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REIMAGINING THE LAW OF SELF-EMPLOYMENT: A COMPARATIVE PERSPECTIVE

Jayesh M. Rathod* & Michał Skapski*

INTRODUCTION

Across the globe, scholars are documenting a trend towards informal, contingent, and independent contracting work schemes, and away from the more traditional employer-employee relationship, which carried with it certain rights and protections.¹ At the same time, there exists in the literature the archetype of the self-employed entrepreneur, who often owns and operates a small business and in some cases, is the primary or sole performer of the work of that business.² The convergence of these distinct phenomena has yielded a large and amorphous category of “self-employed persons,” including both vulnerable independent contractors and thriving small business owners.³

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1. See, e.g., Katherine V.W. Stone, *Flexibilization, Globalization, and Privatization: Three Challenges to Labor Rights in Our Time*, 44 OSGOODE HALL L.J. 77, 77-83 (2006) (describing the trend towards informal work arrangements and the corresponding effect on labor standards, including difficulty invoking union protections); Craig Becker, *Labor Law Outside the Employment Relation*, 74 TEX. L. REV. 1527, 1531 (1996) (“In the last decade there has been dramatic growth in the extent of work done by temporary agency employees and leased employees as well as in the subcontracting of diverse forms of services in which, for the most part, labor is the nub of the trade.”). See also Saskia Sassen, *The Informal Economy: Between New Developments and Old Regulations*, 103 YALE L.J. 2289 (1994) (exploring the trend in industrialized economies towards the informalization of work, including the use of subcontracting in numerous industries).

2. See Amir N. Licht, *The Entrepreneurial Spirit and What the Law Can Do About It*, 28 COMP. LAB. L. & POL’Y J. 817, 820-32 (describing how different bodies of literature have characterized entrepreneurs).

3. See Richard Arum, *Entrepreneurs as Laborers: Two Sides of Self-Employment Activity in the United States*, in THE REEMERGENCE OF SELF EMPLOYMENT: A COMPARATIVE STUDY OF SELF-

This extreme heterogeneity within the category has generated the need for a clearer demarcation of “self-employment” as a legal concept. This need is especially acute in U.S. law, where the common law on self-employment has remained intact for decades⁴ with little recognition of the radical changes befalling the labor market.

Normatively, the need for more explicit definitions and subcategories is fueled by the funneling of workers, especially low-wage, migrant, and other marginalized workers into contingent work schemes that are superficially labeled “self-employment” or “independent contracting.”⁵ These types of nominal self-employment, whether willing or coerced, result in lost protections for workers, given that most of the relevant statutes cover only those workers classified as “employees.”⁶ Many scholars have also noted that such forms of misclassification adversely affect workers’ financial status and the health of the economy,⁷ and form part of an overall weakening of the security of status and position of workers in the labor market.⁸

EMPLOYMENT DYNAMICS AND SOCIAL INEQUALITY 170, 198 (Richard Arum & Walter Muller eds., 2004).

4. See, e.g., *Cromwell Gen. Contractor, Inc., v. Lytle*, 439 S.W.2d 598, 601 (Tenn. 1969) (in determining whether an injured worker was an employee or an independent contractor, the court assessed factors that remain part of the law today, including method of payment and provision of tools and materials); *Murray’s Case*, 154 A. 352, 354 (Me. 1931) (outlining eight tests that continue to be applied today).

5. Catherine K. Ruckelshaus, *Labor’s Wage War*, 35 *FORDHAM URB. L.J.* 373, 378-83 (2008) (detailing how employers misclassify workers, the industries affected, and the impact on workers and the economy).

6. See *id.* at 376-81.

7. Several studies conducted at the state level have documented the financial harm occasioned by worker misclassification. See, e.g., RICHARD CORDRAY, OHIO ATTORNEY GEN., REPORT OF THE OHIO ATTORNEY GEN. ON THE ECONOMIC IMPACT OF MISCLASSIFIED WORKERS FOR STATE AND LOCAL GOVERNMENTS IN OHIO 19 (2009), available at http://www.faircontracting.org/PDFs/prevaling_wages/Ohio_on_Misclassification.pdf (estimating that employee misclassification results in lost state income tax revenue of between \$112-223 million annually, along with lost unemployment insurance and workers’ compensation payments); MICHAEL P. KELSAY ET AL., DEP’T OF ECON., UNIV. OF MO.-KANSAS CITY, THE ECONOMIC COSTS OF EMPLOYEE MISCLASSIFICATION IN THE STATE OF ILLINOIS 6-7 (2006), available at http://www.faircontracting.org/PDFs/prevaling_wages/Illinois_Misclassification_Study.pdf (noting that misclassification forces workers to bear costs normally borne by employers, and estimating an annual loss in Illinois, between 2001 and 2005, of at least \$124.7 million in income tax, and \$39.2 million in unemployment taxes). These findings are supported by research from the recent past. In 1984, the Internal Revenue Service estimated that 15% of employers had misclassified a total of 3.4 million workers in that year, resulting in \$1.6 billion in lost tax revenue for the government. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-06-656, EMPLOYMENT ARRANGEMENTS: IMPROVED OUTREACH COULD HELP ENSURE PROPER WORKER CLASSIFICATION 2 (2006), available at <http://www.gao.gov/new.items/d06656.pdf>.

8. See generally Ruckelshaus, *supra* note 5, at 381 (positioning misclassification as one of several trends contributing to weakened protections for workers).

In response to this trend, this article offers a diagnosis of the flaws in existing self-employment law and a prescription for reform focused on the U.S. and European states with similarly underdeveloped laws relating to self-employment. Part I of this article describes current trends relating to self-employment, contracting, and the contingent workforce. The first section of this article also offers a basic breakdown of different categories of self-employment, as the law exists in the U.S. and in some parts of Europe. As part of this discussion, Part I of the article describes how laws relating to taxation and social insurance significantly shape the categories and definition of “self-employment.” Part II of the article details some of the fundamental defects in self-employment law, while Part III offers a vision for revising the law of self-employment by creating more distinct subcategories that fall along a gradated continuum. As described more fully below, this approach accomplishes two key objectives: (1) it more accurately reflects the economic reality of workers, while accommodating those who wish to transition to or from self-employment; and in so doing (2) it offers the appropriate bundle of incentives and protections for workers, depending on where they fall along the continuum. In the broader landscape of employment law, this approach, which strives for definitional clarity, also challenges the culture of malleability and flexibility that has overtaken employment relations in recent decades.

I. THE PHENOMENON OF SELF-EMPLOYMENT:

CURRENT TRENDS & CATEGORIES

Before proceeding further with our diagnosis of the defects in self-employment law, we first offer data, from both the United States and Europe, about the scope of self-employment in the contemporary economy, noting the affected industries and relevant demographics. We then offer a short typology of different categories of self-employment, all of which fall under the same label, but have distinct features. Finally, we examine how tax and social insurance guidelines in both jurisdictions significantly shape the meaning of “self-employment.”

A. *The Scope of Self-Employment: Current Trends*

The category of the “self-employed worker” has long existed, and is often associated in the public imagination with an entrepreneurial

owner of a small business.⁹ In recent decades, the phenomenon of self-employment has gained renewed importance, in part due to globalization and the accompanying trend towards more flexible work arrangements. As noted above, this “new wave” of self-employment has undermined long-standing models of labor relations, and has generated doctrinal confusion in various jurisdictions.¹⁰ In the U.S., a relatively limited set of norms are now applied to a very broad range of workers,¹¹ creating a mismatch between regulatory objectives and the actual circumstances of the workers. In many European countries, the recent self-employment trends have diminished the potency of the labor code, as workers labeled as “self-employed” are excluded, by definition, from statutory protections for employees.¹²

Existing data reflect the scale of self-employment in various jurisdictions, and hence, its social importance and the need for appropriate legal oversight. In some countries, the “self-employed” label applies to as much as 30% of those earning their own living.¹³ Indeed, data from the mid-1990s, compiled by the Organization for Economic Cooperation and Development (OECD), reflects self-employment rates in European countries of between 5.4% and 25.1%, excluding agricultural employment.¹⁴ More recently, the European Commission reported that 15.2% of all persons employed within the European Union in 2012 were self-employed.¹⁵ These recent data from the EU capture those workers who are owners of an *unincorporated*

9. See Héctor Salgado-Banda, *Entrepreneurship and Economic Growth: An Empirical Analysis*, 12 J. OF DEVELOPMENTAL ENTREPRENEURSHIP 1, 12 (2005) (“Self-employment . . . has often been used as a proxy for entrepreneurship.”).

10. See Efrén Córdova, *From Full-Time Wage Employment to Atypical Employment: A Major Shift in the Evolution of Labour Relations?*, 125 INT’L LAB. REV. 641, 643 (1986).

11. *Independent Contractor (Self-Employed) or Employee?*, IRS.GOV, <http://www.irs.gov/Businesses/Small-Businesses-&Self-Employed/Independent-Contractor-Self-Employed-or-Employee> (last updated Nov. 5, 2013) [hereinafter *Independent Contractor or Employee*].

12. Werner Eichhorst et al., Directorate-Gen. for Internal Policies, EUR. PARL. DOC. PE 507.449, *Social Protection Rights of Economically Dependent Self-Employed Workers* 39 (2013), available at [http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/507449/IPOL-EMPL_ET\(2013\)507449_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/507449/IPOL-EMPL_ET(2013)507449_EN.pdf) (noting, in the German context, that truly self-employed workers “do not hold any legal rights”).

13. See ELŻBIETA KRYŃSKA, *DYLEMATY POLSKIEGO RYNKU PRACY, DILEMMAS OF THE POLISH LABOR MARKET* 109 (2001).

14. David G. Blanchflower, *Self-Employment in OECD Countries*, 7 LAB. ECON. 471, 481 (2000).

15. Martin Teichgraber, *European Commission, Labour Market and Labour Force Statistics*, European Union Labour Force Survey - Annual Results 2012, EUROPA.EU, http://epp.eurostat.ec.europa.eu/statistics_explained/index.php/Labour_market_and_labour_force_statistics (last visited Jan. 18, 2014).

enterprise, along with a few other categories of workers, while excluding those who have formally incorporated their businesses.¹⁶

The recorded prevalence of self-employment is lower in the United States where, in recent years, the self-employment rate has hovered between 10-11%.¹⁷ Of the persons classified as self-employed, only one-third had incorporated their enterprises, while the remaining two-thirds were unincorporated entities.¹⁸ Although the Bureau of Labor Statistics of the U.S. Department of Labor does track the total number of self-employed (including both incorporated and unincorporated), the official estimates of the “self-employed” include, as in Europe, only the unincorporated self-employed; those who have incorporated are technically employees of their own companies, and therefore classified as salary or wage workers.¹⁹

The demographics of the self-employed also reveal interesting characteristics of the workforce. In the United States, the unincorporated self-employment rate tends to be significantly higher among adults aged 65 years and older (18.1%), ostensibly because they have the needed capital and management skills, and also because of the value of self-employment for supplementing income.²⁰ The rates of unincorporated self-employment are higher for men as compared to women.²¹ Furthermore, in the United States, the self-employed are found across a range of industries. The highest rates of unincorporated

16. The European Commission defines a “self-employed” person as “the sole or joint owner of [an] unincorporated enterprise (one that has not been incorporated, i.e., formed into a legal corporation) in which he/she works, unless they are also in paid employment which is their main activity (in that case, they are considered to be employees)” and also captures “unpaid family workers,” “outworkers (who work outside the usual workplace, such as at home),” and “workers engaged in production done entirely for their own final use or own capital formation, either individually or collectively.” European Commission, *Glossary: Self-Employed*, EUROPA.EU, http://epp.eurostat.ec.europa.eu/statistics_explained/index.php/Glossary:Self-employed (last visited Jan. 18, 2014) [hereinafter *Glossary: Self-Employed*].

17. Steven F. Hipple, *Self-Employment in the United States*, 133 MONTHLY LAB. REV. no. 9, Sept. 2010, at 17, 17. According to data released by Bureau of Labor Statistics for May 2013, approximately 10.28% of the U.S. workforce is self-employed. Of this 10.28%, about 6.6% are unincorporated self-employed, and the remaining 3.6% are incorporated self-employed. See U.S. Bureau of Labor Statistics, U.S. Dep’t of Labor, *Economic News Release, Table A-9 Selected Employment Indicators*, BLS.GOV, <http://www.bls.gov/news.release/empsit.t09.htm> (last visited Sept. 25, 2013) [hereinafter U.S. Bureau of Labor Statistics].

18. See U.S. Bureau of Labor Statistics, *supra* note 17.

19. See Hipple, *supra* note 17.

20. See *id.* at 20-21.

21. In 2009, 5.6% of women were unincorporated self-employed persons, compared with 8.3% of men. *Id.* at 21. See generally Arum, *supra* note 3 (examining other factors that may affect self-employment, including level of education, social background, and the type of work performed by one’s parents).

self-employment are found in the “construction and extraction occupations (15.9%); management, business, and financial occupations (11.2%); and sales and related occupations (8.8%).”²² As for the incorporated self-employed workers, the rates were highest in the construction industry (9.2%), along with the professional and business services occupations (8.0%).²³ The breadth of industry coverage is, in some ways, representative of the multifaceted nature of self-employment. The category covers physicians and lawyers who own and operate their own businesses, and also captures more vulnerable, unincorporated workers in the construction and service industries.

In many European countries, agricultural workers (owners of small farms) constitute a significant proportion of the self-employed workforce. Indeed, across the European Union, approximately 19% of the self-employed are engaged in agricultural work, followed by wholesale and retail occupations (17.5%), construction (13.6%), and professional, scientific, and technical activities (10%).²⁴ This varies from country to country: in Germany, most self-employed are in the service sector, whereas in Slovakia, they are tradesmen operating with a trade license.²⁵ The demographics of the self-employed in Europe mirror the United States. A significant majority of the self-employed in Europe (69.6%) is male, and 37.5% are over the age of fifty.²⁶

While these statistics are impressive, their full weight is difficult to discern, given the lack of a consistent definition of self-employment. Indeed, given variations in the definition among different countries and legal systems, direct comparison of data across countries is difficult. Nevertheless, the information compiled in both Europe and the United States reflects a substantial proportion of the workforce that is classified as self-employed and notable demographic trends among the self-employed.

B. *Subcategories of the Self-Employed*

Distilling a universal definition of “self-employed” or “self-

22. Hipple, *supra* note 17, at 24.

23. *Id.* at 25.

24. See EUROPEAN COMM’N, EUROPEAN EMPLOYMENT OBSERVATORY REVIEW: SELF-EMPLOYMENT IN EUROPE 7 (Jo Hawley et al. eds., 2010), available at <http://www.eu-employment-observatory.net/resources/reviews/EEORReview-Self-Employment2010.pdf> [hereinafter SELF-EMPLOYMENT IN EUROPE].

25. *See id.*

26. *See id.*

employment” is quite a challenge, given variations in how the terms are defined. These variations are clearly visible on the European continent. As the European Commission has observed, there are

different understandings and definitions of the term self-employment across [countries in Europe], with a number of different subcategories defined: for instance, according to the legal status of the enterprise, whether the business has employees or not (employers versus own-account workers) and/or the sector in which the business operates (e.g. agriculture). . . . Other[] [countries] distinguish self-employment which is carried out in addition to paid employment. . . .²⁷

As the quote indicates, according to some definitions, the legal status of the business is determinative, whereas others turn on the presence of additional employees. For this latter criterion, family members who help with the business are often included in the category of self-employed, and are understood to be a common feature of small business ownership.²⁸ Other definitions eschew specific distinctions about business ownership, but define “self-employed” according to specific statutory criteria.²⁹ Alternatively, as intimated in the introduction above, “self-employment” is sometimes associated with a pejorative aspect of the contemporary economy—a subversive trend that deprives working people of the rights and privileges which they would otherwise enjoy if they were formally employed.³⁰ Yet, others consider self-employment to be naturally complementary to regular employment and an attractive form of development of the labor market.³¹ The supporters of this latter view sometimes call for an expansion in the number of self-employed persons.³² In Poland, for example, some have argued that the proportion of self-employed is unsatisfactory when compared to countries of a similar level of economic development.³³

In the United States, the category of “self-employed” is defined

27. *Id.* at 6.

28. KRYŃSKA, *supra* note 13, at 108.

29. See ROBERTO PEDERSINI & DIEGO COLETTI, SELF-EMPLOYED WORKERS: INDUSTRIAL RELATIONS AND WORKING CONDITIONS 16-19 (2010), available at <http://www.eurofound.europa.eu/docs/comparative/tn0801018s/tn0801018s.pdf> (describing variations in the statutory definition of “self-employment” across different European countries).

30. See Ruckelshaus, *supra* note 5, at 379-80.

31. See Maria Skora, *Will Self-Employment Save Poland From Crisis?*, SOC. EUR. J. (Jan. 5, 2013), <http://www.social-europe.eu/2013/05/will-self-employment-save-poland-from-crisis> (describing government efforts to promote self-employment in Poland).

32. *See id.*

33. KRYŃSKA, *supra* note 13, at 109.

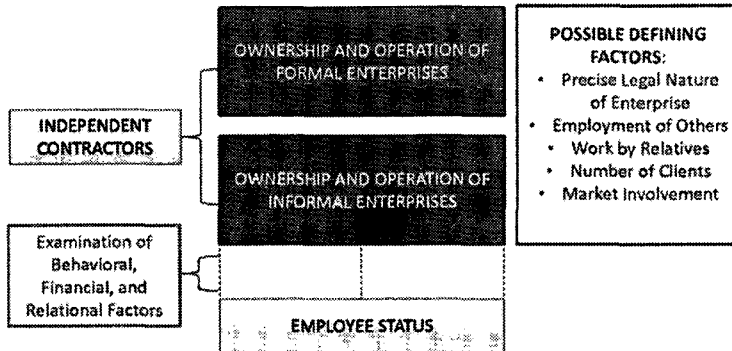
primarily by Internal Revenue Service (IRS) regulations, which assign distinct tax obligations to persons who are self-employed.³⁴ The IRS includes in the category of self-employed the following groups of individuals: persons “who carry on a trade or business as a sole proprietor or an independent contractor,” persons who are members of “a partnership that carries on a trade or business,” and persons who are otherwise in business for themselves, including part-time businesses.³⁵ Each of these terms, including sole proprietorship, independent contractor, and partnership, has its own definition and criteria under U.S. law.³⁶

These broad variations in the definitions of self-employment call for more careful consideration of the phenomenon. In this section, we offer a short typology of “self-employment” as it is currently defined—that is, a rough breakdown of the subcategories that have emerged in most legal systems. We structure this typology around the division between those self-employed persons who operate a formal business entity (such as a corporation or limited liability company) and those who do not, since the legal status of the enterprise is a relevant distinction in many legal systems. Within each of the two categories, we further distill subcategories of the self-employed, referencing considerations that define the self-employed. In this typology, we position independent contractors as a group that bridges both formal and informal enterprises, and which carries its own, separate legal significance. This typology of self-employment is also represented in Figure 1 below.

34. *Self-Employed Individuals Tax Center*, IRS.GOV, <http://www.irs.gov/Businesses/Small-Businesses-&Self-Employed/Self-Employed-Individuals-Tax-Center> (last updated Dec. 10, 2013) [hereinafter *Self-Employed Individuals Tax Center*].

35. *See id.*

36. *See Sole Proprietorships*, IRS.GOV, <http://www.irs.gov/Businesses/Small-Businesses-&Self-Employed/Sole-Proprietorships> (last updated June 27, 2013) [hereinafter *Sole Proprietorships*]; *Independent Contractor Defined*, IRS.GOV, <http://www.irs.gov/Businesses/Small-Businesses-&Self-Employed/Independent-Contractor-Defined> (last updated Nov. 5, 2013) [hereinafter *Independent Contractor Defined*].

SELF-EMPLOYMENT: A CURRENT TYPOLOGY**1. Ownership and Operation of a Formal Business Entity**

The term “self-employment” or “self-employed” is widely used to describe an individual – that is, a physical person – running his or her own business.³⁷ It is obvious that the subject of this concept must be limited to individuals, as the term “self-employment” cannot be used with respect to legal persons.³⁸ Indeed, the phrase “self-employed” is often equated with an entrepreneur who is a physical person.³⁹ In many instances, the self-employed individual operates a formal business entity

37. See *Glossary: Self-Employed*, *supra* note 16; *Self-Employed Individuals Tax Center*, *supra* note 34.

38. Note that the International Labor Organization (ILO), in its proposed convention on contract work, has contemplated that a “subcontractor” or “intermediary” can be either a natural or legal person. See INT’L LABOUR ORG. [ILO], *Contract Labour*, INTERNATIONAL LABOUR CONFERENCE, REPORT V (2B), 86TH SESS. (June 1998), available at <http://www.ilo.org/public/english/standards/relm/ilc/ilc86/rep-v2b.htm> [hereinafter ILO REPORT, 86TH SESS.]. These categories are distinct, of course, from the concept of a self-employed worker. The enterprise owned and operated by a self-employed individual may, of course, be a legal person. *Id.*

39. See generally Licht, *supra* note 2; Blanchflower, *supra* note 14.

such as a limited liability company, sole proprietorship, or a partnership.⁴⁰ Colloquially (and in many jurisdictions, as a matter of law) these persons are considered self-employed.⁴¹ Considering the formality of the enterprise is relevant for a few reasons. First, a self-employed individual who has taken the steps to establish a formal business entity is more likely to have a more mature enterprise, and more significant market presence, as compared to individuals who have not formalized their businesses. Correspondingly, it is also more likely that these individuals truly are self-employed, and are not “employees” masquerading under a different label. Second, more formal business enterprises are more likely to have additional workers (employees of the self-employed individual), which further distances the self-employed person from traditional employment.

Even within this category, there are relevant subcategories that can be identified. As just noted, this category of “self-employment” includes the self-employed who take on employees (and thereby become both “self-employed” and also “employers”), individuals who work for themselves (and do not employ anyone), as well as the family members who help run the business.⁴² As a matter of law and policy, each of these subgroups could be treated distinctly; the economic reality, the nature of their enterprises, and their positions within the enterprise are, in fact, different. Another dividing line within the category could relate to the precise legal nature of the enterprise. In most jurisdictions, including the United States, owners and operators of corporations are not treated as self-employed (for tax purposes); they fall outside of the legal definition of “self-employed,” even if the descriptor still applies colloquially.⁴³ This distinction reflects the social vs. legal understanding of “self-employed” and how the lack of coherence can generate confusion.

In contrast to those who own and operate some kind of formal business entity, there is a large subset of the self-employed who are operating an informal enterprise.⁴⁴ Various criteria may be used to

40. As noted above, in the U.S. the self-employed who have *incorporated* their enterprises are treated as a distinct category, and are subject to different tax and obligations. Although corporate entities are excluded from most *legal* definitions of self-employed, the usage of the term in popular and even policy circles has generated confusion about the precise meaning of “self-employed,” how to measure the scope of self-employment, and how to characterize its impact on the economy. See *Self-Employed Individuals Tax Center*, *supra* note 34.

41. See *id.*

42. See KRYŃSKA, *supra* note 13, at 108.

43. See, e.g., *Glossary: Self-Employed*, *supra* note 16.

44. JAN L. LOSBY ET AL., INFORMAL ECONOMY LITERATURE REVIEW 4-5 (Dec. 2002), available at http://www.kingslow-assoc.com/images/Informal_Economy_Lit_Review.pdf.

distinguish individuals within this category. One approach, per above, is to distinguish between those who take on workers and those who sell only their own work (often called “own-account workers”). While a formal business entity may be more likely to take on employees, it also occurs among informal enterprises. The structure of the clientele seems to be important as well; some informal enterprises have many regular and incidental clients, and offer their services or goods on the market.⁴⁵ Others cooperate with very few clients, sometimes with only one. There are the self-employed whose businesses have substantial turnover and income; their situation is naturally different than those whose income is comparable to an average pay earned in regular employment.⁴⁶ Again, all of these subcategories could be treated distinctly as a matter of law.

2. Independent Contractors

The term “independent contractor” is often used interchangeably with “self-employed,” but the term has a distinct legal definition in the United States and elsewhere.⁴⁷ Independent contractors may own and operate either informal or formal enterprises. All individuals who are properly categorized as independent contractors can be considered self-employed, at least in the colloquial sense. In the United States, the term “independent contractor” is often associated with individuals operating an informal enterprise. For that reason, questions often arise as to the dividing line between “independent contractor” and “employee.”

The Internal Revenue Service has outlined criteria for when an individual worker is to be considered an independent contractor (a subset of the self-employed), and when that worker should be treated as a statutory “employee.”⁴⁸ According to the IRS, the main criterion is the “degree of control and independence” that the worker enjoys.⁴⁹ The IRS further disaggregates this test by examining aspects of behavioral control, financial control, and how the relationship is structured, drawing upon tests that have developed through the common law.⁵⁰ Regarding

45. See *id.* at 13.

46. See PEDERSINI & COLETTI, *supra* note 29, at 29, 41 (noting differential legal treatment of self-employed workers with relatively few clients).

47. See *Independent Contractor Defined*, *supra* note 36. See also Alan Koral et al., *The Wages of Sin: The Legal Consequences of Misclassifying Employees, Independent Contractors, and Others*, 2010 A.B.A. INT’L L. SEC. 20, available at <http://apps.americanbar.org/intlaw> (search “The Wages of Sin”) (describing how independent contractors are positioned under the law of the United Kingdom).

48. See *Independent Contractor or Employee*, *supra* note 11.

49. See *id.*

50. See *id.*

behavioral control, the IRS test examines who controls the content of the work, and the manner in which the work is performed, including the types of instructions given, the level of detail of those instructions, and whether evaluation or training systems are in place.⁵¹ As for financial control, the IRS examines who controls the “economic aspects” of the job, including: whether the worker has made a “significant investment” in work equipment, whether or not expenses are reimbursed, whether there is an “opportunity for profit or loss,” whether the worker’s “services are made available to the market,” and the “method of payment” (regular payments vs. flat fee).⁵² To the extent these expenses are covered by an outside payer (the party contracting with the worker), the relationship is more likely to be an employer-employee relationship, as opposed to an independent contractor situation.⁵³ Finally, the IRS test considers relational factors, including the structure and content of any written contracts, whether employee benefits are provided, the duration or permanency of the relationship, and whether the services provided by the worker are a central part of the business that hires the worker.⁵⁴ The IRS has stated explicitly that these factors need to be applied and assessed on a case-by-case basis.⁵⁵

In the European civil law system, adjudicators must similarly distinguish between employees and independent contractors, and do so by examining the attributes of employment spelled out in the labor code.⁵⁶ In Poland, for example, adjudicators apply criteria that, though named differently, are very similar to the IRS factors in the United States. The first criterion is that of “subordination,” which corresponds with the “degree of control and independence” criterion in the United States. A typical employee, who is in a subordinate workplace relationship, will receive orders specifying: 1) the tasks to undertake, 2)

51. *Behavioral Control*, IRS.GOV, <http://www.irs.gov/Businesses/Small-Businesses-&-Self-Employed/Behavioral-Control> (last updated Dec. 10, 2013).

52. *Financial Control*, IRS.GOV, <http://www.irs.gov/Businesses/Small-Businesses-&-Self-Employed/Financial-Control> (last updated Dec. 10, 2013).

53. *See id.*

54. *Type of Relationship*, IRS.GOV, <http://www.irs.gov/Businesses/Small-Businesses-&-Self-Employed/Type-of-Relationship> (last updated Dec. 10, 2013).

55. *See Independent Contractor or Employee*, *supra* note 11. Additionally, the IRS has created a procedure for determining the status of the worker, when the application of the IRS factors is inconclusive. Specifically, Form SS-8 (Determination of Worker Status for Purposes of Federal Employment Taxes and Income Tax Withholding) may be filed with the IRS and the IRS will typically respond within six months. I.R.S., SS-8, Determination of Worker Status for Purposes of Federal Employment Taxes and Income Tax Withholding (rev. Aug. 2011), *available at* <http://www.irs.gov/pub/irs-pdf/fss8.pdf>.

56. *See AGRIS REPSS ET AL., AM. BAR ASS’N, LABOR AND EMPLOYMENT LAW IN THE NEW EU MEMBER AND CANDIDATE STATES* 171-72, 199, 213, 257 (Anders Etgen Reitz ed., 2007).

the methods of fulfilling these tasks, 3) the time and location of work, and 4) orders regarding cooperation with other employees.⁵⁷ A second criterion, strictly connected with subordination, is the employer's responsibility to supervise and correct performance of the work that she has ordered.⁵⁸ The third criterion is the personal character of the employment relationship; in a traditional employment relationship, only the employee is entitled to perform work, while an independent contractor normally is able to hire a substitute, if necessary.⁵⁹ While many flexible and mixed arrangements are emerging, general principles do apply. If the work is performed under the control of a manager, and for the benefit of an employer, it is likely to be classified as traditional employment.⁶⁰ By contrast, more independent work, for the benefit of a client, is a hallmark of self-employment.⁶¹

These broad categories, and the various distinctions within them, create varied and diversified relations between the "self-employed" and their clients. Entrepreneurs with formal enterprises and numerous clients typically dictate the nature and quality of their services, and tend to be more concerned about their overall market position, rather than catering behavior to a single customer.⁶² Small business owners who personally perform and deliver work or services, especially those with informal enterprises and who work for one client or for very few clients, countenance a completely different reality. They are economically dependent on their clients and are more beholden to their clients' requirements regarding the services to be provided.⁶³ (Per IRS guidelines, the "client" oversees and directs the work.⁶⁴) These characteristics are significant when it comes to possible distinctions between the self-employed and the group of entrepreneurs as a whole.

57. Cf. Paul L. Davies, *Wage Employment and Self-Employment – A Common Law View*, in REPORTS TO THE 6TH EUROPEAN CONGRESS FOR LABOUR LAW AND SOCIAL SECURITY 165, 166-67 (1999) (noting the similarities between the common law tests and the "traditional continental European test of subordination").

58. Sąd Najwyższy [Polish Supreme Court], Decision of July 24, 2001, I PKN 560/00, OSP 2002, No. 5, pos.70 translated by Michal Skapski.

59. See *id.*

60. Koral et al., *supra* note 47, at 19.

61. See *id.*

62. See Dave Donovan, *Is Good Customer Service Really Integral in a Business's Success?*, DUN & BRADSTREET SMALL BUSINESS ADVICE (Dec. 10, 2012), <http://business.dnb.com/small-business-information/is-good-customer-service-really-integral-in-a-business's-success>.

63. See *Marketing 101*, U.S. SMALL BUSINESS ADMIN., <http://www.sba.gov/content/marketing-101-basics#> (last visited Jan. 22, 2014).

64. See *Independent Contractor Defined*, *supra* note 36.

The International Labor Organization has echoed some of these same distinctions, proposing four subcategories of self-employment.⁶⁵

Considering the conceptual complexity of the term “self-employment,” one needs to carefully parse the common social understanding of “self-employed as entrepreneur” and inquire whether there is a deeper set of attributes that define self-employment, and how the law should enable, protect, and/or regulate that form of employment. One must also delimit *actual* self-employment from what is *nominally* labeled self-employment, or in other words, legal vs. illegal self-employment, to ensure that workers are not deprived of needed protections. Before proceeding to answer these questions, we explore the benefits and responsibilities relating to taxes and social insurance that attach to self-employment in the U.S. and Europe. These benefits and responsibilities are at the core of why “self-employment” matters as a legal concept.

C. *Categories as Defined by Taxation and Social Insurance Guidelines*

In both Europe and the United States, the categories of the self-employed and the accompanying benefits and obligations are defined, in large part, by guidance from tax and social insurance laws. As discussed above, there are many ways to parse the broad and amorphous category of “self-employed” and to carve out specific legal subcategories. By closely scrutinizing these benefits and responsibilities, we can better define the employment structures that should trigger this legal regime. As described below, many self-employed workers have tax and social insurance obligations that differ significantly from traditional employees. In many instances the obligations are more burdensome for self-employed workers, although cases will vary depending on the individual situation of the worker and the applicable national law.

For many actors, tax and social insurance laws are central to decisions regarding self-employment. As described more fully below, employers may seek to convert their relationships with employees into independent contractor arrangements, precisely to avoid tax and social insurance obligations. In this way, these laws serve as a determinant of self-employment. Naturally, individuals may be driven to self-employment by other factors, including the experience of

65. Int'l Labour Org. [ILO], Fifteenth International Conference of Labour Statisticians, *Resolution Concerning the International Classification of Status in Employment*, (Jan. 28, 1993), available at <http://www.ilo.org/public/english/bureau/stat/download/res/icse.pdf>. For conceptual purposes, the ILO considers all “employers” to be self-employed, and also includes own account workers, members of producers’ cooperatives, and contributing family workers. *Id.*

unemployment, or other legal and institutional variables in the jurisdiction.⁶⁶ Additionally, migrant workers in particular may gravitate towards self-employment due to challenges in accessing traditional employment (including immigration laws, discrimination, and language barriers).⁶⁷ Although there are many relevant socio-legal forces, this section focuses on tax and social insurance considerations, as they are explicitly interwoven into many countries' legal regimes relating to self-employment.

Since tax and social insurance laws vary from country to country, we are using the Polish legal system to illustrate legal features of self-employment in Europe. In that legal system, as in most legal systems, the principles of taxation applicable to businesses and to physical persons are different. Traditional forms of gainful activity carried out by individuals, such as earning income pursuant to an employment contract, are included in a compulsory progressive taxation scale in which the rates are as follows: the tax rate for income up to 85,528 new Polish *złoty*, or PLN (about US \$26,727) is 18%, whereas income above that amount is taxed at the rate of 32%.⁶⁸ Entrepreneurs, however, can choose to pay a flat rate of 19% on their aggregate income, regardless of the size of their business.⁶⁹ Many choose to pay personal income tax at this flat rate of 19%, as they find it more favorable.⁷⁰

Specifically, those whose income is very high choose the linear tax rate for their income,⁷¹ and in so doing they decrease the state's internal revenue. As described more fully below, impact on government revenue is one driver for more precise definitions of legitimate vs. apparent (or nominal) self-employment. The linear income tax principle is available to those entrepreneurs (including the self-employed) whose business activity does not betray features normally associated with regular work

66. Eichhorst et al., *supra* note 12, at 18-19.

67. Jayesh Rathod, *Immigrant Entrepreneurs – Contributions and Challenges*, in SUSAN D. BENNETT ET AL., *COMMUNITY ECONOMIC DEVELOPMENT LAW: A TEXT FOR ENGAGED LEARNING* 179 (2012).

68. Polish Information & Foreign Investment Agency, *Personal Income Tax*, PAIIZ.GOV (last updated July 2013), http://www.paiz.gov.pl/polish_law/taxation/pit [hereinafter Polish Information & Foreign Investment Agency].

69. See Ustawa z dnia 26 lipca 1991 r. o podatku dochodowym od osób fizycznych [The Personal Income Tax Act of July 26, 1991] (Dz.U. 2010, vol. 51, pos. 307, with amendments) (Pol).

70. See *Poland: Self-Employed Workers*, EUROFOUND, <http://www.eurofound.europa.eu/comparative/tm0801018s/pl0801019q.htm> (last updated Feb. 24, 2009) [hereinafter *Poland: Self-Employed Workers*].

71. See Paweł Jablonowski, *The Polish Tax System is Beneficial for Foreign Investors*, 4 *WORLD COMMERCE REV.* No. 2, xvi (June 2010), available at <http://www.worldcommercereview.com/feeds/show/WCRVol4Issue2>.

contracts (or an employment relation).⁷² In all other cases, the tax authorities impose the progressive tax scale, while ignoring the specific legal architecture of different forms of “self-employment” that are being carried out.⁷³

Article 5b of the Income Tax Act of Poland identifies three conditions that would prevent an entrepreneur from being able to choose the flat rate of 19% CIT: (1) the third-party liability for the results of the work provided rests with the principal, or the ordering party, not the party performing the work; (2) the work is supervised by the ordering party at the time and place designated by this party; or (3) the party who performs the work is not liable for the risk connected with that performance.⁷⁴ Clearly, these are features of a traditional employer-employee relationship. The purpose of this exclusion is to prevent the flat tax rate from being applied to forms of “self-employment” which are more appropriately categorized as an employment relationship.⁷⁵ Proper self-employment, however, characterized by *some* economic dependence of the self-employed but not the typical employee subordination, may be subject to taxation on more favorable terms than those applicable to employees in an employment relationship.⁷⁶ Moreover, entrepreneurs (including self-employed ones) may deduct all business expenses from the taxable base income, while employees on employment contracts may only deduct an insignificant, fixed amount (PLN 1,135 or about US \$354).⁷⁷ This offers further tax relief for the self-employed.

Another difference between self-employment and a traditional employment relationship concerns the costs connected with Poland’s compulsory social insurance. The employee and employer share equal responsibility for a retirement plan contribution, set at 19.52% of income; the law also apportions responsibility for contributions of 8% of income for a disability fund premium, 2.45% for a sickness fund and from 0.40 to 8.12% (depending on the risk inherent in the occupation)

72. See Ustawa z dnia 26 lipca 1991 r. o podatku dochodowym od osób fizycznych [The Personal Income Tax Act of July 26, 1991] (Dz.U. 2010, vol. 51, pos. 307, with amendments) (Pol).

73. See *id.*

74. See *id.*

75. Cf. Koral et al., *supra* note 47, at 19 (noting that “in Poland, [a] primary reason for bogus self-employment is the avoidance of taxes”).

76. As noted above, in Poland, the flat income tax rate for the self-employed is 19%. While employees subject to the progressive tax rates will pay only 18% if they earn less than 85,532 PLN per year (1% less than the flat tax rate), they are required to pay tax at a rate of 32% for any income above 85,532 PLN. Therefore, the 19% flat tax rate represents a significant advantage for any self-employed worker earning more than 85,532 PLN annually. Polish Information & Foreign Investment Agency, *supra* note 68.

77. Ustawa z dnia 26 lipca 1991 r. o podatku dochodowym od osób fizycznych [The Personal Income Tax Act of July 26, 1991] (Dz.U. 2010, vol. 51, pos. 307, with amendments) (Pol).

for the accident insurance plan.⁷⁸ Although the above insurance premiums are calculated strictly based upon the assumption of full-time work (and corresponding income), the self-employed may choose to pay a minimal rate calculated on the basis of 60% of the average pay in the public sector, and not on their actual income.⁷⁹ As a result, the amount of social insurance premiums paid by high-income entrepreneurs is significantly reduced, and so is the cost of self-employment. However, in the long run, the lower the social insurance contributions, the lower the future pensions and other social benefits. Nevertheless, despite the long-term negative effects, many entrepreneurs will act in their short-term interest.

In the Polish social insurance system, in the case of an employee, retirement and disability insurance schemes are contributory. Premiums are paid by the employee and the employer in equal shares, while the self-employed must cover their insurance premium in full.⁸⁰ Personal income tax is paid in full, by way of deduction, by each employee. However, the related paperwork is handled by the employer who also bears all of the accounting costs.⁸¹ As described more fully below, these conditions incentivize the misclassification of workers.

In the United States, self-employed workers face comparable tax obligations. First, self-employed workers are subject to progressive income tax obligations, just like traditional employees. On top of their income tax obligations, the U.S. government imposes a flat self-employment tax upon all individuals who are classified as “self-employed.”⁸² For 2013, the self-employment tax rate is 15.3%.⁸³ The core purpose of the self-employment tax is to finance social insurance benefits for the workers; therefore, of that 15.3% rate, 12.4% is allocated to Social Security, and 2.9% is for Medicare hospital insurance.⁸⁴ Individuals are required to pay the self-employment tax if they earn at least US \$400 in a calendar year, and consistent with that minimum standard, irregular or sporadic self-employment does not subject an

78. Polish Information & Foreign Investment Agency, *supra* note 68.

79. U.S. Soc. Sec. Admin., *Social Security Programs Throughout the World: Europe, 2010, Poland*, SSA.GOV, <http://www.ssa.gov/policy/docs/progdesc/ssptw/2010-2011/europe/poland.html> (last visited Jan. 3, 2014).

80. *Id.*; see also Poland: *Self-employed Workers*, *supra* note 70.

81. Ustawa z dnia 26 lipca 1991 r. o podatku dochodowym od osób fizycznych [The Personal Income Tax Act of July 26, 1991] (Dz.U. 2010, vol. 51, pos. 307, with amendments) (Pol).

82. See *Self-Employment Tax (Social Security & Medicare Taxes)*, I.R.S. <http://www.irs.gov/Businesses/Small-Businesses-&Self-Employed/Self-Employment-Tax-Social-Security-and-Medicare-Taxes> (last updated Oct. 31, 2013) [hereinafter *Self-Employment Tax*].

83. See *id.*

84. See *id.*

individual to the self-employment tax.⁸⁵ The Social Security portion of the tax is subjected to an income threshold, above which the tax is not imposed; in contrast, there is no upper limit on self-employment income that is subjected to the Medicare tax.⁸⁶ Finally, certain deductions may apply.⁸⁷

By contrast, the tax regime for workers classified as “employees” reflects a shared burden among workers and employers. Under existing law, both employers and employees must contribute to a tax that derives from the Federal Insurance Contribution Act (FICA), at a rate of 7.65% each, of which 6.2% is allocated to Old Age, Survivor, and Disability Insurance (OASDI) (a part of Social Security), and 1.45% is allocated to Medicare’s hospital insurance.⁸⁸ As with the self-employment tax, the Social Security tax is imposed only up to a certain level of income.⁸⁹ For tax year 2013, that level is US \$113,700.⁹⁰ There is no analogous ceiling for the Medicare portion of the tax. The employer’s portion of the FICA tax is a deductible business expense, whereas the employee’s portion is deducted from wage payments, and is not deductible.⁹¹

In addition to the FICA tax obligations, both the employer and the employee have additional tax liability: the employee, of course, must contribute federal and possibly state income taxes on the wages earned.⁹² Federal taxes follow a progressive scheme, whereby increasing income tax liability (and a higher income tax rate) accompanies higher earnings.⁹³ Additionally, employers are solely responsible for contributing federal and state unemployment taxes, which are used to fund unemployment compensation.⁹⁴ Most employers must pay the taxes pursuant to the Federal Unemployment Tax Act (FUTA).⁹⁵ As

85. *See id.*; *see also* Steffens v. Comm’r, 707 F.2d 478 (11th Cir. 1983).

86. *See Self-Employment Tax*, *supra* note 82.

87. *See id.*

88. *Social Security & Medicare Tax Rates*, SOC. SECURITY ADMIN., <http://www.ssa.gov/oact/progdata/taxRates.html> (last updated March 8, 2012) [hereinafter *Social Security & Medicare Tax Rates*].

89. *Contribution and Benefit Base*, SOC. SECURITY ADMIN., <http://www.ssa.gov/oact/COLA/cbb.html#Series> (last visited Jan. 3, 2014) [hereinafter *Contribution and Benefit Base*].

90. *See id.*

91. I.R.C. §§ 275(a)(1)(A), 3502(a) (LexisNexis 2013) (nondeductibility of employee FICA contribution); I.R.C. § 162 (LexisNexis 2013) (employer FICA contribution is deductible).

92. Elizabeth Rosen, *State Income Tax vs. Federal Income Tax*, U.S. TAX CENTER (Jan. 22, 2014), <http://www.irs.com/articles/state-income-tax-vs-federal-income-tax>.

93. DEP’T OF THE TREASURY, INTERNAL REVENUE SERV., PUBL’N 15 (CIRCULAR E), EMPLOYER’S TAX GUIDE 44 (2013), available at <http://www.irs.gov/pub/irs-prior/p15-2013.pdf> (percentage tables for federal income tax withholding).

94. *See id.* at 35.

95. *Id.* For the FUTA tax obligation to apply for 2013, an employer must have “paid wages

under the Polish system, given these various tax obligations, both employers and workers may have an incentive to classify work as “independent contracting” as opposed to full-fledged employment.

The significance of the distinction, however, extends beyond the realm of tax law. Self-employed workers, or “independent contractors,” are granted limited or no protections under a range of federal workplace statutes, including the National Labor Relations Act, the Fair Labor Standards Act, the Family and Medical Leave Act, Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, the Age Discrimination in Employment Act, and the Occupational Safety & Health Act.⁹⁶ Additionally, independent contractors are not eligible for unemployment compensation.⁹⁷ These additional obligations imposed upon employers create further incentives for worker misclassification.⁹⁸

The problem of “forced” self-employment, referenced above, and described more fully in Section II below, stems from these incentive structures in the social insurance and tax laws. Some employers choose to restructure their employment relationships with their employees; by adjusting the nature of the work and/or imposing lay-offs, they are able to push the workers into self-employment, and thereby avoid contributions to social insurance.⁹⁹ Other employers simply misclassify the workers as independent contractors, or replace regular employees with self-employed workers, thereby shifting labor costs to the self-employed.¹⁰⁰ As a consequence, the scale of self-employment is growing and extends to those who are nominally self-employed, yet who remain subordinate in a typical employee-employer relationship.

Beyond the concerns about misclassification, the tax and social security regimes in both Europe and the United States reflect certain

of \$1,500 or more in any calendar quarter in 2012 or 2013” or “had one more employees for at least some part of a day in any 20 or more different weeks in [either] 2012 or . . . 2013.” *Id.* There are different threshold requirements for domestic workers and farmworkers. *Id.*

96. See Katherine V.W. Stone, *Legal Protections for Atypical Employees: Employment Law for Workers Without Workplaces and Employees Without Employers*, 27 BERKELEY J. EMP. & LAB. L. 251, 280 (2006) (“Independent contractors are not covered by the minimum wage, workers’ compensation, unemployment compensation, occupational safety and health laws, collective bargaining laws, Social Security, disability, [or] anti-discrimination laws . . .”).

97. See 81 C.J.S., *Social Security and Public Welfare* § 332 (2004) (“Since as a general rule, unemployment compensation acts apply only where the employment relationship exists, independent contractors are generally not within the coverage of the unemployment compensation statutes.”).

98. See *infra* Part II.A.

99. Stone, *supra* note 96, at 279-280, n. 136.

100. *Employee Misclassification as Independent Contractors*, U.S. DEP’T OF LAB., <http://www.dol.gov/whd/workers/misclassification/#stateDetails> (last visited Jan. 3, 2014) [hereinafter *Employee Misclassification as Independent Contractors*].

assumptions about the self-employed. The requirement that the self-employed make their own contributions to social insurance schemes suggests some assumptions about the formality and independence of the self-employed enterprise. Self-employed workers are, quite literally, their own employers, and hence bear the responsibility that applies to statutory or common law “employers” in a traditional relationship of subordination. This obligation, while logical from a policy perspective, may be unusually burdensome for the self-employed who are economically vulnerable and dependent on a small number of clients.

The Polish legal system also reflects a model designed to offers some tax *advantages* to self-employed workers, via a flat income tax rate for those who are truly entrepreneurs. Indeed, many legal systems feature tax advantages for the self-employed, including the possibility of deducting business expenses when calculating tax liability. Underlying these advantages is a recognition of the costs associated with establishing and operating an enterprise, and also acknowledgment of the broader social good that can flow from entrepreneurial activity. With such a broad swath of individuals falling under the label of “self-employed,” however, one must question whether the burdens and incentives embedded in the tax and social insurance laws should be targeted more narrowly.

II. DEFECTS IN U.S. & EUROPEAN SELF-EMPLOYMENT LAW

The law of self-employment in both the United States and Europe suffers from numerous defects. First, variations in the definition of “self-employment” across jurisdictions, coupled with a mismatch between the legal and popular use of the term, have generated normative confusion. It is clear that self-employment, however it is defined, encompasses a broad range of practices. Moreover, due to this doctrinal confusion, self-employment is often defined as distinct from traditional employment, as opposed to an affirmative category with specific attributes. The fact that the category of “self-employed” law is shaped, in significant part, by tax and social insurance law, creates incentives for manipulating the category to serve financial interests. These practices feed a broader, global trend towards increased flexibility in workplace relations – a trend that, in nearly all cases, has signaled diminished protections for workers.

There are many defects that flow from the current categorizations of the self-employed, but two will be examined here. First, the malleability of the category, and its accompanying tax obligations, creates structural incentives for the purposeful misclassification of

workers. Second, as a related phenomenon, the law of self-employment over-relies on the employee vs. self-employed dichotomy, and fails to consider hybrid or intermediary statuses which may be intentional and non-coercive, but not fully within either self-employed or employee status.

A. *Misclassification of Workers into Nominal Self-Employment*

In the United States, a concern that is well documented in the literature is the fluidity, and in some cases, manipulation of the “employee” and “independent contractor” categories. Indeed, in recent years, there has been growing attention given to the phenomenon of worker “misclassification” by employers. Several different concerns have spurred the recent focus on this issue. First, misclassification is framed as a drain on the economy, which deprives the government of tax dollars, and also curbs the income of misclassified workers.¹⁰¹ In particular, government representatives and advocates have noted that misclassified workers often are denied overtime compensation, and instead paid a flat fee that undervalues their work.¹⁰² Additionally, they have pointed to the range of other workplace protections that independent contractors do not receive, and have accused employers of trying to sidestep these protections through misclassification.¹⁰³

At the federal level, the U.S. Department of Labor (DOL) has launched a Misclassification Initiative.¹⁰⁴ Under this initiative, DOL has signed a Memorandum of Understanding (MOU) with the IRS, designed to spur collaboration and information-sharing relating to worker misclassification.¹⁰⁵ Furthermore, various divisions of DOL have signed MOUs with fourteen states; these MOUs likewise target misclassification through collaborative efforts, including, *inter alia*, joint investigations.¹⁰⁶ As part of this initiative the Department of Labor has pursued litigation against employers who have misclassified workers.¹⁰⁷ In May 2013, for example, DOL obtained a consent judgment of over

101. *See id.*

102. *See id.*

103. *See id.*; *see also* Stone, *supra* note 96, at 280.

104. *See Employee Misclassification as Independent Contractors*, *supra* note 100.

105. Memorandum of Understanding Between the Internal Revenue Serv. and the U.S. Dep’t of Labor, 1 (Sept. 19, 2011), *available at* <http://www.dol.gov/whd/workers/MOU/irs.pdf>.

106. *See Employee Misclassification as Independent Contractors*, *supra* note 100.

107. Press Release, U.S. Dep’t of Labor Wage & Hour Div., U.S. Dep’t of Labor Recovers More than \$1 million in Back Wages and Damages for 196 Employees Misclassified as Independent Contractors (May 9, 2013), *available at* <http://www.dol.gov/whd/media/press/whdpressVB3.asp?pressdoc=Southeast/20130509.xml>.

one million dollars on behalf of 196 workers who were misclassified as independent contractors by their employer, Bowlin Group LLC.¹⁰⁸

As a complement to these administrative enforcement efforts, both state and federal governments in the United States have pursued legislation designed to curb misclassification. In the state of Maryland, for example, the legislature enacted the Workplace Fraud Act, which specifically addresses misclassification through targeted enforcement, a worker-driven complaint procedure, and the possible imposition of monetary penalties.¹⁰⁹ Legislation relating to worker misclassification has been introduced in the U.S. Congress, but has failed to secure passage in either the Senate or the House.¹¹⁰

These acts of misclassification, especially when imposed on employees, constitute a pressing and relatively common social problem in both Europe and the United States. In Europe, the precise legal classification of self-employed workers is a “central issue of labor and social security law” and the phenomenon may be observed across European jurisdictions.¹¹¹ To address this phenomenon, the law in many jurisdictions allows adjudicators to look beyond the label and examine the true nature of the relationship. In Poland, for example, existing regulations unequivocally qualify any legal relation that displays certain features as an employment relationship.¹¹² The admissibility of a finding that two entrepreneurs remain in a labor relation if the agreement that binds them shows the features of a different type of relation was once challenged. However, the Supreme Court appropriately ruled that when a physical person, even if that person is an entrepreneur, enters into a contract that has some features of an employment contract, such person does not act within his business activity, and therefore there was no obstacle to establish that the person was an employee.¹¹³ The need to categorize individuals carrying out work into various categories of employment, which consequently requires the application of different legal regimes, will always require actions against superficial labels and misclassification attempts. Regardless of the language that might appear in a contract between two parties, it will be necessary to categorize the

108. *See id.*

109. MD. CODE ANN., LAB. & EMPL. § 3-909(a) (West 2008 & Supp. 2013).

110. *See* Employee Misclassification Prevention Act, H.R. 3178 112th Cong. (2011). The bill would amend the Fair Labor Standards Act, to impose additional record-keeping requirements, along with penalties for misclassification. *Id.*

111. *See* Koral et al., *supra* note 47 at 17.

112. JAKUB LEWANDOWSKI, LAWARDS SULEJ & WOJCIK, FORMS OF EMPLOYMENT IN POLAND 3 (2013), available at http://www.paiz.gov.pl/files/?id_plik=19205.

113. Ryszard Sadlik, *Replace No Contracts of Employment Contracts*, NEWSLETTER OiPiP (Pol.), May-June 2006.

employment relationship based on the actual features and workplace dynamics.

Historically, in the American common law system, workers would have to offer evidence in an adversarial proceeding, to determine whether their employment situation was more properly defined as “employment” or “independent contracting.”¹¹⁴ Ultimately, a fact-finder would determine the proper categorization of the work.¹¹⁵ In recent years, however, the misclassification legislation at the state level, along with internal IRS processes, has created additional pathways for resolving classification disputes.¹¹⁶

Misclassification must be viewed as a pathology of the labor market, akin to the practice of substituting employment contracts with contracts for services. Under the civil law system, entering into contracts for services in lieu of employment contracts is illegal.¹¹⁷ *De lege lata*, should a lawsuit against the employer be brought to court, there is a legal basis to rule that an individual performing the work can be defined as an employee within an employment relationship. In the common law system, attention to these issues is growing, but the legal resolution is often elusive for workers.

B. *Non-Coercive Intermediary Statuses*

As noted above, although there are notable differences among groups of self-employed workers, national laws do not necessarily differentiate or place these workers into separate legal categories commensurate with their actual status. In some instances, workers are not precisely employees, nor do they have the autonomy or independence of a truly self-employed entrepreneur; rather, they fall somewhere in the middle of that continuum. Consider, for example, a construction subcontractor who works exclusively for one general contractor, or a household cleaning worker engaged as an independent contractor by a small number of families. The relative economic position of these workers may create difficulties in meeting the tax obligations of the self-employed, and/or the tax incentives may not be optimally suited for these individuals. The law, as currently structured,

114. See, e.g., *Spirides v. Reinhardt*, 613 F.2d 826, 831-32 (D.C. Cir. 1979) (listing numerous factors, which an agency or reviewing court must consider in determining whether a worker is an employee or independent contractor).

115. Koral et al., *supra* note 47, at 15-16.

116. See *Employee Misclassification as Independent Contractors*, *supra* note 100.

117. See Sadlik, *supra* note 113.

does not allow for distinctions or adjustments to be made along the continuum.

Some authors have begun to make such distinctions, by referring to “proper” vs. “subsidiary” self-employment.¹¹⁸ The “proper” self-employed use their own tools and capital to provide goods and services.¹¹⁹ The “subsidiary” self-employed do not take on employees and base their business on selling their own work at a limited capital investment, that is, with only the tools necessary to do the job.¹²⁰ They often cooperate with a very limited group of clients and their relationships with customers are similar to those existing in an employment relation, although they are deprived of the rights and privileges that an employment contract would normally secure them.¹²¹ Such workers may operate willingly, and may be cognizant of the tax benefits and/or obligations that flow from self-employed status. Given their relative dependence on a few clients and their positioning in the labor market, however, the label of “self-employed” is not entirely accurate. Likewise, family members of the self-employed who assist the business principals are often categorized as “self-employed,” and constitute another intermediary status that would benefit from a more refined definition.¹²²

III. REIMAGINING THE LAW OF SELF-EMPLOYMENT

The process of identifying different categories of self-employment allows one to formulate principles that should underlie future laws and regulations. Moreover, an accurate demarcation of self-employment is critical, because it will make it possible to apply those future regulations exclusively to the self-employed and not to all entrepreneurs. Normatively, reimagining self-employment law will allow a more appropriate matching of rights, benefits, and responsibilities, given the positioning of different actors in the labor market. It will also help remedy pathologies in the labor market that result in the exploitation of vulnerable workers.

Below, we offer some principles for how self-employment law in the U.S. and certain European nations could be restructured.

118. KRYŃSKA, *supra* note 13 at 109.

119. *See id.*

120. *See id.*

121. Eichhorst et al., *supra* note 12, at 25-27.

122. PEDERSINI & COLETTI, *supra* note 29, at 7.

A. Distinguishing Those Who Employ Others . . .

In creating different sub-categories of self-employment, it is vital to assess the proportion of work within the scope of an entrepreneur's business that is performed by others, rather than by the self-employed worker herself. The fact that he or she actually performs the work, (i.e., delivers goods or provides services) distinguishes those persons who are truly "self-employed," in the most literal sense of the term, from other entrepreneurs. It is illogical to place those who employ others to perform their work in the same subcategory of "self-employed" as those who are largely reliant upon themselves.¹²³ Technically speaking, even when only one employee is taken on to complete the work, a workplace is created,¹²⁴ and the self-employed person becomes an employer.

Naturally, a strict definition of "self-employment" based on personal performance of the work or the engagement of other individuals to carry it out can be difficult due to numerous borderline situations, which may display certain features of both types. For example, a self-employed worker – for example, a graphic designer – may choose to subcontract some of the work (to another self-employed worker, or an independent contractor) rather than hire an employee. In this scenario, the first self-employed worker does not become an employer, even though he or she does not carry out the work personally. Another iteration of this scenario: the self-employed entrepreneur may perform some of the work personally with the assistance of family members (who are formally treated as employees, or may simply be "helping out" the self-employed worker).¹²⁵

Although different legal statuses of the individuals who collaborate with the self-employed remain significant, a critical factor is whether the goods are produced or services provided by the self-employed entrepreneur. Occasional involvement of individuals who are not employees should not exclude entrepreneurs from the category of the

123. Another matter arises when self-employment is included within the category of employment. Here, the problem is not only connected with or caused by the conventional linguistic intuition when the meaning of the term is analyzed, but also results from the comparison of the actual and legal status of persons traditionally and legally included in the category of "the employed" or "the self-employed." The inclusion of the self-employed in the "employment" category denies their right to employ others to perform their work.

124. See M. Skapski, *Pracowniczy obowiązek dbałości o dobro zakładu pracy* [The Employee's Duty of Care at the Work Place] 4 PiZA at 11 (2001) (Article 100 § 2, point 4 of the Labor Code).

125. For the concept and legal status of these individuals, see M. Skapski, *Osoba współpracująca przy prowadzeniu działalności gospodarczej w prawie ubezpieczeń społecznych*, 2 RPEiS (2002) (describing collaborating persons as seen by the social insurance law).

self-employed, especially if they are personally engaged in serving the clients. The situation is clearly different when an entrepreneur deals only with the business issues and manages the work of those he employed to realize the orders he has procured.

Even if one can articulate some kind of rule, categorizing different situations is not always an easy task. Particularly in small businesses it is difficult to precisely determine if the owners deal solely with business related matters and management, or if they also personally provide the services or perform the work. Owners of small businesses need to be involved in all aspects of their operations and the practice of subcontracting out some of the work does not deprive them of the status of self-employment as long as they perform most of the work themselves. On the contrary, those entrepreneurs who only occasionally get involved in personal performance of the work and mainly concentrate on managing their business are in a qualitatively different category. One must consider whether the employment of others is enough to distinguish two groups of workers (as a legal matter), or whether additional factors must be added for a more precise and clear-cut division.

In the United States, the Bureau of Labor Statistics has collected data on the proportion of the unincorporated self-employed who employ paid workers.¹²⁶ Perhaps unsurprisingly, the rates are relatively low: in 2009, only 13.6 percent of the unincorporated self-employed had paid employees, and of that 13.6 percent (about 1.3 million people), 79.8 percent had between 1 and 4 workers.¹²⁷

We propose that, at a minimum, those self-employed workers who largely perform the work themselves, especially those who operate informal, unincorporated entities, be treated in a categorically different way from those who consistently employ additional workers. The rule should allow for the employment of family members and the occasional, if irregular, employment of additional workers. In creating this distinction, we recognize that a worker may, over time, shift from one category to another, particularly if his or her business grows, or even shrinks in size. The absence of regular employees, however, can be indicative of more vulnerability in the labor market, and suggests the need for additional protections or beneficial measures. These measures could include reduced tax liability, differential contributions to social insurance programs, and/or the enjoyment of a subset of the rights and benefits traditionally reserved for “employees.”

126. Hipple, *supra* note 17, at 17.

127. *See id.* at 25-26.

B. *Depth of Market Involvement and Economic Dependence*

Another fundamental issue is the depth of market involvement of the self-employed person (i.e., the range of clients with whom the individual, through his or her business, engages). This factor shapes the character of the relations between that person and the customer, as either of them may occupy a dominant position. Unrestricted participation in the market, and directing the products or services to a broad spectrum of potential customers, helps to achieve greater diversification of clients, which then prevents the entrepreneur from being excessively dependent on one or few, and results in diversified sources of income. What is more, in such a relationship the position of the parties is more equal. However, if the self-employed worker's activity is directed at a very limited number of clients, and especially if business contacts with others are contractually prohibited either by written or by oral agreement, then the client takes a dominant position and the self-employed worker is economically dependent on him or her. A prototypical example in the United States is a residential renovation subcontractor – for example, someone with expertise in painting or tile installation – who works exclusively for a single contractor.

There are well-grounded arguments for distinguishing self-employed workers depending on the degree of economic dependence on their clients.¹²⁸ As argued above, “self-employment” is not simply a synonym for “a business owned by a physical person.”¹²⁹ On the contrary, one may argue that *self-employment* should betray at least some of the features of classical employment. The self-employed entrepreneur's economic dependence on one or more patrons may be one of these features, as both employees and entrepreneurs can find themselves in that position. Of course, economic dependence is a social and economic phenomenon, and is not defined by any precise legal standard. The closest proxy is the subordination that occurs in a full-time employee-employer relationship. In this context, with the worker beholden to a single employer for the entirety of her income and livelihood, the employee *does* experience this economic dependence.¹³⁰

Consideration of economic dependence in any disaggregated definition of self-employment is justified because of the growing

128. See Davies, *supra* note 57 at 166.

129. See *supra* Introduction.

130. C. ENGELS, *Employed or Self-Employed*, in BULLETIN OF COMPARATIVE LABOR RELATIONS 42 (R. Blanpain, B. Brooks & C. Engels eds., 1992). One counter-example would be a situation in which an individual works part-time for many employers. Such a worker's existence is not dependent on any of the individual income sources. *Id.*

number of entrepreneurs who find themselves in the above situation.¹³¹ The absence of the criterion of economic dependence would result in the conflation of very distinct work situations. It is this important difference that justifies the creation of separate subcategories among the self-employed. The economic dependence on one or few clients makes the essential difference.

Therefore, one definition of self-employment may be the provision of services or a production activity carried out in the conditions of economic dependence on the recipient of the services or goods. On the one hand, the individual who performs the work is economically dependent on the client, but on the other, there is no employee-type subordination between the individual and the client. Defining self-employment as a separate form of earning one's living involves identifying the features which make it different from running a business in an unlimited manner and from staying out of an employment relationship. While it provides a useful point of departure, the definition of "contract work" proposed in the project of the convention discussed at the 86th ILO session is too broad to inform a definition of self-employment.¹³² The relevant provision states that "contract work" is carried out in the conditions of economic dependence or employee subordination when the parties are not willing to create an employment relationship.¹³³ This blurs the lines between the employer-employee relationship and self-employment, given that genuine economic dependence may also be visible in a self-employment scenario.

C. *Rights of Self-Employed Workers and Identification of Intermediate Categories*

Apart from the differences among the subcategories of the self-employed, their current situation evidences the need for certain legal regulations that guarantee some level of employment security. In practice, among the most important problems that the self-employed must cope with are the lack of daily rest, and also the lack of free weekends and annual leave. For example, in Poland, self-employed entrepreneurs who own and operate small businesses lack meaningful negotiating power, and there are no legal grounds on which they could assert their rights and defend themselves against excessive work

131. See generally Davies, *supra* note 57, at 184-90 (discussing the unique concerns of "dependent contractors" and exploring policy responses).

132. See ILO REPORT, 86TH SESS., *supra* note 38.

133. See *id.*

hours.¹³⁴ Another issue is the question of how to ensure occupational safety in a situation when the self-employed person carries out the work in a foreign environment or on premises where they are unable to eliminate occupational hazards. Furthermore, self-employed workers who are similarly situated vis-à-vis the same contracting party may wish to collectively bargain or collaborate to address shared challenges, but are often unable to do so.¹³⁵

Contract provisions can address these concerns, in some circumstances. Such contracts could ensure that the dominant party does not have the right to make arbitrary decisions and could also strengthen the position of the self-employed. This may be seen, for example, in Western Europe in contracts for delivery entered into with chain store suppliers cooperating with a dominant organization.¹³⁶ These contracts are evidence that protections for self-employed workers can, in fact, be consistent with robust business activity.¹³⁷ Since such contract provisions can be elusive, we must also look to see how the law can be restructured to provide additional protections for the self-employed.

One way to enact such protections is to eschew the rigid dichotomy between “employees” and self-employed workers, to offer statutory protections for self-employed workers, and to envision intermediate categories where self-employed workers (or those in the interstices between employment and self-employment) can enjoy certain benefits and protections. Although such a model is unknown in U.S. law, a few European jurisdictions have embraced such protections and categories.¹³⁸ Described below are the relevant legal provisions from both Spain and Germany.

134. Cf. Skora, *supra* note 31 (noting the “economic coercion” experienced by many self-employed workers in Poland).

135. See Katherine V.W. Stone, *A Labor Law for the Digital Era: The Future of Employment and Labor Law in the United States*, in LABOR AND EMPLOYMENT LAW AND ECONOMICS 689, 703, 709-11 (Dau-Schmidt et al. eds., 2008) (predicting that labor and employment law in the United States will evolve to allow for collective bargaining by independent contractors). One preliminary step in this direction is the emergence of the Freelancers Union. See generally FREELANCERS UNION, <http://www.freelancersunion.org> (last visited Jan. 22, 2014). Certain European jurisdictions already allow for collective bargaining among certain subgroups of self-employed workers. See Eichhorst et al., *supra* note 12, at 31.

136. See Alain Supiot, *Wage Employment or Self-employment*, in REPORTS TO THE 6TH EUROPEAN CONGRESS FOR LABOUR LAW AND SOCIAL SECURITY 129, 147-51 (1999).

137. See *id.*

138. Eichhorst et al., *supra* note 12, at 9 (noting the emergence of hybrid legal categories in Austria, Germany, and Italy). See also Stephen F. Befort, *Labor and Employment Law at the Millennium: A Historical Review and Critical Assessment*, 43 B.C. L. Rev. 351, 455 (2002) (recommending that the U.S follow the model of such jurisdictions).

Spain is the European country with perhaps the most developed law for self-employed workers. In 2007, Spain enacted a statute defining protections afforded to self-employed workers, and creating a separate subcategory for “dependent” self-employed workers.¹³⁹ As Professor Esther Sánchez Torres has written, the law “establishes a true legal framework” designed to “promote and protect self-employment through the statement of various individual, collective, and Social Security-related rights.”¹⁴⁰ The law recognizes dependent self-employed workers as a subcategory, defining them as “those who habitually and personally carry out a for-profit economic or professional activity, directly and predominantly for a physical or legal person, called a client, on whom they depend economically for at least 75% of their income deriving from their economic and professional services.”¹⁴¹ In other words, workers in this category are heavily reliant on a single client for their income.

In addition, the workers must meet other criteria: they must not hire other employees to perform the work, nor may they subcontract the work to third parties; they must have their own tools and materials, and must carry out the work with some degree of independence and discretion; there must not be similarly situated salaried employees working for the same entity; and there must be a written contract between the self-employed worker and the client.¹⁴² These additional criteria speak to the economic vulnerability of the worker, and ensure that the self-employed worker is not simply a misclassified employee.

The Spanish law offers a robust array of protections for self-employed workers, including basic labor rights (equality, non-discrimination, right to payment, *inter alia*), some health and safety protections, and notably, the right to organize and to bargain collectively through a union, professional association, employer’s association, or an independent association.¹⁴³ In addition, the law contemplates varying social security contributions, depending on individual characteristics and the nature of the work performed.¹⁴⁴ The law offers specific protections for dependent self-employed workers, including the right to at least 18 paid days of leave, specification of days off and holidays, limits on extra work days; the right to adapt their schedule to accommodate personal

139. See generally Esther Sánchez Torres, *The Spanish Law on Dependent Self-Employed Workers: A New Evolution in Labor Law*, 31 COMP. LAB. L. & POL’Y J. 231, 232-33 (2010). See also PEDERSINI & COLETTI, *supra* note 29, at 22-23.

140. See *id.* at 234.

141. See *id.* at 236.

142. See *id.* at 236-37.

143. See *id.* at 240-43.

144. See *id.* at 245.

matters; and more.¹⁴⁵ In these ways, the statute in Spain has imported some benefits and protections typically afforded to employees, and has assigned them to the self-employed as a whole, or specifically to the dependent self-employed.

Germany has also developed unique norms relating to the self-employed. There is a category of *arbeitsnehmerähnliche Personen* (employee-like persons) who have the status of entrepreneurs who either perform the work personally for one client, or earn at least half of their income from only one source.¹⁴⁶ Such entrepreneurs have access to some institutions of German labor law, they may enter into industrial disputes and reach collective agreements, or enter into individual disputes before an employment labor court rather than a civil law court; as far as the rights typically given to employees, they enjoy only the right to annual leave.¹⁴⁷ Such employee-like individuals may also be recognized as subjects to the employee social security system. At the same time, they enjoy some of the autonomy of the self-employed as employers (the contracting party) cannot dictate the area and hours of work.¹⁴⁸ Unlike the Spanish statute, the German law is not a free-standing law, but rather a provision of the Collective Agreement Act that elaborates on the treatment of self-employed workers.¹⁴⁹ Also, the German law sets a slightly lower threshold of economic dependence compared to the Spanish law, requiring that more than 50 percent of the worker's income derive from a single, dominant relationship.¹⁵⁰ German law contains some general provisions that apply to both employees and self-employed workers, but carves out twenty-four days of paid leave specifically for dependent self-employed workers.¹⁵¹

The German and Spanish examples raise the question of whether the protection of the self-employed should consist of extending the labor code provisions (that is, the rights of employees) to them, or whether there should be a separate normative system created especially for that group. Polish law lacks these distinctions; its labor law protects solely wage or salaried employees with contracts of employment, whereas the other forms of work are subject to the regulations of the civil or economic law.¹⁵² In the contemporary labor market conditions, where

145. See *id.* at 246-47.

146. Tarifvertragesgesetz [TVG] [Collective Bargaining Act], Oct. 29, 1974 at § 12(a) (Ger.).

147. See Davies, *supra* note 57, at 186.

148. Stefanie Sorge, *German Law on Dependent Self-Employed Workers: A Comparison to the Current Situation Under Spanish Law*, 31 COMP. LAB. L. & POL'Y J. 249, 249 (2009).

149. See *id.*

150. *Id.* at 249-50.

151. *Id.* at 251.

152. See Koral et al., *supra* note 47, at 19.

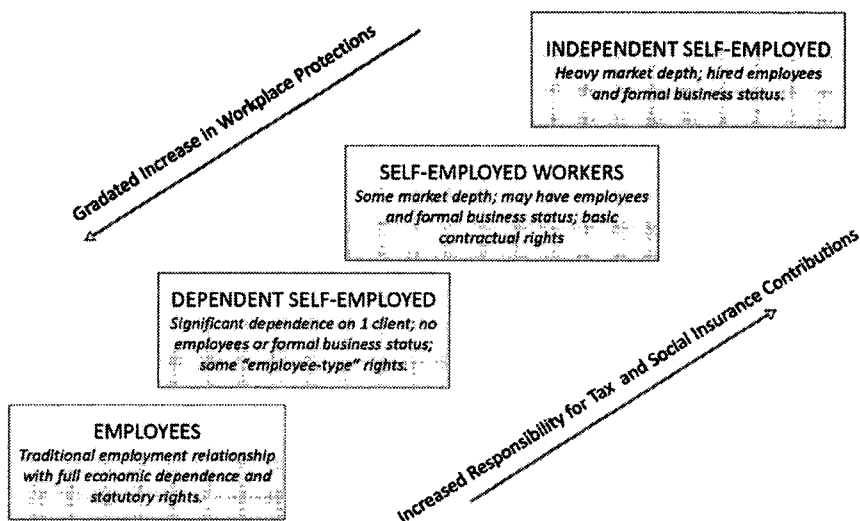
numerous forms of work performance exist, it is necessary to define and regulate those various forms of work carried out according to various legal forms.

Although the common law system approaches employment in a more functional manner, it has retained a fairly rigid division between employees and the self-employed, and has failed to contemplate creative possibilities in between. Certainly, in the American and British literature on employment law, there are substantial differences in legal statuses of those who perform work within various forms of employment.¹⁵³ Yet even in the U.S. common law system, the law on self-employment has failed to evolve sufficiently. One possibility for the U.S. system is the emergence of a category of workers called “independent employees” (another name for the dependent self-employed) who do not have their own employees and who rely substantially on a singular client or contracting party. These workers can be granted rights under certain protective statutes, and can receive distinct treatment under the tax and social security laws, as has been done in some parts of Europe. Given that U.S. employment law is fragmented across many different statutes, a singular bill addressing self-employed workers, akin to the Spanish law, may be the optimal vehicle for reform. Such a bill would, of course, have to address variations at the state level.

Figure 2 below illustrates some of the proposed distinctions among self-employed workers, presenting them along a continuum. While the specific rights and obligations would have to be determined in the context of national law, this chart offers a blueprint for reimagining the law of self-employment along a continuum, taking into account the degree of economic dependence on a single (or few) parties (versus a deeper market presence), the formality of the enterprise, and the presence of additional employees. Workers who are closer to traditional employees can enjoy some, but not all, of the rights and benefits associated with that status. Their tax and social insurance contributions can be adjusted in light of their relative economic vulnerability. At the other end of the spectrum, as self-employed workers emerge as fully independent entrepreneurs with their own employees and operate formal enterprises, they lose the protections afforded to employees, and assume responsibility for tax and social insurance contributions. These categories – particularly the intermediate ones – may remedy some of the issues relating to misclassification.

153. See, e.g., *id.* at 20 (describing legal subcategories of self-employed workers under UK law).

REIMAGINING THE LAW OF SELF-EMPLOYMENT



Some scholars have warned that the introduction of intermediate categories under U.S. law would be ineffective, given that many employers already fail to comply with existing standards.¹⁵⁴ Moreover, employers might attempt to shift their employees into a category that offers fewer protections for workers.¹⁵⁵ While compliance will be an issue under any employment law regime, new categories need not be conceived of, or structured as offering “watered-down” standards; rather, the specific protections made available to workers in the new categories (e.g., health and safety, anti-discrimination, or wage protections) could be set at the same level enjoyed by traditional employees. Moreover, to assess how these concerns might play out, the government could pilot subcategories in certain industries, while identifying certain job types that would presumptively fall into specific categories along the continuum.¹⁵⁶

154. Marley S. Weiss, *Regulation of the Work Performance Relationship: Independent Contractors, Labor Subcontractors, and Joint Control over an Employment-Like Relationship* in *DERECHO SOCIAL: MEMORIA DEL CONGRESO INTERNACIONAL DE CULTURAS Y SISTEMAS JURÍDICOS COMPARADOS* 183, 215 (Patricia Kurczyn Villalobos ed., 2005).

155. *Id.*

156. Under Austrian law, for example, a presumption of subordination applies to “sales

Certainly, it may be very difficult to find common solutions to regulate *every* type of employment. Nevertheless, a more nuanced understanding will begin to fill the gaps in the regulatory frame, both in the U.S. and in parts of Europe. This approach can help eliminate some of the pathologies in the labor market relating to (mis)classification, while also serving broader purposes. First, while coercive misclassification is certainly a problem, the existing legal regime does not sufficiently accommodate those workers who *wish* to transition between different statuses. Instead of forcing these workers into one category or another, our laws could facilitate their transition with a more gradated system. Additionally, the creation of more specific standards and subcategories runs counter to the prevailing “flexibility” narrative that governs workplace relations, especially in the United States. Instead of allowing parties to fashion their own standards – which often reflect the desires of the dominant contracting party – this approach creates more clarity and certainty in workplace relations.

CONCLUSION

Regardless of the path eventually chosen by different countries, it will no doubt be impossible to create a single legal paradigm that will cover all types of employment relationships. The varied economic and social realities of individuals performing work compel the creation of a more refined set of legal regulations relating to self-employment.

This article offers a blueprint for reimagining self-employment law, by transitioning away from the rough divisions that have existed in many jurisdictions, and moving towards more specific subcategories that are accompanied by an appropriate bundle of protections, incentives, and obligations. The current legal regime is simply inadequate, as it fails to remedy the misclassification of workers, and does not facilitate the transition of workers to or from self-employment. Trends in the global economy invite continued attention by legal scholars and policy makers on this critically important social phenomenon, and compel a more nuanced approach.

representatives, pharmacists working in dispensaries open to the public, and sportspeople.” Eichhorst et al., *supra* note 12, at 34.