ERISA: HOW IT CAME TO BE; WHAT IT DID; WHAT TO DO ABOUT IT

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I. ORIGINS OF ERISA

A. ERISA: It Was, and Remains, One of a Kind

Proposals that are eventually enacted into law share common elements: an identified need, a proposed remedy, and support from groups with enough common purpose and clout to achieve enactment. The enactment of ERISA did not fit that pattern. ERISA was enacted without any interest group support. Employers surely did not want it; insurers and others in the finance sector did not want it. No union lent early support, although the Auto Workers' pension guarantee proposal hitch-hiked on the bill that became ERISA.[1] Rather, all stakeholders who engaged in the legislative process did so with reluctance, and all worked to limit ERISA's curative elements. The Kennedy and Johnson administrations did not push its passage. ERISA became law because the media—principally television network programs—publicized events and aired research that demonstrated that the complicated, private-pension hodgepodge that currently existed fell short of providing reliable retirement income to any but a relatively small group that was much better off than most to begin with.

Further, the tax expenditure tab was substantial. For example, "In the fiscal year 2012 Tax Expenditure Budget, all retirement tax expenditures together accounted for more than 12 percent [sic] of all individual tax expenditures . . . and 401(k)-type plans alone were the third largest tax expenditure."[2] Furthermore, the mean contributions for those with earnings of $150,000 or more were multiples of the overall mean contribution.[3]

B. The Leadership of Senator Jacob Javits

ERISA's enactment would not have happened without the leadership of Senator Jacob Javits,[4] ranking Republican member of the U.S. Committee on Labor and Public Welfare. Before Senator Javits became involved, the two relevant statutes were (1) The Welfare and Pension Plan Disclosure Act of 1958, which was the first tepid Congressional response to the pension plan problems, and (2) the Secu-

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1. *See* Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1301–1311 (2012).

2. Ithai Z. Lurie & Shanthi P. Ramnath, *Long-Run Changes in Tax Expenditures on 401(k)-Type Retirement Plans*, 64 NAT'L TAX J. 1025, 1026 (2011) (citation omitted).

3. *Id.* at 1029, Table 1.

4. Senator Javits (R-N.Y.) was elected as a Republican to the U.S. Senate in 1956 and served from January 9, 1957 until January 3, 1981.

rities and Exchange Act template of disclosure, which did not fit the multiple design flaws of private pensions.

Senator Javits's adroit handling of Committee Chair Senator Harrison Williams Jr.[5] involved using a combination of deference to him and pressure to enact remedial legislation.[6] I taught in the field of legislation for twenty years and worked as counsel to Senators Humphrey,[7] Morse,[8] and (on loan) to John F. Kennedy successively in the U.S. Senate for five years. Legislation is one of my longtime passions, and I cannot think of another example of when a ranking member led from behind to achieve enactment of a controversial measure. For his part, Senator Williams sometimes used his position to improve on Senator Javits's proposals. For example, a *Washington Post* story described Senator Javits's audible annoyance at my testimony criticizing his proposal to condition vesting on a combination of age and service—arguing that including age sometimes added years to the service requirements.[9] He was especially irritated that I cited his opposition a year earlier to the inclusion of age in an age-service formula in a House bill.[10] Nonetheless, Senator Williams commented that my objection would be given serious consideration.[11]

C. Public Attention Begins

Public attention to pension plan problems began with the distressing failures of the Packard plan in 1958 and the Studebaker plan in

5. Senator Williams (D-N.J.) was elected as a Democrat to the U.S. Senate in 1958 and served until his resignation in 1982. Senator Williams served as the Chairman of the Committee on Labor and Public Welfare in the 92d through 95th Congresses.

6. *See* JOHN H. LANGBEIN ET AL., PENSION AND EMPLOYEE BENEFIT LAW 81–87 (4th ed. 2006) (describing Senator Javits's contributions to the legislative history of ERISA). Disclosure: "Pete" Williams and I knew each other slightly when we both attended Oberlin College, and a bit more at Columbia University Law School. I gave Senator Javits's campaign a boost by hosting a veterans' organization meeting for him at Columbia when he first ran for the House. However, I had no personal dealings with him during the Senate consideration of what would become ERISA.

7. Senator Humphrey (D-Minn.) was elected as a Democrat to the U.S. Senate in 1948 and served from January 3, 1949 until December 29, 1964, when he resigned to become Vice President of the United States.

8. Senator Morse (R-Or.) was elected as a Republican to the U.S. Senate in 1944 and served from January 3, 1945 until January 3, 1969.

9. *See* George E. Lardner Jr., *Pension Reform Bill Is Called Inadequate*, WASH. POST, Feb. 17, 1973, at A2.

10. *Id.*

11. *Id.* The age element was eliminated when the Senate later passed an amended Williams-Javits bill. *See generally* 29 U.S.C. §§ 1001–1191(c), 1201–1242, 1301–1461 (2012) (noting the lack of an age element in an age-related service).

1963.[12] The fairly generous plans accumulated valid benefits claims that vastly exceeded plan resources. The media found the Studebaker plan's distressing failure especially newsworthy.[13]

In addition, I published my 1964 book, *The Future of Private Pensions*,[14] which Michael Gordon of Senator Javits's staff credited with playing a major role in stimulating media and public attention.[15] The book catalogued some stories of disappointing pension plan outcomes; the media, in turn, seized on the stories of individuals who had worked many years and were deprived of their vested benefits. Beyond that, the book identified the causes of these disappointing outcomes: the plan conditions for benefit eligibility that only a minority of employees could satisfy, the lack of standards to protect employee interests, the dominance of employer plan sponsors, and the lack of court relief.[16] The fifth chapter appeared as an article in the 1963 *Harvard Law Review*.[17] An article based on another chapter ran soon afterward in the *UCLA Law Review*.[18] At the insistence of then-Undersecretary of Labor, Willard Wirtz, the book galleys were provided to the President's Committee on Corporate Pension Funds and Other Private Retirement and Welfare Programs, which reported in 1965.

D. Difficulties in Achieving Pension Benefit Eligibility

Plans typically required decades of unbroken service with a single employer or group of employers participating in an industry-wide

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12. The Packard pension plan was enacted in 1950; credit was given for past service, which meant that these plans were enacted with a significant liability. *See* MERTON C. BERNSTEIN, THE FUTURE OF PRIVATE PENSIONS 94–95 (1964). When the company went out of business due to financial troubles, they had no money with which to pay out their workers' benefits. *Id.* An almost identical problem occurred when the Studebaker plant went out of business. *See* LANGBEIN ET AL., *supra* note 6, at 72–77. Under the Studebaker plan, the liability incurred was to be amortized over a thirty-year period. *Id* at 73. Whenever the plan expanded, the amortization period restarted. *Id.* Thus, when Studebaker went out of business, there was almost no money to pay for its employees' benefits. *Id.*

13. *See* LANGBEIN ET AL., *supra* note 6, at 75 (describing public interest in the Studebaker story).

14. BERNSTEIN, *supra* note 12.

15. *See* Karen W. Ferguson, *Mert Bernstein: Pension Pioneer*, 71 WASH. U. L. REV. 999, 999–1000 (1993) (quoting Michael Gordon as describing *The Future of Private Pensions* as having an "undeniable influence on all who thought, wrote or spoke on the issues of pension reform").

16. BERNSTEIN, *supra* note 12, at 5–8.

17. Merton C. Bernstein, *Employee Pension Rights When Plants Shut Down: Problems and Some Proposals*, 76 HARV. L. REV. 952 (1963).

18. Merton C. Bernstein, *Tax Regulation of Private Pension Plans: Some Problems and Proposals*, 10 UCLA L. REV. 808 (1963).

program.[19] But achieving such service was a long shot in an economy where change often defeated employer continuity, let alone job continuity. For example, dozens of automobile manufacturers disappeared after World War II, including DeSoto, Duesenberg, Graham-Page, Hummer, LaFayette, LaSalle, Nash, Overland, Plymouth, Pontiac, Rambler, Saturn, Willys, and REO.[20]

Although many plans were bargained for, unions could not seek, let alone obtain, protections that—to employers—appeared unaffordable.[21] Even more basic, because pensions were a substitute for wages, unions could not trade away too much in current wages for future benefits, especially as the pay reductions affected the bulk of employees while a much smaller group would achieve benefits. Although the landmark *Inland Steel v. NLRB*[22] decision posited that employer pension plan contributions were a form of compensation—and thus a mandatory subject for bargaining—many continued, and still continue today, to hold the inconsistent view that pension contributions are an additional employer cost.[23]

My book catalogued plan design deficiencies that made it difficult for employees to achieve benefit eligibility.[24] Despite a common impression that plans covered a huge portion of the workforce, the book, other articles, and Congressional testimony described just how limited plan coverage was.[25] For example, plans excluded part-time workers, which presented special problems for women and retail employees, whose work is often seasonal.[26] Reviews of the book, including in *Business Week*, *The Los Angeles Times*, and *The New Republic*, detailed my analysis. *Fortune* ran a major article in the 1970s.

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19. *See* LANGBEIN ET AL., *supra* note 6, at 28 (stating that pension plan coverage correlates positively with length of job tenure; 80% of workers who had been with the employer for fifteen years or more were pension plan participants).

20. *See, e.g.*, *Famous Defunct Auto Brands*, BLOOMBERG BUSINESSWEEK, http://images.businessweek.com/ss/08/11/1111_defunct_auto_brands/index.htm (last visited May 29, 2014).

21. A fine article by Michael K. Brown describes the World War II growth of pensions and medical care plans and their postwar transition to collectively-bargained rather than legislated "fringe benefits." *See* Michael K. Brown, *Bargaining for Social Rights: Unions and the Re-emergence of Welfare Capitalism, 1945–1952*, 112 POL. SCI. Q. 645, 647, 649 (1998).

22. 170 F.2d 247, 254–55 (7th Cir. 1948), *aff'd sub nom.* Am. Commc'ns Ass'n, C.I.O. v. Douds, 339 U.S. 382 (1950).

23. Today, most economists regard pension benefits and health insurance benefits as employee compensation in lieu of wages.

24. *See* BERNSTEIN, *supra* note 12, at 51–69.

25. *Id.* at 5–6.

26. *See* LANGBEIN ET AL., *supra* note 6, at 28. Multiemployer construction collective agreements were rare exceptions in cumulating short episodes of employment. *See id.* at 67–68.

E. Television Programs Spread the Discouraging News About Pension Results

60 Minutes led off.[27] Mike Wallace, a correspondent for the show, was persuaded that the pension problems were not just caused by some bad guys, but resulted from the bad fit between eligibility requirements of long service and shorter-term employment patterns. The constant rearrangement of companies and employment made it difficult, often impossible, for many employees to get onto the eligibility track, and great numbers would fall off before reaching eligibility. The *60 Minutes* segment aired in 1971 and drew considerable attention.[28] Following *60 Minutes*, MacNeil-Lehrer produced an hour-long special for PBS in 1973 covering similar ground but featuring a pension debacle in Pennsylvania with commentary by Senator Richard Schweiker. Not to be outdone, NBC did an hour-long program entitled "Pensions: The Broken Promise."[29] It received critical praise, culminating in a Peabody Award.[30]

F. ERISA: The Legislative Response

Enacted in 1974, ERISA required voluntary employment-based plans to provide vesting after ten years of service, include mandatory funding schedules spanning decades, apply fiduciary standards to many company and plan officials, and preempt state legislation on the same subjects. Senator Javits celebrated,[31] but others found its reforms inadequate.

Although ERISA and its subsequent amendments did improve such voluntary employment-based plans, the principal object of ERISA's concern, the defined benefit plan, has all but disappeared; surviving remnants will shortly be extinct, sometimes hurried along by buyouts. During its era, the defined benefit plan covered a minority of working people and yielded benefits to an even smaller population—at the cost of considerable tax revenue to the U.S.

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27. *60 Minutes* (CBS television broadcast June 8, 1971).

28. *See* Ferguson, *supra* note 15, at 1000 ("The magic of *60 Minutes* worked—it transmuted a dauntingly complex subject into simplicities that incited outrage. When the show aired in 1971, pension reform got onto the national agenda.").

29. *Pensions: The Broken Promise* (NBC television broadcast Sept. 12, 1972), *available at* https://archives.nbclearn.com/portal/site/k-12 (search "Pensions: The Broken Promise") (last visited May 29, 2014).

30. *Id.*

31. Senator Javits described the enactment of ERISA as "the greatest development in the life of the American worker since Social Security." *See* Ferguson, *supra* note 15, at 1001 (citing *Pension Reform Passed by Senate and Sent to Ford*, N.Y. TIMES, Aug. 23, 1974, at A1).

Treasury. The successors of defined benefit plans, defined contribution plans—largely 401(k)s and IRAs—are not designed to protect beneficiaries against risk. When the markets come down with colds, beneficiaries find their plans afflicted by pneumonia. They are good-time Charlies, not cut out for adversity.

ERISA's history provides no precedent for further remedial legislation. ERISA does not apply to state and local retirement programs. That jumble of plans presents its own set of unresolved problems.

II. CURRENT CONCERNS

A. ERISA and Amendments Improved on the Pre-1974 Situation: But Better Is Not Enough Because We Need a Near-Universal Improvement in Retirement Income

There appears to be widespread agreement that most Americans lack sufficient resources for a comfortable retirement. Savings, other than one's home, are often too modest to generate adequate supplementary income. During retirement, income other than Social Security often shrivels because of the lack of cost-of-living adjustments and, sometimes, the absence of spousal benefits. After work income disappears, some expenses, such as costs of getting to and from work, diminish. But the costs associated with, for example, transportation to and from adult children and babysitting the grandchildren increase. We stay home more, and home heating bills go up. As time passes, we become less able to do things for ourselves, such as cutting the lawn and cutting our toenails. With lessened income, what were small expenditures become more substantial. New aches and pains arrive, often unexpectedly; we become used to seeing former golfers using walkers, and shakes where formerly there was strength.

A spouse's death is a double loss—companionship and the economies of scale of two people living together. A Social Security survivor's benefit, important and welcome, does not fully fill the gap. Age-related medical care costs usually increase with the passage of time and, even with Medicare and Medicaid, out-of-pocket expenses go up as well. Oddly enough, when some drugs' patents expire, insurance no longer pays for their generic over-the-counter successors.

All of these are such common experiences that it is strange to see so many espouse trimming Social Security and Medicare "entitlements," which are paid for largely or almost completely by payroll contributions over a working lifetime. Those entitlements are not gifts or handouts. Most of us need more assured income when work income declines or disappears. Where will it come from?

B. "The New Benefit Plan for Lifetime Security" Proposed by ERIC in 2007

ERIC (the ERISA Industry Committee)[32] launched (or attempted to launch) a new initiative to address its concerns with pension benefit plan liability.[33] It focused on the plans' sponsors' overhanging liability for such programs. Although the announcement made it sound as if some dandy new pension protection scheme was at hand, the plan actually proposed off-loading existing plans to new "independent" management entities.

The announced rationale of such a move was that the largest corporations in America lacked the staff capable of understanding complex plan regulations.[34] The notion that these new non-existent, untried entities could better understand pension requirements than the staffs of the foremost companies in the country was preposterous. The proposal was a lead balloon. One wonders why that was not clear to its proponents. Mercifully, the proposal drew little attention or publicity despite my denunciation.

I raise this only to illustrate that big business has to do better in addressing the real problems of retirement security if it is to have any credibility and make any affirmative contribution to producing a system that serves the retirement needs of all American families.

C. Pensions and Pension Substitutes Are Not up to the Job

Defined benefit plans have become memories or soon will be. The Great Recession demonstrated the unreliability of 401(k)s and IRAs, once advertised as devices that could make us millionaires. We must do better before the public decides, with justification, that the financial industry is too much take and too little give.[35]

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32. The ERISA Industry Committee describes itself as "a non-profit association committed to the advancement of the employee retirement, health care coverage, and welfare benefit plans of America's major employers." *See* The ERISA Industry Committee, *About ERIC*, ERIC.ORG, http://www.eric.org/about/ (last visited May 29, 2014).

33. *See* THE ERISA INDUSTRY COMMITTEE, A NEW BENEFIT PLATFORM FOR LIFETIME SECURITY iv (May 2007), *available at* http://www.eric.org/uploads/doc/resources/NewBenefitPlatform.pdf.

34. *Id.* at 5.

35. For a discussion of the paradigm shift away from defined benefit plans and toward defined contribution plans, see generally Edward A. Zelinsky, *The Defined Contribution Paradigm*, 114 YALE L.J. 451 (2004).

D. The Sad Old Three-Legged Stool: Always Risky, Never Reliable

Social Security covers almost all of the working population;[36] in contrast, 401(k)s cover a minority and many of them do not pay off in benefits to employees,[37] just like pension plans in the bad old days. Some justify this with the most unpersuasive figure in the history of sales: the three-legged stool. Some still invoke it to explain that private plans are only meant to provide a portion of retirement income—with Social Security and individual savings making up other portions. One trouble is that three-legged stools, sometimes used for milking, are notoriously unstable—which is why more widely-used chairs employ four legs. Moreover, when the three legs are of unequal dimensions, they become even more unstable. A more apt symbol for private plans would be bird feeders, which provide the greater part of their sustenance to crows and squirrels rather than the desired song birds—which is why my family, like many others, has given up on feeders.

E. Private Plans Do Not Earn Their Substantial Federal Tax Subsidies

In addition, those tax expenditures (briefly described above) add substantially to federal revenue deficits. Some try to use these deficits as an excuse for curtailing Social Security protections, cuts that are especially harsh on future generations.[38]

There is much talk of cutting back on Social Security benefits, although these benefits are paid for by employee contributions and employer contributions that are made in lieu of wages. Bowles and Simpson are the loudest proponents of cutting Social Security and Medicare benefits. Their widely touted *Moment of Truth*,[39] claimed savings for taxpayers; however, a footnote on page 31 cautions, "Under [their proposed Individual Tax Reform Plan], a few tax expenditures remain, for instance no changes are made to the tax treatment of employer pensions . . . ."[40]

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36. *Annual Statistical Supplement, 2013*, SOC. SEC. ADMIN. 1 (Feb. 2014), *available at* http://www.socialsecurity.gov/policy/docs/statcomps/supplement/2013/highlights.pdf.

37. Pension Rights Ctr., *How Much Is Saved in 401(k)s*, PENSIONRIGHTS.ORG, http://www.pensionrights.org/publications/statistic/how-much-saved-401ks (last visited May 29, 2014).

38. *See* Lurie & Ramnath, *supra* note 2, at 1025.

39. NAT'L COMM'N ON FISCAL RESPONSIBILITY & REFORM, THE MOMENT OF TRUTH (Dec. 2010), *available at* http://www.fiscalcommission.gov/sites/fiscalcommission.gov/files/documents/TheMomentofTruth12_1_2010.pdf [hereinafter THE MOMENT OF TRUTH].

40. *Id.* at 31 n.6.

F. Some Propose Expanded, Enhanced, Guaranteed 401(k)s

After the publication of *The Future of Private Pensions*, which, while critical of plan design, advocated private pension expansion, I appeared on several programs with Bob Ball, then-Associate Commissioner of Social Security. Chapter Ten of *The Future of Private Pensions* proposed transferable credits for private pensions and a private clearing house to allow employees to carry with them private plan credits that would otherwise be lost through the disappearance of jobs or ordinary job changes.[41] The proposed clearing house would store the pension value of all jobs and piece them together to provide a meaningful supplement to Social Security. Bob would hear me out and would say to the audience with some amusement, "But we already have such a program; it's called Social Security."

We know that defined benefit plans are almost all gone. We also know that they have been replaced by defined contributions plans which, as we have learned from harsh experience, can rapidly and drastically lose value. We have also learned, somewhat belatedly, that many substantial fees consume a good chunk of the substance of 401(k)s. We have learned how undependable 401(k)s are. It will not help to pile on another version of 401(k)s, as advocated by my friend, Teresa Ghilarducci, who proposes a government guarantee to handle risk.[42] Such a guarantee would encourage risky investment and add new costs. Quite aside from the lack of any justification for such a governmental gift, the additional cost should make her well-intentioned proposal a non-starter. As Bob Ball repeatedly warned, "We have a plan that assures future income. Working people responsibly contribute to it. It is broadly based; it covers such long time spans that it can absorb setbacks whereas IRAs and 401(k)s can be beggared by them."[43]

G. Proposal to Raise Retirement Age Reduces Benefits, Saves Little; Hardship Exemption Is Costly, Slow, and Subjective

Bowles and Simpson,[44] the Business Roundtable,[45] and the head of Goldman Sachs,[46] among others,[47] have proposed raising the Social

41. BERNSTEIN, *supra* note 12, at 264–96.

42. *See* TERESA GHILARDUCCI, WHEN I'M SIXTY-FOUR: THE PLOT AGAINST PENSIONS AND THE PLAN TO SAVE THEM (2008).

43. Bob Ball is referring to Social Security.

44. *See* THE MOMENT OF TRUTH, *supra* note 39, at 48, 50.

Security retirement age and the age of eligibility for Medicare. Proponents claim that such new conditions would provide incentives for many to work longer, thereby generating more work income, which would generate payroll tax revenues and supposedly save on benefit outlays by delaying them.[48]

Most of this reasoning is wrong. First, delaying benefit payments provides no savings because the benefit structure makes payments actuarially equal at all ages up to seventy, the highest new retirement age proposed. The higher age reduces the benefit by 8% for *everyone* retiring after the change is made for each year above age sixty-seven at which the new age is set, no matter when a person retires. Thus, changing the current upper age of sixty-seven to sixty-eight produces a benefit reduction of 8%; raising the retirement age to sixty-nine results in an additional 8% reduction, and so forth. It is primarily these reductions in benefits that result in "savings." Some of the savings of this device come not from people working longer, but from not living long enough to actually receive the delayed benefit.

Further, many of the people who cannot work until they reach the new retirement age will attempt to obtain needs-tested benefits that come out of general revenues. If they receive the needs-tested benefits, there will be no net savings. If the Medicare age is also raised, many of those affected would turn to Medicaid, resulting in more general revenue outlays that reduce supposed "savings."[49]

To answer the complaint that some people simply cannot work beyond the new higher retirement age, some proponents offer the possibility of a "hardship" exemption.[50] Administering such an exemption would require individualized fact-finding, which would be a difficult, expensive, and time-consuming procedure, piled upon

45. *See* BUS. ROUNDTABLE, SOCIAL SECURITY REFORM AND MEDICARE MODERNIZATION PROPOSALS 3 (Jan. 2013), *available at* http://businessroundtable.org/sites/default/files/BRT_Social_Security_Reform_and_Medicare_Modernization_Proposals__January_2013_FINAL.pdf.

46. *See* Jordan Weissmann, *The Head of Goldman Sachs Wants to Raise Your Retirement Age*, THE ATLANTIC (Nov. 20, 2012), http://www.theatlantic.com/business/archive/2012/11/the-head-of-goldman-sachs-wants-to-raise-yourretirement-age/265475/.

47. *See* Cong. Budget Office, *Raise the Full Retirement Age for Social Security*, CBO.GOV (Nov. 13, 2013), http://www.cbo.gov/budget-options/2013/44751.

48. *See, e.g.*, *id.*

49. *See* CONG. BUDGET OFFICE, RAISING THE AGE OF ELIGIBILITY FOR MEDICARE TO 67: AN UPDATED ESTIMATE OF THE BUDGETARY EFFECTS 2 (Oct. 2013), *available at* http://www.cbo.gov/sites/default/files/cbofiles/attachments/44661-EligibilityAgeforMedicare.pdf.

50. *See* THE MOMENT OF TRUTH, *supra* note 39, at 50–51.

the already-dreadful backlog of still-to-be-decided applications for Disability Insurance under current law.[51]

There are two even greater objections against forcing people to work longer. Such proposals do *nothing* to increase job opportunities for older workers. Right now many older people are experiencing great difficulty in ending their unemployment.[52] These proposals also fail to overcome a major stumbling block to employing older people: the high cost of their health insurance. Insurers typically charge more to cover older people because, as they age, they experience a greater incidence of illness.[53] Prior to the enactment of the Affordable Care Act (ACA), there were no legal limits on how much higher insurance rates for older people could be. Under the ACA, however, the rates for older insureds can be no more than three times as high as the rates for younger insureds.[54]

III. THE DESIRED INTERRELATIONSHIP OF EMPLOYERS AND THE EMPLOYED: A PITCH FOR THE GOLDEN RULE

One further word: some of us are lucky by birth. We are born into supportive families that nurture us and educate us. We do not earn that support because most of us are born cute and loved. We have evolved so that families function in that way. But not everyone is so lucky. Some get dealt an inadequate hand or find themselves in difficult situations that are not of their own making. Today's good fortune does not always guarantee continued good fortune tomorrow.

On one occasion years ago, I was invited to speak to a luncheon gathering of the principal officials of a major national corporation. I presented an analysis of the inadequacies of the private pension system and warned them that while they might not give it much attention because they were today's winners, things could change unexpectedly. The officials were understandably resentful and dis-

51. *See* KATHY A. RUFFING, PAUL N. VAN DE WATER & CTR. ON BUDGET & POLICY PRIORITIES, BOWLES-SIMPSON SOCIAL SECURITY PROPOSAL NOT A GOOD STARTING POINT FOR REFORMS: RELIES FAR TOO MUCH ON BENEFIT CUTS, MAKES OTHER PROBLEMATIC CHANGES, CTR. ON BUDGET & POL'Y PRIORITIES 12 (Feb. 17, 2011), *available at* http://www.cbpp.org/files/2-17-11socsec.pdf (noting that "raising Social Security's early-eligibility age for most workers would likely spur more applications for disability benefits, adding to an overburdened Social Security disability benefits processing system").

52. *See* Eric Kingson & Monique Morrissey, *Can Workers Offset Social Security Cuts by Working Longer?*, 343 ECON. POL'Y INST. 7 (May 30, 2012), *available at* http://s3.epi.org/files/2012/bp343-social-security-retirement-age.pdf.

53. *See* U.S. DEP'T OF HEALTH & HUMAN SERVS. ADMIN. ON AGING, A PROFILE OF OLDER AMERICANS: 2011, at 13 (2011), *available at* http://www.aoa.gov/Aging_Statistics/Profile/2011/docs/2011profile.pdf.

54. *See* Patient Protection and Affordable Care Act, 42 U.S.C. § 300gg(a)(1)(A)(iii) (2012).

missive. But within two weeks the corporation announced a major unexpected restructuring. The good fortune of several of those officials had changed for the worse.

Fairness requires that we frequently put ourselves in other people's shoes, that we review our good fortune and realize it is not assured to continue, and that we consider what we would need to protect ourselves and our families. The philosopher John Rawls counseled that we consider the fairness of policies behind "the veil of ignorance."[55] In other words, we must consider what will be most fair in the future, without knowing what our positions or interests will be as fate unfolds. What he advocates is a sophisticated formulation of the Golden Rule, which counsels that we do unto others as we would have them do unto us. Now there is a policy that is hard to improve upon.

55. *See* JOHN RAWLS, A THEORY OF JUSTICE § 24, at 136–42 (9th prtg. 1978).