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Permalink
https://escholarship.org/uc/item/17q0w86m

ISBN
9780275991838

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Publication Date
2008

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UCLA School of Law
Law & Economics Research Paper Series
Research Paper No. 07-13

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by

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In the Shadow of Globalization: Changing Firm-Level Employment Practices and Shifting Employment Risks in the United States

Katherine V.W. Stone[†]

I. INTRODUCTION

One of the most intensely debated questions in the labor relations field today is: What is the impact of globalization on labor standards? Many have predicted that globalization in general and increased global trade in particular will induce firms in developed countries to lower production costs by relocating work to countries that have lower labor standards. The prospect of a major flight of capital—what Ross Perot famously called the "great sucking sound"—has dominated most discussion of trade and labor in the United States over the past two decades. Others have suggested that trade affects labor standards primarily through political processes—that states engage in "regulatory competition" with one another, relaxing or repealing labor protections to attract firms and jobs. Yet others suggest that the opposite will occur: global trade will trigger a race to the top. Some race-to-the-top theorists argue that large multinational firms will spread their labor practices and their high labor standards throughout the world because they value both consistent human resource practices and a reputation for having high standards. Other race to the top theorists suggest that governments in developing countries will raise labor standards to emulate Western states as they engage with more developed economies through the process of trade.

These hypotheses are not merely of academic interest—they have important policy ramifications. They comprise the empirical underpinning of the normative and policy debates in the area of labor and trade. The answers shape our attitudes toward increased trade liberalism and toward the prospect of developing transnational institutions to regulate labor standards. In this chapter, I argue that there is a missing link, a factor that has not yet been adequately identified or theorized in the labor-trade debates in the United States. I outline a framework for understanding this missing link, and present evidence that the experience of the United States on this front is highly relevant to the evolution of labor standards in other developed countries.

The missing link—the variable omitted from the above-mentioned hypotheses—is the impact of global trade on firm-level practices. Firm level practices in turn affect the domestic regulatory environment in which firms operate, which in turn affects labor market outcomes. Once we understand the mechanism by which globalization affects firms and the pressures that imposes on

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regulatory frameworks, we can frame some proposals for meaningful regulatory reform.

In brief, my argument is as follows: Globalization under the neoliberal institutions that have defined and dominated international trade into the early twenty-first century creates increased competition between firms in the product market. The intensified competition causes firms to seek flexibility in their labor relations—flexibility to hire and fire on short notice; to increase or shrink the overall size of their workforce; to adjust pay to short-term performance results; to redeploy workers within the firm and to outside production partners; and to retain workers with particular skills on an as-needed basis. Firms also seek competitive advantage by tapping into the talents, skills, and imaginative capacities of their employees. These practices are in tension with the labor law regimes throughout the Western world.

Until recently, most if not all developed countries had labor law regimes that were established to give workers protection for job security and steady incomes, social insurance, and other benefits. Despite numerous variations and many shortcomings, domestic labor law in the developed world has historically protected workers by making employment conditions stable, reliable, and predictable. However, the laws have also hindered firm operations by making labor practices rigid in many respects. Today, the intensified competition from increased global trade generates pressure on firms to make work more flexible. Thus pressures have emerged to dismantle labor protections and revise the labor laws.

At the present time, the labor laws are being rewritten all over the world. For example, in Japan, the government has enacted a series of new labor laws in the past five years in an effort to bring some flexibility yet protect job security at the same time. These laws make it easier for firms to hire temporary workers by relaxing restrictions on worker dispatching firms.[1] In Australia, a new labor law went into effect in 2006 that introduced new types of decentralization and flexibility into labor-management relations. This law, the Australian Work Choice Act of 2005, threatens to undermine a century-long system of centralized interest arbitration that had helped Australia maintain one of the highest standards of living and systems of social protection in the developed world.[2] Throughout Europe, the issue of flexibility and labor law reform are currently a subject of intense dispute, both within the EU and inside individual nations.[3] To give just one example, in Sweden, where industrial relations are primarily a matter of negotiated agreements rather than legislation, there have been attempts to enact legislation to permit more flexibility, especially by relaxing protection for job security. Further, the government has made changes in the Swedish employment law to permit increased use of fixed-term employment contracts, and has made proposals to further liberalize the use of short-term temporary workers.[4] In addition, in cases in 2003 and 2004 the Swedish Labor Court held that an employer did not violate the Employment Protection Act or a collective

agreement that banned fixed-term contracts by dismissing employees at the same time as hiring contract workers.[5]

In the United States, there have been no new labor laws enacted at the national level for many years, but there have been major revisions in the interpretation and application of existing doctrines, the cumulative effect of which has been to diminish the protections the laws afford. Since 2004, the Labor Board has reinterpreted the National Labor Relations Act in ways that effectively deprive many temporary, part-time, and low level professional workers of legal protection, restrict the rights of all employees to engage in collective activity, and increase employers' latitude to thwart union drives.[6] As a result of these and numerous similar rulings over the past two decades, there has been a rising chorus of complaints that the labor law has become "ossified,[7] that the law is failing to offer meaningful worker protection,[8] that the courts and Labor Board have abandoned the "core values of labor law,"[9] and that Congress has underfunded the labor protective agencies such as the National Labor Relations Board (NLRB), the Occupational Safety and Health Administration (OSHA), and the Hour and Wage Division that administers the Fair Labor Standards Act (FLSA).[10] Indeed, some have contended that over the past two decades, there has been a passive repeal of the employment statutes.[11]

Throughout the developed world, employers' drive for flexibility and the resultant rewriting of the labor laws threatens the welfare of the working population. If left unremedied, the 'flexibilization' of work will lead to a shifting of employment-related risks from firms and states to individuals. It will also lead to the deterioration of the bargaining power of workers both individually and collectively. In the United States, employers' drive for flexibility has fueled aggressive de-unionization efforts, and has induced employers to increase their use of temporary workers and independent contractors and to restructure pension and benefit plans.

A crucial question for employment regulation thus becomes how to protect workers -- how to mitigate their vulnerabilities and ameliorate the shifting risks that today's workplace practices impose. Some countries are attempting to devise new mechanisms to preserve security at the same time that they are relaxing their traditional labor protective regimes. It is an open question whether the US federal government has the political will or the vision that would permit the kind of reinvention of the social safety net that would be necessary to protect working people from the dangers of globalization and flexibilization. It is also an open question whether and what kind of reinvention is feasible in an increasingly globalized world.

II. THE HISTORIC ROLE OF LABOR LAW AND ITS RECENT DEMISE

Historically the aim of labor law in the Western world has been to provide workplace fairness, employment security, decent living standards, and social

justice. Labor laws were enacted throughout the Western world in the nineteenth and twentieth centuries in response to struggles by workers movements, and they represent an enormous achievement, comparable to the elimination of slavery and the emancipation of women. Labor law as a field is dedicated to shielding workers from the vicissitudes of the market and providing them a protective social safety net.

Just naming some of the most widespread types of labor and employment laws reveals their protective nature. Most developed countries have laws to provide minimum wage, unemployment insurance, old age and health insurance, collective bargaining rights, occupational health and safety protection, industrial accident protection, protection against discrimination, prohibition of child labor, and unfair dismissal protection. To be sure, some labor laws are more protective than others, and sometimes the laws are revised in ways that increase or decrease their protective bite, but the aggregate impact of the labor laws is to provide worker protection. One could contend that labor law is not about worker protection but is neutral as to outcomes, and that labor law includes many types of employment relationships, including master-servant law, laws permitting servitude and peonage, and at-will contracts. While technically that may be true, the field of labor law has a historical and a contextualized meaning. And in the sense of its historic meaning, the project of labor law is now at risk.

All over the world, legal scholars and labor activists describe the demise of labor law, both as a field of law and as a system of social protection. Almost universally, it is said that the field is dying—that the labor laws are being revised, repealed or relaxed in their enforcement so as to render them virtually meaningless.[12] It is also said that within businesses, the labor professionals have been marginalized; within government, labor ministries are being dismantled; and within the academy, labor studies has been all but eliminated at many of the leading universities and law schools.[13] Major firms have restructured their corporate chains of command to downgrade the status of human resource departments from vice president levels to subunits of finance. One might interpret these developments as proof that the goals of labor law—fair labor standards and social justice for workers—have been achieved, and that protection for labor is so universal that special labor departments and protective labor laws are no longer necessary. Regrettably, that is not the case. Rather, the dismantlement of labor laws and the marginalization of labor agencies are both symptoms of, and contributions to, the declining power of workers in the global economy.

III. INDUSTRIAL ERA LABOR LAWS IN THE UNITED STATES

The demise of labor law in the United States, as elsewhere, corresponds to a change in the nature of work. The labor law systems that emerged in the United States were designed to provide steady jobs, decent and steady income, social insurance, and a comfortable retirement. Together, these comprised a promise of stability and security for blue collar workers. While the benefits were not

universally available, the system was a tremendous achievement for those who participated in it. It was more than a legal system, however. It was also a production system, a system by which work and industry were organized to foster and fulfill the promise of stability and security.

The current labor laws emerged in the mid-nineteenth century, amidst an era in which firm human resource practices offered stability and job security. Large firms throughout much of the early twentieth century developed human resource practices that valued and encouraged long-term employment. They took their guidance from industrial relations theorists such as Frederick Winslow Taylor and others in the scientific management and personnel management movements who counseled firms to seek long-term relationships with employees in order to foster loyalty, encourage the development of firm-specific skills, and discourage turnover. On the basis of such theories, most large corporations reorganized their workforces into job structures in which individuals were bonded to their firms through pay and benefit structures, promotion prospects, retirement arrangements, and implicit promises of job security. These types of practices, termed "internal labor markets," were a major departure from the fluid and transitory work arrangements of the nineteenth century. In internal labor markets, jobs are broken down into minute tasks and then are arranged into hierarchical ladders in which each job provides the training for the job on the next rung up. Employers who utilized internal labor markets hired only at the entry level, and utilized internal promotion to fill all of the higher rungs.[14]

'Taylorism' became the dominant type of human resource policy within large US manufacturing firms for 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 had their origins in the blue collar workplaces of the smokestack industrial heartland, by the 1960s they were adapted to large white collar workplaces such as insurance companies and banks.[15]

The labor laws that emerged in the United States and throughout the developed world tracked and reinforced the internal labor markets of large corporations. In most countries, an essential feature of the labor laws has been job security. In Europe, laws were enacted making it difficult and cumbersome for an employer to dismiss an employee. There, employers have had to prove just cause for dismissal, provide a significant period of notice, and pay substantial severance pay. In some countries, it has also been necessary to obtain permission of a labor ministry. For example, in Spain, the statutory code governing employment dismissal is a tome of some three hundred pages.[16]

In Japan, job security was not mandated by statute, but instead by a powerful cultural norm that required large firms to give their employees lifetime job security. Japan has an Employment Security Law that requires employers who terminate an employee to give thirty days notice, but the law does not prevent dismissal. However, the cultural norm, in conjunction with various judicial decisions, does.[17]

In the United States, job security has not been guaranteed either by statute or by cultural practice. However, it was an unstated condition in most large corporations that, absent extreme misconduct or severe business decline, a worker who was hired had a job for life.[18] This implicit promise of job security was an important part of the personal practices and policies adopted by US corporations in the early and mid-twentieth century.

Although the labor laws in the United States did not provide job security directly, they were tailored to the industrial era job structures in other ways. For example, the primary objective of the National Labor Relations Act (NLRA) was to promote the self-regulation of the workplace by workers and management, both of which were long-term players with an ongoing relationship to the firm. 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 the unit could and did change, the bargaining rights and bargaining agreements applied to the unit. Unions negotiated agreements that contained 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-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 that 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 their 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 an expeditious and inexpensive mechanism to enforce the psychological contracts of the industrial era workplace.

Thus there evolved an employment system comprised of rising job security, longevity-based wages, employer-based health insurance, and employment linked retirement security. For many unionized American workers, this employment system of the industrial era was the epitome of a good life.[19] However, the system was created within a framework that assumed the existence of strong firm-worker attachment, long-term jobs, and promotion ladders to define progress throughout a career. Indeed, for most of the twentieth century, the law and the institutions governing work in America were based on the assumption that

workers were employed in stable jobs by corporations that valued long-term attachment between the firm and the worker—i.e., based on the internal labor market model of employment. Because the workplace is now changing, the New Deal regulatory framework is becoming increasingly out of date.

IV. THE NEW EMPLOYMENT RELATIONSHIP

Sometime during the 1970s, employment practices in the United States began to change. Since then, the use of temporary and contingent workers increased dramatically, and there have been widespread reports that large corporations no longer offer their employees implicit contracts for lifetime employment. Work has become contingent not only for atypical workers but also for "regular" employees whose attachment to 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 former CEO of General Electric Company, in an interview with the Harvard Business Review in 1989:

> 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.

Labor economists have documented the trend away from long-term firm-worker attachment and toward short-term employment relationships.[20] The Department of Labor's Current Population Survey (CPS) found dramatic declines in job tenure between 1983 and 2002 for all men over the age of twenty, with the most significant declines amongst men in the age groups over age forty-five. This is precisely the group whose members benefited from the old implicit employment contract for long-term employment. 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. Similar large declines occurred for men in every age group over forty-five.[21]

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

> 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.[22]

Regular Workers in the New Employment Relationship

In the late twentieth century, US employers began to dismantle their internal labor market job structures. Faced with rapidly expanding and increasingly competitive global product markets, firms began to create new types of employment relationships that provided them flexibility to make quick adjustments in production methods, product design, marketing strategies, and product mixes. To respond to intense global competition, firms needed the ability to decrease or redeploy their work force quickly as market opportunities shifted. Hence management theorists and industrial relations specialists developed what they call the "new psychological contract,"[23] or the "new deal at work."[24] In the new deal, the prevailing assumption of long-term attachment between an employee and a single firm has been replaced by other implicit and explicit understandings of the mutual obligations of employees and the firms that employ them.

While the new employment relationship does not depend upon long-term employment, attachment or mutual loyalty between the employee and the firm, it also does not dispense with the need for engaged and committed employees. Indeed, firms today believe that they need the active engagement of their employees more than ever before. They want not merely predictable and excellent role performance, but what has been described as "spontaneous and innovative activity that goes beyond role requirements." They want employees to commit their imagination, energies, and intelligence on behalf of their firm.

Today's valuation of employees' cognitive contribution stands in direct contrast to the scientific management approach. Under scientific management, workers were not expected to gain or use knowledge in their jobs. Knowledge was a monopoly tightly held by management. Today, firms believe that they can acquire a competitive advantage by eliciting and harnessing the knowledge of their employees. According to *Fortune* magazine editor, Thomas Stewart, "Information and knowledge are the thermonuclear competitive weapons of our time."[39] Hence firms want employees to innovate, to pitch in, to have an entrepreneurial attitude toward their jobs. They want to encourage 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."[25]

Much of current human resource policy is designed to resolve the following paradox: Firms need to motivate employees to provide the OCB and the

commitment to quality, productivity, and efficiency that they value, while at they same time they are dismantling the job security and job ladders that have given employees a stake in the well-being of their firms for the past one hundred years. Hence managers have been devising new organizational structures that embody flexibility while also promoting skill development and fostering organizational citizenship behavior.

A new employment relationship is emerging through such theoretical and experimental programs as total quality management (TQM), competency-based organizations, and high performance work practice programs.[26] Despite differences in emphasis, the various approaches that comprise the new employment relationship share several common features.[27] First, firms no longer implicitly offer employees long-term job security. By explicitly disavowing a promise of job security, employers do not foster expectations of career-long attachment and avoid liability for dismissal in breach of an implied contract. However, employers give their employees implicit promises and understandings that provide a substitute for the job security of the past. Many employers explicitly or implicitly promise to give employees not job security, but "employability security"—i.e., opportunities to develop their human capital so they can prosper in the external labor market.[28]

The new employment relationship also involves compensation systems that peg salaries and wages to market rates and individual performance rather than internal institutional factors such as lockstep longevity wage scales, seniority, or job evaluation. The emphasis is on offering employees differential pay to reflect differential talents and contributions.[29]

The new employment relationship also involves firms giving their employees opportunities to interact with a firm's customers, suppliers, and even competitors.[30] Regular employee contact with the firm's constituents is touted as a way to get employees to be familiar with and focused on the firm's competitive needs, and at the same to raise the employees' social capital so that they can find job elsewhere. The new relationship also involves a flattening of hierarchy, the elimination of status-linked perks,[31] and the use of company-specific grievance mechanisms.[32]

Another feature of the new relationship is a new emphasis on procedural justice at work. Researchers have found that employees' subjective appraisal of their employer's fairness is considered one factor in generating OCB. Employees who perceive their employer as unfair reduce their OCB, triggering a downward cycle in which the employees' diminished OCB leads the supervisor to withdraw informal types of affirmation, causing the employee to experience additional feelings of unfairness and to further decrease her OCB.[33] Indeed, there is evidence that as firms disavow promises of job security, procedural fairness becomes more important than before.[34]

It is understandable that employees would focus on procedural fairness when they lack promises of long-term employment because in this new

employment relationship, employees are required to bear many of the risks that were previously borne by the firm. Because employees increasingly have to bear the consequences of firm failure or market fluctuations, they at least want to be confident that the incidence of the risks is fairly applied. Employers therefore have attempted to devise procedures for hearing complaints and resolving disputes such as open door policies, ombudsmen, management appeals boards, peer review, mediation, and arbitration.[35]

The Atypical and Non-Employee Worker

Just as the employment contract for "regular" employees is changing, there has also been an explosion in new types of workers who are not "employees" in any conventional sense. Atypical workers—temporary workers, leased workers, part-time workers, trainees and apprentices, and "dependent" independent contractors—are a growing portion of the labor force.

According to the Department of Labor, in 2005, nearly 4.5 million people in the United States—a full 3.6 percent of the workforce—were engaged in temporary work.[36] In addition, firms are subcontracting tasks not only to other firms, but also to individuals termed "independent contractors." Some of those "independent contractors" work at the firms' premises, but many others work at home, akin to nineteenth century home-based piece-workers. As of 2005, there were over ten million independent contractors, comprising 8.4 percent of the labor force.[37] In all, that year the Department of Labor classified 16.2 million people—12.1 percent of the workforce—as contingent workers. In addition, in 2003 the Department of Labor found that there were over five million involuntary part-time workers—those who want but do not have regular employment.[38] A survey of firms in all industries and of all sizes conducted by the Upjohn Institute in 2000 found that 78 percent of all private firms used some sorts of flexible staffing arrangements.[39]

Atypical workers are employees without employers. Some work under at-will contracts and some have no employment contracts at all. Temporary workers move from firm to firm, often dispatched for short-term assignments by a temporary help agency. On-call workers are either retained by a specific employer to work on an as-needed basis, or placed on-call by a temporary help agency and required to be available for work without knowing their next place or hours of work. Independent contractors have none of the rights of employees, even though they often resemble employees in every respect. Many are unskilled workers who face 'shape-ups' in ad hoc hiring halls on street corners every morning.[40] Neither atypical workers nor independent contractors have a reasonable expectation of long-term employment with a particular employer, even though they can spend years in the labor force doing the same kind of work in the same geographic area. Atypical workers receive significantly less pay than their regular employee counterparts and are less likely to receive health insurance or pensions from their employers. They also have very limited rights under the labor laws.[41]

Why the World of Work Has Changed

The reason that firms are shifting their labor practices and dismantling their internal labor markets is that they are acting in response to increased global competition in the product market. The expansion of global trade opens up new opportunities for sales, but also creates new threats that foreign firms will outcompete existing domestic ones. With increased trade, domestic market relations are destabilized and firms' market shares are at risk. At the same time, they face the prospect of untold riches in the new global marketplace. In this Brave New World of Trade, firms seek every possible competitive edge as they try to ward off competitors and capture the new markets. In the 1980s and 1990s, management theorists, business consultants, stock market analysts, and senior management officials determined that the path to success in the new global market was through the use of flexible work practices that elicited employee knowledge and commitment. Hence they repudiated Taylorism and the secure and comfortable arrangements that had persisted under the industrial era.[42]

Empirical evidence confirms that the new employment practices described above were first utilized in firms engaged in international trade or threatened by global competition.[43] For example, Paul Osterman conducted a survey of six hundred businesses of all sizes and in all sectors of the economy in 1992 to determine which were utilizing the various new work practices that comprise the new employment relationship. He reported that "firms most likely to adopt these systems were those with relatively highly skilled technologies, firms that competed in international markets, firms that placed a high value on product quality, and those that were large and part of multi-location organizations."[44] Other studies have similarly found that flexible wage practices are most frequently adopted by firms that are most exposed to foreign trade. Marianne Bertrand found that companies facing competitive pressures from the global marketplace are more likely to adopt flexible wage policies.[45] A study of British confectionary companies also found that those firms whose products competed in a global market were more likely to adopt boundaryless job structures.[46] That is, increasing global competition subjects many firms to increased market pressure, which in turn induces them to adopt the kinds of boundaryless work practices that involve a dispersal of firm-level incomes. Over time, the new work practices spread to all types of firms throughout the economy.[47]

V. RISKS AND VULNERABILITIES OF THE NEW EMPLOYMENT RELATIONSHIP

The new employment relationship shifts onto employees many risks previously borne by the firm. Foremost, employees now face a constant risk of job loss due to the continual workforce churning that characterizes the new workplace. In addition, the new employment relationship generates a level of wage inequality

and 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 pegged to individualized factors and to the external labor market. One result is wage uncertainty for employees: they are experiencing more extreme income fluctuations than ever before.[48] Gone too are the days of reliable and steadily progressing pay levels along some pre-arranged or pre-agreed-upon scale. Another result is increasing wage dispersion. Pay rates for similarly situated employees in different firms and even with a single firm have become markedly diverse.

In addition to job and wage uncertainty, the new employment practices 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.[49] Newly trained employees thus have an advantage over older ones, and ongoing training becomes not an opportunity for advancement but a necessity for survival. The new employment practices thus impose not only risks of job loss on employees, but also risks 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.

Another type of risk generated by the new employment relationship involves the dissolution of stable and reliable 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 people move from job to job, they usually lose whatever employer-sponsored benefits they once had. Therefore, even if one's new employer offers a health benefit plan comparable to those of one's former employer, most plans impose waiting periods for health coverage and exclusions for preexisting conditions that leave many effectively uninsured. Further, most pension plans do not vest for several years, so that mobile workers are often not covered.

The risks workers face today are not merely hypothetical. Since the late 1980s, as global competition became an increasing feature of US economic life and as new flexible work practices began to permeate major industries, working conditions and job security have deteriorated. There has been a long slow decline in union density from a peak of 34.7 percent in 1954 to less than 9 percent in 2006, with the steepest decline occurring since the late 1980s. Private sector union density is now less than 7 percent of the private sector workforce and continues to decline.[50] This deterioration in union density is closely connected to falling wage levels and job security. Without unions to constrain them, firms have been free to improve their bottom line by lowering their labor costs. In the 1980s and 1990s,

for the first time since World War II, wages began to decline in real terms. Real weekly earnings for all production and nonsupervisory workers declined from $562 to $544 between 1979 and 2005.[51] And the pay gap between the top and bottom quintiles of the work force is the greatest it has been at any time since 1947 (when the US Department of Labor first collected such statistics).[52] Capital has increased its share of national income at the expense workers and the underprivileged for the first time in sixty years. The result, as reflected in national income data, has been a dramatic rise in income inequality in the past fifteen years.

In addition to declining unions and stagnating wages, there has been a dramatic decline in benefit coverage. Health insurance in the United States is provided by employers when it is provided at all. As worker-firm attachment has diminished, the percent of employees who have coverage has declined sharply in recent decades. Between 1983 and 1997, the number of workers in medium and large establishments in the private sector who had medical care benefits from their employer decreased from 97 percent to 76 percent.[53] Furthermore, according to a study by the Economic Policy Institute, the number of uninsured employees increased from 39.8 million in 2000 to 46.6 million in 2005.[54] According to the Congressional Budget Office (CBO), the number of individuals who are uninsured at any point in time is much larger than these numbers suggest. The CBO found that between 57 and 59 million people lacked health insurance at some point in 1998, a number that amounted to about a quarter of the nonelderly population.[55]

At the present time, the fastest growing group within the American labor force is the working poor. These are temporary workers, contingent workers, and workers in industries such as fast food or consumer services, who are paid the minimum wage. These workers often who cannot afford to see a doctor or to buy shoes for their children on their forty-hours-per-week paychecks. The working poor comprised 10.4 million people in 1993, according to the Bureau of the Census, and the numbers have been growing. A study conducted by the Working Poor Families Initiative of the Rockefeller, Ford, and Casey foundations reported that, as of 2004, one in four US working families was earning below the poverty level.[56]

Also in the past decade, corporate takeovers and mergers have produced massive employee dislocation. The Bureau of Labor Statistics' Displaced Worker Survey found that the rate at which workers experience involuntary job loss has risen in substantially since 1999, even though since 2001 the economy has been officially in a "recovery."[57] Furthermore, those who lose manufacturing jobs are unlikely to ever get jobs that pay comparable wages or benefits. One study by Princeton economist Henry Farber found that of workers who lost their jobs between 2001 and 2003, one-third failed to find employment at all and 13 percent found only part-time jobs. Those who found full-time jobs earned on average 17 percent less than they had earned on the jobs they lost.[58] Thus despite soaring

rates of corporate profits, workers have not fared well in the boom economy of the late twentieth and early twenty-first century.[59]

VI. THE FAILURE OF US LABOR LAW TO PROTECT WORKERS IN THE WORKPLACE OF TODAY

US labor law has proven ineffective in shielding workers from the new risks and vulnerabilities created by the new flexibilized workplace. Rather, 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. Therefore, as internal labor markets decline in importance, many features of the regulatory framework need to be reconsidered. I describe some of these outmoded features briefly below.

Employee Representation

First, the new employment relationship has been constructed in nonunion environments and has proven remarkably resistant to unionization efforts. In part this is because many of the core practices of unions, such as narrowly defined bargaining units and seniority systems, are antithetical to boundaryless careers. They assume long-term attachment in narrowly defined jobs. As described above, jobs today are defined broadly because seek fluidity between jobs and departments.

In addition, 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 NLRA do not comport with the workplace of today and hence make it difficult for unions to provide worker protection. For example, as mentioned above, the labor law is structured to provide representation to workers in a stable "bargaining unit." Under the NLRA, unions exist only as representatives of a bargaining unit. However, bargaining units imply static job definitions and clear boundaries, and thus are in tension with cross-utilization, broad-banding, and other practices that blur departmental boundaries.[60] The bargaining unit focus of the NLRA 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. As individual workers move between departments, units, and/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. It is no surprise, then, that younger workers who expect to change jobs frequently do not find the prospect of union membership to be in their interest.

There are numerous other respects in which current labor law assumes clear and well-defined boundaries. To give another example, 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 contestation to the immediate parties in a bounded arena of conflict. The effort to limit economic warfare to "primary" participants further assumes that the unionized workplace has static borders and that disputes 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 and less plausible. Rather, unions are finding with increased frequency that efforts to bring economic pressure to bear traverses traditional bargaining units and corporate boundaries. As unions seek to apply pressure on suppliers, joint venturers, co-employers, network partners, and subsidiaries, the secondary boycott laws have become an ever more serious hindrance to their success.[61]

In these and other respects, Wagner Act unionism is job-centered and/or employer-centered, not employee-centered. So long as 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. Hence it is not surprising that unionism has experienced a steady and steep decline that is not likely to be reversed in the near future.

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 both workers' and employers' points 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.

Also, 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. Plans such as defined contribution plans for pensions and health savings accounts for health insurance shift more risk of uncertainty onto employees, and by doing so, they weaken the social safety net.

Regulatory Vacuum for Atypical Workers and Independent Contractors

The US labor laws provide little protection to temporary workers, contingent workers, or independent contractors.[62] The labor law statutes apply only to employees, not independent contractors, so that employees who have atypical employment relationships or weak attachment to an employer are often termed "independent contractors" and thus rendered ineligible for statutory protection. Unlike Europe and Canada, in the United States there have not been legislative efforts to create an intermediate category between "employee" and "independent contractor" that would give atypical workers some of the employment protections available for standard workers.[63] Rather, in the United States there are only two categories—employee and independent contractor—where the former gets employment law protections and the latter does not. Increasingly, employers attempt to reclassify employees and to vary their employment practices so as to transform their former "employees" into "independent contractors."[64] Many large companies have redefined low-wage employees such as janitors, truck loaders, typists, and building cleaners as independent contractors even when they retain them to work on a regular basis. As independent contractors, these employees are not covered by minimum wage, workers compensation, unemployment compensation, occupational safety and health laws, collective bargaining laws, social security disability, anti-discrimination laws, or other employment protections.[65] Furthermore, even those temporary workers who satisfy the criteria to be classified as "employees" face significant limits on their employment rights by virtue of their temporary status. For example, the National Labor Relations Board recently placed severe, almost insuperable, obstacles on the ability of temporary workers to unionize.[66]

Employment Discrimination

The new employment system potentially poses new obstacles to the capacity of women and minorities to achieve equality in the workplace. Much of current equal employment law is designed to help 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 without job ladders and 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 they are not cognizable under existing theories of discrimination.[67]

Ownership of Human Capital

One legal issue that was invisible in the past but has become prominent today is that of who owns an employee's human capital. Because the new employment relationship relies on employees' intellectual, imaginative, and cognitive contribution to the firm, 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, seeks to prevent the employee from taking the job or utilizing the valuable knowledge. Yet employees understand that their employability depends upon their knowledge and skills, so that they assume that they can take their human capital with them as they move around in the boundaryless workplace. As a result of these conflicting perspectives, legal disputes about employees' use of intellectual property in the post-termination setting have increased exponentially. The enforceability of post-termination restraints is now probably the most frequently litigated issue in the employment area.

VII. DEVISING NEW APPROACHES TO EMPLOYEE PROTECTION

Lessons From Abroad

In parallel to the trends in the United States, the pressure for flexibilization has undermined the employment regulatory systems throughout the developed world, eroding the legal protections for job security and other accouterments of stable employment created over the twentieth century. Changes in the nature of work are also forcing policymakers around the world to rethink and reconstruct labor and employment laws. The resulting labor law reforms are generating substantial opposition because while employers want to devise more flexible systems of production, employees are concerned that hard-won gains in security and income will be undermined.

Some countries are devising new regulatory systems that attempt to provide protection for workers within the new flexible employment system. For example, in Japan, the newly revised labor laws give employers more flexibility and freedom to utilize short-term contract workers, while also enhancing the bargaining power and contractual rights of individual employees.[68] In the United Kingdom, there is a widespread effort by scholars and jurists to expand employment protection beyond those considered "employees" to a broader category of "worker," so that the employment laws can protect those "independent contractors" who are in fact economically dependent upon a single business entity.[69] Within the European Community, a group of scholars under the leadership of Alain Supiot produced a report with a comprehensive series of proposals to provide workers with "active security"—measures that would enable

them to obtain training and maintain their livelihoods despite the vicissitudes of the current labor market.[70]

In the United States, we need to think about policy reforms that are adapted to the new reality at work and design meaningful employment protections that support workers as they move in and out of the changing, boundaryless workplace. In order for individuals to survive and thrive in the new decentralized labor market, they need more protections, not fewer, but protections of a different type that employment law provided in the past. The changing nature of work creates new opportunities for workers, but also new types of vulnerabilities. As employer-employee attachment is episodic rather than long-term, the problem of transitions has risen to the fore. Thus the challenge for regulation today is not to recreate the era of worker-employer attachment, but to find a means to provide workers with support structures to enable them to weather career transitions.

Transition assistance can and must take many forms. For example, individuals today need retraining possibilities that are available throughout their working lives so they can learn new skills and upgrade old ones. They need childcare for young children, after-school care programs for school age children, school vacation and snow day coverage. They also need affordable, reliable, and portable health insurance, disability insurance, and old age assistance. Furthermore, in the current era, it is inevitable that many will have periods in which they are not in the labor force. Sometimes these will be involuntarily periods of unemployment between jobs. Sometimes individuals will take time out of the workplace to care for a young child or an elderly dependent. Other times, workers will need to retool, learn new skills, or reposition themselves in relation to the changing requirements of work. Thus one of the most pressing needs of workers today is to have income support for these times of transition. Further, because workers today are forced to bear many new risks in the labor market—risks of job loss, wage variability, benefit gaps, skill obsolescence, and intermittent prolonged periods of unemployment—we need to design social insurance policies to help mitigate those risks. At present, the labor laws do not address these problems, either for regular or for atypical workers.

The Last Big Question

There is still one big question that must be addressed: Given the intensified competition of today's global trading regime, can nations revise their labor laws to provide worker protection in a sustained fashion? Or, will any worker protective measure adopted at the national level be doomed to fail because it will lead domestic firms to either fail or move overseas? That is, is it possible to have labor law reform in one country?

In a recent essay entitled *Egalitarian Redistribution in Globally Integrated Economies*, economist Samuel Bowles addresses this question. Bowles argues that globalization makes it more costly for nations to enact regulations that change

relative factor prices—for example by increasing wages—because capital can easily and instantly move to more profitable locations. However, he shows that the mobility of capital does not preclude all redistributive measures. Measures that promote productivity, such as those providing skills training or health insurance to working people raise their labor market power yet do not impose costs directly on firms. Hence, he concludes, regulation that is redistributive toward workers can be effective if it operates to enhance productivity and does not raise the cost of labor to the firm.[71]

The Bowles analysis suggests that some measures can be undertaken within the United States that would provide worker protection without contributing to capital flight. My analysis suggests that the measures Bowles proposes—training and health insurance—are of vital importance today. I would extend the analysis to include other measures that aid transitions and thus can provide workers security in today's boundaryless labor market, measures to provide transitional income maintenance, lifetime educational opportunities, retooling allowances, child care, and portable benefits. I would also suggest we explore a proposal that has been widely discussed in Europe – a proposal for a workplace sabbatical. This isa system similar to unemployment insurance that would permit individuals to take time away from the labor market in order to enhance their skills and ability to flourish in the labor market.[72]

It is easier to devise proposals than to achieve them. With globalization, the political power of labor has been weakened at the same time that workers' economic welfare has declined. Thus in order to enact measures that might ameliorate the risks that globalization imposes, we have to articulate a national agenda for reforms in the United States that are achievable and do not trigger capital flight—and we have to mobilize constituencies seeking to promote 'fair globalization.' I hope that the analysis offered here can help us take that first step.

Endnotes

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[9] Ellen J. Dannin, TAKING BACK THE WORKERS' LAW: HOW TO FIGHT THE ASSAULT ON WORKERS' RIGHTS (ILR Press, 2006).

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[17] Takashi Araki, LABOR AND EMPLOYMENT LAW IN JAPAN 18-25 (2002). See also, Daniel H. Foote, *Judicial Creation of Norms in Japanese Labor Law—Activism in the Sevrice of Stability?*, 43 UCLA L. Rev. 635 (1997).

[18] See Peter Cappelli, *The New Deal at Work*, 76 Chicago-Kent L. Rev. 1169 1173 - 1175 (2000).

[19] *See, e.g* Ruth MilkmanFAREWELL TO THE FACTORY: AUTO WORKERS IN THE LATE TWENTIETH CENTURY 23–24 (1997) (describing the labor system at a pre-1980s unionized auto plant as "the best America had to offer to unskilled, uneducated industrial workers").

[20] For a detailed discussion of the data on job attachment, see Cappelli, *The New Deal at Work*; Stone, FROM WIDGETS TO DIGITS, supra. n. 14, at 72—83.

[21] For men between 55 and 65, the average time with a given employer declined from 15.3 to 10.2 years over the twenty year period ending in 2002; 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 51. Bureau of Labor Statistics News Release, *Employee Tenure in 2002*, Release 02-531 (September 19, 2002). For women, there was not such a marked decline, and in some cases even a modest rise. However, because women were not generally part of the long-term employment system, the overall percentage of women working for ten years or more is significantly lower than men at every stage. Id.

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[31] *See* Janice Klein, *The Paradox of Quality Management: Commitment, Ownership, and Control, in* CHARLES HECKSCHER, THE POST-BUREAUCRATIC ORGANIZATION, 178 - 182.

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[33] *See* Dennis Organ & Mary Konovsky, *Organizational Citizenship Behavior*, 74 J. Applied Psychol. at 76–77. *See also* Sandra L. Robinson et al., *Changing Obligations and the Psychological Contract*, 37 Acad. Mgmt. J. 137, 149 (1994) (finding that citizenship may result from employees' perceptions of the company's performance of its obligations under the psychological contract).

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