow workers to experience a reduction in their normal hours of work and receive either a reduced wage or unemployment compensation for the hours they otherwise would have worked.³⁶⁶ This government approach allows employers to reduce labor costs during downturns while still retaining skilled workers, and ensures workers continue to receive an income and avoid the economic hardship and stigma associated with unemployment.³⁶⁷ It allows workers to return full time when the economy improves, avoiding employment search costs for both employers and workers, as well as the cost of long-term unemployment compensation for the state.

Another important part of flexsecurity is protecting workers from lost income if they miss work or lose their jobs because of sickness or taking leave to provide necessary care to family members. In most industrialized countries, paid sick leave and family leave is nationally mandated.³⁶⁸ The pandemic revealed how sick leave and family leave are essential components of the social welfare safety net. Bringing the United States up to this international standard would be a start. To reduce incentives to deny workers family leave and to reduce the burden on individual employers of paying for both leave and replacement workers, pay for family leave could be organized through a social insurance structure funded separately from the employer, such as California's State Disability Insurance program. In this system, workers are eligible for paid disability or family leave regardless of their term of service with their employer or even if they have lost their jobs because they are ill or need to care for others. In short, benefits are not tied to

364. *Flexicurity*, EUR. COMM'N, [https://ec.europa.eu/social/main.jsp?catId=102&langId=en&\[https://perma.cc/8RAD-SJSM\]](https://ec.europa.eu/social/main.jsp?catId=102&langId=en&[https://perma.cc/8RAD-SJSM]) (last visited Aug. 13, 2020); see also Heyes, *supra* note 361, at 644.

365. Heyes, *supra* note 361, at 651 fig.3.

366. *Id.* at 652.

367. *Id.*

368. See *supra* note 5.

employment except in the sense that workers must contribute financially to the social insurance system to be covered. This approach meets flexsecurity goals by protecting workers' incomes even if they are let go by their employers because they need time off to care for family members. Employers have the flexibility to respond to labor needs, but employees are not left without income support if they must leave their jobs due to care responsibilities. In other words, social insurance does not assume that caregiving services are both universally available and free to every worker.

Flexsecurity would improve on the American social insurance system because it detaches social insurance protections from employment. It recognizes that temporary unemployment is increasingly normal in the new globalized economy, yet income support and social insurance are still necessary to protect families from financial disaster. The state steps in to provide financial security during employment transition, retraining, or periods out of work for purposes of caring for family members or due to illness. In this way, society collectivizes the risk associated with these relatively common situations, rather than imposing the potentially astronomical costs on an individual worker or employer. It does so through the vehicle of the state, which mandates universal participation and contribution in exchange for protection.

D. Stop Distinguishing Between “Standard” and “Nonstandard” Workers

What Europe's generous employment protections share with the United States' less extensive protections is that they often do not extend to all workers, but instead apply only to employees (known as core workers in the EU) and not to contractors (known as non-standard workers in the EU).³⁶⁹ The pandemic underscores why it is important to extend protections to all, rather than leave large proportions of the workforce exposed to risk.³⁷⁰ When the pandemic struck, work for Uber and Lyft drivers dried up, for example.³⁷¹ As noted above, when Congress created Pandemic Unemployment Assistance for independent contractors, Uber and Lyft urged their drivers to apply for federal benefits, even though they (unlike entities that treated their workforce as employees and had paid the payroll taxes that fund UI) had not contributed to the financing of the benefits.³⁷² Meanwhile, Uber and Lyft

369. See discussion *supra* Part I.C.

370. Indeed, well before the pandemic, studies showed the feasibility of extending eligibility for UI to “nonstandard” workers, including drivers for transportation network companies like Uber and Lyft and advocates called for such an extension. *E.g.*, Pilaar, *supra* note 75.

371. Kate Conger, *The Gig Economy Dipped Again in the Fall. But How Bad Was It?*, N.Y. TIMES (Feb. 8, 2021), <https://www.nytimes.com/2021/02/08/technology/uber-lyft-airbnb-gig-workers-covid.html> [<https://perma.cc/E6AN-VMPV>].

372. Noam Scheiber, *Drivers Say Uber and Lyft Are Blocking Unemployment Pay*, N.Y. TIMES (Mar. 24, 2020), <https://www.nytimes.com/2020/03/24/business/economy/coronavirus-uber-lyft-drivers-unemployment.html> [<https://perma.cc/2E8U-YNKE>].

continued their years-long campaign to prevent states from classifying their drivers as employees,³⁷³ which would require the company to pay FUTA and FICA taxes.

The day after a California judge slammed Uber and Lyft for years of delay in complying with California law requiring them to classify their drivers as employees—which would entitle them to the protections of workers’ compensation, minimum wages, premium pay for overtime, and eligibility for unemployment benefits and old age benefits³⁷⁴—the CEO of Uber candidly, but very belatedly, admitted in a *New York Times* op-ed: “all gig economy companies need to pay for benefits.”³⁷⁵ He then went on to suggest that rather than pay into the same systems available to all California employees, gig economy companies should create their own funds to allow drivers to purchase the benefits that those with employee status receive.³⁷⁶ This would, of course, replicate the inadequacies of the existing system—inadequate coverage, expensive administration, paltry benefits, and the lack of portability. Indeed, the ballot measure, Proposition 22, that Uber and Lyft spent over \$200 million to have enacted in California fails to do even what Uber’s CEO says is necessary. By preventing the California courts and legislature from extending employment protections and unemployment insurance to drivers, and giving only a small subsidy for health care costs to drivers who work extremely long hours, Proposition 22, enacted on November 3, 2020, leaves drivers without social insurance.³⁷⁷ What is necessary is to end the ability and incentives for companies to opt out of social insurance regimes and instead extend coverage to all.

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In responding to the economic, health, and caregiving crises of the pandemic, it is important to recall T.H. Marshall’s belief that the economic rights of social citizenship are “an aid, not a menace, to capitalism, because it relieve[s] industry of all social responsibility outside the contract of employment.”³⁷⁸ If the future of work is some version of Proposition 22 for all jobs, in which businesses can disclaim all responsibility to the labor force, it is essential that there be universal social provision to reduce risk and

373. E.g., Noam Scheiber, *Uber and Lyft Drivers Win Ruling on Unemployment Benefits*, N.Y. TIMES (July 28, 2020), <https://www.nytimes.com/2020/07/28/business/economy/lyft-uber-drivers-unemployment.html> [<https://perma.cc/72P4-Q62P>].

374. *People v. Uber*, No. CGC-20-584402, 2020 WL 5440308, at *1-2, *7 (Cal. Super. Ct. Aug. 10, 2020), *aff’d*, 270 Cal. Rptr. 3d 290 (Cal. Ct. App. 2020).

375. Dara Khosrowshahi, *I Am the C.E.O. of Uber. Gig Workers Deserve Better*, N.Y. TIMES (Aug. 10, 2020), <https://www.nytimes.com/2020/08/10/opinion/uber-ceo-dara-khosrowshahi-gig-workers-deserve-better.html> [<https://perma.cc/N2EQ-G5AY>].

376. *Id.*

377. CAL. BUS. & PROF. CODE §§ 7448-67 (2020).

378. MARSHALL, *supra* note 318, at 88.

insecurity, and minimize the unnecessary privation of being unfortunate in matters of health or in working in a region or a sector plagued by unemployment. Universal benefits that tie social insurance and economic security to citizenship broadly defined, rather than to employment, would respond to both our current crisis and the underlying structural flaws in American social welfare provision.

CONCLUSION: NEVER LET A GOOD CRISIS GO TO WASTE

We have reached a moment that political scientists call a “critical juncture,” a window of opportunity for major social reform.³⁷⁹ These are moments when the inertia of early but problematic institutional choices can be overcome. These historical turning points often come during major partisan shifts in government, significant economic downturns, or moments of collective action and political unrest.³⁸⁰ The Great Depression was one critical juncture, and many of the social safety net programs we have discussed were created by legislation enacted in 1935.³⁸¹ But, as we have shown, the inequities in the current regime, especially those that disproportionately harm women, and Black, Brown, and working-class people, were the product of political compromises of the 1930s.³⁸² We are now in another critical juncture and have the opportunity to address the failings of the New Deal system. The fact that Black voters indisputably provided President Biden’s margin of victory and delivered the Senate majority to the Democrats presents a crucial opportunity to rectify the racial and other inequities in the social safety net.³⁸³ Advocates of universal social insurance have a rare and fleeting opportunity for change as well as the political will to overcome the status quo bias of our often-divided system of government.³⁸⁴ Now that the House, Senate and White House are under Democratic control, there is an opportunity to break the legislative gridlock of past years and enact major social welfare reforms. The American Rescue Plan, enacted in March 2021, was a major start, but some of its crucial reforms are temporary. What transformative social policies will we have ready now that the opportunity has arrived?

379. HACKER, *supra* note 10, at 60-61.

380. *Id.* at 59.

381. See discussion *supra* Part I.A.

382. See discussion *supra* Part I.B.

383. John Eligon & Audra D.S. Burch, *Black Voters Helped Deliver Biden a Presidential Victory. Now What?*, N.Y. TIMES (Nov. 11, 2020), <https://www.nytimes.com/2020/11/11/us/joe-biden-black-voters.html> [<https://perma.cc/GTS5-AXJK>]; Reid J. Epstein, *High Turnout Among Black Voters Has Lifted the Democratic Senate Candidates in Georgia*, N.Y. TIMES (Jan. 5, 2021), <https://www.nytimes.com/2021/01/05/us/politics/high-turnout-among-black-voters-has-lifted-the-democratic-senate-candidates-in-georgia.html> [<https://perma.cc/RD8U-KZ7F>].

384. See Eligon, *supra* note 383.

Keeping social insurance benefits tied to employment will deepen inequality and precarity in the future. Although COVID-19 led to an unprecedented economic crisis, it only revealed underlying flaws in the American social insurance system. It did not create them. Widespread unemployment and economic precarity caught our attention when it happened to everyone all at once, but precarity defines the quotidian experience of far too many Americans even in ordinary times. Without access to reliable income, health care, and paid sick and family leave, workers have little protection against the risk of extreme economic hardship resulting from unemployment, accidents, illness, caregiving demands, and old age. Nor do most workers earn enough to accumulate sufficient savings to protect against these risks on their own.

A social safety net tied to the employment relationship is both untenable and unjust. It gives the largest spoils to the wealthy and privileged and leaves a significant proportion of the population without meaningful protection from economic and social risks. We find ourselves at an historical crossroads as a nation. We must decide between continuing down the road of neoliberal economic insecurity that leaves so many Americans behind, or taking the path of universal social insurance provision to spread the risk of catastrophic events. Rather than acquiesce to the devil take the hindmost philosophy, we should repair this fundamental flaw in the institutional design of the American social insurance system so that no American faces economic disaster from illness, old age, disability, or recession alone.