LEGAL REGULATION OF THE CHANGING [EMPLOYMENT] CONTRACT

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INTRODUCTION

Over the past ten years, we have seen changes in the nature of employment that will have momentous implications for labor and employment law. The papers in this Symposium address different aspects of these developments. Here I want to describe in more detail what aspects of the workplace have changed and what those changes mean for our current system of employment regulation.

I. CHANGES IN THE EMPLOYMENT RELATIONSHIP

By all accounts, the employment relationship in the United States is undergoing a profound transformation. The old assumption of long-term attachment between an employee and a single firm has broken down. No longer is employment centered on a single, primary employer. Instead,

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employees now expect to change jobs frequently and firms now expect a regular amount of churning in their workforces. They encourage employees to look upon their jobs differently, to manage their own careers, and not to expect long-term career-long security.

This new employment relationship is a vast departure from employment relationships in the past. Roughly one hundred years ago, the employment relationship underwent a transformation that persisted throughout most of the twentieth century. On the basis of the scientific management theories of Frederick Winslow Taylor and those in the personnel management tradition, most large corporations organized their workforces into job structures termed "internal labor markets." In internal labor markets, jobs are broken down into minute tasks which are then arranged into hierarchical ladders, with each job providing the training for the job on the next rung. Employers who utilized internal labor markets hired only at the entry level and then internally promoted employees to fill higher rungs.

Taylorism became the dominant type of human resource policy within large U.S. manufacturing firms throughout most of the twentieth century. Throughout corporate America, management reduced the skill level of jobs, while at the same time encouraging employee-firm attachment through promotion and retention policies, explicit or de facto seniority arrangements, elaborate welfare schemes, and longevity-linked benefit packages. Because employers wanted employees to stay a long time, they gave them implicit promises of long-term employment and of orderly and predictable patterns of promotion. These were the dominant job structures of the industrial era. While these systems originated in the blue-collar workplace of the smokestack industrial heartland, by the 1960s they had been adapted to large white collar workplaces such as insurance companies and banks.

Sometime in the 1970s, employment practices began to change. Since then, large corporations have ceased offering their employees implicit contracts for lifetime employment. Work has become contingent, not only in the sense that it is formally defined as short-term or episodic, but in the sense that the attachment between "regular" employees and the firm has been weakened. The "recasualization of work" has reportedly become a fact of life both for blue collar and for high-end professionals and managers. This was expressed eloquently by Jack Welch, the notorious former CEO of General Electric Company, in an interview with the Harvard Business Review in 1989 when he said:

> Like many other large companies in the United States, Europe, and Japan, GE has had an implicit psychological contract [with its employees] based on perceived lifetime employment. People were rarely dismissed except

> for cause or severe business downturns. . . . This produced a paternal, feudal, fuzzy kind of loyalty. You put in your time, worked hard, and the company took care of you for life.

That kind of loyalty tends to focus people inward. But given today's environment, people's emotional energy must be focused outward on a competitive world where no business is a safe haven for employment unless it is winning in the marketplace. The psychological contract has to change.[1]

Labor economists have documented the trend away from long-term firm-worker attachment and toward short-term employment relationships. The U.S. Department of Labor Bureau of Labor Statistics' Current Population Survey (CPS), found dramatic declines in job tenure between 1983 and 2002 for all men over the age of 20, with the most significant declines amongst men in the age groups over age 45.[2] This is precisely the group of persons who were the beneficiaries of the old psychological contract for long-term employment. For men between the ages of 55 and 65, the average time with a given employer declined from 15.3 to 10.2 years over this twenty year period; for men between 45 and 54, it declined from 12.8 to 9.1; for men between 35 and 44, it declined from 7.3 to 5.1.[3]

In addition to the job tenure data, the CPS found a significant decline in the number of men who had been with their current employer for ten years or more. For men ages 40 to 44, the percentage declined from 51 percent in 1983 to less than 38 percent in 2002.[4] Similar large declines occurred for men in every age group over 45.[5] These are dramatic changes. For women, there was not such a marked decline, and, in some cases, there was even a modest rise. However, because women were generally not part of the long-term employment system, the overall percentages of women working for ten years or more are significantly lower than men at every stage.

This job tenure data is consistent with accounts by industrial sociologists and industrial relations practitioners. For example, the sociologist of work, Richard Sennett, interviewed a number of younger employees about their experiences in the labor market and reports:

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[1] Noel Tichy & Ram Charan, *Speed, Simplicity, Self-Confidence: An Interview with Jack Welch*, HARV. BUS. REV., Sept.-Oct. 1989, 112, 120.

[2] U.S. Department of Labor Bureau of Statistics, Current Population Survey: Employee Tenure Summary, (Sept. 19, 2002), *available at* http://www.bls.gov/news.release/tenure.nr0.htm (last visited Aug. 25, 2004).

[3] *Id.*

[4] *Id.*

[5] *Id.*

> The most tangible sign of that change might be the motto "No long term." In work, the traditional career progressing step by step through the corridors of one or two institutions is withering. . . . Today, a young American with at least two years of college can expect to change jobs at least eleven times in the course of working, and change his or her skill base at least three times during those forty years of labor.[6]

Before examining the new employment relationship, it is necessary to consider why employers are changing the psychological contract and recasualizing work. I would posit that the reason employers are changing the employment relationship is that they are adjusting work practices to fit production requirements. As firms are forced into a more competitive environment as a result of increases in trade and global competition, they have to pay more attention to short-term cost reduction. In addition, the market for corporate control forces firm managers to be responsive to short-term change in revenues and demand. Part of this responsiveness involves just-in-time production, just-in-time product design, and just-in-time workers.

II. THE NEW EMPLOYMENT RELATIONSHIP

As employers dismantle their internal labor market job structures, they create new types of employment relationships that give them the flexibility to cross-utilize employees and to make rapid adjustments in production methods as they confront increasingly competitive product markets. They do not want to create expectations of long-term career jobs because they want to be able to decrease or redeploy their work force quickly as product market opportunities shift.

We see evidence of this change all around us. For example, McDonald's recently distributed the following brochure along with its burgers:

> Good Jobs for Good People
>
> Looking for a good job? Look no further than McDonald's.
>
> If you're still in school, we can offer you the chance to learn valuable skills for your future while you earn extra spending money.
>
> If you have young children and only want to work part time, we can give you flexible hours while you earn the extra income a growing family needs.

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[6] RICHARD SENNETT, THE CORROSION OF CHARACTER 22 (1998).

> If you're retired and want a job that lets you meet people and have fun while you earn a little extra cash, McDonald's can give you that too.
>
> If you think a job at McDonald's sounds like a good idea, don't wait. Fill out the attached application and talk to a member of our management team today.
>
> Tomorrow you could have a job.

Primarily aimed at students, young mothers, and retirees, this brochure seeks to recruit applicants by promising flexibility and learning opportunities. McDonald's is not seeking long-term, attached and loyal employees.

Even nonprofit organizations are redefining employment relationships. For example, last year the cafeteria at Cornell Law School advertised to hire employees—termed Members of its "Culinary Service Team"—with the following brochure:

> Cornell Dining
> eat, work, play and get paid!
> Join the Team
> Great pay
> Flexible Hours
> Free Food
> Meet New People
> Fun Social Activities
> Other Great Benefits
> We can interview you today!

While there is no harm in offering jobs that promise to be fun—indeed, such a job would be a welcome change from the tedium of most jobs—the promotional pitch is interesting for what it omits. There is no mention of long-term employment prospects, no mention of promotional opportunities, and no mention of joining the larger Cornell "family."

At the other end of the spectrum, business consultants talk about the "talent wars" of recruitment. They advise firms to restructure human resource policies in order to attract top talent by offering learning opportunities, lifestyle perks, and performance incentive compensation. For example, one influential consultant, Bruce Tulgan, advises firms that to retain valued employees, they need to permit people to customize their jobs to suit their own ambitions and life styles.[7] Firms should let their employees select their work tasks, work location, schedule, and learning opportunities. In Tulgan's view, employees are free agents operating in a free talent market, so they should be offered whatever it takes to attract

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[7] BRUCE TULGAN, WINNING THE TALENT WARS 155–57 (2001).

and keep them—whatever it takes except promotion opportunities or job security.[8]

These observable trends reflect what management theorists and industrial relations specialists call the "new psychological contract" or the "new deal at work."[9] In the new deal, the long-standing assumption of long-term attachment between an employee and a single firm has broken down. However, while firms disavow any long-term employment relationship, they also believe they cannot succeed if employees simply perform their tasks in a reliable but routine manner. Firms today need not merely predictable and excellent role performance, they need spontaneous and innovative activity that goes beyond role requirements. They need employees to commit their imagination, energies, and intelligence on behalf of their firm. They want employees to innovate, to pitch in, to have an entrepreneurial attitude toward their jobs—essentially, and to behave like owners. Current best management practices dictate that they give employees discretion, but they want to ensure that the discretion is exercised on behalf of the firm. Thus, they want to elicit behavior that goes beyond specific roles and job demands, and gives the firm something extra. Organizational theorists characterize this something extra as organizational citizenship behavior, or "OCB."[10]

Much of current human resource policy is designed to encourage OCB. However, there is a paradox: firms need to motivate employees to provide a commitment to quality, productivity, and efficiency while at they same time they dismantle the job security and job ladders that have given employees a stake in the well-being of their firms for the past 100 years. In the past, internal labor markets were adopted by firms to solve problems of employee motivation, encourage skill acquisition and discourage employee oppositional behavior. In the new era, they need to find other means to accomplish these goals.

Managers have been devising new organizational structures that embody flexibility, promote skill development, and foster organizational citizenship behavior. However, they want to achieve commitment and OCB without promising job security and creating the kind of career-long expectations of the past. That is, the goal of today's management is, in the words of one management consultant, to foster "commitment without loyalty."[11]

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[8] *Id.* at 176–66.

[9] *See, e.g.*, PETER CAPPELLI, THE NEW DEAL AT WORK: MANAGING THE MARKET-DRIVEN WORK FORCE (1999). *See also* KATHERINE V.W. STONE, FROM WIDGETS TO DIGITS: EMPLOYMENT REGULATION FOR THE CHANGING WORKPLACE 87–116 (2004).

[10] *See generally* DENNIS W. ORGAN, ORGANIZATIONAL CITIZENSHIP BEHAVIOR: THE GOOD SOLDIER SYNDROME (Issues in Organization and Management Series 1988).

[11] CAPPELLI, *supra* note 9 at 217 (1999); *see also*, ROSABETH MOSS KANTER, E-VOLVE!: SUCCEEDING IN THE DIGITAL CULTURE OF TOMORROW 225–26 (2001).

The management systems of competency-based organizations and total quality management (TQM) are two prominent examples of comprehensive proposals for restructuring the workplace, promoting skill development, and fostering organizational citizenship behavior without promising long-term attachment. Advocates of the competency-based organization emphasize skill development by insisting that employees be paid for the skills they have, rather than according to lock-step job evaluation formulas.[12] Skill-based pay, they claim, will give employees an incentive to acquire new skills and also make it incumbent upon employers to provide training and career development opportunities.[13] On the other hand, advocates of TQM counsel firms to involve every employee, at every level, in continuous product and service improvement. Some of the specific recommendations of TQM are to provide continuous training and opportunities for individual improvement and to give workers direct contact with customers, external suppliers, and others who do business with the firm.[14]

A new employment relationship is emerging through these and similar experimental programs developed by organizational theorists and management practitioners. Despite different emphases, the approaches share several common features. One is that employers explicitly or implicitly promise to give employees employability rather than job security. They promise to provide learning opportunities which enable employees to develop their human capital but do not promise long-term employment. Employers no longer promise to, nor are they are expected to, keep employees on the payroll when demand for their products fluctuates downward. In the new employment relationship, the risk of the firm's short-term and long-term success is placed squarely on the employee.

The new employment relationship also involves compensation systems that peg salaries and wages to market rates rather than internal institutional factors. Employees receive differential salaries that reflect their diverse talents and contributions.

The new employment relationship also provides employees with networking opportunities, allowing them to raise their social capital through interaction with the firm's customers, suppliers, and even competitors. It also involves a flattening of hierarchy, the elimination of status-linked perks, and the use of company-specific grievance mechanisms.

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12 *See*, EDWARD E. LAWLER, III, THE ULTIMATE ADVANTAGE: CREATING THE HIGH-INVOLVEMENT ORGANIZATION 156 (1992).

13 *See id.* at 144–56. *See generally*, Stone, *The New Psychological Contract: Implications of the Changing Workplace for Labor and Employment Law*, 48 U.C.L.A. L. REV. 519, 560–65. (2001).

14 *See* JOSHUA G. ROSETT & RICHARD N. ROSETT, CHARACTERISTICS OF TQM (Nat'l Bureau of Econ. Research, Working Paper No. 7241, 1999). *See generally*, ERIC E. ANSCHUTZ, TQM AMERICA (1995); Stone, *supra* n.9.

We can thus make a chart that shows how the new employment relationship differs from the old one:

Old Employment Relationship	New Employment Relationship
Job Security	Employability Security
Firm-specific Training	General Training
Deskilling	Upskilling
Promotion Opportunities	Networking Opportunities
Command Supervision	Micro-level Job Control
Longevity Linked Pay & Benefits	Market-based Pay
Collective Bargaining on Issues Concerning the Group	ADR Procedures to Resolve Individual Fairness Disputes

III. NEW RISKS AND VULNERABILITIES OF THE NEW EMPLOYMENT RELATIONSHIP

The new employment relationship shifts many risks onto employees that were previously borne by the firm. Foremost, employees now face a constant risk of job loss due to continual workforce churning that characterizes the new workplace. In addition, the new employment relationship generates a level of wage inequality and wage uncertainty that was not feasible under the old internal labor market arrangements. In internal labor markets, wages were set by institutional factors such as seniority and longevity. Wages today are increasingly set by individualized factors and pegged to the external labor market. One result is wage uncertainty for employees: Gone are the days of reliable and steadily progressing pay levels along pre-arranged or pre-agreed-upon scales. Another result is increasing wage dispersion. Pay rates for similarly-situated employees in different firms and even within a single firm have become markedly diverse.

The new employment practices also place on employees the risk of losing the value of their labor market skills. When jobs are redesigned to provide greater flexibility, their skill requirements often increase.[15] Newly trained employees thus have an advantage over older ones, and on-going training has become not an opportunity for advancement but a necessity for survival. The new employment practices thus impose not only risk of job loss on employees, but also risk of depreciation of one's own skill base. Rather than being able to count on a rising wage level and a comfortable retirement, many workers are anticipating a lifetime of retooling just to stay in place.

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15 For a series of fascinating case studies that support this conclusion, see Harry C, Katz, *Industry Studies of Wage Inequality: Symposium Introduction*, 54 INDUS. & LABOR RELATIONS REV. 399 (2001).

Yet another risk generated by the new employment relationship is the dissolution of stable and reliable employee old age and social welfare benefits. In the United States, social insurance is generally linked to employment. Workers obtain health insurance, pensions, disability, long-term care, and most other forms of social insurance from their employers (when they can get it), rather than from the state. Even most forms of state-mandated insurance benefits, such as unemployment compensation and workplace accident insurance, require a worker to have a relationship with a specific employer to be eligible for benefits.

Because social insurance is tied to employment, as job security wanes and more and more people move from job to job, employees usually lose whatever employer-sponsored benefits they once had. Therefore, even if one's new employer offers a health benefit plan comparable to that of one's former employer, most plans impose waiting periods for health coverage and exclusions for pre-existing conditions that leave many effectively uninsured. Further, most pension plans do not vest for several years, so mobile workers are often not covered.

The impact of the new employment relationship on social insurance goes beyond simply the change in job longevity. Employers are also restructuring their plans so as to shift more risk of uncertainty onto employees. This is most evident in the area of pensions. In the past, almost all private pensions were "defined benefit" plans in which employers contributed to a fund on behalf of covered employees, and each employee was guaranteed a specified benefit level at the time of retirement. The actual benefit usually varied with length of service and final outgoing salary level, but it was part of a fixed schedule on which the worker could rely.

Since the 1980s, most employers have shifted from defined benefit plans to defined contribution plans so that defined contribution plans have overtaken defined benefit plans as the dominant form of employer-provided pension in the United States. In defined contribution plans, the employer contributes a fixed amount into an account for each worker based on the number of person-hour worked. In some cases, the worker makes a contribution as well. Often the worker is given some choices about how the funds in his or her account are to be invested. Upon retirement, the amount of the worker's pension is determined by the value of that account at that time. If the funds are invested well, or if the market does well overall, the worker's pension could be high. But if they are invested poorly or if retirement occurrs amidst a market downturn, the pension could be paltry. The risk, both of the market and of bad decisions, falls on the individual employee.

IV. THE ROLE OF LAW IN THE OLD EMPLOYMENT RELATIONSHIP

The new employment system has many implications for labor and employment regulation. The basic structure of current U.S. labor and employment law originated in the 1930's New Deal period, when President Franklin D. Roosevelt and a Democratic Congress enacted three significant labor statutes, and the Supreme Court issued opinions in two cases that together established today's framework for governing labor relations. Those developments provided the legal infrastructure for the two-tiered labor law regime of the post-war era—legal support for collective bargaining and mandated minimum terms of employment for everyone else. While there have been many developments in the interpretation of the National Labor Relations Act (NLRA)[16] and many new employment protections enacted by both national and state legislatures, this basic structure survives to this day.[17]

The labor laws of the 1930s were enacted in the industrial era and used that period's labor relations as the template for the employment relationship. This framework was responsive to the Taylorist job structures of the internal labor market. It was a framework that assumed the existence of strong firm-worker attachment, long-term jobs, and promotion ladders to define progress throughout an employee's career. Indeed, for most of the twentieth century, the law and the institutions governing work in America have been based on the assumption that workers have stable jobs with corporations that value long-term attachment—i.e., based on the internal labor market model of employment. The New Deal regulatory framework, however, is becoming increasingly out of date.

A. THE OPERATION OF THE COLLECTIVE BARGAINING LAWS

The primary objective function of the NLRA was to promote the self-regulation of the workplace by organized labor and management. Under the Act, the unionized workplace was divided into discrete bargaining units, each unit a well-defined, circumscribed, and economically stable group. While the individuals in a unit could and did change, the bargaining rights and agreements applied to the unit. Unions negotiated for wages, work rules, and dispute resolution systems for those individuals working in the unit. The terms and benefits applied to the job—they did not follow the worker to other jobs when they left the unit. Job-

16 29 U.S.C. § 151 *et seq.* (1988).

17 For an overview of the history of labor law in the United States, see generally, Katherine Van Wezel Stone, *Labor and the American State: The Evolution of Labor Law in the United States*, in MARCEL VAN DER LINDEN & RICHARD PRICE, THE RISE AND DEVELOPMENT OF COLLECTIVE LABOUR LAW (Peter Lang, 2000).

centered benefits were not problematic in a workplace in which jobs themselves were stable and long-term.

The assumption of long-term employment also permeated union bargaining goals. Many of the benefits and work rules unions negotiated rewarded long-term employment and were thus consistent with the implicit lifetime employment commitment. Wages, vacations, and sick leave policies, for example, were often based on length of service. Long vesting periods for pensions also assumed and reinforced the norm of long-term employment. Unions protected employees against employer breaches of implicit promises of long-term employment with seniority systems and just-cause-for-discharge clauses. They also established grievance and arbitration systems to give workers expeditious and inexpensive mechanisms by which they could enforce the psychological contracts of the industrial era workplace. For many unionized American workers, the employment system comprised of rising job security, longevity-based wages, employer-provided health insurance, and employment-linked retirement security was the epitome of a good life.[18]

The collective bargaining system gave unions little input into strategic corporate decision making.[19] However, labor's circumscribed role in corporate policy was not particularly problematic in an era of growing firms, expanding employment opportunities, and tacit agreements for long-term employment. Furthermore, the implicit promise of job security and the longevity-based system of benefits gave employees a stake in the financial well-being of their firms. Thus, the American unionized corporation offered its workers an American variant of the Japanese lifetime employment system.[20] The tacit promise of lifetime employment in American industry was supported by the confluence of prevailing human resource policy, union bargaining strategy, and the legal framework of the labor laws.

B. STATUTORY PROTECTIONS FOR INDIVIDUAL EMPLOYEES

While the New Deal employment system provided job security and relative prosperity to many, it also created an invidious division between

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18 *See, e.g.*, RUTH MILKMAN, FAREWELL TO THE FACTORY: AUTOWORKERS IN THE LATE TWENTIETH CENTURY 1 (1997) (describing the labor system at a pre-1980s unionized auto plant as "the best America had to offer to unskilled, uneducated industrial workers").

19 *See* Katherine Van Wezel Stone, *Labor and the Corporate Structure: Changing Conceptions and Emerging Possibilities*, 55 U. CHI. L. REV. 73, 74 (1988).

20 *See* RONALD DORE, BRITISH FACTORY—JAPANESE FACTORY 31–41 (1973) (describing the Japanese system of lifetime employment). It is important to note that the Japanese employment system is undergoing transformation similar to that in the United States. According to the *Economist*, "[f]ull-time, lifetime employment in big companies is disappearing .... Since early 1998 Japan has lost more than [one million] full-time jobs; meanwhile it has slowly been creating part-time and temporary ones." *The Amazing Portable Sarariman*, ECONOMIST, Nov. 20, 1999, at 71.

insiders and outsiders, a division that often fell along racial and gender lines. The primary sector—the unionized work force within large firms—was the privileged core, made up primarily of white men. As a core, it generated a periphery in which women, minorities, migrant workers, and rural Americans were clustered. The labor laws and the employment practices of large firms reinforced a sharp divide between those inside and those outside of the corporate family. Insiders benefited from collective bargaining laws and implicit job security of the internal labor market; outsiders had neither. However, in the New Deal employment law system, outsiders were covered by two other types of labor laws—minimal employment standards and employment discrimination laws.

V. THE DEMISE OF THE NEW DEAL SYSTEM

The changes in workplace practices described above have rendered many features of existing labor regulation obsolete. The former regulatory structure was based on the template of long-term employment relationships and strong employer-employee attachment, and thus, it is not well-suited to the newly emerging employment system comprised of implicit promises of employability security, human capital development, lateral employment mobility, and networking opportunities. Therefore, as internal labor markets decline in importance, many features of the regulatory framework need to be reconsidered. I will describe some of these outmoded features briefly.

A. OWNERSHIP OF HUMAN CAPITAL

One legal issue that was invisible in the past but is becoming prominent today is that of who owns an employee's human capital. Because the new employment relationship relies on employees' intellectual, imaginative, and cognitive contributions to firms, employers put a premium on human capital development and knowledge-sharing within the firm. Yet, the frequent lateral movement between firms that typifies the new relationship means that when an employee leaves one employer and goes to work for a competitor, there is a danger that proprietary knowledge will go too. Increasingly, the original employer, fearing that valuable knowledge possessed by the employee will fall into the hands of a competitor, will seek to prevent the employee from taking the job or utilizing valuable knowledge he or she has acquired. However, employees understand that their employability depends upon their knowledge and skills and so assume that they can take their human capital with them as they move within the boundary-less workplace. As a result of these conflicting perspectives, legal disputes about employees' use of intellectual property in the post-termination setting have increased exponentially. (It is probably now the most frequently litigated issue in the employment

arena.) It is therefore necessary to develop a framework for deciding disputes involving the ownership of human capital that protects the individual employee's control of his or her own knowledge and his or her concomitant ability to exert individual power in the labor market.

B. EMPLOYMENT DISCRIMINATION

Second, the new employment system has implications for women and minorities, posing not only new possibilities but also new obstacles in achieving equality in the workplace. Much of current equal employment law is designed to assist women and minorities move up orderly job ladders. Existing theories of liability assume that the discriminator is in a hierarchical relationship to the complainant. In a workplace with flattened hierarchies, discrimination takes different forms. For example, today, discrimination often takes the form of cliques, patronage networks, and buddy systems that utilize tools such as ostracism and subtle forms of non-sexual harassment (as well as sexual harassment) to exclude and disempower newcomers. The harms caused can be devastating to the victim, yet not cognizable under existing theories of discrimination. The law also assumes that corporations have standardized personnel policies and practices and that discrimination can be identified as a deviation from established norms. In a workplace where peer groups are empowered to make many decisions and supervisory authority is delegated downward and away from standard routine practices, liability for discrimination becomes very difficult to establish.

In order to make further strides toward equality, it is necessary to understand the new face of employment discrimination and devise anti-discrimination strategies that are appropriate to the new workplace.

C. EMPLOYEE REPRESENTATION

Third, the new employment relationship has been constructed in nonunion environments and has proven itself remarkably resistant to unionization efforts. In part, this is because many of the core practices of unions, such as utilizing narrowly-defined bargaining units and seniority systems, are antithetical to boundary-less careers. These practices assume long-term attachment in narrow job ladders and do not fit with the flexibility of the boundary-less workplace.

In addition to the misfit between union practice and the boundary-less workplace, there is a misfit between the new workplace and existing labor law. There are several respects in which the rights created and duties imposed by the National Labor Relations Act do not comport with the workplace of today. For example, the bargaining unit is an integral part of the statutory scheme of the NLRA; indeed, under the Act, unions exist only as representatives of a bargaining unit. However, the bargain-

ing unit concept is at odds with many current employer practices, such as cross-utilization, broad-banding, and the blurring of department boundaries because it implies static job definitions and clear boundaries.[21] In addition, the NLRB prefers worksite-specific bargaining units and has adopted a presumption in favor of single facilities.[22] Yet, much of today's work involves networks across multiple establishments or departments, thus defying traditional bargaining unit structure.

The National Labor Relations Board's test for defining a bargaining unit is a "community of interest" amongst the employees. Some of the factors the Board uses to determine whether a community of interest exists are similarity in the kinds of work performed, compensation, training, and skills, integration of job functions, and commonality of supervision.[23] The community of interest test thus assumes an insular and functionally delineated workplace—assumptions that do not pertain to today's workplaces.

The bargaining unit focus of the NLRA also means that terms and conditions negotiated by labor and management apply to jobs in the defined unit rather than to the individuals who hold the jobs. This means that as individual workers move between departments, units, or firms, their labor contracts do not follow them. In today's world of frequent movement, bargaining-unit based unionism means that union gains are increasingly ephemeral from the individual's point of view.

There are numerous other respects in which current labor law assumes clear and well-defined boundaries. To give another example, the central role of grievance and arbitration under the collective bargaining system creates a system of labor-management self-regulation in which unions and firms draw a tight circle around themselves, cordoning themselves off from the rest of society.[24]

In addition, the secondary boycott prohibition assumes that union economic pressure should take place within a discrete economic unit—the bargaining unit—and should not spill over beyond its boundaries. The law attempts to confine economic warfare to the immediate parties

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21 *See* Alexander Colvin, *Rethinking Bargaining Unit Determination: Labor Law and the Structure of Collective Representation in a Changing Workplace*, 15 HOFSTRA LAB. & EMP. L.J. 419, 430–31 (1998) (noting that changes in the nature of employment create problems for bargaining unit determination).

22 *See* Charrette Drafting Supplies Corp., 275 NLRB 1294, 1297 (1985); Haag Drug Co., Inc., 169 NLRB 877, 882–83 (1968); Metropolitan Life Ins. Co., 156 NLRB 1408, 1414 (1966). *See generally*, Howard Wial, *Unionism in Low-Wage Services*, 45 RUTGERS L. REV. 671, 681 & n.34, 710-11 (1993).

23 NLRB v. Purnell's Pride, Inc., 609 F.2d 1153 (5th Cir. 1980). *See generally*, JULIUS G. GETMAN ET AL., LABOR MANAGEMENT RELATIONS AND THE LAW 30–31 (2d ed. 1999).

24 Katherine Van Wezel Stone, *Rustic Justice: Community and Coercion Under the Federal Arbitration Act*, 77 N.C. L. REV. 933, 954–55 (1999) (on arbitration under collective bargaining as one of several examples of legally-empowered self-regulating systems).

in a bounded arena of conflict. Within the unit, economic pressure is seen as potentially effective, yet comfortably containable. The effort to limit economic warfare to "primary" participants further assumes that the unionized workplace has static borders and that disputes within the entity between the firm and its workers affect only those immediate and identifiable parties. In today's network production and boundaryless workplace, the assumption that there can be discrete, bounded conflict with clear insiders and outsiders is becoming less plausible than ever. Rather, unions are finding with increased frequency that efforts to bring economic pressure to bear on employees transverses traditional bargaining unit and corporate boundaries. As they seek to apply pressure on suppliers, joint venturers, coemployers, network partners, and subsidiaries, the secondary boycott laws have become an ever more serious hindrance to union success.[25]

In these and other respects, Wagner Act unionism is job-centered and/or employer-centered, but not employee-centered. So long as the jobs were relatively stable—i.e., the same jobs were performed over time in the same location with the same employees—bargaining units were stable as to membership, size, and composition, and collective agreements were stable as to their scope of their coverage. This is no longer the case.

D. EMPLOYEE BENEFITS

The social insurance system in the United States was initially designed to complement job structures of the industrial era. In the early twentieth century, employers deliberately structured health insurance and pension plans to tie the worker to the firm. These arrangements fit well with the long-term commitment that employers were seeking. But now, when employers neither desire nor offer long-term commitment to their employees, the design of the plans is dysfunctional from the workers' point of view. Workers who change jobs frequently risk losing their benefits, yet those who do not change jobs out of fear of losing benefits—a condition termed "job lock"—cannot succeed in the labor market.

As mentioned earlier, changes in the nature of work have had a twofold impact on benefits. First, because social insurance in the United States is tied to employment, the increased job mobility that character-

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25 *See, e.g.*, Dowd v. Int'l Longshoremen's Ass'n, 975 F.2d 779, 783–87 (11th Cir. 1992) (finding efforts by an American union to obtain assistance of a Japanese union in pressuring a Japanese-affiliated employer to be an unlawful secondary boycott); Carpenters' Local Union No. 1478 v. Stevens, 743 F.2d 1271, 1277 (9th Cir. 1984) (finding that a collective agreement that imposed terms of collective agreement on employer's nonunion subsidiary was improper); D'Amico v. Painters & Allied Trades Dist. Council No. 51, 120 L.R.R.M. (BNA) 3473, 3480 (D. Md. 1985) (finding the effort by a union to achieve anti-double-breasting contract language to be unlawful secondary activity).

izes the new employment relationship would contribute to the erosion of the social safety net even if employer benefit policies or practices remain unchanged. In addition, however, employers are restructuring their benefit plans just as they are restructuring their employment practices. In keeping with the ethos of the new workplace, the new benefit plans embody a retreat from the principle of risk-sharing and an adoption of a principle of individual choice. The new plans, such as defined contribution plans for pensions and health savings accounts, shift more risk of uncertainty onto employees, thereby weakening the social safety net. Thus the issues of benefit portability and broader safety nets need to be placed squarely on the national policy agenda.

E. INCOME INEQUALITY

Fifth, the new workplace is arising at the same time that income distribution is becoming increasingly unequal. The incomes of the less-educated portion of the population have deteriorated in the past twenty years.[26] The pay gap between the top quintile and the bottom quintile of the work force is the greatest it has ever been since the U.S. Department of Labor first collected such statistics in 1947. In addition, there have been widening pay disparities within firms.[27] Considerable evidence shows that the rising pay gap and the deteriorating income distribution are related to the new work practices. If this is so, the shift to the new employment relationship makes it ever more incumbent upon us to consider macro-economic reforms to address the deteriorating income distribution.

VI. REFORMING LABOR LAW FOR THE NEW EMPLOYMENT RELATIONSHIP

There are many types of legal reforms that would help adapt the labor and employment laws to the new employment relationship. To enable all workers to function and flourish in the new workplace, there needs to be universal and portable benefits, public provision of lifetime training opportunities, and publicly funded wage replacement and support for workers in periods of transition. In addition, the labor law will have to be reformed so that workers can form a political and economic force for continual improvement. This means permitting workers to organize across employer units without limitation by narrow notions of

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26 *See* MCKINLEY L. BLACKBURN ET AL., *Declining Economic Position of Less Skilled American Men*, *in* A FUTURE OF LOUSY JOBS? THE CHANGING STRUCTURE OF U.S. WAGES 31 (Gary Burtless ed., 1990).

27 *See* STEVEN J. DAVIS & JOHN HALTIWANGER, EMPLOYER SIZE AND THE WAGE STRUCTURE IN U.S. MANUFACTURING (Nat'l Bureau of Econ. Research, Working Paper No. 5393, 1995).

bargaining units, and permitting them to assert economic pressure beyond the boundaries of the firm without constraint by secondary boycott laws.

In addition to changes in labor law, there need to be serious efforts at income redistribution at the macro-economic level. These could include an expanded Earned Income Tax Credit, a citizen stake-holding system, or, as has been proposed in Europe, a program of special drawing rights that would support workers as they move in and out of the changing, boundaryless workplace.

However, in order for the new workplace to offer justice and fairness to workers, more than changes in the law are required. Specifically, to address the problems of worker vulnerability in both "regular" and informal employment relationships, labor unions must build labor organizations that operate within local and regional geographic areas, across-industries and across-firms. That is, boundaryless workplaces will need to give rise to boundaryless labor organizations—organizations that welcome the unorganized as well as the formally organized, the permanent as well as the contingent, the full-time as well as the part-time, and regular employees as well as atypical ones. In such an organization, the boundaries between industrial, corporate and civic citizenship will also become blurred, making it possible to address not only issues of worker rights but also social rights more broadly.