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CAN SYSTEMS ANALYSIS HELP US TO UNDERSTAND C.O.B.R.A.?: A CHALLENGE TO EMPLOYMENT-BASED HEALTH INSURANCE

ALISON MCMORRAN SULENTIC*

COBRA bedevils health plan administrators throughout the United States on a daily basis. It seems ironic, therefore, that the provisions of the Internal Revenue Code and ERISA that are commonly known as COBRA have inspired only a modest amount of legal scholarship.¹ While frequently a topic for continuing legal education programs, COBRA remains a subject that legal scholars seldom address unless a court hands down a particularly compelling decision or the Internal Revenue Service promulgates a set of regulations.² In the fast-paced practice of employee benefits law, judicial decisions and legislative or administrative actions

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1. See, e.g., Ann Hilton Fisher, *Small Employers and the Health Insurance Needs of Employees with High Health Care Costs: A Need for Better Models*, 8 EMPLOYEE RTS. & EMP. POL'Y J. 53 (2004); Jason R. Yungtum, *COBRA & Preexisting Coverage After The Supreme Court's Decision in Geissal v. Moore Medical Corp.*, 32 CREIGHTON L. REV. 1541 (1999); Joey Nichols, *U.S. Supreme Court Denies Employer the Right to Exclude COBRA Benefits to Terminated Employee Where Employee Had Other Group Health Plan in Place Prior to COBRA Election Date*, 21 U. ARK. LITTLE ROCK L. REV. 692 (1999); Sarah Rudolph Cole, *Continuation Coverage under COBRA: A Study in Statutory Interpretation*, 22 J. LEGIS 195 (1996); Nora Fitzgerald, Note, *You're Sick? You're Fired! The Case for Eliminating COBRA's Gross Misconduct Exception*, 80 MINN. L. REV. 197 (1995); Thomas H. Somers, *COBRA: An Incremental Approach to National Health Insurance*, 5 J. CONTEMP. HEALTH L. & POL'Y 141 (1989); Marshall W. Grate, *COBRA's Requirements for Group Health Plans: Do They Apply in a Strike?*, 4 LAB. LAW. 35 (1988).

2. Roberta Casper Watson's contribution to continuing legal education programs featuring COBRA deserves special attention for the detail and subtlety of her attention to the many facets of COBRA analysis. See, e.g., Roberta Casper Watson, *COBRA Health Continuation Benefits Under the New and Old Regulations*, American Law Institute - American Bar Association Continuing Legal Education, *Fundamentals of Employee Benefits Law* (March 3-5, 2005); PAMELA SANDE, JOAN VIGLIOTTA AND ROBERTA CASPER WATSON, *QUICK REFERENCE TO COBRA COMPLIANCE*, 2003 (Aspen Publishers, Inc. 2003).

rightfully command scholarly attention in order to assess the potential for institutional change and to assist practitioners in developing and implementing a response. This article, however, depicts COBRA not at a particular point of crisis or change, but rather in the broader context of the health care financing system and employment compensation arrangements.

Offering a descriptive analysis of the role of continuation coverage within our health care financing and employment compensation systems departs, to a certain extent, from the traditionally normative focus of legal scholarship.³ Edward Rubin criticizes “standard legal scholarship” as insufficiently “concerned with exploring the underlying function or significance of law.”⁴ Rubin argues instead that legal scholarship’s “distinctively prescriptive stance” is “derived from [the scholar’s] vision of reality itself, not from some normative theory that exists apart from that reality.”⁵ Viewed in this light, prescriptive scholarship addressed to judicial or legislative decision-makers is an exercise in persuasion rather than an increase in understanding or knowledge.⁶ Rubin suggests instead that legal scholars “begi[n]

3. For an assessment of legal scholarship, see Deborah L. Rhode, *Legal Scholarship*, 115 HARV. L. REV. 1327, 1328 (2002) (“The legal profession has no shared vision of what kinds of scholarship are most valuable or even most valued by the academy.”).

4. Edward L. Rubin, *Law and the Methodology of Law*, 1997 WIS. L. REV. 521, 534 (1997). See also Edward L. Rubin, *The Practice and Discourse of Legal Scholarship*, 86 MICH. L. REV. 1835, 1847-53 (1988) (discussing legal scholarship as legal prescriptions).

5. Rubin, *Law and the Methodology of Law*, *supra* note 4 at 542. Rubin’s criticism is reminiscent of Emile Durkheim’s observation of prescriptive scholarship:

Thus, the actual contribution of scientific investigation to economics and ethics is very limited, while that of art is preponderant. Ethical theory is limited merely to a few discussions on the idea of duty, the good and right. And even these abstract speculations do not constitute a science, strictly speaking, since their object is the determination not of that which is, in fact, the supreme rule of morality but of what it ought to be. Similarly, economists are today principally occupied with the problem of whether society *ought to be* organized on an individualistic or socialistic basis, whether it is *better* that that state should intervene in industrial and commercial relations, or whether it is *better* to abandon them to private initiative; whether one ought to use a single monetary standard, or a bimetallic system, etc.

See EMILE DURKHEIM, THE RULES OF SOCIOLOGICAL METHOD 25-26 (ed. George E.G. Catlin, trans. Sarah A. Solovay and John H. Mueller, Free Press 8th ed. 1966) [hereinafter DURKHEIM, THE RULES OF SOCIOLOGICAL METHOD].

6. Rubin, *Law and the Methodology of Law*, *supra* note 4 at 541-42. Rubin notes that descriptive work such as practitioner manuals and treatises is “generally not regarded as scholarship. . . . The sociological fact that this work is not regarded as true scholarship within the legal academy suggests the centrality of prescription as a distinguishing feature of the field, since the subject matter of the two categories is obviously indistinguishable.” *Id.* at 523.

from clearly articulated norms [in order to] elaborate the implications of [these] norms.”⁷ Such a challenge requires not only the self-conscious attention of the scholar to his or her own normative assumptions about a particular area of examination, but also a commitment to producing a nuanced descriptive assessment of the topic of the study that self-consciously addresses those normative assumptions.

This article responds to Rubin's challenge by using some of the tools of systems analysis in order to depict the role of COBRA in the seemingly disparate systems of health care financing and employment compensation. Systems analysis offers an efficient method for providing a detailed description of the topic under examination and exposing normative assumptions that might otherwise color legal analysis.⁸ In an influential article entitled *The Systems Approach to Law*, Lynn LoPucki explained the traditional application of systems analysis in computer programming, engineering and related fields and suggested that this method might prove helpful to “put legal scholarship in touch with reality.”⁹ LoPucki defined systems analysis as follows:

See also Richard A. Posner, *Legal Scholarship Today*, 115 HARV. L. REV. 1314, 1320-21 (2002) (noting that most legal scholarship is directed to “the profession at large, particularly judges and lawyers” and arguing that interdisciplinary scholarship directed to other scholars should be assessed in terms of its practical impact); Rhode, *supra* note 3, at 1337-38 (“the extent to which high theory and interdisciplinary work have displaced traditional doctrinal analysis is overstated.”).

7. Edward L. Rubin, *The Practice and Discourse of Legal Scholarship*, *supra* note 4, at 1904-05. Rubin has argued that the first criterion for excellence in legal scholarship should be a principle of normative clarity or coherence. The legal scholar can achieve understanding only by identifying his controlling norms with clarity and by explaining their relationship to his specific arguments. See Edward L. Rubin, *On Beyond Truth: A Theory for Evaluating Legal Scholarship*, 80 CAL. L. REV. 889, 915-16 (1992).

8. Rubin states that the systems theory developed by Nicholas Luhmann “suggest[s] that legal scholarship possesses its own discourse and cannot profitably borrow empirical insights from social science.” Rubin, *Law and the Methodology of Law*, *supra* note 4 at 558-59. Rubin criticizes the autopoiesis theory (essentially that law is self-contained and “self-reproductive”) as over-reaching. He states:

Legal scholars . . . can be part of an autopoietic legal system, they need not be. Instead they can make direct use of social science to understand the events that affect the legal system and to measure the effects of the legal system on external phenomena. By doing so, they can frame prescriptions that reflect a deeper understanding of the system, and that may be particularly useful to legal actors. Legal scholars would indeed be playing an influential and valuable role if they could penetrate the system's dysfunctional and somewhat old-fashioned autopoieticism.

Id. at 564.

9. Lynn M. LoPucki, *The Systems Approach to Law*, 82 CORNELL L. REV. 479, 482 (1997)[hereinafter LoPucki, *The Systems Approach*].

Systems analysis proceeds by identifying systems, discovering their goals or attributing goals to them, mapping their subsystems and the functions each performs, determining their internal structures, depicting them with attention paid to efficiency of presentation, and searching for internal inconsistencies. These methods generate analytical power by increasing the number of goals, elements, and circumstances that the analyst can take into account simultaneously.¹⁰

Systems analysis has been put to effective use in legal scholarship in the analysis of commercial statutes such as the Uniform Commercial Code and the Bankruptcy Code.¹¹ LoPucki has also explored the potential for systems analysis to shed light on proposed reforms to the process of obtaining informed consent for cardiac procedures.¹² More recently, the systems approach has pointed out new directions for the analysis of liability for medical errors,¹³ corporate governance rules¹⁴ and the impact of malfunctioning voting technology.¹⁵ Each of these very different

10. *Id.* at 481. This description reflects many of the same concerns that Rubin identifies as significant in Continental thinking.

The Continental approach . . . emphasizes two different, although generally interwoven, themes. First, participation in a social movement is a dynamic process in which the individual transforms and redefines herself in her interaction with others. Second, the movement as a whole develops a collective identity, an emergent self-definition that functions analogously to the way that self-definition functions for an individual. The interplay between the socially constructed identities of the individual and the movement is mediated by various mechanisms. One such mechanism particularly favored by Continental scholars is the social network of relationships among individuals, itself both a precondition for social movements and a product of these movements.

See Edward L. Rubin, *Passing Through the Door: Social Movement Literature and Legal Scholarship*, 150 U. PA. L. REV. 1, 42-43 (2001).

11. See Lynn M. Lopucki, *Should the Secured Credit Carve Out Apply Only in Bankruptcy? A Systems/Strategic Analysis*, 82 CORNELL L. REV. 1483 (1997) (applying systems approach to analyze the difference between bankruptcy reforms proposed by Bebchuk, Fried and Warren) [hereinafter LoPucki, *Should the Secured Credit Carve Out Apply Only in Bankruptcy?*].

12. See Lynn M. LoPucki, *Twerski and Cohen's Second Revolution: A Systems/Strategic Perspective*, 94 NORTHWESTERN U. L. REV. 55 (1999)(discussing informed consent) [hereinafter LoPucki, *Twerski and Cohen's Second Revolution*].

13. See Larry I. Palmer, *Patient Safety, Risk Reduction, and the Law*, 36 HOUS. L. REV. 1609 (1999)(analyzing potential medical liability) [hereinafter Palmer, *Patient Safety, Risk Reduction, and the Law*].

14. See Troy A. Paredes, *A Systems Approach to Corporate Governance Reform: Why Importing U.S. Corporate Law Isn't the Answer*, 45 WM. & MARY L. REV. 1055 (2004) [hereinafter Paredes, *A Systems Approach to Corporate Governance Reform*] (analyzing a market bond approach for developing countries).

15. See Paul M. Schwartz, *Voting Technology and Democracy*, 77 N.Y.U. L. REV. 625 (2002) [hereinafter Schwartz, *Voting Technology and Democracy*](using systems approach to explore the issues of election

topics is fraught with complexity, both in terms of empirical reality and lived experience and in terms of legal doctrine. Systems analysis acknowledges this complexity by contextualizing legal doctrine and accounting for the influence of non-doctrinal factors. Anyone who has ever analyzed a claim for continuation benefits under COBRA can testify to the complexity of a statute that reaches into the disparate realms of taxation, employment law, health care financing and pure human emotion in the face of life-changing events. While the need for circumscribed analysis of specific statutory or administrative language will undoubtedly remain important and, indeed, necessary in order to understand and apply COBRA, systems analysis provides an organized method that takes into account market trends, business practices and other factors that would not necessarily come to light in a purely doctrinal work.

Systems analysis occasionally comes under fire for its potential to regard existing social relationships as fixed and imperturbable and, thus, to implicitly reinforce these patterns.¹⁶ Despite the fine contributions of Lynn LoPucki and others, systems analysis has not reached the mainstream of legal scholarship. Moreover, notwithstanding some fascinating contributions from sociology and other disciplines, legal scholars have not explored the possible merits of systems analysis in sufficient numbers to enable a canonical determination of the norms and methodology that define its boundaries.¹⁷ It is not necessary to dismiss these observations, however, in order to suggest that the exploration of systems analysis and other sociological methods will encourage and facilitate a greater understanding of the dense and complex world in which laws are supposed to function. With the help of systems analysis techniques, decision-makers will be better equipped to understand and manage the issues before them. Such normative tasks may include, for example, the legislator's assessment of large-scale questions ("Should legislation such as COBRA bind together such disparate systems as health care financing and employment?") as well as more focused decisions of a small-business owner ("If I set up a health plan, what am I getting myself into?").

technology and democracy).

16. See, e.g., Marc R. Poirier, *Gender Stereotypes at Work*, 65 BROOKLYN L. REV. 1073, 1101 n. 128 (1999).

17. For examples of sociological contributions to the study of law, see ROGER COTTERRELL, *THE SOCIOLOGY OF LAW: AN INTRODUCTION* (Butterworths 1984) [hereinafter COTTERRELL, *THE SOCIOLOGY OF LAW*]; LISA J. MCINTYRE, *LAW IN THE SOCIOLOGICAL ENTERPRISE: A RECONSTRUCTION* (Westview Press 1994). Deborah Rhode notes some of the difficulties involved in the application of social science techniques by legal scholars, including a lack of training in social science methodology (particularly with respect to empirical work). See Rhode, *supra* note 3, at 1352-53.

This article suggests that systems analysis proves an effective tool for examining the role of COBRA in the current system of health care financing in the United States. Part One draws from the emerging legal scholarship on systems analysis to provide a brief introduction to this methodology, which may be unfamiliar to some readers. In Part Two, I examine the uniquely awkward structure of COBRA and the appropriate defining "system" within which COBRA should be located. Due to the unique structuring of American health care financing, one might regard COBRA as an essential component of a system dedicated to providing health care. In this context, COBRA effectively shifts the cost of providing such care, on a temporary basis, to the covered individual and his insurer rather than the public purse. Yet the entity that is primarily responsible for the administration of COBRA is not the government or the affected individual, but the employer. As currently structured, COBRA functions primarily within the employment compensation system yet lacks an obvious connection to the goals of that system. I conclude that systems analysis increases our understanding of COBRA and its flaws and suggests a direction for the development of proposals for future legislative reform.

I. SYSTEMS ANALYSIS

Systems analysis responds to the need for descriptive information of the environment in which the law functions. LoPucki suggests that "[t]he systems approach provides a way for legal scholars to get in touch with reality, to discover how law-related systems work through empiricism, and to discover how they can be improved through modeling."¹⁸ This methodology challenges legal scholars "to observe how subsystems function and how they contribute to the achievement of the system's overall purpose."¹⁹ In theory, therefore, the diligent use of systems analysis should unveil not only legal doctrines, but also the empirical reality in which those doctrines operate.

According to this method of analysis, human beings, in all their individual and relational complexity, play an "observable role" in a complex system that operates alongside and in tension with legal doctrines.²⁰ Unlike a purely doctrinal approach to legal

18. See LoPucki, *The Systems Approach to Law*, *supra* note 9, at 521-22.

19. See Lynn M. LoPucki and George C. Triantis, *A Systems Approach to Comparing U.S. and Canadian Reorganization of Financially Distressed Companies*, 35 HARV. INT'L L.J. 267, 271 (1994) [hereinafter LoPucki and Triantis, *Comparing U.S. and Canadian Reorganizations*].

20. See LoPucki and Triantis, *Comparing U.S. and Canadian Reorganizations*, *supra* note 19, at 271-72 ("A systems analyst's reference to a legal system should include the courts, the lawyers, the reorganizing companies, documents, information flows, transaction costs, computer

analysis, the systems approach regards the observation and depiction of these non-doctrinal factors as legitimate and, indeed, necessary components in any realistic description of a particular system.²¹ In practice, doctrinal legal analysis examines “law . . . in its own terms” through the examination of “the rules, principles and concepts set out in law books and authoritatively stated in legislation or deduced from judicial decisions.”²² Sociologist Roger Cotterrell notes that the “pragmatic rationalizations of legal rules into more or less systematic form” and the ensuing “generalisation of doctrine” play a crucial role in the daily lives of practicing lawyers.²³ For Cotterrell, the task of explaining the nature of law requires “not only systematic empirical analysis of legal doctrine and institutions, but also of the social environment in which legal institutions exist.”²⁴

Systems analysis is one tool that may enable legal scholars to widen the scope of analysis beyond the confines of a particular judicial, legislative or administrative decision. LoPucki contends that systems analysis prods legal scholars to extend the field of inquiry far beyond the review of statutes, regulations and case law.²⁵ According to LoPucki, the minimum requirements for successful systems analysis include:

1. Identifying the system and its distinguishing characteristics;²⁶

systems, and anything else that plays an observable role in court-supervised reorganizations—including law and ideology.”).

21. Systems analysis techniques have been used in order to facilitate problem-solving by decision-makers in the military, in the sciences and in management for many years. See generally R. C. Tomlinson, *Operational Research and Systems Analysis: From Practice to Precept*, 287 PHIL. TRANSACTIONS OF THE ROYAL SOC'Y OF LONDON. SERIES A, MATHEMATICAL & PHYSICAL SCI. 355-56 (1977) (noting that scholars who use systems analysis methods “may argue as to who should have responsibility for a particular study, but they recognize the common methodology and respect the common problems of scientific integrity”).

22. ROGER COTTERRELL, *THE SOCIOLOGY OF LAW: AN INTRODUCTION* 2 (Butterworths 1984) [hereinafter COTTERRELL, *THE SOCIOLOGY OF LAW*].

23. See *id.* at 3 (British spelling from original text).

24. *Id.*; See also Richard A. Posner, *The Decline of Law as an Autonomous Discipline: 1962-1987*, 100 HARV. L. REV. 761, 762 (1987) (describing the notion of law as “an autonomous discipline. . . properly entrusted to persons train in law and in nothing else” is a “perverse or at best incomplete way of thinking about law”).

25. See, e.g., LoPucki and Triantis, *Comparing U.S. and Canadian Reorganizations*, *supra* note 19, at 338 (noting that the source of information most accessible to this study was legislation and case law, which the authors used with caution in light of their desire to consider them in context as part of a more complicated system).

26. LoPucki, *The Systems Approach to Law*, *supra* note 9, at 497-98.

2. Attributing goals (whether “positive” or “normative” in nature”) to the system;²⁷
3. Identifying subsystems in order to determine the structure and function of the system;²⁸
4. Describing relationships among systems components (for example, through developing diagrams, flow-charting or other “external aids”);²⁹
5. Identifying inconsistencies between the goal of a system and the methods used to achieve that goal.³⁰

The more complex depiction of a law-related system that results from attention to this kind of detail in turn permits the analyst to observe when system functions “can be performed by law or by extra-legal means.”³¹

In many ways, the application of systems analysis to law-related subjects draws on methodologies developed by the social theoreticians of the late 19th- and early 20th- centuries.³² Schooled

27. *Id.* at 502-03. I have continued the use of the term “goals” in this Article in keeping with LoPucki’s methodology. However, I note that Durkheim’s effort to validate sociology as a social science led him to prefer the term “function” as less likely to imply any prejudgments concerning the resolution of a particular problem. See EMILE DURKHEIM, *THE DIVISION OF LABOR IN SOCIETY* 49 (trans. George Simpson, Free Press 1964) [HEREINAFTER DURKHEIM, *THE DIVISION OF LABOR IN SOCIETY*]. See generally COTTERELL, *THE SOCIOLOGY OF LAW*, *supra* note 22, at 74-76 (describing the difference between “function” and “purpose” in law).

28. See LoPucki, *The Systems Approach to Law*, *supra* note 9, at 503-04 (discussing subsystems under the “systems theory”).

29. *Id.* at 505-06.

30. *Id.* at 506. LoPucki’s description of systems analysis bears the mark of a Durkheim / Parsons heritage. According to Moshe Hirsch, Talcott Parsons developed a “theory of action” that involved four elements: “(a) an agent (one or more actors), (b) the goal of action, (c) the environment in which the action is taken (‘situation’), and (d) the normative environment in which the action takes place (‘normative action’). Parsons identified “four functional imperatives of any society:” adaptation, goal attainment, integration and latency (pattern maintenance). See Moshe Hirsch, *The Sociology of International Law: Invitation to Study International Rules in Their Social Context*, 55 U. TORONTO L. J. 891, 899-900 (2005).

31. See LoPucki and Triantis, *Comparing U.S. and Canadian Reorganizations*, *supra* note 19, at 272 (describing subfunctions of a reorganization system where law is one component).

32. See generally COTTERELL, *THE SOCIOLOGY OF LAW*, *supra* note 22, at 4 (“The possibility of ultimately describing and analysing the social reality of law, as the embodiment of knowledge which transcends partial perspectives, is the possibility of science.”). Significant contributors to the development of the methodology of social sciences include Emile Durkheim, Max Weber and Talcott Parsons. Durkheim (described by Cotterell as exemplifying “sociological positivism”) believed that scientific methods could be applied to the study of social phenomena by treating “social facts” as observable objects. See generally EMILE DURKHEIM, *THE RULES OF SOCIOLOGICAL METHOD* 14 (ed. George E.G. Catlin, trans. Sarah A. Solovay and John H. Mueller, Free Press 8th ed. 1966) [hereinafter DURKHEIM, *THE RULES OF SOCIOLOGICAL*

in the theories of Max Weber and Emile Durkheim, social scientists have long acknowledged that normative assumptions color a person's analysis of a particular system.³³ Durkheim, in particular, warned social scientists against the temptation of substituting personal ideas about social conduct for the more nuanced results of "observing, describing, and comparing things."³⁴ Durkheim worried that such a mistake would not produce objective results, and suggested instead that it would be more profitable to regard "social facts" or "social phenomena" as "things" or "data."³⁵ Under Durkheim's approach, "[a]ll preconceptions must be eradicated" in order to "escape the realm of lay ideas and to turn [one's] attention to facts."³⁶ In the realm of legal scholarship, Edward Rubin similarly points to the importance of identifying and disclosing the normative assumptions that impact the manner in which an author approaches a topic.³⁷

This practice encourages a candid evaluation of the extent to which the personal opinions and values of an author filter his or her analysis of "social facts" as "things" or "data." Max Weber's instructions to scholars and teachers in this regard are both clear and emphatic:

[T]he teacher [must set] as his unconditional duty, in every single case, even to the point where it involves the danger of making his lecture less lively or attractive, to make relentlessly clear to his audience, and especially to himself, which of his statements are statements of logically deduced or empirically observed facts and which are statements of practical evaluations. Once one has acknowledged the logical disjunction between the two spheres, it seems to me that the assumption of this attitude is an imperative requirement of intellectual honesty; in this case it is the absolutely minimal requirement.³⁸

METHOD]. See also Moshe Hirsch, *The Sociology of International Law: Invitation to Study International Rules in Their Social Context*, 55 U. TORONTO L. J. 891, 898-99 (2005) (acknowledging influence of Durkheim and Parsons on structural-functional or systems theory analysis).

33. COTTERELL, *THE SOCIOLOGY OF LAW*, *supra* note 22, at 15.

34. DURKHEIM, *THE RULES OF SOCIOLOGICAL METHOD*, *supra* note 32, at 14.

35. *Id.* at 29.

36. *Id.* at 31-34.

37. See Rubin, *The Practice and Discourse of Legal Scholarship*, *supra* note 4, at 1895.

38. MAX WEBER, *THE METHODOLOGY OF THE SOCIAL SCIENCES* 2 (Edward A. Shils and Henry A. Finch, Free Press 1949) [HEREINAFTER WEBER, *THE METHODOLOGY OF THE SOCIAL SCIENCES*]. Rubin notes that the similarity between the distinction that he draws between "prescriptive, descriptive and interpretive legal discourse" and Weber's work. See Rubin, *The Practice and Discourse of Legal Scholarship*, *supra* note 4, at 1849 n.49 (discussing Weber's division of the study of law in "moral evaluation, sociological analysis, and legal doctrines").

Weber demanded that “the establishment of empirical facts” remain “unconditionally separate” from the scholar’s “own practical evaluations, i.e., his evaluation of these facts as satisfactory or unsatisfactory.”³⁹ He likewise required the social scientist to exercise a guarded humility with regard to his or her own role in suggesting or shaping policy. In his view, “[t]he social sciences, which are strictly empirical sciences are the least fitted to presume to save the individual the difficulty of making a choice, and they should therefore not create the impression that they can do so.”⁴⁰ Weber’s commentary on the scholar’s role reads like an epigram: “An empirical science cannot tell anyone what he should do — but rather what he can do — and under certain circumstances what he wishes to do.”⁴¹

The enormous difficulty, perhaps even the impossibility, of separating analysis from value assumptions in the study of law has moved Roger Cotterell to argue that “[t]he safest scientific approach would seem to involve being alert to recognize that value judgments inform both the selection of problems for study and their analysis [and] to make them explicit where they can be isolated. . . .”⁴² While respect for sociological methodology does not vitiate a scholar’s normative assumptions, a discipline such as systems analysis can illuminate and, if necessary, counterbalance the extent to which a normative assumption colors the analysis of a law-related problem.⁴³

39. See WEBER, *THE METHODOLOGY OF THE SOCIAL SCIENCES*, *supra* note 38, at 11.

40. *Id.* at 19. Weber was emphatic in his belief that social sciences should not strip the individual human actor from the responsibility of making his or her own decisions concerning social action.

To apply the results of this analysis in the making of a decision, however, is not a task which science can undertake; it is rather the task of the acting, willing person: he weighs and chooses from among the values involved according to his own conscience and his personal view of the world. Science can make him realize that all action and naturally, according to the circumstances, inaction imply in their consequences the espousal of certain values—and herewith—what is today so willingly overlooked—the rejection of certain others. The act of choice itself is his own responsibility.

Id. at 53. Weber’s exploration of the role of the social scientist in contrast to that of the legislator is similar to Durkheim’s attempt to bridge the gap between “state law” and “living law.” See COTTERELL, *THE SOCIOLOGY OF LAW*, *supra* note 17, at 81-82 (describing Durkheim’s view that “law is created in the often ignorant isolation of high-level decision-making in the state”).

41. See *generally* WEBER, *THE METHODOLOGY OF THE SOCIAL SCIENCES*, *supra* note 38, at 54.

42. See COTTERELL, *THE SOCIOLOGY OF LAW*, *supra* note 17, at 15.

43. See *generally* WEBER, *THE METHODOLOGY OF THE SOCIAL SCIENCES*, *supra* note 38, at 60. As a former employee benefits practitioner, I can see a parallel between the lawyer’s obligation to concede final decision-making authority to a client who has been apprised of his or her legal alternatives and

II. APPLYING SYSTEMS ANALYSIS TO COBRA

LoPucki's rubric for systems analysis begins with the identification of the appropriate system. COBRA operates within not one but two independent, interlocking systems. The first may roughly be termed the "health care financing system."⁴⁴ By this term, I mean the elaborate systems dedicated to paying for health care services, whether payment occurs contemporaneously with the receipt of services, as a prospective social investment in the creation of health care facilities, or through long-term repayments of the cost of up-front care. The second system relevant to COBRA pertains to the terms and conditions of employment and, in particular, to a subsystem of employment compensation.

A. Continuation Benefits under COBRA

In April 1986 Congress passed the Consolidated Omnibus Budget Reconciliation Act of 1985 ("COBRA").⁴⁵ Following the model of dual responsibility for the regulation of employee benefit plans, Congress enacted parallel provisions that amended both the Employee Retirement Income Security Act of 1974 ("ERISA") and the Internal Revenue Code (the "Code").⁴⁶ The obligation to provide continuation coverage originally appeared in Section 162 of the Internal Revenue Code (the "Code"), along with a laundry list of other expenditures that qualified for recognition as ordinary and necessary business expenses.⁴⁷ Within two years, however, Congress amended the Code to provide for the imposition of excise taxes in the event that an employer failed to comply with its COBRA obligations.⁴⁸ The tax provisions governing COBRA

the social scientist's desire to contribute through the use of "science" (the "analysis of facts") the tools which permit legislative decision-makers to choose "social policy" (the "statement of ideals").

The central importance of human need defines my own belief that insuring access to adequate health care is a moral imperative and a social responsibility. In much the same way that adequate nutrition and rest are physical necessities, access to health care affords a person the opportunity to attend to his physical, emotional and spiritual needs. See, e.g., Alison M. Sulentic, *Now I Lay Me Down to Sleep: Work-Related Sleep Deficits and the Theology of Leisure*, ___N.D. J. L., ETHICS & PUB. POL'Y ___(forthcoming 2006)(on file with author). This normative assumption leads me to see the patient as the *raison d'être* for the entire system, for without the patient there is no need to render services or to pay for those services. However, the patient participates in a vast network of disparate actors, which systems analysis can identify and portray.

44. In a very real sense, the health care financing system functions as a subset of the larger system of health care delivery.

45. Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. 99-272, 100 Stat. 82 (1986).

46. See I.R.C. § 4980B and ERISA § 601 et seq.

47. See former I.R.C. § 162(k).

48. See Technical and Miscellaneous Revenue Act of 1988 ("TAMRA"), Pub.

moved to Section 4980B and became part of the elaborate excise tax system that motivates (some say "coerces") taxpayers to comply with the obligations of the Code.⁴⁹

The watershed event in the history of modern tax legislation occurred later in the same year when Congress passed the Tax Reform Act of 1986 ("TRA '86").⁵⁰ In its own way, however, COBRA demanded a re-evaluation of the health care financing system in the United States that proved just as radical as many of the changes enacted by TRA '86. Following the enactment of COBRA, employers that chose to sponsor a group health plan were now required to offer continued participation in that plan to "qualified beneficiaries"⁵¹ whose enrollment would otherwise terminate as a result of a "qualifying event."⁵² By requiring plan sponsors to offer continuation coverage, COBRA encouraged an employer to maintain a significant legal and financial relationship with people who were no longer in its employ. Even when an employer and an employee had severed the ties of an employment relationship, COBRA would now bind them together again through administrative, financial and even fiduciary connections. The legislation forged an even more novel connection between the plan sponsor and people whose remote connection to the employer

L. No. 100-647, 102 Stat. 3342 (1988). The history of the tax provisions of COBRA is set forth at 26 CFR § 54.4980B-1, Q&A-1(a).

49. The excise tax is generally imposed upon the employer, although in the case of a multi-employer plan, the tax falls upon the plan itself. I.R.C. § 4980B(e)(1)(A)(ii). In certain limited circumstances, an excise tax may also be imposed on a person who in a "legally enforceable written agreement" assumes responsibility for performing the act that ultimately leads to the noncompliance. I.R.C. § 4980B(e)(2)(A); 26 C.F.R. § 54.4980B-2, Q&A-10(b).

50. Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 2085 (1986).

51. A "qualified beneficiary" is an individual who, on the day preceding a "qualifying event," is covered under the plan and is a covered employee, the spouse of a covered employee or the dependent child of a covered employee. The term may also apply to certain new family members (such as a child born to or placed for adoption with a covered employee). IRC § 4980B; 26 C.F.R. § 54.4980B-3, Q&A-1. Covered employees may become qualified beneficiaries under limited circumstances, generally confined to the termination of employment or reduction in hours of work that results in a loss of coverage and the bankruptcy of the employer. *Id.* at Q&A-1(d).

52. A qualifying event is one of six events that would normally result in a loss of coverage under a group health plan. These events include (1) the death of the covered employee; (2) the termination of the covered employee's employment (other than for gross misconduct) or a reduction in his hours of employment; (3) the covered employee's divorce or separation; (4) the covered employee's entitlement to Medicare benefits; (5) the cessation of a child's status as a dependent of a covered employee and (6) the employer's entry into the federal bankruptcy system. I.R.C. § 4980B(f)(3); 26 C.F.R. § 54.4980B-4, Q&A-1.

and whose participation in a group health plan derived from a family member's employment.⁵³

The link between employment status and health care insurance dates back to the social legislation of the mid-twentieth century.⁵⁴ Prior to the enactment of COBRA, employers had come to understand that "compensation" meant more than simply the wages or salary earned in exchange for the performance of services.⁵⁵ The terse definition of "employee benefit plan" set forth in Section 3(3) of ERISA belies the immense creativity evident in the many different ways in which employers compensated their employees.⁵⁶ In the period between the end of World War II and the enactment of COBRA in 1986, employers implemented increasingly creative compensation arrangements that encouraged (and, in some cases, mandated) "compensation" to be paid not only as wages or salary, but also in the form of pension and profit-sharing plans, subsidies for group life insurance or on-site daycare arrangements and a host of other "employee benefits."⁵⁷ Among

53. I.R.C. § 4980B(g)(1)(A)(including spouses and dependants of the employee as qualified beneficiary).

54. See generally Jennifer Klein, *The Politics of Economic Security: Employee Benefits and the Privatization of New Deal Liberalism*, 16 J. OF POL'Y HIST. 34, 37-46 (2004) [hereinafter Klein, *The Politics of Economic Security*].

55. Almost 30 cents of every dollar that an employer spends on compensation represents the cost of mandated or voluntary benefits. The Bureau of Labor Statistics reported that the average cost to an employer of providing compensation to an employee for an hour of work in September 2005 was \$26.05, of which 29.8 percent was due to the cost of fringe benefits. The BLS statistics reflected legally mandated benefits such as payments relating to Social Security or Workers' Compensation, as well as voluntary benefits such as life, health and disability insurance, vacations, holidays, sick leave, and retirement savings. Press Release, Bureau of Labor Statistics, *Employer Costs for Employee Compensation – September 2005* (December 2005), available at <http://www.bls.gov/news.release/pdf/ecec.pdf>. For a discussion of executive compensation strategies, see Susan J. Stabile, *Motivating Executives: Does Performance-based Compensation Positively Affect Managerial Performance*, 2 U. PA. J. LAB. & EMP. L. 227 (1999) (suggesting modifications in compensation structure).

The creativity of compensation planning strategies is reflected in the expansive and sometimes conflicting definitions of compensation present in the Internal Revenue Code. See generally 26 U.S.C. §§ 3401(a) (defining wages for purposes of calculating federal income tax); 3121 (defining wages for purposes of calculating FICA tax contribution); 415(c)(3) (defining compensation for purposes of calculating compliance with limitation on contributions and benefits under qualified plans); 414(s) (defining compensation applicable for additional testing of qualified plans).

56. See ERISA § 3(3), 29 U.S.C. § 1002(3) ("The term 'employee benefit plan' or 'plan' means an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan.").

57. See JOHN H. LANGBEIN AND BRUCE A. WOLK, *PENSION AND EMPLOYEE BENEFIT LAW* (3d ed. Foundation Press 2000) [hereinafter LANGBEIN AND

the many welfare benefits available to employees, access to group health insurance stood out as a valuable opportunity for an employee who was willing to work in exchange for the opportunity to be assured of his or her own coverage, as well as that of his or her dependents.⁵⁸

An employer's voluntary decision to provide group health coverage during a period of employment fits easily within the traditional framework of compensation.⁵⁹ In other words, if Joan must perform services in order to receive a salary and group health coverage from Big Company, an analysis of Joan's total compensation would have to include the cost of employer contributions to her health care coverage as well as the amount of her salary in order to be accurate. In other words, Big Company subsidizes Joan's health care coverage because she performs services. This interpretation of "compensation" is conceptually broader than a definition that is exclusively focused on wages and salary, but it presents a more realistic vision of the relationship between the two parties.⁶⁰

WOLK, PENSION AND EMPLOYEE BENEFIT LAW].

58. Paul Fronstin and Ray Werntz of the Employee Benefit Research Institute found that while employers historically perceived health benefits to be an important factor in recruiting and retaining employees, increasing frustration with the cost of providing benefits may impact "the willingness and ability of employers" to continue to provide these plans. Fronstin and Werntz suggest that employers should examine the health benefits associated with providing insurance coverage and the impact of "worker resilience, commitment, and ability to innovate." See Paul Fronstin and Ray Werntz, *The 'Business Case' For Investing in Employee Health: A Review of the Literature and Employer Self-Assessments*, EBRI ISSUE BRIEF NO. 267 at 24 (March 2004), available at www.ebri.org/pdf/briefspdf/0304ib.pdf (last visited March 7, 2006). Additional factors that could increase an employer's valuation of health care benefits include improvements in absenteeism and on-the-job productivity. See Sean Nicholson et al., *How to Present the Business Case for Healthcare Quality to Employers* 4, 7 (November 2005) ("[A] typical U.S. company estimates how a health-benefit or health-care quality-enhancing program will affect their bottom line by considering only the direct medical costs that they reimburse as health benefits."). Within the population of employed persons, there are variations in the rate of participation in health care plans that correlate to the size of the employer and the status of the employee as full- or part-time. A recent study states that "85 percent of full-time workers have access to medical care benefits, compared with only 22 percent of part-time workers," while "66 percent of full-time workers participate in employer-provided medical care plans, compared with only 12 percent of part-time workers." See Paul A. Welcher, *Access to and Participation in Employer-Provided Health Care Plans, Private Industry, 2005*, COMPENSATION AND WORKING CONDITIONS ONLINE (January 25, 2006), www.bls.gov/opub/cwc/print/cm20060120ch01.htm.

59. See Welcher, *supra* note 60 (elaborating on why the health benefits fit within the traditional framework of compensation).

60. Viewed as the total payment for services rendered by an employee, this notion of "compensation" also easily expands to include "deferred

COBRA introduced a new role for employers. Not only would employers participate in the traditional exchange of services for compensation, but they were now to become administrators of a government mandate to provide health care opportunities to people who would otherwise be uninsured. This was a novel role for a former employer to play. Consider, for example, that before COBRA was enacted, there was no basis in federal law for requiring an employer to provide health care financing to people whom it no longer employed. Still less evident was a federal statutory basis for requiring an employer to extend continuation coverage to an employee's former spouse or adult child who never actually worked as an employee in his or her own right. Absent judicial intervention or a voluntarily assumed contractual obligation, there was no reason for either party to expect that health care benefits would continue once the employment relationship (or the relationship with the employee) had terminated.

After twenty years, we may have become hardened in the assumption that the duty to provide continuation coverage to terminated employees and other qualified beneficiaries is the logical extension of the employer's contractual and, indeed, ethical obligations.⁶¹ Yet the obligation to provide continuation benefits is a statutory obligation imposed by Congress, rather than an obligation that derives from an employment relationship. The establishment of a group health plan was and continues to be a voluntary decision by an employer in the context of a larger compensation scheme for his business.⁶² In contrast, COBRA requires, rather than enables, an employer to continue to facilitate the participation of any employee or qualified beneficiary who elects continuation coverage after a qualifying event.

Even the financial arrangements for continuation coverage bear little resemblance to remuneration for services rendered.

compensation." Both the Internal Revenue Code and ERISA provide a framework for the employer's voluntary establishment of "deferred compensation" arrangements that would permit Joan to receive some of her compensation well after she ceases to perform active service for the corporation. See I.R.C. § 401(b); ERISA § 3(2); see also 29 U.S.C. § 1002(2)(A)(ii).

61. See Fronstin & Werntz, *supra* note 60, at 4. (noting that "[d]espite the voluntary nature of employment-based health benefits, America's health care system 'assumes' employers will provide these benefits").

62. See Curtiss-Wright v. Schoonejongen, 514 U.S. 73, 78 (1995) (stating ERISA does not entitle one to employer-provided health benefits); Catherine L. Fisk, *Lochner Redux: The Renaissance of Laissez-Faire Contract in the Federal Common Law of Employee Benefits*, 56 OHIO ST. L. J. 153 (1995) ("ERISA jurisprudence reflects the ideological operation of voluntarism (the idea that Congress did not mandate employee benefits but left employers free to volunteer benefits) within the constraints of 'bounded obligations and federal common law.'")

COBRA does not technically require employers to bear the expense of the continuation coverage; an employer may charge a qualified beneficiary up to 102 percent of the premium required for coverage under the plan.⁶³ Moreover, although some employers do absorb the cost of COBRA coverage to the extent that this amount exceeds premium payments, the employer's role is primarily administrative rather than financial in nature. The financial arrangements for funding the cost of COBRA coverage do not even attempt to mimic the structures for present or deferred compensation. The qualified beneficiary (whether a former employee or not) bears the cost of premiums and cannot lessen this cost by offering to provide services without risking the loss of his or her status as a qualified beneficiary.

This anomaly raises a host of questions. Once the relationship that gives rise to COBRA rights is severed, can the employer really be said to be providing compensation in exchange for services? And if the employer continues to provide health care benefits, an old question re-emerges. Why? What is the logic behind the strange mandate that employers assume an administrative responsibility for the provision of health care coverage to people who, by definition, have severed ties with the employer? Why should COBRA be an obligation of employers if the COBRA beneficiaries are paying for the cost of coverage out of their own pockets? Systems analysis brings to light some of the social and economic costs of conflating the system of health care financing with the system of employment and compensation.

63. I.R.C. § 4980B(f)(2)(c)(i); Treas. Reg. § 54.4980B-8, Q&A-1(a)(1999). Section 4980B(f)(4)(A) defines "applicable premium" as "the cost to the plan for such period of the coverage for similarly situated beneficiaries with respect to whom a qualifying event has not occurred without regard to whether such cost is paid by the employer or the employee)." The Code does not specify the methodology to be used in calculating the applicable premium and the Treasury Regulations do not fill this gap. Treas. Reg. § 54.4980B-8, Q&A-2. Self-insured plans must determine a "reasonable estimate of the cost of providing coverage" to similarly situated active employees. I.R.C. § 4980B(f)(4)(B)(i). A plan is permitted to charge a larger premium for coverage provided only as the result of a disability extension. Treas. Reg. § 54.4980B-8, Q&A-1(b); *See also* See Paul Fronstin, Ph.D., Statement, Testimony at Hearing on Oversight of Tax Law Related to Health Insurance, Before U.S. House of Representatives Committee on Ways and Means 3 (April 23, 1998).(stating that the amount of the applicable premium is not always equivalent to the actual cost of providing health care under a plan). In particular, qualified beneficiaries who anticipate a more urgent need for health coverage may be more likely to elect continuation coverage under COBRA. Because of the impact of adverse selection, the cost of premiums may not actually reflect the cost of coverage for such individuals. *Id.*

B. COBRA and the Health Care Financing System

1. Who participates in the health care financing system?

Figure 1 depicts the health care financing system in terms of the relationships that might be typical of a person who participates in an employment-related group health insurance plan.⁶⁴ The central focus of this diagram is the individual consumer of health care services. In the absence of a patient to whom services are or might be rendered, there is no need for health care and the health care financing system lacks meaning. Figure 1 also depicts the close ties that the patient has to payors and providers. As a patient, the consumer comes into direct contact with the following parties:

- Providers of health care services, including physicians and other providers of direct care services (e.g., nurses, physician assistants, nontraditional providers);
- Health care facilities (e.g., hospitals, ambulatory surgical centers, outpatient treatment facilities);
- Third-party payors, including insurance companies, health maintenance organizations, employers and government programs.

Each of these entities has a direct relationship with the patient. In a "fee-for-service" system, there is no particular reason why the third-party payor would be in relationship with physicians or health care facilities. As managed care strategies have encouraged the integration of health care delivery with health care financing, however, the existence of contractual relationships between the third-party payor and the professionals and facilities that provide direct services has become increasingly common. Figure 1 therefore indicates the relationships between these parties, which exist independently of any particular patient.

Surrounding these core players is a broad range of economic actors whose impact on the pricing of health care services and the environment in which services are delivered is significant, albeit more remote from the patient. Roughly speaking, one can include in this larger group entities such as:

- Suppliers of utilities and other necessary goods and services, including, in particular, manufacturers and distributors of medical equipment, durable goods and pharmaceuticals;

64. One of the tasks of systems analysis is to search for an image or descriptive representation that conveys the complexity of the system under examination. While diagrams are not the only method for facilitating description, I have created four diagrams that illustrate some of the complexities of the COBRA problem.

- Financial backers of the institutions involved in the direct provision of services, including guarantors of tax-exempt bond financing schemes for the construction of health care facilities;
- The Internal Revenue Service and other state and local entities that grant favorable tax treatment to health care facilities; and
- Public and private accrediting agencies and state licensing agencies that set the minimum standards for entry and continued functioning in the market.

The influence of these external entities may be regulatory (as in setting the requirements necessary for qualification for tax-exempt status), financial (such as setting the purchase price for products or services that the hospital must purchase) or mimetic (creating cultural or environmental factors that will cause other parties to mimic external behaviors and strategies).⁶⁵

Each component of the diagram represents a subsystem that merits further study in its own right. For purposes of this article, however, the subsystem of greatest concern is represented by the third-party payor block. In the United States, the task of financing health care falls upon many different payors who operate independently, cooperatively, or in tension with each other, depending upon the circumstances of a particular patient. In 2004, over 174 million Americans or 59.8 percent of the population participated in employment-based insurance arrangements.⁶⁶ An additional 79.1 million people received health insurance through public programs, including Medicare, Medicaid and Tricare/CHAMPVA.⁶⁷ A more detailed examination of the non-elderly population (defined as those under age 65) reveals that 17.4 million people purchase individual insurance contracts in order to pay for health care needs.⁶⁸ The number of uninsured Americans rose to 45.8 million, a figure that represents a marginal increase over 2003 levels, but a significant twenty-five percent increase over the 36.8 percent who were uninsured in 1994.⁶⁹ On

65. For a review of the literature on isomorphic behavior in organizations, see Linda Yankoski, C.S.F.N., *The Soul of the Matter: The Impact of Government Funding on the Catholic Identity and Mission of Holy Family Institute, 1900 - 2002* 63-74 (Unpublished Ed.D. dissertation, Duquesne University, 2003).

66. See Paul Fronstin, *Uninsured Unchanged in 2004, But Employment-Based Health Coverage Declined*, 26 EBRI NOTES 2 (October 2005) [hereinafter Fronstin, *Uninsured Unchanged in 2004*]. Fronstin's figures are derived from the Employee Benefit Research Institute's estimates of the March 2005 Current Population Survey and the actual figures from previous surveys.

67. *Id.* at 2.

68. See *id.* at 3-4 (explicating data in Table 3 - Nonelderly Population with Selected Sources of Health Insurance, by Own Work Status and Work Status of Family Head, 2004).

69. See *id.* at 2.

the one hand, these figures suggest that employers (either through self-insurance or through the purchase of contracts from insurance companies) play a dominant role in managing the payment of health care expenses, with significant additional contributions by government agencies. On the other hand, the same statistics suggest that a health care financing strategy that relies heavily on voluntary employment-based health insurance has failed to support the health needs of an increasingly numerous group of uninsured or underinsured individuals.

Employment (either of the individual or a member of his or her family) is the largest single determinant of the likelihood that a person will be insured against health care expenditures. Despite a modest increase in the number of people covered by government health care programs, the majority of non-elderly Americans receive health insurance through an employment-based group health plan.⁷⁰ Moreover, the probability of enrollment in an employment-based plan correlates positively to the size of the employer and the amount of the family's household income.⁷¹ Health economists anticipate that "a relatively weak labor market, combined with rising health benefit costs" explains the gradual drop in the percentage of Americans who participate in employment-based health insurance and, if unchecked, will continue to result in an "erosion in employment-based health benefits."⁷²

Requiring employers to offer continuation coverage after a qualifying event temporarily slows down the possibility that the qualified beneficiary will ultimately become uninsured. Unless other assets are available, the cost of caring for the uninsured may fall on a variety of parties, including the uninsured patient, hospitals that perform increasing amounts of uncompensated emergency room care and government-based providers.⁷³ Figure 2 illustrates the lack of connection and accountability between the front-line parties that service insured patients and the uninsured patient whose relationship with a third-party payor is now defunct. By prolonging the period when an employment-based group health plan bears the cost of care for a person who would otherwise become uninsured, COBRA staves off the moment when

70. *Id.* at 3.

71. *See id.* at 7.

72. *See id.* at 7.

73. Institute of Medicine, *Fact Sheet 4: Uninsurance Facts and Figures, Uninsurance Costs the Country More Than You Think* (January 2004). Expenditures on health care for the uninsured reached \$99 billion in 2003. This amount included out-of-pocket contributions of \$26.4 billion. *Id.* Examples of other assets include private wealth, amounts set aside in health care savings accounts or gift income. See generally I.R.C. § 223 (health savings account).

a participant's insurance status ceases to resemble the diagram in Figure 1 and instead becomes similar to that of Figure 2. But it accomplishes this goal by shifting a burden that might otherwise become a public expense to the plan sponsor of the employment-based group health plan.

If the goal of our health care financing system is to produce widespread access to quality health care, then it is fair to say that COBRA insures a modest contribution to this goal by the sponsors of employment-based group health plans. COBRA enables people to retain group health coverage in a variety of circumstances ranging from divorce to the termination of employment for reasons other than gross misconduct. By electing to continue coverage under COBRA, qualified beneficiaries theoretically avoid periods of uninsurance that would otherwise occur as a result of changes in employment or family lifestyle.

But the decision to posit the systemic goal of improved access to health care likewise permits a reevaluation of some of the aspects of COBRA that do not contribute to this end. A prime example is the plan sponsor's ability to deny continuation coverage under COBRA to persons whose loss of coverage occurs because of the termination of an employee for reasons of gross misconduct.⁷⁴ By relieving the employer of the burden of continuing to provide health benefits to such a person, COBRA undoubtedly relieves a basic human desire to punish or, at a minimum, to ostracize a person who has done harm to co-workers or to the employer as an entity in its own right. Yet while a person who is terminated for gross misconduct may have merited his employer's displeasure, his or her need for health insurance is just as great as that of a person whose termination is voluntary. The gross misconduct exception points to the discontinuity between the systemic goal of increasing access to health care financing and the application of a statutory provision that uses a criterion unrelated to health care (here, gross misconduct) to legitimize excluding a person from the system. The lack of continuity between the posited goal and the actual results of the health care financing system seems even greater in light of COBRA's failure to define "gross misconduct."⁷⁵ This provision manifestly increases the likelihood that the affected persons will become uninsured and it does so at a time when the terminated employee re-enters the job market with a tainted record.

74. I.R.C. § 4980B(f)(3)(B); Treas. Reg. 54.4980B-4, Q&A-1(b)(2).

75. See, e.g., *Conery v. Bath Associates*, 803 F.Supp. 1388 (N.D. Ind. 1992). Because of the lack of a precise definition of gross misconduct, some courts have exhibited a reluctance to construe "gross misconduct" in a manner that adversely impacts the terminating employee.

C. COBRA and the Employment Compensation System

While the phrase “health care financing system” is not uncommon in legal scholarship, the term “employment compensation system” is rarely employed to suggest anything more generalized than the compensation arrangements of a particular employer.⁷⁶ Yet, in truth, the manner in which an employer compensates employees reflects a high degree of regulation and the influence of market competition. Encapsulating the concept of an “employment compensation system” within the context of a single employer’s business plan permits a detailed examination of whether that employer is meeting its goals. This same narrow focus, however, diverts attention from the analysis of the rationale and efficacy of the manner in which employment compensation practices function on a national scale. Since Congress has enacted many laws that directly affect the amount, the form and the enforcement of compensation promises, a broader perspective that considers national regulations offers the potential to glean insights into whether certain practices are peculiar to a particular employer or of greater significance in the marketplace. Likewise, the influence of market expectations transcends the conceptual compartmentalization of a “compensation system” and suggests that internal compensation trends are responsive to external market influences.

A broad-based definition of “employment compensation system” must take into account stakeholders in addition to the employer and the employee. At a minimum, the employment compensation system (depicted in Figure 3) also comprises shareholders, federal agencies (such as the Department of Labor and the Internal Revenue Service), state agencies, unions, third-

76. A search for the term “employment compensation system” within the JLR database on Westlaw produced only four hits, only one of which used the term in a generalized sense. See Sandra N. Hurd & Frances E. Zollers, *Product Liability in the European Community: Implications for United States Business*, 31 AM. BUS. L.J. 245, 254 (1993) (stating that in the European Union, “national health plans provide free medical care, and employment compensation systems protect against lost earnings”). A search for the term “employee compensation system” produced a list of 14 publications, the majority of which used the term to refer to the compensation arrangement of a particular employer, whether private or public. An excellent student comment that examines the tensions evident in the treatment of compensation under the bankruptcy code is an exception to this general observation. See Allison K. Verderber Herriott, Comment, *Toward an Understanding of the Dialectical Tensions Inherent in CEO and Key Employee Retention Plans during Bankruptcy*, 98 NW. U. L. REV. 579, 581, 613-21 (2004) (defining “compensation system” as the impact of stakeholders, media and legislatures on the ability to compensate key employees during bankruptcy). Searches of the same terms in ArticleFirst, a database covering scholarly articles from a broad range of disciplines, produced similarly unpromising results.

party administrators of payroll systems, consultants and lawyers who advise employers concerning potential compensation arrangements, competing employers and advocacy groups dedicated to the promotion of or detracting from normative policies emphasizing a "living wage" or "fair trade" practices. In addition, many industries also respond to the concerns of accrediting agencies that benchmark the quality of a service or product in relation to factors that include measurements of employee compensation. The conscious consideration of these factors expands the understanding of employment compensation as a highly regulated and market-sensitive phenomenon that reflects certain systemic features that exist independent of the perceived needs of particular employers and employees.

Discerning the goal of an "employment compensation system" presents difficulties, as the different participants within that system may well have individual goals that may be in conflict with one another. At a very basic level, however, the goal of the employment compensation system is to insure fairness in setting, observing and reevaluating arrangements for the payment of employee services. By positing this idea, I do not mean to suggest that "fairness" invariably requires compensation amounts to tilt in the employee's favor. Instead, I assume, for purposes of this Article, that fairness requires the enforcement of promises on both sides of the bargain and that this broader goal explains much of the concern of federal, state and local legislators as well as the influence of competitive market trends.

Within the broader concept of an "employment compensation system," however, there is room to consider industry-based subsystems and, within these, a second layer of subsystems focused on individual employers. It seems plausible that both of these subsets would share in the generalized concern for a fair exchange and enforcement of promises made with regard to compensation arrangements. At a micro-level, however, a company may redefine the goal its internal compensation system in light of the perceived needs of its corporate mission, whether these be directed to maximizing shareholder values, creating a worker-friendly environment that promotes meaningful work or other objectives. For example, compensation arrangements are frequently responsive to the value that an employer places on retaining long-term employees; employers that do not perceive an economic or moral reason to encourage long-term employment as a goal may adopt a compensation strategy that shifts away from defined benefit plans and towards defined contribution plans.⁷⁷

77. See generally Regina T. Jefferson, *Rethinking the Risk of Defined Contribution Plans*, 4 FL. TAX REV. 607, 682-83 (2000); Susan J. Stabile, *Paternalism Isn't Always a Dirty Word: Can the Law Better Protect Defined*

Even within an employer-specific subsystem, there is a great deal of complexity in creating and sustaining a compensation system. In the simplest terms, one might observe that an employee performs services for an employer in exchange for payment. A more accurate description of the relationship between employer and employee, however, would demonstrate that an employee performs services in exchange for wages or salary and a host of fringe benefits. In fact, the National Compensation Survey performed by the Bureau of Labor Statistics suggests that mandatory and voluntary benefits together account for almost 30 percent of the amount that an employer spends as compensation for an hour's work.⁷⁸ Moreover, employment permits the employee to rely on the employer's services as a conduit between the employee and the taxing authorities.⁷⁹ In addition, an employee may regard other intangible or unquantifiable benefits as part of the consideration for his or her services. Among these additional benefits of employment may be the psychological and emotional benefits that derive from flexible scheduling, enhanced status within the community or other conditions that provide personal satisfaction to the employee.⁸⁰

Since American employers are not required to establish or maintain employee benefit plans, it is necessary to search outside the command-and-control model of government mandates to explain the proliferation of work-related employee benefit plans. The most common economic explanation for the popularity of employer-provided health insurance is the "worker demand" theory, which suggests that employers establish health insurance plans because "workers prefer to obtain coverage through their employers and so accept a wage offset to cover the cost of that coverage."⁸¹ Ellen O'Brien notes that the empirical evidence for this theory "remains surprisingly weak" and reflects a flawed assumption that the employee is the only party who benefits from the establishment of the plan.⁸² O'Brien suggests that employers also benefit from providing health insurance because a robust

Contribution Plan Participants, 5 EMPL. RTS. & EMPL. POL'Y J. 491, 493-98 (2001).

78. Bureau of Labor Statistics, *Employer Costs for Employee Compensation* – September 2005, *supra* note 57; Bureau of Labor Statistics, *National Compensation Survey: Employee Benefits in Private Industry in the United States*, March 2005 (August 2005).

79. I refer here to the employer's role in transmitting Medicare contributions and federal, state and local income taxes.

80. See generally Ellen O'Brien, *Employers' Benefits from Workers' Health Insurance*, 81 THE MILBANK Q. 1, 5 (2003) [hereinafter O'Brien, *Employers' Benefits from Workers' Health Insurance*].

81. See O'Brien, *supra* note 82, at 1. This viewpoint is associated with health economists Mark Pauly and Thomas Buchmuweller.

82. *Id.*

compensation package permits them “to recruit and retain high-quality workers” and to reap the productivity benefits of an employee’s improved physical and psychological health.⁸³ O’Brien regards an employer’s decision to provide health insurance as an investment in “human capital” analogous to earlier efforts to promote public education and skills-training.⁸⁴ Figure 3 illustrates the complexity of the modern fringe benefit structure which is due, in part, to this investment in human capital.

Several factors that are external to the relationship between employer and employee also contribute to the popularity of employer-provided health insurance. First, basic insurance theory favors the establishment of broad risk pools as a counterbalance to individual risk.⁸⁵ In a balanced group, large health expenditures of participants who are ill or who otherwise require medical attention can be offset by the more modest costs of providing basic services to healthy individuals.⁸⁶ By purchasing health insurance as part of a group, workers effectively present themselves as a team; if one person becomes ill, the rest of the group bears the financial burden regardless of their own good health.⁸⁷ The per-person cost of health insurance is therefore likely to be lower for groups than for individuals who purchase contracts on their own.⁸⁸ In addition, a purchasing group (here, the individuals covered under the employment-related plan) may reduce additional administrative costs by eliminating the need for individuals to negotiate directly with insurance companies or to invest time and effort in evaluating different insurance options.⁸⁹

83. *Id.*

84. *Id.*

85. ROBERT E. KEETON AND ALAN I. WIDISS, *INSURANCE LAW : A GUIDE TO FUNDAMENTAL PRINCIPLES, LEGAL DOCTRINES, AND COMMERCIAL PRACTICES* (West 1988).

86. *See id.* The effectiveness of group rating as a method of cost-containment increases as the size of the group expands. This phenomenon suggests an explanation for the lower rate of health care plan sponsorship among smaller employees. *See generally* Sara R. Collins, Karin Davis & Alice Ho, *A Shared Responsibility: U.S. Employers and the Provision of Health Insurance to Employees*, INQUIRY – EXCELLUS HEALTH PLAN 6, 7 (Spring 2005), available at http://www.cmwf.org/usr_doc/Shared_responsibility_Inquiry_Inquiry_Spring_2005.pdf (describing employee groups as natural risk pools).

87. Congressional Budget Office, *Background Paper: The Price Sensitivity of Demand for Nongroup Health Insurance*, 10 (August 2005), available at <http://www.cbo.gov/ftpdocs/66xx/doc6620/08-24-HealthInsurance.pdf>.

88. *See* Roland D. McDevitt, Watson Wyatt Worldwide, *Federal Policy Options to Support a System of Employment-Based Health Insurance* (April 12, 2004), available at www.watsonwyatt.com.

89. *Id.* at 2-3.

A second explanation for the initial implementation of health insurance plans has historical roots in the wage-and-price freezes enacted during and after World War II.⁹⁰ Unable to reward employees through the traditional motivational strategies such as increased salaries or hourly wages, employers turned to more creative methods of compensation.⁹¹ Although the wage-and-price controls ultimately ended, the "habit" of providing and receiving health insurance remained, presumably engrained into a favorable ideal of compensation.

Third, while Congress has continually declined to mandate that employers provide health insurance to employees, the federal government has nonetheless enacted numerous tax incentives to encourage employers to do so. Although favorable tax treatment may not have been the point of origin of the employment-based health insurance system, employers and employees have been able to rely upon advantageous tax treatment of employment-based health insurance for many years.

While these factors may explain the institutionalization of employment-based health insurance in the American economy, they do not, however, explain the desirability of continuing an obligation to provide health insurance once employment has terminated or another qualifying event has occurred. By definition the continuation of health benefits under COBRA begins only because the employment link between the qualified beneficiary and the plan sponsor has broken. The COBRA beneficiary no longer participates in the plan as compensation for his own services or those of a family member. Moreover, a COBRA beneficiary who pays the premium but does not actually require medical attention during his period of coverage is essentially a paying customer who seeks the employer's services as a plan administrator. This new relationship does not respond to the goals I have posited with respect to the employment compensation system.

Providing post-termination health care coverage in exchange for 102 percent of the normally applicable premium has little impact on the goal encouraging and enforcing fairness in the bargain for wages in exchange for services. Since employers do not normally pre-fund an employee's COBRA commitments in a manner similar to the funding of defined benefit plans, COBRA bears little resemblance to deferred compensation. In fact, COBRA is essentially a pay-as-you-go system that endures only for the period that is both permitted by statute and endorsed by the

90. See LANGBEIN AND WOLK, *PENSION AND EMPLOYEE BENEFIT LAW*, *supra* note 59, at 15; Klein, *The Politics of Economic Security*, *supra* note 56 at 34.

91. See LANGBEIN AND WOLK, *PENSION AND EMPLOYEE BENEFIT LAW*, *supra* note 59, at 15.

payment of premiums by the qualified beneficiary. Once the qualifying event has taken place (whether termination of employment or loss of coverage due to divorce or a change in family status), the employer's participation in COBRA does not affect whether current employees are in a better position to rely on employer promises with regard to current wages. Moreover, other than a moral satisfaction in facilitating the transition of former employees who are laid off or terminated, the continuation of health care coverage under COBRA has little to offer at-will employers in terms of attaining particular financial goals or productivity goals. Figure 4 illustrates the breakdown in relationships that results from an employee's termination.

The Supreme Court's decision in *Geissal v. Moore Medical Corp.* presents further evidence for the proposition that the primary concern of COBRA is not fairness in compensation but rather reducing a beneficiary's likelihood of becoming uninsured.⁹² *Geissal* addresses the common practice of dual coverage; in such a situation, a person who is eligible for coverage under the plan maintained by his or her own employer may also be enrolled as a dependent in his or her spouse's employment-based health plan. In *Geissal*, an employee who terminated employment elected continuation coverage and for six months participated as a COBRA beneficiary in his employer's group health plan.⁹³ After six months, the employer informed the plaintiff that he was in fact ineligible for continuation coverage because he had been covered under his wife's group health plan from the date of his termination.⁹⁴ Based on the statutory language, which refers to the termination of COBRA status for a participant who becomes eligible for additional coverage after the initial date of eligibility, the Supreme Court concluded that Mr. Geissal had always been covered under his wife's plan and therefore could not be said to have become eligible for this coverage after the occurrence of his own qualifying event.⁹⁵ The Court held that an employer could not deny continuation coverage to a qualified beneficiary who is covered under another group health plan at the time he or she elects continuation benefits.⁹⁶

What *Geissal* left unsaid, however, was that, in the absence of a significant difference in the scope of coverage, Mr. Geissal's employer would have been perfectly within its rights to terminate his coverage if he had become covered under his wife's plan at any time after his election of coverage. Viewed as part of the

92. See *Geissal v. Moore Medical Corp.*, 524 U.S. 74 (1998)(reinforcing COBRA's goal of providing continuous coverage).

93. *Id.* at 76.

94. *Id.* at 76-77.

95. *Id.* at 81.

96. *Id.* at 87.

employment compensation system, this result would suggest that the distinguishing factor — here, the date of the election to participate in his wife's plan — should be evaluated in light of its ability to contribute to the function or goal of the system. But is it fair to treat former employees differently depending upon the date on which they elect coverage under a different plan? If COBRA is part of the employment compensation system, there would seem to be no reasonable basis for differentiating between former employees based on this factor which, it must be noted, has nothing to do with the terms and conditions of employment that formerly existed between the COBRA beneficiary and the plan sponsor. A more plausible explanation of this decision is that COBRA functions in this regard as part of the health care financing system, and furthers the goal of lessening uninsurance and increasing access to health care.

III. CONCLUSIONS

The purpose of systems analysis is to set forth a description of a problem that will facilitate decision-makers in evaluating proposed solutions. Looking at the text of COBRA and its related regulations can be a maddening exercise without the added complication of considering the larger concerns of health care financing or employment compensation. A narrow textual examination of COBRA limits the decision-maker to assuming that the law is internally coherent and that the options available to the decision-maker are defined by its boundaries.

Systems analysis, however, exposes the complexity of the system and, in that exposition, brings some of the internal inconsistencies of the statute to light. What is the goal of COBRA? According to Congress, the goal is to prevent people from enduring periods in which they are uninsured. Many people, myself included, think this is a laudable goal. I would go further and say that it is our social responsibility. But a problem in the health care financing system is not necessarily resolved by creating additional administrative responsibilities in the employment compensation system. Moreover, the fact that COBRA functions as part of the employment compensation system explains certain inconsistencies in its operation that detract from the achievement of the health care financing system's goal of increasing health coverage. More recent developments such as health savings accounts encourage individual efforts to save for medical expenditures, while the Health Insurance Portability and Accountability Act of 1996 discourages employers from restricting the access of newly hired employees to particular kinds of

benefits.⁹⁷ Despite these advances, far too many Americans remain uninsured, a fact that is an indictment of the existing health care financing system and private and public attempts to correct the problems of inadequate coverage.

Systems analysis can help a decision-maker to determine what is broken and what must be fixed. In the case of COBRA, it is the health care financing system that is broken. It seems at best inefficient to assume that the best way to fix this problem is to impose new responsibilities upon the employment compensation system. In plain terms, if we want to facilitate adequate financing for health care and limit the number of people who are burdened by uninsurance, then we must look for the solution within the health care financing system. The legislative decision-making process, which has demonstrably failed to reducing rising uninsurance, would do well to examine the disfunctionality that systems analysis reveals.

97. For a discussion of health savings accounts and medical savings accounts, see COLLEEN E. MEDILL, INTRODUCTION TO EMPLOYEE BENEFITS LAW: POLICY AND PRACTICE 301-02 (2004). For a discussion of HIPAA, see Colleen E. Medill, *HIPAA and Its Related Legislation: A New Role for ERISA in the Regulation of Private Health Care Plans?*, 65 TENN. L. REV. 485, 496-97 (1998).

FIGURE 1

Health care financing system patient covered under employment-related benefit plan

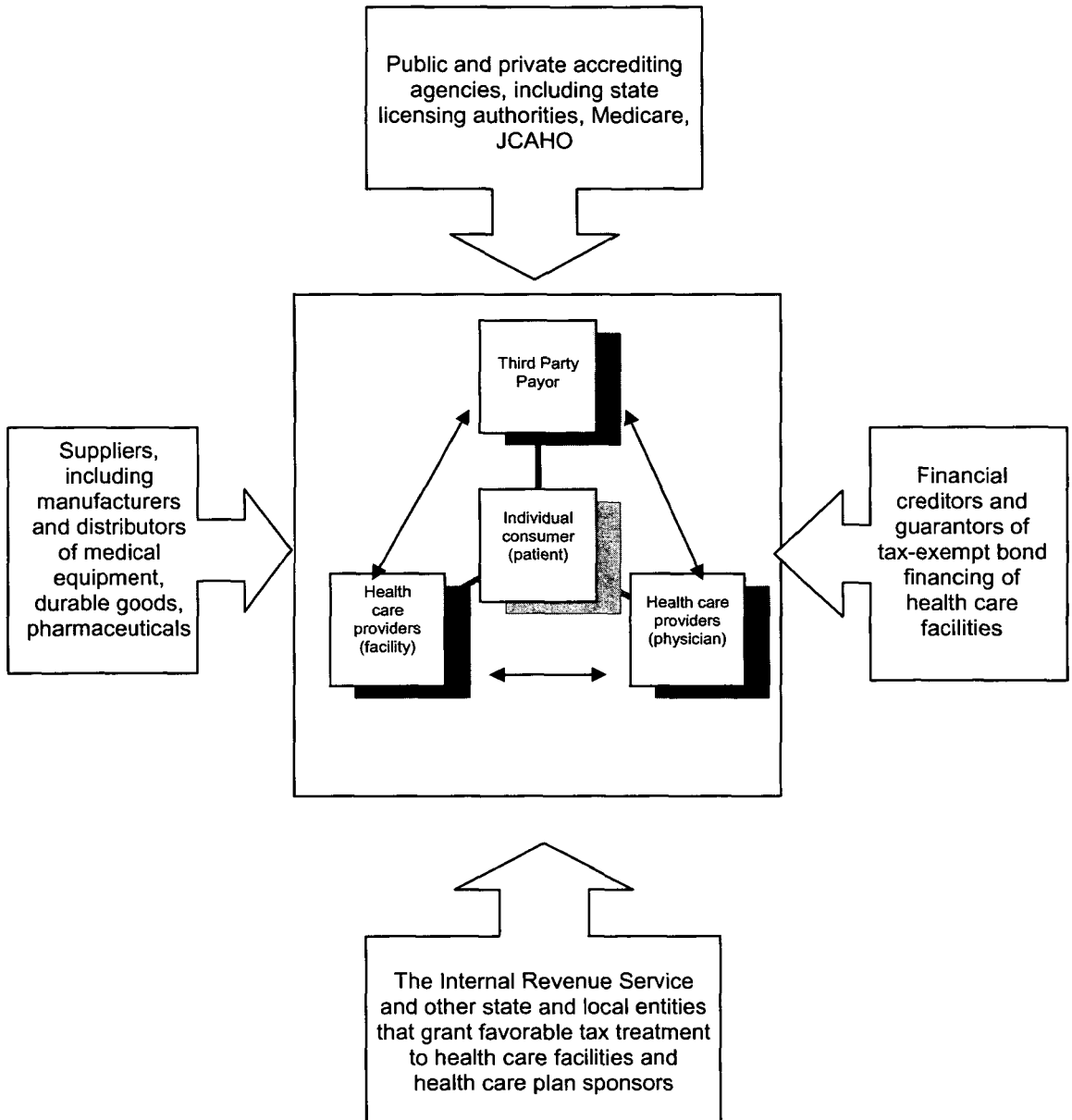


FIGURE 2
Health care financing system
Patient terminated from eligibility for employment-related benefit plan, declines COBRA and ineligible for Medicare or Medicaid

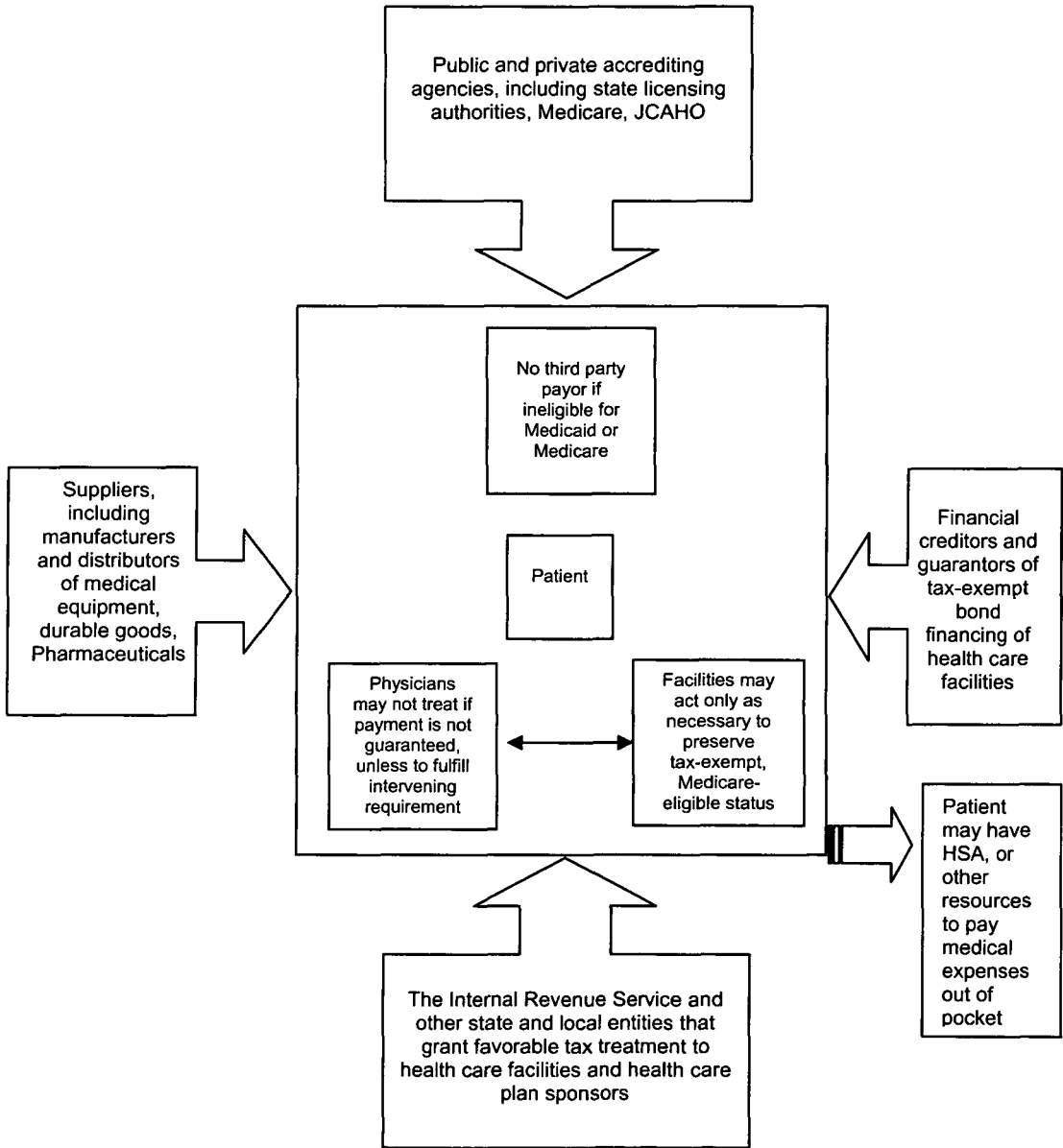


FIGURE 3

Employee Compensation System

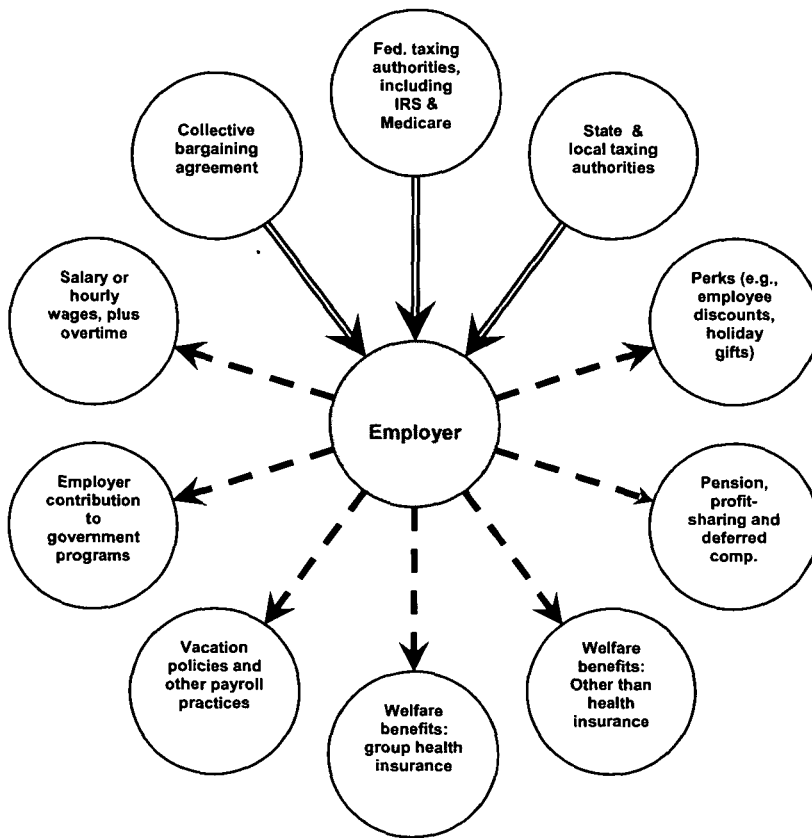


FIGURE 4

Employee Compensation System:
Employee Terminated

